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Injury Settlement Planning Attorneys

It's 2021 - Liability Medicare Set Asides (LMSA)- Mandate or Best Practices?

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January 17, 2021

Let's talk about the new "normal". No, for a few minutes we're going to put aside COVID discussions and get back to the business of obtaining results for your injured clients in liability cases - and covering all the bases. There has been a lot of discussion over the past few years about "considering Medicare's interests" in liability cases. This article is not about the statutory requirement (or lack thereof) for plaintiff's attorneys to adhere to guidelines issued by the Centers for Medicare and Medicaid Services (CMS). Nor is this about lien resolution. This is about something plaintiff's attorneys know much more about - shifting the burden of proof (so to speak).

Here's the basic premise: You represent an injured plaintiff in a liability case. It's possible that this client is or will soon be a Medicare beneficiary. The client's *future* medical costs include items and services that Medicare may normally pay for and relate to the injury. CMS (on behalf of the Medicare program) wants you to consider Medicare's interests (and financial exposure) similar to what is expected in Workers' Compensation cases. But wait, CMS hasn't really come out and said anything on point**,** after years of speculation, anticipated pronouncements and a multitude of experts' commentaries on the subject.

Sounds like there is a disagreement among various parties about how to handle these situations. Could be a grey area of the law. Could be that a failure to adhere to a standard of dealing with this unsettled area could lead to a decision against the party who failed to investigate the issue. Wow, these inconsistencies sound a lot like the issues surrounding red car/blue car, other accident and medical malpractice cases. But, that's what plaintiff's attorneys are good at doing - investigating the murky areas of the case and building a strategy to shift the burden of proof to the other party.

Plaintiff's attorneys regularly hire numerous consultants during the course of litigation. Doctors, nurses, accident reconstruction experts, engineers and life care planners are just some of the consultants frequently employed to further the merits of the plaintiff's case (or avoid a defense verdict). So**,** when it comes to whether or not to investigate if a plaintiff needs to formally consider Medicare's future interests, why not utilize a consultant to once again improve the outcome of the plaintiff's case while reducing potential liability to both the plaintiff and plaintiff's attorney?

The stakes are so high**,** yet the cost and effort to rule out future Medicare liability issues is so minimal in comparison. Since there is a significant amount of time between the date of loss and

mediation or trial, plaintiff's lawyers will regularly contact our firm and ask about these issues and how to deal with them. Sometimes it's literally a 10-minute phone call and the issue is resolved. Other times, it requires a more thorough review of the case. Either way, even in the most complex LMSA situations, the ounce of prevention is worth more than a ton of cure.

Back to our scenario above, by taking simple steps to investigate the future Medicare issue, you are positioning yourself and your client to be able to say to CMS, "Here's what we did to consider your interests". In the current climate**,** without ascertainable rules, at least you've shifted the burden of proof back to CMS to prove you didn't consider their interests. Until CMS provides concrete guidelines on considering or protecting Medicare's interests in liability cases, it is prudent for plaintiff's attorneys to perform their due diligence in this area just like any another aspect of the case. One potential consequence of failing to consider Medicare's interests is the non-coverage of an expensive future medical procedure for your client. Imagine if your former client calls you years after the case is settled after having a new $150,000 surgical procedure for which Medicare declines coverage because you did not consider Medicare's interests?

And**,** finally, you don't want to get blindsided after settling a case at mediation only to find out now that the defense is demanding a LMSA as part of its release document language and you may have to go back to your client and tell them they are getting less money than anticipated because of something you failed to investigate. Remember, we're talking about *future* medical coverage here, something that could take place years after your client settles their case. Next time, we'll discuss how to actually use this scenario to the plaintiff's advantage in negotiations. Stay tuned...