Save Your Settlement

Injury Settlement Planning Attorneys

The Continuing Evolution of Liability Medicare Set Asides
(And how to use them to your advantage)

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In our last newsletter, we discussed how the landscape of Medicare Set Asides (LMSA's) in liability cases is still foggy. However, best practices recognize that the investment of time and money to investigate the options is so small in comparison to the potential future liability to the plaintiff and plaintiff's counsel. Therefore, plaintiff's lawyers recognizing that it's only a matter of time before CMS formally mandates LMSA's are ahead of the curve when deciding to "consider Medicare's interests."

Today's article takes another look at the settlement process and how the introduction of LMSA's, whether by defense counsel and, especially plaintiff's counsel, can be used to the advantage of the plaintiff. As we discussed in our previous article on LMSA's, given the relatively fresh nature of these negotiations in liability cases, many plaintiff's attorneys are caught off guard when they are confronted at mediation (or even worse, afterwards when the Settlement and Release document is offered) that defense counsel intends to shift responsibility (and liability) to the plaintiff and plaintiff's counsel for future Medicare eligibility relating to the injury.

One of the more frequent phone calls we receive from plaintiff's counsel involves how to respond to these demands by defense counsel to make future Medicare expenses the responsibility of the plaintiff as well as indemnifying the defendant and defense counsel (interestingly enough, there never seems to be language indemnifying plaintiff's counsel for this exposure?). What's a plaintiff's lawyer to do? Do you even know what your client's future financial exposure is or may be for Medicare covered services? It's unlikely you'll be able to have a LMSA analysis report created in less than 10 days and then you need the time to analyze it to determine the estimated exposure. But wait, you've already settled the case at mediation. There's no more money coming from the defendant. Wow, time to have that talk with your client about how they might be getting less money than they thought and that you may have promised.

Let's look at another scenario. In the course of your investigation of the case and long before a trial date is set, you have an appropriate consultant determine the likelihood that your client could be forced to consider Medicare's interests in the settlement. (There is no upfront cost to you or your client.) After a review of the case, it may now appear that given your client's medical

history and eligibility for various benefits through the Social Security Administration, it would also be wise to consider Medicare's interests.

Next step - for a small fee to a third-party Medicare savvy consultant which is simply another reimbursable cost of the litigation (but an incredibly important one), you can have a liability Medicare Set Aside analysis report created showing the anticipated future medical costs of your client related to the injury which Medicare may have to pay. Armed with this information, you can better negotiate with defense counsel the fact that a portion of the value of the case is related to these expenses which may have to be set aside by the plaintiff and spent down on medical services before Medicare provides coverage.

This means that, theoretically, the plaintiff never receives these funds and so the defendant should increase the settlement offer by at least this amount. In addition, it is important to start preparing your client for the possibility that even after paying your 33-40% legal fee, plus expenses, the plaintiff will be setting aside some of what's leftover to satisfy Medicare. In reality, the present value of the LMSA can be significantly lower than the report value over the lifetime, which can provide a windfall to the plaintiff in certain circumstances.

So, what's defense counsel's counterargument on future Medicare coverage? There isn't one. The Medicare Secondary Payer Act mandates the consideration of Medicare's interests in a variety of contexts. Also, don't confuse the Medicaid (welfare) coverage argument that many of the future expenses detailed in the Life Care Plan will be covered by Medicaid instead of being privately paid in order to reduce the settlement demand. First of all, the issue is Medicare (insurance coverage), not Medicaid (welfare). Even if another issue involves the possibility that the plaintiff might be able to access Medicaid in the future to pay for some of these expenses, why should the plaintiff, who has been severely damaged by the defendant's negligence, have to resort to welfare? That's not really what the plaintiff had in mind when attempting to be "made whole" by the defendant's compensation.

It's important to realize that planning for future Medicare and Medicaid benefits is a part of almost every liability case. That planning starts months before the mediation date so that everyone has time to prepare for the possibility that an LMSA will be part of the agreement and if that is not negotiated before a settlement is reached, it's potentially another significant deduction from the plaintiff's overall recovery and potential monetary exposure to plaintiff's counsel.

If you're working on a case and you don't know whether your client is a Medicare beneficiary or might become one in the near future or before your case settles, please give us a call to discuss at no obligation.

The attorneys at Julian Gray Associates have assisted numerous personal injury attorneys, their clients and families to maximize their clients' results. For a no obligation, confidential discussion of a pending matter, please contact Julian at 412-458-6000 or visit SaveYourSettlement.com

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