

# Medicare Considerations for Mediations

By James E. Logan, CSSC

Few things can spoil a mediation session faster than finding out Medicare will claim an interest in the personal injury settlement and nobody knows the extent of that interest. Mediators and parties to the settlement process are well advised to determine if the claimant is or will soon become a Medicare beneficiary. To appreciate the importance of the potential impact Medicare may have on a settlement and thus a mediation, consider the following.

## **BACKGROUND:**

The law requires that all parties to a settlement must protect Medicare's interests (42 U.S.C. 1395y – The Medicare Secondary Payer Statute (MSP)). Failure to do so can expose the settling parties, including their attorneys, to severe penalties. In December 2007, Congress passed and the President signed the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA). This act introduced new settlement reporting requirements for insurers and self-insured entities.

Keep in mind that Medicare does not assert a lien. Medicare asserts a statutory claim, which is much stronger than a contractual lien and is enabled by Federal Statute. State laws cannot and do not trump Medicare's statutory claim.

## **MEDICARE'S INTERESTS:**

There are two specific areas of interest to which Medicare lays claim:

- (1) **Conditional Payments:** These are payments made by Medicare for accident-related medical treatment or services to Medicare eligible claimants/plaintiffs. The MSP requires that these payments be reimbursed to Medicare from the settlement proceeds. All Parties to the settlement are required to protect Medicare's interests. Failure to do so can result in Medicare filing a collection action and seeking double damages.

The defendant and plaintiff are well advised to determine if any Conditional Payments have been made well in advance of the commencement of settlement negotiations. Neither party should assume anything with regard to Conditional Payments. If it appears the claimant/plaintiff may be eligible for Medicare, one of the parties should make an appropriate inquiry with the Centers for Medicare and Medicaid Services (CMS). There is a specific process that must be followed that involves the collection of certain information and an authorization to release information. CMS is not quick to respond to such inquiries. If they are submitted properly, a response can be expected within 90 to 120 days. If they are submitted improperly, considerable time will pass before the submitting party is notified and the process will have to start over. The parties should consider utilizing the services of firms such as ours who have considerable experience in securing this information.

- (2) **The Cost of Future Care:** There is a difference in the duty owed by the plaintiff and defendant/insurer for liability settlements.
  - (A) **Defendant/Insurer:** Unlike No-Fault and Workers' Compensation settlements, the defendant is not required to prepare a Medicare Set-Aside Arrangement (MSA) when settling a liability claim. The MSA is nothing more than the segregation of certain settlement funds that are intended to pay for future treatment and services for which

Medicare would otherwise have to pay. Instead, the MMSEA created the requirement for the defendant or its insurer to report the settlement to CMS in a specified and timely manner. Each insurer or self-insured is assigned one week each quarter to electronically report the details of the settlement to CMS. If the report is not timely, CMS may assess a \$1,000 per day penalty. This penalty is assessed on a per settlement basis. Most liability settlements involve doubtful and disputed issues, including the cost of future care; therefore, under the current CMS rules, reporting will not commence until January 2012, but will be retroactive to settlements made since October 1, 2011.

- (B) Claimant/Plaintiff:** The duties and responsibilities of the claimant/plaintiff are not as clearly defined. It is a given that the Medicare Beneficiary and his/her attorney are responsible for protecting Medicare's future interests. The manner in which Medicare addresses the cost of future care can and usually does differ, depending on which CMS regional office is involved with the decision-making. Once the defendant reports the settlement, CMS is alerted and will likely contact the Medicare Beneficiary to determine how much of the liability settlement shall be set-aside for payment of future treatment expenses which Medicare would otherwise have to pay. It is advisable for plaintiff counsel to have an analysis performed as to what the cost of future care would be for Medicare covered treatment and services for the remainder of the claimant's/plaintiff's life. If Medicare (CMS) suggests a larger portion of the settlement be set aside, the analysis will provide a basis for challenging their allocation. It would also demonstrate that the claimant and his/her attorney took Medicare's interests into account at the time of settlement, thereby complying with the MSP requirements.

## **WHO IS A MEDICARE BENEFICIARY?**

This is the most critical question you can ask as you handle the claim. Medicare is a federal program that provides benefits for certain medical and hospital treatment expenses for anyone who...

- Is 65 years or older; or
- Has been receiving Social Security Disability Income (SSDI) benefits for 24 months or more; or
- Is suffering from end-stage renal disease.

It is critical that all parties to a liability settlement determine if the claimant/plaintiff is a Medicare beneficiary or could be at the time of settlement. Eligible Medicare beneficiaries are issued a card with a HICN (Health Insurance Claim Number), which would verify their entitlement to Medicare benefits. It is recommended that discovery be focused, in part, on determining whether or not the claimant/plaintiff is or will soon become a Medicare beneficiary.

## **Indemnity and Hold Harmless Terms:**

It is often believed that indemnity and hold harmless terms inserted into a settlement agreement will protect the defendant or its insurer in the event Medicare asserts a collection claim post settlement. Such language, no matter how artfully crafted, will not protect anyone from Medicare simply because Medicare is not a party to the settlement and has a freestanding statutory claim in its own right.

## **SUMMARY:**

While this information is applicable to any settlement being made with a Medicare beneficiary, it is particularly important to determine if the claimant is a Medicare beneficiary well before the mediation is

scheduled. The process of determining if conditional payments have been made is time consuming. CMS is not able to give quick responses. If you are making an inquiry about conditional payments, it can take up to four months to get a response, assuming you submit your inquiry properly. If you are seeking approval of an MSA, it can take up to six months to receive a response from CMS. Appreciate, too, that different CMS rules and processes apply to liability settlements compared to No-Fault or Workers' Compensation settlements. Great care must be exercised when dealing with CMS, otherwise you can become lost in a bureaucratic maze and generate delays.

Understandably, disputes exist between the parties to a settlement. The one issue for which there can be no dispute is that all parties to a settlement have a statutory duty to protect Medicare's interests. They should work together cooperatively to get the information that is necessary to proceed with settlement. Once the extent of Medicare's interests are understood, the parties to a settlement will be in a much improved position to assess the value of a settlement as you move forward, even though liability is contested. Without knowing the degree to which Medicare may have an interest in the settlement, it is very difficult to know how much to pay or how much to demand.

Time and experience will help you to work your way through this statutory mandate. As you are getting up to speed, be certain to utilize the services of a knowledgeable and skilled professional and engage that person well before settlement discussions take place.

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