THE GREAT MSP DEBATE
FUTURE MEDICALS IN PERSONAL INJURY CASES

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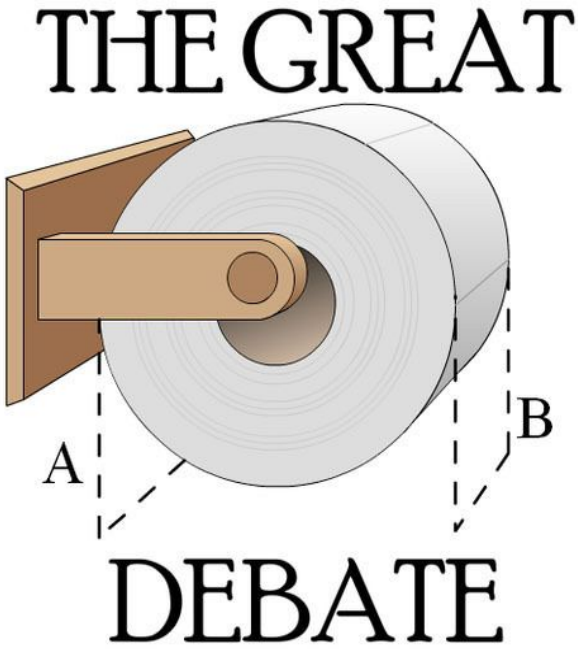
Solving the Medicare maze

THE GREAT MSP DEBATE: FUTURE MEDICALS IN PERSONAL INJURY CASES

The concept of "future medicals" continues to challenges attorneys, claim management professionals and other interested stakeholders who concentrate their practices in personal injury cases. This problem is the result of a number of issues. A recent announcement by the Centers for Medicare and Medicaid Services (CMS) about the creation of a voluntary review process for non-workers' compensation Medicare Set-asides (MSA) will only re-ignite this contentious debate and demand people educate themselves on this important issue.

Future Medicals under the Act: Law v. Policy?

The concept of "future medicals" has caused confusion for even the most experienced practitioners. This is due to the lack of legislative history prior to passage of the Medicare Secondary Pay (MSP) Act, mystifying regulations and CMS policy concerning the treatment of personal injury and workers' compensation claims.[1] Central to this issue is whether the law itself supports future medical considerations in personal injury cases, or if CMS policy is contrary to both the letter and spirit of the MSP Act.



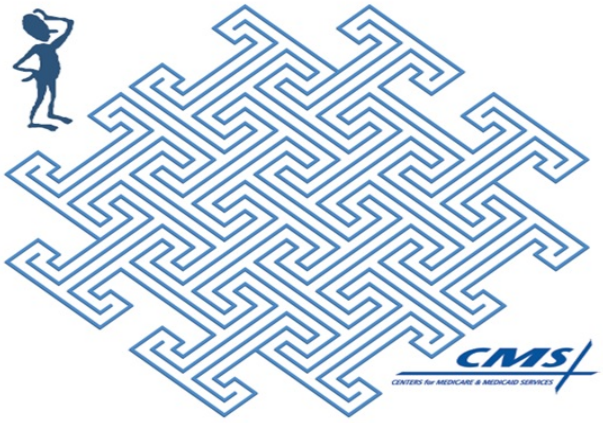
Some legal scholars and attorneys question whether a MSA should be a consideration as part of a personal injury settlement. This is partly because "set-asides" are a legal fiction and not called out specifically by name in the MSP Act or regulation. Proponents also assert that regulations interpreting Medicare's rights of future recovery only impact workers' compensation plans.[2] Any implication for other personal injury claims are outside the regulatory sphere of influence.

In May 2011, Sally Stalcup from the CMS-Dallas Regional Office issued a general memorandum regarding Medicare's interests in non-workers' compensation personal injury cases, otherwise known as Liability Medicare Set-asides (LMSA). In making the case for the applicability of LMSAs, it was asserted that, "Medicare's interests must be protected; however, CMS does not mandate a specific mechanism to protect those interests. The law does not require a 'set-aside' in any situation. The law requires that the Medicare Trust Funds be protected from payment for

future services whether it is a Workers' Compensation or liability case. There is no distinction in the law."

Arguments asserting that Ms. Stalcup's position are not based in law, but policy, ignore the basic tenets and letter of the law. The opening paragraph of the MSP Act notes its application to "a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance …."[3] The statutory definition of what constitutes a "conditional payment" also supports the claim that this issue is not limited to payments by Medicare prior to settlement, but could also apply to similar payments post settlement, judgment, award, or other payment.[4] In sum, the MSP is not merely a reimbursement statute, but is in fact a coordination of benefits law covering both past and future medicals.

Best Practices in Your Injury Cases



State and federal courts are becoming increasingly aware of future medicals in personal injury cases given the rise in this issue being unnecessarily litigated via settlement squabbles and protracted litigation involving the misinformed. This often includes misguided attorneys seeking to cut corners when resolving their cases.[5] Based on the natural trajectory of future medicals in CMS policy and treatment by the courts, it is important to evaluate this issue in all personal injury cases.

In 2012, there was a lot discussion about CMS's intentions regarding future medicals with the issuance of Medicare Secondary Payer and "Future Medicals" proposed rule.[6] This notice generated robust discussion among industry stakeholders and hope for guidance in personal injury cases. This dialogue was tempered in late 2014 when the proposal was withdrawn from consideration. The renewal of this debate has begun with recent statements by CMS that such future medical considerations in personal injury cases may be subject to voluntary review and approval.[7]

While review of future medicals in any personal injury (and workers' compensation) case is never a requirement, it is important for parties to consider and evaluate this issue as part of a final settlement. Attorneys can be a better advocate for their clients by asking if such a review is "recommended" given the case specific dynamics and factors.

Consideration of a LMSA in personal injury matters does not mean one is appropriate in all instances. It is especially important to set client expectations at not only the beginning of each case, but throughout the life of claim — including settlement discussions and drafting of the settlement release. Cooperation and communication between the adverse parties can prevent problems before they arise and diminish client anxiety.

Case law also emphasizes that issues concerning future medicals and necessary settlement release language are an interregnal part of all discussions. These terms should always be

materials terms of the final settlement document.[8] Sloppy and imprecise drafting can result in protracted post-settlement legal wrangling. Parties should also avoid using boilerplate or form language when settling their claims. Consultation with an experienced attorney who understands these issues is essential.[9]

Special attention should be given to cases that have the following characteristics:

- Matters involving Medicare beneficiaries, or claimants who are 62 years and six months old, have End Stage Renal diseases (ESRD) or instances where a claimant is a recipient of SSDI benefits.

- Instances where future medical care and treatment by the injured party is certain. This includes instances where one side has used a life care plan to evaluate future medical needs for the plaintiff(s). Failure to at least consider and advise clients on the issue of future medicals and Medicare's potential rights of recovery in catastrophic case is a major red flag.

- "Mixed" claims that involved motor vehicle/personal injury and workers' compensation cases.

- The use of a structure settlement is another indictor to consider future medicals in a settlement. This is because they are typically used in higher value cases. Injured parties should also take notice of the special requirements of a structured settlement when funding and administering a MSA.

Conclusions

The issue of future medicals in personal injury claims is something all parties should consider. This is based on not only CMS policy and case law, but also the MSP Act itself. While the precise method for resolving this issue is unclear, it is certain that failing to consider Medicare's interests and protecting your client can lead to troubling results.

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[1] "The Medicare Secondary Payer Act is complex and has been described in the courts as "the most completely impenetrable texts within human experience." *Cooper Univ. Hosp. v. Sebelius*, 636 F.3d 44, 45 (3d Cir. 2010).
[2] *See* 42 C.F.R. §411.20, *et seq.*
[3] 42 U.S.C. §1395 y(b)(2)(A)(ii).
[4] *See* 42 U.S.C. §1395 y(b)(2)(B).
[5] *See Benoit v. Neustrom*, 2013 U.S. Dist. LEXIS 55971 (E. La. April 17, 2013), and *Alvarenga v. Scope Industries*, 2016 Cal. Wrk. Comp. P.D. LEXIS _____ (2016).
[6] CMS-6047- ANPRM.
[7] See June 8, 2016 announcement: https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Whats-New/Whats-New.html
[8] *Paluch v. UPS*, 2014 Ill. App. LEXIS 283 (Ill. App. 2014); *See also Bruton v. Carnival Corp.*, 2012 U.S. Dist. LEXIS 64416 (S. Fla. May 2, 2012).
[9] *Iowa Supreme Court Atty. Disciplinary Bd. v. Silich*, 2015 Iowa Sup. LEXIS 97 (Iowa 2015).