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Speed Traps Set: Medicare to Seek Future Medicals in a PI Case

March 27, 2019|Conditional Payments, LMSA, Medicare

Executive Summary: For years, some have thought that Medicare does not pursue reimbursement for medical expenses incurred by a plaintiff after a liability insurance settlement. They reasoned that since there is no requirement to fund a Medicare Set-aside Arrangement ("MSA") when resolving a liability insurance claim, the issue could be ignored.

Recently, a letter from Medicare has surfaced indicating that it, in fact, does seek to collect for conditional payments made after a liability insurance settlement. In that letter, Medicare intends to pursue repayment of conditional payments from a plaintiff for medical expenses paid after her settlement. Such efforts are consistent with federal law as it has been written for years, though enforcement has been lacking. Parties resolving liability insurance claims must account for the future medical provisions of the Medicare Secondary Payer ("MSP") Act. Plaintiff attorneys face heightened danger in the event Medicare seeks recovery from a former client when the attorney fails to counsel the plaintiff about this potential interruption in Medicare coverage.

Introduction.

Ever exceed the speed limit when you drive down the interstate? How often are you guilty of speeding? Out of 10 trips down the interstate, how many trips include some time driving above the speed limit? Every time this happens, you break the law. Sometimes it's innocent and unintentional; other times blatant and obvious. One of the only things to slow you down is when you see state troopers sitting at the side of the road with their radar guns out. Perhaps they have got one or two cars pulled over as you fly by. Their presence alone causes you to think twice and slow down. Enhanced enforcement of the law creates high levels of compliance with that law.

For years, the same could be said about the future medical provisions of the Medicare Secondary Payer ("MSP") Act. While the future medical provisions have always existed, no one has paid them as much attention as they deserve. This is especially true in the context of a liability insurance case. Some have said that the issue can be ignored because Liability Medicare Set-asides ("LMSAs") are not required under the MSP Act. Others say Medicare must enact a regulation about LMSAs before it has a right to future medicals in a personal injury ("PI") settlement. Still others say "I know what the law says, but I'll ignore it until I know that Medicare is serious about the issue."
Medicare is now serious about the issue. We have uncovered an example of Medicare seeking reimbursement for future medicals paid on behalf of a Medicare beneficiary after a PI settlement (the "Plaintiff"). Discussed below is a cautionary tale for all parties resolving liability insurance cases. It's past time to heed warnings and begin driving the speed limit. Medicare has its radar guns out, and is ticketing violators as we speak.

$6,596.53 for Past Medicals; $45,480.23 for Future Medicals.

Medicare sent the Plaintiff a Conditional Payment Notice ("CPN") dated March 5, 2019. It begins innocently enough. "This letter follows a previous letter notifying you/your attorney of Medicare's priority right of recovery as defined under the Medicare Secondary Payer provisions. Conditional Medicare payments for Medicare Part A and Part B Fee-for-Service claims have been made that we believe are related to your case for the Date of Incident listed above." To read the CPN in its entirety, please click here.

Medicare then details its recovery rights under the MSP Act. Citing the MSP Provisions, Medicare asserts a right to recover conditional payments totaling $52,076.76. Medicare advises the Plaintiff that she has thirty (30) days to respond to the CPN before Medicare issues a Final Demand. Of note is the fact that the CPN does not mention the terms "Medicare Set-Aside" or "MSA" once.

As is typical with any Conditional Payment Notice, Medicare includes a specific itemization of payments it made on Plaintiff's behalf. Here is where the rubber meets the road. From date of injury to date of settlement (May 8, 2018), Medicare claims to have made $6,596.53 in conditional payments. From the date Plaintiff settled her liability insurance claim to March 5, 2019, Medicare identifies $45,480.23 in conditional payments. Medicare also reminded the Plaintiff that this should not be considered final, and that it was possible Medicare could identify more conditional payments before issuing a final demand.

Typically, the charges listed in the itemization all occur prior to the date of settlement. That's not the case here. The CPN does not specifically discuss its recovery rights under the MSP Provisions pre-settlement versus post-settlement. The CPN does not specifically discuss LMSAs, MSAs, or even future medicals in general. Based on the itemization, Medicare makes the assumption that all conditional payments it pays on behalf of the Plaintiff are owed as reimbursement, regardless of the timing of those payments (or, perhaps, whether those items were related to the settlement).

Plaintiff's Options Going Forward.

Plaintiff now finds herself in a difficult position. In light of this CPN, her options are limited. Initially, she needs to focus on the CPN itself. Her response to Medicare is due April 4, 2019. First, she could pay the full amount allegedly owed, no questions asked, once Medicare issues a final demand letter. Second, she could pay in part, disputing certain items via the federal administrative appeals process. Third, she could dispute the entire amount she allegedly owes for future medicals.

In part, her options depend on whether she was represented by an attorney when settling her case. If an attorney represented her, she may also have options against that attorney. The CPN does not provide information about any attorney. In fact, Medicare has not applied a procurement cost offset pursuant to 42 C.F.R. §411.37. This indicates that Medicare is not aware that Plaintiff was represented by counsel when settling her case.

Maybe the Plaintiff was not represented by counsel at the time of settlement. However, if that were the situation, you would expect the liability insurance carrier or self-insured entity who settled with the Plaintiff to have addressed (at the very least) the conditional payments incurred pre-settlement. Here, those remain outstanding. Something else is happening here.

Sometimes, the right answer is the most obvious one. In my estimation, Plaintiff was represented by counsel for her case, but the settling parties simply failed to address MSP reimbursement issues. No one verified and resolved Medicare conditional payments made from date of injury to date of settlement. No one determined (via MSA Legal Opinion or otherwise) whether Medicare had any right to not pay certain future medical expenses post-settlement. No one told the Plaintiff what could happen if she ignored those issues, leading to the federal government pursuing her directly for repayment via the CPN and the expected final demand letter.
Assuming Plaintiff was represented by counsel and not made aware of this possibility, she may have additional options. First, she may be able to pursue a legal action based on legal malpractice. Called Attorney Malpractice in North Carolina, this action is available when an attorney represents a client and fails to adhere to certain standards. The elements required in North Carolina to prove a malpractice claim predicated upon a theory of a lawyer's malpractice include: 1) the lawyer breaching a duty owed to his or her client; and 2) the negligence proximately caused; 3) damage to the plaintiff. While I'm no legal malpractice attorney, the Plaintiff's fact pattern seems to fit.

Second, Plaintiff could report her attorney(s) to the state bar. Depending on the state and its specific rules of professional conduct, the attorney could be in violation of one or more rules including Competence, Diligence, Client Communication, and/or Safekeeping Client Property. Attorneys are held to a high ethical bar to maintain their license to practice law. If the Plaintiff here was represented by counsel to help her settle her liability insurance case, counsel appears to have failed to meet that minimum ethical standard, potentially violating four rules of professional conduct along the way. Medicare's radar guns won't pick up on that, but at least the Plaintiff could get someone else to pay her ticket.

Hiding in the Bushes.

The Medicare speed traps are not always in plain sight. Sometimes, they hide in bushes, invisible to most drivers. In recent days, you may have read press releases about the USDOJ settling certain cases with plaintiff attorneys in Maryland and Pennsylvania. There, the lawyers were forced to pay $250,000 and $28,000 respectively as well as establish internal compliance programs. These are the speed traps in daylight, making themselves visible from afar.

Most MSP recovery efforts, however, do not lead to a press release from the United States Attorney's Office. Instead, Medicare reaches out directly to the party responsible for payment of the charges in question. In the context of future medicals made after a settlement, that responsible party is almost always the plaintiff or claimant in the personal injury settlement (i.e., the former client). As part of the settlement, that person accepts responsibility for all future medicals related to the settlement. Medicare seeks recovery from that person. If that person does not pay, then Medicare would refer the matter to the US Department of Treasury for collections. Perhaps Medicare would then also issue letters to the attorney who represented the individual when resolving their liability insurance case. This attorney finds it highly doubtful, though, that Medicare would go as far as to seek recovery from an insurance carrier or self-insured here unless it can be proven that entity was responsible for future medicals post-settlement (a situation that rarely occurs). For that reason, it is plaintiff attorneys who must be on high alert for this issue. If a defense attorney raises this issue during arbitration, mediation, or settlement, you should thank them. You never know when that one situation could morph into a $45,480.23 obligation like the one currently facing Plaintiff.

Conclusion.

For years, we have been providing warnings about this issue. Time and time again, we've been explaining that it would not take a change in the law or "making MSAs required" for Medicare to seek collection of future medicals paid on behalf of a Medicare beneficiary post-settlement. One more time, we are flashing our high beams at you, warning you of the Medicare speed trap over the next hill. Proactively address future medicals as part of resolving a liability insurance claim. Protect a client's future Medicare benefits. Don't find yourself at the side of the road wishing you had slowed down earlier.

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