Medicare Compliance – How to be TOTALLY Medicare Compliant

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So, what do lawyers assisting Medicare beneficiaries do given all of the issues surrounding representing Medicare beneficiaries? In my opinion, you must put into place a method of screening your files to determine those that involve Medicare beneficiaries or those with a reasonable expectation of becoming a Medicare beneficiary within 30 months. You must contact Medicare and appropriately report the settlement to get a final demand. Then, you audit the final demand and avail yourself of the compromise/waiver process. You must also make sure you identify any potential Part C/MAO liens and resolve those as well.

If you have a Medicare beneficiary or one with a reasonable expectation of becoming one within 30 months as a client, you must determine if future medicals have been funded and if so advise the client regarding the legal implications of the MSP related to futures. The easiest way to remember the process once you have identified someone as a Medicare beneficiary or someone with the reasonable expectation is by the acronym "CAD". The "C" stands for consult with competent experts who can help deal with these complicated issues. The "A" stands for advise/educate the client about the MSP implications related to future medical. The "D" stands for document what you did in relation to the MSP. If the client decides that they don't want an MSA or to set aside anything, a choice they may make, then document the education they received about the issue with them signing an acknowledgement. If they elect to do an MSA analysis, hire a company to do the analysis so that they can help you document your file properly and close it compliantly.

In addition, release language is critical when it comes to the question of documentation of considering Medicare's future interests. Release language I have seen prepared by defendant/insurers is typically overbearing. Frequently the language cites regulations that are related to workers' compensation settlements and typically will specifically identify a figure to be set aside. The latter can potentially cause a loss of itemized deductions for the client. Not only is release language an important consideration, so is the method of calculation of the set aside, potential reduction methodologies and funding alternatives (lump sum vs. annuity funding). These issues do impact how the release is crafted as well as considerations of whether to submit to CMS for review and approval (which is rarely a good idea). Submission of a liability set aside isn't required and a settlement should never be made contingent upon CMS review and approval. Some regional offices will not review a liability set aside whiles others will. Since review/approval is voluntary, I typically don't recommend submission given the lack of appeal process should CMS come back with an unfavorable decision. Furthermore, making a settlement contingent upon CMS review/approval could create an impossible contingency if the settlement is in a jurisdiction where the regional office will not review.

Start early and do not let the defendant-insurer control the Medicare compliance process. At the outset of your case you have to confirm disability eligibility with Social Security and get copies of all insurance as well as government assistance cards. Make sure you understand who is potentially Medicare eligible such as those who are on SSDI, those turning 65, someone with end stage renal disease (ESRD), Lou Gehrig's disease (ALS) or a child disabled before age 22 with a parent drawing Social Security benefits. Collaborate with the other side regarding what is being reported under MIR. Be active in mandating the proper ICD codes to be included in the release.

All lawyers assisting those on Medicare must be knowledgeable when it comes to dealing with Medicare conditional payments as well as Part C/MAO liens. Medicare beneficiaries must understand the risk of losing their Medicare coverage should they decide to set aside nothing from their personal injury settlement for future Medicare covered expenses related to the injury. It is about educating the client to make sure they can make an informed decision relative to these issues. Beyond education of the client, the most critical issue becomes how to properly document your file about what was done and why. This part is where the experts come into play. For most practitioners, it is nearly impossible to know all of the nuances and issues that arise with the Medicare Secondary Payer Act. From identifying liens, resolving conditional payments, deciding to set money aside, the creation of the allocation to the release language and the funding/administration of a set aside, there are issues that can be daunting for even the most well-informed personal injury practitioner. Without proper consultation and guidance, mistakes can lead to unhappy clients or worse yet a legal malpractice claim.

The lesson to take away regarding on Medicare compliance and the issues described herein, is not to wind up in federal court over these issues. Instead, deal with these issues pre-settlement strategically. If a client is a Medicare beneficiary, then make sure you know which ICD codes will be reported under the Mandatory Insurer Reporting law and evaluate with the client the possibility of a set aside. Discuss with competent experts the proper steps for MSP compliance. Potentially use the set aside as an element of damages to help improve settlement value. Properly word the release if a set aside is being used to make sure the client doesn't get saddled with inappropriate language or lose itemized deductions. Appropriate planning will avoid a bad outcome or unnecessary trips to federal court.

Medicare Compliance Case Studies

To better understand how to apply the foregoing information, I will illustrate with a few case examples. First, consider a settlement for Jim Doe who is currently forty-six and was injured in a motorcycle accident and lost both of his legs. He worked up until his accident and applied for Social Security Disability (SSDI) after the accident and he was accepted two years ago. He is a current Medicare beneficiary as a result of qualifying for SSDI. You are about to settle his case for $2,000,000 gross and want to make sure you address Medicare compliance issues. In this instance, it makes sense to do a Medicare set-aside analysis to document your file regarding what you are doing to deal with the MSP. The settlement will be reported to Medicare under the mandatory insurer reporting requirements which could trigger a future denial of injury related care. It is ultimately up to the client whether to set aside or not, but your file should be documented about what was done and why. This might be a situation where an argument could be made for a reduced set-aside amount based on Ahlborn/Benoit reduction methodologies if the client did want to set aside. It seems likely that here the client would not be recovering their full value of future medical.

Second, consider the case of Jill Doe who was injured as the result of a defective product. Jill was thirty-eight at the time of her incident and suffered a TBI from a tire blowout. She has applied for SSDI but hasn't been accepted yet and is not a current Medicare beneficiary. The defendant is insisting upon an MSA and detailed language in the release. The settlement was for "nuisance value" of $500,000. This is a case where definitively there isn't an MSP compliance issue. The client isn't a Medicare beneficiary and the settlement will not/cannot be reported to Medicare under the mandatory insurer reporting since there is no Medicare entitlement. Here, you should reject the demands by the defendant to set up an MSA and include Medicare language in the release. It isn't appropriate and your client shouldn't acknowledge an obligation

that doesn't exist. If the client had applied and been accepted for SSDI, then arguably there could be an MSP compliance issue as they would have a reasonable expectation of Medicare entitlement within 30 months. That category of clients does cause some concern but the settlement still can't be reported to Medicare so there is a very small chance of a denial of care.

Third, consider the case of Bill Smith who was involved in a motor vehicle accident suffering a neck and back injury. Bill was fifty-two at the time of the accident. He was accepted by Social Security as disabled and has been receiving SSDI for the last 23 months. He will be Medicare eligible by the time you settle his case for the $100,000 policy limits. The client needs a significant future back surgery which will involve a multi-level fusion. The future medical projection for damages was in excess of $500,000 including that surgical procedure. During litigation, the defense took the position that the neck injuries were pre-existing and didn't agree to pay anything for those injuries with the release stating those claims were being released but they were pre-existing injuries.

This is a tough one from the MSP compliance standpoint, but it is a common scenario trial lawyers face. Here, even though he isn't currently a Medicare beneficiary, he will be by the time the settlement is consummated so it will be reported to Medicare. Given the amount of future medicals and the fact that the client will be Medicare eligible when the case settles, MSP compliance issues should be addressed. Here it is very likely that an argument can be made that future medicals weren't funded at all based upon the fact that you have a $100,000 gross settlement and a future medical cost projection of over $500,000. That needs to be properly documented and the client educated about the risk of setting aside nothing by taking the position that future medicals were not funded. Care should be taken to come to an agreement about how to document this file properly for MSP compliance with the defendant. You don't want them to

report the neck injury when they do the mandatory insurer reporting so in this case, it might make sense to document in writing with the other side exactly what will be reported.