The Top 10 Medicare Risks For Trial Lawyers – Explained

By Jeremy Babener & Jack Meligan, February, 2020

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Most trial lawyers have now heard, or soon will, about Medicare's increased enforcement against personal injury plaintiffs and their lawyers. In this article we identify the key risks, illustrating the importance of considering Medicare before settlement.

The American Association for Justice has diligently educated lawyers on an important Medicare fact – Medicare Set-Aside accounts ("MSAs") are not required in liability cases. Don't believe defendants, insurers, or advisers saying otherwise – Medicare guidance and case law explicitly contradicts them.[1]

That being said, MSAs can be useful in solving a key Medicare risk for plaintiffs after settlement: denial of Medicare coverage for case-related medical services (see Risk #3 below). But, in many cases there are better and simpler solutions, which often depend on finding the right advisor. Clients can also benefit from obtaining an "MSA Allocation Study." Often, that analysis can either (i) confirm that a plaintiff does not need an MSA, or, (ii) add hundreds of thousands of dollars to a settlement, even millions, by establishing greater plaintiff injury.

Before walking through the "Top 10" risks, we provide a quick recap of how Congress inserted Medicare into personal injury cases.

How We Got Here

In 1980, Congress passed the Medicare Secondary Payer Act (the "MSPA").[2] In various circumstances the law empowers Medicare to deny coverage and demand reimbursement from plaintiffs receiving lawsuit proceeds. In 2007, to help Medicare monitor plaintiff recoveries, Congress imposed new reporting obligations for defendants and insurers, plus a non-compliance fine of $1,000 per day.[3] Medicare began enforcing these rules in late 2011.

From 2007-2015, advisors of plaintiffs and plaintiff lawyers observed a slow but consistent increase in Medicare enforcement and aggressiveness. For example, in 2011, the Department of Health & Human Services advised (i) that Medicare will not recognize allocations of future medicals without a court order and (ii) that "[e]ach attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals and if so, a need to protect [Medicare's] funds."[4] Defendants and insurers also began taking unfriendly positions on Medicare issues at settlement.

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[1] *E.g.,* Dep't of Health & Human Servs., Sally Stalcup (May 25, 2011); *Sipler v. Trans Am Trucking, Inc.*, 881 F.Supp.2d 635 (D.N.J. 2012) ("[N]o federal law requires set-aside arrangements in personal injury settlements for future medical expenses.").

[2] 42 U.S.C. § 1395(y)(b).

[3] 42 U.S.C. § 1395(y)(b)(8).

[4] Dep't of Health & Human Servs., Sally Stalcup (May 25, 2011).

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Then, in 2018 and 2019 Medicare significantly stepped up its enforcement. Medicare is now denying coverage and demanding reimbursement based on theories we haven't seen Medicare pursue in over 30 years of advising plaintiffs.[5] And, since 2016, plaintiff lawyers have been sued for millions of dollars by the U.S. Department of Justice and insurance companies offering Medicare Advantage plans – both of which can seek "double damages" under the MSPA.[6]

In this environment, plaintiffs and their lawyers who settle without considering both past and future Medicare issues run a disturbing number of risks. We note ten of them here: 5 for plaintiffs and 5 for plaintiff lawyers. Many professionals offer supportive services on this front, including co-author Jack Meligan's consulting firm, Plaintiff's MSA & Lien Solution. In many cases, lawyers prepared with template materials and information can handle Medicare issues without outside professionals. Here are the "Top 10" risks we believe you should consider as you proceed.

Five Medicare Risks for Plaintiffs

1. When a plaintiff recovers money in her case, Medicare requires repayment of case-related medical expenses that Medicare "conditionally" paid (the "Repayment Amount"). In the last couple years, Medicare has substantially increased its pursuit of repayment, going after former plaintiffs and their lawyers (see Risk #8).

2. In many cases, Medicare has reduced a plaintiff's net recovery by mistakenly inflating the Repayment Amount. Medicare is often over-inclusive in its list of plaintiff expenses that it claims to have "conditionally" paid. Without a line-by-line audit and challenge pursuant to Medicare's stated procedures, a plaintiff may significantly overpay.

3. When a plaintiff recovers money in her case, Medicare is not supposed to pay related medical expenses until she pays a certain amount of them (the "Future Medical Amount"). In recent years, Medicare has increased enforcement of this rule. In general, the Future Medical Amount is the amount that the settlement agreement allocates to future medical expenses. Unless she saves that portion of her recovery, she might be unable to pay (or get Medicare to pay) for medical care that she needs. In many cases, it is possible to reduce the Future Medical Amount – importantly, in a manner that Medicare will accept.

4. Long after settlement, Medicare may deny a plaintiff's coverage for case-related medical care if Medicare disapproves of how she spent her Future Medical Amount or reported to Medicare. For this reason, many plaintiffs benefit from voluntarily creating an MSA account, which can protect, grow, and properly report the correct use of a Future Medical Amount.

5. Misunderstandings by defendants about Medicare rules can reduce a plaintiff's net recovery and delay Medicare coverage. If a plaintiff does not address the Future Medical Amount before the other side involves an outside vendor, she is sometimes saddled with an unnecessary or "overfunded" MSA that wastes settlement money on expenses otherwise covered by Medicare. Under the guise of minimizing risk of Medicare's objection, and with no cost to them, defendants sometimes condition settlement on the use of larger vendors who profit as more money is placed in an MSA. Courts have described the defense's rationale for an MSA an "abundance of caution" based on "no credible threat."[7]

In settling a personal injury action, many plaintiffs face all of these risks and complications. And sometimes, plaintiff risks turn into plaintiff lawyer liability.

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[5] For a video discussion of examples, click here.
[6] 42 U.S.C. § 1395(y)(b)(3).
[7] *See Silva v. Burwell*, 2017 WL 5891753 (D.N.M. Nov. 28, 2017).

Five Medicare Risks for Plaintiff Lawyers

6. Plaintiff lawyers risk legal malpractice suits from clients who suffer any of the five risks above. The rising standard of care in plaintiff work now includes non-litigation issues like Medicare. In fact, ABA continuing education materials hold that a plaintiff lawyer "has a duty to ensure his client is informed about … the effect of the judgment or settlement on the client's public benefits eligibility," as well as "the options of structured settlements [and] trusts."[8] The ABA's litigation section guidelines go further, advising that "competent representation" requires "considering the tax implications of [any] settlement."[9] You can find discussions of settlement tax issues by co-author Jeremy Babener here.
7. Also due to the rising standard of care, plaintiff lawyers are at risk for disciplinary actions. So far, we're only aware of a single case in which a plaintiff lawyer forfeited his license for failing to follow basic Medicare-related protocols.[10] But, surely there are more to come.
8. Perhaps most concerning is Medicare's increasing practice of pursuing plaintiff lawyers post-settlement for their client's Repayment Amount, sometimes referred to as the "Conditional Amount" (see Risk #1). The U.S. Department of Justice has taken a shockingly aggressive tone on this front. After settling with a Baltimore plaintiff firm, the prosecuting U.S. Attorney announced, "We intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments, regardless of whether they were the ones primarily handling the litigation for the plaintiff."[11] After settling with a Philadelphia firm, another U.S. Attorney said, "When an attorney fails to reimburse Medicare, the United States can recover from the attorney—even if the attorney already transmitted the proceeds to the client."[12] We expect other U.S. Attorneys to follow suit.
9. Even if Medicare and the U.S. Department of Justice slow their efforts, which doesn't seem likely, for-profit companies administering Medicare Part C benefits and Medicare Advantage plans have every reason to increase collection actions against plaintiff lawyers – and they have.[13] One of the most widely known examples is a $20 million lawsuit against five plaintiff firms in Texas by Humana, UnitedHealth, and Aetna. The three previously paid that much in medical expenses for the firms' asbestos-litigation clients.[14] A confidential resolution was reached in 2018.[15]
10. Not only are plaintiff lawyers exposed to direct liability, they are pursued under the MSPA for "double damages."[16] Courts are currently split as to whether for-profit companies can charge plaintiff firms with double damages.[17] But, there is no question that Medicare can do so. And

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[8] ALI-ABA, Krooks, Bernard, *Special Needs Trusts: The Basics, The Benefits, and The Burdens* (2009).
[9] ABA, *Ethical Guidelines for Settlement Negotiations*, August, 2002.
[10] *In re Gammage*, 290 Ga. 440 (2012).
[11] U.S. Dep't of Justice, *Baltimore Plaintiffs' Law Firm Saiontz & Kirk, P.S., Pays the United States Over $90,000 to Settle Allegations that it Failed to Reimburse Medicare for Payments Made on Behalf of Firm Clients* (Nov. 4, 2019).
[12] U.S. Dep't of Justice, *Philadelphia Personal Injury Law Firm Agrees to Start Compliance Program and Reimburse the United States for Clients' Medicare Debts* (June 18, 2018).
[13] *See e.g.*, *Humana Ins. Co. v. Paris Blank LLP*, 187 F.Supp.3d 676, 680 (E.D. Va. 2016).
[14] *Humana, Inc. v. Brent W. Coon*, 2016 WL 4702759 (S.D. Tex., Sept. 6, 2016).
[15] Order of Dismissal. *Humana, Inc. v. Brent W. Coon*, 3:16CV00240 (S.D. Tex., Nov. 28, 2018).
[16] *See* 42 U.S.C. § 1395(y)(b)(2)(B) and (b)(3)(A).
[17] *Humana Ins. Co. v. Paris Blank LLP*, 187 F.Supp.3d 676, 680 (E.D. Va. 2016) (concluding that a company can recover double damages); *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 685 F.3d 353 (3rd Cir. 2012) (same); *but see* *Aetna Life Ins. Co. v. Guerrera*, 300 F. Supp. 3d 367, 378 (D. Conn. 2018) (holding that only the U.S. can get double damages).

worse, malpractice insurers might deny coverage for double damages pursuant to policy exclusions for "punitive damages"– in fact, that recently happened to Virginia firm Paris Blank.

Where to Turn

The risks of ignoring Medicare at settlement are daunting – but there are professionals experienced and efficient at resolving these issues, including co-author Jack Meligan's consulting firm Plaintiff's MSA & Lien Solution. While past experience is no guarantee of future results, approximately one-third of plaintiffs working with Plaintiff's MSA & Lien Solution have significantly reduced their Repayment and Future Medical Amounts – two-thirds eliminated them entirely. This means a larger net recovery, a shorter wait for Medicare coverage, and liability protection for plaintiff and lawyer.

With the increased aggressiveness of Medicare, the U.S. Department of Justice, and for-profit Medicare administrators, plaintiffs and their lawyers are well served by addressing Medicare's rules head-on when closing cases. Click here to find relevant documentation, regular updates, and video commentary on Medicare and other settlement issues by co-author Jack Meligan.