Medicare—What Do I Need to Know to Settle a Case Now?

"Medicare." It's the latest word that has personal injury attorneys and claims adjusters cringing. The new reporting requirements and potential penalties easily trigger a painful migraine. Settlements are stalled and have become even more cumbersome than ever before. Heavy caseloads leave little time to try to crawl through the maze of dense and lengthy articles online. So what is an overworked claims adjuster or attorney to do in order to comply with the new Medicare requirements? Not to worry—simply memorize a few basic rules and begin applying them to each and every case that touches your desk. Over time, you will start thinking differently about the settlement process. Here are four of the essentials that you need to know to settle a case now involving a Medicare recipient or future Medicare beneficiary.

#1 Know the difference between MEDICARE and MEDICAID

Many times throughout the day, I find myself educating others who are used to throwing the terms around interchangeably. MEDICARE is a public health insurance system for those who are over 65, have kidney failure or Lou Gehrig's disease, or are totally disabled (and have received SSDI for more than 24 months). MEDICAID is a public health insurance system for those who qualify for low-income or poverty level status. Importantly, the new requirements apply only to cases involving MEDICARE.

#2 Be Able to Identify a "Medicare beneficiary" or "Medicare eligible" Plaintiff or Claimant

Every claims adjuster and defense attorney needs to be able to identify which plaintiffs/claimants are "Medicare beneficiaries" (currently receiving Medicare benefits) and which are "Medicare eligible" (those who are eligible for Medicare currently within the next 2 years). These cases need to be tagged with a "red flag" and require special attention during discovery and at the time of settlement.

MEDICARE BENEFICIARY	MEDICARE ELIGIBLE
▪ Over 65 years of age ▪ Diagnosed with kidney failure or Lou Gehrig's disease ▪ Received SSDI for more than 24 months	▪ Anyone receiving SSDI or planning to appeal an SSDI denial

So how do you know if the plaintiff/claimant is a Medicare beneficiary or Medicare eligible?

- Ask the claimant when the claim is reported.
- Send out a Demand for Medicare/Medicaid Information with your discovery demands and demand a copy of their health insurance card.

- Ask at depositions whether the plaintiff is receiving (or has ever received) Medicare benefits.
    - If the answer is "no," make sure you get the details about their health insurance to verify for yourself that Medicare is not involved.
- Ask at depositions whether the plaintiff is receiving SSDI, has ever applied/been denied SSDI, and whether they have plans to appeal any denial.
- Ask at depositions about potential other available insurances, such as a spouse's employer based health insurance.
- You cannot ignore Medicare's interests even if Worker's Comp or No-Fault is involved in the case.

NOTE: A significant number of Medicare recipients do not even realize they are receiving Medicare benefits because they have a Medicare plan administered by a private insurer, such as Univera, Blue Cross/Blue Shield, or Independent Health. It is important to get a copy (front and back) of the plaintiff's health insurance card to identify whether or not they have a Medicare-based plan.

#3 WARNING: If you are settling with a Medicare beneficiary or a plaintiff who is "Medicare eligible" for more than $300, further action is required!

Liability insurers (including self-insured entities) and attorneys have a non-delegable duty to take into account Medicare's interest at the time of settlement for past and future accident-related medical expenses. In order to settle a case with a Medicare beneficiary or a Medicare eligible plaintiff/claimant, you must document your file to show that you made a good-faith and reasonable effort to protect Medicare's interests at the time of settlement.

As a case approaches potential settlement and BEFORE signing the settlement documents, you <u>must</u> do the following:

(1) Have an up-to-date picture of the plaintiff's treatment for accident-related injuries (in other words, make sure you have updated authorizations and did not let the medical records "lapse" after depositions);

(2) Make sure you or opposing counsel has reported the accident and opened a claim file with Medicare's Coordination of Benefits Department;

(3) Determine whether Medicare has paid for any accident-related medical expenses by requesting and obtaining a Conditional Payment Letter from Medicare (this should be issued automatically by Medicare Secondary Payer Recovery Contractor within 65 days of opening a claim file);

(4) Notify Medicare of the proposed settlement amount and request a updated Conditional Payment amount/Final Demand letter;

   a. If Medicare is not reimbursed for past accident-related medical expenses it has paid, the liability insurer (or self-insured entity) must

reimburse Medicare even if it has already paid the plaintiff (and is subject to double damages). 42 USC § 1395y(b)(2)(A)(ii)

(5) Determine whether a Medicare set-aside is necessary.

#4 A Medicare Set-Aside May be "Required" if the Medicare Beneficiary or Medicare Eligible Plaintiff is Continuing to Treat for Accident-Related Injuries at the Time of Settlement

A Medicare set-aside ("MSA") may be necessary if the Medicare recipient or Medicare eligible plaintiff/claimant is continuing to treat for accident-related injuries at the time of settlement. ***Although a MSA is not technically "required" by caselaw or statute, it is the "method of choice" according to recent Medicare advisory opinion and "provides the best protection for the program and the Medicare beneficiary."*** This means setting aside a portion (or all) of the settlement funds if they are still treating and there are insufficient other sources available to cover accident-related medical expenses. Do not be fooled into thinking that the fact that the plaintiff/claimant is receiving No-Fault benefits eliminates the need for you to take into account Medicare's interest at the time of settlement. Fifty thousand dollars of No-Fault benefits can be quickly exhausted. If you are settling an automobile accident case, you need to determine whether there are any remaining No-Fault benefits available, whether there are any potential APIP benefits available, and determine whether there is enough coverage for the anticipated future accident-related medical expenses.

Admittedly, there are no requirements as to how much money needs to be set aside. Without any bright-line rule to follow, your only option is to set-aside a "reasonable" amount in light of the amount of the settlement and the nature of the injuries. For example, setting aside $1,000 of a $250,000 settlement, where the plaintiff/claimant's treating physician has opined they will need future spinal surgery and No-Fault benefits have been exhausted is most likely NOT reasonable. However, setting aside $5,000 of a $25,000 settlement where plaintiff testified at her deposition that she plans on having minor cosmetic surgery to fix accident-related scarring is arguably considered reasonable. When in doubt, hiring a MSA Allocator is always recommended, especially for larger settlements. Deferring to an expert will provide a target for indemnification in the event the set-aside amount is ever deemed inadequate.

THE GOOD NEWS…

Medicare has slowly begun to assist insurers and practitioners by providing some guidelines to assist with liability settlements.

(1) In a CMS Memo dated September 30, 2011, Medicare advised that it will consider its interest "satisfied" with respect to future accident-related medical expenses if the Medicare beneficiary's treating physician certifies in writing that treatment for the alleged injury has been completed as of the date of the settlement and that future medical items and/or services for that injury will not be required.

(2) As of September 6, 2011, a $300 threshold was implemented by Medicare for liability settlements. If all of Medicare's criteria are met, Medicare will not recover against the beneficiary's settlement, judgment, award or other payment.

(3) For cases involving Medicare beneficiaries and settlements $350,000 or more within the boundaries of the Western District of New York, applications for approval of a

MSA amount can be submitted to Assistant U.S. Attorney Robert Trusiak for his review. If he is satisfied with the amount, a release will be issued relieving all parties including plaintiff's, plaintiff's counsel, insurance carriers, self-insured entities, and defendants from any further obligation to Medicare in the event that the MSA amount proves inadequate.

(4) According to a Regional CMS Advisory Opinion, the only situation in which Medicare recognizes allocations of liability payments for pain and suffering is when a court issues an order after their review of the merits of the case. If a court has reviewed the facts of the case and issues an order determining that there will be no future medical expenses/services, Medicare will accept the Court's finding of fact.

These four basic guidelines are the essentials you need to know to settle a case today involving a Medicare beneficiary or soon-to-be Medicare recipient. Obviously these four steps are just intended to be an easy-to-use guideline and not meant to be comprehensive. Every case is factually different depending upon the nature of the injuries and available coverages for future accident-related medical expenses. Some cases will be easier to deal with Medicare issues and others more complex and problematic. As you become more familiar with these four rules, it will get easier to settle cases involving Medicare, especially if you "think" about Medicare earlier in the case rather than waiting to at the time of settlement. The fact that you are reading this article means that you have already taken the first step towards complying with the new requirements.

If you have any Medicare-related questions or would like assistance with a case or claim involving Medicare, please feel free to contact me at (716) 853-3801 or via email at ALMachacek@kslnlaw.com.