CATTIE, P.L.L.C.
226 S. LAUREL AVENUE
CHARLOTTE, NC 28207

Winter is Coming: LMSA Issues and Ethical Obligations Facing Plaintiff Lawyers

Introduction.

"Winter is coming." That three word statement resonates throughout the Game of Thrones series. It serves both as a reminder for the wary and a warning for the ignorant. Times may be good now, but they will get worse quickly when Winter arrives. Winter in the seven kingdoms meant the arrival of the White Walkers. Winter for plaintiff attorneys handling injury cases involving future medical expenses means the federal government and Liability Medicare Set-aside Arrangements (LMSAs).

The penalties under federal law have been well-documented. Single, double or (perhaps) treble damages for failure to address these obligations properly. Other potential penalties, though, have been less discussed. The purpose of this article is to demonstrate why plaintiff lawyers must be wary of potential LMSA issues in light of state rules of professional conduct. For plaintiff lawyers, Winter is coming.

The Fact Pattern.

Here's a set of facts common in 2017. Plaintiff is injured in a motor vehicle accident. Plaintiff sustains physical injuries, though not necessarily of a catastrophic nature. Future medical treatment is certain though. Plaintiff sues the tortfeasor driver, who has automobile insurance with a large insurance carrier. Eventually, they agree to settle the case. Plaintiff is Medicare enrolled as of the date of settlement. Part of the settlement proceeds are being paid for Plaintiff's future medical expenses related to the accident. Plaintiff settles without being advised about potential Medicare loss of coverage issues related to future medical expenses incurred due to his accident.

Sometime after the settlement, Plaintiff seeks treatment from his doctor. Plaintiff instructs the doctor to bill his Medicare insurance, unaware of potential issues. Medicare receives the bill and pays it. Later, Medicare realizes it should not have paid and seeks repayment. Medicare writes to Plaintiff, advising that he owes $X. Plaintiff then calls you, asking why he got this letter from Medicare.

The Twist.

The fact pattern is ordinary until the last three (3) sentences. To date, we have not yet had clients making those phone calls to our offices. However, some of us can expect some of those calls starting this fall. While the Medicare Secondary Payer (MSP) Act has existed for thirty-seven (37) years, its future medical provisions related to liability insurance settlements have been enforced rarely. Now, recent steps taken by Medicare complicate the fact pattern. Medicare appears to be taking enforcement steps which could have drastic effects on our clients and our legal practices.

In February 2017, the Centers for Medicare & Medicaid Services (CMS) notified the medical community about an LMSA development. In Change Alert 9893, CMS advised the medical community to begin expecting CMS to begin rejecting certain reimbursement claims. When rejected, CMS will advise the medical provider, using a specific billing code, to seek repayment from the patient's LMSA or NFMSA. No longer will the client receive settlement proceeds for future medicals that are related to the accident and then bill Medicare and the American taxpayer to pay for what was already paid for as part of the settlement.

Further, CMS is putting into place a formal LMSA review process. CMS announced the potential development in an Alert in June 2016. As of July 1, 2017, CMS holds the option to ask its new WCMSA review contractor to being reviewing up to 51,000 LMSAs per year. Details of what qualifies for formal review are not yet available. In workers' comp, the current workload review threshold for voluntary

submission to CMS is settlements over 25K involving a current Medicare beneficiary and settlements over 250K involving those injured workers not yet Medicare enrolled but reasonably expected to be enrolled within thirty (30) months of settlement. Cases not meeting this review threshold are not given "safe harbor" on the MSA issue; they simply cannot get CMS officials to review and approval the MSA.

With this twist, it becomes more certain than ever that some plaintiffs will be approached by either CMS or the medical provider for repayment of injury-related medical bills incurred post-settlement. Once that occurs, the plaintiff will undoubtedly call their attorney and ask why that's happening. It's the phone call many plaintiff attorneys fear.

The Ethical Concerns.

The attorney under these facts who failed to advise Plaintiff about potential Medicare complications likely violated multiple rules of professional conduct. While all states have some version of the rules of professional conduct, this article will discuss application of the ABA Model Rules of Professional Conduct (the "Model Rules"). I highly encourage you to review your state's own version so as to understand how this applies to your practice.

Rule 1.1 Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This first rule is foundational. A lawyer must be competent in her representation of the client. That competency must extend to all issues which may affect the client both during the representation and after the representation as a result of the representation. Many lawyers today, if being honest, would say they are not competent when it comes to future medical exposure under the MSP Act and LMSAs. If that's the case, then what must be done to become competent on the issue?

Rule 1.3 Diligence. "A lawyer shall act with reasonable diligence and promptness in representing a client."

The Model Rules obligate a lawyer to act diligently in representing a client. Diligent representation involves being a zealous advocate of the client's best interest. When it comes to Medicare benefits, it cannot be argued that a lawyer must make certain that a settlement does not affect a client's future Medicare benefits adversely. Taking a position that LMSAs are not "required" with no deeper analysis does not accomplish that task, and could hurt the client if the lawyer's analysis is not broader in nature.

Rule 1.4 Communication. Subpart (b) "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Lawyers have a duty to explain all issues to their client. Most likely, the client is a layperson with little to no understanding about the legal issues which affect their case. A lawyer needs to be able to explain any legal issue in a way that allows the client to make an informed decision about their case. This includes how a possible LMSA might affect any settlement offer client wants to accept. Today, can you talk to you client about how LMSA and future medical issues may affect a settlement offer? If not, how can you be sure that you can have that conversation properly?

Rule 1.15 Safekeeping Client Property. Subpart (d) "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person."

Settlement proceeds become client property. In exchange for relinquishing their insurance claim, they receive money. Attorneys have an ethical duty to safeguard that property, but also an obligation to identify liens and other reimbursement obligations. LMSAs and future medical issues under the MSP Act

are reimbursement obligations. Instead of paying Medicare for something it has already paid for, though, the LMSA ensures that Medicare is not asked to pay a bill prematurely that is another's obligation.

Under the terms of most settlement agreements, the plaintiff assumes responsibility for future medicals as of the date of settlement. He or she, not the insurance carrier, becomes the 'primary payer' of future medicals post-settlement.

Plaintiffs today remain largely unaware of the potential to lose their Medicare benefits. It's no fault of their own. Attorneys can do a better job of advising them of the potential of losing their Medicare benefits due to a settlement.

It's not an issue of whether an LMSA is 'required.' Rather, it's an issue as to whether a payment for future medicals has been made under a liability settlement. When answering that question, keep Rules 1.1, 1.3, 1.4(b) and 1.15(d). in mind.

Winter is coming. It may have been thirty-seven (37) years in the making, but all signs say the same. Medicare will begin active enforcement of a law that that existed since 1980. As attorneys, you must be keenly aware of this development as it relates to your practice. You must be competent on this issue, or you must do something to ensure competency. You must address the issue diligently, or do something to ensure you act diligently. You must communicate with your clients about this issue, or take steps to make sure your client is made aware. You must safekeep your client's property, or work with someone who can do that on your behalf.

If you have questions, you can always seek clarification from your state bar. Winter is coming. Make preparations now before Winter is here.