Cattie, P.L.L.C.
226 S. Laurel Avenue
Charlotte, NC 28207

MSAs and FELA Settlements: Has the Train Left the Station?

Executive Summary – Parties resolving claims asserted by railroad employees under the Federal Employers Liability Act ("FELA") may neglect to address future medical exposure under the Medicare Secondary Payer ("MSP") Act. Though Medicare treats FELA akin to liability insurance under the MSP Act, some parties fail to identify, verify and discharge a client's MSP future medical exposure. Federal law prohibits Medicare from paying for a beneficiary's medical expenses where payment has been made under a liability insurance plan (but for one exception). While funding a Medicare Set-aside Arrangement ("MSA") could be one way to negate that exposure, federal law does not require MSAs today. Too many practitioners make the mistake of waiting for Medicare to enact some liability MSA "requirement", leaving clients uninformed and exposed to potential reimbursement claims from Medicare post-settlement. With respect to current clients, silence could amount to a 'material error' as set forth in the American Bar Association's recently issued Formal Opinion 481 (A Lawyers' Duty to Inform a Current or Former Client of the Lawyer's Material Error). This article describes steps parties resolving FELA claims should take to comply with the future medical provisions of the MSP Act. Certainly, a client should not be penalized for an attorney's mistaken understanding about how MSAs could apply to FELA settlements.

Introduction.

Attorneys are human. Attorneys can make mistakes. They can be heading down one track and unbeknownst to them, a switch is triggered, leading them down the wrong track. They could ride that track for hundreds of miles before realizing that the track they are on is wrong.

Some attorneys involved in claims made under the Federal Employers Liability Act ("FELA") fail to grasp potential hazards linked to future medical exposure. Specifically, they fail to grasp how Medicare's rights under the Medicare Secondary Payer ("MSP") Act may affect their client or their law practice post-settlement. A detailed analysis of the salient issues leads the prudent practitioner to the conclusion that more care must be taken pre-settlement to protect clients from hazards associated with the MSP Act post-settlement.

This article intends to accomplish the following: describe FELA at a basic level; describe the MSP Act and its future medical provisions; link FELA to the MSP Act; contrast historical use of MSAs in FELA settlements to Medicare's position on the issue; present the ethical dilemma facing FELA attorneys today; and provide a practical roadmap for how to identify a MSP future medical obligation in a FELA fact pattern.

FELA is not Workers' Compensation.

Enacted in 1908, FELA is a federal law which protects and compensates railroad workers injured on the job. *45 U.S.C. § 51, et seq*. At a glance, FELA looks similar to workers' compensation. To the extent that both help protect workers injured on the job, they are similar. However, that's where the similarities cease to exist.

FELA is a fault based system. To recover under FELA, the railroad worker must prove that the railroad employer was legally negligent, at least in part, in causing the injury. *45 U.S.C. § 53.* That burden of proof

does not exist in workers' compensation. Further, FELA predates any state's workers' compensation laws. Thus, FELA will preempt a state's workers' compensation statute with respect to rights of and obligations facing railroad employers and railroad workers injured on the job.

To receive benefits under FELA, the injured railroad worker must do more than simply file a claim with the railroad employer. That worker must prove that the injury was caused in whole or in part by the negligence of a railroad employee, its agent or contractor, or from a faulty piece of equipment. *Id*. If the worker is not found to be 100% at fault, he has the right to sue for damages in either a state or federal court, no matter how slight that negligence may be. *Id*.

What is a MSA and Where is it in the MSP Act?

The MSP Act broadly prohibits Medicare from making payment for a beneficiary's medical expenses where payment has been made or can reasonably be expected to be made under a workers' compensation plan, an automobile plan, a liability insurance plan (including self-insurance) or a no fault plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. This language imposes a two-step obligation. First, Medicare is prohibited from paying for an item, service or expense when payment "has been made … under a liability insurance plan…" *Id*. Second, Medicare is prohibited from paying for an item, service or expense when payment "can reasonably be expected to be made … under a liability insurance plan…" *Id*.

There is one exception to this broad statutory prohibition known as a "conditional payment." Congress authorized the United States Department of Health & Human Services and its Secretary to make a conditional payment on behalf of a Medicare beneficiary when payment has not been made and cannot reasonably be expected to be made. *42 U.S.C. § 1395y(b)(2)(B)(i)*. As the Centers for Medicare and Medicaid Services ("CMS") is a sub-agency of the United States Department of Health & Human Services, the Secretary delegates the task of making conditional payments and running the MSP program to CMS.

Under certain circumstances, Medicare has a right to recover any conditional payments made. However, this recover right is not automatic. Two (2) things must occur for Medicare to recover a conditional payment. First, a primary plan or payer must accept responsibility for a claimant's medical expenses. Second, that responsibility must be evidenced by a judgment, a compromise for release, or other means. *42 U.S.C. § 1395y(b)(2)(B)(ii)*. Unless both events occur, CMS has no right of recovery for conditional payments.

With respect to future medical obligations under the MSP Act, here is the applicable language to which attention must be paid:

> "Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that … payment has been made … under a liability insurance policy or plan (including a self-insured plan) …"

42 U.S.C. § 1395y(b)(2)(A)(ii).

Thus, when a claimant resolves a liability insurance claim involving future medical expenses and receives dollars from the liability insurance carrier or self-insured paying them for certain future medical expenses, Medicare is prohibited from making payment for those same future medical expenses. The conditional payment exception may arise when a claimant seeks future medical treatment that is related to the compensable claim. There, if 1) the claimant receives treatment, 2) the provider bills

Medicare, and 3) Medicare mistakenly pays the bill, then an overpayment situation exists. Medicare would then have a right of recovery against the party responsible for the medical expense. Under the terms of the settlement agreement previously agreed to by the claimant, the party responsible for that medical expense is the claimant himself. Medicare has the right to seek repayment from the claimant for the amount of the overpayment plus any interest which accrues on that debt.

Further, Medicare could collect up to double the amount of the overpayment. The federal government may bring an action against any entity that is responsible to make payment for that medical expense. *42 U.S.C. § 1395y(b)(2)(B)(iii)*. The MSP Act grants the federal government the right to collect double the amount of the medical expense. *42 U.S.C. § 1395y(b)(3)(A)*. Therefore, the exposure for a claimant who fails to ensure that Medicare is not billed prematurely for future injury-related care could total double the amount of the bill itself or more.

What the MSP Act does not provide is how to comply with its future medical obligations. Some parties resolving liability insurance claims look to the workers' compensation industry for help. It's from there that we get the concept of a Medicare Set-aside Arrangement ("MSA").

The MSA concept is simple on its face. Parties identify a sum certain out of the lump sum settlement award and earmark that for future medicals that would typically be covered by Medicare but for the MSP statutory obligation. The claimant then must spend down and exhaust that amount before Medicare is billed. By so doing, Medicare's status as a secondary payer of medical expenses related to the settlement is preserved. If Medicare is not billed pre-maturely, then Medicare cannot make a conditional payment for which it might seek reimbursement.

While some parties have used the MSA to comply with the MSP's future medical provisions, others take a more hands-off approach. Since the statute and regulations fail to impose any sort of MSA 'requirement', those parties assume that no MSP future medical obligation exists. Advocates of this position believe they can ignore the issue safely until Medicare imposes some MSA requirement.

In the past, you may have seen or heard a Medicare official say or write something similar to the following:

> "FELA does not qualify for review under Medicare's current workers' compensation MSA review process. Additionally, Medicare has not established protocols for the standard review of liability MSAs. While some Medicare Regional Office may review a liability MSA proposal on a one-off basis, our office is not. This is a workload decision and does not provide you with a safe harbor on the issue.
>
> The MSP provisions preclude Medicare payments for medical expenses to the extent that payment has been made under a liability insurance plan (including self-insurance). Medicare defines the term 'liability insurance' at 42 C.F.R. § 411.50(b).
>
> We recommend that the parties take reasonable steps to ensure that Medicare is secondary to any other entity responsible for the payment of medical expenses related to a liability insurance settlement. Any Medicare payments made on behalf of the claimant for medical expenses related to the liability settlement must be reimbursed to Medicare pursuant to 42 U.S.C. § 1395y(b)(2)(B)(ii) and 42 C.F.R. § 411.24."

Historically, those parties interpret statements like these, for some unknown reason, as creating a safe harbor on the liability MSA issue (despite the fact that the Medicare official specifically says no safe harbor is created). Nothing in the statement, however, relieves parties resolving a liability insurance claim from the MSP's future medical provisions. CMS simply does not allow parties to partake in any sort of governmental review of a MSA. Though reasonable minds differ on this issue, it's hard to ignore the clear statutory language saying Medicare will not pay for a beneficiary's medical expenses where payment has been made under a liability insurance plan. *42 U.S.C. § 1395y(b)(2)(B)(ii)*.

Application of MSP Provisions to FELA.

The MSP Act applies to FELA cases. While the MSP Act does not specifically state that it applies to FELA cases, it clearly applies to workers' compensation and liability insurance plans (including self-insurance). *42 U.S.C. § 1395y(b)(2)(A)(ii)*. We've already discussed the fact that FELA is distinctly different from workers' compensation. Medicare agrees with that distinction. Medicare excludes FELA from its definition of the term 'Workers' Compensation Plan of the United States'. *42 C.F.R. § 411.40*.

Medicare defines the term 'Liability Insurance' at 42 C.F.R. § 411.50. There, it says, "*Liability insurance* means insurance (including a self-insured plan) that provides payment based on legal liability for injury or illness or damage to property. It includes, but is not limited to, automobile liability insurance, uninsured motorist insurance, underinsured motorist insurance, homeowners' liability insurance, malpractice insurance, product liability insurance, and general casualty insurance." (Emphasis added). *42 C.F.R. § 411.50*. Though not specifically listed, FELA fits this category. Thus, for MSP purposes, FELA cases should be treated akin to liability insurance. That's how Medicare treats it.

LMSA Update – Storm on the Horizon.

For several years, reasonable minds have debated the extent to which Medicare requires liability MSAs ("LMSAs") when settling a FELA case. All the while, the plain statutory language of the MSP Act with respect to future medicals has remain unchanged. While the statute does not go as far as to specifically require LMSAs, it does broadly prohibit Medicare from making payment for a beneficiary's future medical expenses when some other party accepted responsibility for those same medical expenses.

In a previous article titled, "The Perfect Storm: Final Warnings from CMS About LMSAs", I detailed why CMS is moving forward to enhance enforcement of its future medical rights in liability insurance settlements. Three primary factors drive the LMSA issue at this point: 1) rapidly rising Medicare enrollment rates short term; 2) longer life expectancies; and 3) the repeal/replacement of the ACA. This combination will rapidly deplete the Medicare Trust Funds over the next ten (10) years. Something must be done to preserve the integrity of the Medicare program, and CMS knows that.

Understanding that the liability insurance (including FELA) settlement community would need time to prepare, CMS has issued several warnings in the past twenty-four (24) months. On June 8, 2016, CMS announced that it was considering expanding its formal MSA review process to include LMSAs. The announcement fell mainly on deaf ears in the liability insurance settlement community. "Just one more alert with no requirement or teeth," they thought.

Late in 2016, CMS released a Request for Proposal ("RFP") to find a new Workers' Compensation MSA ("WCMSA") review contractor. Contained in the RFP was work flow for the formal review of LMSAs. At

CMS' discretion, it would ask the new WCMSA review contractor to review upwards of 51,000 LMSAs per year starting July 2018 in addition to the 19,700 WCMSAs it anticipates reviewing annually. The contract was awarded in September 2017. After a 6-month protest to that award concluded, one may expect CMS to announce that it intends to exercise that discretion later in 2018.

CMS has also notified the medical community about LMSAs. In a Change Request dated February 2, 2017, CR 9893 advised the medical community to expect certain reimbursement claims to be denied starting October 2, 2017. *https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM9893.pdf*. CMS told the medical community to seek reimbursement from the beneficiary's LMSA under those circumstances. *Id*.

By providing specific rejection codes and direction to the medical community, CMS closed the loop. CMS issued a similar Change Request for WCMSAs back in 2007. *https://www.cms.gov/outreach-and-education/medicare-learning-network-mln/mlnmattersarticles/downloads/MM5371.pdf*. Not only can CMS seek repayment of any future conditional payments it makes in error post-settlement for medical expenses that are someone else's responsibility, it can properly identify when a bill has been submitted for repayment by a medical provider in error. CMS can then reject the bill, advising the provider to collect payment from the patient. In directing the provider to seek recovery of the bill from the patient, that would subject the patient to potential repayment at 100 cents on the dollar for the bill.

Assessing MSP Future Medical Obligation – Will a FELA Settlement Pay for any Future Medicals?

Remember that Medicare's recovery rights are not automatic. Medicare does not have a right to future medicals in every FELA case. That right does not ripen unless or until payment for future medicals "… has been made … under a liability insurance plan …" *42 U.S.C. § 1395y(b)(2)(A)(ii)*. The task for the attorney becomes figuring out whether a settlement is paying out future medicals, in whole or in part. To the extent it does, the attorney should advise their client of that and then advise them steps to take to discharge that obligation.

This is not as easy as it may seem. First, FELA claims are rarely resolved for one hundred (100) cents on the dollar. When they are, it is because a matter has proceeded to trial, and a trier-of-fact has found in favor of the plaintiff. Claims of this type are usually settled before then on a compromise basis. The settlement amount will always total between a penny on the dollar ($0.01/$1.00) and ninety-nine cents on the dollar ($0.99/$1.00). In those cases, there are confounding factors to a full 100% recovery by the claimant. Those confounding factors could include some or all of the following factors: disputed liability; disputed causation; policy limits; statutory caps; etc. FELA settlements are compromise, not commutation, settlements.

Second, FELA claims contain many more damage categories or "buckets" than a workers' compensation claim. While a workers' compensation claim has three buckets (indemnity/wage loss, past medicals and future medicals), FELA claims have many more. On the economic side, one may see past medicals, future medicals, past wage loss, future loss of earning capacity, loss of household services and perhaps others. Importantly, though, FELA claims possess a non-economic component. Pain & suffering, mental anguish, impairment, disfigurement and other non-economic damages may be recovered in a FELA settlement, none of which are available in a workers' compensation settlement.

As you can see, it is much more difficult to allocate proceeds for future medicals in a liability insurance settlement as compared to a workers' compensation settlement. More buckets lead to increased complexity. Perhaps that is the reason we do not yet have regulations on point from CMS about how to perform that calculation. Despite that, we still have this statutory obligation for future medicals with which we must comply. In order to comply, the practitioner should determine whether a FELA settlement is compensating the railroad employee for future medicals, in whole or in part.

The Dilemma Facing Attorneys.

Attorneys must walk a fine line here. On the one hand, attorneys have ethical obligations under the American Bar Association ("ABA") Model Rules of Professional Conduct or any state's Rules of Professional Conduct to be competent and diligent. *See,* for example*, ABA Model Rules of Professional Conduct Rule 1.1 (Competence) and Rule 1.3 (Diligence)*. They also have obligations linked to client communication and safekeeping client property. *See,* for example*, ABA Model Rules of Professional Conduct Rule 1.4 (Communications) and Rule 1.15 (Safekeeping Property)*. On the other hand, attorneys must also be zealous advocates of their client's interest. *See,* for example*, ABA Model Rules of Professional Conduct: Preamble, Note 8*. The FELA practitioner must balance these potentially competing interests when advising the client.

Here's one extreme example. Let's assume the practitioner believes that LMSAs are not "required." Therefore, he believes he does not need to address the issue with the client, a railroad employee. The client accepts a settlement offer and executes a general release of all claims (including a claim for future medical expenses). Later, the client seeks medical treatment related to the settlement and instructs the medical provider to bill Medicare. Medicare gets the bill, pays the bill and then realizes it paid in error. It seeks to recover the conditional payment from the responsible party, in this case the client, pursuant to 42 U.S.C. § 1395y(b)(2)(B)(ii) and 42 C.F.R. § 411.24. The client receives a letter from Medicare seeking repayment. The client then calls the attorney, asking why they got this letter. At this point, the client would have recourse to: 1) bring a legal malpractice action against the attorney for failure to advise the client about this potential situation, citing Rules 1.1, 1.3, 1.4 and/or 1.15 as justification; or 2) pick up the phone and notify the state bar of this attorney's misconduct. Here, the attorney errs too far in reliance on the notion that no MSA "requirement" means the issue may be absolutely ignored.

On the other hand, here's the opposite extreme. The FELA attorney receives a settlement offer from the railroad employer to resolve his client's FELA case. On its face, the offer appears to be fair, and the client is inclined to accept it. The attorney has researched the LMSA issue, using Medicare's ample WCMSA guidance as his primary source. The attorney addresses the LMSA issue, telling the client that a portion of the amount offered (if accepted) would need to be funded into a LMSA and could only be used to pay for future injury-related care otherwise covered by Medicare. The attorney advises the client that the LMSA is not required in order to make the settlement final, but he cannot recommend accepting the offer without a fully funded MSA. The client does not want to fund the LMSA and refuses to do so. The client then follows the attorney's advice and rejects the settlement offer. Here, the attorney errs too far in deference to the LMSA concept, allowing it to disrupt an otherwise perfectly valid settlement.

ABA Formal Opinion 481 Reinforces the Need to Get It Right.

Recently, the ABA raised the stakes. In Formal Opinion 481 (A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error), the ABA's Standing Committee on Ethics and Professional

Responsibility concluded that Model Rule of Professional Conduct 1.4 requires an attorney to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. "An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; … "ABA *Comm. On Ethics & Prof'l Responsibility, Formal Op. 481*. Along those same lines, "[a] lawyer may not withhold information from a client to serve the lawyer's own interests or convenience." *Id*. Formal Opinion 481 affirms the need to disclose material errors to current clients, though that same obligation does not extend to former clients.

The question for FELA attorneys in light of Formal Opinion 481 is this: "Does it constitute material error to ignore the MSP Act's future medical provisions?" While no concrete MSA requirement exists, the plain language of the statute imposes a broad future medical prohibition. For FELA cases where future medicals are anticipated, Formal Opinion 481 encourages the prudent practitioner to confront the MSA issue proactively. Now, how exactly should the attorney do that consistent with the understanding of what makes a FELA case a FELA case?

Steps to Address MSP Future Medical Exposure in a FELA Case.

There is a line for attorneys to walk here. That line that looks like this:

1) if the railroad employee anticipates needing future injury-related care OR if future medicals are a damage component pled/claimed or will be released at the time of settlement, there is a future medical exposure under the MSP Act which should be addressed;

2) if MSP future medical exposure exists, that does NOT mean to fund a MSA automatically based on medical records. Remember that under no circumstances will future medicals be valued at 100 cents on the dollar if the parties agree to settle the claim. As such, a MSA for a FELA settlement based on medical record review will overfund the MSA every time;

3) parties should identify how much in future medical would be paid as part of any potential settlement offer based on the specific facts of the case, taking into account all damages to be pled/released as well as other potential offsets such as attorney fees, costs, and expenses;

4) parties should utilize a calculation methodology that is tested and has been validated time and time again;

5) the attorney should advise the client about what a potential settlement offer would mean to their future medical exposure under the MSP Act. The answer will be different depending on the offer to settle the case;

6) once the case settles, the parties should incorporate the results into the general release with specific details. If they sought outside advice, incorporate that as an exhibit to the release; and

7) when closing the file, make sure the client understands how to discharge the MSP future medical obligation, be that in the form of a MSA or otherwise. Get a signature from the client acknowledging their understanding of what must be done going forward.

Cattie, P.L.L.C.
226 S. Laurel Avenue
Charlotte, NC 28207

Conclusion.

Too few parties resolving FELA claims address future medical exposure under the MSP Act. Though FELA settlements are treated as liability insurance settlements for MSP purposes, most parties fail to identify, verify and discharge a client's MSP future medical exposure. Federal law prohibits Medicare from paying for a beneficiary's medical expenses where payment has been made under a liability insurance plan (but for one exception). The MSP Act does not exclude FELA settlements from that obligation.

While funding a MSA could be one way to address that exposure, federal law does not require MSAs today. Too many practitioners make the mistake of waiting for some liability MSA "requirement" to arrive, leaving clients uninformed and exposed to subsequent reimbursement claims from Medicare. This creates problems for the client as well as the attorney. Adopting specific firm-wide protocols for identifying, verifying and discharging a client's MSP future medical exposure is not only a best practice, but the best protection against Medicare's future reimbursement claims as well as a potential legal malpractice action asserted by a client.