

Settling a Personal Injury Claim While Providing Comprehensive Counsel

By Deidre M. Baker

Many special needs cases begin with a personal injury that resulted from medical malpractice or some other tragic event. Often, injuries result in civil suits with the potential for large settlements. In creating a strategy to best benefit the client once he or she receives an award, a consultation by the personal injury attorney with an elder law, estate planning, and/or special needs attorney can be very helpful to determine the best strategy.

After all of the effort expended on behalf of the client in order to obtain the best possible settlement given the facts and circumstances surrounding his or her claim, the personal injury attorney needs to be certain to finalize the representation just as effectively as it began. Once the settlement or trial award is secured, the advice of an attorney versed in elder law, estate planning, and/or special needs planning can allow a personal injury plaintiff to preserve his or her settlement assets long into the future.

Medical Coverage and Expenses

Often there are sizable medical expenses or liens that need to be dealt with as the result of the personal injury claim. These expenses are typically assessed during the negotiation process as they will have an impact on the client's net proceeds. While identifying, addressing, and negotiating these issues is often just as time consuming and frustrating for the personal injury attorney as obtaining the actual settlement, it is critical they are resolved prior to accepting the settlement.

Following the resolution of the personal injury claim, the type of medical coverage and services that the plaintiff receives or is eligible for is especially important as these individuals are often disabled, or have some type of preexisting condition, which limits their health care coverage. In addition to basic health insurance, personal injury plaintiffs may come to rely on expensive medications and physical therapy to help them recover from injuries. Determining whether or not the personal injury plaintiff has sufficient medical coverage is important as there are common misconceptions surrounding what government programs actually cover.

While the personal injury attorney may not be familiar with the types of services and benefits to which his or her now-disabled client may be entitled, the attorney should direct the client to seek advice regarding entitlement benefits. It must be determined what benefits or services the disabled individual is already receiving or may be entitled to receive in order to protect the settlement and maintain eligibility for critical benefits. Those

clients who receive Medicaid, for example, need to ensure that assets and income remain below the requisite allowances as determined by Medicaid. These clients, in particular, should seek the counsel of an elder law attorney to shelter as much of their income and assets as possible.

Medicare Secondary Payor Act

Medicare is the federal health insurance program for individuals over the age of 65 or those individuals with a permanent disability. Medicaid is a joint federal-state program that provides health coverage or nursing home coverage for certain categories of low-asset individuals, including children, disabled individuals, or individuals over 65. The programs are administered by the Centers for Medicare and Medicaid Services (CMS). Both programs reserve the right to be paid back by a recipient for funds spent on care, in the event the recipient becomes financially able to do so. In an effort to reduce federal health care costs, several years after the Medicare regulations became effective, Congress enacted the Omnibus Reconciliation Act of 1980 (ORA).¹ Within the Act was a series of provisions, known as the Medicare Secondary Payer Act (MSP),² that designated Medicare as the secondary payor when other groups were available to assume primary responsibility for an injury. These other groups include auto, no-fault, group health plan, general liability, and accidental injury insurers. For all medical services related to the injury at issue, these groups are considered "primary" payers and Medicare is considered the "secondary" payer.

The MSP applies to your case if the plaintiff is a current or potential Medicare beneficiary. An individual is considered a "potential" Medicare beneficiary when they have a reasonable expectation of becoming a Medicare beneficiary within 30 months and the settlement amount is \$250,000 or more. In an effort to clarify some of the confusion around what is meant by "reasonable expectation," CMS issued a memorandum providing guidance.³ CMS indicates that a claimant has a reasonable expectation when they have applied for Social Security Disability (SSD), if they have previously been denied for SSD and are in the process of appealing or refile, if they have end-stage renal disease, or if they may be eligible

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for Medicare within 30 months (i.e. they are 62 ½ years old or older).

While the general rule is that Medicare and Medicaid liens are to be settled along with the underlying claim, these liens are often regarded as afterthoughts. CMS has made it clear that moving forward, it will enforce the Secondary Payor Act for liability cases. For impacted clients, this means that they will need to establish Medicare Set-Aside (MSA) accounts in order to avoid liability. When settling a claim involving a potential Medicare beneficiary, the attorney and the client should consider whether any future medical treatment will be required. Attorneys should also discuss, in writing, with their opposing counsel their mutual obligations to identify Medicare's liens and they should agree to not settle without consideration of Medicare's interest.

Properly drafted and validly executed estate planning documents are important for all individuals. They become critical tools once a person has suffered debilitating injuries or comes into a large sum of money. If your client already had estate planning documents in place prior to his or her accident, they may now need to be updated as the injuries sustained could be to the point of a permanent disability. The right estate planning tools can allow a now-disabled person to effectively manage both their settlement funds as well as potential future incapacity.

A focal point of settlement planning is often a Special or Supplemental Needs Trust. These trusts are tailored to each client's specific needs and goals and differ based upon the age of the beneficiary, his or her medical requirements, family structure, public benefit require-

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Public Benefit Programs and the Importance of Estate Planning Documents

A personal injury plaintiff may be receiving benefits from a number of public benefits programs either as a direct result of his or her underlying claim or prior to the incident. The primary public health care programs are Medicaid and Medicare and the primary public income support programs are Supplemental Security Income (SSI) and Social Security Disability Income (SSDI).

These programs, as well as any other program of which the plaintiff may be a beneficiary, have their own eligibility rules, and receipt of the settlement could result in the loss of benefits. In order to receive benefits through SSI, for example, an individual must be blind, disabled, or over sixty-five. In addition to these basic requirements, an individual may have no more than \$2,000 in assets and earn no more than the Federal Benefit Rate (FBR) in countable income, which is \$735. Even a small financial settlement will render an individual ineligible for this program without proper planning.

ments, and ability to self-manage a settlement. These are especially important when the injured plaintiff is a minor, as he or she is likely to be receiving public benefits. It is also important that the parents' estate planning documents not leave any assets directly to the disabled child, but rather to a third party special needs trust. This will avoid the disabled child from losing government benefits, while still enjoying the use of trust monies for certain allowed expenses.

The job of the personal injury attorney is to win cases. The goal of the elder law, estate planning, and special needs attorney is to identify the potential consequences of a large settlement and assist individuals in preserving assets and planning for an uncertain future. It is critical that personal injury plaintiffs be urged to consult with attorneys who specialize in special needs trusts, preservation of assets and public benefits, estate planning, and tax law, to maximize the value of his or her settlement.

Endnotes

1. *Omnibus Reconciliation Act of 1980*, Pub. L. No. 96-499, §953, 94 Stat. 2599, 2647 (1980).
2. 42 U.S.C. §1395y (b)(2)(A)(ii).
3. Centers for Medicare & Medicaid Services; *Medicare Secondary Payer—Workers' Compensation (WC) Frequently Asked Questions* (April 22, 2003).