Understanding Dual Eligibility – The Interplay between Medicare and Medicaid

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Introduction

Some individuals are "dual eligible" meaning they qualify for both Medicaid and Medicare. In certain cases, a Medicare Set Aside/Special Needs Trust or Pooled Trust Sub-Account may be necessary to preserve the client's dual eligibility. Medicare Set Asides are a device used to preserver future Medicare eligibility. Currently, the use of set asides in liability settlements is at best a grey area. However, in an abundance of caution, it may be prudent to consider setting one up when the injury victim is a Medicare beneficiary or reasonably expected to become Medicare eligible within 30 months. A Special Needs Trust or Pooled Special Needs Trust is appropriate for clients receiving Supplemental Security Income ("SSI") and/or Medicaid benefits. Federal law allows creation of either an SNT or Pooled Special Needs Trust to preserve eligibility for needs based benefits, such as SSI and Medicaid, post settlement of a personal injury claim.

This article will explore the concept of dual eligibility. I will discuss exactly what it is and how Medicaid coordinates with Medicare for those that are dual eligible. Finally, I will discuss the techniques to preserve Medicaid and Medicare for those that are dual eligible.

Dual Eligibility

Dual eligibility is not extremely common, but there is a subset of the injury population who will be dual eligible. Understanding who qualifies for both Medicaid and Medicare is vitally important for the personal injury practitioner to insure the injury victim's benefits are adequately protected. By CMS's definition, dual eligible clients are those that qualify for Medicare Part A and/or Part B and also qualify for Medicaid programs as well. Medicare coverage can be obtained prior to age 65 if an injury victim qualifies for Social Security Disability. It takes a total of 30 months for someone that is disabled to qualify for Medicare (Medicare coverage begins 24 months after the first SSDI check is received which takes 5 months and includes the month of receipt, so plus 1 month).

Medicare Part A provides inpatient hospital care, acute hospital care and limited nursing home care. Physician care in the hospital is also covered by part A. There are no premiums to be paid for Medicare Part A if an individual has enough work credits ("qualifying quarters"). However, one can pay for the coverage if they do not have sufficient work credits. Medicare Part B, by contrast, covers outpatient medical services, physician services outside the hospital and other miscellaneous services not covered by Part A. Medicare Part B has a monthly premium associated with it which is often deducted from the recipient's Social Security check and the premiums for the Part B coverage increases for those with more income.

Some Medicare beneficiaries have so little income or assets that they also qualify for state programs through Medicaid that pay for certain out of pocket expenses not covered by the Medicare program. There are several different programs that injury victims who qualify for Medicaid may be entitled to that help with expenses not covered by Medicare. In addition, there are services that Medicare does not pay for that can be covered by state Medicaid programs. For example, Medicare does not cover nursing home care beyond one hundred days yet Medicaid does, if one qualifies, cover that care.

The programs that cover out of pocket expenses provide limited Medicaid benefits to those that qualify. Through these programs, Medicaid will pay Medicare premiums, co-payments and deductibles within prescribed limits. There are two different programs. First, is Qualified Medicare Beneficiaries ("QMB"). The QMB program pays for the recipients Medicare premiums (Parts A and B), Medicare deductibles and Medicare coinsurance within the prescribed limits. QMB recipients also automatically qualify for extra help with the Medicare Part D prescription drug plan costs. The income and asset caps are higher[1] than the normal SSI/Medicaid qualification limits. Second is Special Low-Income Medicare Beneficiary ("SLMB"). The SLMB program pays for Medicare premiums for Part B Medicare benefits. SLMB recipients automatically qualify for extra help with Medicare Part D prescription drug plan costs. Again, the income and asset caps are higher[2] than the normal SSI/Medicaid qualification limits.

The Centers for Medicare and Medicaid Services ("CMS") provides the following chart on their website of available benefits for those with dual eligibility:

	Type of Medicaid Benefit			
Dual Eligible Category	**Part A Premium**	**Part B Premium**	**Medicare cost-sharing**	**Full Medicaid Benefits**
Medicaid Only	**No**	**Yes**	**No**	**Yes**
QMB	**Yes**	**Yes**	**Yes**	**No**
QMB Plus	**Yes**	**Yes**	**Yes**	**Yes**
SLMB	**No**	**Yes**	**No**	**No**
SLMB Plus	**No**	**Yes**	**No**	**Yes**
QI	**No**	**Yes**	**No**	**No**
QDWI	**Yes**	**No**	**No**	**No**

According to CMS, the "plus" categories were "created when Congress changed eligibility criteria for QMBs and SLMBs to eliminate the requirement that QMBs and SLMBs could not otherwise qualify for Medicaid." QDWI stands for Qualified Disabled and Working Individual which is someone who lost Medicare Part A coverage after returning to work may enroll in and purchase Medicare Part A. There are income and assets caps[3] for this program similar to other programs.

Preservation of Public Benefits for those who are Dual Eligible

For injury victims that are Medicare eligible or reasonably likely to be within 30 months, a trial lawyer must carefully consider compliance with the Medicare Secondary Payer Act ("MSP"). For those injury victims receiving needs based benefits such as SSI and Medicaid, planning is necessary to preserve those benefits. Federal law found at 42 U.S.C. 1396p, allows for the creation of either a special needs trust or pooled special needs trust for those meeting the Social Security definition of disability. Assets placed into one of these trusts do not count for purposes of qualifying for needs based benefits. In the remainder of the article I will cover Medicare Set Asides and Special Needs Trust along with the intersection of these two public benefit preservation devices.

About Medicare and Medicare Set Asides

Medicare and Social Security Disability Income (hereinafter SSDI) benefits are not income or asset sensitive. If a client meets the Social Security's definition of disability and has paid in enough quarters they can receive disability benefits without regard to their financial situation. SSDI is funded by the workforce's contribution into FICA (social security) or self-employment taxes. Workers earn credits based on their work history and a worker must have enough credits to get SSDI benefits should they become disabled ("fully insured"). Medicare is a federal health insurance program. Medicare entitlement commences 2 years after receipt of the first disability payment from Social Security. Medicare coverage is available without regard to a client's financial situation.

A client who is a current Medicare beneficiary or reasonably expected to become one within 30 months should concern every trial lawyer because of the implications of the MSP. The MSP is a series of statutory provisions enacted during the 1980s as part of the Omnibus Reconciliation Act with the goal of reducing federal health care costs. The MSP provides that if a primary payer exists, Medicare only pays for medical treatment relating to an injury to the extent that the primary payer does not pay.

In certain cases a Medicare Set Aside may be advisable in order to preserve future eligibility for Medicare coverage. A Medicare set aside (hereinafter MSA) is a tool that allows an injury victim to preserve Medicare benefits by setting aside a portion of the settlement money in a segregated account to pay for future Medicare covered healthcare. The funds in the set aside can only be used for Medicare covered expenses for the client's injury related care. Once the set aside account is exhausted, the client gets full Medicare coverage without Medicare ever looking to their remaining settlement dollars to provide for any Medicare covered health care. In certain circumstances, Medicare approves the amount to be set aside in writing and agrees to be responsible for all future expenses once the set aside funds are depleted.

While there is no requirement to establish a liability Medicare Set Aside, there is ample reason for evaluating whether one should be established. There are currently no guidelines, polices or procedures for Medicare Set Asides in non-Workers' Compensation cases. Nevertheless, there are ways to insure that Medicare's interests were addressed when settling with a Medicare beneficiary. The only known sure fire way to do this is with a Medicare Set Aside.

Planning for Medicaid or SSI Recipients

Unlike SSDI and Medicare, Supplemental Security Income (SSI) and Medicaid are income and asset sensitive public benefits that require planning to preserve. In Florida (and most states), one dollar of SSI benefits automatically brings Medicaid coverage. This is very important, as it is imperative to preserve some level of SSI benefits if Medicaid coverage is needed in the future. SSI is a cash assistance program administered by the Social Security Administration. It provides financial assistance to needy aged, blind, or disabled individuals. To receive SSI, the individual must be aged (65 or older), blind or disabled and be a U.S. citizen. The recipient must also meet the financial eligibility requirements.

Medicaid provides basic health care coverage for those who cannot afford it. It is a state and federally funded program run differently in each state. Eligibility requirements and services available vary by state. Medicaid can be used to supplement Medicare coverage if the client has both programs. For example, Medicaid can pay for prescription drugs as well as Medicare co-payments or deductibles.

A special needs trust (SNT) is required if the client is receiving Supplemental Security Income (SSI) or Medicaid. A SNT is a trust whose corpus or any assets held in the trust do not count as resources for purposes of qualifying for Medicaid or SSI. Thus a personal injury settlement can be placed into a SNT so that the victim can continue to qualify for SSI and Medicaid. Federal law authorizes and regulates the creation of a SNT. 42 U.S.C. §1396p(d)(4)(A)-(C) governs the creation and requirements for such trusts. First and foremost, a client must be disabled in order to create a SNT.

There are 3 primary types of trusts. First is the (d)(4)(A) trust which can only be established for those who are disabled and are under age 65. This trust is established with the personal injury victim's settlement funds and is established for the victim's own benefit. Second is a third party SNT which is established and funded by someone other than the personal injury victim (i.e., parent, grandparent, donations, etc. . .) for the benefit of the personal injury victim. The victim still must meet the definition of disability. Third is a (d)(4)(c) trust typically called a pooled trust that may be established by the injury victim with their own funds without regard to age restriction.

The Intersection of Medicare and Medicaid – SNT/MSA

If you have a client that is a Medicaid and Medicare recipient, extra planning may be in order. If it is determined that a Medicare Set Aside is appropriate, it raises some issues with continued Medicaid eligibility. A Medicare Set Aside account is considered an available resource for purposes of needs based benefits such as SSI/Medicaid. If the Medicare Set Aside account is not set up inside a Special

Need Trust, the client will lose Medicaid/SSI eligibility. Therefore, in order for someone with dual eligibility to maintain their Medicaid/SSI benefits the MSA must be put inside a Special Needs Trust. In this instance you would have a hybrid trust which addresses both Medicaid and Medicare. It is a complicated planning tool but one that is essential when you have those with dual eligibility.

[1] Resources must be at or below twice the standard allowed under the Supplemental Security Income (SSI) program and income at or below 100% of the Federal poverty level.

[2] Resources must be at or below twice the standard allowed under the SSI program and income exceeding the QMB level, but less than 120% of the Federal Poverty Level.

[3] Resources must not exceed twice the SSI limit and must have income of 200% of Federal Poverty Level or less. QDWIs must not be otherwise eligible for Medicaid benefits.