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Also in this month's newsletter, Val H. Stieglitz discusses a recent decision by the South Carolina Supreme Court that clarified unanswered questions relating to "promoter liability" and placed South Carolina in the mainstream of the case law on this recurring and important subject.

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The Waiting Game: Litigators Must Wait a Little While Longer For CMS Guidance on Medicare Set Asides

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Most defense counsel are familiar with the settlement tight-rope scenario often spun by plaintiff's counsel. It begins with allegations that the plaintiff sustained injuries which will require costly treatment well beyond the settlement date. Reports authored by plaintiff's experts are often used to justify these costs and plaintiff's counsel does not hesitate to use these allegations to drive up the cost of settlement. Yet when defendants mention the need for a Medicare Set Aside ("MSA"), the urgency behind these future medical treatment allegations suddenly vanishes.

This tactic was supposed to come to an end. Over two years ago, the Centers for Medicare and Medicaid Services ("CMS") signaled their intent to provide some long-awaited guidance as to the who, what, when, where, why and how of creating a MSA.[1] The comment period ended this past summer and guidance was supposed to be at hand this year. If you have been holding your breath for guidance, it's time to take another long breath because on

[1] 77 F.R. 35918, No. 116, June 15, 2012.

October 8, 2014, CMS withdrew its proposed rules.[2]

The effort to provide guidance, however, has not flat-lined by any means. Experts chalk up the withdrawal to "a preemptive move by CMS to avoid the Office of Management and Budget [from] rejecting the rules as submitted."[3] Even though litigators will now have to wait even longer for guidance, the comment period proved useful and yielded signs of what will likely be modified by the time a new proposed rulemaking process is announced.

The following is a summary of the publicly available comments and provides insight where the ultimate consensus may lie amongst CMS' desire to recoup its expected loss and the needs of the plaintiff and defense bars.

Framework

Virtually all commentators agreed that taking the worker's compensation MSA model and slapping a litigation label on it would not work because the worker's compensation model fails to account for litigation specific damages such as pecuniary losses (such as earning capacity and household services) and non-pecuniary losses (such as pain and suffering or mental anguish). The general tone was that the framework should strike a balance between uniformity and the nuances present in product/tort litigation. Above all, every commentator agreed that case value and/or settlement amounts should dictate the MSA, not the reverse.

A cautionary note from the plaintiff's bar was that CMS may never recover past or future medicals if it creates a system rendering it economically unfeasible for attorneys to accept clients that have significant CMS paid expenses. As many litigators know, the current system inhibits early settlement because the final payment amount and MSA often cannot be resolved until the tail-end of litigation. Many commentators recognized this problem and emphasized to CMS the need for a framework where settlement could easily be obtained prior to either party incurring substantial litigation expense.

Definitions

In its rulemaking process, CMS proposed the following definitions to dictate when a MSA is appropriate:

- *Chronic Illness/Condition*: means that the illness/condition persists over a long period of time. The term is generally applied when the course of a disease or condition lasts for more than 3 months. If the individual/beneficiary alleges an injury that is a chronic illness condition, it is presumed that future medical care will be required. Examples of chronic

[2] http://www.reginfo.gov/public/do/eoDetails?rrid=123255

[3] *Medicare Update: CMS Withdraws Proposed MSA Rules for Liability Settlements*, Daniel W. Hayes, Esq. October 22, 2014,

diseases include, but are not limited to: Chronic airflow limitation including asthma and chronic bronchitis, cancer, diabetes, quadriplegia; and nephrogenic systemic fibrosis.

- *Date of Care Completion*: means the date the individual/beneficiary completed treatment related to his or her "settlement." The individual/beneficiary's treating physician must be able to attest that the individual/beneficiary has completed treatment and that no further medical care related to the "settlement" will be required.

- *Future Medical Care ("future medicals")*: means Medicare covered and otherwise reimbursable items and services that the individual/beneficiary received after the Date of "Settlement." This definition specifically applies to items and services related to the individual/beneficiary's settlement, judgment, award, or other payment.

- *Physical Trauma*: refers to an injury (asa wound) to living tissue caused by an extrinsic agent. This also includes blunt trauma, which refers to injury caused by a blunt object or collision with a blunt surface (as in a vehicle accident or fall from building).

- *Major Trauma*: major trauma means serious injury to two or more Injury Severity Score (ISS) body regions or an ISS greater than 15. The ISS body regions include the following:

    - Head or neck.
    - Face.
    - Chest.
    - Abdomen.
    - Extremities.
    - External.[4]

Other than a preference for the more specific Abbreviated Injury Scale ("AIS") to measure whether a trauma is major, there was little criticism of the proposed definitions for *Future Medical Care*, *Physical Trauma* and *Major Trauma*. With regard to *Chronic Illness/Condition*; however, several commentators pointed out that the definition would unintentionally capture cases involving soft-tissue injuries, temporal conditions and non-catastrophic loss. The consensus solution was to define the condition to last at least one year, not three months.

The plaintiff's bar also pointed out a real-world problem regarding the *Date of Care Completion* definition. The required attestation from a treating physician is often difficult to obtain because most of them fear the legal ramifications of making such an

[4] 77 F.R. 35919, No. 116, June 15, 2012.

attestation. A consensus solution was for the proposed rules to provide immunity for treating physicians making the attestation and/or judge these attestations by a preponderance of evidence standard.

Options

The CMS proposed rules also suggested the following options[5] to address MSA arrangements:

Options	Available to Medicare Beneficiaries	Available to Individuals Who Are Not Yet Medicare Beneficiaries
1) Pay for all related future medical care until the settlement is exhausted	Yes	Yes
2) No Payment if certain safe harbor criteria are met	Yes	Yes
3) Date of Care Completion Attestation	Yes	Yes
4) Submission of MSA for CMS review and approval	Yes	Yes
5) Extension of the Threshold, Fixed Payment and Self-Calculated Payment Options	Yes	No
6) Upfront Payment	Yes	No
7) Compromise or Waiver of Recovery	Yes	No

All commentators found Option 1 to be unworkable. Option 4 was equally unlikely to succeed unless CMS seriously considered adding the resources required to provide a due process system for determining whether a MSA is appropriate. And while commentators had suggested revisions to the remaining options which are far too nuanced to detail here, it seemed clear that Options 2, 3, 5, 6, and 7 will remain viable alternatives for both the plaintiff and defense bars.

Calls for a MSA formula were abundant. Suggestions ranged from a flat tax on the gross settlement to a formula akin to the one used to determine conditional payment amounts. The ideal solution seemed to be a CMS sponsored website portal which would allow plaintiffs to calculate the final demand amount and MSA by inputting case specific information. Such a system would not only create uniformity and reliability, but also lessen or even eliminate the need for CMS to have formal review system for MSA arrangements.

[5] 77 F.R. 35919-35921, No. 116, June 15, 2012.

Conclusion

While the perception may be that litigators are back at square one, the reality is that the withdrawal of the proposed rules is a good development. It signals that CMS weighed the public comments appropriately and that a day will soon come when more robust and realistic MSA guidelines are proposed.

For now, defense attorneys should remind opposing counsel that in a March 24, 2009 conference call, CMS clearly declared that MSAs were necessary in liability situations. Until new proposed rules are issued, defense attorneys must follow the laws in place, but should also allow the 2012 proposed rules - along with the arsenal of consensus comments regarding them - to serve as a guide when determining whether a MSA arrangement is reasonable.

South Carolina Decides Case of First Impression in Recurring Area of "Promoter Liability"

ABOUT THE AUTHOR

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The concept of the "promoter" has long been recognized in business law. A group of people have an idea for some sort of venture – but someone needs to spearhead the raising of money as well as planning, organizing, and otherwise scouting out the business opportunity. Otherwise, the idea remains nothing more than an idea. This person – the one out hustling to pull together all the pieces necessary to turn an idea into a functioning business - is the "promoter."

Many of the things "promoters" do actually take place before the business is formally organized. The reality in these situations is that an individual must frequently take actions, make presentations, communicate as well as make commitments, promises, or representations – all in furtherance of a business that does yet exist. Not surprisingly, these "pre-formation" activities can give rise to legal claims by individuals or businesses with which the "promoter" dealt. Once the business has been formed, and is up and running, it may become an attractive target for claims based upon things the promoter did or said before the business was organized. Thus, the law has had to address the question of when a business is liable for a promoter's pre-formation conduct.

This past year, the South Carolina Supreme Court addressed this very issue for the first time. In *Hansen v. Fields Company, LLC, et. al.,* 763 S.E.2d 31 (S.C. 2014), filed on August 20, 2014, the South Carolina Supreme Court addressed a factually-complex pre-formation liability case to determine: *"if and when a limited liability company can be held liable for its promoter's pre-incorporation contracts or torts…"*

In *Hansen*, the Plaintiff and an individual named Robert Fields had lengthy and convoluted interactions concerning plans to purchase a water company in South Carolina. Mr. Fields was involved in a number of business entities, one of which undertook to assist Hansen in securing financing to purchase the water business. This arrangement with Mr. Fields was subsequently terminated, and ultimately certain members of the entity which had been contracted to assist Hansen in locating financing formed a new and separate entity (Beechwood Development Group, Inc.) which, after Hansen was unable to consummate the water company purchase, acquired an interest in the water company itself. Fields was one of several members of the acquiring company. Hansen sued Mr. Fields and the acquiring-entity (Beechwood Development Group, Inc.), alleging that Beechwood Development Group, Inc., was liable for certain breaches of contract and torts committed by Fields before Beechwood Development Group, Inc., was formed.

The factual landscape was substantially more complicated than the brief summary above, and the jury returned a verdict for Hansen in the amount of $1,189,408.00.

On appeal, the South Carolina Supreme Court reversed, holding that:

1. South Carolina would adopt the "prevailing rule" that since a corporation cannot have agents, contract for itself, or be contracted with prior to its incorporation, a corporation is not liable on any contracts that a promoter makes for its benefit prior to incorporation unless it assumes the obligation by its own act after incorporation. A corporation can become liable under this principle through either expressly ratifying the contract, or by implicitly ratifying the contract - by accepting its benefits with full knowledge of its terms. The South Carolina Court cited to cases from Delaware, Maryland, and Mississippi in so holding.

2. The record was devoid of evidence that Beechwood Development Group, Inc., ratified any pre-formation contract with Hansen, or benefited from or accepted the benefits of Mr. Fields' dealings with Hansen. Interestingly as a "practice pointer" in this area, the Court noted that Hansen failed to identify any specific pre-formation contract and explain how it was expressly or impliedly ratified; relying instead on broad claims that Beechwood Development Group, Inc., ratified *"all"* of Mr. Field's pre-formation actions and representations.

3. With respect to Hansen's tort claims, the South Carolina Court adopted the rule that "a corporation is not liable for torts that its promoters committed before it came into existence." The Court cited cases from Florida, Ohio, Oregon, and Texas as support, and also cited several policy reasons behind its holding.

This case, which decided previously-unresolved questions, appears to have placed South Carolina in the mainstream of the case-law on this important and recurring point of

corporate law, and enables promoters to, indeed" promote" the development of businesses within a legal framework that has been widely recognized in other jurisdictions.

* Beechwood Development Group, Inc., was represented by the author on its appeal.

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