



How to Structure Language in a Medicare Settlement Release

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In personal injury cases, Medicare has a right to reimbursement for Medicare benefits already received or that may be received for future medical care. If plaintiff or plaintiff's counsel does not reimburse Medicare, the defendant's liability insurer may be on the line.

When handling personal injury suits, defense counsel should keep in mind three critical issues if there is a potential for Medicare to have an interest. First, the release should explicitly state that the parties have considered Medicare's interests. Second, the insurance carrier must report the settlement or verdict to Medicare. Lastly, the litigation file should document the consideration of Medicare's interests and possibly obtain a judicial finding as to the quantification of those interests.

The release can include a clause that commences with the statement, "The parties to this settlement believe that any rights or interests Medicare may have in the within settlement have been considered pursuant to 42 CFR §1395y(b)(3)(A). It is not the intention of the parties to this settlement to shift responsibility of future medical benefits to Medicare." Immediately following this statement, the release should state the plaintiff's full name, home address, telephone number, date of birth, Social Security number, and Medicare number, which the defendant's insurance company is required to report to Medicare under 42 USC § 1395y(b)(8).

The tricky part arises in the description of the parties' consideration of Medicare's interests. The release should clearly state plaintiff's representations regarding Medicare benefits, past and future. If the plaintiff has received past benefits, the release should state this, and to what injury or injuries they relate. Typically, Medicare is named on the settlement check or a separate check to Medicare is prepared for the exact amount of benefits Medicare certifies it has paid. The release can also expand the indemnity clause to include Medicare's claim for reimbursement. If the plaintiff never received benefits, the release should state that the plaintiff

has neither applied for nor received any benefits from Medicare, including payment for healthcare services for injuries sustained in the incident.

A more complicated scenario involves the possibility of future Medicare benefits for the injuries sustained. If there is no possibility that the plaintiff will require future medical care for injuries, the release language needs to state this specifically. However, placing this language in the release is not enough. The defense counsel's litigation file should include a doctor's representation in either a formal report or a specific letter detailing the doctor's expert opinion that the plaintiff has fully recovered and will not require future care.

If there is a possibility that the plaintiff will require future care, the release should specifically state this in addition to the anticipated care required and the costs associated. Again, it is critical to ensure that the defense counsel's litigation file includes an expert opinion from a doctor on the future medical care required. Finally, just as is done in workers' compensation claims, an allocation of the settlement or judgment should be made that will fund future medical expenses, with the release also detailing this fund. If there is a dispute or mutual uncertainty as to the amount of the fund, the parties may be able to take the issue to a trial court and have the court make a judicial finding on the reasonably expected future medical costs.

The bottom line for protecting against Medicare reimbursement claims in personal injury cases is to include plaintiff's representations as to Medicare's interests in the release. Additionally, there should be documentation in the litigation file and possibly a supporting judicial finding to maximize the protection for the defense in cases where a Medicare beneficiary may owe reimbursement

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