THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

www.flatls.org Vol. XXXIX, No. 4 Summer 2010

MESSAGE FROM THE CHAIR:

Why Are We Fighting? (Part II)

Last issue I wrote about lawyers fighting with lawyers, and the dire need for increased professionalism on the part of trial lawyers. I thought I was getting a bit preachy, but I received emails, letters and calls from all over the state thanking me for speaking out against dog eat dog practices. They came from plaintiff's lawyers, defense lawyers and commercial trial lawyers. No one, it seems, likes the type of practitioner who does "whatever it takes to win," and does not care who gets hurt along the way.

So, let me use this issue's column to reinforce the same message. There is NEVER a place or a time to act unprofessionally towards another lawyer or judge, regardless of that lawyer's action toward you. Is it tempting? Of course. In most of our brains the desire to "fight fire with fire" reigns supreme. But does it ever solve anything? No, it just degrades you to the level of your already unprofessional opponent. Is that what you want? To sink down into the mud so you can start flinging it with those already in the mud? If you have ever tried that type of tactic just because your opponent was doing it, did it make

continued, next page

What Do Clients Want? Investing In and Building Relationships With Your Clients

By Ann Kruse and Colleen Yamaguchi

George interviewed four law firms before choosing one to help him start up his technology company (all situations described in this article are real; the names have been changed). All four firms had the necessary level of technical expertise. In the end, he selected the lawyer who "invested in building the relationship." That investment showed in several ways.

- Time spent getting to know George and his new business idea.
- Giving a discounted rate up front to help George get started.
- Creating a shared understanding of how they would work together. After a couple of hours talking with his lawyer, George "had a good sense of what it would be like to work with the firm."

Ken, general counsel for a national company, works with many lawyers around the country, from mega-to small firms. He values a lawyer who quickly picks up what he's grappling with and the kind of advice that will help him do his job. For Ken, that often means an off-the-cuff summary of significant issues and pragmatic guidance as to whether it's worth pursuing the matter further.

continued, page 3

In This Issue:

you feel better about yourself? Did it lift up our profession? Were you proud of acting like your opponent? I doubt it.

So next time it happens, and the other side tries to essentially bait you into acting like they do, are you going to fall for it? Or, are you going to rise above it and act professionally, as you know you should do? I hope the latter. I believe most of us know what is right. I realize that it can be hard to do what is right when those you are battling never do. And though it is probably axiomatic, wrong never makes right. Abraham Lincoln once said "let us have faith that right makes right, and in that faith let us to the end dare to do our duty as we understand it."

And each one of us promised, when we were sworn in a member of the Florida Bar, "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor." Do you remember that promise? If not, then go read it again. And mean it this time. Maybe it is a good idea for all of us to read that again.

This is my last *Advocate* column, and I wanted to say it has been my honor and privilege to serve all of the trial lawyers in our state this past Bar year. I mentioned in my last column in the Advocate, which I wrote shortly after being discharged from the hospital, that I had the opportunity to reflect on where I was in my career, how I was handling my practice, and the interaction I have with the lawyers before whom, with whom and against whom I practice. I have had a lot of time since that time to continue my reflection. What I did not say in that last column is that I was diagnosed in February with cancer. Yes, the "C Word." Not the one that anyone my age (or any other age, for that matter), wants to hear. It was a shock to me, my family and friends, and my law partners. But, it did make me step back and certainly made me get better (in a hurry) at taking one day at a time.

I wanted to leave you all with some words from Henri Nouwen that have become both more personal and more important to me: "A new beginning! We must learn to live each day, each hour, yes, each minute as a new beginning, as a unique opportunity to make everything new. Imagine that we could live each moment as a moment pregnant with new life. Imagine that we could live each day as a day full of promises. Imagine that we could walk through the new year always listening to a voice saying to us: 'I have a gift for you and can't wait for you to see it!' Imagine."

Save The Date

The Burton Summit
January 13-15, 2010
Omni Orlando Resort at ChampionsGate
Orlando, Florida

The Trial Lawyers Section is planning its 1st Annual Retreat and encourages all members to attend.

The retreat will include:

The Chester Bedell Mock Trial Competition
Continuing Legal Education Seminars
General Session, Forum and Luncheon
Social Gathering

Don't Miss This Event!

Look for a brochure in the mail and information on the Trial Lawyers Section's website www.flatls.org in the coming months.

BUILDING RELATIONSHIPS
from page 1

What frustrates him is the technician with a narrow perspective who focuses only on what can go wrong with each scenario Ken presents. He values the lawyer who offers new ideas and solutions and who anticipates what would be helpful for him and his company. "Sheer technical brilliance" is not enough.

Susan looks for lawyers who invest in their relationship by learning about her company's business and way of operating. As senior attorney for a major global company, she favors firms that develop a team with depth to service her account. She is willing to invest in her outside counsel by providing them with insights into her company. In turn, she expects that information to be shared with other attorneys through training and mentoring, so that all lawyers on the team understand the company's business, preferences, and points of view. This "seamless transition" greatly benefits Susan, and she prefers the law firm that makes it happen. One of her pet peeves is partners who hoard clients. She appreciates the senior partner who exercises good judgment in determining when and to what extent to be personally involved, and when to delegate to lawyers with lower billing rates.

Priya is a business owner who is thinking about "cutting the cord" with the law firm she has been using. At first she was impressed by her lawyer's expertise. But she sees the senior partner on the team doing a lot of "project management" work. She wants to know that the fees she is paying are providing her with real value. Her attorney has not been willing or able to engage in a meaningful conversation with her that will give her that assurance.

The authors of this article have spoken with business owners, executives, and senior in-house counsel to understand what attracts and repels them when it comes to choosing lawyers and law firms, particularly in this economy. While fees and competence are important to those who purchase legal services, they also mentioned other key, and often decisive, factors.

One theme stood out in terms of what clients want: Clients most appreciate lawyers and law firms who demonstrate a willingness to "partner" with them. This shows primarily in three ways.

1. Clients want to know that their lawyers understand and care about them, their business, their issues – in other words, they want their lawyer to:

Clients want more than "Sheer technical brilliance"

- Spend time getting to know key factors affecting their client's business and operations.
- Be able to figure out, when their client calls, what is needed and when, and then deliver accordingly.
- Put themselves in the client's shoes so that they can respond in a way that is not just technically correct, but also helpful.

2. The one-on-one relationship is important. Even when the relationship is institutional, the individual in-house lawyer will likely, when given the chance, choose to work with the lawyer (not necessarily the law firm) with whom he has the best personal connection. Lawyers develop loyal clients by engendering trust. They do this by consistently being on point with advice that is responsive to their client's needs; (b) showing self-awareness as to strengths and limitations and not "winging" it when they are out of their depth; and (c) being genuine (not a "schmoozer").

3. While clients are concerned about fees, they focus primarily on value. They tolerate high fees when they are confident in the value they are receiving and when they know their lawyer is being judicious in deciding the extent of work to be done and who on the team handles what work. Value is a function of perception, and a lawyer who can appreciate the larger concerns of his or her client will be better equipped to address the issue of value without becoming defensive.

What turns clients off? Quite simply, not being helpful. Our interviewees were very vocal about this! They dislike lawyers who:

- Respond narrowly to just the questions asked directly, who only poke holes in proposals, and who don't think about other scenarios or possibilities or the "big picture." This leaves the client feeling exposed and stressed. They prefer – and feel supported and strengthened by – counsel who offers other possible solutions.
- Take a formal legal opinion approach in responding to every request for advice. Often the client prefers the lawyer's off-the-cuff, pragmatic reaction to the situation.
- Deal only in theory or whose every answer starts. "It all depends." Clients operate in a world where decisions and actions are required. Lawyers who don't help their clients make decisions and take action will frustrate more than help their clients and will not be seen as valuable.
- Are not appropriately supervised or mentored, leading to unpolished work and having little insight into the client.
- Write or communicate poorly in a way that is not sensitive to the needs and demands of their client. This can include overly long e-mails, writing in "legalize" rather than plain English, or being off point.
- Are abrasive or arrogant, acting as though the client should appreciate the privilege of working with them.
- Are not available, especially if they are not forthright about their tight

continued, next page

BUILDING RELATIONSHIPS
from page 3

schedules.

- Don't solicit feedback, or upon receiving feedback, don't make modifications in response to it.
- Are not sensitive to the financial limitations of a "bootstrap start-up."
- Do work that has no clear value for the client, fail to communicate the value of their work, or who, as senior lawyers, do work that could be assigned to a more junior (and less expensive) lawyer.

Clients will tolerate high fees if they are confident the lawyer provides a value added service.

In addition to what we heard in our interviews, we found additional insight in the 2008 Managing Outside Counsel Survey, collaboration between the Association of Corporate Counsel (ACC) and Serengeti Law, which provides law departments with a widely used system for electronic billing and matter management.

Among the 337 corporate law departments that participated in the survey, over 40 percent reported that they have terminated relationship with some of their outside counsel during the prior year. Specific reasons for termination included lack of responsiveness, costs that were too high, and poor work product or results. Of particular interest, notes Serengeti's Rob Thomas, the author of the survey report, is that one-third of the respondents now cite "communication and personality issues" as a major reason for termination.

According to Thomas, "An important message for law firms is that they should consider redirecting at least part of the time and money that they are spending on new client marketing to assess and address existing client concerns."

There is no one formula lawyers can follow to attract or retain clients. Instead, each lawyer has to be sensitive to the needs and preferences of the individual client. This requires tuning in to clients and effectively communicating, not simply about the legal issues, but also about the relationship and how things are going.

Lawyers who take the time to really listen to their clients, who pick up on cues and feedback, and who respond not solely on the narrow legal issues presented but more broadly in a way that is helpful to that client, will be better able to understand how they can add value for their client and then communicate the value that justifies their fees.

As a profession, we lawyers do not take naturally to seeking, accepting, and acting upon feedback. We tend to be perfectionists who want to cover every base and not show vulnerability. In avoiding feedback, however, we decrease our ability to relate to and best serve our clients. The lawyers and law firms who serve clients most effectively have the mindset that "feedback is good" and take the time to (1) seek out feedback from clients and (2) acknowledge and respond to the feedback by reporting changes that will be and have been made. This is fundamental to understanding clients' expectations and how we, as counsel, are doing in meeting those expectations.

In today's market, with abundant talent and computerization that can increasingly level the playing field, lawyers can no longer differentiate themselves based simply on technical expertise. What matters more is how they discern and respond to client needs and the nature of the relationships they build.

**Colleen Yamaguchi, J.D., M.B.A. is a lawyer and professional certified coach focusing on leadership, professional development, and transition.*
Ann Kruse, J.D., MSO, is a lawyer and leadership development expert.

THE FLORIDA BAR
BOARD CERTIFIED
SM

New areas for board certification

On June 11, 2009, the Supreme Court of Florida adopted rules regarding two new areas of board certification– **EDUCATION LAW** and **ADOPTION LAW–** to Chapter 6 of the Rules Regulating The Florida Bar. In re: Amendments to the Rules Regulating The Florida Bar– Rules 6-27 and 6-28, SC08-1981, effective June 11, 2009.

Florida attorneys will be able to apply later this year for certification in adoption law and education law.

For more information, go to: *http://www.floridabar.org/certification* or contact *spiland@flabar.org* (adoption law) and *jcoiro@flabar.org* (education law).

Applicants are also being sought for the adoption law and education law certification committees.

The rules can be found on the Florida Bar's web site: *http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView*

The court opinion can be found on the Court's web site: *http://www.floridasupremecourt.org/decisions/opinions.shtml*

Press Release: Embargo From Release Wednesday, June 3, 2010 @ 3:00 P.M.

Tallahassee, Florida

Today, Leon County Circuit Judge Frank Sheffield entered a Final Order Granting a Summary Final Judgment in favor of two taxpayers who challenged the constitutionality of a statute which required that the first $80 of certain civil action filing fees be deposited directly into the State General Revenue Fund rather than be retained to defray the administrative costs of operating the State Judicial System.

The Plaintiffs in the case included lawyers Robert M. Ervin and Davisson Dunlap who are both fifty-year veteran members of the Florida Bar.

The Plaintiffs successfully persuaded Judge Sheffield that the diversion of civil action filing fees to the State General Revenue Fund is an illegal tax.

The Plaintiffs argued that their constitutional rights to access to the courts was unlawfully hampered by the diversion of filing fees to the State General Revenue Fund.

The Plaintiffs also argued that the filing fees diverted to the General Revenue Fund constituted a tax because they were being spent by the Legislature on social programs, including prisons, and not being spent solely on expenses necessary to operate the State Judicial System.

The Florida State Judicial System is experiencing a deepening financial crisis caused chiefly by its underfunding from General Revenue and from the explosion in filings of foreclosures triggered by the economic recession. Foreclosure filings have increased throughout the state to approximately 40,000 cases per month. The Legislature only appropriated an additional $6 million in the last legislative session to help pay for the spiraling administrative costs associated with the huge influx of foreclosure cases.

Because of the economic crisis and the underfunding of the court system, Florida Clerks of Court throughout the state have been forced to close offices during some weekdays and furlough employees as cost cutting measures

In 1998 the Florida Constitution was amended by the voters to provide that the cost of the administration of the State Judicial System would be paid by the state government rather than the local county governments. The cost of operating the judiciary is funded both by the General Revenue Fund and by "user fees" which includes civil action filing fees paid when a lawsuit is filed with the Clerk of Court.

Since 2004, the Legislature has dramatically increased the cost of filing a civil lawsuit in court. Since that time the fees have doubled to over $400 in most cases and as high as $5000 in limited to divorce and foreclosure cases. The statutes providing for increased fees have required that the first $80 be deposited directly into the State General Revenue Fund rather than be retained to pay for the administration of the State Judicial System where it is needed most. Instead, the portion of filing fees deposited into the General Revenue Fund have been appropriated by the Legislature to pay for prisons and other social programs unrelated to the State Judicial System.

Plaintiffs Ervin and Dunlap complained to Judge Sheffield that the diversion of these filing fees away from the state court system to be spent on prisons and other social programs constituted an illegal tax.

Judge Sheffield agreed that the statutes acted as an illegal tax which denied Plaintiffs' constitutional rights to access to the courts. The Florida Constitution provides in Article 1, Section 21 that the courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay. This constitutional provision originated in the Magna Carta signed by King John in the year 1215 and has been incorporated into every Constitution adopted by Florida since statehood in 1845.

Plaintiffs' counsel includes prominent trial lawyers from Tallahassee, Jacksonville, Orlando, St. Petersburg, and Miami who are acting pro bono. The Plaintiffs' lawyers are not only working without compensation but also they are not requesting that the state award any attorney's fees whatsoever for their efforts in this case. The Plaintiffs are not seeking a refund of any nature from the claimed taxes that they have been forced to pay in the guise of civil action filing fees. The Plaintiffs are simply seeking to help the entire State Judicial System by keeping the civil action filing fees from being spent on anything other than the administrative costs to operate the State Court System. The prison system is not part of the State Court System and is operated by the executive branch of government. The Plaintiffs claim that the expenses of the state prison system must be generated by taxes and not siphoned in an illegal fashion from court filing fees which must be spent to operate the courts.

Plaintiffs' counsel hold the position that Judge Sheffield's Final Order has the effect of putting the word "trust" back into the term "trust funds". Article 5, Section 14 of the Florida Constitution adopted by the voters

PRESS RELEASE
from page 5

in 1998 provides that the funding of the State Court System shall be provided from state revenues and by filing fees, service charges and costs for performing court related functions as required by general law. The exclusive expenditure of filing fees on the cost of administering the State Court System is essential if the constitutional guarantee of access to courts is to be realized.

Plaintiffs' counsel also point out that Judge Sheffield's Final Order did not enjoin the Court Clerks from collecting all of the filing fees provided by statute. The effect of his order is simply that all of the filing fees must remain in the state court coffers to be spent on state court expenses only. None of the filing fees can be used for other nonjudicial services. It is only fair that those citizens who paid the civil action filing fees receive access to the courts that they paid for.

For information contact:
Sidney L. Matthew (850) 224-7887
Davisson F. Dunlap, Jr. (850) 385-5000
Dexter Douglass (850) 224-6191
Charles H. Baumberger (305) 373-0708
Michael T. Callahan (727) 894-3535
Joseph P. Milton (904) 346-3800
John Edwin Fisher (407) 843-2111

Medicare Myths: What Every Trial Lawyer Should Know About The MSP &Liability Medicare Set Asides

by Jason D. Lazarus, Esq.[1]

Passage of Section 111 of the Medicare, Medicaid & SCHIP Extension Act in 2007 ("MMSEA") and its original reporting deadline of 7/1/092 has caused a tremendous amount of confusion among insurance professionals, lawyers and settlement planners alike. As a result of the MMSEA new discovery is being sought to assist insurers in complying with the reporting requirements. While the new discovery is proper, some changes attributed to the MMSE A are completely inaccurate. For example, some insurers are insisting on putting Medicare on the check claiming the "new law" requires it. Another example is the insistence by some insurers that Medicare Set Asides are now required in all liability cases. Neither is true. The simple fact is that the MMSEA imposes a mandatory insurer reporting requirement upon responsible reporting entities ("RREs"). CMS has created a 224 page manual explaining what is required and defining terms used in the MMSEA. A discussion of all of the aspects of the MMSEA is beyond the scope of this article. I will delve into the MMSEA briefly to explain what it is and what is required, but the focus of this article is what it does not require in an attempt to clear up widespread misconceptions.

Section 111 of the MMSEA

First, what is the MMSEA and what does it require. On December 29th of 2007, President Bush signed into law the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA").[3] Part of this Act, Section 111, extends the government's ability to enforce the Medicare Secondary Payer Act.[4] As of April 1, 2011, an RRE, (liability insurer, self insurer, no fault insurer and workers' compensation carriers) shall determine whether a claimant is a Medicare beneficiary ("entitled") and if so provide certain information to the Secretary of Health and Human (hereinafter "Secretary") Services when the claim is resolved.[5]

Under MMSEA, the RREs/insurers (hereinafter RRE) described above, must report the identity of the Medicare beneficiary to the Secretary and such other information as the Secretary deems appropriate to make a determination concerning coordination of benefits, including any applicable recovery of claim.[6] Failure of an applicable plan to comply with these new requirements will incur a civil money penalty of $1000 for each day of noncompliance with respect to each claim.[7] A single claimant can have more than one claim but the penalty is per claim. These new reporting requirements will make it very easy for CMS to review settlements to determine whether Medicare's interests were adequately addressed by the settling parties.

Section 111 and Resulting New Discovery Requests

As a result of the MMSEA and RREs fear of not reporting promptly and being subjected to fines, many insurers are propounding discovery aimed at securing information to comply with the reporting. The RREs are requesting a Social Security number in order to verify whether a claimant is Medicare eligible. According to CMS, RREs may "submit a query to the COBC to determine Medicare status of the injured party prior to submitting claim information for Section 111 reporting." The query process is designed to assist RREs in determining whether the claim must

See "Medicare Myths", page 12

Protective Orders In Mass Tort Litigation

By Lisa Moran McMurdo*

As mass torts have become more complex, so too has the discovery of product-related materials, including the manufacturer's proprietary business and commercially sensitive documents. Product-related materials may fall short of trade secrets, but the manufacturer may have invested millions of dollars in the research and development effort leading to the creation of these documents and wishes to protect them against unwarranted disclosure.[1] As one federal judge noted,

> The propriety and desirability of protective orders securing the confidentiality of documents containing sensitive commercial information that are the subject of discovery in complex cases is too well-established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been approved by the court. Protective orders have been used so frequently that a degree of standardization is appearing.[2]

The parties in any mass tort traditionally have agreed to a confidentiality or protective order to protect commercially sensitive information under rules like Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure. Recently, however, discovery in these cases has become a battle within itself, and the parties not only dispute the proposed terms of protective orders but even the need for such orders. This article examines several of these recent trends.

Protective or Confidentiality Orders

Mass tort litigation is increasingly complex, and discovery in those matters invariably seeks a wide range of proprietary materials, such as specifications, manufacturing methods or procedures, marketing materials, testing protocols and results, financial information, distribution lists and so forth. Even though the retail or manufacturing party holding that information (the producing party) recognizes the broad discovery standard of "relevant to the subject matter of the litigation," it usually wishes to protect its proprietary information from falling into the hands of competitors. Enter Federal Rule of Civil Procedure 26(c)(1)(G) and its state counterparts. The federal rule provides:

> (c) Protective Orders
>
> (1) In General. A party or any person from whom discovery is sought may move for a protective order . . . including one or more of the following.
>
> . . . .
>
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]

Trade secrets versus commercially sensitive material presents very different questions regarding protective orders.

Most states have adopted some variation of the federal rule, while the remainder has enacted particular statutes or rules permitting or creating such orders.[3] One rationale underlying the use of such orders is the salutary effect they have on facilitating discovery. Other rationales include the need for protecting research and costly development information to maintain the strength of the U.S. economy and the need to minimize the drain on judicial resources by considering special means to address repetitive discovery. Thus, whatever the rationale, protective orders are available to litigants in virtually every jurisdiction.

Trade Secret versus Confidential Commercial Information

Some practitioners limit Rule 26(c)(1)(G) and its state counterparts to information that constitutes a trade secret. This ignores the plain language of the rule and undoubtedly limits interpretation and enforcement of confidentiality agreements or orders by the court.[4] Rule 26(c)(1)(G) covers both "trade secret" and "other confidential . . . information." Indeed, many courts expressly recognize the availability of protective orders to protect confidential but less than trade secret information.

Trade secrets are defined in uniform legislation, such as the Uniform Trade Secrets Act, in most states. Other stats consider a list of factors from the Restatement (First) of Torts section 757 (1939) to determine whether information qualifies as "trade secret" or should be protected under a lesser "confidential" standard. The standard for permitting discovery shifts once a party proves that particular information constitutes a trade secret. The requesting party not only must demonstrate "relevance" but also shoulders a heavier burden of showing a particular need for the information. If the trial court determines that this balancing test weighs in favor of disclosure, it should then fashion a specific protective order to further protect the proprietary interests of the holder of the trade secret

continued, next page

information about to be disclosed.[6] In many states, trade secrets enjoy a qualified privilege and cannot be disclosed unless withholding would create a fraud or otherwise invoke an injustice.[7]

Because the discovery of trade secrets and ordinary confidential information often involves different standards, using one protective order for both types of information can result in unanticipated problems. Thus, the protective order should clearly delineate the types of information encompassed under the terms of that order, and the producing party must be able to articulate the grounds for seeking protection, either as trade secret or as "other" confidential material.

Sharing versus Non-Sharing Protective Orders

Given the many bases for using protective orders, including facilitating the flow of information in discovery, the terms of such orders frequently are negotiated and agreed to by the parties and entered by the court as "stipulated" orders. On other occasions, the court considers competing drafts of proposed orders suggested by the parties and enters an order of its own volition, choosing the provisions that best suit the court. In either event, it is becoming harder to reach agreement on certain terms, such as sharing provisions, confidentiality challenges, and whether any type of protective order is available in a products case.

Most, if not all, protective orders typically include provisions for

- Marking the documents, including deposition exhibits
- Limiting the use of confidential documents to the litigation at hand
- Limiting dissemination to a defined group of recipients
- Returning the documents at the end of the litigation
- Vesting the court with jurisdiction to enforce the order

The requesting party's attorneys, who have an ethical responsibility to their clients, are anxious to obtain discovery and prosecute their clients' case to completion.[8] Therefore, they have ordinarily agreed to the terms of a protective order to govern production of confidential documents in the case.

Opponent's of SILA argue that the purpose of discovery is not to provide a national database of defendant's documents.

More recently, however, these same lawyers have begun to resist the notion that their use of protected information should be limited to the case at issue or that the information is even "confidential." Rather, they seek the ability to discuss or "share" purportedly confidential documents produced to them with other attorneys, experts, or consultants involved in similar litigation. The terms of the proposed sharing can differ broadly from sharing with attorneys having filed cases against the same manufacturer allegedly involving the same product to sharing documents and information with any lawyer with an actual or a potential claim against the manufacturer, regardless of product or type of failure.[9]

From the producing party's viewpoint, it has expended considerable sums in developing its proprietary materials and methodologies, and the requested information forms the company's "property."[10] As the circle of recipients increases pursuant to a sharing provision, the likelihood of improper disclosure also increases, thereby increasing the chance that a competitor could obtain this information without a comparable investment.[11] The producing party also is concerned with public disclosure of this information and its use to create public concern about its products – either fairly or unfairly. Finally, any party would like to avoid additional litigation and thus does not want to empower other attorneys to file suit against it.[12] If attorneys in other litigation need or want similar information, they can use discovery in their own lawsuit to obtain it.

Conversely, proponents of sharing protective orders often point to the savings in judicial resources that can be realized if the information can be obtained without formal discovery. As one court has noted,

> The plaintiffs' attorneys' discovery information exchange group reduces the effort and expense inflicted on all parties, including Ford, by repetitive and unnecessary discovery. In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessibility and economy of justice.[13]

These attorneys also claim that sharing protective orders will help keep the defendant honest, because the manufacturer will be facing a level playing field across the country.

In the event that the defendant manufacturer and plaintiff are unable to agree on the scope or extent of any sharing provision, this decision ultimately must be determined by the court.[14] Such an impasse is further complicated by the laws in a number of states that prohibit non-sharing protective orders or otherwise restrict the scope of confidentiality orders.

> Some state legislatures have entered this fray. Virginia's is one example.
>
> A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter.[15]

The reach of this statute remains cloudy, as there have been no reported

continued, next page

decisions applying or interpreting its terms. The phrase "similar or related matter," for instance, is still undefined, perhaps because a party can always attempt to avoid the statute by persuading the court that its information requires greater protection than that afforded by the statute's provisions.

Another problem that may emerge in mass tort litigation is caused by the differing views of co-plaintiffs or co-defendants toward the terms of protective orders. Some parties have established a repository or set of documents they routinely produce in discovery in particular litigation. In an effort to reduce costs, those parties typically encourage sharing to preclude repetitive discovery responses and productions. Thus, a "sharing" protective order is entered in those cases in an effort to have one order that protects the interests of most parties. This may lead to multiple protective orders within one case to govern the competing interests of the producing parties.

Sunshine in Litigation

A number of states have enacted Sunshine in Litigation Acts (SILA), which limit the reach of protective orders where a public hazard is involved. SILAs restrict the trial court's ability (or even the parties' agreement) to enter orders regarding certain kinds of information that relates to the harmful consequences of using hazardous products.

Earlier this year, for example, Nevada adopted a new rule for "scaling and redacting court records."[17] Significantly, this rule affects only court records or documents filed with or maintained by the court in connection to a particular matter—not the documents generally exchanged by the parties in the course of discovery.[18] This limitation can be important. While court records may include some of the more sensitive documents that have been used as exhibits to a motion or at trial and that the producing party wishes to protect, this group generally is much smaller than the confidential discovery exchanged by the litigants. Nevada law now requires the court, which may hold a hearing, to make a specific finding not only that protection of these court records is "justified by identified compelling privacy or safety interests" but also that those interests outweigh the public's interest in maintaining an open judicial system. Furthermore, the law provides that "[i]n no event may the sealing or redaction have the purpose or affect of concealing a public hazard."[19]

A more sweeping version of a SILA statute has been introduced in the Senate on several occasions.[20] While this proposed bill contains many of the provisions of the Nevada rule or other state SILAs, it would apply to "information obtained through discovery," not just court records. The breadth of this far-reaching proposal runs contrary to the well-established principle that there is generally no right of public access to discovery materials where good cause is shown to prohibit disclosure, even when those materials are filed with the court. As a number of courts have recognized, "material filed with discovery motions is not subject to the common-law right of access."[21] Indeed, an attempt to expand the common-law right of access has been met with disapproval by at least one court, which cautioned "restraint" against expansion.[22] The proposed federal statute, however, would eviscerate this general rule by limiting available protections and thereby expanding access to discovery materials.

Again, before entering any protective order under Federal Rule of Civil Procedure 26(c), the court under the proposed federal SILA statute would be required to make the following specific finding.

> The public interest in disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question.[23]

Since an already-burdened trial court is unlikely to take the time to conduct the necessary hearing, entertain the requisite evidence, or otherwise engage in fact finding, this proposal could well undermine the use of protective orders in federal court in many types of cases.

These SILAs raise a number of disturbing constitutional issues. The U.S. Supreme Court has recognized that a company's proprietary information amounts to the company's property and cannot be "taken" (publicly disclosed) without appropriate safeguards.[24] The Constitution, as well as notions of statutory construction, requires that any law be relatively precise in its language to be applied fairly.[25] Most SILAs rather loosely define the term "public hazard" and the point when such hazards are determined. At the same time, however, every product liability lawsuit must allege that a product failed due to a defect and resulted in injury (e.g., a public hazard) to survive even the most preliminary challenges. Does the filing of a lawsuit, without more, define a public hazard? Is a jury or court finding of a defect and "causation" required? Because many products are regulated by either federal or state agencies, does an agency's finding of a deficit (or lack of a defect) preempt or trump an opposite "finding" by a jury? These questions highlight some of the problems created by such statutes.

An Illustration of the Problem

Many of these issues have collided in Florida, a state with one of the older and more widely publicized SILAs.[26] Like the proposed federal bill, Florida's statute also prohibits the entry of a protective order "which has the purpose or effect of concealing a public hazard, and would encompass discovery exchanged pursuant to such an order."[27] The term "public hazard" is further defined as a product "that has caused and is likely to cause injury."[28]

continued, next page

from page previous page

The Florida SILA was interpreted in *Jones v. Goodyear Tire & Rubber Co.*,[29] in which a plaintiff was allegedly injured when a truck tire "exploded" while he was checking it for leaks. After a jury verdict in favor of the mechanic, the trial court decided that the plaintiff's expert should not have been permitted to testify. Without that testimony, there was no evidence to support the jury's verdict, and the court entered judgment for Goodyear. Plaintiff appealed, asking the appellate court to reinstate the jury's verdict.

The appellate court not only reinstated the verdict but also vacated the protective order the trial court had entered over plaintiff's objection. Apparently, while attempting to negotiate the terms of this order, plaintiff suggested that the defendant submit the documents to the special discovery master who would review the documents in camera to determine their confidentiality. Instead, the defendant requested the trial court to enter a blanket order protecting the documents. Because the jury in Jones found the tire to be defective and to have caused plaintiff's injury, the appellate court felt that finding triggered the SILA.[30] That, in turn, negated the protective order in the case.

On remand, the defendant in *Jones* requested a hearing before the trial court and asked to review the discovery documents in camera as required by subsection 7 of the Act. When the trial court declined, the defendant sought appellate relief.[31] The appellate court found that it had waived the Act's requirements for in camera review because any error "was caused by [defendant] who obtained the benefit of a confidentiality order without a hearing."[32]

In a feat of *ipse dixit*, the appellate court also rejected the defendant's constitutional due process arguments supposedly because the prior opinion "considered" and rejected the same challenges. Moreover, ignoring the imprecise definitions under the act, the appellate court found that the SILA sought to achieve a legitimate legislative interest. Hence, the act passed constitutional muster, at least in substantive due process terms.[33]

Florida was one of the first states to enact a Sunshine in Litigation Act (SILA) aimed at providing information to the public about hazardous products

Perhaps in light of the ruling in *Jones*, the same defendant argued against a blanket protective order covering all confidential materials produced in discovery in a subsequent Florida case brought in a different appellate district than *Jones*.[34] In *Schalmo*, the defendant refused to produce any documents that had not been first reviewed by the court under the SILA. When the trial court refused to conduct this review and instead entered a blanket protective order over defense objection, the defendant appealed. This time, the appellate court sided with the defendant, although it further clouded the issues.

> When the Sunshine in Litigation Act is raised, the possible existence of a public hazard can limit the use of confidentiality or protective orders. Therefore, the possible existence of a public hazard must be determined up front.[35]

Unlike in *Jones*, there had been no jury finding of a defect or causation in *Schalmo*. Rather, the plaintiff merely alleged a public hazard, and the appellate court felt this was enough--the mere "suggestion that the tires at issue constitute a 'public hazard'" was sufficient to implicate the act.[36] In an era of notice pleading, the court appeared ready to permit requesting parties, through their allegations and artful pleading, to determine whether protective orders will be entered in any product case.

It is noteworthy that the *Schalmo* decision recognized the burden an in camera review of thousands of technical documents would have on the trial court at an early phase of the litigation. The nature of the documents makes it unlikely that the court will fully appreciate the technical contents of the documents or the lawyer's discussion of those documents. Nonetheless, the appellate court felt compelled by the SILA to impose that burden, despite its "sympathy" with trial courts.[37]

In contrast, another Florida intermediate appellate court recently approved a blanket protective order in *Cordis Corp. v. O'Shea*, a medical device product case, albeit with the addition of a broad sharing provision.[38] The court avoided any SILA issues by noting that the plaintiff had not "invoked" the act's application to the dispute, and thus the court would not "extend our consideration to that issue."[39] Arguably, *Schalmo* and *Cordis* reflect a difference among lower appellate courts.

Overlooked in either opinion, however, is the question of reliance and the fairness of subsequently revoking or modifying a protective order used to govern the production of confidential materials. In other words, should a party be able to vacate the order after receipt of confidential documents? That concern recently was addressed by the *Missouri Supreme Court in State v. Ford Motor Co.*[39] a products case in which the decedent allegedly was killed in a rollover accident. During discovery, the defendant produced a number of documents subject to a non-sharing protective order. After settlement, the trial court vacated that order and replaced it with a sharing protective order. The Supreme Court reversed.

> In the present case, Ford's reliance on the non-sharing protective order was manifest. . . It would be unreasonable to conclude that Ford would have insisted on this protection and allowed access to their company files if the non-sharing protective order was only

continued, next page

> to last until the settlement of that dispute.[41]

As a result, the court found that the defendant's reliance outweighed any interest in facilitating discovery in similar matters.

> The discovery process is primarily designed to facilitate an orderly and efficient resolution of individual lawsuits, not to provide a national database (of defendant's documents).[42]

Thus, with so many different approaches taken by courts across the country over the entry and application of protective orders, it appears that the battle over a party's confidential and proprietary information will continue.

Conclusion

Civil discovery often seems to be dictated by knee-jerk reactions: If one side objects to producing something, the other side immediately wants it. If this is true, the future use of protective orders in mass tort litigation remains uncertain. What is clear, however, is the certainty that the confidentiality of information is under attack and requires vigilant protection.

Lisa Moran McMurdo is with Moran Brown PC in Richmond, Virginia.
Reprinted with permission of the American Bar Association Section of Litigation

Endnotes:

1 See Carpenter v. United States, 484 U.S. 19 (1987) (commercially sensitive information constitutes a constitutional property right). For the distinction between trade secrets and confidential information, see K. Moran & S. Jansma, Discovery of Trade Secrets: What Constitutes Protected information?, 22 LIN'S PRODUCT LIABILITY L. & STRATEGY, nos. 7-8 (2004).

2 Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 529 F. Supp. 866, 889 (E.D. Pa. 1991).

3 See, e.g., ILL. SUP. CT. R. 201; PA. R. CIV. P. 4012.

4 In a recent case, for example, the court seized upon the term "trade secret" in a protective order and refused to protect clearly confidential information since it did not rise to the level of a trade secret. Estate of Kelly Hanson v. Ford Motor Co., et al., No. TC019911 (Superior Court of Cal., Los Angeles County), Order entered Mar. 6, 2008.

5 See, e.g., Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545, 547 (Mass. 1998) (recognizing "that confidential and proprietary business information may be entitled to protection, even if such information cannot claim trade secret protection").

6 Unfortunately, many courts overlook the first part of this balancing equation and look directly at the availability and terms of a protective order. In Urbina v. Goodyear Tire & Rubber Co., et al., CV-07-3705-CAS (CTX) (C.D. Cal.), for example, the magistrate judge required Goodyear to produce what it claimed was the trade secret formula for one of its tire compounds: "There is a broad protective order in place signed by the district judge that covers confidential information produced in this action. Accordingly, Goodyear should produce the requested information." Order dated Dec. 30, 2008.

7 Some 20 states consider trade secrets to be privileged. Texas Rule of Evidence 507 is typical: A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

8 CAL. BUS. & PROF. CODE ' 6068 see also MODEL RULES OF PROF'L RESPONSIBILITY R. 1.2.

9 See, e.g., Bertetto v. Eon Labs Inc., 2008 WL 2522571, at *2-3 (D.N.M. May 30, 2008) (refusing to approve sharing agreement in pharmaceutical product liability case).

10 See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35-36 (1984); Ford Motor Co. v. Manners, 239 S.W. 3d 583 (Mo. 2007).

11 See, e.g., Culinary Foods, Inc. v. Raychem Corp. 151 F.R.D. 297, 306-7 (N.D. Ill. 1993) (clarified on other grounds) (barring dissemination of confidential information obtained under protective order with other litigants suing defendant).

12 See Westinghouse Elec. Corp. v. Newman, Holtzinger, P.C., 992 F.2d 932 (9th Cir. 1993) (discussing the dissemination of protected information "to stir things up and foment litigation")

13 Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982)

14 Compare Wilson v. Am. Motors Corp., 759 V.2d 1568 (11th Cir. 1985) (the public's right of access to trial records including exhibits outweighed damage to reputation or risk of other trials against the manufacturer) with Williams v. Taser Int'l, Inc., 2006 U.S. Dist. LEXIS 4725T (June 30, 2006) (risks faced by the release of confidential documents outweigh the interests in sharing). See also Ward, 93 F.R.D. 579 (sharing permitted where alleged design defect and evidence the same in "hundreds of cases").

15 VA. CODE ' 8.01-420/01.

16 In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 R.F.D. 482 (D. Mich. 1979).

17 NEV. SUP. CT. R. 3.

18 See also TEXAS R. CIV. P. 76(a) upon which the Nevada rule is based; General Tire, Inc. v. Kepple, 970 S.W.2d 520 (Tex. 1998) (limiting rule to "court records" and not unfiled discovery).

19 NEV. SUP. CT. R. 3.

20 Sunshine in Litigation Act of 2008, S. 2449, 110th Cong. (2007).

21 Chicago Tribune Co. v. Bridgestone/Firestone, inc., 263 F.3d 1304, 1309, 1312 (11th Cir. 2001) (per curiam); accord Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) (finding right of public access only in a "substantive pretrial motion, unrelated to discovery").

22 Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164-65 (3rd Cir. 1993) ("The public policy implications of an expansion of the common law presumption of access to discovery motions are unclear, and this alone should counsel restraint."") (cited with approval in Chicago Tribune, 263 F.3d at 1312).

23 28 U.S.C. ' 1660(a)(1)(B)(c)

24 See Carpenter v. United States, 484 U.S. 19 (1987) (commercially sensitive information constitutes a constitutional property right).

25 U.S. CONST. amend. XIV, ' 1.

26 FLA. Stat. ' 69.081 (2001). The author thanks Frederick J. Fein of Thornton, Davis & Fein, P.A., in Miami, Florida for his assistance and insights into Florida's statute and cases.

27 Id., ' 69.081(3)

28 Id., ' 69.081(2)

29 871 So. 2d 899 (Fla. 3rd D.C.A. 2003).

30 Id., at 906

31 Goodyear Tire & Rubber Co. v. Jones, 929 So. 2d 1081 (Fla. 3rd D.C.A. 2005).

32 Id., at 1084.

33 Id., at 1086.

34 Goodyear Tire & Rubber Co. v. Schalmo, 987 So. 2d 142 (Fla. 3rd D.C.A. 2008).

35 Id., at 1145 (emphasis added).

36 Id.

37 Id., at 146.

38 Cordis Corp. v. O'Shea, 2008 Fla. App. LEXIS 11857 (Fla. 4th D.C.A. Aug. 6 2008).

39 Id. at *13.

40 State v. Ford Motor Co. 239 S.W.3d 583 (Mo. 2007).

41 Id., at 588.

42 Id., at 589.

be reported or not. The query must contain the client's SSN or Medicare Health Insurance Claim Number (HICN), name, date of birth and gender of the injured party. The COBC, upon submission of the information outlined above will respond and indicate whether the individual is a Medicare beneficiary. If the injured party is a Medicare beneficiary, the HICN and other information found in the Medicare Beneficiary Database will be provided to the RRE. This process is done electronically with HEW (HIPAA Eligibility Wrapper) software provided by CMS, but the RRE must have the SSN or HICN. This is the reason why the new discovery requests are being implemented.

MMSEA and Conditional Payments

The stated intent of the new reporting requirements was to identify situations where Medicare should not be the primary payer and ultimately allow recovery of conditional payments. The Medicare Secondary Payer Act (MSP) prohibits Medicare from making payments if payment has been made or is reasonably expected to be made by a workers' compensation plan, liability insurance, no fault insurance or a group health plan. However, Medicare may make a "conditional payment" if one of the aforementioned primary plans does not pay or can't be expected to be paid promptly.[8] These "conditional payments" are made subject to being repaid when the primary payer pays. When conditional payments are made by Medicare, the government has a right of recovery against the settlement proceeds.

Congress has given the Centers for Medicare and Medicaid Services (CMS) both subrogation rights and the right to bring an independent cause of action to recover its conditional payment from "any or all entities that are or were required or responsible ... to make payment with respect to the same item or service (or any portion thereof) under a primary plan."[9] Furthermore, CMS is authorized under federal law to bring actions against "any other entity that has received payment from a primary plan." Most ominously, the government may seek to recover double damages via an independent cause of action.

US v. Harris: A Trial Lawyer's Worst Nightmare

The government takes its reimbursement rights seriously and is willing to pursue trial lawyers who ignore Medicare's interest. In U.S. v. Harris, a November 2008 opinion, a personal injury plaintiff lawyer lost his motion to dismiss against the U.S. Government in a suit involving the failure to satisfy a Medicare subrogation claim. The plaintiff, the United States of America, filed for declaratory judgment and money damages against the personal injury attorney owed to the Centers for Medicare and Medicaid Services by virtue of 3rd party payments made to a Medicare beneficiary. The personal injury attorney had settled a claim for a Medicare beneficiary (James Ritchea) for $25,000. Medicare had made conditional payments in the amount of $22,549.67. After settlement, plaintiff counsel sent Medicare the details of the settlement and Medicare calculated they were owed approximately $10,253.59 out of the $25,000. Plaintiff counsel failed to pay this amount and the Government filed suit.

The motion to dismiss was denied by the United States District Court for the Northern District of West Virginia despite plaintiff counsel's arguments that he had no personal liability. Plaintiff counsel argued that he could not be held liable individually under 42 U.S.C. 1395y(b)(2) because he forwarded the details of the settlement to the government and thus the settlement funds were distributed to his clients with the government's knowledge and consent. The court disagreed. The court pointed out that the government may under 42 U.S.C. 1395y(b)(2)(B)(iii) "recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity." Further, the court pointed to the federal regulations implementing the MSPS which state that CMS has a right of action to recover its payments from any entity including an attorney.[10] Subsequently, the U.S. Government filed a motion for summary judgment against plaintiff counsel. The United States District Court, in March of 2009, granted the motion for summary judgment against plaintiff counsel and held the Government was entitled to a judgment in the amount of $11,367.78 plus interest.

Medicare on the Settlement Check

Most trial lawyers understand their obligations under the MSP with regard to making sure conditional payments are repaid. The problem is the growing misconception among insurers that Medicare should be on the settlement check to insure compliance with the MSP. Some insurers have even been told that the law requires Medicare be on the check. This is simply not so.

I was asked last year by a trial lawyer to assist in a case where Medicare was put on the check despite this not being a term of settlement. The insurer moved to enforce the settlement and plaintiff counsel was forced to defend his position that the law didn't require Medicare be on the check. I provided an affidavit arguing why the law did not require Medicare be on the check. That case resulted in a published Federal District Court opinion, *Tomlinson v. Landers*, regarding the issue of whether Medicare must be on the check.

The Tomlinson court found definitively that the MSP didn't require Medicare be on the check. The court stated that "federal law does not mandate that a primary payer

continued, next page

(or insurer) make payment directly to Medicare." The court did recognize though that "an insurer may be liable to Medicare if the beneficiary/payee does not reimburse Medicare for any amounts owed to Medicare within sixty (60) days." Nevertheless, the court found the defendant's decision to "list Medicare as a payee on the settlement check may have been in [defendant's] ... best interest, however, [defendant] ... was not required by federal to include Medicare on the settlement check." Given this fact and the dispute concerning whether Medicare needed to be included on the check illustrated to the court there was no meeting of the minds in terms of settlement. As a result, the settlement was not enforced and a bad faith action could be pursued. When an insurer takes a similar position in the future, it may open the door to similar holdings and bad faith causes of action.

Medicare Set Asides in Liability Settlements

While "Medicare on the check" is a very problematic issue, a larger issue is the alleged connection between Medicare Set Asides and the MMSEA. CMS has made it very clear in numerous conference calls that the MMSEA is totally unrelated to Medicare Set Asides. In an MMSEA conference call, Barbara Wright, acting director of the Medicare debt management division at CMS, stated that Section 111 of the MMSEA "does not mandate or specify anything about liability set asides." It can't be made any clearer than that. There is no relationship between MMSEA and Medicare Set Asides in liability cases. However, Barbara Wright did say in that same teleconference "we have a very informal, limited process for liability set asides." She acknowledged they didn't have the "extensive" rules or procedures like the "ones [they] . . . have for workers' comp." Finally, she indicated that "CMS approval of a set aside amount is not required. It is a voluntary process." Each regional office sets its own policy on whether to review liability set asides despite Barbara Wright's comments. Out of the 10 regional offices informally surveyed, two will not review (Boston and San Francisco).

The Advent of Set Asides

Despite the lack of connection between the MMSEA and Medicare Set Asides, the issue is still a troubling one. For many years personal injury cases have been resolved without consideration of Medicare's secondary payer status even though since 1980 all forms of liability insurance have been primary to Medicare. At settlement, by judgment or through an award, an injury victim would receive damages for future medical that were Medicare covered. However, none of those settlement dollars would be used to pay for future Medicare covered health needs. Instead, the burden would be shifted from the primary payer (liability insurer or Workers' Compensation carrier) to Medicare. Injury victims would routinely provide their Medicare card to providers for injury related care.

These practices began to change in 2001 when Medicare Set Asides (hereinafter "MSA") were officially recognized by CMS for Workers' Compensation cases. Interestingly, around that same time the General Accounting Office was studying the Medicare system and pointed out that Medicare was losing money by paying for care that was covered under the Workers' Compensation system.[11] Accordingly, CMS circulated a memo in 2001 to all its regional offices announcing that compliance with the secondary payer act required claimants to set aside a portion of their settlement for future Medicare covered expenses where the settlement closed out future medical expenses.[12] The new "set aside" requirement was designed to prevent attempts "to shift liability for the cost of a work related injury or illness to Medicare."[13] Set asides ensure that Medicare does not pay for future medical care that is being compensated by a primary payer by way of a settlement or an award. The procedures and policy for set asides have been developed through subsequent CMS memoranda known as Frequently Asked Questions.

CMS' rationale for creating an MSA is compliance with the Medicare Secondary Payer Act (hereinafter "MSP"). The MSP is a series of statutory provisions[14] enacted in 1980 as part of the Omnibus Reconciliation Act[15] 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.[16] The regulations that implement the MSP provide "[s]ection 1862(b)(2)(A)(ii) of the Act precludes Medicare payments for services to the extent that payment has been made or can reasonably be expected to be made promptly under any of the following" (i) Workers' compensation; (ii) Liability insurance; (iii) No-fault insurance.[17]

There are two issues that arise when dealing with the application of the MSP: (1) Medicare payments made prior to the date of settlement (conditional payments) and (2) future Medicare payments for covered services (Medicare set asides). Since Medicare isn't supposed to

continued, next page

pay for future medical expenses covered by a liability or Workers' Compensation settlement, judgment or award, CMS recommends that injury victims set aside a sufficient amount to cover future medical expenses that are Medicare covered. CMS' recommended way to protect future Medicare benefit eligibility is establishment of an MSA to pay for injury related care until exhaustion.

The problem is that MSAs are not required by a federal statute even in Workers' Compensation cases where they are commonplace. Instead, CMS has intricate "guidelines" and "FAQs" on their website for nearly every aspect of set asides from submission to administration. There are no such guidelines for liability settlements involving Medicare beneficiaries. Without codification of set asides, there are no clear cut appellate procedures from arbitrary CMS decisions and no definitive rules one can count on as it relates to Medicare set asides. While there is no legal requirement that an MSA be created, the failure to do so may result in Medicare refusing to pay for future medical expenses related to the injury until the entire settlement is exhausted. This creates a difficult situation for Medicare beneficiary-injury victims and contingent liability for legal practitioners as well as other parties involved in litigation involving physical injuries to Medicare beneficiaries.

Additionally, problems exist and greater costs may be incurred in the settlement of cases involving Medicare beneficiaries due to the lack of uniformity as well as clarity regarding Medicare Set Asides.[18] The lack of uniformity and clarity comes from the fact that CMS regularly changes its procedures through publishing new memoranda in the form of FAQs which articulate policy. There have been 11 such memos since the original 2001 memo announcing set asides. Submission of a set aside to CMS for review is sometimes a long process which causes extra costs for parties to the litigation. The amount of the set aside does not take into account that the settlement amount may be lower due to other factors in the settlement apart from medicals. Fees are incurred in preparation of an allocation and submittal to CMS. The costs in creating a set aside may ultimately lower what is available to the injury victim to compensate for non medical damages. Delays in settlement or the inability to settle cases due to the set aside issue is another significant problem that has a large impact on the tort system. The absence of any law or guidelines in the liability context is a tremendous problem. Since guidelines only exist in Workers Compensation cases, those guidelines are frequently applied to liability settlements. However, this creates many problems as Workers' Compensation cases and liability cases are two very different animals.[19] Thus, codification is vitally important from a systemic and cost perspective for both comp and liability.

A Need for Codification – "LMSA"

As uncertain and lacking in formal protections as is the Workers' Compensation system is regarding Medicare set asides, it pales in comparison to the current state of affairs in liability settlements. The only known formal mention of Medicare Set Asides in liability settlements comes in the form of an answer to a FAQ in an April 2003 CMS memo.[20] CMS stated:

> Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a Workers' Compensation (WC) carrier from any future medical expenses, a CMS approved Workers' Compensation Medicare Set-aside Arrangement (WCMSA) is appropriate. The WCMSA would need sufficient funds to cover future medical expenses incurred once the total third party liability settlement is exhausted. The only exception to establishing a WCMSA would be if it can be documented that the claimant does not require any further WC claim related medical services. A WCMSA is also not recommended if the medical portion of the WC claim remains open, and WC continues to be responsible for related services once the liability settlement is exhausted.[21]

While the foregoing is not on point as it addresses the question of whether a set aside is necessary when a 3rd party settlement extinguishes a workers' compensation obligation, it is instructive in the sense that it states CMS's position that 3rd party proceeds are primary to Medicare always. However, a plain reading of the MSP can provide that type of information. There have been some recent statements by CMS officials regarding liability set asides during town hall conferences which gives insight into how CMS views liability set asides. These town hall conferences relate to the new Medicare mandatory insurer reporting requirements under the Medicare, Medicaid & SCHIP Extension Act of 2007 ("MMSEA") which requires insurers and self insureds to report settlements with Medicare beneficiaries to CMS.22 Due to confusion about this law and misinformation that it somehow requires Medicare Set Asides in third party liability settlements; CMS has been forced to address liability Medicare Set Asides during these calls.

In one such call from 2008, Barbara Wright (Acting Director of the Medicare Debt Management division at CMS), said "I don't believe there is a General Counsel Memo that says there are no liability set asides."[23] She went on to say "we have a very informal, limited process for liability set asides. We don't have the same extensive ones we have for worker's comp." Finally, she reiterated an important admission that "CMS approval of a set aside amount is not required. It is a voluntary process." In a more recent call from September of 2009, Barbara Wright

continued, next page

again addressed the issue of liability set asides by stating "[t]here is not – the same formal process for liability set asides that there is for Workers' Compensation set asides. However, the underlying statutory obligation is the same."[24] In the most recent call in October of 2009, Barbara Wright again emphasized that the review process for liability settlements was voluntary and each CMS regional office makes its own decision whether to review or not.[25] When discussing whether a CMS regional office would review or not she indicated that if the regional office believes there are "significant dollars at issue", they may review a proposed set aside amount for liability.[26] However, she says that the "fact that they decline to review in a particular case does not create any type of safe harbor. So you're back to an obligation that has existed essentially since 1980."[27]

The most recent version of the Medicare Secondary Payer manual, revised on 3/20/09, was updated with references to set asides in the liability context. In Section 20, which contains definitions, set aside arrangement are defined as follows:

> An administrative mechanism used to allocate a portion of a settlement, judgment or award for future medical and/or future prescription drug expenses. A set aside arrangement may be in the form of a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA), No-Fault Liability Medicare Set-Aside Arrangement (NFSA) or Liability Medicare Set-Aside Arrangement (LMSA).[28]

Clearly CMS has intentions to do something as it relates to liability settlements and set asides since this was included in the MSP manual. The question is what and how will guidelines be developed? Will it be similar to Workers' Compensation? How will the decidedly different issues involved in liability settlements be addressed?

Given all of the foregoing, legal practitioners, Medicare beneficiary-injury victims and insurers are left guessing as to what to do when a liability settlement is achieved. Is a set aside necessary? If so, how do parties determine if they are necessary? Is it only "significant dollars" cases? What rules apply if you do create a set aside? Do we look to the 12 CMS memoranda? What about the differences between Workers' Compensation cases and liability cases? Will CMS take into account policy limits in a liability case in determining the sufficiency of an allocation? What happens if policy limits are $50,000 and the future Medicare covered services are $150,000? Will CMS take into account comparative fault/contributory negligence issues that may reduce recovery? What about statutory or constitutional caps on damages? Can CMS fail to pay for Medicare covered services post liability settlement for the Medicare beneficiary-injury victim if there is no set aside created?

It should be painfully obvious from the foregoing discussion that codification of set asides is imperative. Given the possible loss of Medicare benefits, as threatened by CMS, a Medicare beneficiary has significant risks when it comes to Medicare Set Asides with little or no corresponding legal remedies. Significant delays persist in the Workers' Compensation MSA process which in some instances leads to settlements falling apart.[29] In addition, liability cases brought on behalf of Medicare beneficiaries may decrease due to the possibility of having to put all of the net proceeds into an MSA. As Rick Swedloff put it in his 2008 law review article, it creates a classic situation of "can't settle, can't sue."[30] In the context of conditional payments, he said that the "MSP discourages Medicare beneficiaries and their contingency fee attorneys from bringing suit in simple tort disputes."[31] That statement is all the more profound today in the face of the increasing complexities of conditional payments and the confusion over Medicare Set Aside issues. What to do?

The question becomes what to do when faced with an insurer who insists on a Medicare Set Aside in a liability case. A trial lawyer could ask for the insurer's legal basis for mandating a Medicare Set Aside in a liability case. You can ask for a cite to the federal statutes, code of federal regulations, case law or any rules/process regarding Medicare Set Asides for liability cases. There are currently none, no one will find any law that directly addresses the issue of Medicare Set Asides for liability cases. However, I am not advocating ignoring Medicare's interest under the Medicare Secondary Payer Act. To adequately protect yourself and a client who is a Medicare beneficiary or reasonably expected[32] to become a Medicare beneficiary within 30 months of settlement, a Medicare Set Aside evaluation may be in order. As described below, this is a voluntary process and CMS may not review the proposed set aside.

A trial lawyer may want to take the position that the insurer should bear the costs of the MSA evaluation and costs of the set aside (including professional administration of the account). In addition, there are many non-Medicare medical expenses that must be considered in arriving at a settlement for future medical costs (i.e., certain durable medical goods, custodial care, certain prescription medications and the Part D donut hole to name a few). If a set aside will be established, a thorough examination of non-Medicare expenses along with an allocation of future Medicare covered future services should be undertaken. There are other options besides a formal set aside if a trial lawyer is faced with an insurer who requires addressing Medicare's interest.

One option is to estimate the future Medicare covered expenses the client will potentially incur and document that amount in the settlement agreement. The estimate can be created from doctors reports or life care plans. The client then sets aside this amount and is told to use it

continued, next page

for future Medicare covered expenses. No submission to CMS is done if this option is exercised. However, the release provides evidence that Medicare's interests were taken into account at settlement. Since CMS admits there is no formal review process for liability settlements and submission is voluntary, an argument can be made that all the current law requires has been done and then some.

Another option is to do the formal allocation report and again document it just like was mentioned in the foregoing paragraph. Since CMS does not guarantee a review of a liability set aside, a formal allocation along with documenting it in the settlement agreement provides the necessary evidence that Medicare's interest were adequately addressed. A formal allocation also gives the trial attorney a third party who is independent to review the future medical expenses and determine what is Medicare covered and what is not. This is an important piece of protection for the trial attorney as it provides an extra layer of E&O protection.

Conclusion

It is this author's opinion that Medicare protocols and procedures regarding the repayment of conditional payments should not change due to MMSEA. However, insurers' behavior will and has most certainly changed. Insurance companies are fearful of all the reporting requirements under MMSEA because failure to comply is a $1,000 per day, per claimant fine. For a large insurer, that is significant exposure. Therefore, new discovery has been created to help insurers comply. Medicare may be put on the settlement check and unfortunately some insurers are insisting on Medicare Set Asides in liability cases. Federal law does not require Medicare be placed on the check, a fact confirmed by the Tomlinson decision. Federal law does not contain any codification of the obligation to create a Medicare Set Aside in liability cases. However, each trial lawyer and law firm will have to interpret the MSP laws and deal with the insurers on these issues to protect the client as well as their practices. There are many unanswered questions that persist with little clarity or law to help guide trial lawyers.

Endnotes:

1 Jason D. Lazarus is an attorney in Orlando, Florida. He is the founding partner with the Settlement Law Firm, a

boutique firm focusing on "special needs settlement planning" and lien resolution.

2 This date has been pushed back several times and is now slated for 4/1/11.

3 Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173). This Act was passed by the House on

December 19, 2007, and by a voice vote in the Senate on December 18, 2007.

4 Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173).

5 Id.

6 Id.

7 Id.

8 42 U.S.C. § 1395y (2007).

9 Id.

10 See 42 C.F.R. 411.24 (g).

11 Edward M. Welch, Medicare and Worker's Compensation After the 2003 Amendments, WORKERS'

COMPENSATION POLICY REVIEW, at 5 (March/April 2003).

P a g e | 15

© Jason D. Lazarus, Esq. 2010

12 Parashar B. Patel, Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements, Centers for Medicare

and Medicaid Services Memorandum, July 23, 2001.

13 Id.

14 The provisions of the MSP can be found at Section 1862(b) of the Social Security Act. 42 U.S.C. § 1395y(b)(6)

(2007).

15 Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499 (Dec. 5, 1980).

16 42 CFR § 411.20(2) Part 411, Subpart B, (2007).

17 Id.

18 Eric J. Oxfeld, Congress Must Reform Medicare Set Asides, FLA. UNDERWRITER, May 2006, at S-9.

19 Zinman v. Shalala, 67 F.3d 841, 846 (9th Cir. 1995). The Zinman court recognized how different Workers'

Compensation settlements are from liability. The court pointed out that "[a]pportionment in workers' compensation

settlements therefore involves a relatively simple comparison of the total settlement to the measure of damages

allowed for individual components of the settlement, pursuant to a prescribed formula. Tort cases, in contrast,

involve noneconomic damages not available in workers' compensation cases, and a victim's damages are not

determined by an established formula. Apportionment of Medicare's recovery in tort cases would either require a

factfinding process to determine actual damages or would place Medicare at the mercy of a victim's or personal

injury attorney's estimate of damages."

20 Thomas Grissom, Medicare Secondary Payer – Workers' Compensation (WC) Frequently Asked Questions,

Question 19, Centers for Medicare and Medicaid Services Memorandum, April 22, 2003.

21 Id. (emphasis added)

22 Medicare, Medicaid and SCHIP Extension Act of 2007 (P.L. 110-173). This Act was passed by the House on

December 19, 2007, and by a voice vote in the Senate on December 18, 2007. It was signed into law by President

Bush on December 29, 2007.

23 Barbara Wright, MMSEA October 29,2008 NGHP Transcript at P. 18

24 Barbara Wright, MMSEA September 30, 2009 NGHP Transcript at P. 25

25 Barbara Wright, MMSEA October 22, 2009 NGHP Transcript at P. 65

26 Id.

27 Id.

28 Medicare Secondary Payer (MSP) Manual (Rev. 65, 03-20-09).

29 Eric J. Oxfeld, National Issues Impacting Workers' Compensation

30 Rick Swedloff, Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries, 41

AKRON L. REV. 557 (2008).

31 Id.

32 Reasonable expectation is defined as an individual that has applied for Social Security Disability Insurance

("SSDI") benefits; has been denied SSDI but anticipates appealing that decision; is in the process of appealing

and/or refilling for SSDI; is 62 years and 6 months old (i.e., may be eligible for Medicare based upon his/herage

within 30 months); or has End Stage Renal Disease (ESRD) condition but does not yet qualify for Medicare based

upon ESRD.