Medicare Set Aside Arrangements and Mass Torts

On Ringler Radio, host Larry Cohen is talking about Medicare Set Asides with colleague and co‑host, Lynn DeMauro Clark and guest, Attorney John "Jay" F. Kearns III from the firm Kearns & Kearns. They take a look at mass torts and the facts surrounding the US v. James J. Stricker case. In addition, Jay explores the Medicare Medicaid SCHIP Extension Act of 2007 (MMSEA) and how it has created an uproar among insurers and personal injury lawyers and talks about Stricker's overall significance to plaintiff attorneys.

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LARRY: Well, hello everyone, and welcome to Ringler Radio. I'm Larry Cohen, head of Ringler Associates' northeast operations, and we're certainly glad you could join us again today. Well, today on Ringler Radio, we're going to take a look at Medicare set-aside arrangements and mass torts. And we're going to do that by spotlighting the, uh, recent case, US vs. Stricker, and we're going to discuss its overall significance. As you all know, Medicare set-asides have become a real, buzzword today in the whole settlement, uh, industry. And joining me today, as my co-host, is my good friend and Ringler colleague Lynn De Mauro Clark, from our Meridan, Connecticut office of Ringler Associates. Lynn, welcome to Ringler Radio.

LYNN: Thanks, Larry, good to be here!

LARRY: Good to hear you again. And our special guest today is attorney Jay Kearns, from the Kearns & Kearns law firm in West Hartford, Connecticut. Jay is a certified elder law attorney, and, uh, his practice area includes special needs settlement services, estate planning, and probate law. You can find out more about Jay and his firm at kearnsandkearns.com, and with that, welcome to Ringler Radio, Jay.

JAY: Thank you, Larry. Hi, Lynn!

LYNN: Hi, Jay.

LARRY: Very good. You know, uh, I know you folks are in Connecticut and I'm up in Boston, and, uh, it's interesting because I'm a big Yukon Husky fan, so every time I hear anything about Connecticut, I get real excited. I hope you root for the Huskies, Jay.

JAY: I'm an Orangeman.

LARRY: Well, we'll talk about that later. [LAUGH] Well, Jay, let's start out, the show today by taking a look at the Medicare Secondary Payer Act of 1980. Why don't you give us a brief overview of that act?

JAY: Sure. Larry, when Medicare first started in 1965, it was a primary payor for any individuals who were beneficiaries of the Medicare Trust. And in 1980, Congress thought that we're going to have a problem with Medicare going bust, and so they enacted legislation for what's called the MSP, or the Medicare Secondary Payor statute, and that's found at 42 United States Code Section 1395-Y. And there's regulations that accompany that, which are 42 CFR 4-11, is where primarily most of the Medicare regs are. But the primary purpose of the Medicare Secondary Payor statute was to make sure that Medicare was a secondary payor, much like the name implies, for any medical services where payments have been made or could reasonably be expected to be made under either a worker's comp plan or some kind of insurance plan, or even a, uh, self-funded insurance plan. And one of the other purposes, too, was to avoid cost-shifting where, perhaps someone may have received a settlement or a judgment for past medical injuries and future medical injuries, and what the government sought to do was to avoid what we call cost-shifting. And cost-shifting meant that basically the plaintiff would be putting all the money in their pocket, and not expending any of it on future medical expenses, and expecting that Medicare would pick up the tab.

LARRY: Well, that makes sense. I think we're all looking… the government does a lot of things wrong, but in trying to make private parties pay before the government pays makes a lot of sense. And so the Secondary Payer Act was passed, and there it sits.

LYNN: So Jay, for our listeners out there who might be unfamiliar, what is a Medicare set-aside?

JAY: Well, Lynn, a Medicare set-aside is something that our listeners will not find in a statute or in a regulation. Uh, it's a customary and standard practice that's been around primarily in worker's comp cases. If you go back to 1965, when Medicare first started, uh, at that point in time, the government would not allow worker's comp plans to shift to Medicare. And, uh, in 1980, when the Med- Medicare Secondary Payment statute came about, the law was on the books, but if you think of, uh, Uncle Sam like Rip Van Winkle, where they were asleep for years, they really didn't start enforcing that until the late '90s. And so in the late '90s, uh, you had the advent of the Medicare set-asides. And what it is, it's an arrangement whereby a portion of a settlement is, in fact, set aside, and it's to be applied for the future medical expenses that would be normally covered by Medicare. And once the Medicare set-aside amount is spent, then Medicare will pay for someone's medical expenses.

LARRY: Well, you know, that, that whole process, in the worker's comp arena, kind of, even though there was no statutory regulatory for, in essence, almost by the nature of its use, almost became a de facto, uh, statutory kind of a, an approach. Because aren't, I think in most worker's comp cases, and Lynn, I know you do a lot of comp, in most worker's comp cases, uh, that's where these set-asides really got there, got wind behind their backs. Isn't that right?

LYNN: Absolutely. I mean, you know, Jay's spoken a little bit about how the MSA is a customary standard of practice in workers' comp cases. You know... if you could give us some of the basics for the listeners out there, and talk a little bit about who approves the MSA.

JAY: Sure. Well, the agency which reviews the Medicare set-aside is CMS, and that stands for the Center for Medicare and Medicaid Services, in Baltimore, Maryland, which once upon a time was called the Healthcare Financing Ad-Administration. But CMS routinely reviews the Medicare set-aside inside of the worker's comp scenario, but they only recently, within the last few months, have issued any memos which deal with the liability Medicare set-aside, like in the personal injury cases.

LARRY: Well, we're going to, and we're going to talk about that in a little bit, uh, because this whole Medicare Medicaid SCHIP Extension Act of 2007 is really the catalyst for a lot of the, the current, uh, concentrated efforts around Medicare set-asides in the liability arena, revisiting them in the comp arena, and how they all mesh together. So talk, let's talk about this, they call it this, MMSEA, or the "Mimmsea" Extension Act of 2007. How has that impacted MSAs, and, uh, talk about the issues like responsible reporting entities, and, and those new, uh, those new, uh, entities that, that were given, you know, some, some birth in this new act.

JAY: Okay. Well, for our listeners, on MMSEA, which stands for the Medicare, Medicaid, SCHIP Extension Act, uh, it absolutely has nothing to do with Medicare set-aside arrangements. Uh, Larry, the reason why everybody got excited when they heard about the mandatory insurance reporting is that the required entities, a responsible reporting entity such as an insurance plan or a worker's comp plan, a health insurance plan, group plan, whatever kind of plan that might be out there which pays for someone's medical expenses in the future must report to CMS, uh, that someone's receiving payments. And what it's done now is, in the past, the Center for Medicare/Medicaid Services never had a way of tracking who gets what kind of settlements. And so now the personal injury bar is well aware of the fact that the insurers are mandatory reporters for any kind of settlements or judgments, and that there's a $1,000 a day penalty for an insurer for a failure to report to the government.

LYNN: Understandable, then, why there's been such an uproar amongst the insurers and the personal injury lawyers in light of these new guidelines.

JAY: Well, that, that's true, Lynn, because now, the bar is forced to focus on protecting Medicare's interests. And so in the past, if you had settled a case, and you never said anything to Medicare, there was really no way that Medicare could trace the settlements and where the money went. And now with the insurance carriers reporting the name, the Social Security number of the claimant, and the name, and the bar number, and the telephone number of the personal injury attorney, uh, it really has heightened a lot of attention to protecting Medicare's interest at this point in time. And the insurers, when it comes to the insurance carriers representing the defendants don't want to be caught in the

crossfire, either, with any kind of penalties. And so you're finding both the defendant's counsel as well as the plaintiff's counsel collaborating to make sure that the insurers are, in fact, protected, and that the information is going to CMS.

LARRY: And we're really talking here about two distinct elements. One is, in all of this reporting, uh, one is is to recover the so-called liens that have already been paid, uh, my Medicare, from this settlement that's going to be, uh proffered by the insurance company. So it's looking back to recover liens, and then it's also looking forward to provide some means or, or measure to make sure that Medicare is still a secondary payor for the future. So we have the lien issue, and then we have the going forward issue. And I guess MMSEA really started the, the, the thought process about the liability Medicare set-aside, as opposed to the worker's comp field. So talk about that. Talk about how MMSEA and this, this, this desire to look back for liens and look forward to protect Medicare's secondary payor status now affects the liability arena.

JAY: Well, first and foremost, Larry, an attorney always had an obligation, to notify Medicare immediately when their firm, uh, or they individually were retained to represent a client who was entitled to Medicare. But now, with both the counsel, uh, reporting to Medicare, as well as the insurer, you're really locking in a plaintiff. And one of the things that you've got to be very careful of is your pleadings. Because if you're going to, uh, plead that your plaintiff has suffered a variety of ailments and injuries, and you might be stretching the truth a little bit, Medicare's going to read that complaint, and they're going to construe it against the plaintiff. So there's a danger there in over-pleading. And so now you have CMS with the ability to get the settlement information from the carrier, the representation from the attorney. They very can easily, can now come in and read the complaint, and then say, hey, wait a second, you alleged all these horrific injuries to your client. Were you telling the truth in your pleadings? And if we construe that those pleadings are correct, then we're going to go back after those conditional payments that were made in terms of a Medicare lien. And, number two… we want to make sure that a good amount of that settlement is going to be set aside in the future to cover those medical expenses that Medicare might be on the hook, but for the settlement.

LARRY: Well, there's no question that, as they say, the, some of these plaintiff attorneys potentially get hoisted on their own petard there, because they, they have made these, these life-care plans, et cetera, that are, that are so extensive, they can get bitten, in the end. And Lynn, as you know, a cottage industry has arisen to, of folks that actually sit down and evaluate, the future expenses, make sure they're Medicare-eligible expenses. They, they cut them down in terms of what Medicare might pay. So trying to whittle down this, this future amount that the set-aside might, might require. And, there are a lot of companies out there that do that, and that's become a real big part of this.

LYNN: Absolutely, Larry. And, you know, in fact, and we see it more and more as time progresses, that this responsible reporting has really opened the door to a huge boom in, in that industry. We're going to start seeing more of that, I think, as the, as years, you know, approach, because these liability carriers have started taking this more seriously, and they've started looking at what the requirements are. They're looking at their own

responsibilities. The plaintiff's bar is following behind. So I think that, as everyone gets up to speed, and as Medicare prepares itself more and more for the opening of the door for the liability Medicare set-aside program, we're going to start seeing more of the, those cottage industries, um, taking root. Jay, if we may, um, at the top of the show we talked about, the US vs. Stricker case. Can you share a little bit with us regarding the facts of that case?

JAY: Sure. Stricker's an important case because, you can look at Medicare suing several law firms as well as suing several defendants and insurance carriers in a large mass tort action which took place in Alabama. The facts of the case were that, back in 1995, there was the allegation by several plaintiffs that PCBs, which are found hazardous by the EPA, were dumped into a river, uh, in northern Alabama. And it turned out that some 20,500 plaintiffs then filed suit, claiming that they were injured by the release of the PCBs from a chemical plant that had been owned by Monsanto and Solutia, and another, uh, spinoff called Pharma. And in this particular situation, the plaintiffs' claims were consolidated into two primary cases. One was called Abernathy and the other one was called Tolbert. And in the year 2003, a law professor got together and, as part of the important facts of the case, on September 3 of 2003, a settlement was reached, and then within a week, uh, $75 million was transferred into a bank account subject to the court jurisdiction. And then what happened was, the attorneys went about getting a certification from the rest of the class. And when they had 97 percent of the plaintiffs certifying that they were going to go along with the settlement on December 2nd of 2003, they thought they were all set. Well, on December 1st of 2009, some six years later, and one day before, the anniversary of that certification, the Department of Justice files a lawsuit against the three groups of defendants, which were the mass tort defendants, Monsanto, Pharmacia, and Solutia, you know, who are the polluters. Two, they sued the insurance carriers, which was Travelers' Insurance and AIG, American International. And three is, they sued all of the law firms who had received and distributed out the settlement money. And so the Department of Justice claimed several things. Number one is that the plaintiffs in the class action has released their medical claims in the mass tort action, two, that Medicare, uh, when they went and audited the 20,500 plaintiffs, discovered that there was 907 Medicare beneficiaries who had received some $67 million worth of Medicare benefits. And because the payments were conditional, they were secondary, and therefore this recovery from Monsanto, Solutia, and the insurance carriers were primary payments, that the insurance carriers, the lawyers and the defendants had a duty to make sure that those conditional payments, the $67 million had been reimbursed to Medicare, and of course it had not been. So in this particular settlement, there's 300 million that was on the table for everyone, and the law firm had received 129 million, and was classified as an entity, uh, underneath the Medicare statute. And so that the Department of Justice sued, uh, all three classes of defendants for double damages, which meant $67 million plus a 100 percent penalty for failing to make the conditional payment.

LARRY: Well, the story on this case is getting more and more intriguing. We're going to take a quick break right now, but when we come back in about a minute, we're going to continue the, the discussion on the Stricker case with, uh, attorney Jay Kearns. I think we call can't wait to hear how it all turned out. So, we'll be right back on Ringler Radio.

LARRY: Welcome back to Ringler Radio. Glad you could join us. My co-host today is Lynn De Mauro Clark, and our special guest, attorney Jay Kearns, from the Kearns & Kearns law firm in West Hartford, Connecticut. Jay, let's get back to the Stricker case. You mentioned that the, the case was settled in September 3rd of 2003, and then certified in December of that year…and then it wasn't until 2009, until the, the Justice Department stepped in. I assume there is a statute of limitations with questions that arose. What exactly happened and transpired from that point on? How did the court ultimately decide?

JAY: Well, Larry, first and foremost, which I think is a, a dangerous situation for our listeners is, on the Medicare Secondary Payer Act, there is no statute of limitations. And one of the first things that the defendants challenged was the, ability of the Department of Justice to bring this case almost six years, or six and a quarter years after the money had already been distributed to people. And so they filed a motion for dismiss, alleging that, uh, this was a statue of limitations issue. And so here in the Stricker case, one of the significant factors in the decision is that for the first time ever, a Federal court determines what the statue of limitations is. And they looked at two things. When it came to attorneys, they said, look. The attorneys are really agents for the Medicare beneficiaries. They've acted as agents. There's a contractual relationship that's presumed between the Medicare beneficiaries and the attorneys, because of the attorney-client agreement and a fee agreement. And so there, they held that that's subject to a six-year statute of limitations. And where they got the six-year statute of limitations from is the Federal Claims Collection Act, which is found at 28 United States Code 2415. So there, you're now seeing a decision by a Federal court saying the government can go back six years after a settlement, and hunt down the lawyer who gave away the money to the plaintiff without paying Medicare.

LYNN: Well, and I think there's some important lessons here for the, for the attorneys. Talk a little bit about what the Stricker decision's significance to the plaintiffs' attorneys is. ..

JAY: Well, I think the, the significance here, Lynn, is you really have to get as much information from your client as possible. Because the Medicare Secondary Payer Act throws a net around people who have Medicare eligibility, or within 30 months are going to be on Medicare, because they've got to wait for, Medicare disability, and then that may take six months, and then, wait two years after they have a finding of Social Security Disability to qualify for Medicare. So, someone who is receiving Medicare, or possibly in the future, within 30 months, is going to receive Medicare, you've got to be very careful that you know all their medical expenses.

LARRY: What else did they say, when they talked about the statute of limitations as it, as it relates to the lawyers, what about to the other defendants?

JAY: On the other defendants, they found that it was a three year statute of limitations, and they found that that was for tortious conduct, and underneath the Federal Claims Collection Act, it's a three-year statute of limitations that apply to the two classes of defendants which were the insurance carriers and the mass tort defendants, Monsanto, Solutia, and Pharmacia.

LARRY: So in that case, did they say Medicare, you, you were too late to, to assert your claim back against these folks?

JAY: Yes, they did, Larry. One of the things they found is that Medicare should've brought the case some three months earlier, before the September 3rd, 2009, six-year anniversary, when it came to the lawyers. With the mass tort defendants and the insurers, they were way too late and they should've been sued within three years. It was interesting discussion where the Federal judge who made the decision said that at any point in time, the Federal government could've, appeared and intervened in the case. And they had plenty of time to do so, and even in the decision, cited the fact that the case was well publicized in the Wall Street Journal, a lot of TV shows, and...

LARRY: So there was notice. They had notice.

JAY: There was notice in terms of the newsworthiness of the settlement.

LARRY: Well, I assume Medicare's gotten a lot smarter since, since this, this action.

LYNN: We'd like to think so. And Jay, really, in summary, considering all the facts of the case and the decisions, what advice would you give the listeners of this program, who are looking at liability Medicare set-asides in mass tort cases?

JAY: Well, number one, when it comes to the liability Medicare set-aside part, I think the Stricker case shows you that the Federal government has the ability to go back six years in a time machine to do an audit on various plaintiffs to see if there are conditional payments that they're entitled to recover. But the other side of the sword is that now they can say to those people that they recover the conditional payments from, what should they do to protect Medicare's interest in the future? You know, do you have a liability Medicare set-aside? And one of the remedies that the, uh, Federal government has under MMSEA is that if they don't receive the conditional payment, they can basically shut off the Medicare beneficiary and say, sorry, we're not going to pay you any Medicare benefits. And Lynn, what that's going to trigger is, if the plaintiff finds out that there should've been a liability Medicare set-aside, and CMS decides not to pursue the lawyer or pursue the Medicare beneficiary directly, they can just shut off the benefits. And another remedy is to collect on the, uh, Medicare lien directly from that individual's Social Security check.

LARRY: And you also know at that point, the claimant's going to sue his lawyer.

LYNN: That's right, it could get very ugly.

LARRY: On an E&O claim, saying you didn't protect my interest. So I think the, the lesson for everybody here is that Medicare, this is, this is serious business now for Medicare. We all know that Medicare's under a lot of stress in terms of just being able to pay future beneficiaries. So, anything they can do to recover funds, they're going to be, uh, like tigers. So everyone's got to be aware of the rules that have to be followed and the, the real strength that Medicare has to come back and, and really go after everybody. So, Jay, I think what you're really saying is be very careful when you're dealing with Medicare. Make sure we're considering Medicare's interest when we settle these cases, and for insurers make sure you're becoming that responsible reporting entity. Make sure that whatever is out there, that Medicare can, can be dealt with, gets dealt with by all the parties up front, and have all the language in the settlement agreements that speak to it.

JAY: That's an excellent summary, Larry, and I'd throw one other point in there. And I think that when it comes to the litigation, there's going to be a requirement of collaboration between the defendants' counsel, who are going to want to protect the defendants and the defendants' insurance carrier, and also the plaintiffs, because everybody's in the crosshairs of the Department of Justice. And so there has to be some amount of collaboration and exchange of information in order to make sure that everybody protects Medicare's interests, so that Medicare, at a later date, can't come back and s-sue everybody.

LARRY: Well, that's a good, that's a good place to close this discussion. I think we've all been learning along the way. And Lynn, I know you do so many of these, and Medicare's got their fingers in everything, and we've all got to be very, very careful.

LYNN: They do, and this was very valuable information. Thanks so much, Jay.

LARRY: Jay, how would someone get ahold of you if they wanted to reach you? I know we mentioned the website earlier, but why don't you repeat that? And if there are any other ways, let me know.

JAY: Sure. My last name is spelled K-E-A-R-N-S, and my website is www.kearnsandkearns.com. And my phone number in West Hartford, Connecticut is 860-233-1281.

LARRY: Great. Lynn, if someone wanted to reach you, how would they do that?

LYNN: Well, they can reach me at my Ringler Associates website. That's lclark@ringlerassociates.com, or at area 203-639-3585, which is my office in Meridan, Connecticut.

LARRY: Great. And if you're out there, uh, listening, you can obviously get ahold of any of the Ringler Associates by going to the Ringler Associates website, ringlerassociates.com. And you can listen to all the Ringler Radio shows, by going to ringlerassociates.com or legaltalknetwork.com, where you can actually download, listen right there, download it on to your iPod, and walk around the reservoir in West Hartford, Connecticut, with your little ear buds in and hear, hear Jay Kearns and Lynn in this discussion. So for all of you out there, thanks for listening. Jay, thanks again.

JAY: Thank you, Larry.

LARRY: And Lynn, thank you.

LYNN: Thank you both.

LARRY: Now, all of you out there… go out and have a great day.