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SPECIAL REPORT: Medicare Set-Aside Arrangements in Third Party Liability Cases

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THE LEGAL AUTHORITY FOR REQUIRING A MEDICARE SET-ASIDE ARRANGEMENTS

Medicare Secondary Payor Act. The authority for the Centers for Medicare and Medicaid Services (CMS) to require a Medicare Set-Aside Arrangement (MSA) is found in the Medicare Secondary Payer Act (MSPA). Under the MSPA Medicare is generally precluded from paying the beneficiary's medical expenses when payment "has been made or can reasonably be expected to be made under a worker's compensation plan, an automobile or *liability* insurance policy or plan (including a self-insured plan) or under no-fault insurance.

Medicare payments are conditional on reimbursement from the primary payor.

Medicare, Medicaid and SCHIP Extension Act of 2007. Historically, CMS has enforced the provisions of the MSPA only in worker's compensation cases. However, the passage of the Medicare, Medicaid and SCHIP Extension Act of 2007 requires all insurers, third party administrators for group health plans, self-insured plans, and self-administered plans to identify situations where the plan is or has been a primary plan to the Medicare program. There is a civil penalty of \$1,000 per day for non-compliance. The plan shall determine whether a claimant is entitled to benefits under the Medicare program. If the claimant is determined to be so entitled, the plan must submit a report including the identity of the claimant and such other information as the secretary shall specify.

The reporting requirements for group health plans begin January 1, 2009. The reporting for liability cases begins July 1, 2009. The report includes the contact information for the personal injury attorney.

CMS Regional Coordinator Pronouncement. According to Sally Stalcup, Region VI, MSP Regional Coordinator, CMS, "At this time, the Centers for Medicare and Medicaid Services (CMS) is not soliciting cases solely because of the language provided in the general release. CMS does not review or sign-off on counsel's determination of the amount to be held to protect the Trust Fund in most cases. If we do, however, urge counsel to consider this issue in settling the case and recommend that their determination as to whether or not the case provided recovery funds for *future medicals* (emphasis added) be documented in their records. Should they determine that future services are funded, these dollars must be used to pay for future otherwise Medicare covered case-related review process in the liability arena as there is for worker's compensation. On rare occasions, when the liability is large enough or other unusual facts exist within the case, the CMS Regional Office will review the settlement and help make a determination on the amount to be available for future services."

Anticipated Impact of the Medicare, Medicaid and SCHIP Extension Act of 2007. The likely outcome of the reporting requirements of the Medicare, Medicaid and SCHIP Extension Act of 2007 is that insurance companies will begin to require MSAs in third party liability cases. There is no reason for insurance companies to run the risk of failing to establish an MSA.

THE THEORY BEHIND A MEDICARE SET ASIDE ARRANGEMENT

Contrived Shift. Under the Medicare Secondary Payor Act, Medicare makes conditional payment for medical expenses for beneficiaries with the understanding that Medicare will be paid when the beneficiary receives payment from a third party. Medicare is opposed to any settlement that results in a contrived shift to Medicare of responsibilities of a claimant's future medical care. In settling claims, Medicare's interest must be considered. The solution to the problem of burden shifting is to establish a Medicare Set-Aside Arrangement (MSA).

Past and Future Medical Bills. Medicare has a right of recovery for past medical bills up to the date of the settlement. The Medicare Secondary Payor Act also applies to third party liability situations in which the settlement or award includes payment for *future* medical expenses. Medicare is not bound by the release with respect to an allocation for future medical expenses. If Medicare determines that the injured party will have future medical expenses then a Medicare Set-Aside Arrangement is expected.

WHEN IS THE MSA REQUIRED?

While the MSPA clearly establishes a requirement that Medicare's interest be considered in liability cases, there are no rules or regulations under the MSPA. There are rules in Worker's Compensation (WC) cases and the prudent course of action might be to follow those in liability cases. That would mean that an MSA is required if:

- the settlement exceeds \$25,000 and the claimant is currently eligible for Medicare; or
- the settlement is for more than \$250,000 and the plaintiff can reasonably be expected to become eligible for Medicare within 30 months.

If an individual is in the process of filing, appealing or re-filing for SSDI, that person is included in the 30-month window notwithstanding the fact that a previous application may have been denied and have not been appealed. An individual who is 62 years and 6 months of age could be eligible within 30 months, and an individual suffering from End-Stage Renal Disease (ESRD), but who does not yet qualify for Medicare based on ESRD, would also be considered a person having a "reasonable expectation" of Medicare enrollment within 30 months .

If neither of these criteria are met, there is no need for an MSA. If it is absolutely clear that there will be no future medicals as a result of the injury subject to the litigation, then no MSA is required.

It is important to note that a beneficiary may not waive his right to future Medicare in order to avoid establishing an MSA.

In determining whether the \$250,000 threshold is met, if there is a structured settlement the value of the structure rather than the cost is used. Also, in determining whether the \$250,000 threshold is met, past medicals, future medicals, attorney's fees and costs are included.

WHAT IS THE RISK TO THE PERSONAL INJURY ATTORNEY FOR FAILING TO ESTABLISH AN MSA?

Double Damages. Plaintiff's attorneys who fail Medicare's interest are potentially responsible for double damages. CMS is authorized to bring an action "against any entity" including a beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received any portion of a third party payment directly or indirectly, if those third party funds – rather than Medicare – should have been paid for the injury-related medical expenses.

Potential Malpractice. In addition, there is a malpractice risk. Plaintiffs who have not established an MSA and who file future claims for Medicare may have those claims denied. CMS has taken the position that where no MSA has been established, the entire settlement can be considered for future medicals and Medicare will not pay the plaintiff's medical bills until an amount equal to the entire settlement has been spent for the plaintiff's medical care. Each personal injury attorney must decide how much risk he or she is willing to accept in order to avoid establishing an MSA.

HOW IS THE SET-ASIDE AMOUNT DETERMINED?

There are companies who will calculate the set-aside amount. The amount is determined by evaluating past medical treatment, current medical condition, and the probability of future medical needs, as well as other factors. Future medicals are limited only to those expenses that Medicare would pay that are related to the injury. Medicare does not pay all medical expenses. There are some services that are not covered; there are deductibles, copayments and maximums per spell of illness. The MSA need not contain monies for those services that would not be covered by Medicare. In calculating the set-aside amount the plaintiff's life expectancy is considered. It is often useful to obtain a rated age as a part of this process. The rated age shows that a person's actual life expectancy may be considerably shorter than their actuarially life expectancy, so that less money is required to be set aside.

Once a Medicare Set-Aside amount is calculated in a worker's compensation case, it is submitted to Medicare for approval. While CMS maintains that a set-aside is necessary in liability cases, there is no mechanism for approval at this time.

CMS is not bound by an allocation for future medicals made by the parties in the settlement agreement. CMS may disregard any such allocation and make its own calculation as to the cost of future medicals.

The cost of future prescription drugs must be considered in calculating the set-aside amount.

ADMINISTRATING THE MSA

There are four possibilities for administering an MSA:

Self-Administered Accounts. These accounts are usually small accounts and are administered by the claimant. No formal agreement is necessary. The claimant must follow the same accounting rules as a professional administrator, but it is likely that most claimants will not comply, but the liability of the personal injury lawyer should terminate when the MSA is established.

Custodial Account. A larger account is usually administered by a custodian. These are professional organizations that have expertise in medical claims administration. They charge a fee and are recommended where financially justified.

Medicare Set-Aside Trusts. A Medicare Set-Aside Trust is a formal trust with a trustee. These are usually used for large accounts. They are also used in connection with Special Needs Trusts if the plaintiff is receiving means-tested public benefits such as SSI, Medicaid, Food Stamps, Veterans Benefits or Section 8 Housing.

Pooled Trusts. In smaller cases where the plaintiff is receiving any of these means-tested public benefits, a Pooled Trust may be considered. A Pooled Trust is operated by a non-profit. The plaintiff's money is pooled with other persons' money for investment purposes, but each member has an individual sub-account. Whenever a trust or a Pooled Trust is used, a sub-trust is established for the Medicare Set-Aside funds.

	No Public Benefits	Public Benefits
Small Settlement	Self Administered	Pooled Trust
Large Settlement	Custodial Agreement/ Professional Administrator	Stand Alone Special Needs Trust

Note: As used above the term "Public Benefits" applies to only means tested public benefits where there are financial eligibility rules pertaining to income and/or assets of the beneficiary and/or his or her family or household. These benefits typically include SSI, Medicaid, Veteran's Benefits, Section 8 Housing and Food Stamps. For purposes of the chart, public benefits does not only include SSDI and Medicare, but a MSA will always be required if the plaintiff is receiving or will receive these benefits.

HOW DOES A STRUCTURED SETTLEMENT FIT INTO A MSA?

Seed Money. An MSA must include seed money with is a cash amount equal to the amount of monies calculated to cover the first surgery procedure and/or replacement and two years of annual payments.

Structured Settlement. If there is a sizable MSA, the balance is usually funded with a structured settlement. The structured settlement is usually payable in annual installments. The remainder of the Set-Aside is divided by the remainder of the claimant's life expectancy and the structured pays annual deposits into the MSA based on a "anniversary date" which cannot be more than one year after the settlement date. If the funds paid into the MSA from the structured settlement are exhausted before the next "anniversary date" Medicare pays until such time as the next structured settlement payment is received.

RECOMMENDATIONS FOR PERSONAL INJURY ATTORNEYS

Recommendations for Personal Injury Attorneys wanting to protect themselves against the risk of future claims by Medicare or malpractice claims by clients are as follows:

- Since no rules currently exist for third party liability cases, follow the WC rules with respect to MSA.
- Arrange for the calculation of a Medicare Set-Aside amount.
- Submit the proposal to CMS. It is unlikely that CMS will respond, but the personal injury attorney should be off the hook so far as his or her obligation to consider Medicare's interests.
- Establish an MSA and fund it with the amount calculated.
- Advise the plaintiff in writing with respect to the rules.
- Advise the client in writing of the potential for the denial of future medical care coverage for the injury subject to the litigation.
- Paper your file.

MEDICARE SET-ASIDE ARRANGEMENTS

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- Is the client receiving SSI or SSD at the time of settlement? Yes No
- Has the client applied for SSDI, or has client applied and been denied but anticipates appealing the decision? Yes No
- Is client in the process of appealing and/or refilling for SSDI benefits? Yes No
- Is client age 62 years 6 months of age or older at the time of settlement? Yes No
- Does client suffer from end stage renal disease but does not yet qualify for Medicare based on ESRD? Yes No
- Is the settlement in excess of \$250,000? Yes No

Note: If client is already receiving Medicare, the threshold is \$25,000.

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