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# Medicare Set Aside Facts

We have many clients who are still very confused regarding the issues concerning the use of Medicare Set Aside ("MSA") arrangements in both Workers' Compensation and Liability Settlements. Our firm has completed a significant amount of research on this subject and hope that the information below will clarify some of the issues pertaining to this topic.

**What is the purpose of an MSA?**

The purpose of an MSA, in both the liability and the workers' compensation context, is to pay for future injury-related care which would otherwise be covered by Medicare.

**Current Guidance from CMS re: MSAs in Liability Settlements**

The Centers for Medicare & Medicaid Services ("CMS") has not chosen to expand its MSA guidance to specifically include liability settlements without a workers' compensation component. That is not to say CMS cannot make such an extension. However, based on our research we believe that unless a settlement has a specific allocation of future medical expenses otherwise covered by Medicare, the elements that would require MSAs in the liability context do not exist.

**What About the New MMSEA Statute?**

The Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") does not contain any new guidance or requirements related to MSAs. The relatively new MMSEA statute has nothing to do with MSAs. The MMSEA statute requires defendants/insurers to report certain information regarding settlements with Medicare beneficiaries to the Secretary of Health and Human Services when appropriate. In fact, the sole purpose of the MMSEA is to ensure that settling parties fully comply with the previously existing Medicare Secondary Payer requirements; that is, past Medicare payments must be verified and resolved in all liability, workers' compensation and no-fault settlements. In this regard, if plaintiff's counsel is already verifying and resolving Medicare's reimbursement claim in all settlements, then they are compliant as far as MMSEA is concerned. This new law (to date) has nothing to do with identifying Medicare-covered future costs of care, which leads to MSA issues and analysis.

In spite of this current lack of statutory requirement for MSAs in liability settlements parties to the settlement should be reviewing MSA issues as part of a settlement and either establishing an MSA for an appropriate amount (if necessary) or documenting the reason why an MSA was not appropriate based on the case-specific facts in light of the currently enacted law and guidance provided by CMS.

**When is an MSA needed in a Workers' Compensation settlement?**

Based on currently enacted law and guidance provided by CMS, an MSA is needed in a workers' compensation settlement when all of the following three criteria are met: 1) the claimant is either

currently enrolled in Medicare or possesses a "reasonable expectation" of Medicare enrollment within thirty (30) months of settlement; 2) the workers' compensation settlement permanently closes future medical expenses, effectively shifting the burden of future injury-related care from the workers' compensation carrier to Medicare on a permanent basis going forward; and 3) the claimant, in fact, requires future injury-related care that would otherwise be covered by Medicare. If a workers' compensation settlement meets these three criteria, then an MSA is appropriate. MSAs are not needed in all workers' compensation settlements.

**When is the Submission of MSA Proposals for Review / Approval necessary?**

While CMS has provided a series of guidelines to help the parties properly address the MSA issue in all workers' compensation settlements, CMS only will "review and approve" workers' compensation settlements (and associated MSA calculations) that meet certain thresholds. CMS established the following workload review thresholds to help manage the number of workers' compensation MSA proposals submitted for review and approval: 1) for a claimant who is a current Medicare beneficiary, the gross settlement amount must be greater than $25,000; and 2) for a claimant who is not yet Medicare enrolled but possesses a "reasonable expectation" of Medicare status within thirty (30) months of settlement, the gross settlement amount must be greater than $250,000.

*An often misunderstood concept here is that these thresholds are workload review thresholds, not safe harbor amounts.*

We still hear many workers' compensation attorneys say that an MSA is not required in their case because the gross settlement amount is not greater than $250,000, however, again this is only a threshold for CMS's review and pre-approval so please be careful!

**Claimant Education is Key**

It is ***very*** important that the injured claimant is educated regarding Medicare Set Aside issues and why or why not one is needed in their case. Counsel should not assume that simply because an MSA is proposed and structured in a certain way that it is, 1) the correct way; 2) the only way, 3) or even necessary.

Please let us know if you have any questions regarding the issues discussed above or anything else. We would be happy to assist you with the education of claimants regarding MSA issues and the evaluation of MSA proposals.

***SOURCE**: The source for much of the information above is an article published by the Garretson Firm titled "The Use and Propriety of Medicare Set Asides in Liability Settlements" and available on their web site at www.garretsonfirm.com.*