



Legal Bulletin

April 14, 2010

Liability Settlements: Considering Medicare's Interest as to Future Medicals

In reference to liability settlements involving Medicare beneficiaries, a continuing topic of discussion among attorneys and adjusters is the appropriate method by which to consider Medicare's interest as to future medicals including whether usage of a Medicare Set-Aside (MSA) arrangement is mandated. The following is a brief summary of the current information available as it applies to this topic.

Relevant Laws

- The Medicare Secondary Payer Statute (MSP) enacted in 1980 essentially relegates Medicare to the status of secondary payer when payment has been made or can reasonably be expected to be made by a primary plan. 42 U.S.C. 1395y (b) (2) (A).
- Primary plans include liability insurance and self insured plans. 42 U.S.C. 1395y (b) (2) (A) (ii). No distinction is made that "carves out" or limits MSP obligations in liability settlement cases.

The Medicare, Medicaid & SCHIP Extension Act of 2007 (MMSEA) requires the reporting of a settlement, judgment, award or other payment from a liability (including self-insureds), no-fault or workers compensation insurance involving Medicare beneficiaries. For more information, please see the Centers for Medicare and Medicaid (CMS) website (<http://www.cms.hhs.gov/mandatoryinsrep>).

CMS Position

On several occasions, CMS has provided guidance on its position concerning whether the requirements of the MSP apply to cases involving a liability settlement. In short, CMS teleconferences have confirmed that they expect their interest to be taken into account when a settlement involving a Medicare beneficiary includes future medicals. Please note the following:

On the October 1, 2008 CMS Teleconference, the agency clarified their position regarding Liability Medicare Set-Asides:

"With respect to liability Medicare Set-Asides, in general, Medicare does not have the same formalized process as workers compensation. But the obligation with regard to protecting Medicare's interest is the same for both workers' compensation and liability situations."



In October 2009, the San Francisco CMS Regional Office stated the following:

“The Centers for Medicare & Medicaid Services has no current plans for a formal process for reviewing and approving Liability Medicare Set-Aside arrangements. However, even though no formal process exists, there is an obligation to inform CMS when future medicals were a consideration in reaching the liability settlement, judgment, or award as well as any instances where a liability settlement, judgment, or award specifically provides for medicals in general or future medicals.”

Most recently, on March 16, 2010, during a Teleconference, CMS provided additional clarification on Liability Medicare Set-Asides:

Question: “Do you have any thoughts or any expectation that doing Medicare Set-Asides is ever going to be something that enters the world of the liability and casualty payers”?

Barbara Wright: “*It has already entered.* As we’ve said on many calls, CMS has a formalized process to review proposals for workers’ compensation Medicare Set-Aside amounts. It does not have the same formalized process for liability Medicare Set-Aside arrangements. The process for workers’ compensation is voluntary. We have a process for an informal process on the liability side that if a plaintiff’s attorney or insurer, et cetera, wishes to approach the appropriate CMS regional office and the regional office has the ability to do so workload or otherwise, that they can choose to review a proposed set-aside amount if they believe there is significant dollars at issue. Again, it’s not the same extensive process that we have for worker’s compensation. But regardless of whether CMS has a formalized process, or regardless of whether or not you’re participating in the formalized process for workers’ compensation Medicare Set-Aside, the statute has the same language in either situation. It’s not parallel language. It’s not similar language. *It’s literally the same physical sentence that we’re not to make payment where payment has already been made.* So where future medicals are a consideration in arriving at the settlement, et cetera, then appropriate arrangements should be made for appropriate exhaustion of the settlement before Medicare is billed for related services.”

Summary

As noted above, currently CMS has not provided any protocols for establishment of their interest in future medicals such as those which exist within the area of workers’ compensation. Thus, while a formal Medicare set aside arrangement (MSA) is not mandated, the parties should still give consideration to protecting Medicare’s interest and the appropriate method by which to do so. The following are some options:

1. Preparation of an LPPA – establishes the cost projection of future medicals but is not an MSA.

