



August 8, 2011

## **Stalcup Handout Cited in Louisiana Federal Court Case**

This Legal Bulletin follows up on PMSI's prior bulletin dated August 1, 2011, which discusses a "handout" written by Ms. Sally Stalcup of Region VI of the Centers for Medicare and Medicaid Services (CMS). A case has recently been decided in the United States District Court for the Western District of Louisiana, Lafayette Division, which places Ms. Stalcup's handout in proper context and perspective. For a copy of the handout, [click here](#). In *Schexnayder v. Scottsdale Insurance Company*, 2011 U.S. Dist. LEXIS 83687, decided July 28, 2011, it becomes clear that the purpose of Ms. Stalcup's handout was to respond to an inquiry made by the federal judge in this case.

In *Schexnayder*, the claimant was involved in an automobile accident while in the course and scope of his employment. The defendants in the case were two insurance carriers, a workers' compensation carrier and a liability carrier. The defendants stipulated to liability, but strongly contested the reasonableness and necessity of the medical treatment and overall damages amount. This case involved a settlement for both a worker's compensation and liability claim. CMS has stated that settlements involving both a workers' compensation and third-party liability claim still require a Medicare Set-Aside (MSA), as third-party liability proceeds are also primary to Medicare.<sup>1</sup>

The parties eventually reached a global settlement on the issue; however, the global settlement was conditioned upon the claimant accepting sole responsibility for protecting Medicare's interests. One of the conditions of the global settlement of this case was that CMS had to approve a submitted MSA; however, the settlement parties submitted to the court that because the claimant was not currently Medicare-eligible and did not have a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date, Medicare would not review a proposed MSA.

The court decided to set the matter for an evidentiary hearing and ordered service to be made by the Clerk of Court on the Secretary of Health and Human Services (HHS), Chief Counsel of

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<sup>1</sup> See CMS Memo April 22, 2003 Q&A 19.



HHS/OGC for Region VI and the Civil Chief of the Office of the United States Attorney for the Western District of Louisiana. The court was advised by a letter dated July 6, 2011 from the U.S. Attorney that the HHS/CMS would not participate in the hearing. Nonetheless, CMS provided the Court, through the United States Attorney's Office, with Ms. Stalcup's handout. The *Schexnayder* opinion does not specify, but it appears to be possible that Ms. Stalcup's handout was prepared in response to *Schexnayder's* service upon Region VI seeking clarification of various issues. Regardless, the court used the handout as a guide to make its decision as to what needed to be done to protect Medicare's interests.

Interestingly, the court spent an ample amount of time analyzing Ms. Stalcup's statement that "[t]he current policy of CMS/Medicare is that they do not require or approve Medicare set aside settlements in personal injury cases. . ." What the court likely did not realize is that CMS would classify this as a global settlement involving a workers' compensation and liability claim. Due to the fact that a workers' compensation injury was involved, the workers' compensation MSA review thresholds could be applied to this settlement. Therefore, the fact that CMS does not have a formal policy in place for review of liability MSAs was not really pertinent to the court's decision. Had the claimant been on Medicare or within 30 months of reasonable expectation of Medicare eligibility, CMS would have reviewed the MSA since it would be considered a workers' compensation MSA for CMS submission purposes.

Despite being able to obtain CMS' review on the MSA, the court still sought to ensure that it protected Medicare's interests. Christine Hummel ("Hummel"), an attorney and MSA/MSP specialist, determined that the claimant's future potential medical expenses would be \$239,253.84. Hummel utilized Louisiana Workers' Compensation Fee Schedule to determine the claimant's future medical costs and was accepted as an expert by the court. The court ordered that Hummel's recommended MSA amount be set aside by the claimant. The court further instructed that should Medicare make any conditional payments, the claimant promptly reimburse Medicare for such conditional payments.

The *Schexnayder* decision is interesting on many levels. First, this case demonstrates that the current MSP compliance framework continues to confuse and frustrate parties, who are attempting to settle a case in which Medicare's interests may be involved and desire some type of assurance that Medicare will not come back at a later date in an attempt to impose additional liability. An example of this confusion is that if a claimant is not receiving Medicare benefits, conditional payments are not an issue as it is not possible for Medicare to make a conditional payment on a claimant who is not currently receiving Medicare benefits. Therefore, the court instructing the claimant to reimburse Medicare for conditional payments appears to be unwarranted and perhaps overprotective.

Nonetheless, what is well known is that Medicare's interests must be protected in these secondary payer situations; however, CMS does not mandate a specific mechanism to protect



those interests. On this final point, CMS seems unwilling to provide any additional guidance on exactly how a party can demonstrate, beyond all doubt, that the parties have structured a settlement in which Medicare's interests have been fully and completely protected.

In a time in which MSP compliance remains very much an uncertain and gray area, it is likely that we will see more decisions similar to *Schexnayder* and perhaps more "informal" guidance from other regions of CMS who are being solicited to provide their opinions on how to protect Medicare's interests in a particular settlement. Ultimately, *Schexnayder* and other cases like this may be used as support for further clarification in the MSP compliance area.

For more information, please contact Heather Schwartz, Corporate Counsel, PMSI at [Heather.Schwartz@pmsisettlement.com](mailto:Heather.Schwartz@pmsisettlement.com) or 813.612.5504 or visit our Blog at [www.MedicareInsights.com](http://www.MedicareInsights.com).

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