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Medicare Set-Aside Accounts for Future Medical Expenses in Personal Injury Claims

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When a settlement is reached in a personal injury lawsuit, a written settlement agreement is prepared, and, if medical expenses for the injured party have been paid by Medicare, a Medicare Set-Aside Account (MSA) may be created to reimburse Medicare for past, and potentially future, medical payments.

The purpose of a MSA is to ensure that Medicare will not pay bills for plaintiff's injuries where there is other insurance available. The rationale is that since plaintiff received settlement money from an insurance company to cover future medical expenses, Medicare wants to ensure that a portion of the settlement money is spent on injury-related care before the taxpayers start paying through Medicare.

Attorneys and claim representatives need guidance to advise clients and comply with Medicare's demands. This article discusses the ramifications of a recent federal decision, Aranki v. Burwell, as well as other federal and state cases on personal injury settlements when dealing with the issue of the potential need for MSAs for future medical expenses.

History

Until 1980, Medicare was the primary payer for all services covered by Medicare except those covered by workers' compensation. In 1980, in an effort to shift costs from the Medicare program to private payers, Congress enacted the Medicare Secondary Payer Act (MSPA), 42 U.S.C. § 1395y(b), which made Medicare a secondary payer to certain plans, including liability insurance. Regulations implementing the "nuts and bolts" of the MSPA have been codified at 42 C.F.R. Part 411. As the secondary payer, Medicare provides coverage for any amount not covered by a primary payer or primary plan. Under the MSPA, a primary payer includes a tortfeasor and the tortfeasor's private insurer.

The importance of MSA's in today's litigation realm

There is no federal rule or statute that requires the creation of MSAs for future medical expenses in third-party personal injury actions. Attorneys and claim representatives need guidance to advise clients and comply with Medicare's demands. Some commentators believe that MSAs for future medical expenses are required in personal injury actions where the injured party is either a Medicare recipient or is Medicare eligible. Others believe no such requirement exists, reasoning that the federal government has no right to claim an interest in future medical expenses as part of a settlement given the absence of any enforceable regulations. So what is the answer?

Case law and Centers for Medicare and Medicaid Services' policy memoranda

A recent case out of the U.S. District Court in Arizona, Aranki v. Burwell, makes it very clear that MSAs are not required for future medical expenses in personal injury cases, unlike such requirements in workers' compensation cases. The following is an excerpt from the Aranki case:

> To comply with the provisions outlined in the MSP statute, in workers' compensation cases CMS (Centers for Medicare and Medicaid Services) mandates the creation of a 'Medicare Set Aside' ("MSA") account. (42 C.F.R. §411.) The purpose of a MSA is to allocate a portion of a workers' compensation award to pay potential future medical expenses resulting from the work-related injury so that Medicare does not have to pay. However, no federal law or CMS regulation requires the creation of a MSA in personal injury settlements to cover potential future medical expenses.

The Aranki case involved the issue of whether a MSA is necessary in a medical malpractice case. The court held the case was not ripe for review because no federal law mandates CMS to decide whether plaintiff is required to create a MSA. As such, the court lacked subject matter jurisdiction to hear this case. As the court noted, there may be a day that the CMS requires the creation of MSAs for future medical expenses in personal injury cases, but that day has not yet arrived.

Those having to deal with MSAs and future medical expenses in liability settlement cases can also look to other recent court decisions for some guidance. For example:

- *Berry v. Toyota Motor Sales, U.S.A., Inc.* (2015) The parties asked the court to determine whether there was a need for a MSA in connection with a settlement. Specifically, the parties sought a determination that CMS's interests had been adequately taken into account by the settlement to which the parties had agreed. The Berry court found there

was no need for a MSA as part of the settlement of this case. Based on the evidence of plaintiff's treating medical providers and correspondence from CMS, Medicare had been reimbursed for all conditional payments that it made for plaintiff's accident-related treatment. Since it was not reasonably anticipated that plaintiff would receive any future accident-related treatment, the court found that Medicare would not be called upon to pay for such are in the future.

- *Tye v. Upper Valley Med. Ctr.* (2014) The Ohio Supreme Court decided that the parties were not required to set aside any portion of the settlement proceeds for future benefits which may be paid or payable to Medicare. In its decision, the Court noted several reasons for its holding, including: (1) the plaintiff's injuries were paid by a private health insurance carrier, (2) the private health insurance carrier would continue to pay plaintiff's medical expenses in the foreseeable future, and (3) Medicare did not have an established policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement.
- *Warren Frank v. Gateway Ins. Co.* (2012) The United States District Court for the Western District of Louisiana held Medicare does not currently require or approve MSA's when personal injury lawsuits are settled.
- *Sipler v. Trans Am Trucking, Inc.* (2012) The court determined that no federal law requires set-aside arrangements in personal injury settlements for future medical expenses.
- *Big R Towing, Inc. v. David Wayne Benoit, et al.* (2011) The United States District Court for the Western District of Louisiana found that a set-aside for future medical expenses in a liability case was appropriate.

Along with the above case law, CMS policy statements offer additional guidance in terms of when to set up a MSA account for future medical expenses. Although these statements do not have the force of law, they do reflect a body of expertise and informed judgment to which courts may properly resort for guidance. (See Anderson v. Burwell, (2016) F.Supp.3d (U.S. Dist. MI))

CMS policy memoranda

CMS has issued several policy memoranda on how Medicare's interests must be protected in liability cases. In 2011, CMS issued a 3-page handout with internal guidance addressing liability settlements and MSAs where no future injury-related care was required. Although not legal authority, the handout provides some guidance when dealing with parties' respective responsibilities with respect to future medical expenses. With respect to the obligations of plaintiff's counsel, the handout advises that when a plaintiff attorney determines decides that

a settlement is intended to pay for future medicals, he or she should see to it that those funds are used to pay for otherwise Medicare-covered services related to what is claimed and/or released in the settlement.

According to Medicare Regional Coordinator Sally Stalcup:

> There is no formal CMS review process in the liability area as there is for Workers' Compensation, however Regional Offices do review a number of submitted set-aside proposals….If there was/is funding for otherwise covered and reimbursable future medical services related to what was claimed/released, the Medicare Trust Funds must be protected. If there was/is no such funding, there is no expectation of 3rd party funds with which to protect the Trust Funds. Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals and if so, a need to protect the Trust Funds. They must decide whether or not there is funding for future medicals….If the answer for defense counsel or the insurer is yes, they should make sure their records contain documentation of their notification to plaintiff's counsel and the Medicare beneficiary that the settlement does fund future medicals which obligates them to protect the Medicare Trust Funds. It will also be part of their report to Medicare in compliance with Section 111, Mandatory Insurer Reporting requirements.

On September 30, 2011, CMS Acting Director Charlotte Benson issued a policy memorandum outlining the possible requirement of MSA funds in liability cases. This memo provided first-time guidance for MSA amounts related to liability insurance settlements, judgments, awards, or other payments. In discussing settlements of injuries related to liability insurance, the memo states:

> Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability insurance 'settlement' has been completed as of the date of the 'settlement,' and that future medical items and/or services for that injury will not be required, Medicare considers its interest, with respect to future medicals for that particular 'settlement,' satisfied. If the beneficiary receives additional "settlements" related to the underlying injury or illness, he/she must obtain a separate physician certification for those additional 'settlements'.

In late 2014, the United States Department of Health & Human Services (the federal agency CMS reports to and takes direction from) issued the following:

> The Centers for Medicare & Medicaid Services (CMS) 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 judgment or award specifically provides for medicals in general or future medicals.

Similar to the 2011 CMS handout discussed above, this letter is not legally binding, but is useful for attorneys handling the issue of future medical expenses and settlements.

To what extent are attorneys responsible for establishing MSAs for future medical expenses?

As of the date of this article, there is no statutory requirement that attorneys establish MSAs in liability settlements if the plaintiff is not a Medicare beneficiary. Personal injury settlements are clearly distinct from workers' compensation settlements. As one court noted, in contrast to the workers' compensation scheme that "generally determines recovery on the basis of a rigid formula, often with a statutory maximum," tort cases involve noneconomic damages not available in workers' compensation cases, and a victim's damages are not determined by an established formula." (Sipler v. Trans Am Trucking, Inc. at p. 638) However, that does not mean attorneys can ignore this issue and then plead ignorance. Medicare's interests must still be protected, which may involve setting up a MSA. Otherwise, the attorney may face severe penalties of up to $1000 per day, per claim.

When MSAs are required

For a MSA to be appropriate, (1) the plaintiff must be a Medicare beneficiary and (2) it must be determined that plaintiff will incur future care related to the underlying lawsuit or injury which would otherwise be covered by Medicare. If these two requirements above are met, then the parties should determine what amount of the settlement should be allocated to future medical care.

According to the Garretson Resolution Group (GSG), we now have some clarity about what the federal government considers material when it comes to future medical expenses under the MSPA. GSG, a neutral private provider of services to parties settling personal injury claims involving MSA and MSA custodial account services, has recently published a guide on how to handle future medicals in 2016 and under the MSP Statute. The 20-page guide lays out what GSG considers to be the "best practices" on the future medicals issue today. GSG explains the best practice is to (1) identify whether the amount of compensation from the primary plan

exists within the settlement award, (2) identify the exact amount of compensation for future medical expenses, and (3) ensure Medicare is not billed until that amount is exhausted.

Arguments for and against establishing these accounts for future medical expenses

For MSAs

At present, there is a heated debate among practitioners over whether MSA's are even required. Federal law explicitly states that if dealing with a recovery in a personal injury case, the interest of Medicare must be considered. (42 U.S.C. §1395y(b)(2)) By setting up MSAs, parties will avoid costly penalties if Medicare determines the parties improperly billed Medicare, including double damages in a claim by the U.S. for recovery of conditional payments, as well as a debt collection action by the Department of Treasury. MS's are cost effective, are easily accessible, and bring finality to the liability claim. They are not required by law, but it is a reasonable approach that parties can adopt to protect themselves from MSP liability. As noted, if MSA accounts are not set up but should have been, the attorney may face fines of $1000 per day, per claim. (See "When to Use a Liability Medicare Set-Aside Arrangement (LMSA) by Roy A. Franco")

Against MSAs

As noted above, there is no federal regulation nor does the United States Code specifically require that MSA fund be created. The federal regulations dealing with Medicare as a secondary payer to post-settlement medical expenses apply only to workers' compensation cases. Medicare does not currently have an established policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases.

Based on CMS's policy memoranda and recent case law, there seems to be a distinction being drawn between cases that require a MSA and those that do not. MSAs are not required where (1) the claimant is being compensated only for past medical expenses, and future medical expenses are not at issue; and (2) the claimant is not receiving Medicare, nor is expected to do so in the near future. Those against MSAs argue that a requirement to have personal injury settlements specifically apportion future medical expenses would prove burdensome to the settlement process and, in turn, discourage personal injury settlements. Medicare may refuse to pay future medical expenses related to the claim for which a responsible reporting entity has already assumed liability. Some believe that MSAs increase cost of the claim; however, MSA supporters remind those who oppose MSAs that the Medicare Set Aside comprises a portion of the settlement amount, and therefore there are no increased costs.

While no regulation or statute currently requires the creation of a MSA for future medical expenses in a third-party injury settlement, given the current trends as discussed in this article, it would seem prudent to create a MSA in any case that involves a reasonable likelihood of future injury-related medical care arising out of the underlying events covered by the settlement. The wise practitioner or claim professional should make this part of his or her settlement "checklist" in personal injury cases.

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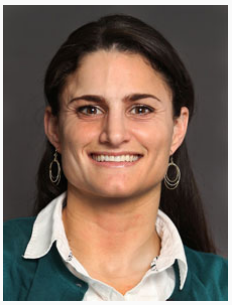

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