Medicare Matters: Part III

Utilizing Medicare Set Aside Accounts in Personal Injury Settlements

by Jill Gradwohl Schroeder & Stephanie Frazier Stacy

Editor's Note: "Medicare Matters" is a three-part series addressing several of the ways in which Medicare's right to recover conditional payments impacts personal injury claimants, lawyers and insurance carriers. Part I and II appeared in the March & May 2009 issues of The Nebraska Lawyer and are archived on the NSBA website. This article, Part III of the series, discusses utilization of Medicare Set-Aside accounts (MSAs) when settling personal injury claims in which Medicare may have a right to recover conditional payments in the future.

When settling personal injury cases involving Medicare beneficiaries, it may not be enough to merely protect Medicare's right to recover *past* conditional payments for accident-related care. In cases where the settlement or judgment includes compensation for future accident-related medical expenses, parties also may need to consider how to protect Medicare's status as a secondary payer in the *future*.

Years ago, it was not uncommon for Medicare beneficiaries to negotiate a personal injury settlement which included compensation for future medical expenses and, after receiving the settlement funds, allow their future medical bills (whether accident-related or not) to be submitted to Medicare for payment. This practice effectively shifted to Medicare the burden of paying for future accident-related medical care despite the fact that a "payment has been made" by a "primary payer" intending to compensate the claimant for future accident-related care.[1]

In recent years, Medicare has become increasingly more vigilant about preserving the Medicare Trust Fund and asserting its status as a "secondary payer." One of the ways Medicare has accomplished this has been to recommend that, in addition to reimbursing Medicare's past conditional payments from personal injury settlement funds, Medicare beneficiaries also "set aside" a portion of their settlement to cover the costs of future medical expenses so the responsibility for future accident-related medical expenses is not unfairly shifted to Medicare.

What is a Medicare Set Aside account?

A Medicare Set Aside account (or "MSA") is a separate, interest-bearing, bank account established for the claimant to

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spend exclusively for accident-related medical expenses that would otherwise be covered by Medicare. If the MSA is properly established and administered, once the funds in the account have been depleted, Medicare will begin to pay the claimant's medical expenses even if those expenses are accident-related. By establishing an MSA, the parties may be able to define and limit exposure for payment of medical bills, preserve the Claimant's Medicare coverage, and avoid receiving unanticipated requests for reimbursement from Medicare long after they thought the settlement had been finalized.

MSAs have been widely used in workers' compensation cases, and are Medicare's preferred method for protecting its future interests in settlements which include compensation for future medical expenses. Medicare has issued a series of memoranda to provide specific guidance on how and when MSAs should be utilized in workers' compensation cases,[2] and an entire industry has evolved to facilitate MSA arrangements.

Are MSAs Necessary in Liability and No-fault Settlements?

Use of MSAs in the workers' compensation context, and the resulting savings to the Medicare Trust Fund, prompted some to ask whether, and when, Medicare might formally expand the use of MSAs to no-fault and liability settlements. A review of the literature reveals a continuum of positions on the subject, with some suggesting Medicare is already requiring MSAs in no-fault and liability cases, others predicting Medicare is on the cusp of recommending MSAs in no-fault and liability settlements, and still others arguing there is no need to even consider MSAs outside the workers' compensation context. Some have predicted that, with the advent of Mandatory Insurer Reporting[3], Medicare is likely to take steps to formalize a procedure for establishing MSAs in no-fault and liability settlements, and there already are indications Medicare is doing precisely that. For instance, effective July 6, 2009, Medicare added a definition of "Set-Aside Arrangement" to its Medicare Secondary Payer Manual which, for the first time, defined MSAs in a way which did not limit them to the workers' compensation context:

> Set-aside Arrangement - An administrative mechanism used to allocate a portion of a settlement, judgment or award for future medical and/or future prescription drug expenses. **A set-aside arrangement may be in the form of a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA), No-Fault Liability Medicare Set-Aside Arrangement (NFSA) or Liability Medicare Set-Aside Arrangement (LMSA).**[4]

While the federal statutory basis for establishing Medicare as a secondary payer is no different for workers' compensation plans than for no-fault or general liability plans, Medicare has declined to formally address or establish uniform procedures for utilizing MSAs outside of the workers' compensation context and, as a result, some of Medicare's Regional Offices will agree to review and approve MSAs in liability cases, while others Regional Offices refuse to do so. To further complicate the debate, Medicare's own manual currently states: "There should be no recovery of benefits paid for services rendered after the date of a liability settlement"[5] suggesting a fundamental shift in Medicare policy would be necessary before it could be said that MSAs are recommended in liability and no-fault settlements. As the debate rages on regarding whether MSAs are necessary, or at least advisable, in no-fault and liability settlements, those who bring and defend personal injury claims are left to grapple with how to adequately protect Medicare's interests when settling claims involving future medical expenses.

This article will summarize the arguments for and against using MSAs in personal injury settlements (including workers' compensation, liability and no-fault settlements), and will provide practical strategies for weighing and managing the risks so practitioners can decide for themselves, on a case-by-case basis, whether an MSA is appropriate.[6]

Arguments Supporting Use of MSAs

1. The Medicare Secondary Payer Act provides that Medicare will not pay for services "to the extent that . . . payment has been made or reasonably can be expected to be made under a workmens' compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance."[7] When settlements include compensation for ongoing or future medical expenses, Medicare can take the position that "payment has been made" by the primary payer and Medicare should not be required to pay for such services.

2. If Medicare determines responsibility for ongoing or future accident-related medical expenses has been inappropriately shifted to Medicare after a settlement, Medicare may decline to pay for such services until the settlement proceeds are exhausted, leaving the claimant without Medicare coverage for accident-related treatment until the amount of covered treatment equals the amount of the settlement.[8]

3. Although MSAs are "recommended" by Medicare and are not "required" they have developed as Medicare's preferred method for preventing the unfair shifting of accident-related medical expenses to Medicare following a settlement.[9]

4. If an MSA account is established, the injured party will have funds available to pay for ongoing or future accident-related medical treatment, ensuring that the portion of the settlement designed to compensate the claimant for future medical expense is actually used for that purpose. Assuming the MSA account is properly established and administered, once the account is depleted, Medicare will step in to pay the Claimant's accident-related medical expenses.[10]

5. If Medicare' interests are not adequately protected, Medicare has a right to recover payment from any person or entity that has received a primary payment, including the beneficiary and his or her attorneys.[11]

6. Mandatory Insurer Reporting[12] means the days of flying under Medicare's radar are gone, as Medicare will now be notified of every settlement, judgment, award or other payment issued to claimants entitled to Medicare, thus enabling Medicare to more effectively enforce compliance with all aspects of the Medicare Secondary payer statutes.

7. Medicare has instituted procedures to more carefully track medical treatment related to accidents. For instance, information gathered for Medicare's Common Working File now includes a specific data field in which the existence of an MSA can be identified so Medicare does not issue conditional payments for accident-related medical expenses that should be paid from the MSA.[13]

8. Historically, Set Aside arrangements in workers' compensation cases have been designated as WCMSAs (Workers' Compensation Medicare Set Asides). Recently Medicare has expanded its definition of "Set Aside Arrangement" to include no-fault and liability settlements, and has created new acronyms to recognize Set Asides in those contexts,[14] signaling that expansion of MSAs to liability and no-fault settlements may be just around the corner.

9. The Nebraska Worker's Compensation Court will require MSA arrangements under certain circumstances before a lump sum settlement will be approved.[15]

Arguments Opposing Use of MSAs

1. The Medicare Secondary Payer Act neither mentions nor requires Medicare Set Aside accounts.

2. Even Medicare acknowledges that MSAs are voluntary and are not "required" in workers' compensation cases or otherwise.[16]

3. While there are federal regulations which expressly prohibit shifting future accident-related medical expenses to Medicare when settling workers' compensation claims,[17] there is no similar regulatory support in the context of no-fault or third-party liability settlements even if a portion of the settlement is allocated to compensate for future accident-related medical expenses.

4. Although the Medicare Secondary Payer Manual addresses utilizing MSAs in workers' compensation settlements to ensure Medicare's interests are properly considered,[18] the manual does not address MSAs in the context of liability and no-fault settlements.

5. The concept that there may be liability to Medicare for *future* accident-related care following a liability settlement appears inconsistent with current Medicare policies as outlined in the Medicare Secondary Payer Manual. For instance, the Manual instructs that once a beneficiary agrees to reimburse Medicare the amount it seeks in past conditional payments, the beneficiary is entitled to a "general release" which (among other things) releases the beneficiary from all "claims, actions, causes of action, demands, rights damages, costs, loss of service, expenses, and compensation whatsoever, which Medicare now has or which may hereafter accrue related to the incident above."[19] Moreover, the current MSP manual directs that "There should be no recovery of benefits paid for services rendered after the date of a liability settlement."[20]

6. There is no clear or uniform directive from Medicare on when or how to utilize MSAs outside the workers' compensation context.

7. There is no established procedure for having Medicare review and/or approve MSAs outside the workers' compensation context.

8. The future viability of the current MSA scheme has been called into question by federal litigation alleging Medicare has violated Due Process and has exceeded its rulemaking authority in establishing procedures for MSAs, and which raises fundamental questions regarding Medicare's authority to review/approve MSAs or require Medicare beneficiaries to establish such accounts.[21]

How Do I Know Whether an MSA is Needed? - Start by Weighing the Risks

Understand that MSAs are not *required* in any cases. The concept of MSAs has developed as a method through which parties can demonstrate that Medicare's interest has been considered as part of a settlement that ends the primary payer's responsibility for payment of future medical expenses. MSAs are a function of the *level of risk* the parties are willing to accept in fully and finally settling claims.

Establishing an MSA that reasonably anticipates future accident-related medical care (whether or not it is submitted to Medicare for approval) demonstrates Medicare's status as a sec-

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ondary payer was considered and protected at the time of the settlement.[22] Claimants and insurers may conclude it is better to establish an MSA than face the uncertainty of potential additional requests for reimbursement by Medicare or the risk that a claimant's Medicare benefits will be suspended.

When Weighing the Risks, Consider the Following:

• **Is the Claimant Currently a Medicare Beneficiary or will the Claimant Soon be Entitled to Medicare?** This sounds like a simple inquiry, but in practice can be a difficult question to definitively answer and should be carefully documented. If the claimant is, or is soon to become, entitled to Medicare one should analyze the likelihood that Medicare will be called upon to pay for accident-related care in the future.

• **Does the Settlement Include Compensation for Future Accident-Related Medical Expenses?** If so, it is likely Medicare will view that portion of the settlement as representing a primary payment for the Claimant's future accident-related medical bills. Understand that Medicare will not necessarily recognize parties' efforts to allocate settlement proceeds to damages other than medical expenses unless the allocation is based on a court order issued on the merits of the case.[23]

• **Is Medicare Likely to be Called Upon to Pay for Accident-Related Care in the Future?** This question goes to the heart of whether a Medicare Set Aside account should be established. If it is likely Medicare will be asked to pay future accident-related medical expenses, the parties should carefully consider establishing an MSA to avoid unfairly shifting responsibility to Medicare. If, on the other hand, the claimant is not likely to require future accident-related medical expenses, there may not be a need for an MSA.

• **What is the Anticipated Cost of the Accident-Related Medical Care the Claimant is Reasonably Likely to Incur in the Future?** The anticipated cost of future accident-related medical expenses will need to be evaluated on a case by case basis in the context of the specific medical recommendations made for the claimant by treating physicians. The more likely and costly the anticipated treatment is, the greater the need to consider establishing an MSA to manage the risks associated with Medicare's Secondary Payer status.

• **What are the Potential Consequences of Failing to Establish an MSA in this Case?** In any case, the potential consequences for failing to protect Medicare's future interests in the settlement include: (1) the risk that Medicare will refuse to pay accident-related medical expenses until the amount of such bills equals the amount of the settlement; and (2) the risk that Medicare will pay accident related medical bills and then seek reimbursement (with interest) from those who made or received the settlement proceeds (a primary payment).

• **If a Workers' Compensation Case Does Not Meet Medicare's "Workload Review Thresholds", Do I Still Need to Consider Establishing an MSA?** Medicare will review MSA proposals in cases involving full and final settlements of claims when: (1) the claimant is currently a Medicare beneficiary *and* the total settlement amount is greater than $25,000; or (2) there is a reasonable expectation that the injured worker will become a Medicare beneficiary within 30 months *and* the total settlement amount is greater than $250,000.00.[24] It is very important to note the parties may have an obligation to consider Medicare's potential interest in settlements even if the claim does not fall within these "workload review thresholds". *The "workload review thresholds" describe the cases CMS will review, but they are not "safe harbors".*[25] Do not rely on these thresholds as the sole determining factor for whether an MSA needs to be established.

• **Will Establishment of an MSA Potentially Disqualify the Claimant from Other Government Assistance?** For claims involving people who are dually eligible for Medicare and Medicaid, a Special Needs Trust [26] may be separately established in addition to the Medicare Set Aside allocation to ensure the money in the MSA does not count as an "available resource"[27] that would disqualify the individual from Medicaid or other government assistance for which income eligibility standards exists. Special Needs Trusts need to be carefully drafted and approved by appropriate governmental entities in order to be effective.

If an MSA is Appropriate, What's Next?

If an MSA is going to be established, careful consideration will need to be given to the following issues:

• **How Much Should Be Set Aside?** Under the current MSA system, it can be a challenge for parties to accurately predict the nature or cost of future accident-related medical expenses, particularly when the claimant's anticipated life expectancy spans decades. However, to the extent future medical expenses can be predicted with reasonable medical probability, the parties may be able to determine on their own the amount of future Medicare covered expenses to be included in the Set Aside fund. In complicated or catastrophic cases, a life care planner may need to analyze the extent to which the injured party is likely to incur Medicare covered medical expenses over his or her life expectancy. Whether the MSA is submitted to Medicare for review or whether it is memorialized in a separate agreement between the parties, careful and complete documentation as to the basis for the MSA amount should be included.

Clear medical documentation describing in concrete terms the type and frequency of anticipated future Medicare covered medical services, if any further medical care is necessary, is essential in determining the amount of money to be allocated to

the Medicare Set Aside arrangement. If submitted for review, Medicare will require medical records documenting the last two years of medical treatment. MSAs that include future prescription medication expenses must be calculated based upon the average wholesale price (AWP) of those medications.[28]

• **How Will the MSA Be Funded?** Will it be funded through a single payment or by an annuity?

• **Who Will Administer the MSA?** Is the Claimant capable of self-administering the MSA funds? Do limitations of the Claimant, or the amount of the MSA, warrant administration by a professional?

• **Will the MSA Be Submitted to Medicare For Approval?** There is a benefit to obtaining approval of the MSA by Medicare as doing so provides an assurance that its interests have been adequately protected.[29] However, there is no requirement that an MSA be submitted to Medicare for approval, and in some instances Medicare may decline to review MSA proposals. For example, Medicare has not adopted a consistent policy as to review of Liability or No Fault MSAs, and will not review workers' compensation MSAs falling outside of its "workload review thresholds".

When Medicare review/approval of the MSA is not sought or is unavailable at the time of settlement, it is even more important that the settlement agreement or release recites and explains the basis for the MSA, with supporting documentation, as any party to the settlement may later be called upon to justify to Medicare the amount set aside from the settlement. The analysis as to how much money should be included in the Medicare Set Aside should be the same whether the settlement will be submitted to Medicare for review or not. The focus of the analysis should be on identifying the reasonably anticipated future Medicare covered medical expenses that will be required as a result of the accident, and it should be supported by competent medical opinions.

If an MSA is Not Going to Be Established, What Should I Do?

If it is determined an MSA is not necessary, that decision will need to be carefully documented. It may be wise to identify in the settlement agreement or release the medical evidence supporting the conclusion that no future accident-related medical care will be necessary, as any of the parties may later be asked by Medicare to justify why no settlement funds were set aside.

It is possible to establish that the parties have adequately considered Medicare's interest even though *no* money is going to be set aside for future Medicare covered medical expenses. In the workers' compensation context, Medicare has specified the circumstances under which a Medicare Set Aside arrangement need not be established, and these factors may provide a framework for analysis of liability and no-fault settlements as well:

It is unnecessary for the individual to establish a set-aside arrangement for Medicare if all of the following are true:

> a) The facts of the case demonstrate that the injured individual is only being compensated for past medical expenses (i.e., for services furnished prior to the settlement);
>
> b) There is no evidence that the individual is attempting to maximize the other aspects of the settlement (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment; and
>
> c) The individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require any Medicare-covered treatments related to the WC injury.[30]

While it is possible to obtain Medicare's approval of a "Zero" MSA, *all* of these elements must be present before Medicare will determine a Set Aside arrangement does not need to be established.

Conclusion

The ultimate decision of whether to utilize an MSA will vary depending on the unique facts and circumstances of each claim. A common element in all claims is the need to provide careful thought to adequately protecting Medicare's interests at the time of settlement, and assessing the risks associated with failing to do so. Claimants and their attorneys will want to ensure future Medicare benefits are not placed in jeopardy following a settlement, and all parties want to fully and finally resolve the case and protect against the possibility that Medicare may seek additional recovery of future accident-related care down the road. As the federal government continues to search for more effective ways to protect its status as a secondary payer and preserve the Medicare Trust Fund, MSAs--in some form or another--are likely to remain an integral part of the equation. Attorneys who handle personal injury claims need to remain on high alert for developments in this rapidly evolving area, so they can appropriately advise their clients regarding available options for protecting Medicare's interests, and weigh the risks associated with utilizing, or choosing not to utilize, MSAs when settling personal injury cases.

Endnotes

1 42 U.S.C. § 1395y(b)(2) (2009).

2 The entire collection is available online at http://www.cms.hhs.gov/WorkersCompAgencyServices/

3 Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), 42 U.S.C. § 1395y(b)(8).

4 Medicare Secondary Payer (MSP) Manual - Chapter 1 - Background and Overview, section 20 - Definitions (2009). (Emphasis added).

5 Medicare Secondary Payer (MSP) Manual, Chapter 7 - Contractor MSP Recovery Rules, section 50.5 (2009).

[6] While important, discussion of the detailed rules governing the establishment, approval, and administration of Medicare Set Aside accounts is beyond the scope of this article. If you want to know more about those issues, a good starting point may be the website of the Centers for Medicare and Medicaid Services: http://www.cms.hhs.gov/WorkersCompAgencyServices/

[7] 42 U.S.C. § 1395y(b)(2) (2009).

[8] 42 C.F.R. § 411.46 (2009).

[9] Memorandum issued by Parashar B. Patel, Deputy Director, Purchasing Policy Group, Center for Medicare Management to All Associate Regional Administrators on July 23, 2001, particularly at Footnote 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/

[10] Memorandum issued by Parashar B. Patel, Deputy Director, Purchasing Policy Group, Center for Medicare Management to All Associate Regional Administrators on July 23, 2001, particularly at Questions 3 and 4, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/ See also 42 C.F.R. § 411.46 (2009).

[11] 42 U.S.C. § 1395y(b)(2)(B) (2009); 42 C.F.R. § 411.24(b),(e), and (g) (2009); and 42 C.F.R. § 411.26 (2009).

[12] Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), 42 U.S.C. § 1395y(b)(8).

[13] CMS Manual System, Pub 100-05 Medicare Secondary Payer, Transmittal 65, Change Request 5371 (March 20, 2009).

[14] Medicare Secondary Payer (MSP) Manual, Chapter 1 - Background and Overview, section 10.4.1 (March 20, 2009).

[15] Nebraska Workers' Compensation Court Guidelines for Medicare Set-Asides in Lump Sum Settlements, found at http://www.wcc.ne.gov//legal/medicare_set-aside_lss_guidelines.pdf See also, *Garcia v. Platte Valley Construction Co.*, 15 Neb. App. 357 (2007).

[16] Memorandum issued by Parashar B. Patel, Deputy Director, Purchasing Policy Group, Center for Medicare Management to All Associate Regional Administrators on July 23, 2001, particularly at Footnote 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/ ; Motion for Summary Judgment and Supporting Brief at p. 2, *Protocols, LLC v. Michael Leavitt in his capacity as the Secretary of the Department of Health and Human Services, et al.*, United States District Court for the District of Colorado (Denver), Civil Action No. 05-cv-01492-BNB.

[17] 42 C.F.R. §§ 411.46 and 411.47 (2009).

[18] Medicare Secondary Payer (MSP) Manual, Chapter 7 - Contractor MSP Recovery Rules, section 40.3.5 and 40.3.5.1 (2009).

[19] Medicare Secondary Payer (MSP) Manual, Chapter 7- Contractor MSP Recovery Rules, section 50.5.2.4 and 50.5.2.4.1 (2009).

[20] Medicare Secondary Payer (MSP) Manual, Chapter 7- Contractor MSP Recovery Rules, section 50.5 (2009).

[21] *Protocols, LLC v. Michael Leavitt in his capacity as the Secretary of the Department of Health and Human Services, et al.*, United States District Court for the District of Colorado (Denver), Civil Action No. 05-cv-01492-BNB.

[22] CMS has issued Memoranda confirming that "Once the final settlement agreement is submitted to CMS' COBC, the claimant and all other parties to the WC settlement can rely on CMS' written opinion regarding whether the WC settlement adequately protects Medicare's interests". Memorandum from Gerald Walters Director Financial Services Group Office of Financial Management to All Regional Administrators, July 24, 2006, at Question 8.

[23] Medicare Secondary Payer (MSP) Manual, Chapter 7- Contractor MSP Recovery Rules, section 50.4.4. (2009).

[24] Memorandum from Director Center for Medicare Management to All Regional Administrators, dated May 23, 2003 at Question 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/

[25] Memorandum from Director Financial Services Group Office of Financial Management to All Regional Administrators, July 11, 2005, at Question 1, available at: http://www.cms.hhs.gov/WorkersCompAgencyServices/

[26] See 42 U.S.C.§ 1396p(d)(4) (2009).

[27] 469 Nebraska Administrative Code 2-009.02

[28] Memorandum issued by Gerald Walters Director Financial Services Group Office of Financial Management to All Regional Administrators, April 3, 2009.

[29] CMS has issued Memoranda confirming that "Once the final settlement agreement is submitted to CMS' COBC, the claimant and all other parties to the WC settlement can rely on CMS' written opinion regarding whether the WC settlement adequately protects Medicare's interests". Memorandum from Gerald Walters Director Financial Services Group Office of Financial Management to All Regional Administrators, July 24, 2006, at Question 8.

[30] Memorandum of Thomas L. Grissom, Director, Center for Medicare Management, to All Regional Administrators, April 22, 2003.