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Addressing MSA Issues in Liability and No Fault Insurance Claims: What Are You Waiting For?

Overview: Recently, the federal government notified the medical community that Medicare will begin rejecting reimbursement claims made by medical providers based on the need to pay for the service in question from a liability or no fault MSA. Combining this with the federal government's recent announcement that it is considering expanding its MSA review process to include up to 51,000 MSAs for liability and no fault insurance settlements, the liability and no fault MSA issue should be front and center for all parties resolving those insurance claims. Non-compliance in this area has been rampant over the years, and changing your habits now is critical to ensuring a closed file remains closed from the federal government's perspective.

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In 1980, Congress enacted the Medicare Secondary Payer (MSP) Act. *42 U.S.C. § 1395y(b)(2)*. From this law (and following administrative policy statements from the federal government), parties resolving workers' compensation (WC) claims became concerned about the application of Medicare Set-aside Arrangements (MSAs). Today, we see the MSA issue often grinding a WC settlement to a halt for a variety of reasons. Strangely, the same broad level of concern has never really existed for those resolving liability or no fault insurance claims.

This article explores why these MSA issues have only resonated in the WC community historically. By comparing the issue in the WC context versus the liability and no fault insurance context, you will see that parties resolving liability or no fault insurance claims without addressing the MSA issue (more accurately stated as the future medical exposure issue) expose themselves needlessly to the federal government asserting recovery for future medical expenses it paid mistakenly on behalf of its beneficiary. This exposure could lead to the federal government pursuing recovery of double (or perhaps treble) damages. Recently, the federal government announced it is considering expanding its MSA review process to include liability and no fault insurance cases. No one wants to be the ones the federal government targets for non-compliance. Perhaps the Chinese philosopher Sun Tzu said it best in The Art of War: "The greatest victory is that which requires no battle." At this point, if you're not yet addressing liability MSA or no fault MSA issues as standard operating procedure on every single case, what are you waiting for?

Background.

In 1980, Congress enacted the MSP Act. With the goal of extending the life of the Medicare Trust Funds, the MSP Act provides that the federal government should not pay for a beneficiary's medical expenses when payment has been made under a workers' compensation policy or plan, an automobile policy or plan, a liability insurance policy or plan (including self-insurance) or a no fault plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. When the federal government's

right of recovery under the MSP Act is triggered, the parties involved in the claim have the responsibility to make sure Medicare does not pay a bill prematurely that had been paid previously as part of the settlement, judgment or award. *42 U.S.C. § 1395y(b)(2)(B)(ii)*.

In 2001, the federal government, through what is now known as the Centers for Medicare and Medicaid Services (CMS), first verbalized its statutory interpretation of the MSP Act as applying not only to past medical expenses, but also to future medical expenses. In what became known as the "Patel Memo", CMS described situations in WC claims where parties should consider funding a MSA to ensure that Medicare is not asked to pay a medical bill prematurely on behalf of one of its beneficiaries. Since 2001, CMS has provided ample guidance in the form of additional policy memoranda and a reference guide which incorporates those policy memoranda for those who wish to ask CMS to review and approve an MSA as part of resolving a WC claim. Today, MSA concerns are commonplace in the WC community, but not in the liability insurance community or no fault insurance community. Why is that?

Statutory and Regulatory Language.

As a launching point, it's important to understand the MSA statutory and regulatory landscape. In short, there is none. That's right, neither the MSP Act itself nor the regulations enacted by CMS to provide its official interpretation of the MSP Act discuss or even mention the terms 'Medicare Set-Aside' or 'MSA.' Further, the Medicare Act provides that "The Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter. *42 U.S.C. § 1395hh(a)(1)*. In situations where regulations are not enacted, the Medicare Act provides that "No rule, requirement, or other statement of policy … that establishes or changes a substantive legal standard … shall take effect unless it is promulgated by the Secretary by regulation under paragraph (1)." *42 U.S.C. § 1395hh(a)(2)*. As the MSP Act is a subpart of the Medicare Act, this applies to the MSP Act as well. Plainly put, since no regulation exists about MSAs today, there is no substantive legal standard parties must meet with respect to MSAs themselves.

However, parties focusing on the so-called "MSA requirement" have missed the forest for the trees. An MSA is one possible tool to comply with the obligation to make sure Medicare does not pay a medical bill which is someone else's responsibility. That same broad prohibition has existed under the MSP Act since December 5, 1980. **Medicare will not pay for a beneficiary's medical expenses where payment has been made under a workers' compensation plan, an automobile plan, a liability insurance plan (including self-insurance) or a no fault plan.** *42 U.S.C. § 1395y(b)(2)(A)(ii)*. The same statute addresses future medical expenses Medicare could potentially be asked to make post-settlement for liability and no fault insurance just as it does for WC. According to the law, Medicare is barred by statute (but for the conditional payment exception) to make that payment where payment has already been made for those same items, services, and expenses. Presumably, that payment would have already been made by the liability insurance carrier, the no fault insurance carrier or the self-insured to the claimant as part of the settlement.

While the statute does not address MSAs, it does address future medicals. The fact that parties resolving liability insurance and no fault insurance claims miss this is troubling. What's more

troubling (for some) is that the statute has addressed future medicals in liability and no fault insurance cases for thirty-six (36) years. Future medicals in liability and no fault insurance cases under the law is not a new development. Despite the clear statutory text of the Medicare Act, parties resolving WC claims worry about MSA issues while parties resolving liability and no fault insurance claims generally do not. Why is that?

MSA Jurisprudence.

Maybe the distinction lies with the body of case law that has developed around the MSA issue in the liability and no fault insurance context. Specifically, at least two (2) federal courts have concluded that liability MSAs are not "required" while none (to the author's knowledge) have concluded that liability MSAs are "required." *See Sipler v. Trans Am Trucking Inc., 881 F. Supp. 2d 635 (2012)* and *Aranki v. Burwell, No. 2:15-cv-00668 (D. Ariz. Oct. 15, 2015).* Not a surprising conclusion from the judiciary given the fact that neither the law nor the regulations interpreting the law "require" liability MSAs. Still, that same law does not differentiate between WC claims and liability insurance claims. In both, Medicare's right to not pay certain future medical expenses rises when payment has been made by a primary plan or payer to a claimant for those same expenses. *42 U.S.C. § 1395y(b)(2)(B)(ii)*. But the WC world acts as though MSAs are "required", evidenced by corporate protocols which mandate MSAs under certain circumstances and state industrial boards asking for (or even requiring) CMS review and approval of the MSA. The law itself provides no distinction. Without a distinction, one might think that concern for MSA issues would be the same in the liability or no fault insurance context as they are in the WC context. But they have not been historically. Why is that?

Federal Administrative Guidance.

If it's not the statute itself or the regulations enacted to interpret the statute or the case law rendered when parties have taken the MSA issue in front of the judiciary, perhaps it is administrative guidance in the form of policy memoranda which stokes the heightened concern in the WC community compared to the liability and no fault insurance settlement communities. While not active in drafting regulations about MSAs, CMS has been active in providing policy memoranda and other informal writings about MSAs in WC. Starting with the Patel Memo of 2001, CMS drafted approximately sixteen (16) policy memoranda about WCMSAs. Then, in 2013, CMS combined those policy memoranda into one comprehensive WCMSA Reference Guide. As of April 4, 2016, CMS issued Version 2.5 of its WCMSA Reference Guide and it has become CMS' one source of the truth when it comes to WCMSAs. By comparison, CMS has issued scarce guidance about liability MSAs. One can look to one policy memo in 2011, an Advanced Notice of Proposed Rulemaking (ANPRM) in 2012 and a Notice of Proposed Rulemaking (NPRM) in 2013. CMS voluntarily withdrew the NPRM in October 2014.

So, perhaps the distinction lies in the existence of the policy memoranda and the WCMSA Reference Guide. And that might make sense but for one thing. Policy memoranda and reference guides issued by the federal government alone are not afforded *Chevron* deference. For the non-lawyers out there reading this, *Chevron* deference is an administrative law principle whereby courts will defer to a federal administrative agency (like CMS) and its statutory interpretation of a law unless such interpretations are unreasonable. According to the United

States Supreme Court, "Interpretations such as those in opinions letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris County, 529 U.S. 576 (2000).* Thus, the mere fact that CMS has issued policy memoranda and reference guides about MSAs in WC situations does not mean those statements have the force of law behind them. Despite this, WCMSAs remain an issue of high concern while liability MSA and no fault MSA issues remain largely ignored. Why is that?

CMS and its Current MSA Review Process.

Well, the only other possibility for the disparate treatment of the MSA issue in WC as compared to liability or no fault insurance is the existence of a formal review process for WCMSAs. CMS is willing, under certain circumstances, to review a WCMSA when the parties voluntarily submit that WCMSA to CMS for review. However, since it cannot review every single WCMSA due to resource constraints, CMS has established workload review thresholds to help manage its caseload. This workload review threshold is not a safe harbor, and CMS clearly states this in its WCMSA Reference Guide. This means that cases that do not meet the threshold are not provided safe passage from CMS on the issue. Future medicals should still be considered in a WC settlement that does not meet the CMS review threshold. That goes for WCMSAs in cases where the threshold is not met *as well as liability or no fault cases for which CMS does not yet offer a formal review process*. The mere lack of a formal review process does not mean Medicare relinquishes its right to not pay certain future medical expenses under the law. Nor does it mean that Medicare surrenders its right to pursue parties who have failed to address the future medical issue compliantly under the MSP Act. The MSP Act grants Medicare the right to recover up to double damages plus interest for any conditional payments it is not reimbursed. *42 U.S.C. § 1395y(b)(3).*

Further, Medicare might be able to recover treble damages if it chooses to assert claims under the federal False Claims Act. *31 U.S.C. §§ 3729 et seq.* It is the False Claims Act, in the author's estimation, that parties should be concerned about most in this area, no matter whether you are a lawyer on either side of the 'V', a Fortune 500 company who self-insures liability or no fault insurance claims or a liability insurance carrier. For a moment, think about the number of liability or no fault insurance claims you have resolved over the past 10 years or so without addressing the MSA issue. Then, multiply that number by anywhere between $10,781.40 and $21,562.80 and then triple that figure. That's the future medical exposure facing parties not addressing the liability or no fault MSA issue today. Claims brought by CMS under the False Claims Act represent the "nuclear" option which would be the federal government's most sensational way to enforce its rights in this area. But, as it currently stands, parties resolving liability or no fault insurance claims seem comfortable with this exposure while the WC community is not. Why is that?

CMS Moving Towards Formal Review for Liability and No Fault MSAs.

Given all that, perhaps you're still comfortable with your MSA exposure. You ignore the plain statutory text which places WC, liability and no fault insurance claims on level ground. You point to the lack of regulations directly on point. You cite the cases that state that LMSAs are

not "required." You cling to the fact that CMS withdrew the NPRM in 2014 and conclude that must mean that MSAs are a non-issue in liability and no fault insurance settlements. You're the one who says that liability and no fault MSAs will be an issue to be concerned about only when CMS provides an official review process. Well, get ready to be concerned because that time appears to be right in front of us.

On June 8, 2016, CMS announced that it is considering expanding its formal MSA review process to include liability and no fault claims. CMS doubled down on that announcement in December 2016. As part of its RFP for WCMSA review contractor services, CMS asked bidders to provide information about its ability to review up to 51,000 LMSAs annually starting in 2018. That represents a 258% increase in MSAs reviewed as compared to current WCMSA reviewed. Bids were due to CMS by February 15, 2017 with an anticipated contract award date of June 30, 2017.

Finally, CMD has notified the medical community about this change. CMS issued Change Request (CR) 9893 on February 3, 2017. CR 9893, effective October 1, 2017, advises physicians, providers and suppliers when to expect Medicare to reject claims they submit to Medicare for payment. CR 9893 provides the specific rejection codes Medicare will use to deny payment for items and services that should be paid from a liability MSA or a no fault MSA. Effectively, Medicare has given the medical community eight (8) months to begin seeking payment for those items, services and expenses from the Medicare beneficiary instead of Medicare.

If CMS is considering expanding the formal MSA review process and has put the medical community on notice of future claim payment rejections, it must mean that CMS believes MSAs in those types of claims is a thing, right? Why else consider expanding its formal review process? If CMS believes liability and no fault MSAs are a thing, how long has it thought that, and how much work has been done internally to vet the liability and no fault MSA issue and the parties resolving those claims without addressing the issue? So many questions and so much exposure which could be remedied by one simple step. "The greatest victory is that which requires no battle."

Conclusion.

By this point, certainly one realizes the ostrich approach to the liability and no fault MSA issue is ill advised. The time is right to either: 1) formalize your process for addressing the MSA issue on every one of your liability or no fault cases pre-settlement; or 2) begin formulating your plan to defend yourself when CMS pursues you seeking double or treble damages for future medical payments it made for its beneficiary by mistake. As a lawyer, I prefer the former but am willing to be hired to help those who prefer the latter.

Your goal should be to minimize or even extinguish your future medical exposure. You should get comfortable with the idea that Medicare's right to future medicals is not limited to WC, and steps need to be taken proactively to ensure your future medical exposure is minimal or even non-existent in the future.

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If you're interested in learning how you can devise internal protocols to address potential liability/no fault MSA issues or would like a legal opinion about the MSA issue in a specific case, I'd be happy to speak with you. Call me at (704) 232-7297, email me at jcattie@cattielaw.com, visit my website at www.cattielaw.com or tweet me @MSALawyer. Don't wait until it's too late and you can't keep your file closed. Win the victory without fighting the battle.