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How the MSP Act Affects Individuals Not Yet Enrolled in Medicare

At this point, you are aware of the additional obligations facing parties resolving claims involving Medicare beneficiaries. Under the Medicare Secondary Payer ("MSP") Act, certain reimbursement obligations must be satisfied to prevent the federal government from collecting additional dollars subsequent to the resolution of the Workers' Compensation ("WC") claim. *42 U.S.C. § 1395y(b)(2)*. Under the Medicare, Medicaid, & SCHIP Extension Act of 2007 ("MMSEA Section 111"), certain data must be reported to Medicare under certain circumstances to satisfy a statutory reporting obligation. *42 U.S.C. § 1395y(b)(8)*. The MSP Act obligates parties to reimburse Medicare for any conditional payments made from date of loss to date of settlement/judgment/award as well as identify situations where a primary plan/payer is "prepaying" for a claimant's future injury-related care which would otherwise be covered by Medicare. *42 U.S.C. § 1395y(b)(2)(B)(ii)*.

What remains a mystery to most, however, is how the MSP Act affects parties resolving claims involving individuals who are not yet enrolled in Medicare. While there is no obligation to report information under MMSEA Section 111 or resolve conditional payments for past medicals under such situations, the statute provides a broad prohibition on its ability to pay for a Medicare beneficiary's medicals when payment for those same medical expenses has already been made by an employer or WC insurance carrier. *42 U.S.C. § 1395y(b)(2)(A)(ii)*. Thus, you should identify whether any part of the settlement proceeds are being paid to compensate the claimant for future medicals which *could* be paid by Medicare at some point in the future.

With respect to future medicals, the MSP Act applies to beneficiaries and non-beneficiaries alike. The MSP Act provides the following: "Payment … may not be made, except as provided in paragraph B, with respect to any item or service to the extent that … payment has been made … under a workers' compensation law or plan …" *42 U.S.C. § 1395y(b)(2)(A)(ii)*. The only exception to this broad statutory prohibition is known as a conditional payment, discussed in paragraph B of the MSP Act. Medicare may make a conditional payment on behalf of its beneficiary when an entity has not yet accepted responsibility to make payment. *42 U.S.C. § 1395y(b)(2)(B)(i)*. Medicare pays on the condition that it will be reimbursed when an entity accepts responsibility for that payment and that responsibility is evidenced in a judgment, a compromise for release or other means. *42 U.S.C. § 1395y(b)(2)(B)(ii)*.

So, according to the MSP Act itself, Medicare won't pay when payment has already been made by an employer or WC insurance carrier. The trick about Medicare paying a bill, though, is that the person asking Medicare to pay that bill must be enrolled in the Medicare program in order for Medicare to pay. Why would Medicare pay otherwise? Parties construing the MSP Act strictly will say this is the reason why the statute only applies to Medicare beneficiaries, and can be ignored in all other circumstances. Others understand there are situations where the MSP Act certainly applies to individuals not yet enrolled in the Medicare program, but who could be enrolled sometime in the future.

Let's look at an example. A 45 year old female (Mrs. Smith) is injured in an auto accident sustained while in the scope of her employment. She sustains a broken femur and head trauma. Mrs. Smith is not a Medicare beneficiary as of the date of the accident and is not a Medicare beneficiary when she agrees to settle her claim with her employer, who accepted her claim from the outset. In fact, Mrs. Smith has not even applied for Social Security Disability Income ("SSDI") benefits. The parties agree

to resolve the claim for $100,000. They identify $16,234 of the $100,000 as being paid to compensate Mrs. Smith for her future medical expenses which would otherwise be covered by Medicare that are related to the compensable claim (as opposed to indemnity/wage loss or past medical expenses). So there are $16,234 being paid to Mrs. Smith for her future medicals which Medicare would otherwise cover. So what?

Some readers might say there is no future medical obligation here since the settlement involves an individual not yet enrolled in Medicare and the gross award does not exceed $250,000. In other words, Mrs. Smith does not have a "reasonable expectation" of Medicare enrollment within thirty (30) months of settlement. For years, that has been the benchmark when resolving a WC claim involving similarly situated individuals. Parties have seen the WCMSA workload review thresholds issued by CMS and concluded that when a fact pattern fails to meet that threshold, then there are no additional obligations facing the parties with respect to future medicals. That's a dangerous interpretation of the statute when the federal administrative agency charged with enforcing the statute is aggressively seeking additional avenues of income in order to provide benefit payments to a group of beneficiaries growing larger every year.

While CMS does provide workload review thresholds to help manage its review caseload, those thresholds do not represent safe harbors. CMS plainly states that in Section 8.1 of its WCMSA Reference Guide. Besides, while CMS only reviews certain WCMSA proposals, the statute remains unchanged and applies to all WC claims. The statute itself provides no such safe harbor for parties resolving a WC claim involving a claimant like Mrs. Smith. The law still obligates parties to determine if an employer or WC insurance carrier is "prepaying" Mrs. Smith's future medicals within the award. *42 U.S.C. § 1395y(b)(2)(A)(ii*). The fact that CMS does not review those types of fact patterns does not negate or even alter the present statutory obligation in the slightest.

According to the MSP Act, Medicare won't pay when payment has been made by a WC policy or plan. *Id*. The prohibition is absolute, but for that one exception called a conditional payment. *42 U.S.C. § 1395y(b)(2)(B)(i*). When Medicare does make that payment, then the entity responsible for that specific item or service must repay Medicare for conditional payments made. *42 U.S.C. § 1395y(b)(2)(B)(ii*).

Returning to our fact pattern, Medicare will not be asked to pay a bill today for Mrs. Smith since Mrs. Smith is not Medicare enrolled. And Medicare will not be asked to pay a bill next month. Those bills should be paid by other means. Mrs. Smith should be using her $16,234 to pay for future injury-related care which would otherwise be covered by Medicare. Mrs. Smith will (presumably) enroll in the Medicare program at some point in time in the future. What if, once enrolled, Mrs. Smith has not yet spent all of the $16,234 on future injury-related care otherwise covered by Medicare which the WC plan identified to prepay her future medicals?

Let's assume that $3,000 remains as the balance on the day she is enrolled in Medicare. Since she received that $3,000 from the WC insurance plan to pay for her future injury-related care otherwise covered by Medicare, Mrs. Smith should not bill Medicare for her future injury-related care until that care totals $3,001. At that point, she would no longer have dollars from her settlement proceeds pre-paying her future medicals. She could then bill Medicare comfortable in the knowledge that Medicare will pay those bills on her behalf going forward. While Mrs. Smith was not Medicare enrolled as of the date of settlement, the MSP Act does apply in that she received a certain amount of settlement

proceeds ($16,234 in this case) to pay for her future injury-related care otherwise covered by Medicare. When she hit Medicare enrollment, $3,000 remained from the $16,234. Therefore, she should spend down that $3,000 before billing Medicare. In so doing, Mrs. Smith and her employer are complying with the MSP Act.

While many in the past have tried to couch this future medical discussion as one asking whether the federal government requires Medicare Set-Asides ("MSAs"), the future medical obligation under the MSP Act really is more one that is an accounting obligation. Neither the MSP Act itself nor any regulation supporting the MSP Act even mentions the term "Medicare Set-Aside" or "MSA", let alone requiring parties to establish an MSA as part of any settlement, even in the WC context. Somehow, the settlement community has been led astray by assumed MSA "requirements" over the years, whether those assumptions were well-intended or merely driven by third party economic motives.

It's time to refocus on what the MSP Act actually says. There are potential ramifications in billing Medicare for the same medical items, services and expenses that were prepaid as part of the settlement award, even when the claimant is not Medicare enrolled as of the date of settlement. Making assumptions simply because it was said at some continuing education event by a vendor simply doesn't cut it. Instead, make sure your MSP compliance protocols contain both a medical and a legal basis. Identifying proceeds which prepay a claimant's future medicals, advising the claimant to spend down those proceeds before Medicare gets billed and providing the accounting safety net to ensure the dollars are spent down properly are future medical best practices in 2016 if we are serious about protecting ourselves from the federal government. Besides, why would we take that risk in the first place?