

Post Script

by *Ellen B. Flynn, Esquire, Co-Editor-in-Chief of Trial Reporter*

I want to thank the authors of this important article for submitting it to the Trial Reporter. Their expertise on the topic is certainly helpful. I encourage our members to reach out to them with their questions. As with many emerging issues in the law, there are several points of view to be expressed on this issue, and MAJ wanted to provide the opportunity for this perspective to be considered by our members.

The American Association of Justice (AAJ) has remained vocal on the issue of MSA's, as evidenced by a recent announcement regarding Liability MSAs.¹⁶ "We do expect that Medicare's new policy will generate additional issues when parties settle claims with a Medicare component. This instruction does not affirmatively create a new mandate for Medicare beneficiaries to create a liability set-aside. However, AAJ recommends that you evaluate and begin to resolve any lien early in the settlement process if your case has a Medicare component. AAJ also recommends that all attorneys have a general understanding of the MSP statute, even if you contract out for your lien resolution. AAJ is concerned that CMS is once again attempting to shift towards a mandatory LMSA regime. AAJ is pursuing all available legislative, regulatory, and legal options to ensure CMS only implements a legally sound, fair, and efficient process for collecting reimbursements."

Some of AAJ efforts surrounding CMS issues appear to have paid off. The U.S. Senate and House reached a budget deal this month that secured a permanent and retroactive repeal of the Bipartisan Budget Act (BBA) language that granted Medicaid a right of first recovery for full reimbursement of covered medical costs before plaintiffs could receive any recovery for lost wages, non-economic damages, or any other type of recovery. AAJ had successfully kept at bay this provision of the BBA that had originally gone into effect in 2013, with successful delays in implementation of the provision. The last delay expired on October 1, 2017.

On October 26th, 2017, CMS had issued the following alert:

"The Centers for Medicare and Medicaid Services continues to consider expanding its voluntary Medicare Set-Aside Arrangements (MSA) review process to include liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS will work closely with the

stakeholder community to identify how best to implement this potential expansion of voluntary MSA reviews. Please continue to monitor CMS.gov for updates and announcements of town hall meetings in the near future."

This alert seems to evidence a recent step in the attempt by CMS to establish formal guidelines for liability MSAs. CMS first brought this matter to light with the Advanced Notice of Proposed Rulemaking (ANPRM) proposals in May 2012. In October of 2014, CMS withdrew their Notice of Proposed Rulemaking (NPRM) for protecting Medicare's future interests with respect to future medicals. The NPRM was originally submitted to the Office of Management and Budget (OMB) back in August 2013. With the NPRM, it was anticipated CMS was going to establish formal regulations for liability Medicare set asides (MSAs). The ANPRM was a series of ideas and suggestions for how to protect Medicare's interests when future medical care was claimed as part of a settlement, award or judgment for liability insurance (including self-insurance), no-fault insurance, and workers' compensation. There was a 60-day commentary period where CMS invited remarks from the Medicare secondary payer (MSP) industry. According to the agency, CMS took all of the recommendations into account when they submitted the NPRM to the OMB. The next step was going to be establishing formal guidelines for liability MSAs. That never happened. However, they appear to be in continued pursuit of accomplishing this objective in the near future.

There is no doubt that as trial attorneys we need to stay on top of any alerts issued by CMS on these important topics. We need to protect our clients and ourselves, while striving to maximize settlements and judgments for our clients. It is difficult to plan for the uncertainty of actions that might be taken by CMS. How can you properly inform your client about a settlement or post-judgment liability with so much uncertainty? Perhaps you tell them that there is no guarantee that Medicare won't deny future medical expenses, and if they want to protect themselves, they need a MSA. This will likely drive up the acceptable settlement value of the case. But even if you choose to implement a MSA for future medical expenses, how do you determine how much to put in it? How do we know it will be acceptable to CMS since they haven't issued any guidelines? Regulations are silent on this issue. How do you balance what is right when you have settled by compromising on what possible future care needs will be worth?

Perhaps one approach would be to inform Medicare of your mediation date, tell them that if they wish to

assert their rights concerning future care expenses, they should send someone to attend the conference. I doubt they will show up, but at least you have a record that you informed of them they should participate in protecting their interests.

There are several questions to be answered, and no doubt, we will continue to be plagued with the uncertainty of implementation until guidelines are actually issued that address when and how liability set asides are to be enforced.

Endnotes

- 1 The MSP is a series of statutory provisions enacted in 1981 as part of the Omnibus Reconciliation Act with the goal of reducing federal health care costs. The MSP provides that if a primary payer exists, Medicare only pays for medical treatment relating to an injury to the extent that the primary payer does not pay. CFR Title 42, Part 411, Subpart B, Section 411.20 (2) provides “[s]ection 1862(b)(2)(A)(ii) of the Act precludes Medicare payments for services to the extent that payment has been made or can reasonably be expected to be made promptly under any of the following” (i) Workers’ compensation; (ii) Liability insurance; (iii) No-fault insurance. The one exception is conditional payments pre-settlement.
- 2 Parashar B. Patel, Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements, Centers for Medicare and Medicaid Services Memorandum, July 23, 2001
- 3 <https://www.cms.gov/medicare/coordination-of-benefits-and-recovery/mandatory-insurer-reporting-for-non-group-health-plans/overview.html>
- 4 This informal alert was reissued and summarized by Medicare Learning Network in June 2017.
- 5 <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2017Downloads/R17870TN.pdf>
- 6 <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM9893.pdf>
- 7 <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE17019.pdf>
- 8 https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=d3b45cd4fe90079ae5eaf5b2a96b9298&_cview=0
- 9 https://www.fbo.gov/index?s=opportunity&mode=form&id=244bfc6f69ffabc8e368ab7eb68d01d4&tab=core&tabmode=list&_
- 10 The last review contractor received a \$6 million contract.
- 11 The number of LMSA and NFMSA submissions could result in as many as 51,000 per year according to the draft proposal for the new review contractor.
- 12 Parashar B. Patel, Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements, Centers for Medicare and Medicaid Services Memorandum, July 23, 2001.
- 13 For years, Synergy has stressed the importance of proper reporting of ICD codes. Failure by the responsible reporting entities (RREs) to report a claim in a timely manner can result in penalties of up to \$1,000 per day. They can also be on the hook for double damages if Medicare’s reimbursement claim is not resolved at the time of resolution.
- 14 MM9893 alert referenced not only individual ICD codes but family of ICD codes could trigger a denial.

15 Stalcup CMS Handout

16 Update on Medicare Secondary Payer and Ahlborn, September 7, 2017
Email blast to members

Biographies

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