

## **Navigating the Uncharted Waters of Medicare Futures**

*By Jason D. Lazarus, J.D., LL.M., MSCC*

Medicare's clear as mud position on post-settlement care coverage in liability settlements poses significant challenges for personal injury attorneys. Understanding and addressing the potential denial of future injury-related care is crucial to safeguarding your clients' future eligibility and ensuring compliance with the Medicare Secondary Payer Act (MSP). This blog post explores the unregulated frontier of Medicare futures and the critical steps law firms must take to navigate these complexities.

### *Medicare's Potential Denial of Future Care*

Personal injury settlements today come with a new, daunting reality: the threat of Medicare denying future care for injury-related conditions. This risk is automatically triggered by the Mandatory Insurer Reporting (MIR) system, which reports settlements over \$750 along with specific injury-related ICD codes. Once a denial occurs, the appeal process is long and arduous, often spanning multiple levels of internal Medicare appeals and federal courts. This can be particularly devastating in catastrophic injury cases, where denied care severely impacts the victim's quality of life.

### *Understanding the Risks and Liabilities*

Historically, trial lawyers did not worry about Medicare's payment for future care post-settlement. However, this landscape has changed dramatically. Consider a scenario where a Medicare beneficiary's settlement triggers a denial of future care because the settlement included funds for future medical expenses. This reality was highlighted in 2018 when a personal injury victim received a denial notice from Medicare, stating that "you may have funds set aside from your settlement to pay for your future medical expenses and prescription drug treatment related to your injury(ies)." The denial was related to a 2014 personal injury settlement wherein the Medicare beneficiary was paid money as damages for future injury related care.

### *The Evolution of MSAs*

For years, personal injury settlements did not consider Medicare's secondary payer status, shifting the burden to Medicare for future care. This changed in 2001 when CMS introduced MSAs for Workers' Compensation cases to prevent shifting the burden from primary payers to Medicare. This compliance tool ensures that settlement funds for future medical expenses are used before Medicare becomes the primary payer.

### *Addressing Medicare Compliance Related to Futures*

There is no one-size-fits-all solution for Medicare compliance related to futures. Each case requires a thorough, individualized analysis. If future medical expenses are funded by the settlement, doing nothing is risky. A client facing a denial of care may endure a lengthy appeals process, deciding between paying out-of-pocket or delaying care.

For trial lawyers, the risk of malpractice claims looms if they fail to advise clients properly about setting aside funds. Though no cases have yet seen Medicare pursuing law firms for failing to

establish Medicare Set-Asides (MSAs), recent Department of Justice actions on MSP compliance emphasize the importance of addressing Medicare related issues.

#### *Fundamental Concepts Related to Set-Asides*

Set-asides are only necessary when dealing with current Medicare beneficiaries or those expecting to become beneficiaries within 30 months. Although no statute or case law mandates MSAs, they are similar to special needs trusts used in Medicaid or SSI settlements. Clients should be educated about MSAs to protect future Medicare eligibility for injury-related care just like with SNTs. MSAs can also be used to strategically set a baseline for medical damages in negotiations.

#### *Why Consider Setting Up an MSA?*

Despite the absence of a legal requirement for MSAs, conducting a legal analysis to determine the necessity of setting aside funds is crucial. This issue primarily concerns plaintiffs, with the penalty for non-compliance being the potential loss of future Medicare coverage for injury-related care. CMS recommends establishing an MSA to protect future Medicare eligibility, ensuring Medicare becomes the primary payer once the MSA is exhausted.

#### *Conclusion*

Medicare beneficiaries who attempt to shift the burden of future injury-related care to Medicare after a settlement may face denial of coverage. Medicare interprets the MSP Act as requiring consideration of their future interests. While set-asides are not legally mandated, they are recommended by CMS to protect future Medicare eligibility. Failure to address this issue can result in denied care and significant complications for clients and attorneys alike.

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