**SYNERGY WHITE PAPER: Medicare Futures – Noteworthy "Cases"**

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As discussed in previous White Papers, there are no real hard and fast rules when it comes to set-asides since they are not codified in federal statutes. This has resulted in parties addressing these issues by securing a court approval order when settling cases involving Medicare beneficiaries.

*Section 1: Does a Set-Aside Need to be Considered? Aranki v. Burwell*

The first case of note is the most dangerous since it is frequently misinterpreted. Many lawyers have said that the *Aranki v. Burwell* decision holds that MSAs are not required in liability settlements and that these issues need not be addressed at all.[1] The former is accurate, but the latter assertion could not be further from the truth. In *Aranki*, the parties sought to have a federal district court declare there was no obligation to set anything aside. The court said "[n]o federal law or CMS regulation requires the creation of a MSA in personal injury settlements to cover potential future medical expenses."[2] The court did not determine that Medicare's future interest could be ignored. The court echoed existing CMS memoranda in finding that an MSA is not required by any statute or regulation. Most importantly, nothing in the opinion precludes Medicare from denying future injury-related care based upon information reported to CMS as part of MIR. The nuance of this case should be considered carefully. It certainly does not represent a 'get out of jail free card' in regard to these issues and Medicare can always deny care.

[1] *Aranki v. Burwell*, 151 F.Supp.3d 1038 (D. Az. 2015).
[2] *Id.*

**KEY TAKEAWAY: The *Aranki v. Burwell* decision is often misinterpreted by lawyers, leading to a misunderstanding regarding Medicare Set-Asides (MSAs) in liability settlements. While the court declared that no federal law or CMS regulation requires the creation of an MSA for personal injury settlements, it did not imply that Medicare's future interest could be disregarded. This ruling is not a 'get out of jail free card,' and nothing in the opinion prevents Medicare from denying future injury-related care; thus, the nuances of this case must be regarded with caution in any settlement process.**

*Section 2: Funding of Future Medicals? Sterrett v. Klebart*

One of the big issues that can arise in trying to do a set-aside is the question of funding of future medicals. Funding of future medicals is a prerequisite to any type of set-aside analysis in the first place. The first question always asked is whether the client is a current Medicare beneficiary or has a reasonable expectation of becoming one within 30 months. If the answer is no, there is no need for a set-aside analysis. Similarly, if future medicals aren't funded then there is no need to engage in a set-aside analysis.

The issue of funding future medicals was addressed by a Connecticut state court. In *Sterrett v. Klebart* (Conn. Super. Ct. Feb. 4, 2013), the court was asked to decide whether Medicare's interests were reasonably considered pursuant to the Medicare Secondary Payer Act.[3] The Connecticut court found that future medicals were not funded in this case due to competing claims. Specifically, the court stated that "the settlement payment to Sterrett does not address any future medical expenses that may be covered by Medicare and the facts of this case mandate the conclusion that the defendants and their carriers lack liability with regard to any such

[3] *Sterrett v. Klebart*, 2013 Conn. Super. LEXIS 245 (Conn. Super. Ct. Feb. 4, 2013).

expenses."[4] The court found that the settlement represented a "substantial compromise" considering the potential verdict range.[5] The settlement was a compromise due to the nature of the injuries and defenses according to the court. Further, the court understood that even though Sterrett would incur medical bills payable by Medicare, the settlement didn't compensate for such future medical benefits.[6] Instead, the limited settlement funds it found were payable for the plaintiff's non-economic damages with a small portion to be used for non-Medicare covered economic damages.[7] For those reasons, the court held that no set-aside was required and found that the parties had reasonably considered the interests of Medicare in the settlement of the case.[8]

**KEY TAKEAWAY: The *Sterrett v. Klebart* case emphasizes the significance of funding future medicals in determining the necessity of a Medicare Set-Aside (MSA). The decision to engage in a set-aside analysis hinges on two factors: whether the client is or will likely be a Medicare beneficiary within 30 months, and if future medicals are funded. The Connecticut state court case, *Sterrett v. Klebart*, is instructive in addressing this issue, illustrating that if a settlement does not fund future medical expenses and represents a substantial compromise considering the nature of injuries and defenses, then no MSA is required.**

*Section 3: Future Medicals Not Fully Funded? Benoit v. Neustrom*

The really problematic issue is how do you deal with cases where future medicals are funded but they were settled for pennies on the dollar? Can you apportion the settlement so that you create a reduction formula tied to a comparison of the full value of damages versus what was

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

actually recovered? For example, if the total value of the damages was $1M but only $100k was recovered due to policy limits, can you set aside only 10% instead of 100% of the value of future medical expenses that are Medicare covered related to the injuries suffered? This issue was addressed by a Federal District Court in 2013. In *Benoit v. Neustrom* (W.D. La. 2013), the United States District Court for the Western District of Louisiana rendered an unprecedented decision.[9] In a case where a limited recovery was achieved due to complicated liability issues with the case, the Court reduced a liability Medicare Set-Aside allocation by applying a reduction methodology.

The *Benoit* case was settled in October of 2012, conditioned upon a full release by Mr. Benoit and his assumption of sole responsibility for "protecting and satisfying the interests of Medicare and Medicaid." To that end, a Medicare Set-Aside allocation was prepared by an MSA vendor. The MSA cost projections gave a range of future Medicare covered injury-related care of $277,758 to $333,267. The gross settlement amount was $100,000.00. Medicaid agreed to waive its lien. Medicare asserted a reimbursement right for its conditional payments of $2,777.88. After payment of fees, costs and the Medicare conditional payment, Mr. Benoit was left with net proceeds of $55,707.98. Mr. Benoit filed a motion for Declaratory Judgment confirming the terms of the settlement agreement, calculating the future potential medical expenses for treatment of his injuries in compliance with the Medicare Secondary Payer Act and representing to the court that the settlement amount was insufficient to provide a set-aside totaling 100% of the MSA.

[9] *Benoit v. Neustrom*, 2013 U.S. Dist. LEXIS 55971 (W.D. La. 2013).

The matter was set for hearing and Medicare was put on notice of the hearing. Medicare responded with a written letter asserting its demand for repayment of the conditional payment in the amount of $2,777.88 but didn't address the set-aside. Having heard testimony, the court rendered its opinion in April of 2013. The court made its findings of fact and conclusions of law which were not worthy of mention aside from the bombshell finding that the net settlement was 18.2% of the mid-point range of the MSA projection and using that percentage as applied to the net settlement, the sum to be set-aside was $10,138 and not $305,512. The court found that $10,138 adequately protected Medicare's interests.[10]

In its conclusions of law, the court first found it had jurisdiction to decide the motion because there was "an actual controversy and the parties seek a declaration as to their rights and obligations in order to comply with the MSP and its attendant regulations in the context of a third party settlement for which there is no procedure in place by CMS."[11] The court then found that the sum of $10,138 "reasonably and fairly takes Medicare's interests into account."[12] Lastly, the court found that since CMS provides no procedure to determine the adequacy of protecting Medicare's interests for future medical needs in third-party claims and since there is a strong public policy interest in resolving lawsuits through settlement, Medicare's interests were "adequately protected in this settlement within the meaning of the MSP."[13] The court ordered that the MSA be funded out of the settlement proceeds and be deposited into an interest-bearing account to be self-administered by Mr. Benoit's wife.

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

This opinion is so important because it hits the nail on the head regarding an argument I have been making since the advent of liability MSAs. As both sides have pointed out to CMS in vetting proposed regulations for liability set-asides, a liability insurer is not legally obligated to provide medical care in the future whereas Workers' Compensation carriers are obligated to pay for future medical if the injury-related conditions persist. Furthermore, liability settlements are fundamentally different from Workers' Compensation settlements in that liability cases are settled for a variety of reasons which do not necessarily include contemplation of future medical treatment. Even when future medical care is contemplated as part of a settlement, the amount can be very limited when compared to what the ultimate costs may end up being. Accordingly, if set-asides are done in liability settlements without recognition of these differences and with no apportionment of damages, you can conceivably have a situation where a party is setting aside their entire net settlement even though it is made up of non-medical damages. In effect, it can eliminate the recovery of the non-medical portion of the damages by requiring the Medicare beneficiary to set aside all of their net proceeds. There is nothing in the MSP regulations or statute that requires Medicare to seek one hundred percent reimbursement of future medicals when the injury victim recovers substantially less than his or her full measure of damages.

**<u>KEY TAKEAWAY:</u> In *Benoit v. Neustrom* (W.D. La. 2013) the court applied a reduction methodology, linking the value of a Medicare Set-Aside (MSA) to the proportion of damages recovered. The court found a reduced amount of the set-aside as adequately protecting Medicare's interests, recognizing the fundamental differences between liability and Workers' Compensation settlements. This trial court order underscores the necessity of a nuanced approach to MSAs, taking into account the complex dynamics of settlements**

**and respecting the recovery of non-medical damages, rather than blindly demanding 100% funding of future medicals.**

*Section 4: A Reduction Method Based on Benoit & Ahlborn Ideology*

As discussed above in the *Benoit* case, there has to be a framework to address settlements that do not make a plaintiff whole in the context of liability MSAs. Obliviously, it does not work to have 100 percent of a settlement consumed by a Medicare set-aside that the client can't touch except to pay for future Medicare-covered services. I would argue that this gets to the very root of the issue dealt with in the U.S. Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn*.[14] The *Ahlborn* decision forbids lien recovery by Medicaid state agencies against the non-medical portion of the settlement or judgment. While admittedly that decision dealt with Medicaid lien issues and the Medicaid anti-lien statute, the arguments by analogy can be applied in the Medicare set-aside context. The *Ahlborn* holding gets at the fundamental issue of whether a lien can be asserted against the non-medical portion of a personal injury recovery. Justice Stevens, in stating the majority opinion, said "a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others." Isn't this so in the Medicare set-aside context (which is really a future lien)? How do you settle a case for an injury victim when all of the proceeds would have to go into a set-aside? Wouldn't that force cases to trial where damages could be allocated to different aspects of the claim and a larger recovery might be possible?

In addition, the 11th Circuit *Bradley* decision addressed the issue of Medicare's lien rights in the context of Florida's wrongful death statute.[15] In *Bradley*, CMS took the position that only

[14] Ahlborn, 547 U.S. 268 (2006); see *The ElderLaw Report*, June 2006, p. 6.
[15] *Bradley et al v. Sebelius* (11th Cir., No. 09-13765, Sept. 29, 2010).

an allocation on the merits of a case would be recognized in terms of reducing a Medicare conditional payment obligation. The 11th Circuit approved a probate court's equitable distribution findings to reduce the Medicare conditional payment obligation. In so doing, the court found that it would be improper to require a trial on the merits of a case to determine an allocation for purposes of Medicare conditional payment resolution. The *Bradley* court focused on the strong public policy favoring "expeditious resolution of lawsuits through settlement." According to the court, Medicare's position would have a "chilling effect on settlement." This is so because Medicare's position compels plaintiffs to force their tort claims to trial, burdening the court system. The same argument could be made in the Medicare set aside context for liability settlements that are significantly compromised. Why would an injury victim settle his case if it will all go into a set-aside?

There is some basis in CMS's own regulations for a reduction. In 42 C.F.R. 411.47 there is a computation example for workers' compensation settlement where there is no allocation in a compromise situation. It is as follows:

> As the result of a work injury, an individual suffered loss of income and incurred medical expenses for which the total workers' compensation payment would have been $24,000 if the case had not been compromised. The medical expenses amounted to $18,000. The workers' compensation carrier made a settlement with the beneficiary under which it paid $8,000 in total. A separate award was made for legal fees. Since the workers' compensation compromise settlement was for one-third of the amount which would have been payable under workers' compensation had the case not been compromised ($8,000/$24,000=1⁄3), the workers' compensation compromise settlement is considered to have paid for one-third of the total medical expenses (1⁄3×$18,000=$6,000).

Admittedly, this particular regulation deals with conditional payments and has been flatly rejected by CMS in terms of its use in the context of reducing workers' compensation Medicare set-aside arrangements. Nevertheless, this type of analysis makes considerable sense in the context of liability Medicare set-asides. Considering CMS has not given any guidance in the liability Medicare set-aside area, how can CMS argue it is improper to employ such methods?

So how would one perform a calculation to determine the amount of reduction of a set-aside? Best practices, in my opinion, is the *Ahlborn* approach. The *Ahlborn* approach would necessitate an estimate of the total value of all damages, without any limitations (like comparative, caps, available coverage, etc.), which would then be compared to the actual recovery. From there you would determine the percentage of recovery that the settlement represented when compared to the total value of all damages. That type of analysis might look like the following:

$4,000,000 = Total Value of All Damages

$1,000,000 = Settlement

$400,000 = Fees (40 percent fee)

$600,000 = Net

$200,000 = Projected Set-Aside Allocation

$30,000 = Reduced Set-Aside Allocation (Client recovered 15 percent of total damages)

I want to make it very clear that there are no guarantees that CMS would ever approve of either method to reduce a liability Medicare set aside. However, submission to CMS of a liability set aside (and for that matter workers' compensation as well) is voluntary and in most instances, you can't even obtain a review from the regional offices. Accordingly, if one of these

methods was utilized and the case was not submitted to CMS for review and approval, I believe CMS would be hard pressed to argue that it was an inappropriate course of action. Given the fact that CMS has ignored questions about how to deal with these issues for liability Medicare set asides and failed to provide any meaningful guidance whatsoever in this area, I believe one could make an estoppel type of argument if CMS ever claimed it was improper. Especially since there is usually no review available.

**KEY TAKEAWAY: When it comes to liability MSAs, a fair and flexible framework is necessary to address settlements that do not make the plaintiff whole. Requiring that one hundred percent of a settlement be consumed by an MSA is not only impractical but may also undermine the objective of reaching a settlement. Legal precedents and regulations, including the *Ahlborn* decision and 42 C.F.R. 411.47, provide a basis for a more nuanced approach that aligns with the principles of justice and the public policy in favor of expedient resolution through settlements. Although no CMS approved methods for reducing an MSA exist, and guidance from CMS is lacking, logical and legal principles offer defensible solutions to this complex issue. By considering the net recovery against the total value of all damages, a more equitable solution to this intricate problem could be realized, allowing for a proportionate set-aside amount that respects the intent and nature of the settlement.**

*Conclusion*

In conclusion, these trial court orders that have addressed certain issues demonstrate part of the problem lawyers face when dealing with Medicare futures. While the cases are instructive, they are by no means binding on Medicare nor do they have any precedential weight.

However, they do help craft arguments as to why, in certain cases, there should be a reduced amount set aside or what to do when future medicals aren't funded at all.

**SYNERGY MSP COMPLIANCE PRACTICE TIP:**

Address any Medicare compliance issues at the time of settlement to avoid disputes requiring federal court intervention. However, *Klebart* and *Benoit* are cases that can be used to the injury victim's advantage in dealing with the set-aside issue in liability settlements. *Klebart* can be used in certain cases where the client isn't arguably recovering any future medical damages at all due to the nature of what was claimed along with competing claims. *Benoit*, on the other hand, can be used as a roadmap for reducing the amount to be set aside when there are large future damages but a very limited recovery.