

SYNERGY WHITE PAPER: Medicare Futures – The Unregulated New Frontier

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With the complete absence of definitive law when it comes to Medicare paying for future injury related care, it puts trial lawyers into a very difficult position given the risks and liabilities of doing nothing at all when they represent a Medicare beneficiary in a settlement. This White Paper discusses the risks and liabilities as well as solutions to address Medicare secondary payer compliance related to Medicare futures.

Section 1: Medicare's Potential Denial of Future Care

Today, there is a very real threat of Medicare denying future injury-related care after the personal injury case is resolved. This can be very easily triggered by the MIR and reporting of injury-related ICD codes which happens automatically now with any settlement of seven hundred and fifty dollars or greater. Once a denial of care is triggered, a Medicare beneficiary has to go through the four levels of internal Medicare appeals plus a federal district court before ever getting the denial of care addressed by a federal appeals court. This is why it must be of primary concern for the personal injury practitioner to address these issues, particularly in catastrophic injury cases where denial of care could be devastating to the injury victim's medical quality of life.

KEY TAKEAWAY: There is a critical and growing threat of Medicare denying future injury-related care after a personal injury settlement, a process that can be automatically triggered by the Mandatory Insurer Reporting (MIR) and specific injury-related coding for any settlement of \$750 or more. This issue must be a primary concern for personal injury practitioners, as a denial can lead to a complex and lengthy appeal

process. It can be particularly devastating in catastrophic injury cases, potentially severely impacting the victim's medical quality of life.

Section 2: Understanding the Risks & Liabilities

In the past, trial lawyers never had to worry about whether Medicare would pay for their client's future care post-settlement. This may not be the case in the future. Consider this scenario: You represent a current Medicare beneficiary in a third-party liability case. As part of the work up of the case, you determine the client will need future medical care related to the injuries suffered. This could be determined by either deposing the treating physician, or by the creation of a life care plan for litigation purposes. Ultimately, you settle the case. Since the client is a Medicare beneficiary, the defendant will report the settlement under the Mandatory Insurer Reporting law as it is greater than \$750.00 in gross settlement proceeds. The defendant puts some language into the release about a Medicare Set-Aside being the injury victim's responsibility and that they can't shift the burden. Everyone signs the release and settlement dollars are paid. The file is closed, then forgotten. What happens though if that course of action triggers a denial of future care by Medicare?

For many years this was not even a concern for trial attorneys and their clients; however, the risk of this occurring is a very real possibility. In fact, in 2018, a personal injury victim got this type of notice of denial for injury related care from Medicare. The service provided was hospital outpatient clinic services under Part B of Medicare. The bill was denied, based upon the notice, because Medicare said, "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.¹ Medicare's position that an injury victim can't settle their case and shift the burden to the Medicare Trust Fund for injury related care isn't new. Medicare has stated this premise over and over. This was the first time anyone had seen an actual denial.

KEY TAKEAWAY: There has been a fundamental shift in how Medicare-related considerations must be handled in personal injury settlements. Whereas trial lawyers previously did not need to worry about Medicare's payment for their client's future care post-settlement, a real and tangible risk has emerged that Medicare may deny future injury-related care if it deems that funds should have been set aside from a settlement to cover those costs. It is no longer sufficient for legal practitioners to ignore or overlook Medicare's interests in these matters, as failure to consider these aspects may lead to denied care for the client, even years after a case has been settled and closed.

Section 3: Addressing Medicare Compliance Related to Futures

Unfortunately, there is no cookie cutter answer for what to do about Medicare compliance. It is a case-by-case analysis. In some instances, there may be an argument that future medicals aren't funded at all by the settlement. In other cases, there might be an argument that a reduced amount of future medicals should be set aside to satisfy obligations under the MSP because the case settled for less than full value. There are just too many possibilities to give a simple one size fits all answer; however, what is clear is that doing nothing has its risks. For example, the client who received the denial of care likely will face a lengthy appeal within

¹ A study was done by Ametros related to denials of care in workers' compensation settlements. This study can be found at <https://ametros.com/wp-content/uploads/2022/03/A-Study-of-CMS-policy-on-treatment-denials-for-injured-workers-with-a-Medicare-Set-Aside-Whitepaper.pdf>

Medicare's administrative process that must be exhausted before having the issue addressed by a federal district court. In that scenario, the client is going to have to decide between paying out of their own pocket for future care or waiting for the care until exhausting all appeals in anticipation of prevailing over Medicare.

While the problem created for the client is a serious one if they are denied care, an equally scary proposition for the trial lawyer is their exposure for malpractice claims in this scenario. Let's assume that the injury victim who got this denial letter was not properly advised of the risks of failing to set aside money. Would the trial lawyer potentially face a suit for legal malpractice? The answer is most likely they would. There could be all sorts of arguments made about whether they fell below the standard of care, but in the end, this is a known issue and one that is of the law. Worse yet, a trial lawyer and his/her firm could have Medicare knocking on their firm's door. While we haven't seen any instances of Medicare pursuing a law firm over failing to set up a Medicare Set-Aside, as discussed earlier, there are recent examples of law firms being pursued by the Department of Justice (DOJ) related to other aspects of the MSP and failing to have a process internally to ensure compliance with the MSP.

KEY TAKEAWAY: Due to the complexity and risk associated with Medicare compliance in personal injury settlements, there is no one-size-fits-all solution. Careful, individualized analysis is needed to determine the right course of action for each case. The risks of non-compliance are grave, with potential lengthy appeals for the client, the possibility of malpractice claims against the trial lawyer, and even the potential for legal action by Medicare or the Department of Justice (DOJ) against a law firm for failing to comply with the Medicare Secondary Payer (MSP) provisions.

Section 4: Fundamental Concepts Related to Set Asides

When it comes to set asides, there are a few fundamental concepts to understand. First, you only have to worry about this issue if you are dealing with someone who is a current Medicare beneficiary or arguably those with a reasonable expectation of becoming one within 30 months. The latter includes those who have applied for or begun receiving Social Security Disability benefits. At time of publishing, there is no regulation, statute or case law requiring a Medicare Set Aside to deal with futures. Instead, it has become analogous to the situation in resolving cases with those who are on Medicaid or SSI. In those cases, a client must be educated about the opportunity to set up a special needs trust to remain eligible for needs-based benefits. Similarly, a Medicare beneficiary should be informed about the opportunity to set up a Medicare Set Aside to protect future Medicare eligibility for injury-related care. The good news for attorneys assisting Medicare beneficiaries is that a Medicare Set Aside allocation can be used in an offensive manner to set the floor for medical damages in the right case.

KEY TAKEAWAY: Dealing with set-asides is only necessary when you have a settlement involving a current Medicare beneficiary or those reasonably expecting to become one within 30 months. While there is no legal requirement to set up a Medicare Set Aside (MSA) for future medical needs, the practice has become similar to setting up special needs trusts in Medicaid or SSI cases for preservation purposes. It may also be utilized as a strategic tool in negotiations, setting a baseline for medical damages in certain situations.

Section 5: Why Consider Setting up an MSA?

All of that being said, you might be wondering why even consider doing a Medicare Set Aside when they aren't required by any law? The answer is that actually setting anything aside is less important than doing the legal analysis to determine why anything should be set aside. Said a different way, this is a plaintiff issue and not a defense issue. The only penalty for failing

to address this issue is the potential loss of future Medicare coverage for injury-related care. You ultimately want to educate the client on the risks of failing to do a set aside analysis and then document it in your file. The next question might be: What risk is there if there isn't any law requiring set asides? Again, the answer boils down to CMS's interpretation of the MSP. According to CMS, since Medicare isn't supposed to pay for future medical expenses covered by a liability or Workers' Compensation settlement, judgment or award, it *recommends* that injury victims set aside a sufficient amount of a personal injury settlement to cover future medical expenses that are Medicare covered. CMS's 'recommended' way to protect future Medicare benefit eligibility is establishment of an MSA to pay for injury-related care until exhaustion.² Once the MSA is properly exhausted, Medicare becomes the primary payer from that point forward for injury-related care.

KEY TAKEAWAY: While there is no requirement to create a Medicare Set Aside (MSA), the critical aspect is to conduct a legal analysis to determine the necessity of setting anything aside. It's a plaintiff issue and not a defense issue, with the only penalty being the potential loss of future Medicare coverage for injury-related care. The Centers for Medicare & Medicaid Services (CMS) recommends establishing an MSA to protect future Medicare eligibility, even though it's not mandated by law.

Section 6: Why & How Did CMS Come Up with MSAs?

For many years, personal injury cases have been resolved without consideration of Medicare's secondary payer status even though since 1980 all forms of liability insurance have

² Sally Stalcup, MSP Regional Coordinator (May 2011 Handout). *See also*, Charlotte Benson, *Medicare Secondary Payer – Liability Insurance (Including Self-Insurance) Settlements, Judgments, Awards, or Other Payments and Future Medicals – INFORMATION*, Centers for Medicare and Medicaid Services Memorandum, September 29, 2011.

been primary to Medicare. At settlement, by judgment or through an award, an injury victim would receive damages for future medical that were Medicare covered; however, none of those settlement dollars would be used to pay for future Medicare covered health needs. Instead, the burden would be shifted from the primary payer (liability insurer or Workers' Compensation carrier) to Medicare. Injury victims would routinely provide their Medicare card to providers for injury-related care.

These practices began to change in 2001 when set asides were officially developed by CMS as an MSP compliance tool for Workers' Compensation cases. Interestingly, around that same time the General Accounting Office was studying the Medicare system and pointed out that Medicare was losing money by paying for care that was covered under the Workers' Compensation system.³ Accordingly, CMS circulated a memo in 2001 to all its regional offices announcing that compliance with the MSP required claimants to set aside a portion of their settlement for future Medicare covered expenses where the settlement closed out future medical expenses.⁴ The new 'set aside' requirement was designed to prevent attempts "to shift liability for the cost of a work-related injury or illness to Medicare."⁵ Set asides ensure that Medicare does not pay for future medical care that is being compensated by a primary payer by way of a settlement or an award.

KEY TAKEAWAY: For many years, personal injury cases were resolved without considering Medicare's secondary payer status, effectively shifting the burden from primary payers like liability insurers to Medicare. This began to change in 2001 when CMS

³ Edward M. Welch, *Medicare and Worker's Compensation After the 2003 Amendments*, WORKERS' COMPENSATION POLICY REVIEW, at 5 (March/April 2003).

⁴ Parashar B. Patel, *Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements*, Centers for Medicare and Medicaid Services Memorandum, July 23, 2001.

⁵ *Id.*

officially developed set asides as a compliance tool for Workers' Compensation cases, introducing a requirement to set aside a portion of a settlement for future Medicare-covered expenses, preventing the shifting of liability for work-related injuries or illnesses to Medicare.

Conclusion

To summarize, a Medicare beneficiary who settles their case and attempts to shift the burden to Medicare to pay for future injury-related care might be denied coverage by Medicare. Medicare interprets the Medicare Secondary Payer Act as requiring consideration of their “future interests”. While set asides are not required by a statute or regulation, they are a creature of CMS policy. Failing to address this issue can result in a future denial of injury-related care by Medicare.

SYNERGY MSP COMPLIANCE PRACTICE TIP:

There are currently no regulations, statutes or cases that require a personal injury victim to create a Medicare set-aside; however, given the totality of what has been stated in this White Paper it is advisable to educate personal injury victims you represent about the possibility of loss of future Medicare coverage for injury-related care and about the option to create a Medicare set-aside. Conceptually, this is similar to how you would advise someone on SSI or Medicaid related to establishment of an SNT. You only need to worry about educating clients who are current Medicare beneficiaries or have a reasonable expectation of becoming one within 30 months. So, if you have a Medicare eligible client who will need future treatment and they receive settlement monies for future medicals, that is an appropriate case to consider establishing a Medicare set-aside or exploring alternatives. The alternatives to setting up a set aside without shifting the

burden to Medicare include, but are not limited to, securing private healthcare coverage; become a self-payor, set up a trust or structured settlement to pay privately for future injury-related medical care.