

SYNERGY WHITE PAPER: What is a Medicare Set-Aside and How are they Regulated?

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Understanding Medicare set-asides and how they are regulated is important for trial lawyers who represent a Medicare beneficiary at settlement. This White Paper attempts to explain the what, how and why related to set-asides in personal injury settlements.

Section 1: What is a Medicare Set-Aside?

Before getting into an overview of the regulatory environment of MSAs, it is first important to explain what exactly a set-aside is. An MSA is a portion of settlement proceeds set aside, called an “allocation,” to pay for future Medicare-covered services that must be exhausted prior to Medicare paying for any future care related to the injury.¹ The amount of the set-aside is determined on a case-by-case basis and is submitted to CMS for approval if it is a Workers’ Compensation case and fits within the review thresholds established by CMS. CMS’s review and approval process is voluntary.² There are no formal guidelines for submission of liability settlements and the CMS Regional Offices determine whether or not to review liability submissions (presently, most do not review). CMS explains on its website that the purpose of a Medicare set-aside is to “pay for all services related to the claimant’s work-related injury or disease, therefore, Medicare will not make any payments (as a primary, secondary or tertiary payer) for any services related to the work-related injury or disease until nothing remains in the

¹ See <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Overview.html>

² *Id.*

WCMSA.”³ According to CMS the set-aside is meant to pay for all work-injury-related medical expenses, not just portions of those future medical expenses.

KEY TAKEAWAY: An MSA is a designated portion of a settlement, referred to as an "allocation," earmarked to cover future Medicare-covered services related to an injury, which must be depleted before Medicare contributes. The process for determining the MSA amount is case-specific. Submission to CMS for Workers' Compensation cases is voluntary, but no formal guidelines exist for liability settlements, underscoring the MSA's role in exclusively handling all post-resolution expenses tied to work-related injuries or diseases.

Section 2: Regulatory 'Scheme' - What, if Any, 'Law' is there for Set Asides in Personal Injury Settlements?

A formal 'Medicare Set-Aside' is not required by a federal statute even in Workers' Compensation cases where they have been commonplace since 2001. Instead, CMS publishes and regularly updates the Workers' Compensation Set-Aside Arrangement (WCMSA) Reference Guide (hereinafter "Reference Guide"). The Reference Guide contains intricate guidelines for nearly every aspect of set-asides from when to do one, to submission, to administration for Workers' Compensation settlements.⁴ There are limited guidelines for liability settlements involving Medicare beneficiaries. Without codification of set-asides, there are no clear-cut appellate procedures from arbitrary CMS decisions and no definitive rules one can count on as it relates to Medicare set-asides. While there is no legal requirement that an MSA be created, the

³ *Id.*

⁴ See <https://www.cms.gov/medicare/coordination-benefits-recovery/workers-comp-set-aside-arrangements>. Prior to the Reference Guide's release in 2014, which provided a consolidated source of guidelines, this information was scattered across FAQs on CMS' website and occasional memoranda that addressed questions related to MSAs.

failure to do so may result in Medicare refusing to pay for future medical expenses related to the injury until the entire settlement is exhausted. There has been a slow progression towards a CMS policy of creating set-asides in liability settlements as a result of the MMSEA's passage and the onset of MIR. This culminated with the presumed codification of formal regulations back in 2014.⁵ However, without explanation, those regulations were withdrawn after having gone through significant vetting along with public commentary. The apparent reason was complaints from both sides about the fairness and workability in practice of the proposed regulations.

In 2016, it became evident that CMS was not fazed by previous failed attempts at codification of rules for set asides in liability cases and was determined to develop a process to avoid shifting of the burden to Medicare post-resolution of a personal injury settlement. The Department of Health and Human Services issued its budget for 2017 which included a line item indicating CMS had requested legislative authority to pursue a new policy regarding the treatment of future medicals.⁶ In June of 2016, CMS issued an alert that they were considering expanding their voluntary review process to liability cases.⁷ Thereafter, CMS sought proposals

⁵ 77 F.R. 35917; <http://www.gpo.gov/fdsys/pkg/FR-2012-06-15/pdf/2012-14678.pdf>

⁶ Medicare beneficiaries are unable to satisfy Medicare Secondary Payer "Future Medical" obligations at the time of settlement, judgment, award, or other payment because the current law does not specifically permit the Secretary to deposit such payment in the Medicare Trust Funds. Future Medical is defined as Medicare covered and otherwise reimbursable items and/or services furnished after the date of settlement, judgment, award, or other payment. This proposal expands current Medicare Secondary Payer statutory authority to permit the Secretary to deposit into the Medicare Trust Funds a lump sum, upfront payment from beneficiaries when they obtain liability insurance, no-fault insurance, and workers' compensation settlements, judgments, awards, or other payments. [\$65 million in savings over 10 years]. <https://www.hhs.gov/about/budget/fy2017/budget-in-brief/cms/medicare/index.html>

⁷ **"June 8, 2016 – Consideration for Expansion of Medicare Set-Aside Arrangements (MSA). The Centers for Medicare and Medicaid Services (CMS) is considering expanding its voluntary Medicare Set-Aside Arrangements (MSA) amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year. Please continue to monitor this website for additional updates."** <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Whats-New/Whats-New.html>

for a new review contractor for set-asides which included the anticipated review of 51,000 liability proposed set-asides annually.⁸ In 2017, Medicare sent a memorandum to its contractors indicating that Medicare and its contractors will reject medical claims submitted post-resolution of a liability settlement on the basis that those claims “should be paid from a Liability Medicare Set-Aside (LMSA)”.⁹

Late in the fall of 2018, the Office of Management and Budget issued a notification from the Department of Health and Human Services which oversees CMS of a proposed rule related to the MSP. The abstract of the rule says it “would ensure that beneficiaries are making the best health care choices possible by providing them and their representatives with the opportunity to select an option for meeting future medical obligations that fits their individual circumstances, while also protecting the Medicare Trust Fund.”¹⁰ It indicated that the rule was “economically significant” and the basis for the legal authority was 42 U.S.C. 1396y(b). The final rule sought to clarify “existing Medicare Secondary Payer (MSP) obligations associated with future medical items related to liability insurance (including self-insurance), no-fault insurance, and workers’ compensation settlements, judgments, awards, or other payments.” Although this notice of proposed rule had been delayed many times over the years, it was finally withdrawn on October 13, 2022.

It is simply unclear what type of future regulations may be crafted by CMS in this area. What is clear though is that Medicare’s position as it relates to the Medicare Secondary Payer Act and the requirements it places upon settling parties hasn’t changed. Shifting the burden to

⁸<https://www.fbo.gov/index?s=opportunity&mode=form&id=f1ae2d5eb785ac35d331eccc4d001ebb&tab=core&tabmode=list&=>

⁹ <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/MM9893.pdf>

¹⁰ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0938-AT85>

Medicare to pay for future injury related care is, based upon CMS's interpretation of the act, prohibited when settling a case for a Medicare beneficiary which includes payments for those damages.

KEY TAKEAWAY: Although MSAs have been standard in Workers' Compensation cases since 2001, there is no federal statute requiring their creation. Guidelines are intricate and limited, especially for liability settlements. Several attempts have been made to codify formal regulations, but all have been withdrawn, most recently in 2022, leading to an unclear regulatory landscape. Nevertheless, CMS's stance is firm: shifting the burden to Medicare for future injury-related care is prohibited when settling a case for a Medicare beneficiary. This creates a pressing, albeit nebulous, responsibility for parties involved in settlements.

Conclusion

All the foregoing considered, while there is no regulation or statute requiring anything be done when it comes to set-asides, ignoring the issue isn't the answer. It is obvious that Medicare interprets the MSP as preventing shifting the burden from a primary payer to Medicare post-resolution of a personal injury settlement. The problem is: How do you do that in a liability settlement given the issues that cause those cases to frequently settle for less than full value? There is no good answer to that question; however, there are cases that have addressed a couple of very important issues in that regard. While they are only trial court orders, they are instructive in terms of how to deal with the issues. The following chapter explores some of the trial court orders that exist and discusses their importance.

SYNERGY MSP COMPLIANCE PRACTICE TIP:

Given the intricate and ever-changing landscape surrounding Medicare Set-Asides (MSAs), trial lawyers must exercise diligence in addressing MSAs in both Workers' Compensation and liability settlements. Even though there is no federal statute mandating MSAs, failure to consider them may lead to Medicare refusing to pay for future medical expenses related to the injury. A comprehensive approach should include staying abreast of CMS guidelines, conducting a case-by-case analysis to determine if an MSA is appropriate, and documenting every decision related to MSAs in your case file. Understanding Medicare's interpretation of the Medicare Secondary Payer Act and ongoing attempts to regulate MSAs will allow you to better navigate this complex area and protect both your clients' interests and your own practice from potential risks. In liability settlements, particularly, carefully educating the client about the risks and potential obligations, and obtaining documented consent for the chosen approach, is paramount. Consider seeking expert consultation if dealing with particularly complex MSA matters to ensure compliance with CMS' current interpretation and practices.