PRECISION RESOLUTION

Paramount

The Truth About Medicare Set-Asides

Paul K. Isaac, Esq., ChSNC®

John Riccardi, Esq., MSCC, ChSNC®

Ryan Collins

ADDRESS :

4134 SENECA STREET
BUFFALO, NY 14224

CONTACT:

888-961-LIEN
PRECISIONLIENRESOLUTION.COM

The Truth About
Medicare Set-Asides

What is the Basis for an MSA?

"The MSP Act's General Rule states that Medicare may not make payment for any medical items and services "to the extent that payment has been made . . . under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance."

42 U.S.C. §1395y(b)(2)(A).

• The MSP General rule makes clear that in the event there has been a payment by a primary plan, Medicare shall not pay for any items or services.

• The risk that the MSP imposes for future medicals incurred after the date of a liability insurance settlement is clear, i.e., that Medicare will not cover accident related medical treatment costs after the date of a liability settlement.

Paul Isaac, Esq., ChSNC®
FOUNDER, CHIEF COUNSEL, SETTLEMENT ADVISOR
isaac@precisionlienresolution.com | 716-712-0127

The Stalcup Memo

There is no legal mandate to establish an MSA in any case. CMS has confirmed such in administrative publications.

"Medicare's interests must be protected; however, CMS does not mandate a specific mechanism to protect those interests. The law does not require a 'set-aside' in any situation. The law requires that the Medicare Trust Funds be protected from payment for future services whether it is a **Worker's** Compensation or liability case. There is no distinction in the law."

"There is no formal CMS review process in the liability arena as there is for Worker's Compensation. However, CMS does expect the funds to be exhausted on otherwise Medicare covered and otherwise reimbursable services related to what was claimed and/or released before Medicare is ever billed. CMS review is decided on a case by case basis."

"Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding medicals and if so, a need to protect the Trust Funds."

-Sally Stalcup, MSP Regional Coordinator, CMS Region VI (May 25, 2011 Handout).

Medicare Set-Asides in Worker's Compensation Settlements

While there is no requirement for an MSA in a worker's compensation case, CMS has promulgated thresholds for cases in which it will review an MSA allocation:

- The claimant is currently a Medicare beneficiary and the total settlement amount is greater than $25,000;
- The claimant has a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date and the anticipated total settlement amount for future medical expenses and disability/lost wages over the life or duration of the settlement agreement is expected to be greater than $250,000.

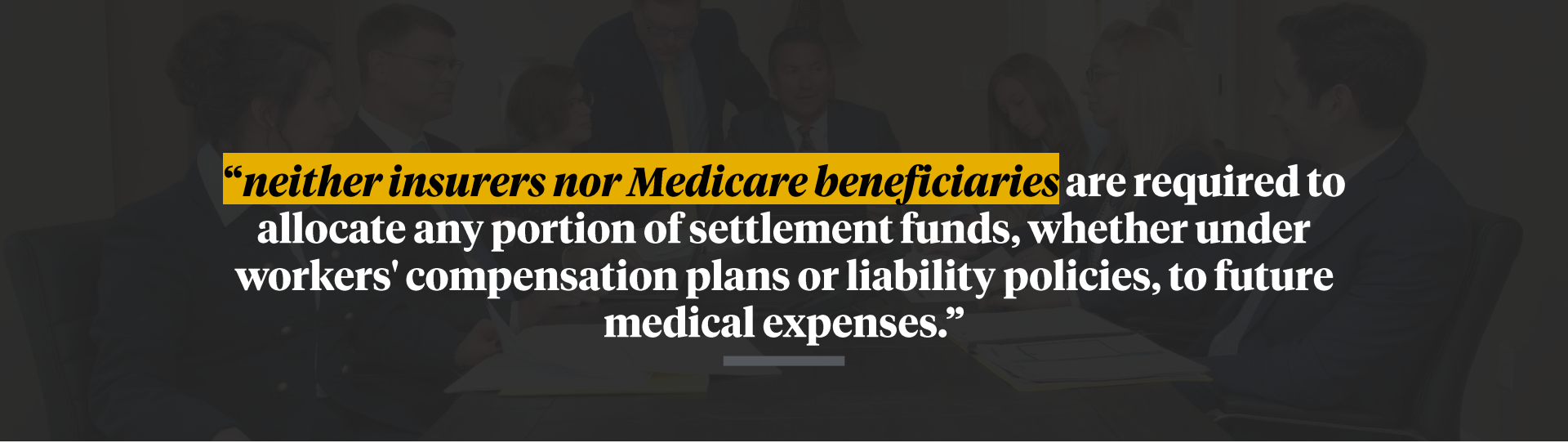
§ 411.46 Lump-sum payments

(a) ***Lump-sum commutation of future benefits.*** If a lump-sum compensation award stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payments for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump-sum payment.

(b) ***Lump-sum compromise settlement.***

(1) A lump-sum compromise settlement is deemed to be a workers' compensation payment for Medicare purposes, even if the settlement agreement stipulates that there is no liability under the workers' compensation law or plan.

(2) If a settlement appears to represent an attempt to shift to Medicare the responsibility for payment of medical expenses for the treatment of a work-related condition, the settlement will not be recognized. **For example, if the parties to a settlement attempt to maximize the amount of disability benefits paid under workers' compensation by releasing the workers' compensation carrier from liability for medical expenses for a particular condition even though the facts show that the condition is work-related, Medicare will not pay for treatment of that condition.**



“*neither insurers nor Medicare beneficiaries* are required to allocate any portion of settlement funds, whether under workers' compensation plans or liability policies, to future medical expenses.”

”Despite some lingering counsel by lawyers and structured settlement companies that MSAs are required in settlements of any kind with Medicare beneficiaries who are likely to incur significant future medical expenses, neither insurers nor Medicare beneficiaries are required to allocate any portion of settlement funds, whether under workers’ compensation plans or liability policies, to future medical expenses.

No such obligation is imposed by the MSP statute, Section 111, or any other laws, regulations, or Medicare guidance, and CMS has unmistakably confirmed this fact in recent court filings, CMS Regional Office communications, and periodic Section 111 Town Hall Teleconferences.“

- An excerpt from ”Dispelling Medicare Myths in Tort Settlements” by Kathryn Butcher, Richard L. McConnell and Katherine R. McDonald (click to download)

MSA “Case Law”

Sipler v. Trans Am Trucking, Inc., 881 F. Supp. 2d 635, 638 (D. N.J. 2012) ("[T] require personal injury settlements to specifically apportion future medical expenses would prove burdensome to the settlement process and, in turn, discourage personal injury settlements.");

Aranki v. Burwell, 151 F. Supp. 3d 1038, 1040 (D. Ariz. 2015("[N]o federal law or CMS regulation requires the creation of a personal injury settlements to cover potential future medical expenses.");

Silva v. Burwell, 2017 U.S. Dist. LEXIS 195032, 2017 WL 5891753 (D. N.M. 2017) ("That CMS has not responded to Plaintiff's petitions on the issue, is not reason enough for this Court to step in and determine the propriety of its actions. There may be a day when CMS requires the creation of MSA's in personal injury cases, but that day has not arrived.").

Q:

Does CMS require that a Medicare set-aside arrangement be established in situation that involve both a WC claim and a third party claim?

Answer:

Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a WC carrier from any future medical expenses, a CMS approved Medicare set-aside arrangement is appropriate.

This set-aside would need sufficient funds to cover future medical expenses incurred once the total third party liability settlement is exhausted. The only exception to establishing a Medicare set-aside arrangement would be if it can be documented that the beneficiary does not require any further WC claim related medical services.

A Medicare set-aside arrangement is also unnecessary if the medical portion of the WC claim remains open, and WC continues to be responsible for related services once the liability settlement is exhausted.

Excerpt from a Blue Cross and Blue Shield Employer Funded Plan:

"The Employer's Group Health Plan is a Primary Plan except where federal law mandates that the Employer's Group Health Plan is the Secondary Plan.

Any claims where Medicare is primary must be filed by the Member after Medicare payment is made."

The Affordable Care Act

Can I get a Marketplace plan in addition to Medicare?

No. It's against the law for someone who knows that you have Medicare to sell you a Marketplace plan. This is true even if you have only Part A (Hospital Insurance) or only Part B (Medical Insurance). If you want coverage to supplement Medicare, visit Medicare.gov to learn more about Medigap policies. You can also learn about other Medicare options, like Medicare Advantage Plans.

Can I choose Marketplace coverage instead of Medicare?

Generally, no. As noted on the previous page, it's against the law for someone who knows you have Medicare to sell you a Marketplace plan. But there are some situations where you can choose Marketplace coverage instead of Medicare:

- You can choose Marketplace coverage if you're eligible for Medicare but haven't enrolled in it (because you would have to pay a Part A premium, or because you're not collecting Social Security benefits). If you're eligible for premium-free Part A but choose Marketplace coverage over it, you won't be eligible for help paying your Marketplace plan premiums.
- If you're paying a premium for Part A, you can drop your Part A and Part B coverage and get a Marketplace plan.

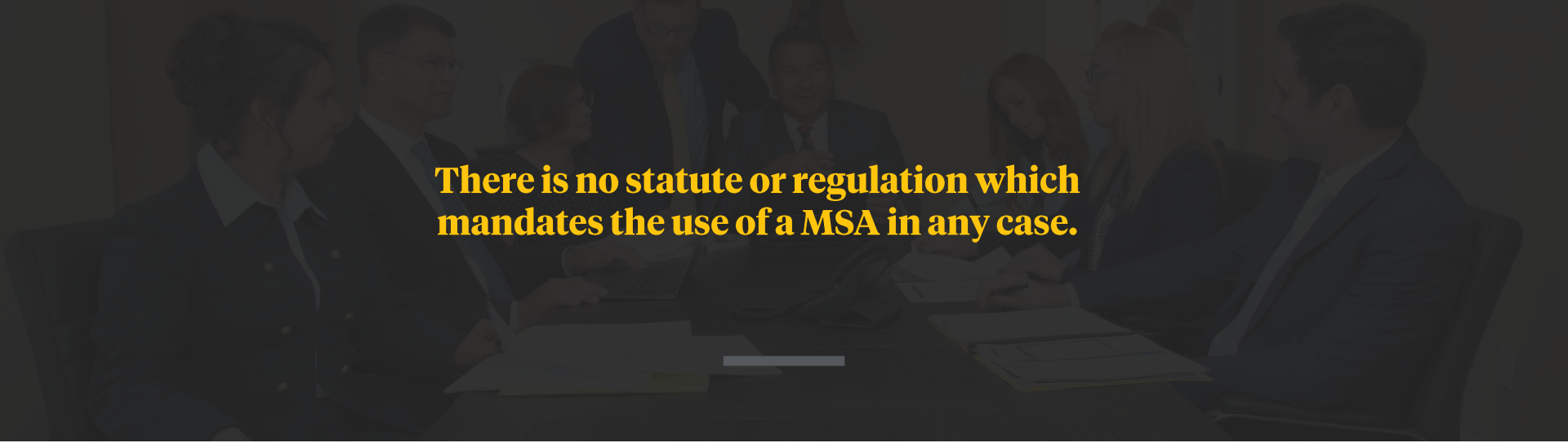
https://www.medicare.gov/Pubs/pdf/11694-Medicare-and-Marketplace.pdf

The Stalcup Memo Revisited

While not required, an MSA can offer all-around protection.

"[A] Set-aside is our [CMS] method of choice and the agency feels it provides the best protection for the program and the Medicare beneficiary."

John Riccardi, Esq., MSCC, ChSNC®
SENIOR MEDICARE SET-ASIDE ANALYST, SETTLEMENT ADVISOR
riccardi@precisionlienresolution.com | 716-712-0417



There is no statute or regulation which mandates the use of a MSA in any case.

A Question of Protection

The question becomes: to what extent must the parties to a settlement ensure that Medicare does not cover future accident-related medical expenses, and who bears the responsibility to protect Medicare's future interests?

What is a Set-Aside

The Medicare Set-Aside–the creation of a separate bank account that a Medicare beneficiary utilizes solely to privately pay for accident-related and otherwise Medicare-covered treatment occurring after the date of a settlement–has emerged as Medicare's preferred method that Medicare beneficiaries utilize to protect Medicare's future interests in a settlement.

What documents should I rely on calculate a Medicare Set-Aside?

Answer:

In order to get a full picture of the future accident-related Medicare-covered treatment for your client, you should be prepared to review or provide the following documents to a third-party allocator:

- Records/reports from your client's treating physician(s) for the past two (2) years of treatment or from the date of accident (whichever is shorter);
- IME Reports for the past three (3) years or from the date of the accident (whichever is shorter);
- Print out of payment history for medical benefits for the past three (3) years, if it is readily available;
- A list of current and future prescriptions if not otherwise included; and
- Complaint setting forth the facts of the case.

Ryan Collins
SETTLEMENT ADVISOR
ryan.collins@planningisparamount.com | 716-712-0127

Medicare Accepts Two Funding Vehicles for MSAs

Funds from an MSA cannot be utilized for anything other than accident-related treatment which would otherwise have been covered by Medicare.

Lump Sum Funding

With a lump-sum MSA, a Medicare beneficiary must spend the entire amount of the MSA before Medicare will cover Medicare expenses relating to the work injury. The funds are to be deposited into an interest-earning account and the beneficiary must maintain control and keep diligent records of expenditures.

Annuity Funding

Medicare recognizes that an MSA can be funded with a structured settlement annuity.

In these circumstances, the first two years of anticipated expenditures are deposited into an interest bearing account. Thereafter, an annuity stream is tailored to make annual payments to the beneficiary in the amount of the anticipated annual expenditure for accident-related treatment covered by Medicare.

Here, Medicare may be billed once those funds are exhausted in the calendar year that they have been received. Once the next year's annuity payment is received, Medicare become "secondary" again until the funds are depleted.

Temporary Life Payments

Remember that, no matter what the carrier's representative state, an MSA is not required in any case.

Further, when the adjuster presents you and your client with an MSA and corresponding annuity, be sure that the annuity is not using Temporary Life benefits.

Temporary Life benefits cease to pay out once the beneficiary is deceased. Temporary Life is a cost saving tactic for insurance companies and only benefits those companies.

Instead, you should be discussing your options with a plaintiff or claimant-only planner who can provide period certain or other types of more favorable funding options.

With a period certain annuity, if the claimant dies prior to the balance of the annuity payments being made, the claimant's beneficiaries stand to collect any remaining payments.

Click Here for Examples Referenced by Paul Isaac, Esq. at 44:43 of the webinar.

The Benefits of Third-Party Administrators

With either the lump sum or annuity option, the beneficiary must maintain diligent record keeping to be sure that Medicare become the primary payer when MSA funds are depleted.

However, in our opinion, there is better option.

There are companies dedicated to the professional administration of MSA accounts.

Typically, for a small one-time fee, these companies will manage MSA accounts, coordinate prescription and physician visits and even serve as coordination of benefit sounding boards for beneficiaries.

Using a professional administrator shift the annual reporting and record keeping burden off of the shoulders of the beneficiary and onto these firms.

Recommendations can be provided upon request.

Precision Resolution Fee Schedule

Medicare Set-Asides

Precision Resolution takes the guesswork out of Medicare Set-Aside solutions. When considering if an MSA is appropriate in your client's case don't rely on flow charts, questionnaires, or the guidance of defense counsel.

The stakes are high, with the potential for Medicare to deny plaintiffs coverage for future accident-related treatment. What is needed is the advice of experts.
Rely on the expertise of Precision Resolution's staff of Medicare Set-Aside Certified Consultant attorneys and nurse allocators.

Let us review the specific facts of your case and we will recommend a defensible, plaintiff-focused and cost effective MSA solution that will protect your plaintiffs and practice in the long run.

Click Here to Submit a Case.

Defense Has No Exposure

At the outset, it is important to note that Medicare Set-Asides are not required in any case – not workers' compensation or liability. For this reason, Precision Resolution offers a host of MSA solutions including:

- **Opinion Letters;**
- **MSA Allocation Projections & Reports;**
- **CMS Submissions (where appropriate); and**
- **Audit and Review of Defense-Prepared MSA Allocation Projections**

Medicare Set-Aside Solutions

Medicare Set-Aside Allocation	Medicare Set-Aside Opinion Letter	Medicare Set-Aside Submission to CMS
$2,200	$1,500	$1,000
Additional Fees for Expedited Reports	Additional Fees For Records over 1,500 Pages	Additional Fees For Records over 1,500 Pages

Precision Resolution Fee Schedule

Lien Resolution

Whether the primary case is open for three months, or three years, Precision Resolution's fees or level service will not change. The minimum per lien fee shall equal $500.00.

Also note that Precision does not charge for submitting settlement details and securing Medicare's pro-rata reduction for attorney fees and expenses pursuant to 42 CFR 411.37.

When Precision Resolution submits this information to Medicare, it is not considered a billable event for Precision Resolution.

Click Here to Submit a Case.

Lien Reporting & Resolution Outsourcing Solutions for Medicare, Medicaid, Medicare Advantage, ERISA and other Healthcare Liens:

- Reporting to Recovery Contractor and/or Government Agency
- ERISA Plan & Trust Agreement Document Requests & Review
- Updated lien amount requests every 90 days, at a minimum
- Audit of all lien ledgers, notifying counsel of findings
- Claim Coordination & Medical Record Review
- Closing duplicate liability cases with Medicare created by erroneous Section 111 Reporting
- Multiple challenges and appeals of lien amount, In effort to reduce, where necessary
- Reporting of settlement to contractors and agencies to secure the final lien amount tracking of repayment until the file has been closed.

$500 PER LIEN CLAIM	*plus, if applicable*	**15%** OF LIEN REDUCTION CONTINGENT FEE*
Fees Due at Case Submission		Fees Due When Funds Received

*If Precision Resolution litigates the lien the contingent fee shall equal 25% of the reduction of the lien amount. All fees will be discussed with counsel prior to engagement.

PRECISION RESOLUTION

Paramount

The Truth About Medicare Set-Asides

Call Precision Resolution at 888-961-LIEN for your free lien screen and Medicare Set-Aside case consultation and let Precision's attorneys build a custom-tailored outsourcing plan for your practice.

ADDRESS :

4134 SENECA STREET
BUFFALO, NY 14224

CONTACT:

888-961-LIEN
PRECISIONLIENRESOLUTION.COM