maps | Lien Resolution Services

Two Lakeway Center
3850 N. Causeway Blvd Ste. 400
Metairie, LA 70002
Phone: 504.831.2141
800.443.7351
Fax: 504.837.2566
800.878.5080
www.mapsLRS.com

NOVEMBER 12, 2014

ARE MEDICARE SET ASIDES LEGALLY MANDATED IN PERSONAL INJURY SETTLEMENTS

BY: ROGER LARUE, JD, MBA
504-453-1315 CELL
PRESIDENT AND CHIEF COMPLIANCE OFFICER

ISSUE

Are Medicare Set Asides (MSAs) legally mandated when settling third-party liability claims?

OPINION

No, MSAs are not legally mandated in third-party liability cases. While properly evaluated MSAs are the method preferred by the Center for Medicare and Medicaid Services (CMS),[1] and the safest for protection of the parties and counsel, there is no authority that they are mandated. To the contrary, the overwhelming evidence is that MSAs are not mandated.

Observation

The Medicare Act "is one of 'the most completely impenetrable texts within human experience'".[2]

REASONS

The issue of MSAs arises out of the Medicare Secondary Payer (MSP) Act, 42 U.S.C. § 1395y(b)(2)(A) & (B).

Section A, the "General Rule," prohibits Medicare from paying for medical expenses related to third-party liability claims as long as a "primary plan" exists.[3] A "primary plan," as defined by the MSP Act, can be any one of a number of resources: personal and/or group health coverage, workers' compensation, or a monetary personal injury settlement wherein the claimant releases the defendant(s) from payment of future medical expenses.[4]

The only exception to this general prohibition on payment of medical expenses is found in section B of § 1395y(b)(2), "Conditional Payments". Under that section, Medicare is authorized to make payments for accident-related medical expenses under certain circumstances.[5] These payments are considered "conditional" because they must be repaid upon receipt of settlement funds by the claimant. The procedures for repayment and the penalties for failing to repay the "conditional payments" are very specific, and the rights of CMS to collect conditional payments are spelled out in detail in the MSP Act and its implementing regulations.[6]

A glaring distinction exists between sections A and B. Although the General Rule states that Medicare is prohibited from paying for medical expenses related to third-party liability claims, the General Rule of MSP Act contains no statutory time limits, procedures, or regulations setting forth the duration of that prohibition. In other words, unlike the "Conditional Payment" section, the "General Rule" continues past the closure of the claim: without any time limits on protecting Medicare's interests, the parties are obligated to protect Medicare's interests as long as a primary plan exists. The MSP Act is somewhat confusing because no person, fund or entity is required to reimburse Medicare until payment is made. Therefore if the defendant wins via summary judgment, directed verdict, etc., it has no responsibility to repay Medicare because it didn't ever become a "Primary Plan". Courts have taken notice of this. Indeed one court has noted:

> "[§] 1395[y] is not a model of clarity[,] [y]et it does clearly provide that, where there is some entity, other than Medicare, obligated to pay for an item or service, that entity shall pay first and Medicare shall pay the excess."[7]

The same reasoning applies to post-settlement protection of Medicare. However, neither the MSAP Act, nor the Code of Federal Regulations, nor CMS have articulated how that obligation should be satisfied.

In 2001, CMS published the "Patel Memorandum" which contained the first mention of MSAs as a means of protecting Medicare's post-settlement interests.[8] Since the publication of the Patel Memorandum, CMS has issued many other memoranda and guidelines on this issue.[9]

Over the same period that CMS was publishing and expanding its MSA guidelines, there were growing concerns about whether set-asides of any sort were mandated, particularly in liability cases. Additionally, the tide was changing as to whether MSAs were legally mandatory in liability cases in view of the fact that the language of the MSP Act says nothing about MSAs. Likewise, the federal regulations are silent as to post-settlement protection of Medicare.[10]

The first note which I personally received indicating that MSAs are not legally mandated is found in a November 2006 e-mail from Sally Stalcup, CMS's MSP Regional Coordinator for Region 6, headquartered in Dallas.[11] The email stated in pertinent part:

> "Section 1862(b)(2)(A)(ii) of the Social Security Act [42 U.S.C. § 1395y(b)(2)(A)(ii)] precludes Medicare payment for services to the extent that payment has been made or can reasonably be expected to be made promptly under liability insurance.
>
> "This also governs Workers' Compensation. 42 CFR 411.50 defines liability insurance. Anytime a settlement, judgment or award provides funds for future medical services, it can reasonably be expected that those funds are available to pay for future services related to what was claimed and/or released in the settlement, judgment, or award. Thus, Medicare should not be billed for future services until those funds are

> exhausted by payments to providers for services that would otherwise be covered by Medicare. . . .
>
> **"There is no regulation that requires the establishment of a set-aside fund. The law does require that those funds be available to pay for future otherwise Medicare covered services related to what was claimed and/or released in the settlement agreement. There is no formal CMS review process in the liability arena as there is for Workers' Compensation." (**Emphasis added).

A second basis for my opinion is a handout by Ms. Stalcup at a Medicare conference held in May 2011.[12] In that handout, Ms. Stalcup stated:

> **"The law does not require a 'set-aside' in any situation**. The law requires that Medicare Trust Funds be protected from payment for future services whether it is a Workers' Compensation or liability case."

In a CMS memorandum published on May 11, 2011,[13] CMS reiterated that it had issued guidelines on Worker's Compensation Medicare Set-aside Agreements (WCMSAs) which can be found on a "dedicated workers' compensation" website. This memorandum effectively excluded all liability cases from CMS's MSA guidelines.

Also during this period, the Eleventh Circuit decided *Bradley vs. Sebeluis*.[14] With respect the methodology of handling matters falling outside the MSP Act and the Code of Federal Regulations, *Bradley* stands out for the following statement:

> "At present, there is no vehicle or mechanism in the MSP statute or its regulations that specifically prescribes how a lump sum settlement will be prorated between multiple parties. Until better methods are prescribed and followed, the one pursued here [i.e., a probate court's equitable allocation of wrongful-death settlement proceeds between a beneficiary's children for non-medical losses and Medicare for medical expenses paid] is reasonable and, indeed, the only one available."[15]

Stated otherwise, in situations where MSP statute or its regulations are silent as to how a Medicare issue should be resolved, parties should exercise reason, due diligence, and

common sense in regard to Medicare's interests. Indeed, this is how courts have interpreted *Bradley*.

For instance, in *Benoit v Neustrom*,[16] the district court clearly noted that MSAs are not mandatory. Citing the May 25, 2011 CMS memorandum and *Bradley v. Sebelius*, supra, the court stated in its findings of fact:

> "Medicare does not currently require or approve Medicare set asides when personal injury lawsuits are settled. Medicare does not currently have a policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases."[17]

Additional proof that CMS has not issued any guidance on liability MSAs is found in CMS' Advanced Notice of Proposed Rulemaking (ANPR) published in the Federal Register in June 2012.[18] The purpose of that notice, as stated by CMS, was:

> [To] solicit[] comment on standardized options that we are considering making available to beneficiaries and their representatives to clarify how they can meet their obligations to protect Medicare's interest with respect to Medicare Secondary Payer (MSP) claims involving automobile and liability insurance (including self-insurance), no-fault insurance, and workers' compensation when future medical care is claimed or the settlement, judgment, award, or other payment releases (or has the effect of releasing) claims for future medical care.

The ANPR then provided several options as to how to protect Medicare's interests following conclusion of a liability case. Of the seven options that CMS sought comment on, only one mentioned set asides (option 4). On October 15, 2014 CMS withdrew these proposals[19] because, and this is not official, the proposed rules did not pass muster with the Office of Management and Budget. A big roar went up by many litigators for reasons unknown to me. Since a Rule was never published, none of the options mentioned in the original ANP came into effect, leaving us with in the same exact position as we were all along.

What are we left with? In my opinion we are left with the same judicial pronouncements as before: MSAs are not mandatory, but are CMS' preferred method of protecting Medicare's post settlement interests. If a MSA is not utilized, than the parties should use "good faith" and "reason" in protecting Medicare's interests.

SUMMARY

For all these reasons, it is my opinion that Medicare Set Asides are not legally mandated when settling third-party liability claims. However, using the rule of reason, the parties must protect Medicare's interests. The methods for protecting Medicare's post-settlement interests are case-specific and are not addressed herein.

---

[1] CMS is a federal agency within the Department of Health and Human Services (DHHS) that administers the Medicare program and works in partnership with state governments to administer Medicaid, among other programs.

[2] *Parra v. PacifiCare of Arizona*, 715 F. 3rd 1146, (9th Cir. 4/19/2013); *Cooper University Hospital v. Sebelius*, 636 F.3rd 44, 45, (3rd Cir. 2010)

[3] The MSP Act is somewhat vague in the definition of a "Primary Plan" because, in reality the defendant only becomes a "Primary Plan" when the claim is concluded via a compromise or judgment, i.e. the claimant receives a sum of money for his/her injuries. Before that point in time the proper term should be that the defendant is a potential primary plan. If the defendant succeeds in winning the case by whatever means, the defendant never becomes a "Primary Plan".

[4] § 1395y(b)(2)(A)(ii).

[5] Medicare normally makes "conditional payments" if the claimant has no source of medical funding that should reasonably pay within 120 days of the injury. 42 U.S.C. §1395y(b)(2)(B)(i); 42 C.F.R. §411.21.

[6] § 1395y(B)(2)(B)(i)-(iv); 42 C.F.R. § 411.21.

[7] *Bradley v. Sebelius*, 621 F.3d 1330, 1339 n.21 (11th Cir. 2010) (citing § 1395y(b)(2)(A), (b)(2)(B)(ii)).

[8] http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads/July-23-2001-Memorandum.pdf.

[9] http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Memorandums.html.

[10] *See generally* 42 C.F.R. §§ 411.01 through 411.54.

[11] Upon request, the entire email can be forwarded to you. Because Stalcup is a public servant, the e-mails are not confidential and can be review by interested persons.

[12] http://www.pmsionline.com/pdf/May-25-2011-CMS-Handout-Stalcup.pdf.

[13] http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Downloads/May-11-2011-Memorandum.pdf.

[14] 621 F. 3d 1330.

[15] *Id*. at 1339 n.21.

[16] No. 10-cv-1110, 2013 WL 1702120 (W.D. La. Apr. 17, 2013).

[17] *Id*. at *5.

[18] Medicare Program: Medicare secondary Payer and "Future Medicals", Federal Register/ Vol. 77, No. 116, June 15, 2012, Pg. 35917-35920; http://www.gpo.gov/fdsys/pkg/FR-2012-06-15/pdf/2012-14678.pdf.

[19] RIN 093-AR43.