

## **Cutting Through the Confusion on Medicare Set-Aside Accounts**

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Personal injury attorneys are bombarded with confusing and often inaccurate information regarding Medicare Set-Aside Accounts (MSA). What is an MSA and what are the requirements to set up this type of account when you settle a case for a Medicare recipient?

### **What is a Medicare Set-Aside Account?**

A Medicare Set-Aside Account is an account to hold the portion of a settlement allocated to future medical expenses for a Medicare recipient. This account is used to pay for specified medical expenses related to the tort injury until the account is exhausted. Until the account is depleted Medicare will not cover expenses for medical care and treatment covered by the MSA.

The agency responsible for determining whether an MSA will be required is the Centers for Medicare and Medicaid Services or CMS. Whether an MSA will be required is usually decided at the regional level of CMS. Washington State is in Region X with headquarters in Seattle.

Currently CMS only requires an MSA in state and federal workers compensation cases (including Jones Act cases, Federal Employees Liability Act (FELA) cases and Harbor Workers and Longshoremen Act cases). CMS has never promulgated regulations in the CFR on workers compensation MSAs but there is information on the CMS web page regarding these accounts.

**CMS does not currently require a Medicare Set-Aside in traditional tort cases with third party liability.** There is no question the CMS has the legislative authority to require an MSA in all tort liability cases but they have not done so to date.

### **Medicare Subrogation**

An MSA is not the same as Medicare subrogation. Medicare has always had a right to claim reimbursement from liability settlements for medical expenses caused by the tort feason's conduct. Medicare refers to its payments as "conditional payments" subject to reimbursement when the third party liability claim is paid. Subrogation claims include Medicare payments paid up to the date the case is settled.

An MSA is not for Medicare payments made to the date of settlement but it is for **future medical claims** related to the negligent conduct.

### **New Reporting Requirements**

One source of the current confusion about MSAs is a recent federal law, the SCHIP Extension Act of 2007. This act originally was to go into effect on July 1, 2009 but the effective date was recently extended to July 1, 2010.

Contrary to some information generated by the MSA industry, this statute has nothing to do with Medicare Set-Asides. The statute is a reporting statute, requiring all insurance plans to report to CMS information about potential recipients of Medicaid or Medicare benefit who potentially may receive a personal injury settlement. This information is to help CMS and state Medicaid agencies enforce their right to subrogation reimbursement, not to establish an MSA for future medical expenses.

### **Should your client set up a voluntary MSA in a tort liability case?**

There is a cottage industry that has developed around MSAs in the workers compensation area. Some attorneys, liability insurers, structure sales people and administrators of MSA accounts recommend that attorneys set up a *voluntary* MSA in tort liability cases even though it is not required by current CMS regulation, memorandum or practice. The concern expressed by those advocating a voluntary MSA in tort liability cases is that CMS could later deny coverage for future medical treatment to the Medicare recipient who received a tort settlement. Others suggest that the personal injury attorney could be held liable for failure to set up the MSA voluntarily.

Personal injury attorneys need to make a decision about whether they or their Medicare clients are at risk if they do not set up a voluntary MSA account in tort cases. Keep in mind that there are no current CMS regulations or web site memos requiring an MSA in tort cases. The only current requirement on the CMS web site relates to MSAs in workers compensation cases. Also remember that if your client voluntarily sets aside money out of the gross settlement to pay future medical expenses that would otherwise be billed to Medicare, there will be less money for the client to use for other needs. The Center for Medicare Advocacy, a nonprofit organization that advocates on behalf of Medicare beneficiaries, has expressed concern about the recent trend of attorneys encouraging Medicare recipients to set up a voluntary MSA in tort cases even though it is not required by CMS.

Attorneys need to ask if their clients will benefit from setting up a voluntary MSA if it is not required under existing regulations. Second, attorneys need to decide if there is a serious risk that a court is likely to later support CMS if it ever decided to retroactively punish Medicare recipients and their attorneys for failing to comply with a rule or policy that was not in existence when the settlement was received. CMS has never stated that it has any intention of retroactively applying the current MSA regulations for workers compensation cases to tort liability cases. Given the general requirements of the Administrative Procedures Act and

due process notice requirements it is not unreasonable to assume that CMS will adopt written rules and share them with the public before it implements a Medicare Set-Aside requirement for tort liability cases.