Medicare Futures – The Unregulated New Frontier

By Jason D. Lazarus, J.D., LL.M., MSCC, CSSC

While resolving Medicare conditional payments is very important, a larger issue looms regarding payments made by Medicare after settlement. 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 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.

In the past, trial lawyers never had to worry about whether Medicare would pay for their client's future care post-settlement. There is cause for concern that 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 now 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. 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.

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 process within Medicare 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 breathing down their necks. While we haven't see 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 insure compliance with the MSP.

When it comes to set asides, there are a few key takeaways. 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 a case.

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 that education 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.[1]

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 been primary to Medicare. At settlement, by judgment or through an award, an injury victim

[1] 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.

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 a 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.[2] Accordingly, CMS circulated a memo in 2001 to all its regional offices announcing that compliance with the secondary payer act required claimants to set aside a portion of their settlement for future Medicare covered expenses where the settlement closed out future medical expenses.[3] 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."[4] 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.

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

---

[2] Edward M. Welch, *Medicare and Worker's Compensation After the 2003 Amendments,* WORKERS' COMPENSATION POLICY REVIEW, at 5 (March/April 2003).
[3] Parashar B. Patel, *Medicare Secondary Payer Statute: Medicare Set-Aside Arrangements*, Centers for Medicare and Medicaid Services Memorandum, July 23, 2001.
[4] *Id.*

CMS policy. Failing to address this issue can result in a future denial of injury related care by Medicare.