

What is a Medicare Set-Aside?



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The following is adapted from [The Art of Settlement](#).

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 would receive damages for future medical expenses 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 Centers for Medicare and Medicaid Services (CMS) as a Medicare Secondary Payer Act compliance tool for workers' compensation cases. CMS circulated a memo to all its regional offices announcing that compliance with the Medicare 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. This is the simple definition of a "Medicare Set-Aside" (MSA).

But of course, the “simple” definition is never quite as simple as it seems. Read on to learn more about Medicare Set-Asides and why they’re problematic.

A Deeper Definition

A Medicare Set-Aside 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. In certain cases, a Medicare Set-Aside may be advisable in order to preserve a client’s future eligibility for Medicare coverage.

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’ review and approval process is voluntary. 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 Workers’ Compensation Medicare Set-Aside Arrangements [WCMSA].” 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.

Once the Set-Aside account is exhausted, the client gets full Medicare coverage without Medicare looking to their remaining settlement dollars to provide for any Medicare-covered healthcare. In certain circumstances, Medicare approves the amount to be set aside in writing and agrees to be responsible for all future expenses once the Set-Aside funds are depleted.

The Problem with MSAs

The problem is that MSAs are not required by a federal statute even in workers’ compensation cases where they are commonplace. There are no regulations, at this time, related to MSAs either. Instead, CMS has intricate “guidelines” and “FAQs” on their website for nearly every aspect of Set-Asides from submission to administration. There are only 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 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 toward a CMS policy of creating Set-Asides in liability settlements over the last seven years as a result of the Medicare Medicaid SCHIP Extension Act’s passage. This creates a difficult situation for Medicare beneficiary-injury victims and

contingent liability for legal practitioners as well as other parties involved in litigation involving physical injuries to Medicare beneficiaries given the uncertainty surrounding the need to create a Set-Aside.

There appears to be regulations on the horizon for Set-Asides based upon a Notice of Proposed Rulemaking from CMS entitled “Medicare Secondary Payer and Future Medicals.” 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 healthcare 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.” 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 was expected sometime in 2019 but hasn’t yet materialized.

Medicare Set-Asides are an Unregulated New Frontier

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. 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.

In other words, it’s not required, but failing to address this issue can result in a future denial of injury-related care by Medicare. It is obvious that Medicare interprets the Medicare Secondary Payer Act 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. These are the shifting sands of an unregulated new frontier.

For more advice on Medicare Set-Asides, you can find [The Art of Settlement](#) on [Amazon](#).

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