

# Medicare Secondary Payer Compliance

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## The Harsh Reality

- Reimbursement of Medicare is a major issue
  - Is not an obscure 'lien' subject
  - Penalties for non-compliance are severe
  - Many, if not most, product liability plaintiffs, defendants, attorneys, and insurers may already be in violation
  - Right now there are more questions than answers
  - What is certain, however, is that way personal injury claims have been handled and resolved in past will not work anymore

## Today's Discussion

- The History of the Medicare Secondary Payer (“MSP”) Act
- Current MSP Act Requirements And Penalties
- Implications And Issues To Be Concerned About
- Compliance Best Practices

# The History of the Medicare Secondary Payer Act

## Social Security Act of 1965

- Act created two new government-sponsored health insurance programs: Medicare and Medicaid
  - Medicare provides government-sponsored health insurance for:
    - People age 65 or older
    - People under age 65 who are disabled
      - Tied to eligibility for Social Security Disability Benefits
    - People of any age with End-Stage Renal Disease (ESRD)  
(permanent kidney failure requiring dialysis or a kidney transplant)

## Medicaid

- Medicaid is a needs-based medical assistance program that pays for medical care for low-income persons who are
  - aged,
  - blind, or
  - disabled
- Medicaid is operated, and partially funded, by the states, and every state has its own program
- Not concerned with Medicaid, only Medicare

## Medicare Basics

- The idea is to provide federal health insurance to individuals who lose their health coverage once they stop working because of retirement or disability
- Medicare has four parts
  - Medicare Part A (Hospital Insurance)
  - Medicare Part B (Medical Insurance)
  - Medicare Part C (Medicare Advantage Plans)
  - Medicare Part D (Prescription Drug Coverage)

## Medicare Administration

- **Administered by The Centers for Medicare & Medicaid Services (CMS)**
  - Part of the Department of Health and Human Services
  - Two contractors do most of day-to-day MSP work
    - Coordination of Benefits Contractor (COBC)
    - Medicare Secondary Payer Recovery Contractor (MSPRC)
- **The Social Security Administration determines Medicare eligibility**



## Medicare as Primary Payer

- For the first 15 years Medicare was a 'primary payer'
  - Medicare paid for health care, even if person had private health insurance or someone else might have been responsible (e.g., a tortfeasor or tortfeasor's liability insurer ).
  - Only exception - worker's compensation
    - Medicare a "secondary payer"
    - Secondary Payer = Medicare only pays *after* the responsible worker's compensation plan pays
- But after years of ever escalating Medicare costs ...

## The Medicare Secondary Payer (“MSP”) Act of 1980

- A small, largely unnoticed, piece of The Omnibus Reconciliation Act of 1980, a larger deficit reduction bill
  - Codified at 42 U.S.C. § 1395y, et seq. *See also* 42 C.F.R. § 411
- Intent to shift the primary burden of Medicare payments from Federal Government to private sources of payment

## More Secondary Payer Situations

- Medicare now secondary payer for medical services when payment “has been made or can reasonably be expected to be made” by a primary plan
  - Act defines a “primary plan” as
    - A group health plan
    - A workmen’s compensation law or plan
    - An automobile or liability insurance policy or plan (including a self-insured plan)
    - No fault insurance

## Conditional Payments

- Medicare may make primary payments
  - In the event that a recipient will not receive prompt payment from a primary plan
- These payments are conditional
  - Medicare to be reimbursed when payment for same services is received from primary plan

## Pursuit of Tortfeasors

- After 1980, the MSP Act expressly applied to liability insurers, including self-insured plans
- Government then started targeting tortfeasors for reimbursement of “conditional” payments
  - Claiming they were self-insurers if they paid settlements or judgments directly
  - The Courts repeatedly disagreed
- Which prompted the 2003 Medicare Modernization Act...

## Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

- Best known for new Medicare Prescription Drug Benefit
- Added following definitional sentence to the MSP Act:
  - “An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part”
- MMA closed other perceived “loop holes” in MSP Act
- The clarifying and technical amendments are effective retroactively from the date of original MSP Act enactments

## Medicare, Medicaid, and SCHIP<sup>1</sup> Extension Act of 2007 (MMSEA) - Section 111

- Imposes new notice and reporting requirements
  - Reporting burden falls on Responsible Reporting Entities (“RRE”)
    - Group Health Plans
    - Workers’ Compensation Plans
    - Liability Insurance Providers (including self-insurance)
    - No-Fault Insurance
  - Are significant financial penalties for failure to comply
- New reporting requirements do not change or eliminate any existing obligations under MSP Act

## Enhanced Enforcement of Reimbursement Rights

- **New reporting rules will enhance Medicare's ability to enforce its reimbursement rights**
  - Following a
    - Settlement
    - Award/Judgment
    - Or other payment
  - To a Medicare beneficiary
- **Reporting rules have led to justifiable nervousness**
  - And much misinformation



# Current MSP Act Requirements and Penalties

## Medicare as Secondary Payer

- Under MSP Act, Medicare is secondary payer for medical services
  - When payment has been
  - Or reasonably can be expected to be made
  - By a primary payer
    - A group health plan
    - A workmen's compensation law or plan
    - An automobile or liability insurance policy or plan (including a self-insured plan)
    - No fault insurance

## Medicare Will Pay -- Conditionally

### ■ Conditional Payments

- Medicare may make a conditional payment for medical treatment if a primary payer did not pay, or cannot reasonably be expected to issue payment promptly (120 days)
- Ensures beneficiary receives needed care (e.g., during litigation)
- Medicare expects to be reimbursed by primary plan (e.g., liability insurer or self-insured tortfeasor)

## Reimbursement of Conditional Payments

- **A Judgment or Settlement = A reimbursement obligation**
  - The mere act of settling creates a reimbursement obligation
    - No finding or admission of liability is necessary
    - If Plaintiff “compromised, waived, or released” claims for injury, then Medicare must be reimbursed
- **The reimbursement obligation is immediate and automatic**
  - Beneficiary must reimburse Medicare within 60 days
  - If not, primary payer must reimburse Medicare “even though it has already reimbursed the beneficiary.” 42 C.F.R. § 411.24(i)

## Interest Penalty

- If payment is not made, interest will be due and owing on unpaid amount
  - Even during pendency of an unsuccessful request for waiver and/or appeal
  - Only way to avoid interest is to pay within specified timeframe
  - If a request for waiver or appeal is granted, beneficiary will receive a refund from Medicare

## Enforcement Action Targets and Damages

- If nobody reimburses, U. S. may choose its target(s) in an enforcement action
  - “[A]ny or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment” 42 U.S.C. § 1395y(b)(2)(A)(iii)
    - May recover double damages, on top of any payment primary plan has already made to beneficiary
  - Any “beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment” *Id.*
    - May recover lesser of conditional payment and amount of primary payment received by recipient

## U.S. v. Stricker

- Enforcement lawsuit under MSP Act
- Has nothing to do with the new reporting requirements
- Filed December 1, 2009
- U.S. District Court for the Northern District of Alabama

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
EASTERN DIVISION

FILED  
2009 DEC -1 P 4 03  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

THE UNITED STATES )  
OF AMERICA, )  
Plaintiff. )  
)  
v. ) Civil Action No.  
)  
James J. Stricker; )  
Daniel R. Benson; ) CV-09-PT-2423-E  
Kasowitz, Benson, Torres )  
& Friedman, LLP; Donald )  
W. Stewart d/b/a as )  
Donald W. Stewart, PC; )  
Don Barrett; The Barrett )  
Law Firm, PA; Charles E. )  
Fell, Jr.; Charles L. )  
Cunningham, Jr.; )  
Cunningham & Fell, PLLC; )  
Johnston Druhan, LLP; )  
Greg Cusimano; Cusimano, )  
Keener, Roberts & Raley, )  
PC; The Cody )  
Law Firm, PC; Monsanto )  
Company; Solutia, Inc.; )  
Pharmacia Corporation; )  
Travelers Companies, )  
Inc., d/b/a The )  
Travelers Indemnity )  
Company; American )  
International Group, )  
Inc., )  
)  
Defendants, )

COMPLAINT

The United States of America files this civil

-1-

## *U.S. v. Stricker*

- Plaintiff: The United States of America on behalf of the Secretary of Health and Human Services
- Defendants: Settling liability insurers, self-insured defendants, and plaintiffs' counsel
- \$300 million PCB exposure settlement
- ~907 Medicare beneficiaries
- U.S. seeking double damages from insurers and self-insured defendants and straight damages from underlying plaintiffs' lawyers



## Statute of Limitations

- Underlying litigation in *Stricker* case settled in 2003
- Government reimbursement action filed 2009
- What is the statute of limitations for enforcement actions?
  - No S/L in MSP Act
  - Issue still being litigated
  - But courts have tended to apply a 6-year S/L from time of notice
- May have exposure for past settlements

## Allocation of Damages

- Government may seek recovery of conditional payments from awards or settlements without regard to how award or settlement allocates damages/payment
  - May seek full reimbursement even though settlement was discounted. *Zinman v. Shalala*, 67 F.3d 841 (9th Cir. 1995)
  - May seek whole settlement and frustrate Plaintiff's ability to recover anything
  - Medicare, however, will recognize allocations of liability payments to non-medical losses when payment is based on a court order on merits of case

## Medicare's "Super-Lien"

- "[T]he MSP statute does not give the government a claim against property." Instead, "Medicare has a cause of action for damages." *Zinman v. Shalala*, 835 F. Supp. 1163, 1171 (N.D. Cal. 1993)
- Medicare's right to reimbursement is statutory and automatic - no intervention or notice required
- Much stronger than a mere lien

"the United States' right of [Medicare] reimbursement is **paramount** to any other claim."  
*United States v. Geier*, 816 F. Supp. 1332, 1337 (W.D. Wis. 1993)

## Compromise of Recovery Claims

- Medicare is authorized to compromise its claims for recovery of conditional payments 42 U.S.C. § 1395y(b)(2)(B)(v)
  - Where beneficiary is unable to "pay the full amount within a reasonable time"
  - Where "cost of collecting . . . does not justify the collection of the full amount"
  - Where "there is significant doubt concerning the government's ability to prove its case in court"

*In re Zyprexa Prod. Liab. Litig.*, 451 F. Supp. 458, 466 (E.D.N.Y. 2006)

## Waiver of Recovery Claims

- Medicare is authorized to waive its claims for recovery of conditional payments 42 U.S.C. § 1395y(b)(2)(B)(v)
  - If either the "probability of recovery, or the amount involved, does not warrant pursuit of the claim" 42 C.F.R. § 411.28(a)
- Medicare also may grant what are known as hardship waivers
  - Where recovery would defeat purposes of the Medicare Act
    - Would defeat purposes if would deprive a beneficiary of income required for ordinary and necessary living expenses
  - Where recovery would be "against equity and good conscience"

## Adjustment for Beneficiary's Procurement Costs

- A beneficiary's reasonable costs of procuring a judgment or settlement (*e.g.*, attorney's fees and expenses) may reduce Medicare's claim
  - If conditional payment is  $<$  judgment or settlement, Medicare's recovery is reduced by an amount equal to ratio of procurement costs to total recovery
  - If conditional payment  $=/ >$  judgment or settlement, Medicare recovers its conditional payments, less the procurement costs
  - No reduction if Medicare must sue to obtain reimbursement from beneficiary

## MSP Act Private Cause of Action

- Congress added a private right of action to the MSP Act in 1986
  - Act states that “[t]here is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement)”  
42 U.S.C. § 1395y(b)(3)
  - Is not a *qui tam* action
  - Citizen must have standing to bring action
    - Citizen must be able to demonstrate an injury actually done to him or her by the defendant

## Future Medicals

- **Duty to protect Medicare's interests includes taking into consideration future medical expenses when resolving a personal injury claim**
  - Medicare not bound by allocation for future medical expenses made by parties
  - Medicare may disregard any allocation and make its own calculation as future medical costs
  - If a fair amount is not allocated to future medical expenses, Medicare will not pay a beneficiary's future medical expenses



## How Will CMS Ever Know If I Complied?

### Mandatory Insurer Reporting

42 U.S.C. 1395y(b)(8)

## What Is It?

- Medicare, Medicaid, AND SCHIP Extension Act (MMSEA) of 2007.
- Section 111: Medicare Secondary Payer Mandatory Reporting Provisions.
  - *Does NOT apply to Medicaid (yet).*

## Is This Separate From MSP?

- WORK TOGETHER
  
- Medicare is using MIR as a tool to target non-compliance with MSP Act

## Requirements

- **Require WC cases to report quarterly for non-contested claims [ORM]**
  - Must report claims where ORM exists as of 1/1/10
- **One time basis for contested claims with single settlement, judgment, award, or other payment [TPOC]**
  - Beginning 10/1/10 (changed from 7/1/09)

## Timeline

5/1/09: RRE registration with CMS

1/1/10 – 12/31/10: MANDATORY testing period

1/1/11 – 3/1/11: Reporting Begins

- RREs may report sooner if testing is completed, but not required.

## Will The Reporting Requirement Be Enforced?

- A plan that fails to comply - subject to civil penalty \$1000 for EACH DAY of noncompliance for EACH PLAINTIFF
- One year fail to report one claimant = \$365,000
- Medicare estimates collecting \$1.1 billion in fines in first five years

## Implications and Issues to be Concerned About

## Implications & Concerns – New Reporting Requirements

- Costs to insurers and self-insureds will go up as they have to allocate resources (personnel and systems) to complying with reporting requirements of MMSEA.
- Increased reimbursement enforcement is all but guaranteed by MMSEA reporting
- The confidentiality of settlements is put at risk by new MMSEA reporting requirements
- Penalties for failure to timely report are severe



## Implications & Concerns – Increased Settlement Costs

- Compliance with MSP Act all but certainly will increase the average cost of personal injury claims
  - Because of increased administrative burdens
  - Because settlement negotiations likely will become more difficult
  - Because claim files will not close as quickly as in past, and settlements may fall apart because of delays
  - Because threshold for settlements likely will increase to an amount in excess of Medicare's reimbursement right
  - Because of uncertainties in trying to make certain that future Medicare benefits are properly addressed

## MSP Implications

- You may already be in trouble for past cases
  - Indemnification clauses won't save you
- Need to get compliant for pending and future cases
  - At time of settlement, its too late
- Need a separate process for all Medicare plaintiffs
- Realize the settlement negotiations may break down
  - No such thing as a nuisance settlement - need to cover Medicare
- Beware the private cause of action

## What You Must Remember

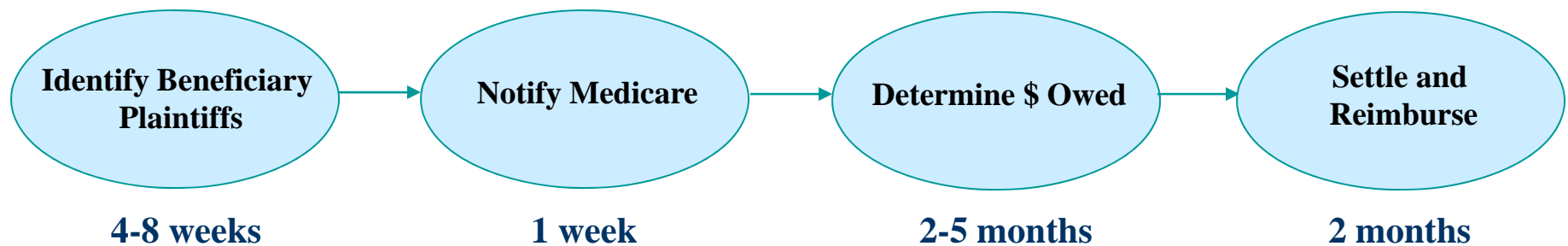
- Reimbursement obligation is automatic – be proactive
- Reporting requirement has teeth. When in doubt, report!
- Increased reimbursement enforcement is all but guaranteed by MMSEA reporting
  - The U.S. has 6 years, they may be better at enforcement by then
  - Easy for politicians to target manufacturers, insurers and lawyers to shore up Medicare
- Penalties are severe. Ignore MSP issues at your own peril.

## Conditional Payment Obligation

- **Pay Medicare for past payments relating to the injury**
  - Generally obligates plaintiff, plaintiff's counsel, liability insurer or self-insured defendant.
- **Automatic statutory obligation – not really a 'lien'**
  - Plaintiff has 60 days, otherwise primary payer also responsible even if Plaintiff has already been paid. 42 C.F.R. § 411.24
- **There is too much pre-work involved to address this only at the time of settlement or judgment**

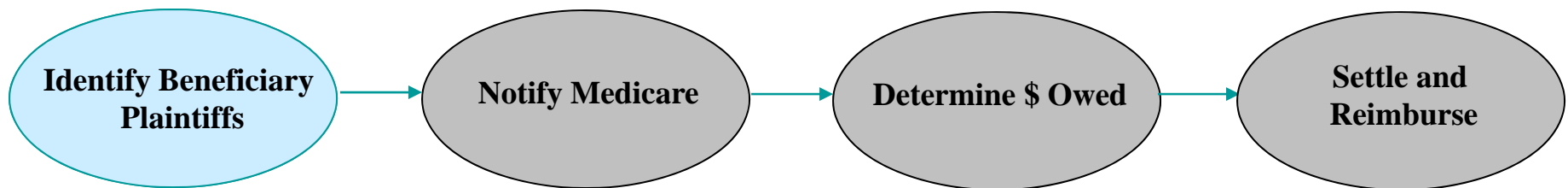
# Compliance Best Practices

## Conditional Payment Reimbursement Compliance Process



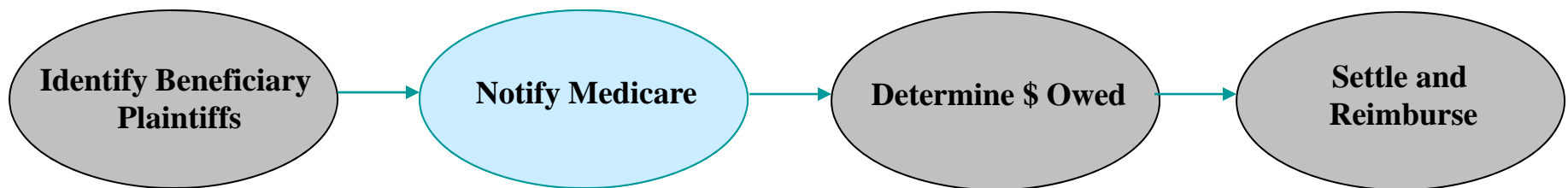
- This will take months
- Need to have a plan and make it an early priority
  - Settlement - Can dramatically effect settlement negotiations – act early to avoid blowing-up settlements at the last minute
  - Trial - You won't have enough time post-judgment to figure this out before the reimbursement obligation arises

## Identify Beneficiaries in Every Case



- Plaintiffs' Counsel is best positioned to expedite this process
- Otherwise, Defense can serve MSP discovery to identify current or potential beneficiaries
- Ask again in depositions
- Have the RRE do the on-line beneficiary query
- Check plaintiff's medical billing records

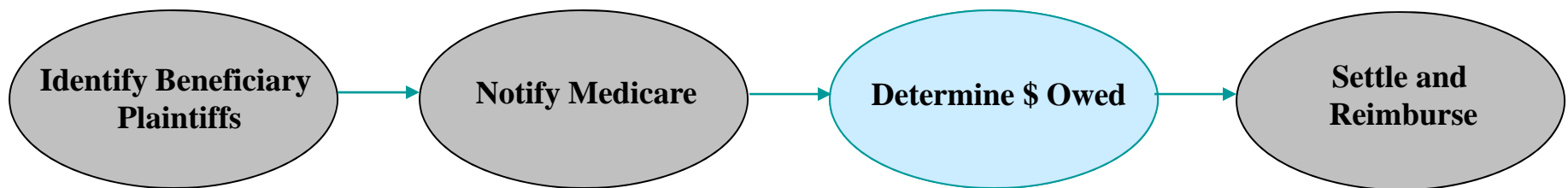
## Then Let Medicare Know



- Gets the process underway and starts the clock
- Plaintiff's counsel ideally will handle, but if not...
- "a primary payer . . . must provide notice about primary payment responsibility and information about the underlying MSP situation to [Medicare's Coordination of Benefits Contractor]." 42 C.F.R. § 411.25
- Making the initial notification is also a good chance to demonstrate an eagerness to comply – builds a favorable paper trail

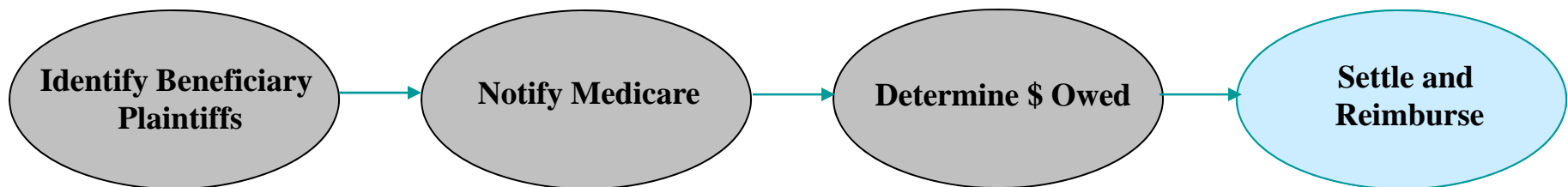


## Medicare will Quantify the “Lien”



- Get a ‘Proof of Representation’ or ‘Consent to Release’ form signed by beneficiary
- MSPRC will send “Conditional Payment Letter” in 65 days.
  - Will quantify Medicare’s Interests - \$ spent on relevant injury
  - Expect huge headaches if multiple causes or preexisting injuries
  - No idea how they will handle multiple defendants
- Can dispute the amount and then get a revised letter

## Settle the Case and Reimburse Medicare



- **Agree on settlement terms**

- Defense: Remember the private COA and get a release
- Defense: Get an indemnification, but it is incomplete protection at best
- Plaintiffs: Be wary of indemnification clauses drafted to include counsel perjury
- Be specific about how MSP will be addressed

- **MSPRC provides final demand letter within 60 days**

- One more chance to argue, but now interest accrues

- **Make sure Medicare is actually reimbursed**

- And the beneficiary doesn't just get a new truck
- There are several possible techniques



# Medicare Set Aside “Best Practices” (Medicare’s Future Payments)

## Medicare Set-Aside Arrangements

- One way to protect Medicare's interests regarding future medical expenses is to use a Medicare Set Aside Arrangement (MSA)
  - A MSA is an agreed amount of settlement funds "set-aside" in order to pay for future expenses where Medicare is a secondary payer
- Neither MSP Act nor regulations refer to MSA
  - Medicare Regional Offices will review and approve a WC settlement that includes a MSA
  - No such procedures yet for liability cases

## MSAs for Personal Injury Cases



- MSAs required for personal injury cases?
  - Same statute applies to personal injury as to Workers' Compensation
    - Workers' Compensation: regulations, formal procedures, voluminous guidance, years of past practice
    - Personal Injury: almost nothing.

## MSAs are Just for Workers' Compensation, Right?

When CMS was asked if the MSP statute applies to future medicals for personal injury as well as to Workers' Compensation:

"It's not parallel language. It's not similar language. It's literally the same physical sentence that we're not to make payment where payment has already been made."

*CMS March 16, 2010 town hall teleconference*

## The Real Issue: Future Medicals, not MSAs

“[W]here future medicals are a consideration in arriving at the settlement... then appropriate arrangements should be made...”

*CMS March 16, 2010 town hall teleconference*

“Whether or not [Medicare] is protected through setting up a formal set-aside, setting up a formal trust, simply keeping the money and ensuring that it’s... paying... in a priority manner to Medicare until the appropriate funds are exhausted; those are all choices, ... we are not in fact saying that liability set-asides aren’t appropriate.”

*CMS January 28, 2010 town hall teleconference*

## Issues with Future Medicals Compliance for Personal Injury

- There are a host of unaddressed issues
  - Few clear best practices
  - No guidance on calculation methods
  - No review and pre-approval of set-asides by Medicare
  - Multiple defendants settling or going to trial at different times – who is responsible?
  - Class actions, comparative fault, nuisance settlements, multiple causes, damage caps – nobody knows the answers



## MSA Compliance for Personal Injury

- **Realistically, until CMS publishes guidance this will be a burdensome case by case project**
  - Leverage Workers' Compensation guidelines as much as feasible
  - Consider settlement consulting firms
  - Refer to future medicals identified in case
    - e.g. lifecare plans: beware – it may be difficult to backtrack from numbers prepared prior to settlement
  - Plan for heavy reliance on risk assessment and judgment calls
- **Act in good faith and build a paper trail of your efforts**
- **Do NOT rely on wordsmithing or “creative” settlement language**
  - Putting most damages to a loss of consortium claim
  - Pretending all damages are for pain and suffering
  - Assuming indemnification will save you

## Consequences of Failure to Comply

- Primary Payer, Plaintiff, Contingency Fee Counsel:  
Double damages plus interest, plus cost to defend
  - Triple damages for Primary Payer if already paid plaintiff
- Possible private cause of action by beneficiary
- False Claims Act
- It gets worse – once identified as an offender, the U.S. may very well investigate the rest of your (client's / insurer's) past cases for other failures. Robert Trusiak, U.S. Attorney 2/4/2010



## Compliance Efforts May Affect Who Gets Targeted For Any Failures

“The inclusion or exclusion of the liability insurer in the [enforcement] suits will be partly based on the good faith attempts of the liability insurer to promote compromise of the MSP amount. The act of an insurer requiring only an indemnification has not advanced MSP compliance and constitutes a factor favoring inclusion in the action.”

Robert Trusiak, U.S. Attorney 2/4/2010

- **Conditional Payments** – The requirements are clear, you simply have to do it.
- **Future Medicals** – This is a huge mess. Act in good faith and hope for the best.

# MSP Reporting - Key Steps to Prepare

## How Do I Protect My Company Or Clients With Reporting Requirements?

1. Determine who is the RRE?
2. If RRE, must report all claims involving Medicare Beneficiaries.
3. Evaluate when MSA is needed

## Determine If An Entity Is a RRE

- **Immediately determine if are a RRE under MMSEA**
  - If so, should immediately register with CMS and take necessary steps to ensure are able to comply with reporting requirements by 1/1/2011
  - Be on lookout for changes in reporting requirements or for further guidance from CMS about reporting process
- **To avoid late reporting penalties, ensure make timely reports on an ongoing basis**
  - If a report is late, there is no defense to imposition of penalties

## Hypothetical

- Attorney settles a case for \$100,000
- Plaintiff IS Medicare Eligible, but NO set-aside allocation is made for future medicals
- RRE fails to report the “settlement”
- Conditional Payments for \$20,000 no one addressed

## What Can Happen?

- Medicare refuse to pay Plaintiff's medical up to amount of settlement because no allocation
- Claimant have COA against his attorney
- RRE fined \$1,000 every day per Plaintiff it didn't report
- Medicare can recover double damages for \$20,000 conditional lien from any party (claimant, attorney, primary payer) + interest



## What You Must Remember

- Reporting requirements have teeth
- Reimbursement obligation is automatic
- Increased reimbursement enforcement is all but guaranteed by the new MMSEA reporting requirements
- Penalties for non-compliance are severe and non-compliance exposes attorneys to malpractice claims
- Act in good faith and build a paper trail of your efforts
- Be on lookout for legal developments and further guidance from CMS

## Website Resources and References

- **CMS, COB Fact Sheets: MSP Laws and Third Party Payers Fact Sheet for Attorneys**
  - <http://www.cms.hhs.gov/ProviderServices/Downloads/thirdpartypayers.pdf>
- **Mandatory Insurance Reporting**
  - <http://www.cms.gov/MandatoryInsRep/>
- **Medicare Secondary Payer Manual, CMS Pub. 100-05**
  - <http://www.cms.gov/manuals/iom/itemdetail.asp?itemid=CMS019017>
- **MSPRC Information**
  - <http://www.msprc.info/index.cfm?content=main>

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