

# **Medicare Secondary Payer Status: Importance of Protecting Medicare's Interests in Liability Settlements**

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As MMSEA Section 111 continues to unfold, and until such time as CMS publishes policy (as provided in Medicare Secondary Payer Workers' Compensation) regarding future medical benefits in liability settlements, the plaintiff attorney settling a claim will need to determine the most prudent means to "reasonably consider" Medicare's interests. In looking back at the road paved by the MSP WC regulations, the Medicare Set-Aside provides a structured and safe means to reasonably consider Medicare's interests and is clearly the "gold standard" as Medicare recognizes it for this purpose. Therefore, in dealing with liability settlements, it appears that the study of the MSP WC practices, regulations, and policy memos offered by CMS offer the best guidance/insight we have as to how to avoid potential negative consequences.

The exposure to consequences to various parties for the failure to "reasonably consider Medicare's interests" are generally understood by those practiced in this field, i.e. both the settling entity and the plaintiff attorney (accepting payment on behalf of the plaintiff) are at risk for having to reimburse Medicare for any future "overpayments", otherwise known as Medicare payments for post-settlement injury related services to the claimant.

MSP WC regulations allow Medicare to retain its status as secondary payer post settlement and further allow CMS to review the "reasonableness" of an allocation to future medical expenses. If CMS determines that the allocation to future medical is unreasonably low, they are empowered under 42 C.F.R. 411.47 to require that the entire settlement be spent on future injury-related expenses before Medicare will cover injury-related/Medicare compensable medical services.

Therefore, it is important for the plaintiff attorney settling a liability claim to be aware of the risk created for the client who has received a settlement for future injury related medical expenses and fails to educate the client regarding a federal statute that has been in existence for decades. This also gives rise to another tangible exposure to the plaintiff attorney that might be brought in the form of a legal malpractice claim asserted by the plaintiff in the underlying claim who received these monies.

Consider the following example of a catastrophically injured plaintiff receiving a ten million dollar settlement. For many individuals, besides receiving money damages for future wage loss when totally disabled, the single most costly item in the Life Care Plan is usually custodial attendant care, an item that is not compensable under Medicare. A Medicare Set-Aside in this instance would identify a reasonable allocation to be set aside, demonstrating that Medicare's interests have been considered, and thus avoid the risk of exposure of the entire settlement. If such an individual had to document that the "entire

settlement” had been spent on future injury- related, Medicare compensable services, prior to being able to access their Medicare benefit for injury related care, they would never be able to do so. This individual would be effectively cut off from medical benefit for these services. It would seem that the plaintiff attorney who failed to properly advise and protect his client’s settlement may be at risk for having this client bring a legal action against him/her and may seek money damages to assist in paying for these same future medical services. Without knowledge that they needed to “set-aside” a portion of their settlement since the plaintiff was assuming Medicare coverage, the plaintiff may have used their settlement dollars for other purposes.

Since we know that CMS will have knowledge of these settlements given MMSEA Section 111, it seems clear that the “reporting” of these settlements back to January 1, 2010 is designed to avoid these over-payments and certainly gives CMS the opportunity to readily identify individuals who receive payments for future medicals of the type that are compensable by Medicare. The individual who cannot show evidence of a consideration of “Medicare’s interest” would seemingly be left in a precarious and exposed position. All parties clearly have exposure to negative consequences by ignoring the obligations imposed under the MSP statute.

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