

Medicare Futures – What is a Medicare Set Aside?

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An MSA 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.¹ 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’s review and approval process is voluntary.² 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 Web site 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 WCMSA.”³ 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.

Regulatory ‘Scheme’ - What, if Any, ‘Law’ is there for Set Asides in Personal Injury Settlements?

A formal ‘Medicare Set Aside’ is not required by a federal statute even in Workers’ Compensation cases where they have been commonplace since 2001. Instead, CMS has intricate guidelines and FAQs on their website for nearly every aspect of set asides from when to do one,

¹ See <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Overview.html>

² *Id.*

³ *Id.*

to submission, to administration for Workers' Compensation settlements.⁴ There are 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 towards a CMS policy of creating set asides in liability settlements as a result of the MMSEA's passage and the onset of MIR. This culminated with the presumed codification of formal regulations back in 2014.⁵ However, without explanation, those regulations were withdrawn after having gone through significant vetting along with public commentary. The apparent reason was complaints from both sides about the fairness and workability in practice of the proposed regulations.

In 2016, it became evident that CMS was not fazed by previous failed attempts at codification of rules for set asides in liability cases and was determined to develop a process to avoid shifting of the burden to Medicare post resolution of a personal injury settlement. Last year, the Department of Health and Human Services issued its budget for 2017 which included a line item indicating CMS had requested legislative authority to pursue a new policy regarding the treatment of future medicals.⁶ In June of 2016, CMS issued an alert that they were considering

⁴ See <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Memorandums/Memorandums.html>

⁵ 77 F.R. 35917; <http://www.gpo.gov/fdsys/pkg/FR-2012-06-15/pdf/2012-14678.pdf>

⁶ Medicare beneficiaries are unable to satisfy Medicare Secondary Payer "Future Medical" obligations at the time of settlement, judgment, award, or other payment because the current law does not specifically permit the Secretary to deposit such payment in the Medicare Trust Funds. Future Medical is defined as Medicare covered and otherwise reimbursable items and/or services furnished after the date of settlement, judgment, award, or other payment. This proposal expands current Medicare Secondary Payer statutory authority to permit the Secretary to deposit into the Medicare Trust Funds a lump sum, upfront payment from beneficiaries when they obtain liability insurance, no-fault insurance, and workers' compensation settlements, judgments, awards, or other payments. [\$65 million in savings over 10 years] <https://www.hhs.gov/about/budget/fy2017/budget-in-brief/cms/medicare/index.html>

expanding their voluntary review process to liability cases.⁷ Thereafter, CMS sought proposals for a new review contractor for set asides which included the anticipated review of 51,000 liability proposed set asides annually.⁸ In 2017, Medicare sent a memorandum to its contractors indicating that Medicare and its contractors will reject medical claims submitted post-resolution of a liability settlement on the basis that those claims “should be paid from a Liability Medicare Set Aside (LMSA)”.⁹

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 health care 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.”¹⁰ 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.

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. It is obvious that Medicare

⁷ “June 8, 2016 – Consideration for Expansion of Medicare Set-Aside Arrangements (MSA). The Centers for Medicare and Medicaid Services (CMS) is considering expanding its voluntary Medicare Set-Aside Arrangements (MSA) amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year. Please continue to monitor this website for additional updates.” <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Whats-New/Whats-New.html>

⁸<https://www.fbo.gov/index?s=opportunity&mode=form&id=f1ae2d5eb785ac35d331eccc4d001ebb&tab=core&tabmode=list&=>

⁹ <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/MM9893.pdf>

¹⁰ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0938-AT85>

interprets the MSP 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.