

THE USE OF MEDICARE SET-ASIDE TRUSTS IN WORKER'S COMPENSATION SETTLEMENTS  
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**THE USE OF MEDICARE SET-ASIDE TRUSTS  
IN WORKERS COMPENSATION SETTLEMENTS**

by

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**I. INTRODUCTION**

The Health Care Financing Administration (HCFA) has announced an all out effort to collect monies owed to Medicare under the Medicare Secondary Payment statute qualified at 42 U.S.C. '1395y. HCFA intends to make referrals to the Department of Justice for prosecution. A pilot project is already underway in New York. HCFA has stated, We are vigorously investigating liability and workers compensation settlement situations where in settlements involving Medicare beneficiaries have occurred absent the knowledge, consent and participation of HCFA such that Medicare's interest was not considered and protected. Insurance carriers and claimants attorneys are in jeopardy if they fail to obtain Medicare's approval of any settlement and set aside sufficient funds to cover the claimants future medicals.

Under the applicable federal regulations, Medicare can assert a secondary payer claim for conditional payments that have been made prior to a personal injury settlement. (42 C.F.R. '411.24.) Under the regulations, a conditional payment is a Medicare payment for services for which another payer, such as a products liability insurer or a workers compensation insurer, is responsible. (42 C.F.R. '411.21.) Medicare may make a conditional payment for services if Medicare does not reasonably expect the third party insurer to make its primary payment promptly. (42 C.F.R. '411.24(a)(2).) This is especially true if Medicare has information that services for which Medicare benefits have been claimed are for treatment of an injury or illness that was allegedly caused by another party. (42 C.F.R. '411.52.) There is no provision under the regulations that would permit Medicare to assert secondary payer claims because of services paid for *after* receipt of a lump sum personal injury settlement, provided Medicare's conditional payments were reimbursed prior to settlement. Medicare's right to recover prior to settlement is described in the regulations as a Medicare secondary payer claim.

The regulations regarding Medicare's secondary payer claim for services provided prior to settlement are the same whether the third party is a liability insurer, a no-fault insurer or a workers compensation insurer. In the context of either a commutation or a compromise, a workers compensation plan is a primary payer with respect to services also covered under Medicare. (42 C.F.R. "411.20(a)(2)(I) & 411.40.) Conditional payments may be made by Medicare if the beneficiary has filed a proper claim and Medicare determines that the workers compensation plan will not pay promptly (including cases where the workers compensation claim has been denied) or if the beneficiary, because of physical or mental incapacity, failed to file a proper workers compensation

claim. (42 C.F.R. '411.45.) Medicare may assert secondary claims for conditional payments made prior to settlement, just as in the case of a personal injury settlement. (42 C.F.R. '411.20, 411.21 & 411.24.)

Medicare is not likely to make any secondary payments at all until all workers compensation benefits and remedies have been exhausted by the beneficiary. (42 C.F.R. '411.43(b).) A lump sum settlement from a workers compensation plan is deemed to be a workers compensation payment for Medicare purposes, regardless of the language in the settlement. (42 C.F.R. '411.46(b)(1).)

## **II. DIFFERENCES BETWEEN PERSONAL INJURY SETTLEMENTS AND WORKERS COMPENSATION SETTLEMENTS**

The most significant difference in Medicare's secondary payer status with regard to personal injury settlements and workers compensation settlements is that, in the context of workers compensation settlements, the regulations permit Medicare to retain secondary payer status for injury related medical expenses incurred *after* settlement. Specifically, the regulations provide that Medicare will not pay for any *future* medical expenses *after* a lump sum settlement is received until the total future medical expenses related to the employee's injury equals the amount of the lump sum settlement which was allocated to future medical expenses. (42 C.F.R. '411.46(d)(2).) If the settlement agreement does not make a reasonable allocation of a portion of the lump sum to future medical expenses, Medicare can make the allocation itself according to a formula set out in the regulations. (42 C.F.R. '411.47(a).)

This striking difference between third party liability settlements and workers compensation settlements is perfectly logical. Only in the context of a workers compensation settlement is the carrier liable for the claimant's lifetime medicals. Medicare will resist any attempt by the workers compensation carrier to shift liability for lifetime medicals to Medicare. Accordingly, *some* part of the workers compensation settlement will need to be set aside to pay for future medicals until the requirements of 42 C.F.R. '411.46(d)(2) are satisfied and Medicare will again pay the claimant's medical expenses.

More importantly for the litigants, under 42 C.F.R. '411.26, Medicare is subrogated to and has a right of recovery against every party involved: the injured worker, all attorneys, the insurance carrier and all medical services providers including physicians and therapists. Therefore, if a Medicare repayment situation occurs after settlement of the workers compensation case and the petitioner has insufficient funds, Medicare will look to the other parties.

## **III. THE MEDICARE SET-ASIDE TRUST**

The solution to this problem lies in the utilization of a Medicare Set-Aside Trust. HCFA has accepted this trust. Here is how the Medicare Set-Aside Trust is implemented in practice.

In either a commutation or a compromise, the release must allocate an amount roughly equal to the amount of the lump sum settlement allocated to future medicals. (42 C.F.R. '411.46(d)(2).) However, not all future medicals allocated in the agreement need be set aside in a trust. Only those medicals that Medicare would normally cover are required to be set aside. Thus, monies for custodial care, prescriptions, nursing home

care and other items not covered by Medicare need not be placed into the Medicare Set-Aside Trust.

The regulations envision that carriers are likely to negotiate a settlement, whether that settlement is a commutation or a compromise. (42 C.F.R. "411.46 & 411.47.) Therefore, the amount allocated to the Medicare Set-Aside Trust may reflect that negotiation. That is, the monies allocated to the Medicare Set-Aside Trust need not necessarily equal the claimants calculated medical expenses for life. After all, the claimant may die within a year or less of the settlement. Rather, the amount allocated to the Medicare Set-Aside Trust must be sufficient to demonstrate that Medicare's interests have been reasonably considered.

Typically, where the workers compensation settlement fails to allocate a specific dollar amount or a specific percentage of the lump sum settlement to future medical expenses and no set-aside trust has been created, the actual amount allocated can be negotiated based upon a rough application of the formula contained in 42 C.F.R. '411.47(a)(2). Presumably, Medicare would then require the beneficiary to place the negotiated amount into a Medicare Set-Aside Trust to insure that Medicare will pay future benefits once the set-aside portion is gone.

However, it is a far better practice to make a fair allocation of future medical expenses in the settlement itself; and then to set aside a portion of those funds in a Medicare Set-Aside Trust. If a workers' compensation settlement comprises (represents a commutation of) all future medicals and disability benefits in an undifferentiated manner, Medicare is not *required* to negotiate, and can deem the settlement attributable entirely to future medicals. On that basis, Medicare may deny coverage for any post-settlement, injury-related medical expenses until all settlement proceeds are exhausted. Medicare's regulatory scheme reveals the rationale that a workers compensation settlement must give reasonable consideration, and accordingly segregate a reasonable allocation, to the claimant's future medicals.

Our offices routinely seek Medicare's approval as to the reasonableness of the monies set aside in the trust. By securing Medicare's approval of the proposed settlement before the claimant releases the carrier, the claimant is assured that Medicare will pay for future medical expenses once the set-aside monies are spent.

A proper Medicare Set-Aside Trust must be customized to fit the individual needs of each workers compensation claimant. A so-called form trust should never be used. No form can accommodate the many variables involved in these complex cases. In each instance, the Medicare Set-Aside Trust must be modified to consider:

1. Medicaid;
2. Tax consequences;
3. Other public benefits programs;
4. Accounting requirements to HCFA;
5. The situs of administration;
6. Whether court oversight is necessary;
7. To whom the trustee must report ;
8. Whether the trustee can be removed;
9. The status of the fund on the death of the trust beneficiary,  
including but not limited to:
10. Coordination with other sources of insurance coverage; and,

11. Arrangements for the protective oversight of incapacitated trust beneficiaries.

A more detailed outline of the procedure used for establishing a HCFA-approved trust is attached to this article as an Appendix

#### **IV. DETERMINING THE ALLOCATION AMOUNT**

Reasonableness of a future-medicals allocation can be established to Medicare's satisfaction by both a treating physician's report and by the claimant's medical-expense history. The physician can be asked to devote a section of the prognostic analysis to the question of future medicals, and a settlement amount can be set aside on that basis. When the settlement plan is presented to Medicare for review and express approval (this is possible and advisable as a protective measure), the physician's report becomes "Exhibit A." Similarly, the claimant's medical-expense history, which the billings will document fully, can be used as a basis for a future-medicals projection, and that becomes the foundation for the set-aside amount.

Presented with: (a) a proper and reasonable proposal, comprising a medical-expense history, medical records and a physician's report, (b) a detailed settlement agreement, or (c) a thorough life care plan outlining the personal and financial needs of the claimant, Medicare can determine that the settlement plan allocates a reasonable portion of the settlement to future medicals. The settlement plan has "attended" to Medicare's interests.

It is important to note here that every workers compensation case is different, and thus requires advocacy. Each claimant will have different needs.

#### **V. PLEADINGS**

The pleadings to Medicare must be drafted to outline the claimants history, the status of his care, his unmet medical needs and his personal financial situation. There must be disclosure to HCFA whether the claimant has family who attend him or whether the claimant will need custodial care. This pleading is then coordinated with the workers compensation settlement agreement to ensure that the monies allocated to the Medicare Set-Aside Trust are specified in the release and settlement as being for future medicals. We differentiate the release into five categories: (1) past medicals ( a lien can only be asserted against that portion allocated to past medicals); (2) future medicals (exclusive of skilled care); (3) future medicals (those that encompass skilled care); (4) indemnity (life-time lost wages); and finally, (5) attorneys fees and costs. Unless the release is drafted to accommodate these categories, the claimant risks losing his Social Security Disability payments and his Medicare benefits.

More importantly, the Medicare Set-Aside Trust is part of a package (pleading, release and trust) which must all be presented to HCFA. In this instance, the individual selling the Medicare Set-Aside Trust was not an attorney.

#### **VI. CONCLUSION**

The Medicare Set-Aside Trust, along with the pleading to HCFA and the release must all be coordinated and drafted with regard to the specific facts of each case. The

determination of public benefits, the consideration of tax implications, the facts of the particular case, and the coordination of other sources of insurance - all make the Medicare Set-Aside Trust a unique instrument in every case.

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