SYNERGY

MEDICARE SET-ASIDE SERVICES

Liability Medicare Set Asides: A Disconnect Between the Plaintiff's Bar and Insurance Industry

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In the absence of formal guidance from Centers for Medicare and Medicaid Services (CMS), the plaintiff's bar and the insurance industry have not agreed upon the appropriate way to protect Medicare's interests when resolving a liability case that funds future medical needs. This brief article will explain this disconnect between the settling parties on liability claims as well as provide some recommendations to bridging the gap between the parties to ensure practical compliance with the Medicare Secondary Payer law (MSP).

Identification of Problems

Problem (1) The carriers are experienced in the area of Worker's Compensation Medicare set asides (WCMSAs).

Since 2001, insurance companies have been using Worker's Compensation Medicare Set Aside agreements (WCMSA) as a tool to resolve cases involving a Medicare beneficiary with a future medical component. Trying to use a WCMSA in a liability claim is like putting a square peg in a round hole. There is a fundamental difference between worker's compensation claims and liability claims. The primary issue with WCMSA's is they fully fund future Medicare allowable expenses related to an industrial accident since the carrier is liable for all future medical costs. Whereas, most liability cases resolve for a compromised amount due to issues such as pre-existing conditions, liability, causation, caps on damages and limited coverage. The common result in liability settlements involving Medicare beneficiaries is a disagreement between the parties as to what should be done for MSP compliance once the liability claim resolves, as well as how much, if any, of the settlement proceeds should be set aside. This disagreement causes delays in the settlement and ends up costing all parties involved.

As a recent example, Synergy was retained to review a Liability Medicare Set Aside (LMSA) prepared by the insurance carrier and provide guidance on the appropriate action for protecting Medicare's future interests. The carrier insisted as part of the settlement, that the plaintiff fully fund a Medicare set aside in the amount of $110,000, which would have represented nearly 75% of the net recovery. This LMSA stipulation was not made not until after the mediation agreement had been signed. After reviewing all of the facts of the case, Synergy recommended $23,500 be set aside based on the appropriate reduction formula.

The settlement was delayed for over six months until the plaintiff attorney filed a motion for a special hearing to enforce the settlement and left the court to decide what the appropriate amount was that adequately considered Medicare's interests. There were unnecessary and increased litigation expenses, as well as the resolution was delayed for nearly a full year. The judge ultimately approved the apportioned MSA amount based on a reduction formula similar to equitable distribution. Synergy has been involved in numerous cases where the LMSA issue had to ultimately be decided by the courts when the parties were able to resolve their differences on protecting Medicare's future interests. Getting court approval of an LMSA is not the norm and it should not become the norm. Instead, it should be the last resort for settling disagreements on MSP compliance.

At present, CMS does not have a formal process to review and approve liability MSAs as they do in workers' compensation cases. CMS review of proposed LMSAs is determined on a case-by-case basis by the appropriate regional office. For example, both the California and Atlanta Regional offices routinely refuse to review LMSAs submitted for formal approval. In years' past, Medicare would respond with a letter saying, "due to resource constraints, CMS is not providing a review of this proposed liability Medicare set aside arrangement." This form letter would go on to say "this does not constitute a release or a safe harbor from any obligations under any Federal law, including the MSP statute." (Emphasis added). In bold print the letter would warn, "All parties must ensure that Medicare is secondary to any other entity responsible for payment of medical items and services related to the liability settlement, judgment or award." Currently, most regional offices have discontinued sending response letters to LMSAs. They simply will not bother to respond at all. Nevertheless, CMS does expect the funds to be set aside and spent on Medicare covered services before Medicare is ever billed, regardless of whether the MSA is reviewed/approved by CMS.

Problem (2) The carriers are writing the checks to resolve the liability claims.

The insurance carriers are paying to resolve the liability cases, which oftentimes gives them leverage to dictate the terms of the settlement. The plaintiff attorneys want the injury victims to get the settlement funds as quickly as possible so their client's quality of life can be improved as they transition from litigation to life. They also have their attorney fees and need to recoup the costly litigation expenses of the case. As such, some plaintiff attorneys may be more likely to agree to Medicare secondary payer release provisions in an effort to expedite the exchange of settlement funds. These MSP provisions demanded by the defendants often are inaccurate, may not be applicable or may restrict the plaintiff in terms of future benefits. In many instances, the plaintiffs are not yet eligible for Medicare benefits, nor may they ever be entitled to receive Medicare benefits which makes it inappropriate to include any MSP language at all in the release.

Synergy was recently retained by a Minnesota law firm on a catastrophic multi-million dollar case. The insurance carrier refused to send the settlement checks until the plaintiff agreed to carve out monies for future medicals into a separate trust account. The plaintiff had not yet applied for Social Security disability benefits at the time of settlement; as such, she was not even eligible for Medicare benefits. However, the plaintiff agreed to set aside stipulation so the case could resolve without further delay or litigation expenses.

In another case, the insurance carrier insisted the plaintiff not only establish an MSA, but also submit the MSA to the Centers for Medicare and Medicaid Services (CMS) for review and approval. The insurance carrier attempted to build these terms into the mediation agreement. This client was receiving Medicaid benefits but was never going to be eligible for Medicare since she had not earned enough working credits to qualify. These

are just but a few of many examples where a liability insurer attempted to impose MSP compliance terms to a settlement that were not applicable to the claim.

Problem (3) There is a tremendous amount of misinformation in the marketplace about Liability MSAs.

Some insurance carriers are convinced that failure to address Medicare's future interests on liability case exposes them to future liability if not properly addressed. There is a small contingent of MSA vendors who have convinced the insurance industry that if you do not do an MSA when resolving a liability claim, then CMS can levy serious fines, penalties, or bring legal action against them. The most common argument by these MSA vendors is that CMS can impose a lien post-settlement; therefore, retroactively exposing the carrier for not properly extinguishing all the liens. This argument is completely without merit. Since there are no regulations or statutes empowering Medicare to take any punitive action at all against a carrier for LMSAs, insurance carriers should be more concerned with conditional payments and reporting requirements.

On the other side of the spectrum, many plaintiff attorneys believe that they do not need to do anything with respect to protecting Medicare's future interests. The plaintiff's bar rightfully takes the position that one never has to do an MSA. While there is currently no regulation or law that mandates a liability Medicare set aside, it does not mean there will be no consequences when a plaintiff attempts to shift the burden to Medicare for future injury-related care. It is very clear from Medicare's public statements that the agency believes that set-asides are the best method to protect the program from paying for injury-related care when future medicals are funded by a settlement. That does not mean it is the only way to demonstrate that Medicare's interests were taken into account when a case involving a Medicare beneficiary is settled, it simply means it is one way.

The real issue, when a case involving a Medicare beneficiary is settled, boils down to the risk taken by the plaintiff in terms of coverage of their future injury-related care by Medicare. This is not a defense issue; it is a plaintiff issue. The plaintiff, if he/she does nothing without legal justification, could face a situation where Medicare denies future injury-related care since nothing was set aside. The plaintiff needs to understand this risk before settling their case. Since the settlement will be reported to Medicare under the Mandatory Insurer Reporting laws (Section 111 reporting), Medicare will be on notice of the settlement and the injury related ICD codes. That could trigger a denial of care and a lengthy internal appeals process before Medicare payments for accident related care might have to be reinstated by a Federal District Court. This author has seen on numerous occasions where Medicare has denied accident related care for a plaintiff post-resolution of a liability claim when improper or no action was taken to protect Medicare's future interests. Given the current interworking of Medicare, the risk for denial of benefits is extremely low but it still is a very real risk nonetheless.

Action Steps

CMS has stated the MSA issue is the plaintiff's responsibility and the role of the defendant is to report current Medicare beneficiaries under Section 111 reporting. The reality is that the defendant has no exposure for failure to address the MSA issue. However, plaintiff's counsel has legal malpractice risks if they fail to properly advise the client regarding the set aside issue when they are currently eligible to receive Medicare beneficiary benefits. Therefore, it is incumbent upon plaintiff counsel to consult with experts about proper Medicare compliance techniques, educate the plaintiff on the issues surrounding the MSP and then document what they have done to comply with the MSP.

Conclusion

Protecting Medicare's interests on liability settlements should be a collaborative process for all parties involved. There needs to be greater education amongst the plaintiff and defense about the real potential implications of failing to adequately consider Medicare's future interests. The parties must openly communicate to determine proper Section 111 reporting data, the Medicare eligibility status of the plaintiff, as well as MSP release language. They must also be proactive regarding the potential for a LMSA: what party is going to handle, and how much, if any, is going to be set aside, based on all of the facts of the case. There are numerous ways to deal with Medicare secondary payer compliance without having to do a Medicare set aside to ensure all parties are protected.

The lack of proper MSP compliance education and miseducation are the reasons for the great divide between the plaintiff's bar and the insurance industry. Currently, there is no "one size fits all" approach to addressing LMSAs. All parties must make their best effort to protect Medicare's interests. Section 111 Reporting has given CMS the ability to track current Medicare beneficiaries settling claims but the reality is CMS handles every liability case differently. Synergy has had clients recover millions of dollars and Medicare continues to pay for their accident related care. In other cases, we have seen plaintiffs get Medicare benefits for accident related care denied on cases settling for less than $50k. Some have even had their benefits denied as late as two years post-settlement. Synergy will continue to assist with techniques that lower the MSA or results in a zero amount set aside, while still ensuring our clients are properly protected

Until CMS provides formal guidance on LMSAs, the plaintiff's bar and the insurance carriers must consult with competent MSP compliance experts such as our team at Synergy, advise their respective clients on what the potential implications are for not properly taking into account Medicare's interests, and document the file as to what was done, or what was not done as far as protecting Medicare's interests. For more information about LMSAs, or if you would like to sign up for a complimentary CLE on liability MSP compliance issues, please go to **http://www.synergysettlements.com/synergy-cle/**

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