Hunting for Bear?

Or Caught in a Trap?

`In Workers’ Compensation matters it is the carrier’s responsibility to consider Medicare’s interests at settlement. In other Liability matters, this burden falls to the plaintiff. This is a trap for the unwary.

**Under** 42 U.S.C. § 1395y(b)(2)(A)(i-ii):

**In general**

***Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that***-

(i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or

(ii) ***payment has been made or can reasonably be expected to be made*** under a workmen's compensation law or plan of the United States or a State or ***under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance***.

The discussion of “future medicals” has often been in terms of asking whether the federal government requires Medicare Set-Asides (“MSAs”). This misstates the question, as future medical obligations as described in the Medicare Secondary Payer (MSP) Act are really more of an accounting obligation. There is no portion of the MSP Act itself nor any regulation supporting the MSP Act that ever mentions the term “Medicare Set-Aside” or “MSA”, let alone requiring parties to establish an MSA as part of any settlement. This is true in liability claims going forward just as it has been for years in Workers’ Compensation claims in the past.

The obligation is to “reasonably” consider Medicare’s interests when settling a liability claim. Assumed MSA “requirements” over the years have misled the range of professionals and providers discussing and reaching settlements. Whether those assumptions were well-intended or merely driven by third party economic motives is not relevant but those assumptions must be cast off to address these issues appropriately in the future.

It’s time to study, once again, what the MSP Act actually says. There are penalties that may be imposed for billing Medicare for the same medical items, services and expenses that were prepaid as part of the settlement award. This is even true, given the statutory language, when the claimant is not Medicare enrolled as of the date of settlement. Making assumptions simply because it was a vendor explained their “take” on the issue at a CLE/CPE is not the application of due diligence or evidence of appropriate consideration of Medicare’s interests.

It is imperative that firms continuously update their MSP compliance protocols and that those protocols include and consider both a medical and a legal basis. Identification of settlement proceeds which prepay a claimant’s future medicals; advising the client to spend down those proceeds before becoming otherwise eligible for Medicare, or Medicare is billed for related expenses; and, providing an accounting system and strategy to ensure the apportioned proceeds are spent properly are future medical best practices in 2018 and beyond. Practitioners serious about protecting their clients from loss of future benefits and the wrath of the federal government, as well as themselves and their firms from allegations of impropriety will proactively consider Medicare’s interests and educate their clients on the means of protecting their settlement funds.

Because the nature of a MSA, be it in Liability or Workers’ Compensation matter, is an accounting to show due consideration of Medicare’s interest; remember that neither law nor medicine actually rules the day. Calculations are actually fairly straightforward and the basic information has, in diligently pursued cases, been gathered and presented by both sides of the bar. The MSA is simply a two column accounting page: one reporting recipient of funds (planned or completed), and the other the amounts disbursed or planned for disbursement.

The long and short of the accounting is something like this:

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| **Item** | **Totals** |
| Settlement Amount | $700,000.00 |
| Attorney's Fees | $233,333.33 |
| Case Costs | $37,572.51 |
| Medicare Lien | $0.00 |
| Medicaid Lien | $0.00 |
| Group Health Lien | $10,570.18 |
| VA Lien | $0.00 |
| LOP Lien | $264,461.36 |
| Lien, Oasis | $76,706.50 |
| Lien, Green Link | $7,515.54 |
| Lost Wages or earning capacity | $19,497.00 |
| Non-covered medical treatment | $0.00 |
| Total deductions | $649,656.42 |
| Monies available for MSA consideration | $50,343.58 |
| Total cost of future covered medical treatment | $9,656.78 |
| Balance | $40,686.80 |

These rules basically mean if your PI case settles for $700,000, and there is no MSA, the client will be faced with spending the full $700,000 on injury-related treatment before using their Medicare card. It is possible that Medicare will grant that attorney fees and case costs and expenses are not considered in their calculations of offsets required. If asked the question on the record, Medicare will say that it does not recognize an offset for those items. Hence, the client will be required to offset the full settlement amount before Medicare will pay for care. Off the record, however, their practice is to consider those monies as the “cost of recovery” and not part of the basis in calculating the recoverable amount. Importantly, the current language of the regulation is such that CMS would likely have to permit that offset since the regulation is not specific in nature.

This simple document, appropriately completed, may protect your client from any future recovery efforts by Medicare. This is especially true when the MSA is fully funded. In cases of no known or expected related future medical expenses, a treating physician may write a letter for the firm file to that effect. Alternatively, an attorney well versed in Medicare regulations and law may be consulted to draft an equivalent letter to the affect that there are no future medical expenses anticipated that would be covered, or recoverable, by Medicare. This is effectively a “zero-allocation” as Workers’ Compensation practitioners know it.

Plaintiff attorneys who now face this burden long addressed by insurance defense attorneys in Workers’ Compensation matters put their clients’, and even their firm’s own assets at risk by not taking the simple step of adding one “accounting procedure” step to the settlement process. Engaging a MSA specialist to “reasonably” apportion settlement proceeds protects the entire settlement from adverse actions by CMS. While CMS may, consistent with its current practice, not seek reimbursement through action against plaintiff attorney fees, case expenses and costs, in addition to action against the client, clients are not likely to be pleased with the outcome.

As in all ventures, preparation is key to success.

Contact MarGin Consulting for assistance in remaining ahead of the curve in complying with CMS requirements and protecting your clients and your firm from future recoveries by CMS.