



Legal Bulletin

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Superior Court of New Jersey Allows Plaintiff Attorney's Fees to be Deducted from MSA Allocation

There has been a great deal of commentary from the liability industry concerning the necessity of liability Medicare Set-Aside Allocations (MSAs) under the Medicare Secondary Payer Act (MSP), and whether the published guidance applicable for workers' compensation MSAs provides any insight regarding how liability MSAs should be handled. Although there is no statutory requirement to create an MSA when future medical expenses are awarded, it is recommended by the Center for Medicare and Medicaid Services (CMS) and has become a best practice in workers' compensation cases. In liability cases, resistance to MSAs continues due to a lack of published guidance and issues that are specific to liability cases. For example, if a settlement is only \$100,000, and the projected MSA is \$150,000, how can plaintiff's attorneys get their fees if the entire settlement is taken up by an MSA?

The majority of the liability industry has been resisting liability MSAs for many reasons and there is a perceived lack of clarity from the CMS. However, it is interesting to find a case in which the court attempts to make it possible for Medicare, as well as all parties involved in the litigation, to have their interests protected and considered. While the future ramifications of this decision are not entirely clear, this case shows a noble effort by the court to satisfy all parties involved.

In *Hinsinger v. Showboat Atlantic City*, 2011 N.J. Super. LEXIS 96, (January 21, 2011), a personal injury action, the Plaintiff prevailed at trial and the parties settled the matter for \$600,000. Due to the fact that the Plaintiff had become Medicare-eligible in November 2009, the parties of the litigation sought to ensure they were compliant with the MSP. CMS confirmed that Medicare had not made any conditional payments; therefore, the only issue that remained was to protect Medicare's future interests. The parties agreed to allocate \$180,600 to an MSA to provide for the Plaintiff's future medical expenses related to the injuries. The Plaintiff Attorney subsequently moved for a portion of his attorney's fees to be taken from the MSA.





The court first conducted an analysis to determine if a different standard should be applied to MSAs created with money obtained from liability claims than to MSAs created with workers' compensation claims. The court decided that the statutory and policy reasons for creating both types of MSAs are the same and also referenced the fact that on multiple occasions, CMS has stated that the same statutes that necessitate or otherwise apply to MSAs in workers' compensation cases also apply to third-party liability situations.

Due to the court's conclusion that the same regulations and directives apply to third-party liability cases, the court was then able to consider whether or not the regulations and directives allow an attorney to recover fees for a judgment or settlement obtained on behalf of a client in a civil suit from the MSA itself. The court analyzed 42 CFR § 411.37, entitled "Amount of Medicare Recovery when a Primary Payment is Made as a Result of a Judgment or Settlement." Generally, in the past, 42 CFR § 411.37 has historically only been applied to provide a procurement cost reduction to the total amount of conditional payments owed (a pro-rated reduction of attorneys' fees applied to the total amount of conditional payments due to CMS). However, the court found that it could also apply to funds obtained for future medical expenses through settlement or judgment in the same way it applies to recovery of funds already expended by Medicare in conditional payments.

The court also noted that a CMS memorandum dated May 7, 2004 appears to address this issue and would seem, at first glance, to not allow the deduction for attorneys' fees from the MSA. However, the court found that the directive in the memorandum applies only to attorneys' fees "specifically associated with establishing" the MSA, but does not apply to attorneys' fees incurred in procuring funds in a civil suit, a portion or all of which may or may not end up in an MSA.

The court further cited equitable principles as reasoning to allow attorneys' fees to be deducted from the MSA—the plaintiff's attorney works on behalf of Medicare to secure funds to pay future medical expenses that Medicare would otherwise pay, which allows Medicare to avoid paying an equitable share of the procurement fees for a settlement or judgment amount, which would be unfair to Plaintiff. Often, a Plaintiff may end up receiving nothing after creating the MSA and paying attorneys fees. This would not only be inequitable but would also deter those who are injured and on Medicare from bringing claims.

The court therefore determined that the ratio of procurement costs to the total settlement was 32.778%, which would deduct \$59,196.67 from the MSA to be applied as attorneys' fees instead. The Plaintiff Attorney won his motion and was able to collect his fees.

The only question that remains is now that the Plaintiff needed \$180,600 to pay for his future medical expenses, and he will now only have \$121,403.03 for his MSA after attorneys' fees are taken out, will Medicare provide coverage upon proper exhaustion of the \$121,403.03? Or, will Medicare require the Plaintiff to spend the additional \$59,196.67 out of his settlement funds?





The latter option would clearly be unfair to the Plaintiff. One would hope that Medicare would choose the first option.

There appears to be some pros and cons to this decision. The positives are that decisions like these are at least providing incentive for Plaintiff's attorneys to protect Medicare's interests if they know that they can recover their portion of fees from the MSA. Furthermore, anytime a court provides guidance on whether or not liability MSAs are required under MSP, it provides more clarity at a time when CMS has not issued any firm directives to the industry on the issue. The negatives are that it is unclear in settlements like these whether or not the Plaintiff will lose Medicare coverage in the future at the expense of his attorney being paid. Furthermore, whether or not CMS would respect and abide by a decision such as this when it splits hairs as to the meaning of its memoranda is not clear either.

PMSI will continue to observe this case. For more information, please contact Heather Schwartz, Corporate Counsel, PMSI at Heather.Schwartz@pmsisettlement.com or 813.612.5504.

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