



Legal Bulletin

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Western District of New York Medicare Secondary Payer Protocol—MSP Compliance in Liability Settlements to be determined by the U.S. Attorney’s Office?

On May 6, 2011 the U.S. Attorney’s Office for the Western District of New York issued a one page document outlining protocol for Medicare Secondary Payer (MSP) Compliance in liability claims. The reach of the protocol does not seemingly go as far in comparison to the requirements currently being put into effect by states such as Maryland and Kentucky for workers’ compensation claims; however, the protocol does seem to demonstrate that more states, and now even Federal Districts of states, are taking MSP Compliance into their own hands. While the protocol is a noble effort by the U.S. Attorney’s office to provide an alternative solution to a back-logged Centers for Medicare and Medicaid Services (CMS), the initiative appears to be somewhat flawed.

To apply for an MSP compromise, an application must be made jointly by the Medicare beneficiary, or the beneficiary’s representative, and the primary plan. Why parties would want to file an application with the U.S. Attorney’s Office before they finalize their settlement is not really clear; however, it seems that parties to a settlement that need some finality as to Medicare compliance may want to attempt this avenue.

A few key items to note from this protocol—it is applicable only in Federal courts in the Western District of New York and it is a voluntary procedure for only liability settlements (mass tort settlements are not included) in which the plaintiff is a Medicare beneficiary and the settlement exceeds \$350,000.

The settlement must also meet the following criteria to submit an application for MSP Compromise:

A copy of the Medicare Secondary Payer Recovery Contractor (MSPRC) letter stating the matter concerning repayment for historical medical items and services related to the tort was reviewed and resolved or provide adequate assurance to that effect. Since a Final Conditional Payment Demand letter from the MSPRC cannot be obtained until after settlement, and the MSPRC specifically instructs parties in its initial Conditional Payment Letters to not send a check for conditional payments until the case has settled, it is not clear how parties will be able to show the court that conditional payments were resolved. It appears the parties will alternatively have to provide “adequate assurance to that effect” instead. This could possibly be



demonstrated by the proposed settlement documents in which there likely is a stipulation as to how conditional payments will be re-paid. For example, a statement in the settlement documents that Plaintiff/Plaintiff's counsel will place adequate funds in escrow for resolution of the conditional payments would be used to demonstrate "adequate assurance to that effect."

The parties are also required to submit a **proposed Liability Medicare Set-Aside Arrangement (LMSA) concerning payment for the future medical items and services related to the tort.** This statement seems somewhat overbroad and could be construed to be a future medical cost projection for ALL future treatment related to the tort. This may have been better phrased to make it clear that only those items that would be otherwise covered by Medicare would be included in the proposed LMSA.

The parties must also submit **an agreed copy of the settlement agreement subject to completion of the MSP obligations.** The parties further must submit a **joint statement from the applicants that warrants the following:** that the value of the agreed settlement equals or exceeds \$350,000; the Plaintiff is a Medicare beneficiary as that term is defined under 42 § CFR 400.202; CMS was requested to approve the LMSA, but no substantive response has been received for at least sixty (60) days from the date of the letter to CMS; and an affidavit from the preparer of the LMSA that it is true and correct based on the Medicare beneficiary's medical records and the injuries being released as well as in conformance with the WCMSA submission checklist as published by CMS. It is not clear who would be the appropriate person to be designated as the "preparer." If an MSA vendor uses an "assembly-line" type approach to producing the MSA and the MSA is therefore prepared by anywhere from five to ten people, who would be considered the "preparer" of the MSA? Could the "preparer" of the MSA be more broadly defined as a top-level person from the MSA vendor that prepared the allocation? This is not clear and will likely have to be ironed out in the future.

In summary, this protocol's impact on the industry is likely minimal and obviously geographically limited, however it is apparent that there is an increasing awareness surrounding LMSAs. Further, it is clearly a sign of things to come that more control will be exercised at the state level to ensure that settlements are MSP Compliant, both in liability and in workers' compensation as was demonstrated in Maryland and Kentucky with their new workers' compensation settlement guidelines.

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