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U.S. ATTORNEY IN WESTERN DISTRICT OF NEW YORK ISSUES PROTOCOL FOR LIABILITY MEDICARE SET ASIDES

By now, almost everyone has heard about the US Attorney's office in Western New York and their protocol for the protection of Medicare in liability settlements.

What the Western District has done is put together a way to move cases forward when parties reach a settlement and felt it was in their clients best interest to submit the settlement to CMS for review. The office listed several requirements in the 1 page paper:

"The application for MSP compromise concerning payment for the future medical items and services related to the tort shall include:

1. A copy of the 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.
2. Proposed Liability Medicare Set-aside Arrangement concerning payment for the future medical items and services related to the tort (LMSA) .
3. An agreed copy of the settlement agreement subject to completion of the MSP obligations.
4. A joint statement from the applicants that warrants the following:
 - a. The value of the agreed settlement equals or exceeds \$350,000.00.
 - b. The plaintiff is a Medicare beneficiary as that term is defined under 42 C.F.R. §400.202.
 - c. The Centers for Medicare and Medicaid Services (CMS) was requested to approve the LMSA, but no substantive response has been received for at least 60 days from the date of the letter to CMS; and
 - d. 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. "

If the application is filed with the office, the parties must show CMS had been notified and a copy of the final demand letter from the MSPRC (Medicare Secondary Payer Recovery Contractor) showing the conditional payment lien has been resolved or the release shows proper adequate assurance that it will be resolved.

The US attorney's office may request additional information to finalize their review of the set aside amounts and will, if agreed by them, issue a response to the amounts.

The office does correctly indicate that "*This is a voluntary process and not policy of the CMS.*"

In my discussion with Jessica Rogers in the Western District office, I was advised this protocol is only available for matters that have been filed in the Western District of New York. They will not review any settlements that are filed in any other jurisdiction of the US nor any case in which litigation has not been instituted.

What all this means is if you have a case filed in the Western District of New York and it involves a Medicare beneficiary, you can seek their sign off of the liability Medicare Set Aside if there has been no response to the submission 60 days after CMS acknowledges receipt of the submission.

There are a few questions that arise:

1. Will CMS recognize an approval that has been done outside of their protocols?
2. If allocation of liability is used, will CMS recognize that allocation since there was no hearing on the matter before a court of competent jurisdiction?
3. Will other US District Courts have a similar process?