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PROTECTING MEDICARE'S INTERESTS AND SUMMARIZATION OF ONE REGION'S INTERPRETATION

Sally Stalcup, MSA Regional Coordinator, CMS Division of Financial Management and Fee for Service Operations, Region VI office in Dallas recently issued an un-dated memorandum regarding Liability MSA's. This memorandum emphasized:

“It is intended to provide consolidated guidance to those attorneys, insurers, etc., working liability, no-fault and general third party liability cases for any Medicare beneficiary residing in Oklahoma, Texas, New Mexico, Louisiana and Arkansas and is not to be considered a CMS official statement of policy.”

Again this is a guidance memorandum for Region VI only and is NOT an official CMS policy statement.

The Regional office memorandum was really nothing new that would affect our guidance regarding the resolution of liability matters. They indicated, as we have stated, that Medicare's interests must be protected. There is no mandate of a specific mechanism to protect those interests. The law does not require a "set-aside" in any situation. The law requires that the Medicare Trust Funds be protected from payment for future services whether it is a Workers' Compensation or liability case. There is no distinction in the law.

The Region does indicate that a set-aside is our method of choice and that CMS feels it provides the best protection for the program and the Medicare beneficiary.

As has been stated in several town hall meetings and by various CMS officials there is no formal CMS review process in the liability arena as there is for Workers' Compensation.

CMS bases their position on the language of Section 1862(b)(2)(A)(ii) of the Social Security, Act [42 USC 1395 y(b)(2)] which precludes Medicare payment for services to the extent that payment has been made or can reasonably be expected to be made promptly under liability insurance, does expect the funds to be exhausted on otherwise Medicare covered and otherwise reimbursable services related to what was claimed and/or released before Medicare is ever billed.

The problem area of this memo surrounds how to allocate funds within a settlement on which CMS will not review or which you will not submit for review. This memo states that the only time Medicare recognizes allocations of liability payments to nonmedical losses is when payment is based on a court of competent jurisdiction's order after their review on the merits of the case. (See my previous comments on Haro v Sebelius and comments relating to

Zinman v Shalala (67 f.3d841,49). If they will not recognize an allocation except by a hearing on the matter, then will they recognize the allocation of medical within the settlement release?

The comment from Region VI is “Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals and if so, a need to protect the Trust Funds. They must decide whether or not there is funding for future medicals. If the answer for plaintiff’s counsel is yes, they should see to it that those funds are used to pay for otherwise Medicare covered services related to what is claimed/released in the settlement judgment award.”

Does this place a responsibility on the claimant attorney to also oversee the payment of medical expenses which would otherwise be paid by Medicare, after settlement? Should the funds be professionally administered? Again each case needs to be considered on a case by case basis and some risk analysis is needed.

What about the defense? If the defense counsel or the insurer sees the possibility of future medical within the settlement, they should make sure their records contain documentation of their notification to plaintiff’s counsel and the Medicare beneficiary that the settlement fund future medicals which obligates them to protect the Medicare Trust Funds.

The best alternative we can see is have a Medicare compliance analysis completed on the medical needs prior to settlement using a professional compliance/allocation company that is independent of the parties involved in the settlement. They can complete a non-partisan Medicare allocation and assist with sample language to include within the settlement releases.

CMS does not review or sign off on counsel's determination of the amount to be held to protect the Trust Fund in most cases. They do, however, urge counsel to consider this issue when settling.