



Critical Injuries

Bodily injury liability insurers need protection against unseen risks in Medicare Set-Aside settlements.

by Henri Bersoux

New risks for bodily injury liability insurers are coming to light concerning the Medicare Set-Aside relationship to injury claims, including those filed under self-insurance, no-fault insurance and workers' compensation.

One seldom mentioned risk is that a significant number of injured claimants may exhaust Medicare's settlement set-aside funds sooner than originally estimated. When these claimants are subsequently denied coverage by Medicare, they may resort to extra-contractual actions against the primary payers as well as the allocators who prepared the files.

Medicare may legally declare the entire amount of the settlement as a "set-aside" if it can show that the settlement did not properly protect its interests. In fact, Medicare may legally recover from anyone who "touched" the file, including the insurers, allocators, attorneys and anyone else.

Contributor Henri Bersoux is vice president and general manager of PMSI MSA Services in Tampa, Fla. He can be reached at Henri.Bersoux@pmsimsaonline.com.

Medicare is often criticized for unreliable and unpredictable enforcement. But occasionally the agency sets an example, as shown in *USA v. Baxter International et al*, a class-action liability lawsuit concerning silicone breast implants. With the case seemingly settled in 1995, the Department of Justice, on Medicare's behalf, pursued a post-resolution reimbursement claim for medical expenses paid to women allegedly injured by the implants. Medicare was granted an \$11.3 million settlement against several manufacturers.

Coming into View

Why is this issue more visible on the horizon now?

First, MSAs have only been around in large numbers for five or six years. That means most legitimate claimants will only be reaching the end of their funds during the next few years. There has not yet been a flood of claim denials by Medicare for work-related injuries.

Second, Medicare can be expected to step up enforcement in cases where it is expected to be the secondary payer. The agency retained Chickasaw Nation Industries as the sole coordination-of-benefits subcontractor in 2006, and Medicare is

► **What's Up:** Bodily injury liability insurers face new risks when dealing with MSAs.

► **What's New:** Federal law now authorizes stiff penalties for delayed reporting of Medicare-eligible cases.

► **What's Next:** As the MSA industry matures, allocators will develop the expertise to avoid administrative and legal entanglements.

beginning to reap the recovery rewards of having one entity responsible in claims where primary payers exist.

In addition, the Medicare, Medicaid and SCHIP Extension Act of 2007 requires claim handlers to report all claims they are adjusting in which the injured party is Medicare-entitled. This will provide Medicare with a "target list" of bodily injury liability and no-fault claims in which Medicare should be protected as a secondary payer in cases of claim settlements involving final closure of medical benefits. No longer can primary payers claim uncertainty about whether certain types of bodily injury cases (i.e. workers' compensation or liability) are covered by the Medicare Second Payer statute. What's more, the penalties for doing so are harsh—\$1,000 per-day per-claim as long as the case remains unreported.

Full Disclosure

Signed by President Bush last Dec. 31, Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 requires the “submission of information by or on behalf of liability insurance (including self-insurance), no-fault insurance and workers’ compensation laws or plans if the claimant is determined to be Medicare-entitled.” The act authorizes the Secretary of Health and Human Services to impose fines up to \$1,000 per day per claim for those Medicare-entitled cases not reported in accordance with the secretary’s instructions, beginning July 1, 2009.

The statutory financial risks for failing to report claims of Medicare-entitled injury cases to Medicare are known and quantifiable. Less quantifiable is the risk associated with underallocations and having claimants eventually turn against the industry in a massive class-action lawsuit. That could happen if an allocator—internal or external—routinely underestimates the future cost of medical care for a sizable number of claimants.

Whether through incompetence or malfeasance, this risk is significant. It can approach the size of all settlements in which an MSA was involved, even if it was a tiny part of the overall picture. Getting MSA compliance right is vital, yet the industry’s relatively short existence and limited experience make doing so difficult.

Major Concerns

Set-asides are made even harder to determine by Medicare changing interpretation of its key components. For example, one month Medicare will price spinal cord stimulators at \$24,000 every five years; the next month it prices them at \$29,000 every seven years.

Another issue of concern is that the MSA industry is not regulated. Anyone with a computer and access to the Internet can proffer a reasonable facsimile of a set-aside. As a result, the MSA allocator industry has been joined by scores of individual professionals, smaller firms and attorneys’ offices.

What’s an MSA?

A Medicare Set-Aside is a holding account for funds separated from the final injury settlement and allocated to cover medical costs associated with the injury that are covered by Medicare. They were developed as vehicles to meet legislative requirements for protecting Medicare’s secondary-payer status.



MEDICARE-SET-ASIDE AUTHORITY: The U.S. Department of Health and Human Services headquarters, the Hubert H. Humphrey Building, in Washington, D.C. The Centers for Medicare and Medicaid Services is an agency within HHS.

One area which Medicare has not focused on is the pharmacy component of MSAs. As a result, some allocators have taken liberties—everything from quoting CNN on drug regimens to making liberal use of herbal and other nontraditional medicine to reduce the size of allocations. This means that a claimant needing certain drugs over a 20-year life expectancy could run out of allocated funds well before the anticipated life expectancy is reached.

Some allocators, eager to grow their business, take dangerous shortcuts to artificially lower allocations and ingratiate themselves with field adjusters who are anxious to close cases.

For instance, if relevant medical records are listed in the payment ledger but missing from the file, these allocators may not take the extra step of locating those records. Executives at the home office should examine such situations closely. The risk to insurers is the size of the whole settlement.

Protective Steps

The following items should be implemented to fully address potential MSA risks:

- Appoint a full-time, professional home-office expert to manage a Medicare Secondary Payer compliance program. Give field adjusters clear guid-

ance on compliance. Balance the need for settlement speed with the need to get the allocation right and review legislative requirements on a regular basis.

- Decide whether to use an outside vendor or create an in-house MSA capability. Specialists can lower risks and costs significantly. An in-house department may be an option if the volume and cost of set-aside-related work is appropriate; if internal expertise is deep enough to ensure accuracy and effectively mitigate risk; and annual peer reviews of the files are provided.

- Visit, inspect and review outside vendors on an annual basis. Pick vendors who have formal, documented training, quality control and internal audit professionals.

- Size matters. CMS often signals changes by rejecting submissions without notice or explanation. The higher the vendor’s volume, the quicker they catch on. The smaller the vendor, the more hands-on review will be required on your part.

- Choose vendors who bring a wealth of talent to the table: medical, insurance and regulatory. Every week, CMS announces new “discrepancies” that require a change in allocation procedures. Ask to drop in occasionally on your vendors’ discrepancy meetings to get a feel for the changing nature of the environment. **BR**