


A GOOD FIT

Structured Settlements and Medicare Set-Aside Arrangements Are Complementary Claims Resolution Tools

By Dan Finn and Rasa Fumagalli

“The best file is a closed file” has long been the universal mantra of insurance claims professionals around the nation. Unfortunately, the Medicare Secondary Payer Act (MSP), 42 U.S.C. §1395y(b), has complicated the closure of future medical rights in many workers’ compensation and liability claims.

For those unfamiliar with the MSP, it was enacted into law in 1980 and was intended to preserve Medicare trust funds. Under the MSP, Medicare is prohibited from making payment for medical services where “payment has been made or can reasonably be expected to be made” by a primary payer. A primary payer may be a workers’ compensation plan, an automobile or liability insurance policy, a no-fault insurance plan, or another plan (including a self-insured plan). A primary



payer's responsibility for payment may be "demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan, or the primary plan's insured, or by other means."

Medicare, however, may make payment of medical services when the primary plan has not made or cannot reasonably be expected to make payment with respect to an item or service. Medicare's payment for the services is considered a conditional payment and is contingent on the payment's reimbursement to a Medicare trust fund. A conditional payment generally would be made when the claim is disputed or the medical provider inadvertently billed Medicare.

In light of Medicare's status as a secondary payer in workers' compensation and liability claims, settlements that close out future injury-related care should avoid shifting future injury-related medical treatment expenses to Medicare. A Medicare Set-Aside (MSA) arrangement is a settlement tool that allows the parties to allocate a portion of the settlement funds for future injury-related Medicare-covered treatment. The future-care allocation is separate and distinct from the parties' obligations to resolve Medicare's conditional payments in the claim, if any.

The Centers for Medicare and Medicaid Services (CMS) has issued numerous guidance memos outlining the voluntary CMS review process for projected settlements that meet its workload review thresholds. The April 4, 2016, Workers' Compensation Medicare Set-Aside Arrangement Reference Guide consolidates the information


from the memos and discusses the MSA projection process as well as the administration of the MSA allocation funds. Should the parties elect to submit the MSA to CMS, the Workers' Compensation Review Contractor (WCRC) will review the future injury-related care allocation to determine if it gives Medicare's interests adequate consideration.

According to the reference guide, the WCRC considers "treatment and usage patterns, the recommendation of the treating providers, life expectancy, functional status, responses to treatment, and effectiveness of therapies as established in the records." Medicare-covered prescription medications also are included in the MSA projections. Rated ages serve to reduce the amount of the MSA and are considered by the WCRC provided that

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they comply with certain criteria. The quotes must be independent, name the claimant, be made by an insurance company and on insurance company or settlement broker letterhead, be independent, and provide a specific rated age or life expectancy. The WCRC also requires that specific language be used in connection with rated-age quotes essentially to ensure that the submission includes all the relevant rated-age quotes.

Funding for the MSA may be made by a lump-sum payment or through a structured settlement annuity. If a structured settlement is proposed, the initial deposit or "seed" amount must



include the cost of the first surgical procedure and first replacement, if any (e.g., pain pump or spinal cord stimulator). If a trial is associated with the procedure, the cost of the trial is included in the cost of the procedure. The WCRC also requires the addition of the first two years of annual payments to the seed.

The administration of the MSA funds, regardless of whether or not CMS review was sought, must follow specific CMS guidelines in order for it to find the MSA funds were appropriately exhausted. MSA funds may be spent on injury-related Medicare-covered medical treatment and Medicare-covered pharmacy expenses only. The payment for the treatment also must be consistent with the way the treatment was priced in the MSA. This means that, if the MSA was funded based on a specific state's workers' compensation medical fee schedule, the treatment billed to and paid from the MSA account must be based on the workers' compensation medical fee schedule charge for the service on the date it was provided. If the MSA was funded by a structure, excess funds must be carried forward in the account. Should the structured MSA account be exhausted prematurely in any given year, CMS should pay for additional injury-related medical expenses during the year, provided that the claimant is on Medicare.

For a significant percentage of MSAs that are proposed, using a structured settlement to implement them makes a great deal of sense on several levels. Because of their unique ability to provide guaranteed, tax-free income at future dates coinciding with the anticipated MSA allocation, structured settlements allow injured workers and employers/carriers alike to satisfy their MSP obligations more cost-effectively. Because a dollar guaranteed in the future costs less than a dollar today to secure, settling parties can ensure MSP compliance for a present value that is

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less than an all cash, lump-sum MSA. This savings can then be used to further reduce reserves or to allow more flexibility in helping to resolve other medical or indemnity aspects of the workers' compensation claim.

As an example, assume an MSA proposal is received which determines that it will cost \$100,000 to satisfy MSP compliance on a given claim. Further assume this same MSA proposal allows for a structured settlement annuity alternative that requires an upfront deposit of \$30,000 in seed money followed by \$70,000 paid out in equal annual payments over the injured worker's remaining life expectancy. After reviewing the life insurer market of companies providing structured settlements annuities, it is learned that it costs \$50,000 to provide this additional \$70,000 over time. In this instance, \$30,000 seed money plus \$50,000 to purchase the life annuity equals \$80,000. In other words, the parties resolve the \$100,000 MSA at a cost of only \$80,000, a 20 percent discount.

Oftentimes the savings can be even more dramatic if the injured worker has a medical history that reveals conditions normally associated with statistically reduced life expectancy. Because life annuities for someone with a rated age can be purchased for less than it would cost to provide identical benefits for a person of the same age and gender with no adverse medical conditions, this difference can make the settlement even more economical. If the person in the preceding example were being treated for a severe heart condition, for instance, it's not inconceivable that the same annuity that cost \$50,000 could be

purchased for \$45,000 instead, increasing the discount to 25 percent. Total cost for this illustrative \$100,000 MSA with the rated age factored in is now only \$75,000.

Life insurers are in the business of managing mortality risk, and because of the law of large numbers, they can do so far more cost-effectively than any individual or company not specializing in such risk transfer concepts. Rated ages are secured readily from licensed structured settlement professionals who carry appointments with the annuity markets and specialize in providing this type of service.

For workers' compensation claims professionals striving to close more files involving injured workers' future medical needs that fall under the MSP, MSAs that are partially funded with structured settlement annuities afford some of the best potential for more cost-effective claims resolution. MSAs and structured settlements independent of each other have long demonstrated their value throughout the claims community. But when combined, these complementary claims resolution tools can result in settlements in which the whole is greater than the sum of its parts. ■

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