Creative Settlements
&
Medicare Set-Asides©

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Medicare Secondary Payer Act

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HISTORY:

- Medicare was enacted in 1965 as a primary payer of medical claims except those covered by worker's compensation;
- Even though WC was excluded under the Medicare rules; payment for WC expenses continued;
- Congress needed to close the gap of Medicare payments when it was a statutory secondary payer;

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HISTORY

- December 5, 1980 Congress amended the Social Security Act to include 42 USC § 1395y, the Medicare Secondary Payer Act (also known as § 1862 of the Social Security Act; and

- Financial concerns within Social Security and Medicare in the last 5-15 years have led to greater scrutiny of the interaction between Medicare and WC.

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Knowing that Medicare has a financial stake in the resolution of worker's compensation claims, exactly what stake do they have?

- Past payments (i.e. Conditional Payments)
  - Applicable only if the IW is a Medicare beneficiary
- Future payments

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According to the MSPA, **PAYMENT**

- "***may not be made***, *except as provided [with conditional payments]*, with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under [general group health plans], **or *payment has been made or can reasonably be expected to be made*** under a workmen's compensation law …."

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What are Conditional Payments?

- Essentially all Medicare payments are "conditional."

- Made when a primary plan "has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection."

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Conditional Payments:

- Responsibility for the reimbursement of Conditional Payments exists when:
  1. Demonstrated by a judgment;
  2. 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
  3. By other means (catch-all with no definition).

- Failure to pay/negotiate with 60 days of a demand letter triggers interest on the amount due.

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Conditional Payments:

- Litigation under §1395y(b)(2)(B)(iii):
  - The United States may bring an action **against any or all entities that are or were required or responsible:**
    1. Insurer or self-insurer;
    2. As a third-party administrator;
    3. As an **employer that sponsors or contributes to a group health plan, or large group health plan**; or
    4. Otherwise to make payment with respect to the same item or service (or any portion thereof) under a primary plan.

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Conditional Payments:

- Litigation under §1395y(b)(2)(B)(iii):
  - If forced to litigate, the United States may collect **double damages.**
  - In addition, the United States may recover under this clause **from any entity that <u>has received payment from a primary plan</u>** or from **<u>the proceeds of a primary plan's payment to any entity.</u>**

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Conditional Payments:

- Litigation under §1395y(b)(2)(B)(iv)
  - The United States is **subrogated** to the extent of any conditional payments made "to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan."
- Litigation under §1395y(b)(2)(B)(v)
  - The United States may **waive** (in whole or in part) its claim.

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Conditional Payments:

- Litigation under §1395y(b)(2)(B)(vi)
  - Statute of Limitations on Conditional Payments
    - **3 years from the date of the service rendered and claimed.**

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How Much Will Medicare Recover?

See: 42 CFR 411.37

- Medicare payments ≤ Settlement:
  - Pro rata the recovery by taking the ratio of procurement costs vs. total settlement.
- Medicare payments ≥ Settlement:
  - Recovery amount is the total judgment or settlement payment minus the total procurement costs.
- If Medicare has to sue to recover:
  - Lesser of the Medicare payment, or the total judgment/settlement amount minus procurement costs.

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PROCESS – Dealing with Conditional Payments
Pre-Settlement

- Once CMS/Medicare/Coordination of Benefits Contractor (COBC)/Medicare Secondary Payer Recovery Contractor (MSPRC) receives notification of the WC claim, it will generate a "**Rights and Responsibilities Letter**" (RRL) and send it to all involved parties (provided they have notice of all the parties).
  - Make sure that CMS is aware of all parties (including attorneys).

- Within 65 days of the RRL, a "**Conditional Payment Letter**" (CPL) is generated, listing all payments issued to date.

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PROCESS – Dealing with Conditional Payments
Pre-Settlement

- Upon immediate receipt of the Conditional Payment Letter:
  - Review the charges against the medical records.
    - Strike-out and dispute non-WC related charges.
    - Dispute "dual purpose billing" (i.e. those charges lumped into one bill for WC and non-WC treatment).
  - Can only get an updated CPL every 90 days.

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Tips to Deal with Conditional Payments:

- Monitor the Group Health Plan and work with medical providers to separate WC-related and non-WC-related charges.
- Review the Conditional Payment Letter for inaccuracies.
- Once settlement is reached, notify CMS (MSPRC) of the settlement and provide all documentation (i.e. settlement docs and Order)
  - MSPRC issues a Demand Letter
    - Resolve Conditional Payments within 60 days of the Demand Letter.

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PROCESS – Dealing with Conditional Payments

Post-Settlement

- Once notified of a claim post-settlement, MSPRC generates a Conditional Payment Notice (CPN).
  - Parties have 30 days to respond, to dispute the charges.
  - If no response within 30 days, a Demand Letter is generated.
  - 60 days to reimburse MSPRC for the conditional payments.

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Conditional Payment - Demand Letters

- Once issued, the full amount is due within 60 days.
  - Generally no further reductions.
    - Extraordinary circumstances.
  - If the beneficiary fails to reimburse the MSPRC, the **primary payer must reimburse Medicare "even though it has already reimbursed the beneficiary or other party."**
    - 42 CFR 411.24(h)
  - If not paid timely, interest "as determined by the Secretary of Health and Human Services," is applicable.
  - Can also seek double damages if forced to litigate to recover.

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Conditional Payment - Waiver

- Solely personal to the beneficiary.
- Complete the SSA-632 Form.
  - Looks at the financial impact of requiring repayment and whether the repayment would result in undue financial hardship.
  - Several months to rule on a Waiver, very few granted.
    - Those granted have very high Medicare payment v. Settlement ratios.

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Case Law

- Under the *Hadden* case - Personal Injury – unknown driver 90% responsible.
  - Conditional Payment reimbursement when a liability settlement of $125K and Medicare lien of over $68,000;
  - 6th Circuit of US Court of Appeals Ordered - full reimbursement.
    - No reduction based on settlement % vs. full value of claim (apportionment).
    - No Waiver because there was no hardship on the beneficiary.
      - » Beneficiary still recovered after the Conditional Payment was paid.
    - Beneficiary requested full payment of medical expenses by primary payer, therefore cannot request reduction from Medicare.

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Case Law

- Under the *Bradley* case - Wrongful Death Case
  - Conditional Payment reimbursement when a liability settlement of $52,500 and Medicare lien of over $22,000;
  - 11th Circuit of US Court of Appeals Ordered reimbursement of $788 out of $22,000;
    - Probate Court had found that claims of family trumped that of United States.
  - 11th Circuit applied a form of apportionment.
    - Note in *Hadden*, no apportionment!

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Case Law

- Under the *Stricker* case - Class Action resulting from exposure to PCBs.
  - Conditional Payment reimbursement when a liability settlement of $300M to over 900 Medicare beneficiaries.
  - 11th Circuit of US Court of Appeals **Denied** US Attorney General's claims based on Statute of Limitations for recovery.
    - US AG argued that the settlement is a structured settlement with periodic payments. Based on the periodic payments, a new US claim arises each time a payment is issued.
    - US AG **sued** Medicare beneficiaries **and** Corporate Entities (i.e. employers), but not the attorneys.

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Case Law

- How does the case law guide us?
  1. It doesn't!
  2. Federal Circuit Courts and Appellate Courts are divided.
  3. There is a battle between the State Courts and Federal Courts on adjudicating these issues.
     - According to the 11th Circuit Court of Appeals, state law trumps federal law on this issue!
  4. Clearly the greatest challenges to the MSPA are going to be brought in the 11th Circuit.
- WHY?
  - The MSPA is both broad and vague;
  - CMS has adopted rules through processes that did not comply with the administrative rules making procedures;
  - CMS changes the rules periodically; and
  - Past compliance with the law has not been mandated.
- Result?
  - Current INTERPRETATION of the law varies greatly!

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Knowing that Medicare has a financial stake in the resolution of worker's compensation claims, exactly what stake do they have?

- **Past payments** (i.e. Conditional Payments)
  - Applicable only if the IW is a Medicare beneficiary.
- **Future payments**

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Future Medical Expenses

- When parties settle their WC claims and close out future medical expenses they need to protect Medicare's future interests.
  - What does "protect Medicare's future interests" mean?

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Future Medical Expenses

- Defined – Medical expenses incurred by an IW after a settlement that are Medicare-covered.
  - Any Medicare-covered medical treatment.
  - Irrespective of whether the IW is a Medicare beneficiary.
  - Use of the WCMSA is limited to services that are related to the workers' compensation (WC) claim or settlement and that would be covered by Medicare if the individual were a Medicare beneficiary. (7/11/05 CMS Memo)
    - Allows for use of WCMSA funds for WC injury-related treatment even if the IW is not a current Medicare beneficiary.

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Future Medical Expenses

- According to CMS there are two types of WC settlements, only **one** of which **recommends the protection of Medicare's future interests**.

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Future Medical Expenses

- 2 Types of WC Settlements (Per CMS)
  - **Compromise**: Occurs when the settlement only makes remuneration for past and current medical expenses.
    - Future medical expenses are left “open”.
    - We typically refer to these as “limited compromise agreements.”
    - No need to protect Medicare’s future medical interests because primary payer remains responsible.
      - No burden shifting.

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Future Medical Expenses

- 2 Types of WC Settlements (Per CMS)
  - **Commutation**: Occurs when the WC settlement takes into consideration and makes remuneration for past, current, and future medical expenses.
    - Future medical expenses are closed-out.
    - We generally refer to these types of settlements as "Complete Compromise Agreements."
    - **Recommends protection of Medicare's future interests!**

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Future Medical Expenses

- **How to protect Medicare's future interests?**
  - CMS: Recommends evaluation of whether a WCMSA (Worker's Compensation Medicare Set-Aside) is necessary.
    - WCMSA is merely a tool, not a requirement.
  - Proactive Claims Management.

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Future Medical Expenses

- **WCMSA: What is it?**
  - Monetary funds placed into an interest-bearing account, separate from the IW's personal banking accounts, that are used only for Medicare-covered medical treatment related to the work-related injury.

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Future Medical Expenses

- **WCMSA: Why go through the WCMSA process?**
  - Approval from CMS in order to:
    - C.Y.A. – Essentially it's what risk management is all about!
      - CMS approval of a WCMSA ***currently*** ensures that the parties have no further liability provided that the funds are properly appropriated and accounted for.
        - » SUBJECT TO CMS POLICY CHANGES!!!!
        - » Still not a safe harbor even if approved by CMS
          - WCMSA process is a policy, not a formalized procedure or statutory prescription.
          - There are various legislative bills pending in Congress to formalize/reconfigure the processes involved.

❖CMS only reviews and approves WCMSAs under 2 specific scenarios**.**

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Future Medical Expenses

- **WCMSA**: CMS *Review Thresholds*
  - **Scenario 1**
    - **The IW is a current Medicare Beneficiary AND the total settlement value exceeds $25,000; or**
  - **Scenario 2**
    - **The IW has a reasonable expectation of Medicare enrollment within 30 months AND the total settlement value exceeds $250,000.**

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Future Medical Expenses

- **WCMSA**: CMS Review Thresholds

- THE REVIEW "THRESHOLDS" **ARE NOT SAFE HARBOR PROVISIONS**.

  – Just because a WCMSA is not reviewable by CMS, ***DOES NOT MEAN*** that you can ignore Medicare's future interests!

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Future Medical Expenses

- **WCMSA:** What information does CMS look at?
  - Includes all medical expenses necessary to treatment the IW's WC-related injury throughout the IW's lifetime (irrespective of the type of treatment, including medications).
  - Based on the TREATING physician's future medical treatment recommendations.
    - IME recommendations carry little to no weight with CMS.
  - Medications are priced out at the current level over the life of the IW.
    - Tapering can be considered if the treating physician recommends it.
    - Drug Utilization Reviews can be submitted, but carry less weight than the treating physician.
  - Rated-Ages can be used, but all must be disclosed.
  - Reviews the IW's last two years of medical records, prefers for the IW to be at MMI.

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Future Medical Expenses

- **WCMSA**: *The Golden Ticket*

  - ***If the treating physician states with clarity that the IW requires no further/future medical treatment, then no WCMSA is necessary.***
    - Medicare's future interests are considered, but since no future medical treatment is recommended and related to the work injury, no WCMSA is necessary.

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Future Medical Expenses

- **WCMSA**
  - There are no formal appeal processes for CMS review of the WCMSA.
    - May change depending on pending legislation.
  - Get it right the first time!

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Future Medical Expenses

- **Proactive Claims Management**
  - Work with your WCMSA vendor to closely review the medical records and the recommended treatment.
  - Develop partnerships with the treating physician and staff so that they don't have any extra incentive to "pile on" medical treatment.
  - Don't alienate the IW. Alienation fosters malingering and magnification, requiring additional medical treatment.
  - The goal for all WC claims is a release to full-duty work, no permanent work restrictions, and NO NEED FOR FUTURE MEDICAL TREATMENT!

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Future Medical Expenses

- **WCMSA**
  - Tips to reduce your exposure on WCMSAs
    - Be a partner with the treating physician!
      - Work with the treating physician throughout the process.
      - Don't be an obstacle to healing.
      - Make sure that the treating physician has the whole picture.
        - » Complete medical records
        - » Job analysis
        - » IW outside activities
        - » Surveillance
      - Talk with the treating physician about tapering before settlement and get tapering documented. (Consider also, Generics v. Label)
      - The goal is to obtain the "Golden Ticket" – No need for future medical treatment.

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Future Medical Expenses

- **WCMSA**
  - Tips to reduce your exposure on WCMSAs
    - Rely on DWD Chapter 81 – Medical Treatment Guidelines
      - Make sure that the treating physician is aware of the guidelines when preparing the recommendation for future medical treatment.
        - » If the employer/carrier is funding the WCMSA, the guidelines should apply.

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Future Medical Expenses

- **WCMSA**
  - Statute of Limitations Argument
    - Wis. Stat. §102.17(4) – 12 years from the date that compensation (indemnity, not settlement funds) was last paid. (Note exclusions for SOL defense for traumatic injuries in the loss or total impairment of a hand or any part of the rest of the arm proximal to the hand, or of a foot, or any part of the rest of the leg proximal to the foot, any loss of vision, any permanent brain injury, or any injury causing the need for a total or partial knee or hip replacement.)
    - If the Statute of Limitations defense applies, then upon its tolling, the primary payer (i.e. employer/carrier) is no longer "responsible" for payments under the MSPA.
      - Work with treating physicians to provide a specific timeframe for future recommended treatment (i.e. no treatment expected for 12 years).

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Future Medical Expenses

- **WCMSA**
  - Delay & Prevail
    - WCMSA submissions have to include the IW's last two years of medical records, upon which the WCMSA is calculated.
    - Enter into a Limited Compromise leaving open future medical expenses, subject to defenses; and
    - After two years, collect the medical records and review them to determine the current course of treatment.
      - If no recent medical treatment, obtain a report from the treating medical provider that no future medical treatment is necessary since no recent treatment has been sought.
      - Then close out future medical expenses with no requisite WCMSA.

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Future Medical Expenses

- **WCMSA**
  - Roll the Dice – *Least recommended*
    - Submit a Zero MSA based on the IME (knowing that the IME will be rejected), or other fact-based defense.
      - Force CMS to use their own pricing and treatment frequency structure.
      - *Generally,* results in lower WCMSA costs than what a WCMSA vendor provides.
        - » CMS can and has come back with higher WCMSAs.
      - Recommend obtaining WCMSA from vendor detailing expected WCMSA exposure and noting the file that CMS *may* come back with a significantly higher WCMSA.

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Future Medical Expenses

- **WCMSA**
  - Am I **<u>required</u>** to protect Medicare's future interests through the use of a WCMSA?
    - **<u>Absolutely not! It is merely a tool in the toolbox.</u>**
      - However, the only way to C.Y.A. is to obtain CMS approval of a WCMSA, when applicable.
        - » Subject to the review thresholds.
        - » ***<u>CMS will not review or issue advisory opinions on WCMSA that do not meet the review thresholds</u>***.

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Future Medical Expenses

- **WCMSA**
  - What about those settlements that fall outside of the CMS review guidelines?
    - Options
      - Cannot fully C.Y.A. in this scenario since CMS will not approve.
      - Fund a WCMSA as set forth by a WCMSA vendor without CMS approval.
      - Detailed legal analysis based on the facts of the case, supporting a lower WCMSA or even no WCMSA.
      - Obtain the Golden Ticket.
      - Delay & Prevail.
      - Structured Settlements (i.e. annuities).
      - Life Care Plans signed off by treating physician.

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Future Medical Expenses

- **WCMSA**
  - What about those settlements that fall outside of the CMS review guidelines?
    - Options (Continued)
      - Allocate a "reasonable" portion of the settlement for future medical expenses.
        - » Reasonableness has be through some sort of rationale method of calculation.
        - » Merely allocating a specified sum of $$$ without rationale will not protect interests.
      - Low $$$ settlement, set aside the same $$$ for future medicals
        - » Medicare is only entitled to come back for the full value of the settlement.
          - (Poison Pill provision)
      - If any medical or permanent indemnity has been paid, the likelihood of obtaining a zero WCMSA approval is extremely low.

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Case Law – Food for Thought

- WCMSA: **In re Marriage of Christopher Washkowiak and Rosana Washkowiak** (IL)
  - Decision from the Illinois 3rd District Appellate Court affirming a lower court decision.
  - Mr. Washkowiak received a $435,000 settlement on his WC claim in Illinois.
  - Part of the settlement included a commutation of the claim and an additional $70,000 for an MSA.
  - Ms. Washkowiak was awarded 17.5% of the "net proceeds" from the settlement.
    - Is the WCMSA a settlement proceed?

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Case Law – Food for Thought

- **In re Marriage of Christopher Washkowiak and Rosana Washkowiak**
    - Is the WCMSA a settlement proceed?
        - YES!!! (according to Illinois courts)
    - Ms. Washkowiak was awarded 17.5% of the WCMSA.
    - Mr. Washkowiak was advised by the Courts to replace the 17.5% taken from the WCMSA with the remaining funds from his settlement.
- Impact?
    - What if Washkowiak does not replace the funds?
        - CMS can withhold payment for Medicare-covered treatment up to the missing $$$ amount?
        - It can sue for the funds…the beneficiary, the attorneys, the employer, anyone who received proceeds (the ex-wife!) or anyone responsible for the payments.
        - Decision is consistent with views of MSA funds being counted as assets for bankruptcy, public assistance, debt collections, and support obligations.

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Questions?

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