



Ignoring Medicare Set-Asides Puts Coverage at Risk

By [Pi-Yi G. Mayo, CELA](#) & [Bryn Poland, Esq.](#)

When a personal injury suit is being settled, one often overlooked step is the creation of a “Medicare Set-Aside (MSA),” money earmarked for future injury-related costs that would otherwise be covered by Medicare. The confusion arises because CMS (The Centers for Medicare and Medicaid Services) has yet to establish guidelines for injury suits that don’t involve workers’ compensation. What’s clear, though, is that CMS requires such settlements to “reasonably consider Medicare’s interest” and cites MSAs as the “preferred” means of doing so. If the plaintiff is currently on Medicare or likely to be within the next 30 months, failure to take adequate steps can result in the loss of Medicare benefits. CMS may also seek restitution from anyone involved in the settlement—insurance companies, defendant, plaintiff or attorneys.

If eligibility for means-tested benefits such as Medicaid or SSI (Supplemental Security Income) is important, [the MSA should be embedded within a first party special needs trust \(SNT\)](#) so that the reserved funds won’t be counted as “available resources.”

How Much Is Enough?

Projecting future medical costs is difficult, but there are financial services companies that specialize in estimating the appropriate allocation. They assess the plaintiff’s care plan, consider life expectancy, then project injury-related Medicare-covered expenses.

Based on their long experience with workers’ compensation, these firms understand what CMS is likely to find acceptable. That’s tricky, though. CMS isn’t required to review non-workers’ comp MSA proposals, and regional offices are inconsistent about doing so. The good news is that, if they do approve an allocation, Medicare can’t require more funds from the beneficiary if the MSA becomes depleted at some point in the future. On the other hand, if CMS rejects the proposed allocation, there’s no formal appeals process. Without prior approval, if the MSA’s funds run out, Medicare may or may not cover remaining expenses related to the original injury.

Use a Professional Administrator

The rules for administering an MSA are so complex that I recommend getting professional assistance. Here’s what’s required:

- Funds must be placed in a separate interest-bearing account and earnings reported at tax time.
- Funds may only be used for Medicare-allowable expenses resulting from the settlement-related injury. An annual report must be filed with CMS, asserting that funds have been used properly.
- Medical provider fees must be negotiated to comply with CMS's fee schedule.
- Upon exhaustion of MSA funds, a report must be filed with the appropriate Medicare Secondary Payer Recovery Contractor before Medicare will assume responsibility for injury-related expenses.

Failure to comply with these requirements can jeopardize future Medicare coverage, even for expenses that are unrelated to the injury in question.

In addition to ensuring compliance with all CMS requirements, a professional MSA administrator can:

- Coordinate payments by the MSA, Medicare and other insurers.
- Obtain discounts on medications, medical equipment and medical care.

Common Mistakes

The most prevalent mistake regarding MSAs is simply neglecting to create one. While there is no federal law stipulating that this particular instrument be used, it's clear that Medicare will take punitive action if its interests are not recognized when injury settlements are negotiated.

Failing to embed the MSA in a special needs trust is another major oversight. Unless protected by an SNT, funds held in an MSA will be considered a countable resource and are likely to render the beneficiary ineligible for means-tested government benefits.

Finally, funding an MSA with cash is almost always a mistake. Instead, work with a broker to purchase a qualified structured annuity that will feed into the MSA over time. You'll save money, because annuity payments are tax-free.

Given the complexity and uncertainty surrounding MSAs, families should seek professional guidance when negotiating personal injury settlements. Special Needs Alliance attorneys can help.

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