

MEMORANDUM

To: NAELA Board of Directors

From: NAELA Public Policy Committee and the Medicare Set-Aside Task Force

Date: October 27, 2010

Re: Task Force Report

The Task Force, comprising Bradley Frigon, Lawrence Friedman,* Charlie Sabatino,* Sally Hart, and Alfred Chiplin, met via telephone conference call over a two-year period to discuss and review the use of Medicare set-aside agreements in tort liability cases. The task force was assisted in its work by Brian Lindberg, NAELA's public policy advisor, in consultation with Shirley Whitenack.* The Task Force chair was Alfred Chiplin.

In early October 2010, the report of the Task Force was presented to the NAELA Public Policy Committee for review and discussion. Alfred Chiplin, Charlie Sabatino, and Brian Lindberg from the Task Force attended in order to answer questions about the Task Force Report. The Public Policy Committee asked for clarifying language and modifications, which have been incorporated.

The Public Policy Committee recommends that the Board approve the report.

The Task Force report is attached.

*Members of the NAELA Public Policy Committee.

National Academy of Elder Law Attorneys

Medicare Task Force On The Use of Set-Aside Arrangements

October 2010

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In the spring of 2008, the Public Policy Committee of the National Academy of Elder Law Attorneys (NAELA) created a Medicare Task Force to review the Use of Set-Aside Arrangements in settling personal injury cases where third party liability for the payment of Medicare-covered medical expenses has been established. The task force was asked to explore the appropriateness of MSAs, including whether they are required by the Medicare Secondary Payer Program (MSP) as contained in the Medicare statute. The findings and recommendations of the task force are followed by a list of legal resources that provide background references and information about the Medicare Secondary Payer Program.

Findings

1. The Centers for Medicare & Medicaid Services (CMS) acknowledges that there is no Medicare requirement to establish Medicare set-aside arrangements (MSAs).
2. CMS's National Office has indicated through Ms. Barbara Wright, Director, Division of Financial Management and Fee For Services Operations, CMS - Baltimore Office, that it is not likely to issue a further clarification with respect to requiring MSA arrangements for future medical expenses in liability cases; that CMS is aware that some attorneys create such arrangements; that CMS is not opposed to MSAs; and that CMS acknowledges that there is no Medicare requirement to establish set-aside arrangements. [Telephone conversation with Alfred Chiplin, November 2009.]
3. Ian Frazer, CMS Region IX (San Francisco, CA), Division of Financial Management and Fee For Services Operations (handling Medicare Secondary Payer Program (MSP) matters), has said in conversation with Sally Hart, Esq., that Region IX is not reviewing liability settlement provisions for future medicals because "they are not required," that some CMS regional offices will review them, and said that one region will review them when the amount of the settlement exceeds \$750,000.
4. One CMS regional office that was said to be reviewing liability settlement arrangements is the Texas office, but that information is now more than a year old.

5. CMS has not set forth a formal procedure for tort cases although CMS considers the Medicare Secondary Payer Act to apply to tort cases and requires a plaintiff to protect Medicare's future interests.
6. Medicare has statutory authority to apply coordination of benefits for future medical expense requirements to tort cases as well as to Workers Compensation cases.
7. A personal injury attorney or an elder law attorney may be vulnerable to future client claims if that attorney does not advise the client that there is a possibility that Medicare will not pay for future medical expenses resulting from a tort settlement if a sizeable settlement or award is based on specific estimates and evidence of future medical expenses (like a life care plan). In such a case, the client should be counseled to consider setting aside funds to pay for future medical services related to the tort of the kind that would normally be covered by Medicare.

Recommendations

The National Academy of Elder Law Attorneys (NAELA) recommends that special needs and elder law attorneys consider the following approaches to handling personal injury settlements involving the MSP program:

1. Document files to reflect advice and counseling about the appropriateness of Medicare Set Aside arrangements in the context of a given case.
2. Advise Personal Injury (PI) clients to set-aside in a self administered Medicare set-aside arrangement (MSA) an amount equivalent to the required amount of funds designated for future medical expenses to the same extent as if the damages arose from a Workers Compensation claim.

Caveat: The requirement for future medical expenses set-asides in tort cases is not as clear as it is in WC cases.

3. Warn clients that the Medicare Secondary Payer Act (MSP) applies to all tort settlements and that CMS considers PI plaintiffs to have an obligation to protect Medicare's interests in coordinating future benefits.

Caveat: The requirement for future medical expenses set-asides in tort cases is not as clear as it is in WC cases.

4. Advise PI clients to consider formal MSA Set-Asides with applications for approval to CMS.

Caveat: Some Medicare regional offices will not consider MSP set-asides in tort cases. Cases in which the above advice should be communicated to clients should be limited to those cases with large settlement/awards based on specific estimates and evidence of the costs of future medical services.

5. Be mindful of their duty under state law to protect their client's liability recovery from incorrect claims and unnecessary charges. See *In Re Swarts*, 636 P.2d 1236, 1244-66 (Ariz. 1984). See also the ABA model rules of Professional Conduct, §1.15(d).

Further, NAELA recommends:

6. That the NAELA Public Policy Committee and the Set-Aside Task Force continue:
 - A. A dialogue with appropriate CMS officials;
 - B. Efforts to educate NAELA members through NAELA publications; and
 - C. Activities to communicate NAELA's position on MSA set-aside arrangements to appropriate PI lawyer trade associations.

Resource Information

1. CMS FACT SHEET: A Medicare Secondary Payer Fact Sheet (April 2009), which provides a general overview of the MSP provisions for individuals involved in the admission and billing procedures at provider, physician, and other supplier settings, is now available in downloadable format from the Medicare Learning Network at:
http://www.cms.hhs.gov/MLNProducts/downloads/MSP_Fact_Sheet.pdf .
2. LIMITS ON MEDICARE'S RECOVERY OF HEALTH CARE PAYMENTS WHEN THE BENEFICIARY HAS LIABILITY OR WORKERS' COMPENSATION INSURANCE:
http://www.medicareadvocacy.org/InfoByTopic/MedicareSecondaryPayer/Secpayer_09_09.17.MedicareLimitations.htm.
3. Article: Norma S. Schmidt, *The King Kong Contingent: Should the Medicare Secondary Payer Statute Reach to Future Medical Expenses in Personal Injury Cases*, 68 U. Pitt. L. Rev. 469 (2006-2007).
4. Article: Sally Hart, Esq. *The Myth of the Superlien: Medicare Secondary Payer Law Clarified*, Vol. V, No. II, NAELA Journal 2009, p. 95.

5. Begley & Jeffrey, *Representing the Elderly*, Chapter 19 of the 2010 supplement (Medicare Set-Asides in workers comp and Third Party Liability cases).
6. Begley & Cannellos, *Special Needs Handbook*, Chapter 12, Supplement.
7. Pending Legislation: 111TH CONGRESS, 1ST SESSION H. R. 2641
To amend section 1862 of the Social Security Act with respect to the application of Medicare secondary payer rules to workers' compensation settlement agreements and Medicare set-asides under such agreements.
8. Medicare Secondary Payer (MSP) Manual Chapter 7 - Contractor MSP Recovery Rules. <https://www.cms.gov/manuals/downloads/msp105c02.pdf>.
9. Soc. Sec. Act §1862(b), Medicare as Secondary Payer, Soc. Act §1862(b), [42 U.S.C. §1395y(b)] MEDICARE AS SECONDARY PAYER. http://www.ssa.gov/OP_Home/ssact/title18/1862.htm .