

# Medicare Secondary Payer Act: Reporting Requirements, Medicare Set-Asides and Third-Party Liability

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Presented by Katy Klingelhafer



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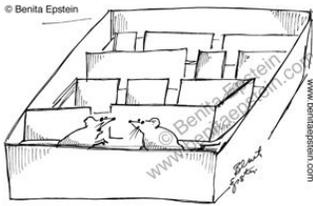
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## Medicare Secondary Payer Act



"This is easier than navigating through Medicare."



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## Medicare Secondary Payer Act (MSPA)

MSPA is a federal statute designed to ensure that Medicare would be the "secondary payer" in instances when a claimant is covered by another form of "primary insurance." (liability insurance, settlements from a tortfeasor).

How? Medicare has authority to recoup payment from the rightful primary payer (or the recipient of such payment). CMS may also pursue reimbursement from claimants and attorneys.

42 U.S.C. 1395y(b)(2).



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## MSPA Reporting Requirements

In 2007 the law was changed to require insurers, self-insureds and others to *report* third-party liability claims and settlements involving Medicare beneficiaries to the Centers for Medicare & Medicaid Services (CMS).

42 USC 1395y(b)(8)



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## MSPA Reporting Requirements

Under the Medicare, Medicaid and SCHIP Extension Act (MMSEA) of 2007's new mandatory reporting obligations, liability insurers are required to provide detailed information regarding all liability settlements with ongoing responsibility for medical treatment with Medicare beneficiaries.

If not? Penalties of \$1,000 per day, per claim for failure to comply.



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## MSPA Reporting Requirements: What Must be Reported?

**Information is submitted electronically to CMS through forms and CMS software.**

**Data includes more than 100 fields:**

- Total Settlement Amount
- Medicare Beneficiary's name, gender, DOB
- Social Security Number and Medicare Health Insurance Claim Number
- Identification of claimant's attorney
- Identification of any applicable insurance policy



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## MSPA: Is this claimant a Medicare beneficiary?

Three groups of people may be:

1. Social Security Disability.
2. End Stage Renal Disease.
3. Age 65 and older.



Query: Reporting entities can submit identifying information to find out if a claimant is a Medicare beneficiary (or is reasonably expected to be within 30 months).

Critical consideration during litigation and settlement negotiations.



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## MSPA Reporting Requirements: Practical Considerations

Medicare's reimbursement right takes priority:

- Claimant's claims for pain and suffering, loss of consortium

MSP Manual Chapter 7 50.4.4: Medicare recognizes allocations of liability payments to nonmedical losses *only* when payment is based on a court order.

Consider in Settlement Agreements:

- Medicare status
- Future Medicals
- Allocation of settlement



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## MSPA Future Medicals

**Medicare requires that its interests be "taken into account" in any judgment or settlement including compensation for future health care costs.**

**Future medical costs present unique challenges.**

Requirement to consider Medicare's interests applies in workers' compensation cases and in liability cases



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## MSPA Future Medicals: Workers' Compensation Medicare Set-Asides (MSA)

### Workers' Compensation: Practices for Medicare Recipients

- Protecting Medicare's interest with respect to future medical costs
- MSA--account or trust set aside for payment of future medicals
- If a WC case involving a Medicare beneficiary meets the required threshold (\$25,000 total settlement amount) a sum of money is "set aside" from the settlement proceeds to account for future medical costs that Medicare would otherwise pay
- For a WC case, the amounts put into the MSA **can and should** be approved by CMS
- CMS will provide written opinion on proposed MSA



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## MSPA Future Medicals: Liability MSAs?

**What about liability cases?** In short, no clear answer.

- CMS has no formal policy.
- Hints that MSAs may be expected.



•A May 2011 memo from Sally Stalcup, Regional Coordinator for Region VI: "We are still asked for written confirmation that a Medicare set-aside is, or is not, required [in liability cases, and we can say that "the Medicare Trust Fund must be protected."  
•"There is no formal CMS review process in the liability arena as there is for Workers' Compensation. However, CMS does expect funds to be exhausted on otherwise Medicare covered. . . Services[.] CMS review is decided on a case by case basis."

•But, MSAs are not required in liability cases, and CMS may refuse to consider MSAs. See *Sipler v. Trans Am Trucking, Inc.*, 2012 U.S. Dist. LEXIS 109278 (D. N.J. July 24, 2102)



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## MSPA Future Medicals: What to do in Liability Cases?

- Discovery Issues: Consider if this case is one that implicates Medicare's interests.
  - Is Plaintiff a Medicare beneficiary?
  - Does the settlement involve future medical expenses?
- If it does implicate Medicare's interest, considerations re type of case:
  - Large case?
  - Large component of future medical expenses?
  - Availability of other coverage for future medical expenses?
- **Consider Medicare's Interest** (even without specific rules, regulations or guidance from CMS)



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## MSPA Future Medicals: How to consider Medicare's Interests

**Medicare Set Aside:** Some Medicare representatives have instructed regional offices that they "may review a proposed set aside amount for liability" if there are significant dollars at issue and the workload of the office permits.

Consider requesting a liability MSA if:

- Catastrophic injury
- Large settlement
- Clear component is for future medical care



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## MSPA Future Medicals: How to consider Medicare's Interests

CMS appears to recognize that an MSA is not always appropriate (settlement size, workload of CMS).

Difficult to obtain jurisdiction over CMS for court-approval of a liability MSA. (42 USC 405(g) requires administrative remedies to be exhausted).

CMS director has stated that *"you need to at least think about having a process in place where you're documenting why or why not there are future medicals and how you took care of that."*



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## MSPA Future Medicals: How to consider Medicare's Interests

### Documentation in Settlement Agreement

If there is Medicare eligibility and future medicals are a component:

- Identify and describe future medical compensation
- Set out allocation of the total settlement for future care (expert opinions)
- Physician Certifications, documentation in file
- Include acknowledgment of Medicare responsibility in the settlement agreement
- Confirm reporting to CMS
- If liability/future medicals are contested, consider reciting the nature of contested causation/cost of future care



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## MSPA Future Medicals: Implications for Reporting

### Reporting Requirements: Initially a reporting entity may report a settlement based on ICD-9 codes.

- Medicare will then consider that any subsequent Medicare claim for reimbursement relating to that code was implicated in settlement.
- Medicare may wrongly consider post-settlement claims under those codes to be under settlement proceeds.
- Need for accurate reporting—failure to do so could alter intended settlements.



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## MSPA: Recent Case Law

*Schexnayder v. Scottsdale Insurance Co.*, 2011 U.S. Dist. LEXIS 83687 (W.D. La. July 29, 2011)



- MSA submitted to CMS was met with a response that CMS would not have approval for quite some time.
- Parties sought declaratory judgment as to adequacy of MSA.
- Court heard evidence from physicians, an attorney who was an expert in the area of MSAs—but no representative of CMS.
- Court determined that the MSA was reasonable and entered declaratory judgment that Medicare's interests were adequately protected.

*\*This case is the exception, not the rule.*



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## MSPA: Recent Case Law

*Seeger v. Tank Connection, LLC*, 2010 U.S. Dist. LEXIS 49013 (D. Neb. April 22, 2010)

- Plaintiff was injured in workplace accident after being splashed with molten zinc.
- Plaintiff refused to provide SSN, Medicare Claim Number, information relating to Medicare benefits.
- Court ordered that Plaintiff was compelled to produce requested information.



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## MSPA: Recent Case Law

*Wilson v. State Farm Mut. Auto. Ins. Co.*, 2011  
U.S. Dist. LEXIS 63430 (W.D. Ken. June 15, 2011)

- Insurance company agreed to pay Plaintiff \$50,000. Before issuing check, State Farm requested information to determine amount of Medicare lien OR to list Medicare as a beneficiary on the check. Plaintiff refused, filed a claim for bad faith.
- Court held that delay in payment to ascertain Medicare lien is not bad faith.



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## Where do we go from here?

An Advanced Notice of Public Rulemaking, [CMS-6047-ANPRM](#), from the Centers for Medicare and Medicaid Services (CMS) was published in the July 15, 2012 Federal Register. <https://www.federalregister.gov>

There are seven options proposed: 1 – 4 applying to both beneficiaries and those with the "reasonable expectation," and 5 – 7 applying only to beneficiaries.

- The beneficiary pays for future medicals out of the settlement funds, until exhausted, with random CMS audits.
- Medicare does not pursue future medicals if certain conditions are met including relating to the amount of the settlement, the type of injury, persons Medicare status, etc.
- The injured person provides certification regarding the Date of Care Completion from his/her treating physician.
- The individual/beneficiary submits a Liability MSA for CMS' review and approval.



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## Where do we go from here?

- The beneficiary participates in one of the three new Medicare recovery options regarding a \$300 threshold, a fixed payment option or \$25,000 or less self-payment option.
- The beneficiary makes an upfront payment to Medicare.
- The beneficiary obtains a compromise or waiver of recovery and Medicare would have the discretion to not pursue future medicals.



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Questions?

Katy Klingelhafer  
kklingelhafer@fbtlaw.com  
614-559-7285



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# Katherine M. Klingelhafer

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## Associate

kklingelhafer@fbtlaw.com

*One Columbus, Suite 2300  
10 West Broad Street  
Columbus, Ohio 43215-3467*

T: 614.559.7285 | F: 614.464.1737

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## Assistant

Wanda Hoffman  
wandahoffman@fbtlaw.com  
T 614.559.7222

## PRACTICE AREAS

Tort and Insurance Defense  
Business Litigation

## BAR MEMBERSHIPS

Ohio State Bar Association  
Columbus Bar Association  
American Bar Association

## COURTS

Ohio, 2009  
Northern District of Ohio  
Southern District of Ohio

## EDUCATION

The Ohio State University, Moritz  
College of Law, J.D., 2009, *magna  
cum laude*

- Order of the Coif
- *I/S: A Journal of Law and Policy  
for the Information Society*
- Staff Editor, 2007-2008
- Senior Editor, 2008-2009

Duke University, B.A., 2006, History,  
minor in English

Katy is an associate in the Firm's Columbus office. She graduated from The Ohio State University Moritz College of Law in May 2009. Katy is a member of the litigation department, with a concentration in the tort defense and insurance and business litigation practice groups. While in law school, she worked as a summer associate with the Firm.

## Civic & Charitable Organizations

Ronald McDonald Charities of Central Ohio - Member of Red Shoe Society,  
serving as Chair of the Membership Committee