

Liability and No Fault Medicare Set Asides

MARC Coalition Presentation to Office
of Management and Budget, Office of
Information and Regulatory Affairs
April 21, 2017

About the MARC Coalition

- Founded in 2009 to exclusively focus on MSP issues – www.marccoalition.com
- Advocated for SMART Act (P.L. 112-242)
Represents beneficiaries, insurers, and self-insured
 - Large and mid-size insurers
 - Fortune 500 and other companies
 - Major trade associations
 - Beneficiaries, attorneys, and other stakeholders

The Issue -- Introduction

- For the past six years, CMS has considered, but not implemented, “Liability Medicare Set Aside” arrangements
- Notwithstanding commitment to work with stakeholders, CMS most recently and unilaterally proceeded with LMSA implementation and expanded to no-fault arrangements
- CMS has neither legal authority or ability to manage complexities of implementation
- Instead, CMS should focus program resources on improving, rather than expanding, the MSP program, which still suffers from considerable delay, error and wrongful denial of beneficiary coverage

Regulatory History of LMSA Issue

- Origins of LMSAs are found in WCMSA program
 - Created by CMS Memorandum dated July 23, 2001 (the so-called “Patel” memo), and updated since
- June 15, 2012 -- CMS publishes ANPRM soliciting ideas on eight different proposals (77 Fed. Reg. 35917)
 - Proposals confusing at best
- September 2013 -- Draft Proposed Rule Created
 - MARC met with OIRA urging withdrawal of rulemaking
 - CMS withdraws proposed rule

Regulatory History (cont.)

- June 8, 2016 -- CMS Website Announcement
 - “The Centers for Medicare and Medicaid Services (CMS) is considering expanding its voluntary Medicare Set-Aside Arrangements (MSA) amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. **CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year.** Please continue to monitor CMS.gov for additional updates.”

Stakeholder Response to CMS -- 2016

- November 2016 -- Stakeholders write to CMS asking for engagement on LMSA Issues before further action is taken, and urging CMS to abandon unauthorized efforts
- Consistent with GAO Findings:
 - “And unlike for WCMSAs, CMS does not have a formal review and approval process for liability or no-fault MSA arrangements. Upon request, some CMS regional offices will review liability or no-fault MSAs, but this is at the regional office’s discretion. NGHP stakeholders report variation in regional office response, including which regional offices will review liability MSAs, policies (such as setting thresholds for review), and regional office responsiveness.... CMS officials did not report that they were taking any steps to address regional office variation in liability MSA review.” GAO Report at 33.
- February 3, 2017 – CMS Announces Instructions to MAC
 - <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2017Downloads/R1787OTN.pdf>

CMS Manual System

Pub 100-20 One-Time Notification

Transmittal 1787

Department of Health &
Human Services (DHHS)

Centers for Medicare &
Medicaid Services (CMS)

Date: February 3, 2017

Change Request 9893

SUBJECT: New Common Working File (CWF) Medicare Secondary Payer (MSP) Type for Liability Medicare Set-Aside Arrangements (LMSAs) and No-Fault Medicare Set-Aside Arrangements (NFMSAs)

I. SUMMARY OF CHANGES: This change request (CR) identifies the roles the A/B Medicare Administrative Contractors (A/B MACs), Durable Medical Equipment MACs (DME MACs), shared systems, and Common Working File (CWF) will have for creating Liability Insurance Medicare Set-Aside Arrangement (LMSA) or No-Fault Insurance Medicare Set-Aside Arrangement (NFMSA) records on CWF and process Medicare Secondary Payer (MSP) claims accordingly with an open set aside MSP record on CWF.

EFFECTIVE DATE: July 1, 2017 - MCS, VMS, FISS and CWF Analysis and Design; October 1, 2017 - MCS, VMS, FISS and CWF Coding and Testing

**Unless otherwise specified, the effective date is the date of service.*

IMPLEMENTATION DATE: July 3, 2017 - MCS, VMS, FISS and CWF Analysis and Design; October 2, 2017 - MCS, VMS, FISS and CWF Coding and Testing

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Statutory and Regulatory Provisions

- There is no statutory basis for LMSAs
 - 42 U.S.C. 1395y(b)(2)(B)(i) --
- Unlike Workers Compensation Arrangements, There is no Regulatory Basis for LMSAs
 - Compare 42 C.F.R. 411.46/47
- There is no sub-regulatory authority for LMSAs
 - Nor is sub-regulatory authority permitted or appropriate
- GAO statements (GAO 12-333) are not founded in statute, policy, recommendations or fact
 - <http://www.gao.gov/assets/590/589158.pdf>
 - Page 36 recommendation unrooted in text or law

LMSA Proposal Is Bad Policy

- Deeper CMS intrusion into private settlement arrangements runs counter to Administration direction of less, rather than more, regulation
- CMS has yet to produce any evidence that MSA arrangements have positive cost-benefit effect
- Liability and No Fault MSAs are not like WC Arrangements
 - Allocation of fault principles are fundamentally different than WC contractual principles
 - This is true even in No Fault coverage cases, where subrogation claims are typical
 - Liability settlements far more frequently involve property damage claims with no bodily injury claims
 - Coverage of bodily injury far more limited in actual BI claim cases
 - No Fault coverages even more limited – typically low dollar limits
 - Opportunities for wrongful denial of benefits far greater
 - WC arrangements are limited to and specifically characterize recovery as medical or economic loss; liability cases involve property damage and other non-economic damages
 - At their core, liability claims result in a compromised payment

Policy Considerations (cont.)

- There is still a lot in need of repair in the statutorily-authorized MSP program
 - Basic Management of Contractors
 - Timely ORM Policies
 - Inability to Allow Portal Access
- There is still a lot of SMART to be implemented
 - Failure to allow access to Portal harms CMS and all others
- WCMSA Program Remains Troubled
 - Approval times, management of requests, problematic
 - CMS and contractors apply non-real-world analysis
 - Beneficiaries using funds for other purposes (and may legally do so)

Inevitable Problems with LMSAs

- Time to review:
 - Depending on the year and the Regional Office, it has often taken CMS months to review and approve WCMSAs, delaying settlements and in some cases negating the opportunity to settle altogether
- Consistency of Review/Fee Schedules
 - Different CMS Regional Offices review WCMSAs using different criteria and reaching different conclusions
 - Reviewers do not honor or use state fee schedules, Medicare coverage limitation policies, or allocation of fault principles
- Cost of Drugs (60% of cost):
 - WCMSAs use of “average wholesale price” unjustified and vastly overinflated
 - Assumes that the branded drug will be used even when generics are available
 - Assumes lifetime utilization of medications (including opioids) in violation of clinical guidelines
- Billing Codes
 - WCMSAs utilize incorrect treatment codes, resulting in inflated costs
- Primary Payment Limits
 - It is likely that any LMSAs will ignore primary payment limits (at which coverage is exhausted)

Implications of Future LMSA Implementation

- Best case – settlements delayed
- Worst case -- Settlements lost and CMS recovers zero (including conditional payments)
- Beneficiaries' Common Working File “flagged”
 - Unrelated care wrongfully denied
 - CMS/contractors misuse different (and inappropriate) ICD coding between Section 111 and MSA, confusing coverage and wrongfully denying benefits

Conclusion

- CMS should immediately terminate development of LMSA program
 - At a minimum, stakeholder consultation needed
- CMS should focus on implementing the program it is authorized by statute to operate
- CMS should improve program for beneficiaries, settling parties, and other stakeholders
 - Improve Portal, ORM, Contractor, and other programs
 - Otherwise ultra-vires overreach will affect millions