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Welcome to NBKL's "Medicare Secondary Payer Compliance Corner"

Medicare Part D Coverage for Opioids and the MSA / Rasa Fumagalli

A Medicare Set-Aside (MSA) is a settlement tool used by parties to prevent a cost shift of future injury-related Medicare covered expenses to Medicare when the settlement terms close out liability for future medical. The MSA will generally include projections for future injury-related medical treatment and prescription drugs that are covered by Medicare. Since the MSA funds must be properly exhausted before Medicare will become primary, the funds may only be used to pay for those expenses that would normally be paid by Medicare. The Workers' Compensation Medicare Set-Aside Arrangement Reference Guide, Version 2.9 (January 4, 2019) (Reference Guide) states: "If payments from the WCMSA account are used to pay for services other than Medicare-allowable medical expenses related to medically necessary services and prescription drug expenses for the WC settled injury or illness, Medicare will deny all WC-injury-related claims until the WCMSA administration can demonstrate appropriate use equal to the full amount of the WCMSA." (Section 17.3) The Reference Guide further states that Medicare coverage for a particular medical service or prescription drug expense may be determined by reviewing CMS' website. This article will examine Medicare Part D plan coverage issues when it comes to opioids.

Medicare coverage of drugs may change over time. The opioid abuse epidemic has prompted both local and federal governments to take action to try to halt the epidemic. In 2016, the Comprehensive Addiction and Recovery Act (CARA) gave Medicare programs the authority to limit a Medicare beneficiary's access to coverage for opioids and other frequently abused drugs under certain circumstances. In 2018, CMS introduced a three-prong approach to deal with the opioid abuse epidemic. The approach focuses on: prevention of new cases of opioid use disorder, expanded access to treatment for the disorder, and data sharing to assist with the prevention and treatment of opioid use disorders. Recently, in 2019, Medicare Part D plans implemented opioid overutilization initiatives that are expected to continue into 2020. The opioid overutilization initiatives provide for better coordination of care between the treating physician and the pharmacy when a beneficiary is determined to have high risk opioid use.

Under these initiatives, Part D plans are expected to have real-time opioid care coordination requiring discussion with patients and prescribing physicians about the risks of opioid overdose and prevention when a beneficiary is daily dispensed 90 morphine milligram equivalents (MME) by a pharmacy. Additional safety edits may also be triggered by exceeding a predetermined

specific number of prescribing physicians or pharmacies that are being used by the beneficiary. In addition, CMS recommended that Part D plans limit initial opioid prescription fills to seven days when prescribed for acute pain. These limitations do not apply to beneficiaries in long term care facilities, hospice care or those that are being treated for active cancer related pain.

Many Medicare Part D plans provide Drug Management Programs (DMP) as a way of coordinating this care. Under the DMPs, a Medicare Part D plan may limit at-risk beneficiaries' coverage of opioids and benzodiazepines to specific selected providers and or pharmacies. Exceptions to these limits would be available in certain circumstances. As of January 1, 2022, all Part D plans will be required to have DMPs in place.

The 2019 and 2020 Overutilization Monitoring System (OMS) criteria also require - at a bare minimum - that all Part D sponsors with DMPs review beneficiaries for the following: use of opioids with an average daily morphine milligram equivalent (MME) greater than or equal to 90 mg for any duration for the last six months and either three or more opioid prescribers and three or more opioid dispensing pharmacies, or five or more opioid prescribers. Supplemental DMP criteria may also provide for review of beneficiaries who are using any level of opioids with seven or more prescribers or pharmacies.

It is clear that CMS expects Medicare Part D plans to be proactive in the prevention and treatment of opioid use disorders. Since MSA funds may only be properly spent on injury-related Medicare covered drugs, it will be interesting to see what, if any, impact the Part D opioid coverage limitations may have on the way MSA accounts are administered. We will keep you advised.

Staying In Your Lane: Navigating the Ethics of Medicare Set-Asides / Julie Garrison

Medicare Secondary Payer (MSP) compliance is a detailed, somewhat complicated, and often dynamic field. MSP law and regulations are constantly evolving and subject to some interpretation. MSP consultants contend with claims and risk management concerns, medical and health sectors, legal and privacy issues, and both federal and state government agencies. Various professionals with overlapping roles include physicians, nurses, attorneys, adjusters, and settlement consultants. A large component of the MSP practice involves the analysis, preparation, and submission of Medicare Set-Aside (MSA) proposals; ethical issues can arise during this process.

Initially, an MSA consultant must be competent with command of all applicable federal and state statutes and regulations and experience complying with those laws. Medicare Set-Aside Certified Consultant (MSCC) and Certified Medicare Secondary Payer (CMSP) credentials indicate a level of knowledge while continuing education programs and seminars provide additional training, insight, and updates. Involvement in professional organizations such as the National Alliance of Medicare Set-Aside Professionals (NAMSAP) offers educational opportunities, programs and can act as a sounding board.

Regarding the actual analysis and preparation of MSAs, integrity and independence are essential. The consultant must first gather the necessary background and factual material and in particular, complete medical records. This information is usually obtained from insurers, claims administrators, and the parties and their attorneys. Sometimes, complete records must be requested from medical providers. The impetus is on the consultant to ensure that all necessary information is available and to then conduct a thorough analysis. This process also requires confidentiality of medical and personal information with use of specific, legal consent to gather and share a claimant's status.

Next, the consultant should remain independent from dictates or wishes of the various participants. An MSA allocation should give Medicare's interests adequate consideration as dictated by objective facts and supported by reasoned and experienced analysis. MSP consultants should not be advocates, but as with our firm, may also be attorneys. Citing legal defenses and including factual arguments is permissible and in our view, entirely relevant in assessing whether Medicare's interests are adequately considered or if Medicare is the proper primary payer for unrelated conditions or care. Whether the MSA is prepared by an attorney or other professional, knowing when to consult with medical and other experts is also important. Medical professionals such as nurse consultants are invaluable when preparing MSAs for more complicated and catastrophic claims.

At times, certain facts present ethical questions. Examples include treating providers who previously made remote recommendations for costly medical care or reference a long "laundry list" of possible future treatment. Usually, these statements fall short of current future treatment recommendations. In other cases, a claimant may decline to undergo recommended treatment. In such circumstances, the MSP consultant might still propose a conservative allocation excluding these items, but should notify its client of the potential exposure and related costs. As with the ultimate decision of whether or not to submit an MSA to CMS for approval, the determination to settle a claim with funding of a proposed or even approved MSA is not made by the MSP consultant.

One timely concern within the MSP arena is the inclusion of opioid and other narcotic medications in MSA plans. Given the ongoing opioid crisis in our country, the allocation of these drugs over several years poses serious ethical and medical issues. Suggestions from MSP professionals include weaning and tapering of these drugs and use of professional administration of MSA funds as an extra oversight layer. To that end, NAMSAP leadership has addressed this and other concerns with CMS representatives.

NBKL has a team of knowledgeable, credentialed, involved, and experienced MSP attorneys with workers' compensation and liability backgrounds. We can help the many participants and interested parties navigate MSAs and MSP compliance.

MSP Case Law Update / Joseph Gregorio

Auto Carrier's "Legitimate Defense" Sufficient to Convince Medicare, and Protect Against Double Damages When Proven Wrong

In *Duncan v. Liberty Mutual Insurance Company*, 2019 U.S. Dis. LEXIS 106265, the U.S. District Court for the Eastern District of Michigan found that a decedent's Estate ("Plaintiff") did not have standing to seek double damages against Liberty Mutual ("Liberty"), the decedent's no-fault PIP carrier. Although the Opinion ultimately decided standing issues, its background and discussion regarding the underlying double damages claim is even more noteworthy.

The decedent was injured in an automobile accident in January 2013, suffering a severe brain injury, and ultimately died in December 2014. Plaintiff filed suit in state court to recover under the PIP policy.

Medicare conditionally paid hospital and long-term care expenses related to those injuries, and sought reimbursement from Liberty. Liberty denied liability for medical expenses based upon expert opinions stating that the decedent suffered a fatal heart attack while driving. Medicare agreed with Liberty and issued a letter in June 2015 stating that it reversed its initial determination and Liberty did not owe Medicare anything.

Subsequently, a portion of the personal injury case was tried in state court, and in April 2016, the court entered a judgment based on a jury verdict finding the accident "caused or contributed" to the decedent's brain injury. Thereafter, Liberty notified Medicare of the verdict, and, in anticipation of reimbursing Medicare upon receipt of a final conditional payment amount ("final bill"), funded an escrow for that purpose.

In July 2016, Plaintiff amended its complaint to assert an MSP double damages claim, and Liberty removed the case to Federal Court. On cross motions for partial summary judgment, the District Court found in favor of Liberty in that Liberty "did not 'fail to provide for primary payment' because it had a plausible argument as to why it was not liable under the no-fault policy. That argument . . . was strong enough to convince Medicare" and when Liberty eventually lost that argument in the jury verdict, it immediately informed Medicare and accepted reimbursement.

Plaintiff attempted to argue that Liberty would not have agreed to reimburse Medicare but for their successful jury verdict, and therefore, they essentially forced Liberty into reimbursing Medicare. In rejecting this assertion, the District Court noted that 1) Liberty was allowed to contest its liability under the no-fault policy, 2) they appropriately challenged Medicare's initial determination pursuant to its administrative procedures, and 3) once its liability was determined, Liberty conceded its responsibility to reimburse Medicare.

Plaintiff appealed to the Sixth Circuit, who remanded the case for a determination of whether Plaintiff had standing. On remand, the District Court held that Plaintiff did not have standing for the MSP double damages claim because Plaintiff failed to establish they suffered any injury in fact from Liberty's failure to pay decedent's medical bills, noting that the bills were paid conditionally by Medicare and Liberty has committed to reimbursing Medicare upon receipt of a "final bill." Although Plaintiff had standing to bring breach of contract claims under the PIP policy, those claims were being litigated in state court, and the "injury in fact" requirement must be satisfied for each claim.

Commentary: This case illustrates the steps a carrier may take to challenge a disputed claim, while still insulating themselves from double damages if they are eventually found liable for the injuries. The District Court highlighted Liberty's prompt notification to Medicare several times in its opinion, as well as its willingness to reimburse Medicare upon receipt of the final conditional payment amount, as demonstrated by the funding of the escrow. Finally, the fact that Medicare initially agreed with Liberty's disputes helped bolster the finding that it had a "legitimate defense" prior to the jury's findings.

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Our MSP Compliance Services

Our dedicated team diligently and efficiently streamlines and navigates the Medicare Secondary Payer (MSP) landscape for our clients. The attorneys, nurses, and paraprofessionals at NBKL guide you through the entire process from initial investigation through post-settlement. Our team's vast experience in workers' compensation defense, personal injury claims and MSP compliance makes us industry leaders in partnering with clients to achieve optimal claim resolutions while meeting all MSP requirements.

Services We Provide:

- Medicare Set-Asides ("MSA") (traditional and non-submit) including:
  - Legal Zero MSAs
  - Evidence Based Medicine MSAs
  - Future Medical Allocations/Life Care Plans
  - Advice and Recommendations to Mitigate MSA exposure
  - Analysis and Mitigation of competitor's MSA proposals
- Medicare Parts A & B Conditional Payment Analysis, Negotiation and Resolution
- Medicare Advantage Plan (Part C) and Prescription Drug Plan (Part D) Lien Investigation, Negotiation and Resolution
- Medicaid Lien Negotiation and Resolution
- Settlement Contract drafting to protect against past and future Medicare exposure
- Settlement Consulting on all aspects of MSP Compliance in Workers' Compensation and Liability cases
- Design and Implementation of MSP Compliance Programs

Contact us for information regarding the above services. Additional services may also be available upon request.