



Settling WC Medical Expenses Prior to CMS Approval of a Proposed MSA

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In the July 11, 2005 CMS policy memorandum, question 5 addressed the settlement of WC medical expenses prior to CMS review of a proposed MSA and stated,

The parties may proceed with the settlement, but any statement in the settlement of the amount needed to fund the WCMSA is not binding upon CMS unless/until the parties provide CMS with documentation

that the WCMSA has actually been funded for the full amount as specified by CMS that adequately protects Medicare's interests as a result of its review.

If CMS does not subsequently provide approval of the funded WCMSA amount as specified in the settlement and proof is not provided to CMS that the CMS-approved amount has been fully funded, CMS may deny payment for services related to the

WC claim up to the full amount of the settlement. Only the approval of the WCMSA by CMS and the submission of proof that the WCMSA was funded with the approved amount, would limit the denial of related claims to the amount in the WCMSA. This shall be demonstrated by submitting a copy of the final, signed settlement documents indicating the WCMSA is the same amount as that recommended by CMS.

While the memorandum focused on the provision of proof of full funding to CMS, there are several other issues to be considered including repayment of Medicare conditional payments, responsibility for funding of additional amounts required by CMS and the potential for modification of the initial and annual payment amounts for MSA arrangements funded by a structure.

Provision of Proof of Full Funding to CMS

NuQuest, a national company specializing in Medicare Secondary Payer compliance, submitted a request to CMS on July 22, 2005 for consideration of an alternative to use of the final signed settlement document indicating the MSA is the same amount as that recommended by CMS as proof that the MSA has been fully funded. The position NuQuest presented was that this policy is not practical as it would require an addendum to the previously finalized settlement document if CMS recommended an amount other than the original MSA amount outlined in the settlement document. NuQuest suggested that an accounting showing the deposit of the additional MSA funds recommended by CMS be considered as adequate proof of full funding.

The response from CMS central office received on December 9, 2005 states,

Under all circumstances, one of the parties or the submitter should send a copy of the final, signed settlement agreement. If the final, signed settlement agreement does not agree with



the amount that CMS provided as adequate to protect Medicare's interest, then CMS will accept the Medicare Set-aside Agreement executed by the parties, which reflects the CMS approved amount; or a professional or self-administration accounting showing the deposit of additional funding to the WCMSA.

Repayment of Medicare Conditional Payments

While CMS continues to improve its turnaround time for review of MSA proposals, there has been inadequate improvement in the turn around time of the Fiscal Intermediaries in response to requests for conditional payment estimates in cases involving Medicare beneficiaries. NuQuest

compiles statistical data on the response time of the Fiscal Intermediaries. Of 540 requests to Fiscal Intermediaries for conditional payment claim estimates, 319 of those took over 90 days to receive a response with the average response time being 143 days. With NuQuest's average CMS MSA approval turnaround time of 79 days, it is common to receive CMS approval far in advance of receiving an estimate of Medicare conditional payment claims. Therefore, settling cases prior to CMS approval of a proposed MSA typically also means that the case is being settled prior to obtaining a Medicare conditional payment claim estimate from the Fiscal Intermediary in cases involving a Medicare beneficiary. The issue of

who will be responsible for the repayment of Medicare conditional payment claims post settlement should be addressed at the time of settlement. Typically, the primary payer agrees to assume the responsibility for repayment of Medicare conditional payments in this scenario. If the parties agree that the claimant will assume this responsibility, CMS still has a direct right of action to recover from the primary payer if the claimant does not repay Medicare.

Responsibility for Additional MSA Amounts Required by CMS

When settlements are finalized

prior to CMS review of a proposed MSA, there is always the potential that CMS will require additional MSA funds to satisfy Medicare's interests. The parties should agree at the time of settlement who will be responsible for any additional funding requirements.

Risk of CMS Modification to Initial and Annual Payments in MSA Arrangements Funded by a Structured Payment Plan

MSA arrangements funded by a structured payment plan may face greater challenges if CMS requires additional MSA funding since an increase in the MSA amount will

likely change the initial funding amount (seed) or the annual payment amount or both. When the case is settled prior to CMS approval, the initial MSA funding is dispersed and the annuity to fund the annual payments is purchased at the time of settlement. In this scenario, an additional lump sum deposit may need to be added to the original seed amount and/or an additional annuity may need to be purchased to supplement the annual payments. The settling parties should be aware of this possibility and agree who will be responsible for the additional funding and arrangements.

It is imperative that the parties to a WC settlement understand the potential pitfalls associated with settling cases prior to CMS approval of a proposed MSA Arrangement and ensure that the settlement documents address the responsibilities of the various parties in the settlement language.



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