



# NAMISAP

National Alliance of Medicare Set-Aside Professionals

## What Do the Latest Notices of Proposed Rulemaking Mean For You?

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# Regulatory Landscape

## **Stalcup Handout (2011):**

Lays out general obligation to protect Medicare trust fund when future medicals are funded. Defense obligations detailed (report and notify). MSA never required by law or statute.

## **CMS HQ Memorandum (2011):**

Creates an exception for when a set aside isn't necessary. TX Dr. certification.

## **ANPRM/NPRM (2012-2014)**

CMS's first attempt at regulations

# ANPRM (2012-2014)

- Medicare Program; Medicare Secondary Payer and “Future Medicals”
- Published June 15, 2012
- “This advanced notice of proposed rulemaking solicits comment on standardized options that we are considering making available to beneficiaries and their representatives to clarify how they can meet their obligations to protect Medicare’s interest with respect to Medicare Secondary Payer (MSP) claims involving automobile and liability insurance (including self-insurance), no-fault insurance, and workers’ compensation when future medical care is claimed or the settlement, judgment, award, or other payment releases (or has the effect of releasing) claims for future medical care.”
- Seven potential Options, all indicating Beneficiary responsibility
- ANPRM withdrawn on October 8, 2014

# CMS Tipping Their Hand

## July 2016

CMS is considering expanding its voluntary review process to include Liability MSAs.

## December 2016

Request for new Workers Comp Review Contractor

- 51,000 new submissions

## February 2017 / June 2017

MM9893: Medicare to reject claims in October 2017

## September 2017

WCRC selected by CMS / \$60 million contract

# Final Notice

- December 2018: OIRA's OMB publishes NPR
- “Miscellaneous Medicare Secondary Payer Clarifications and Updates”
- “This proposed rule would ensure that beneficiaries are making the best health care choices possible by providing them and their representatives with the opportunity to select an option for meeting future medical obligations that fits their individual circumstances, while also protecting the Medicare Trust Fund. Currently, Medicare does not provide its beneficiaries with guidance to help them make choices regarding their future medical care expenses when they receive automobile and liability insurance (including self-insurance), no fault insurance, and workers’ compensation settlements, judgments, awards, or payments, and need to satisfy their Medicare Secondary Payer (MSP) obligations.”
- Agenda Stage: Proposed Rule Stage
- Timetable: 9/00/2019
- “Economically Significant” priority



## View Rule

[View EO 12866 Meetings](#)

[Printer-Friendly Version](#)   [Download RIN Data in XML](#)

HHS/CMS

RIN: 0938-AT85

Publication ID: Fall 2018

**Title:** • Miscellaneous Medicare Secondary Payer Clarifications and Updates (CMS-6047-P)

**Abstract:**

This proposed rule would ensure that beneficiaries are making the best health care choices possible by providing them and their representatives with the opportunity to select an option for meeting future medical obligations that fits their individual circumstances, while also protecting the Medicare Trust Fund. Currently, Medicare does not provide its beneficiaries with guidance to help them make choices regarding their future medical care expenses when they receive automobile and liability insurance (including self-insurance), no fault insurance, and workers' compensation settlements, judgments, awards, or payments, and need to satisfy their Medicare Secondary Payer (MSP) obligations.

**Agency:** Department of Health and Human Services(HHS)

**Priority:** Economically Significant

**RIN Status:** First time published in the Unified Agenda

**Agenda Stage of Rulemaking:** Proposed Rule Stage

**Major:** Yes

**Unfunded Mandates:** No

**EO 13771 Designation:** Regulatory

**CFR Citation:** Not Yet Determined (To search for a specific CFR, visit the [Code of Federal Regulations.](#))

**Legal Authority:** [42 U.S.C. 1395y\(b\)](#)

**Legal Deadline:** None

**Timetable:**

Action	Date	FR Cite
NPRM	09/00/2019	

**Regulatory Flexibility Analysis Required:** No

**Government Levels Affected:** None

**Federalism:** No

**Included in the Regulatory Plan:** No

**RIN Data Printed in the FR:** No

**Related RINs:** Related to 0938-AR43

**Agency Contact:**

Susan Bozinko

# History of LMSAs: 2005-2012

- Medicare eligible/substantial settlement value/serious and severe injury
- Regional office discretionary review
- Inconsistent and unreliable
- Resource constraints



# Town Hall Meetings: Possible Outlook

- LMSA policy rollout no sooner than October 2019
- Voluntary review program
- LMSA/NFMSA used to protect entitlements
- MSA review after settlement reached
- May apply to Beneficiaries and those with a reasonable expectation

# Town Hall Meetings: Possible Outlook

- Minimum workload threshold \$250,000-\$750,000 for formulaic review
- Settlements exceeding \$750,000 would be full commutation with more traditional evaluation
- **Plaintiff's responsibility**

# Common Disagreements on LMSAs

- LMSA or not?
- How much?
- ICD Codes
- Release language
- Motions to Enforce

# Default Options by Carrier

1. Fully funded Medicare Set Aside
2. Letter from the treating doctor = no future care
3. Sign a waiver they are not going to bill Medicare

# Case Law to Know

- Benoit v. Neustrom
- Ahlborn v. Arkansas Department of Human Services
- Bradley v. Sebelius

# Benoit Reduction

Total Case Value - \$2,000,000.00

Actual Settlement- \$100,000.00

Fees, Costs & Liens - \$44,293.00

Net to Client - \$55,707.00

Set Aside Amount - \$305,512.00

Net as a Percentage of MSA - 18.23%

**Reduced Set Aside Amount - \$10,157.60**

# Ahlborn Reduction

Total Case Value - \$2,000,000.00

Actual Settlement- \$100,000.00

Fees, Costs & Liens - \$44,293.00

Net to Client - \$55,707.00

Set Aside Amount - \$305,512.00

Net Recovery as % of “Full Value” – 2.78%

**Reduced Set Aside Amount - \$8,509.58**

# Case Example I: Carol

- \$250,000 Settlement
- Neck and Back injuries
- Treating Doc recommended future care for injections, physical therapy, and periodic follow up visits
- 71 year old Carol
- Medicare Advantage Plan



# Case Example I

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**From:** Michael J. O [<mailto:MO>]  
**Sent:** Tuesday, August 13, 2019 2:28 PM  
**To:** Bord  
**Subject:** carol schweitzer - 34121273 DOA 5/19/18

Mr. Bord

Please confirm that UHC/Optum does not require a medicare set aside for future accident related treatment. Thanks.

**Sent:** Tuesday, August 13, 2019 3:35 PM  
**To:** Michael J. O  
**Subject:** RE: carol s - 34121273 DOA 5/19/18

Michael,

That is correct in this case we will not be looking for a set aside.

# Case Example I

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**From:** Michael J. O

**Sent:** Tuesday, August 13, 2019 2:37 PM

**To:** Bord, G

**Subject:** RE: carol s - 34121273 DOA 5/19/18

Is there plan language you can provide so I can help alleviate Carol's concerns?

# Case Example I

**From:** Bord@optum.com]  
**Sent:** Tuesday, August 13, 2019 3:44 PM  
**To:** Michael J. O  
**Subject:** RE: carol s- 34121273 DOA 5/19/18

No. The plan does not address a set aside. This is the language that is contained in our settlement letter.

This letter confirms our previous communications. Optum was retained by UnitedHealthcare to pursue a recovery for medical expenses arising out of the above captioned loss.

As we discussed, in an effort to settle this matter, my client has agreed to accept \$XXX in settlement of its claim. In addition, provided meets the Plan requirements and remains a Plan Beneficiary, the Plan will provide benefits for future necessary incident related treatment.

Please issue your reimbursement check for \$XXX, payable to “Optum”, Federal Tax Identification Number 41-1858498, and please include our file number on the check. Please send payment to the following address:

Optum  
L-3994,  
Columbus, OH 43260-3994

# Case Example I

**From:** [Michael J. O](#)  
**To:** [Josh Pettingill](#)  
**Subject:** FW: carol schweitzer - 34121273 DOA 5/19/18  
**Date:** Friday, August 23, 2019 9:13:10 AM

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Here is the form letter from Optum pertaining to lien resolution. It says the Plan will provide benefits for future necessary incident related treatment.

# Case Example I: Carol

- Recommendation??
- Outcome??

# Case Example II: Ben Perr

- \$5.5 million Settlement
- Quadriplegic
- Age 62
- Medicare eligible
- Private Health Insurance through spouse

# Case Example II: Benjamin

## Josh Pettingill

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**From:** Lara S  
**Sent:** Wednesday, July 31, 2019 5:15 PM  
**To:** Josh Pettingill  
**Cc:** Alex G  
**Subject:** Perr MSA  
**Attachments:** [1892942] No determination on MSA.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Josh, here is the letter we got from Medicare about MSA determination...

# BCRC Letter / August 2019

Dear Sir/Madam:

You contacted the Medicare recovery contractor, Benefits Coordination & Recovery Center (BCRC), asking if a Liability Medicare-Set-Aside Arrangement is necessary for this case. The BCRC does not have the authority to make that determination.

Due to resource constraints, CMS is not providing a review of proposed LMSA amount. Please be advised this does not constitute a release or a safe harbor from any obligations under any Federal law, including the MSP statute. This decision regarding future medical treatment is independent of any determination regarding Medicare Secondary Payer recovery rights for conditional payments Medicare made for claim-related items and services furnished before the date of the settlement, judgment, award, or other payment. Medicare has the right to recover (or take back) Medicare payments related to any liability insurance settlement, judgment, award, or other payment Medicare may have made that should have been paid from the liability insurance settlement, judgment, award, or other payment must be repaid to Medicare.

Please contact the Benefits Coordination & Recovery Center at 1-855-798-2627 to discuss the amount Medicare has paid for items and services related to the liability insurance settlement, judgment, award, or other payment. For more information on Medicare Secondary Payer recovery, please visit our website and review the information in the section entitled “Coordination of Benefits & Recovery Overview”.



# Case Example II: Benjamin

## Josh Pettingill

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**From:** Lara S  
**Sent:** Wednesday, July 31, 2019 5:23 PM  
**To:** Josh Pettingill; Alex G; Jason Lazarus  
**Cc:** GTeam  
**Subject:** RE: 2015-37 Perr, Benjamin v. LCorporation: MSA Commutation  
**Attachments:** 8.16.19 Notice Of Hearing on Ptf Motion To Enforce Settlement.pdf; Motion For Enforcement.pdf

Josh- here is the notice of hearing for the Motion to Enforce Settlement. I know you said you'd be out of town but if Jason is available, we would like for him to be present at the hearing to address the MSA issue should it be necessary. We are hopeful the motion will be decided on the simple premise that the MSA requirement was not a materials term of the settlement agreement but in case the Court is looking for more, it would be great to have you guys there. The motion to enforce is also attached for reference.

Thanks so much, and please let us know if Jason is available on 8/16.  
Have a great evening-  
Lara

# Case Example II: Benjamin

- Recommendation??
- Outcome??

# Best Practices

- NAMSAP Liability MSP Committee Memorandum 2017
- <http://files.constantcontact.com/8516d32a001/12b6e24b-838e-4593-95da-6e35c5dc11d4.pdf>

# ANPRM SECTION 111 REPORTING CIVIL MONETARY PENALTIES

- History of CMPs:
  - 42 USC 1395y(b)(8) provides that CMPs of up to \$1,000 per day per claim can be assessed for noncompliance
  - What constitutes non-compliance now?
    - Old CMS Memo
    - Report timely and without errors (clear right?)
  - 2013 Advanced Notice of Proposed Rulemaking
    - No further regulatory action until now

# Section 111 Reporting Civil Monetary Penalties

- Office of Management and Budget indicates that CMS will move forward with a Notice of Proposed Rulemaking (NPRM) on “Civil Monetary Penalties (CMPs) and Medicare Secondary Payer Requirements.”
- Assigned “Significant” priority
- Anticipated release date September 2019

# Section 111 Reporting Civil Monetary Penalties

- What we anticipate
- What you can do now to get compliant
- What does “good faith effort” to comply mean?
- Can an audit help to identify shortcomings in your existing system?

# Section 111 User Guide Updates

- Ch. III of the User Guide now clarifies that beginning January 1, 2019, the threshold for liability insurance settlements, judgments, awards, or other payments will remain at \$750. CMS will also maintain the \$750 threshold for no-fault insurance and workers' compensation settlements, where the no-fault insurer or workers' compensation entity does not otherwise have ongoing responsibility for medicals. This is outlined in Section 6.4 of Ch. III and in short, simply restates the fact that the TPOC dollar thresholds remain at \$750 for liability, no-fault, and workers' compensation insurance.
- The definition of the 'Funding Delayed Beyond TPOC Start Date 1' data field has been updated. This definition can be found in line 82 of Table A-3 and states "If funding is determined after the settlement date (TPOC Date), provide actual or estimated date of funding determination." The previous definition simply stated "If funding for the TPOC Amount is delayed, provide actual or estimated date of funding." The same verbiage has been added to lines 95, 98, 101, and 104 of Table A-5 Auxiliary Record, updating the definition of this field for all possible additional TPOCs (TPOCs 2 – 5).
- – Ch. IV of the User Guide also provides updated versions of the excluded ICD-9 and ICD-10 tables in order to match the excluded lists that are available through the Section 111 MRA application (<https://www.cob.cms.hhs.gov/Section111>). These tables can be found in Appendices I and J.
- – Lastly, version 5.5 of the User Guide has been updated to only include information from the last four User Guide releases in order to reduce the number of version and revision history pages.

# Questions????