



Quarterly Newsletter

Volume 6, No. 1 - January 2014

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NAMSAP is the only non-profit association exclusively addressing the issues and challenges of the Medicare Secondary Payer Statute and its impact on workers' compensation and liability settlements. Through the voluntary efforts of our members, NAMSAP is a forum for the exchange of ideas and is a leading resource for information and news in this constantly evolving area of practice. The collective knowledge of our members and NAMSAP's resources will provide you with the ingredients essential to your success!

PRESIDENT'S LETTER

Greetings Fellow NAMSAP Members,

With the winter holidays just behind us, I am mindful that I have much to be thankful for. My two boys have grown into the fine young adults that I dreamed and prayed they would become, and my wife is the best partner I could ever have. I am thankful that my father is still going strong at age 87 and that he served his country in WWII, along with millions of other young men and women.

I am also grateful that I work in this industry for a wonderful company and that I have the opportunity to lead this association for one year as president. It has been a pleasure to work side by side with, and to become close friends with, each of the current NAMSAP board members, namely: Mike Westcott, David Korch, Debra Pfeifle, Leslie Schumacher, Aaron Frederickson, Barbara Bate, Ben Basista, Christine Melancon, Gary Patureau, Kim Wiswell, Matt Larkin and and Kimberly LaBounty. I would also like to thank all the committee chairs, committee members and members who help organize and participate in all of the various activities that NAMSAP is involved in.

We have come a long way as a trade organization largely due to the tireless efforts of our founding board: Patty Meifert, Robert Lewis, Tim Nay and Michele Whitmore. Other past board members have contributed greatly like Mark Popolizio, Fran Provenzano, Bill Van Wambeke, John Williams, Robert Barson, Bob Brown, John Gice, Rafael Gonzalez, and Jill Schroeder. I appreciate all you have done to make this organization what it is today.

This has been an exiting and busy year for NAMSAP. Our 2013 annual meeting in Baltimore was fantastic. In September 29 of our members went to Washington DC and shared our message with 38 congressional offices. Our committees are engaged in too many activities to name separately. But one of note is that we just submitted a NAMSAP response to the new CMS SMART Bill rules. Thanks again to everyone who is working so very hard to make this a trade organization that is making a real difference in our industry.

Please plan on attending our Miami Regional Meeting on Friday, January 10, 2014. This one-day event is going to be outstanding and I would love to see you there. Also, don't forget about our 10th Annual Meeting and Educational Conference in Las Vegas, at the Vdara Hotel and Spa, May 8-9 2014.

Thank you all. I wish you a blessed holiday season and a happy, healthy and prosperous new year.

Sincerely,

Doug Shaw



CORNER

by Rochelle L. Lefler, JD,RN, LHRM

CASE LAW

Hello everyone! Once again it is time to get caught up on what is happening within our area from a case law perspective. As always we wish to thank those of our members who take the time to enlighten the public and our membership about those cases which have interesting or cornerstone issues.

In this edition we start out discussing a couple of “blasts from the past”. Since our last newsletter, the United States Court of Appeals for the Eleventh Circuit has affirmed the district’s court’s ruling in United States v. Stricker, (USCA, July 26, 2013). By way of background, Stricker was a class action lawsuit against several companies and their insurers which resulted in a \$300 million dollar settlement. Central to this case was the timeline involved in the settlement process. More than six years after the PCB producers transferred \$275 million to the PCB plaintiffs’ lawyers pursuant to the settlement terms, but prior to distribution to the PCB plaintiffs, the government filed suit under the MSPA. Under the Federal Claims Collection Act, when an action is “founded upon [a] contract,” the government must sue within six years of the accrual of the cause of action. See 28 U.S.C. § 2415(a). For actions “founded upon a tort,” the government must file suit within three years of accrual. See 28 U.S.C. § 2415(b). *Id* at pg 3.

As you may recall, the defendants argued the three year statute applied as the case was based upon a tort but that even if the six year statute was applied, the suit by the government was untimely. The court in reviewing the terms of the settlement and payment schedule, ultimately utilized a date which would have barred the lawsuit by the government under either statute and thus avoided deciding which statute actually applied.

Unfortunately, in Haro v. Sebelius, 2013 U.S. App. LEXIS 18353 (Dist. AZ September 4, 2013) the Ninth Circuit of Appeal partially reversed the District court of Arizona’s ruling in favor of a class of Medicare beneficiaries. The underlying case challenged the “up front” payment provision of past medical conditional payments despite a pending appeal or waiver. Additionally, at issue was whether an attorney must withhold settlement proceeds regarding those sums. The district court ruled in favor of the Plaintiffs on both counts, however, the ninth circuit has now reversed those rulings. As to the issue of the “up front” payment provision, the court reviewed 42 U.S.C. section 405(g) of the act and determined the Plaintiffs had not exhausted their administrative remedies (no subject matter jurisdiction) as this issue had not been presented or argued at the administrative level. Regarding the withholding of the settlement proceeds, the court reasoned that ultimately an attorney can be construed as an entity which has received a “primary payment” when funds are received from a primary plan and thus subject to the broad construction intended under the MMA of 2003. Thus, the secretary’s interpretation under 42 CFR § 411.24(g) was held to be reasonable. *Id.* at pg. 5. It is not clear however whether an attorney would be personally liable for these funds as no such demand was made. While the injunction was in effect CMS did not seek reimbursement for those conditional payments pending appeal.



An interesting case which arose out of a Texas state workers compensation case is Caldera v. The Insurance Company of the State of Pennsylvania, 2013 U.S. App. LEXIS 9706 (Fifth Cir. May 14, 2013). This case involves the private cause of action provision in the Medicare Secondary Payer Statute (“MSP”), 42 U.S.C. § 1395y(b), and Texas workers’ compensation law. Claimant sustained a workers’ compensation injury in 1995. He became a Medicare beneficiary in 1998. At issue were two back surgeries which had been performed without prior authorization from the workers’ compensation carrier (ICPS), in contravention of the state workers’ compensation law. Medicare thus paid for both surgeries which totaled \$42,637. The Claimant exhausted his administrative remedies and finally sought review in state court where an “Agreed Judgment” was entered. The judgment established the causal relationship between the workers’ compensation accident and the subsequent surgeries, but no damages were awarded. Additionally,

Caldera filed a reimbursement claim (declaratory judgment) under the MSP for double damages. Caldera argued preemption of the MSP statute as against state laws. However, the court in analyzing the MSP statute indicated that the “plain language of the MSP illustrates its harmonious relationship with state workers’ compensation law: a workers’ compensation carrier is “primary” only if “payment has been made or can reasonably be expected to be made under a workmen’s compensation law or plan of the United States or a State.” 42 U.S.C. § 1395y(b)(2) (A)(ii). ID at 10. The court concluded that the MSP complements rather than usurps state law and presupposes a properly filed claim under the state statute which did not occur in this case as Caldera did not seek and obtain prior authorization for the surgeries. A writ of certiorari was filed, however review was denied on October 15 2013.

Please keep on eye on upcoming legal seminars

Life Tables

The Centers for Disease Control and Prevention have published the new life tables. There is no directive yet from CMS as to when we should start using them.

www.cdc.gov/nchs/products/life_tables.htm



NAMSAP Takes the Hill

On September 26, 2013, NAMSAP held its first annual Take the Hill event. Twenty-nine NAMSAP members from across the country traveled to Washington D.C. in an effort to raise awareness of the Medicare Secondary Compliance industry on Capital Hill. The attendees scheduled meetings about 40 elected officials in both the House and Senate including U.S. Senator Harry Reid (D-NV) who currently serves as the Senate Majority Leader, U.S. Congressman Dave Camp (R-MI) who currently serves as the Chairman of the House Ways and Means Committee, U.S. Senator Richard Durbin (D-IL), U.S. Congressman Harry Waxman (D-CA), and U.S. Senator Al Franken (D-MN), just to name a few. The message delivered to these legislators was that there is an entire industry dedicated to assisting settling parties to an insurance claim comply with the MSP statute which leads to a substantial savings to Medicare. The message was very well received on The Hill, and the NAMSAP voice was heard loud and clear!

In addition to the scheduled meetings, NAMSAP hosted a reception in the Rayburn House Office Building that was attended by many members of both the House and Senate, as well as many of their staffers.

NAMSAP also hosted an educational program that provided several continuing education credits to the attendees. Highlights of the program included a discussion of the results of the congressional meetings, a blue print of NAMSAPs plans for Congress, an in-depth discussion of HR 1982, a discussion on the latest CMS Reference Guide, a glimpse into the possible future of Congress' plan for the MSP statute, and an update on the Advanced Notice of Proposed Rulemaking regarding Liability MSAs. The speakers (Allison Haley, Doug Shaw, Aaron Frederickson, and Michael Westcott) were very well versed and provided a tremendous insight into the current state of the MSP industry.

This event was a major success for NAMSAP that took months of planning with a host of training webinars and conference calls leading up to the event. A tremendous thank you and congratulations goes out to the Regional Meeting Sub-Committee including Eileen Atkinson (Chairperson), Stephanie Volm (Chairperson), Reinaldo Alvarez, Alisa Cornetto, Katie Fox, Aaron Frederickson, and Angelo Sevarino on a job well done! Also, thanks to the entire legislative committee, chaired by Allison Haley, for all their hard work.

NAMSAP Committee News

Membership Committee

The recently formed Membership Committee welcomes Greg Gitter of Gitter & Associates, Tom Matson and Emily Grocoff from Medivest and Tom Stanley from Stanley Insurance Services to the group. We are working on the initial phase of rolling out several new sponsorship options for the coming year as well as a plan to expand membership. Specifically, we will be reaching out to our Insurance Partners and other organizations in the industry that have a vested interest in MSP compliance. We are excited about the opportunity to serve the membership of NAMSAP. Stay tuned for future updates through the newsletter and listserv updates.

Data and Development Committee

The Data and Development Committee (DDC) continues meeting on a monthly basis. We would like to extend an open invitation to our members to join and actively participate in the analysis of data. The meetings are held the third Wednesday of each month. They start at 11:00 AM, EST and do not last longer than one hour. The more members we have, the larger the data pool and thus the greater the validity of our research.

We continue to identify both submitter and CMS errors in medication calculations.

This is a general question to the MSA Listserve Community regarding a frequent dilemma: One of our DDC members experienced CMS providing an incorrect mg and cost of a medication. The CMS mg amount was less than the one submitted. However, it was not the correct amount the claimant was being prescribed. The submitters provided the correct information. However, with this CMS error the MSA cost was reduced. How would you handle this situation? Do you notify WCRC and your client? Do you allow the client to make the decision as to contacting the WCRC? Please take a moment to describe how you are handling of this delicate situation. All responses will be kept anonymous.

A newer trend we see occurring in more of the ROs include: a new policy requiring the claimant/or claimant attorney to provide in writing they are agreeable in changing the settlement from lump sum to annuity. Some of our DDC members are encouraging their clients to submit all proposals as annuities, to avoid this unnecessary time consuming extra step.

We are currently tackling a situation where CMS appears to be adding medications that have neither been prescribed or filled in greater than one year within the MSA. In one particular case, re-review by the submitter was denied. If others are experiencing this issue, please let us know.

Most on the committee have noticed an increase in development letters asking for medical records in both the liability and workers' compensation, addressing treatment outside the scope of the WC injury. Some committee members commented this is occurring with every case submitted with CMS requesting both indemnity and medical expense payout, specifically requesting details on major surgeries in MR, whether related or non-related.

There are some who feel that CMS' requests for medical records that are not injury related, seeks information that is outside of its scope of review of the WCMSA proposal. The information sought is also irrelevant to CMS' determination. Relevant evidence, as defined by Rule 401 of the Federal Rules of Evidence, is: that which tends to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

When a waiver is being requested there appears to be an increase in the demand that the submitter must provide not only the expense report, indemnity payout but now a signature as well. We would like to know if these are isolated instances or are more of our members dealing with this issue.

Steve Miller, another vital member of the DDC committee provided a reference from a blog article in Drug Channels in which Adam Fine noted that a potential pricing model that may take the place of AWP is the National Average Drug Acquisition Cost (NADAC) . In referencing a small sampling of this list, Steve noted that some drugs have increased up to 6,000% in ACQ cost over the past 6 months. This could impact both the claim cost as well as the MSA at some point.

Our Committee is also monitoring the situation in which CMS approval was obtained and then several months later CMS issued a new increased approval letter. CMS completed this effort without the request from the submitter or the carrier.

Should you wish to join our committee or have any questions, please do not hesitate contacting me.

Fran Provenzano

Legal RoundTable Committee

NAMSAP's Legal Roundtable Committee provided a Webinar on November 21, 2013 called *MSP Compliance & Exhaustion: How Your Tireless Efforts Build a Federal Case*. It addressed jurisdictional requirements of the Federal Court in hearing conditional payment appeals. In order for a Federal Court to entertain a legal action regarding a conditional payment appeal, the court must have proper jurisdiction over the case (i.e. perfecting the appeal). Jurisdiction is a checklist of hoops that need to be jumped through in order for the Federal Court to hear/decide a case.

Presentment: the Social Security Act states that no findings of fact or decision of the Secretary shall be reviewed by the Courts unless the statute specifically gives the Court that right to hear the issue. 42 USC 405(h). This statute is also known as a channeling statute which allows Medicare an opportunity to “apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual Courts applying ‘ripeness’ and ‘exhaustion’ exceptions case by case.” *Shahala v. Illinois Counsel on Long-Term Care, Inc.*, 529 US 1, 12-13, 120 S. Ct. 1084 (2000). This concept requires a party to raise all issues before the Social Security Administration before the Federal Court will hear the issue. Medicare cannot waive presentment as a jurisdictional requirement, allowing the Federal Court to hear the matter.

Exhaustion: In order to satisfy the exhaustion requirement, a Medicare beneficiary must move through the entire administrative appeals process of the Social Security Act prior to bringing a lawsuit in Federal Court. Medicare can waive the exhaustion requirement.

Hence, in order to perfect an appeal and preserve subject matter jurisdiction of the Federal Court (present and exhaust requirements), a Medicare beneficiary would:

- (1) Receive a final demand from MSPRC and dispute the final demand;
- (2) If Medicare denied the dispute of the final demand, the Medicare beneficiary would have to request reconsideration by MSPRC;
- (3) If Medicare denies the reconsideration, the beneficiary would then need to request a hearing before an Administrative Law Judge;

(4) If the Administrative Law Judge continues to deny the beneficiary's dispute of the conditional payments, the beneficiary would seek review from the Appeals Council of the Social Security Administration;

(5) If the Appeals Council denies beneficiary's dispute, the beneficiary could then bring suit in the Federal Court as they have now perfected the appeal.

However, a Respondent (insurance carrier, TPA, etc.) may have to go through a different route in order to establish presentment and exhaustion for the Federal Court to hear a conditional payment dispute. This is because there does not appear to be an administrative appeal process afforded to non-Medicare beneficiaries through the Social Security Act. However, this writer recommends that a Respondent attempt to move through the Administrative appeal process in disputing conditional payments (request hearing before ALJ, Appeals Council review) prior to bringing suit in Federal District Court. Proceeding in this fashion will provide proof that the Respondent has attempted to exhaust and present all issues before the Social Security Administration prior to the Federal Court hearing the matter.

In summation, whether you are a Medicare beneficiary or a Respondent, ensuring the Federal Court has jurisdiction to hear your conditional payment dispute requires a party to present all arguments, including constitutional arguments, to Medicare to hear, rule or decide (presentment). Further, a party must move through all phases of the administrative appeals process provided by the Social Security Act or attempt to move through all phases of the administrative appeal process (exhaustion).

--Robert Brown, Attorney at Brown Law Firm

--Patrick Czuprynski, MSCC and Associate Attorney at Nyhan, Bambrick, Kinzie and Lowry, P.C.

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NAMSAP LinkedIn

Save the Date

Miami Regional Meeting

Friday, January 10, 2014

Don't miss this informative and interactive meeting including sessions on the impact of the aging population on WC and MSP, MART Act and Medicare compliance trends.

You will be entered into a drawing for a Two-Night Stay Certificate for the DoubleTree by Hilton Grand Hotel Biscayne Bay if you register for the NAMSAP Miami Regional Meeting by December 17, 2013. Certificate to be used for a future stay and the winner will be announced at the meeting.

DoubleTree by Hilton Grand Hotel Biscayne Bay

1717 N. Bayshore Drive

Miami, Florida 33132

(800) 853-0270 - reference NAMSAP

www.NAMSAP.org / Education / 2014 Miami Regional Meeting



Continuing Education

NAMSAP is approved for MSCC: (6.75), CLCP / CCLCP: (6.75), Ethics Hours CCM: (6.75)

NAMSAP has applied for CMSP, CWCP and Florida CLE

10th Annual Meeting and Educational Conference

May 8-9, 2014

Vdara Hotel & Spa

2600 W. Harmon Ave.

Las Vegas, NV 89158

(866) 745-7767 and reference NAMSAP

www.vdara.com

Vdara is an All-Suites, Non-Gaming, Smoke-Free, Eco-Friendly hotel.

Room Rate:

- Tuesday, May 7th - Thursday, May 8th
\$160.00 plus taxes
- Friday, May 9th - \$184.00 plus taxes

Rate Includes:

- Internet access in room and throughout the City Center Campus
- (2) bottles of water per day
- Local and 800 number phone calls
- Access to Vdara Fitness Center
- Daily newspaper from the front desk
- Daily turn-down service (upon request)



www.NAMSAP.org / Education / 2014 Annual Meeting

NAMSAP Online Education

NAMSAP's webinars provides timely information of special interest to professionals working within the MSA industry and those seeking to learn more about this evolving area of practice. Webinar sessions are presented in "real time" via the Internet and through recordings. Participants view webinar materials online while listening to the audio portion of the presentation via the telephone or their computer audio system. Throughout the live webinar sessions, participants are encouraged to interact with other attendees and the presenter.

All NAMSAP webinars apply for (1) credit hour of continuing education for MSCC, CLCP, and CMSP.

Cost

Members: \$63

Non-Members: \$83

Upcoming Webinars

Don't forget to check the NAMSAP website for more information on upcoming webinars.

www.NAMSAP.org / [Education](#) / [Online Education](#)



Past Recorded Webinars

All recorded webinars have been approved for (1) hour of MSCC, CLCP, and CMSP Credit.

MSCC Training Course

The MSA training program is designed to provide the core essential knowledge components necessary for practice in the area of Medicare Set Aside Arrangements. If you already have your MSCC credential you can view individual modules for (3) hours of MSCC Credit, or purchase the entire (11) module series at a discounted rate.

Module Cost

Members: \$65

Non-Members: \$75

Entire Series (11 Modules)

Members: \$650

Non-Members: \$75

NAMSAP 2014 Membership Renewal



Please remember to renew your 2014 NAMSAP membership. We are looking forward to an exciting new year with the latest industry information!

Thank You to Our 2014 Partners

2014 Gold Partner Members



2014 Silver Partner Members



2014 Bronze Partner Member



Thank You to Our 2014 Miami Regional Sponsors

