



NAMISAP

National Alliance of Medicare Set-Aside Professionals

Quarterly Newsletter

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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!

NAMSAP PARTNERS

NAMSAP's Corporate Partners play an important role in the life of the association. As a result, we want to extend a very special thanks to our current NAMSAP Partners:

Gold Partners



Silver Partners



WELCOME NEW NAMSAP BOARD MEMBERS

Aaron P. Frederickson

Aaron Frederickson is an attorney and founder of MSP Compliance Solutions, which is located in St. Paul, MN. Prior to starting his current practice, Aaron worked as a litigator for over a decade in the area of workers' compensation, no-fault and general liability law. He is a Medicare Set-Aside Consultant Certified (MSCC), and has helped countless clients solve the Medicare maze. Aaron is also involved with Volunteer Lawyers Network and serves low-income clients on legal matters.



Matt Larkin

Matt Larkin, MSCC provides customers hope and clients peace of mind by utilizing highly effective cost-containment and business development solutions within the Workers Compensation, Liability and Medicare market channels.

A native New Englander, Matt now resides and works in the greater Boston area. He holds a certificate from the Commission on Health Care Certification as a Medicare Set-Aside Consultant Certified (MSCC).

Matt is currently working with Experea Pharmacy Services, Inc. providing cost-containment programs for financial institutions, professional administration/allocation companies, and individuals who self-administer their own Medicare Set-Aside funds.

He is also the sole proprietor of MedLife Savings Group which is a network of discounted services ranging from Dental, Vision and Physician Visits as well as a customized pricing tool designed for determining future costs of medical treatment, procedures and medications.

He consults regularly with executives from a variety of fields creating new opportunities and implementing best of breed solutions to address various industry issues relating to ever increasing health care costs.

Matt continually studies trends in the industry and over the last few years has served as Chairperson of the Educational Committee for the National Alliance of Medicare Set-Aside Professionals (NAMSAP). Within this role he has served as feature presenter and helps coordinate the NAMSAP continuing education webinar program which is certified by the International Commission on Health Care Certification (ICHCC) to qualify for continuing education units.



CASELAW CORNER

By Rochelle L. Lefler, JD, RN

The following article is a summary of some of the more recent cases discussed at our 2012 NAMSAP Annual Meeting and Educational Conference for those of you who could not attend.

Schexnayder v. Scottsdale Insurance Company- This is a U.S. District Court opinion out of the Western District of Louisiana. There are several interesting aspects about this case. It contains both workers' compensation and liability aspects, involves establishment of a liability Medicare set aside ("LMSA") despite the fact Mr. Schexnayder is a non medicare beneficiary(with no reasonable expectation of eligibility within 30 months of settlement) and seeks approval of the LMSA from the court. The case stems from a trucking accident which occurred on the job. The parties proceeded to have a global settlement (2.1 million dollars) and it was determined by the parties that the workers compensation carrier would not establish a WCMSA as the Claimant did not meet the current thresholds established by CMS for review. In apparently an abundance of caution, the parties proceeded to fund the LMSA (based on La workers compensation fee schedule) and filed for declaratory relief seeking approval of the amount from the court. CMS was invited to attend but declined in keeping with their prior stance on this issue. Instead they submitted the Stalcup memo regarding protection of Medicare's interest. Based upon expert testimony at an evidentiary hearing which included both physician and an MSA expert testimony, the court approved the amount. The funds were to be deposited into a self administration account. Questions raised by this case included the following:

- **Whether or not parties were burdening the judicial system?** First one has to consider whether the hearing should have taken occurred in the first place? This case involved a non medicare beneficiary with no reasonable expectation of eligibility within 30 months of settlement. Unfortunately, the criteria previously mentioned applies to workers compensation cases and CMS has yet to establish any such criteria for liability or whether that criteria can be utilized. It does beg the question however whether the LMSA needed to be established in the first place as Plaintiff was a non Medicare beneficiary. Further, what would be the effect on court dockets if every liability case sought court approval of the MSA?

- **Is court approval necessary or dispositive when CMS declines review?** Once again we are in the dark as to what effect a court order truly has against CMS should they ever challenge the amount of an MSA. The trend, however, appears to be seeking court approval, especially in significant dollar cases.

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Guidry v. Chevron USA, Inc.- (2011 U.S. Dist. LEXIS 148942) Yet another case out of the Western District of Louisiana although this case involved claims made under several laws including the LHWCA. The Plaintiff in this case had a pending SSD application so as part of the settlement the parties agreed he would be responsible for satisfying Medicare's interest under the Medicare Secondary Payer Statute ("MSP"). A declaratory action was filed seeking approval of the settlement and determination that Medicare's interest was adequately protected. As in the case above, the court relied upon both medical testimony and MSA expert testimony. The court determined (utilizing a "reasonably foreseeable standard") that the amount set aside by the parties was sufficient and ordered the MSA allocation to be placed in a self administered account.

Once again we are faced with the same questions, namely did the parties need to seek judicial approval? Once sought, what protection or advantage if any does such a determination provide against challenge by CMS? How cost effective is this avenue? These are all questions which would need to be addressed when considering this approach.

Smith v. Marine Terminals of Arkansas (2011 WL 3489806, E. Dist. Ark. August 9, 2011). This case involved the filing of a joint Motion to Determine

Set Aside Amount. Plaintiff was a truck driver on floating barge when the accident occurred in 2006. A global settlement was reached as to the liability and workers compensation claims in the amount of 1 million dollars. CMS declined review of the MSA citing thresholds reasons. The Court in reviewing the MSA determined that since the Plaintiff was on SSD and therefore Medicare eligible, he would be considered a "Medicare beneficiary". The Court further noted that the parties were not attempting to shift the burden to Medicare and in fact did everything that was reasonable and prudent in this regard. What protection that affords against a challenge by CMS remains to be seen.

Aside from the issues or questions stated previously above, do these cases show a predisposition by the courts to take a more active role in light of potential CMS delays? Hopefully as more case law develops we will get answers to some of these questions.

A petition for certiorari was filed in the Hadden v. US case and was currently pending before the Supreme Court. The writ was filed as a result of the 6th Circuit Court of Appeals upholding full recovery (not subject to any apportionment) by CMS. The Supreme Court declined to hear the case.





MARYLAND HOUSE BILL 114

A Great Reason to Annuitize or Professionally Administer MSAs in Maryland

On April 14, 2012, Maryland Governor Martin O'Malley signed into law a bill that amends Sections 9-806 and 9-1007 of the Maryland Labor & Employment code governing mandatory assessments on certain workers' compensation awards and settlements on behalf of the state's Subsequent Injury (SIF) and Uninsured Employers' Funds (UIF). SIF receives 6.5% and UIF another 1% of any award for PT or death, including awards for disfigurement and mutilation, or settlements approved by the Commission. In 2011, three cases were appealed on the issue of these assessments on Medicare Set-asides (MSAs) with two different results. The one case where the insurer was not required to pay the assessments turned on the fact that the claimant never received the funds. The MSA in that case was established as professionally administered with a reversion upon death back to the carrier. The new legislative exemption draws from that case.

H.B. 114 creates an exemption for a "formal set-aside allocation" [for definition, see COMAR 12.09.01.01(B)(3)] if the medical benefit is in excess of \$50,000 and paid out with an annuity or in any amount that is professionally administered by a 3rd party vendor with no reversion to the claimant's estate.

While obviously a savings to insurers, this is a greater victory for injured workers. Self-administration as established by CMS is an incredible burden on the injured worker with serious risk of further loss of medical benefits if done improperly. Claimants are expected to maintain MSAs in interest bearing accounts separate from their personal finances and used only for medical treatment related to the settlement and otherwise a service that Medicare would have otherwise covered, paid at the rate used to calculate the MSA even if the state WC fee schedule that a private pay patient will have no statutory support for obtaining from a physician any longer, a full accounting maintained so that it can be demonstrated to CMS that the allocation was fully exhausted to possibly resume benefits someday if needed and to annually attest to CMS each year that this was all done. Furthermore, lump sum funding of MSAs that are self-administers provides an incredible temptation to an individual whose inability to work will clearly have already caused a financial strain in his life yet is reported by CMS to occur in over 90% of the MSAs it has approved over the last decade. This legislation will encourage more insurers to do the right thing and if not pay for the professional administration at the time of settlement to ensure that all parties to settlements, including Medicare, are better protected, to at least utilize annuity funding to prevent one improper act from rendering an injured worker without access to necessary lifetime medical care.

MARK YOUR CALENDAR!



SAVE THE DATE

2013 NAMSAP ANNUAL MEETING
AND EDUCATIONAL CONFERENCE

April 25 - 26, 2013

Baltimore, Maryland • Hyatt Regency Baltimore

Check out the NAMSAP website for more information on this and other upcoming events.

COMMITTEE UPDATES

MARC Update: The SMART Act (Strengthening Medicare And Repaying Taxpayers Act of 2011) was introduced on March 14, 2011. To date (4/23/2012) there are 100 co-sponsors on the House bill (HR 1063). The Senate bill was introduced on October 17, 2011 (S.1718); currently there are 15 co-sponsors. Over the last several months, a strong grassroots effort significantly increased the number of house supporters. The most significant step is the preliminary discussion with the Congressional Budget Office, which provided direction to congress on the anticipated cost of the bill. Based on the feedback from CBO, mild adjustments are being considered to align the bill as a budget neutral piece of legislation. The actions of CBO are significant, depicting the serious consideration being taking by congress on movement of the bill. The MARC Coalition is seeking letters on support, both from individuals and from organizations. Please visit the MARC website (www.marccoalition.com) to take action.

Katie A. Fox, MSCC, VP Medicare Compliance

The Legislative and Law Committee: The Legislative and Law Committee has been working hard the last several months on a number of issues. Some of these projects include the following:

1. **WCMSA/WCMSA Portal.** Gail Diamond Baker continues to analyze trends on MSA submissions and study the WCMSA submission portal. Gail is looking for input from NAMSAP Members on trends that they are seeing related to common errors in the submission process, pricing of MSAs from CMS and the effectiveness of the new web-based Portal. NAMSAP members who have comments can contact Gail via e-mail at gbaker@bktriallaw.com.
2. **Case Law Update.** The Legislative and Case Law Committee is continuing its efforts to create a database of MSP and MMSEA/Section 111 Reporting cases. In order to do this, we need your help. If you come across a case you would like to share, please pass it onto committee member Ben Basista at bmbasista@bwhllc.com.

Aaron P. Frederickson, Esq., MSCC

Communications Committee: The Communications Committee is currently working on updates to the website as well as developing upcoming newsletters. We are seeking new committee members. Please reach out to us if you are interested in assisting us in keeping the website updated, monitoring Listserv postings, and securing newsletter articles, etc. Our aim is to improve communication with our membership to allow for more effective membership updates.

April Pettengill, Communications Committee Chair

Data and Development Committee: The creation of this committee represents the ushering in of a new era within NAMSAP. We are one, and are now working together to accomplish things we never dreamed were possible. By sharing data on tendencies we are each seeing within CMS, we will prepare ourselves with the information we need to start to make a difference. We encourage each of you to contribute and participate on this committee. A Data and Development Committee sign-up sheet was available for those that were interested in Orlando, but for those of you that could not attend, we hope you will reach out and make yourselves available to the data collection procedures. Fran Provenzano is chair of this committee and can be emailed at Fran@msaspecialists.com

EBM Committee:

1. The EBM Committee hosted a webinar, which has been recorded and is available for review. The purpose of the webinar was to further expand the understanding of how EBM works. We had a guest speaker, Phil LeFevre of Work Loss Data, the producers of the ODG guide. We controlled the dialogue, as this was a initial taste of the ODG world. It was clear not everyone agrees with its' applicability to the MSP world. Also, the speaker started down the path of selling and we deferred to other speakers at that point. Overall we felt it was a success at introducing the "how" of EBM. Please listen to the recording if you were unable to attend the live presentation.
2. EBM Committee, like all the committees has struggled to get traction this summer. Gary and Mike have been basically moving things along as time allows.
3. We have not developed a budget for the balance of 2012. Our goal is to use the year to form the committee and develop a plan for 2013. That will allow us to develop a budget for next year.
4. We have been working with Education, Meetings, Legislative and other committees to keep EBM pertinent to those other entities.
5. We hope to do a call for members to join EBM in Fall 2012.

Conference Committee: The planning for the Annual Conference is well underway. We have already planned our proposed agenda for the Annual Meeting. Once we feel comfortable that we have done everything we can for the Mid-Year, we will refocus our efforts on the Annual. We have discussed our goals for the annual. Considering the amount of time between annual meetings and the proposed agenda we have planned, we feel strongly that we should be able to reach at least 250+, attendees which would make the 2013 Annual Meeting the biggest we have ever seen.

Tom Watson, Conference Committee Chair



Membership Committee: The goal of the membership committee will be to increase NAMSAP membership by 20% within the next 12 months. We believe the committee can achieve this goal by securing the current membership, marketing new targeted members as well as approaching those that let their membership's lapse.

Brian Fillion, Membership Committee Chairperson

CALL FOR NEWSLETTER ARTICLES

The NAMSAP Communications Committee would like to encourage you to submit an industry-related article for our upcoming newsletter. We are accepting submissions in the following categories: Legal, Legislative, and Medical. If you are interested in contributing to one of these categories, or have an idea for a new category, please contact April Pettengill, Communications Committee Chair. She can be reached by email at april@alpmedicalconsultants.com, or call her at (802) 849-2956.

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