



# Liability MSP Advisory Committee Bulletin

Disclaimer: This bulletin is intended to provide a starting point for considering Medicare's future interests when resolving liability or no-fault cases. The emphasis is on Medicare's future interests, not past interests or reporting requirements for the settlement. A collaborative effort between the plaintiff's bar, insurance industry and all other MSA stakeholders involved in the process is recommended in order to secure the best results. The views expressed here do not necessarily reflect the opinions of NAMSAP. All readers are encouraged to develop their own internal best practices to ensure Medicare Secondary Payer (MSP) compliance when resolving personal injury cases. This bulletin will be updated to reflect further developments as they arise.

## Introduction

In the absence of formal guidance from Centers for Medicare and Medicaid Services (CMS), the plaintiffs' bar, the insurance industry and MSA stakeholders have differing views on the appropriate course of action for protecting Medicare's interests in a liability settlement that funds future medical needs. The MSP Act clearly states that Medicare may not make a payment with respect to any item or service to the extent that "payment has been made or can reasonably be expected to be made under workers' compensation, liability or no-fault insurance." 42 U.S.C. §1395y (b)(2). A primary plan's responsibility for such payment may be "demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan, or the primary plan's insured or by other means." 42 U.S.C. §1395y (b)(2)(B)(ii). In order to prevent a future conditional payment by Medicare in a settlement, parties may include a future medical allocation or Medicare Set Aside (MSA) in their settlement terms. Although many practitioners choose to apportion liability settlement funds towards future injury related Medicare covered treatment, others do not arguing that the MSA should be limited to workers' compensation cases given CMS's specific guidance and established voluntary review process for workers' compensation settlements that meet their workload review thresholds[1].

[1] The current CMS review thresholds (Not safe harbors) for workers' compensation MSAs are: Class I: The plaintiff is a current Medicare beneficiary and the settlement is for more than \$25,000. Class II: The plaintiff has a "Reasonable Expectation" of becoming eligible for Medicare benefits within 30 months and the total settlement is greater than \$250,000.

**[Click here](#) to read the entire Bulletin.**

For more information, contact Committee Chairs  
Tom Stanley at [TomStanley@cox.net](mailto:TomStanley@cox.net) or  
Bill Delaney at [wad@nbkllaw.com](mailto:wad@nbkllaw.com)