

## **Is Your Medicare Set-Aside Provider Planting *False Claims Act* Liability Seeds in Each of Your Settlements?**

### **The Rush to MSA Providers**

Insurance companies, third-party administrators and self-insured employers are seeking expert advice to assist them in settling workers' compensation cases that involve Medicare issues. Due to the demand for competent, fast and efficient service, numerous Medicare set-aside (MSA) providers have rushed to provide these services.

Many MSA providers promote their services by touting their aggressive and creative techniques for getting Medicare to approve a MSA for the least amount possible. Keep in mind, however, the old adage, "if it sounds too good to be true, it probably is."

When analyzing the advice of any MSA provider, keep in mind the purpose of the Medicare Secondary Payer (MSP) Statute. The purpose of that statute is to prevent the parties to a workers' compensation claim from shifting liability for future medical treatment to Medicare. If Medicare pays for medical treatment for a work related injury, Medicare can assert a claim for reimbursement and damages against any party of the underlying workers' compensation claim. Furthermore, since federal law supersedes state law, Medicare's claim is not limited by any settlement agreement entered into between the parties.

### **Can You Be Too Aggressive?**

What might happen to a company who follows the aggressive and unreasonable actions of their Medicare set-aside provider when establishing and funding a MSA? Although there has yet to be any definitive case law developed in this area, we can look at the Medicare reimbursement field for answers.

The Medicare reimbursement field is a complicated area in which consultants advise medical providers how to bill Medicare for their services.

In 2001, the Department of Health and Human Services, Office of Inspector General (OIG) released a ***Special Advisory Bulletin*** entitled "***Practices of Business Consultants.***" OIG warned about the use of consultants who encourage aggressive and unreasonable practices.

The Advisory Bulletin indicates that following the aggressive and unreasonable practices of a consultant "***potentially subjects both the consultant and the client to liability under the False Claims Act.***"

For example, one Medicare set-aside provider advises its clients on how to limit the rated age information provided to Medicare. The rated age is used to determine the amount required to be set aside and then used to pay for the claimant's future medical treatment that is related to the industrial injury.

Depending on the funding mechanism, the manipulation or restriction of such information can decrease the amount of money the parties set aside to pay for future medical treatment which is related to the industrial injury and would otherwise be covered by Medicare. Consequently, the chance of shifting liability to Medicare is increased, as are the damages that can flow from such conduct.

The courts have yet to determine whether using such strategies forms the basis of a legal loophole or liability under the False Claims Act (FCA). It is, however, the position of MSP Solutions that any employer, third-party administrator or carrier who is developing a pattern of practice in using such "tactics" is possibly exposing themselves to damages under the FCA. Therefore, each client should be advised of the various risks associated with such conduct. A client is free to use legitimate aggressive or creative techniques when calculating and funding MSA accounts, of course, but he/she should be fully apprised of the risks associated with such conduct.

### **Don't Open the Door to Future Liability**

**The FCA allows the government to seek insurmountable damages against anyone who causes a false claim to be submitted to Medicare. *Damages under the FCA are up to \$11,000.00 per false claim submitted, plus triple the amount of the claim at issue.***

**Denying a claim for which a provider has liability can be argued as causing a false claim to be submitted to Medicare. (See *United States of America, ex rel. Elizabeth Drescher v. Highmark, Inc.*, 305 F. Supp. 2d 451 (E.D. Pa. 2004); *United States ex rel. Morton v. A Plus Benefits*, 10<sup>th</sup> Cir., No. 04-4148, unpublished 7/19/05.)**

For a copy of the **OIG Special Advisory Bulletin, "Practices of Business Consultants,"** and the cases listed above, go to our web site at [www.msp-solutions.com](http://www.msp-solutions.com).

You may also go to our web site, <http://www.msp-solutions.com/Developments.php>, to download a copy of the latest Medicare memo regarding prescriptions and workers' compensation settlements.

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**MSP Solutions** was created to provide our clients a highly skilled team to help them manage the entire settlement process those cases which involve Medicare set-aside issues. When one of our clients has a question or problem with any piece of settlement that involves a Medicare issue, we take the lead and resolve the problem.

If you want to experience a partnership with a Medicare set-aside and allocation service provider who takes great care of clients, give us a call at **866-677-6717** or visit our web site at **www.msp-solutions.com**.