

## **Medicare Update – October 2005**

### **The Centers for Medicare and Medicaid Services (CMS) current method for evaluating and approving Medicare Set-Aside Proposals comes under increasing attack.**

Since CMS issued the first Medicare Set-Aside Memorandum on July 23, 2001, there has been considerable debate as to the extent each party has to go to protect Medicare's future interests when settling a workers' compensation or personal injury claim.

A number of lawsuits have challenged Medicare's authority to review and approve the settlement of a workers' compensation or personal injury claim which closes out the right of the injured party to obtain future medical benefits. The cases have been dismissed. The primary reason for dismissal is that the party bringing suit has either failed to either exhaust administrative remedies or demonstrate any current harm. The courts have held that the right to bring a claim does not arise until Medicare demands payment from a party, or fails to provide a benefit to a beneficiary, and the party has attempted to resolve the issue through the administrative process set forth in the Medicare statute and regulations.

The latest suit, Protocols, LLC v. Michael Leavitt, 05-CV-1492 (U.S. Dist. Court, Colorado), is based on the July 5, 2005, memorandum issued by Medicare which specifically states there is no formal appeals process to resolve Medicare set-aside issues.

The Plaintiff, Medical Settlement Protocols, L.L.C. (Protocols) brought suit in August of 2005, challenging the lack of a mechanism to litigate or otherwise challenge possible CMS errors in interpretation and application of the MSP regulations when evaluating a Workers' Compensation Medicare Set-Aside Proposal.

Protocols' allegations stem from the July 5, 2005 CMS Memorandum Q.12 and A.12 which states:

Q12. If I disagree with the amount that CMS has determined for my WCMSA, do I have any recourse?

A12. There are no appeal rights stemming from a CMS determination of the appropriate amount of a WCMSA.

The critical issue will be whether the plaintiffs have standing to bring the claim. Protocols alleges standing as it provides consulting services regarding MSP compliance in workers' compensation cases. Protocols contends that CMS's interpretation of the statute has and will cause them irreparable harm.

We will keep you updated as the case progresses. If you have any questions, please call Mary Foley (303.297.7294) or Glen Goldman (303.297.7281) in our Denver office.