



CMS SHOULD WITHDRAW ITS LMSA PROPOSAL FROM OMB AND REPLACE IT WITH A VOLUNTARY REPORTING ACTION PLAN

ISSUE: CMS has advised the MSP stakeholder community that it has been developing a Liability/No Fault Medicare Set Aside (LMSA) program to “respond to affected parties’ requests for guidance on ‘future medicals’ MSP obligations, specifically, how individuals/beneficiaries can satisfy those obligations effectively and efficiently.” *77 Fed. Reg. 35917 (June 15, 2012)*. CMS has suggested it needed to announce a voluntary LMSA program to respond to the recommendations of the 2012 Government Accountability Office (GAO) Report calling upon the Agency to “develop guidance regarding liability and no-fault set-aside arrangements.” *GAO Report 12-333 (March 2012) at 40*.

ANALYSIS: Neither justification warrants proceeding with a LMSA program: first, the entirety of the MSP stakeholder community – beneficiaries, plaintiffs lawyers, defense lawyers, insurers, self-insured, third-party administrators, and claims adjusters -- have urged CMS *not* to launch a LMSA program. There is not a single stakeholder who has come forward otherwise, and if even such a person existed in the past they would be in the vast minority.¹ Further, the GAO Report did not recommend CMS develop an LMSA program. GAO only stated that CMS needed to “develop guidance.” In response to the same report, CMS advised GOA that it was not accepting in full other GAO recommendations, and GAO accepted that response and “closed” the recommendation.² Thus, CMS can issue explicit guidance that it will not be implementing a LMSA program akin to the WCMSA program, advise GAO of its actions, and similarly close out the open GAO recommendation. No LMSA program is needed.

CMS ACTIONS TO ADDRESS FUTURE MEDICALS: To the extent that CMS is compelled to take some action addressing future medicals, we recommend the Agency pursue the following two steps:

- A. Create a new voluntary entry on the “Final Settlement Detail Document” form for any settlement that expressly provides for future medicals so that the Agency could intervene in claims (in cases over a \$1 million threshold) to protect its interests.
- B. To flag appropriate cases for CMS and to allow the Agency to exercise the rights that Congress gave to it, CMS could set up a voluntary form that would allow beneficiaries (and their counsel) in cases over \$1 million to notify the Agency of the claim and to allow CMS to intervene to protect its interests.

CONCLUSION: Every affected stakeholder opposes the LMSA concept. The Agency can close the GAO Report by issuing guidance that it will not be implementing an LMSA program. If compelled to do so, CMS can implement common sense solutions to protect the Trust Fund.

¹ When in June 2018 stakeholders directly requested that CMS identify any affected party who had requested an LMSA program, CMS advised that a “trial lawyer in Buffalo, NY” was seeking the policy, but after extensive effort no such person could be identified.

² https://www.gao.gov/products/GAO-12-333#summary_recommend (noting CMS rejection of recommendation to eliminate ICD code reporting)