

## In This Issue

### From the Desk of...

Issues to consider when drafting a C & R that includes an MSA

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## From the Desk of...

It's becoming more and more common place to include an MSA (Medicare Set Aside) in a C & R. If the applicant is Medicare eligible the only way that you can safely settle the applicant's future medical rights is to include a MSA that is approved by Medicare. This is particularly true in view of the reporting requirements that Medicare has. A defendant settling a case by way of C & R essentially does so at their own peril if the applicant is Medicare eligible.

The language in the C & R that includes the MSA should consider a number of different items. Certainly the C & R should identify the fact that an MSA is part of the C & R. Most of the companies that put together proposed MSA's can provide so called boiler plate language that can be included in the C & R. This language is usually geared to satisfy the requirements of Medicare. The language usually doesn't address some of the questions that arise when an MSA is being used.

Unless you already have an approved MSA, which usually is not the case, you are dealing with a proposed MSA. This proposal may or may not be approved by



Kenneth L. Peterson, Esq.  
Contributing Editor

Centers for Medicare and Medicaid Services (CMS). On occasion CMS will require that additional monies be paid. The question then arises as to who will pay the additional monies. The C & R should specify how this contingency will be handled. Most applicant attorney's wish to have the defendant pay any additional monies that will be needed to obtain an approval by CMS of the MSA.

A number of other things are to be considered as well. When you have a disputed body part that should be reflected in the proposed MSA. CMS may or may not insist on the inclusion of additional monies for the disputed body part. If there is a very good basis for claiming that the disputed body part is AOE/COE, that information should be included in the proposed MSA.

The proposed MSA will include the total monies expected to be paid over the applicant's life expectancy. Consideration should be given to obtaining an annuity to make these payments. Many times fifty percent or more of the proposed MSA value can be saved by the use of an annuity. Consideration should also be given to obtaining a "rated age" amount for the annuity. If the applicant has a medical condition which will impact their life expectancy, there is a good chance that a rated age can be obtained for purposes of the annuity. In some cases this could dramatically reduce the cost of an annuity. A rated age can be obtained based upon not just the injuries which the applicant received on an industrial basis, but also the general health. Issues such as diabetes, high blood pressure, etc. can bring about a very favorable rated age finding by some insurance companies.

Another issue that needs to be considered is what happens if the applicant dies after the C & R has been approved, but before the proposed MSA has been approved by CMS.

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The C & R should specify where the monies should go in that eventuality. If the monies are to go to the applicant's estate, there should be at least a one hundred and eighty day hold on the monies so that CMS can make a claim for any monies which they may have paid to any medical providers that actually are part of the industrial claim. This will allow the defendant to insure that they will not have any additional obligations to CMS that is not covered by the C & R.

One other very important factor that should be included in the C & R is what happens to the monies that are spelled out for the proposed MSA. The C & R should state that the defendant is to withhold the monies to be paid out for the proposed MSA. A particular dollar amount should be included. It is usually best to include an additional five hundred to a thousand dollars over the estimated cost of the MSA for the amount to be withheld.

Good C & R's which include language addressing all of the above noted issues will avoid potential problems down the line. Careful drafting of a C & R which includes a proposed MSA is well worth the extra effort.