

MSA Insider



Getting You to Settlement

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Federal Appellate Court Finds in Favor of Medicare in Hadden Decision

At the end of 2010 we advised the decision in Hadden vs. U.S. was one to watch for in 2011. On November 21, 2011 the U.S. Court of Appeals for the 6th Circuit held Medicare is not bound by principles of comparative fault when asserting its reimbursement rights under the Medicare Secondary Payer Act.

Facts: The Plaintiff, Vernon Hadden, was injured in an automobile accident when he was struck by a vehicle. He asserted to Medicare that he had recovered only 10% of the total damages in the case as another unidentified motorist was 90% at fault. The party which was 10% at fault agreed to a settlement of \$125,000 out of which Medicare made a reimbursement claim of \$62,338.07. Hadden stated Medicare's claim should be reduced to 10% of the settlement amount given that was the proportionate amount of legal responsibility of the settling defendant.

Decision: In a 2-1 decision the Appellate Court held in favor of Medicare in that it may be reimbursed for the entire conditional payment amount without regard to any comparative fault principles. The Court stated that when a plaintiff makes a claim for the full extent of his medical expenses as he did in this case and then receives a settlement from a primary plan, i.e. insurance carrier, the parties have demonstrated a "responsibility" under the Medicare Secondary Payer to fully reimburse Medicare. In this case, the plaintiff demanded recovery for not 10% of medical expenses, but for all medical expenses from the primary plan. In response, the court stated, "And thus a beneficiary cannot tell a third party that it is responsible for all of his medical expenses, on the one hand, and later tell Medicare that the same party was responsible for only 10% of them, on the other."

In a dissenting opinion, Judge White stated that while it is correct to say that by a primary plan making payment as part of a settlement acknowledges the parties' responsibility to reimburse Medicare; it does not define the extent of that reimbursement.

Bottom Line: The decision affirms the current state of affairs when it comes to Medicare conditional payment recovery and Medicare's right to recover its full amount without regard to compromise, comparative fault or other equitable principles. Whether this decision gets appealed to the U.S. Supreme Court remains to be seen. Nonetheless, CMS remains open to pre-settlement compromise requests in certain cases. MedAllocators continues to offer pre-settlement compromise services for these cases.

CMS Opens Up Web Portal for Workers' Compensation MSA Submissions

After a long time in development CMS has finally gone "live" with a web portal for WC MSA submissions. Following an initial testing period CMS has now opened up what is called the Workers Compensation Medicare Set-Aside Portal (WCMSAP) for full use. This portal allows MedAllocators to submit WC MSAs for review to CMS and its Workers Compensation Review Contractor as well as all other exchange of information, including development letter and approval letters. Consequently, this should have the effect of reducing the turnaround time in obtaining CMS approval of WCMSAs.

CMS Reiterates Position that Under Threshold WCMSAs Should Not Be Submitted for Review

As part of its announcement of the web portal going live, CMS again stated that Workers' Compensation MSAs that are under its workload review thresholds should not be submitted for review. To emphasize this point, CMS has advised that those individuals and companies attempting to submit under threshold MSAs through the web portal will have their access to the portal revoked. CMS has taken this position as they indicate even under threshold MSAs must be opened in their system and reviewed to a point where it is identified as an under threshold WCMSA. Consequently, this clogs up the system and slows down approval for WCMSAs that do meet the review threshold.

MedAllocators wants to ensure our continued access to the web portal as well as ensure our clients with above threshold WCMSAs can obtain CMS approval as expeditiously as possible. Accordingly, MedAllocators will no longer submit under threshold WCMSAs to CMS. If requested, MedAllocators' Compliance Director will provide a formal opinion stating the WCMSA does not meet CMS review thresholds. These review thresholds which CMS reiterated in its memo of May 11, 2011 are as follows:

1. If the claimant is currently a Medicare beneficiary and the estimated settlement amount is greater than \$25,000; or
2. The claimant is on Social Security Disability (SSDI) (or in the process of applying/appealing) and the estimated settlement amount exceeds \$250,000; or
3. The claimant is at least 62 1/2 years old and the estimated settlement amount exceeds \$250,000.

What to Watch for in 2012

- ✓ **WCMSAs:** While the web portal will have some effect on reducing turnaround times the larger issue has been the delay in the actual review by CMS and its contractor. CMS has named a new contractor for WCMSA reviews so we will wait and see if this reduces the time for review and approval in the new year.
- ✓ **LMSAs:** CMS released its first official memo on Liability Medicare Set-Asides on September 30, 2011. In this memo CMS states when not to submit an LMSA for CMS review. The bigger question which remains unanswered is under what criteria an LMSA should be submitted for review.
- ✓ **MSPRC:** CMS is ending its contract with Chickasaw Nation Industries as its Medicare Secondary Payer Recovery Contractor and combining the MSPRC and the Coordination of Benefits Contractor (COBC) into one. In 2012 we will see if this merger has any affect on the conditional payment process and specifically processing times.
- ✓ **MMSEA Section 111 Reporting:** The first of the year kicks off mandatory reporting for Liability TPOCs, Total Payment Obligations to the Claimant; however, this has been modified by the phase-in thresholds announced by CMS last September.
- ✓ **Conditional Payment Web Portal:** CMS has indicated they are considering a web portal allowing for the input of information as well the obtaining of conditional payment letters, demand letters, etc.
- ✓ **Option Allowing CMS to Hold MSA Funds:** Under consideration by CMS
- ✓ **Payment to Medicare for conditional payments prior to settlement:** Under consideration by CMS