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## **MEDICARE SET-ASIDES: IS COMPLIANCE WORTHWHILE FOR THE INJURED PARTY?**

If you have a personal injury case, or a workers’ compensation case that is being resolved with a final settlement (known as a Section 32 settlement), and you are (1) receiving Social Security Disability; (2) have an application pending; or (3) are expected to be Medicare-eligible within the next 30 months, you can expect to be told that a “Medicare Set-Aside,” or “MSA” is required. The MSA is the amount of money that Medicare requires you to set aside out of your settlement to pay your future medical expenses. Depending on your situation, you might be better off honoring the MSA – or ignoring it.

Why are MSAs required? By law, Medicare is a “secondary payor.” What this means is that Medicare is not supposed to pay any medical bill that should have been the responsibility of other insurance. If you were injured on the job, then the primary source of medical coverage for your work-related injuries is your employer’s workers’ compensation insurance. Because personal injury recoveries include payment for medical expenses, Congress has also required Medicare to count those recoveries as “other insurance” for Medicare purposes.

It’s important to understand that Medicare’s goal in setting the MSA amount is to be certain that it does not pay medical bills related to your accident. Medicare’s job is to preserve the Medicare trust

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fund by avoiding payment of medical bills that could or should have been paid by other insurance. As a result, when it establishes an MSA amount in your case, Medicare is choosing a number that it thinks you will not use all of to pay your medical bills after the settlement.

If an MSA is required in your case, then there are generally two ways you can satisfy the requirement. You can either have the MSA account professionally administered (often through an annuity); or you can “self-administer” the account. This means that you must put the money in a separate interest-bearing checking account, use the funds only for accident-related medical expenses at the appropriate fee-schedule rate, and provide an accounting to Medicare annually.

Ultimately, if an MSA is required in your case, you have two fundamental choices:

(1) Ignore the set-aside amount, put the money in your pocket, and understand you will be a self-payor for your accident-related medical bills. You cannot and should not assume that a private insurer will pay bills that are related to your case, especially if it is was a workers’ compensation case. The benefit of this option is that you have full use of your entire settlement proceeds, immediately. The price of this option is you lose the potential for Medicare to step up as a secondary payor if it turns out that your medical expenses are more than the set-aside amount.

(2) Honor the set-aside and comply with Medicare’s requirements. The benefit of this option is that you retain the availability of Medicare as a secondary payor. The price of this option is that you don’t have the use of all of your settlement money, and it may turn out that the amount of the MSA is more than the amount of your medical bills – in which event you will have set aside the money for no reason.

Which choice is better? It depends on a number of factors, including the nature of your case, the amount of the settlement, the amount of the MSA, and the realistic expectation of your future medical

bills. There is no one-size-fits-all answer – you should discuss your case with your doctor and the experienced attorneys at Grey & Grey. However, at least one company has reached the conclusion that most MSA amounts are far too high. You can read that study here:

<https://carebridgeinc.com/big-data-analysis-of-the-actual-costs-of-future-medical-claims-involving-medicare-secondary-payer-workers-compensation-medicare-set-asides/>

This white paper was written from the perspective of insurers, and concludes that it costs insurers too much money to add money to settlements to account for MSAs as opposed to continuing to pay medical bills directly. However, the same logic would apply for the injured party: if the MSA amount is far more than the medical expenses, then there is no reason to honor the MSA as opposed to making use the settlement proceeds.

Again, however, it is important to remember that this means you will be paying your own medical bills related to the accident out-of-pocket forever (as opposed to for the duration of the MSA funds), and that the best choice may vary from person to person.