

Medicare Compliance Inserts to Settlement Agreement/General Release

Acknowledgment: (to be placed in the recitals section of agreements)

[Plaintiff and Defendant, (collectively, the “Settling Parties”)] hereby acknowledges the following: (1) Under the Medicare Secondary Payer (“MSP”) statute, 42 U.S.C. §1395y(b), and its accompanying regulations (“the MSP Provisions”), the Centers for Medicare and Medicaid Services (the “CMS”) in certain circumstances may have an obligation to seek reimbursement of conditional payments made by the Medicare program (Title XVIII of the Social Security Act) (the “Medicare Program”) on claims for items and services relating to injuries allegedly sustained by [Plaintiff]; (2) [Plaintiff] and [Plaintiff’s counsel] are in the best position to determine if any reimbursement obligation exists, based on [Plaintiff]’s entitlement (or lack thereof) to Medicare Program benefits, [Plaintiff]’s actual receipt of such benefits, and, if there is a reimbursement obligation, to ensure that the Medicare Program’s interests are properly considered and discharged; (3) If there is a reimbursement obligation to the Medicare Program, [Plaintiff] and [Plaintiff’s counsel] are responsible under the MSP Provisions to verify, resolve and satisfy such obligation; and (4) If [Plaintiff] is now or in the past has been enrolled in the Medicare Program, [Defendant] will report the [Settlement] to the CMS pursuant to the MSP Provisions (even if [Defendant] does not agree that the evidence actually establishes liability for injuries allegedly sustained by [Plaintiff]).

Plaintiff Statements:

[Plaintiff] represents and warrants that [Plaintiff] and [Plaintiff’s counsel] have reviewed the underlying facts and evidence of this case. [Plaintiff] understands and acknowledges that if Plaintiff is Medicare-enrolled at the time of settlement, [Defendant] is required to report this [Settlement] to the CMS but further acknowledges that by doing so, [Defendant] does not concede or admit that it necessarily agrees that [Defendant] is liable for [Plaintiff’s] alleged injuries.

[Plaintiff] also represents and warrants that, if [Plaintiff] has not already reimbursed or otherwise satisfied the Medicare Program for conditional payments made on claims for items and services relating to the injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff] will do so in a timely manner as set forth in the MSP Provisions.

[Plaintiff] further represents and warrants that, to the extent any other government payer (including but not limited to Medicaid, Veteran’s Administration, Tricare/CHAMPUS) has a right to be reimbursed for any payments made on claims for items and services relating to the alleged injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff] has, or will, fully reimburse, resolve, otherwise satisfy, or properly consider, the rights of such payers.

[Plaintiff] acknowledges that in making payment to [Plaintiff] pursuant to this [Settlement], [Defendant] is reasonably relying on the representation and warranties made by [Plaintiff] herein and these representations and warranties are a material inducement to [Defendant] to make payment as part of this Agreement.

Plaintiff’s Counsel Statements:

In addition to [Plaintiff]’s representations and warranties set forth above, [Plaintiff’s counsel] represents and warrants that it has applied a formalized screening process to determine if [Plaintiff] is enrolled to Medicare Program benefits, and, if [Plaintiff] is so enrolled, when [Plaintiff] became so enrolled to Medicare Program benefits. [Plaintiff’s counsel] has reviewed the relevant MSP Provisions regarding reporting of claims by [Defendants] to the CMS and reimbursement to the Medicare Program for conditional payments made, and has reviewed all relevant case-specific evidence, including but not limited to medical records, interrogatories, depositions, expert witness reports, affidavits, brochures and other reports, where available. [Plaintiff’s counsel]

understands and acknowledges that where Plaintiff is identified as Medicare-enrolled at the time of execution of this Agreement, [Defendant] is required to report this [Settlement] to the CMS but further acknowledges that by doing so [Defendant] does not concede or admit that it necessarily agrees that [Defendant] is liable for [Plaintiff's] alleged injuries.

[Plaintiff's counsel] also represents and warrants that it will hold or arrange to hold sufficient net settlement funds (defined as gross settlement funds less procurement costs following 42 C.F.R. §411.37) in trust, escrow, or other similar client trust account (should needs-based government benefits such as Medicaid require preserving), until such time as any obligation to reimburse the Medicare Program for conditional payments on claims for items and services relating to the injuries that are the subject of this action being resolved by this [Settlement] have been fully resolved or satisfied. [Plaintiff's counsel] further represents and warrants that it will take all reasonable and necessary actions to ensure that any such reimbursement obligation is in fact resolved or satisfied. Finally, [Plaintiff's counsel] represents and warrants that, as a material inducement to [Defendant] making payment under this [Settlement] before such reimbursement obligation is resolved or satisfied, and as a condition subsequent to this [Settlement], [Plaintiff's counsel] will provide [Defendant] with proof of the Medicare Program's determination that such reimbursement obligation has been fully resolved or satisfied once such determination is received by [Plaintiff's counsel].

[Plaintiff's counsel] further represents and warrants that, to the extent any other government payer (including but not limited to Medicaid, Veteran's Administration, Tricare/CHAMPUS) has a right to be reimbursed for any payments made on claims for items and services relating to the alleged injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff's counsel] will take all necessary and reasonable actions to ensure that [Plaintiff] has, or will, fully reimburse, resolve, otherwise satisfy, or properly consider, the rights of such payers.

[Plaintiff's counsel] acknowledges that in making payment to [Plaintiff] pursuant to this [Settlement], [Defendant] is reasonably relying on the representation and warranties made by [Plaintiff's counsel] herein and these representations and warranties are a material inducement to [Defendant] to make payment under this Agreement.

Tort Recovery or Similar Record

Based on the warranties and representations made above, a tort recovery or similar record may need to be established by [Plaintiff's counsel] and a reporting event may be triggered, which would be the responsibility of the [Defendant], by and through its insurance carrier. In the case of a reportable event, [Defendant] will comply with the MSP Provisions. [Defendant] will determine whether the [Settlement] is reportable under the Act. If there is an obligation to establish a tort recovery or similar record with the CMS, [Plaintiff's counsel] shall provide [Defendant] appropriate information validating that such a record has been established with the CMS and/or its recovery contractor. The [Settling Parties] expressly agree that payment of settlement proceeds is not conditioned upon Plaintiff providing proof that all Medicare reimbursement claims and obligations have been satisfied. Rather, [Defendant] agrees to forward the gross settlement proceeds within the time frame agreed between the [Settling Parties] at the time of settlement once [Plaintiff] has tendered an executed release, and [Plaintiff's counsel] has provided [Defendant] with appropriate information validating that a tort recovery or similar record has been established with the CMS and/or its recovery contractor.

Medicare's Potential Future Interests

The [Settling Parties] do not intend to shift responsibility of future medical benefits to the Federal Government. [Plaintiff] and [Plaintiff's counsel] have been informed and acknowledge that Medicare cannot accept the terms of the [Settlement] as to an allocation of funds of any type if the [Settlement] does not adequately address Medicare's interests. If Medicare's interests are not reasonably considered and protected, Medicare will refuse to

pay for services related to the alleged injury (and otherwise reimbursable by Medicare) until such expenses have exhausted the amount of the entire settlement. Medicare may also assert a recovery claim, if appropriate, based on conditional payments made by Medicare within the meaning of 42 U.S.C. §1395y(b)(2). The CMS has a direct priority right of recovery against any entity, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer, that has received any portion of a third party payment directly or indirectly. The CMS also has a subrogation right with respect to any such third party payment. *See*, for example, 42 C.F.R. §§411.24(b), (e), and (g) and 42 C.F.R. §411.26. Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a liability carrier from any future medical expenses, based on an allocation of future medical expenses as part of a settlement or judgment, or where such damages otherwise comprise a significant part of total damages and are reasonably considered by the parties as being paid as a part of the gross settlement proceeds; and creates a permanent shift of the burden of paying and managing such future injury-related care over to Medicare within the meaning of 42 U.S.C. §1395y(b)(2) going forward, a Medicare Set-aside Arrangement (“MSA”) may be appropriate. This MSA, if required, would need sufficient funds from the [Settlement] to cover future medical expenses incurred once the total third party liability settlement is exhausted.

Federal regulations provide that the liability for work-related injuries resulting in lifetime medical expenses should not be shifted to Medicare from the responsible party after settlement. Accordingly, a portion of a Medicare beneficiary’s workers’ compensation settlement in certain cases must be set aside to pay for the beneficiary’s future work-related injury or illness resulting in medical expenses per 42 C.F.R. §411.46. However, because this [Settlement] does not involve a workers’ compensation claim, and no Federal laws or regulations exist in mandating an MSA in a liability settlement, the [Settling Parties] agree that the manner in which Medicare’s interests may be properly considered is not limited to establishing an MSA. Accordingly, [Plaintiff] agrees to take such actions as are considered legally necessary to ensure Medicare’s interests are properly considered.

[Plaintiff] and [Plaintiff’s counsel] represent and warrant that they have reviewed any applicable statutes and regulations, including, but not limited to, 42 U.S.C. §1395y(b)(2), 42 C.F.R. §§411.24(e) and (g-i), §411.26, §411.46 and §411.47.

Consequently, to comply with the applicable Federal regulations and to reasonably recognize Medicare’s interests, [Plaintiff] and [Plaintiff’s counsel] represent that they agree to satisfy any and all Medicare subrogation interests, claims and/or liens, as may be finally determined and/or compromised, from the proceeds of the settlement funds as distributed to [Plaintiff’s counsel].

[Plaintiff] understands that it is [his] responsibility to properly consider Medicare’s future interest. If Medicare’s future interest is not properly considered, [Plaintiff] understands that the CMS may be entitled to recover its future interest from [Plaintiff], and that [Defendant] is not liable to the CMS for [Plaintiff’s] failure to properly consider Medicare’s future interest. Recovery of this future interest may include but may not be limited to the following: payment directly to the CMS out of the settlement proceeds and/or revoking/denying the [Plaintiff’s] Medicare benefits for injury-related or non-injury related medical expenses for a certain amount of time to be determined by the CMS in its sole discretion.