

## The Medicare Secondary Payer Act: Medicare Set-aside Legal Reference Sheet

 Protocols™	Commutation ("Full Funding")	Compromise (With Funds for Future Medical)	Compromise (Past Medical Only)	Nuisance	Waiver
<b>Statutory Basis:</b>	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)(B)(5)
<b>Regulation:</b>	42 C.F.R. 411.46(a); <i>See Note 1</i>	42 C.F.R. 411.46(b)-(d); 42 C.F.R. 411.47	42 C.F.R. 411.46(b)- (d); 42 C.F.R. 411.47	42 C.F.R. 411.46(b)-(d); 42 C.F.R. 411.47	None; <i>See Note 2</i>
<b>Basic Legal Requirement:</b>	No unreasonable burden shift to Medicare	A reasonable allocation of the settlement	No allocation if the settlement is for past medical only	Allocation of settlement may or may not be necessary	CMS must agree to a waiver in writing
<b>Available CMS Review?</b>	Yes; <i>See Note 1.</i>	No	No	No	Yes
<b>Medical Cost Projection?</b>	Recommended; <i>See Note 1.</i>	Recommended; <i>See Note 3</i>	Not Necessary	Maybe; if Allocation	Recommended
<b>Administrative Appeal Rights?</b>	Yes; but very limited	None	None (Except for conditional payment demands)	None	None; waivers are voluntary by CMS
<b>Federal Court Appeal Rights?</b>	Yes in 10th Circuit, Likely elsewhere	Yes	Yes; (Administrative requirements may apply)	Yes	Not likely: Waivers permissive, cannot force a waiver

**Note 1:** There is no defined legal standard concerning how the future medical projections need to be completed. CMS utilizes certain (mostly) unpublished rules when it reviews future care projections. The effect of these rules is an inflation of the future medical costs as a result of CMS requiring standard pricing or inclusion of procedures that are not otherwise included in the settlement. Prior to 2001, if the parties to a settlement negotiated a settlement that included x, y and z for future care, that was the care that was accepted by Medicare as the "Medicare set-aside". The exception was Medicare could disregard if the parties acted in concert to purposely settle for less than full value of future medical. Legal issues with CMS requiring additional care are: (1) it may exceed the statutory authority given to CMS under the Medicare Secondary Payer Act ("MSP"); (2) it fails to recognize the reasonableness of the amount proposed (or recognize state law) and; (3) it shifts the burden on the submitter to show the projection as reasonable instead of Medicare showing an illegal cost shift.

**Note 2:** Technically, waivers are authorized for conditional payment reimbursement (liens) and not the MSA requirements. CMS, in practice, is granting waivers for certain settlements concerning the MSA requirements.

**Note 3:** Since issues of dispute are involved, it is often advisable to use a neutral third party to prepare this projection.

*Please note that this table is not designed to give specific advice on any settlement. It is designed to provide attorneys, risk managers and insurance executives with a guide to the legal requirements of the MSP and Medicare Set-asides. Please contact an attorney for specific legal advice concerning a settlement. Copyright Protocols LLC 01/01/2009 All rights reserved.*