



# Optimal Outcomes

Keeping You Up-to-Date on Medicare Set-Aside Issues

## The Compromise Allocation

The Medicare Secondary Payer (“MSP”) laws require that all parties to a settlement protect Medicare’s interests when resolving cases with prior injury-related Medicare payments and future medical expenses. The Medicare Set-Aside (“MSA”) that parties are most familiar with is a Commutation MSA or an allocation that fully funds all future medical for the claimant’s life expectancy. This occurs in a claim where the employer/carrier agrees that it owes both medical and indemnity payments per the applicable law and contract. The Center for Medicare and Medicaid Services (“CMS”) reviews all MSA proposals that meet its review thresholds as either commutation allocations or zero waiver request allocations.

Many legitimately disputed cases are settled on a compromise basis. In light of the disputes, a fully funded MSA or commutation allocation is inappropriate. A zero waiver request allocation may also be inappropriate if medical payments were made in the case. Since every settlement needs to give Medicare’s interest reasonable consideration, Protocols has developed the Compromise Allocation. A Compromise Allocation in a settlement context is a “settlement of a disputed claim by mutual concession to avoid litigation.”

The Compromise Allocation has its origins in Social Security Rule (SSR) 70-38, 20 C.F.R 405.320 and what is now known as 42 C.F.R. 411.47. The 42 C.F.R. 411 regulations contain definitions and rules that apply equally to all or most types of insurance that are primary to Medicare. 42 C.F.R. 411.47 provides in pertinent part as follows:

**(1) “If a compromise settlement allocates a portion of the payment for medical expenses and also gives reasonable recognition to the income replacement element, that apportionment may be accepted as a basis for determining Medicare payments.”**

**(2) “If the settlement does not give reasonable recognition to both elements of a workers’ compensation award or does not apportion the sum granted, the portion to be considered as payment for medical expenses is computed as follows:**

- (i) Determine the ratio of the amount awarded (less the reasonable and necessary costs incurred in procuring the settlement) to the total amount that would have been payable under workers’ compensation if the claim had not been compromised.**
- (ii) Multiply that ratio by the total medical expenses incurred as a result of the injury or disease up to the date of the settlement. The product is the amount of the workers’ compensation settlement to be considered as payment for medical expenses.”**

Although CMS asserts that 42 CFR 411.47 only applies to conditional payments (liens or past payments) and not to future medical exposure, a fair reading of the statute does not limit its use. The Protocols Compromise Allocation provides the parties in a disputed case with a Medicare Set-Aside allocation that takes into account the disputed nature of the settlement. It has a sound basis in the Code of Federal Regulations and complies with the requirement of the Medicare Secondary Payer laws that the allocation of future medical care be reasonable. Although CMS is notified of the Compromise Allocation, the Compromise Allocation is never submitted to CMS for review.

--ADDITIONAL INFORMATION IS AVAILABLE UPON REQUEST--