

## How Does the Medicare Secondary Payer Statute Impact Personal Injury Settlements?

42 USC sec. 1395y(b)(2) prohibits Medicare from paying a beneficiary's medical expenses when payment has been made or can reasonably be expected to be made under a workers' compensation, auto liability or liability insurance policy or plan of self-insurance.

**Conditional payments:** However, Medicare can make conditional payments for Medicare covered services that the third party payer does not pay promptly. The Medicare payment is conditioned on reimbursement to Medicare from proceeds received pursuant to a third party settlement, award, judgment or recovery.

**Right to reimbursement:** If Medicare makes a payment when another policy or plan is primary, the statute gives Medicare a priority right of recovery which may be exercised directly or through subrogation. Medicare may under the statute recover its payment from any entity that has been paid by the responsible primary payer, including the beneficiary, the beneficiary's attorney, the primary payer or a third party administrator for the primary payer.

**Procurement costs:** Medicare's reimbursement is reduced by a pro rata share of procurement costs (e.g. attorney fees and costs). When settling a personal injury claim in which Medicare is entitled to reimbursement, Medicare must be paid before any other distribution of settlement proceeds takes place. Interest may be assessed on balances not paid within 60 days.

**Duty to notify:** Beneficiaries and their attorneys are obligated to notify Medicare when a claim against a liability, no fault, or workers' compensation insurer or insured/self-insured is made.

**Medicare priority:** The MSP statute provides that Medicare has priority over other claim holders to reimbursement out of settlement proceeds.

**Limit of reimbursement:** If the Medicare reimbursement is less than the total settlement amount, Medicare is entitled to the amount of its conditional payments less a pro rata share of procurement costs. If the conditional payments exceed the total settlement, Medicare can recover the amount of the conditional payments less the procurement costs. (42 CFR 411.37)

**Can Medicare waive reimbursement?** Reimbursement may be waived if the beneficiary was without fault and the reimbursement would effect financial hardship or be against equity and good conscience. 42 USC sec. 1870(c). Waiver consideration will not be made until after the settlement is concluded.