

## MEDICARE SET-ASIDES IN CIVIL ACTIONS IN MASSACHUSETTS

Medicare Set-Aside • June 20, 2018

Recently, the Superior Court of Massachusetts issued a decision in *Stephen Duff v. Paul Cusick, M.D. and Massachusetts General Hospital* (Superior Court Civil Action No: 2013-4513-C).

There were multiple Medicare issues in this case. Initially, the plaintiffs argued that Part C programs (Medicare Advantage Plans) did not have to be considered in the settlement because they did not have the same right to recover as Medicare. The Superior Court ruled in the defendant's favor and indicated that, based on *Avandia* (685 F.3d 353) (3<sup>rd</sup> Cir. 2012), the plaintiffs had to consider the Part C plan in this case and had to repay the Part C plan in accordance with the Medicare Secondary Payer law. The court also indicated that if the parties could not agree on an amount to be escrowed, the court would set an amount to be escrowed for the Part C plan.

Next, the court addressed conditional payments from Medicare. The plaintiffs had received a letter from the CRC indicating that there was no Medicare payment and that, since Medicare had not paid any Part A or Part B service claims, they had closed their file. The defendants indicated that they thought there was at least one payment from Medicare for a hospitalization. The court ruled that since the letter had already been received by Medicare and the case was closed, no monies had to be escrowed for Medicare.

From a Medicare standpoint, it is not unusual to see a zero conditional payment letter in cases where the claimant is covered by a Medicare Advantage Plan since that plan usually pays all fees.

Finally, the court addressed the issue of a Medicare Set-aside. In a very short paragraph, the court ruled that there is no federal law or CMS regulation requiring the creation of a Medicare Set-aside in personal injury settlements. As such, the court concluded that the plaintiffs did not have to set up a Medicare Set-aside account.

We do not know what evidence or case law the defendants presented with regard to Medicare Set-asides. However, as we know in several other states, Medicare Set-asides have been

approved in civil actions. Thus, we must proceed with caution. We still recommend at least trying to bargain for a Medicare Set-aside in civil cases. However, if the issue goes to court and the court rules that no Set-aside is necessary after a hearing on the evidence, if Medicare has been notified of that hearing and chooses to participate or not to participate, the court ruling is binding on the Agency.

If you have any questions, please do not hesitate to contact the authors. ||



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