HOW TO SETTLE A CASE WHEN THE CLIENT NEEDS BOTH A POOLED SPECIAL NEEDS TRUST AND A MEDICARE SET-ASIDE

Presented by:

www.trustCCT.org  www.MSAmeds.com
Presenters

• Joanne Marcus, MSW
  Executive Director, CCT

• Karen Dunivan, Esquire
  General Counsel, CCT
Who we are....

Commonwealth Community Trust (CCT)

- Nonprofit organization operating nationally that administers *Pooled Special Needs Trusts* for individuals with special needs
- Established in 1990
Public Benefits Primer

Disability as defined by the Social Security Administration (SSA)

<table>
<thead>
<tr>
<th>ADULT</th>
<th>MINOR (under 18)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To be disabled within the meaning of the Social Security Act, the individual must have a severe,</td>
<td>The child must have a physical or mental condition(s) that very seriously limits</td>
</tr>
<tr>
<td>medically determinable physical or mental impairment which has or is expected to last for one year</td>
<td>his or her activities; and the condition(s) must have lasted, or be expected to</td>
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<tr>
<td>or to result in death. In addition, the impairment must make the individual unable to engage in</td>
<td>last, at least one year or result in death.</td>
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<tr>
<td>“substantial gainful activity.”</td>
<td></td>
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</tbody>
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Source: Social Security Handbook (disability.gov)
Public Benefits Primer

Social Security Disability Insurance – SSDI

- A monthly benefit from SSA
- Based on a worker’s social security withholdings while working just as social security benefit at retirement is based on withholdings
- Adults are eligible for SSDI if
  - disabled before retirement age **AND**
  - accumulated enough quarters of withholdings based on age
- Government’s version of disability insurance
- Worker gets out based on what is paid in
Public Benefits Primer

Supplemental Security Income: SSI

- What happens if one is disabled but hasn’t worked enough quarters for SSDI?
- A monthly monetary allowance that is intended to pay for food and shelter
- Needs tested benefit for the disabled who are impoverished
- Adults are eligible if
  - they are disabled,
  - have no more than $2,000 in countable resources, AND
  - are below 133% of the federal poverty income level.
- Minors have the same eligibility PLUS the parents’ “deemed” income.
Public Benefits Primer

**Medicare**
- Federal health insurance program for
  - people who are 65 or older, AND
  - the disabled who are receiving SSDI and have received SSDI for 24 months

**Medicaid**
- Federal health insurance program for the aged, blind and disabled.
- Administered by the States – some states have different eligibility requirements.
- Virginia – Medicaid administered through the local Department of Social Services.
- For simplicity sake – eligibility for Medicaid is the same as SSI
  - cap on resources and income

Can be dual eligible for Medicare and Medicaid
The Public Benefits Problem

Clients who receive needs based government benefits (Medicaid, SSI), may lose eligibility due to the injury award.
The Medicare Problem

• Federal law prohibits Medicare from paying for injury-related medical expenses that an employer or health insurer is primarily responsible to pay

• Workers’ Compensation regulations require a portion of settlement funds be “set-aside” in an account (MSA) to pay for future injury-related medical expenses; liability cases have no regulations yet, but soon will.

• An MSA will solve the Medicare problem, but the account may be considered a resource

There is a solution to this problem........
Why Nest an MSA Inside a PSNT

<table>
<thead>
<tr>
<th>PSNT</th>
<th>MSA</th>
</tr>
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<tbody>
<tr>
<td>• To protect eligibility for means tested government benefits</td>
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<tr>
<td>• To manage funds for a Beneficiary who cannot manage their own funds and needs the assistance of a Trust Administrator</td>
<td>• Self administration of an MSA is overwhelming for non-professionals</td>
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</table>
The Solution...

Coordinated use of a Medicare Set-Aside Account within a Pooled Special Needs Trust to protect government benefits
Why Nest an MSA Inside a PSNT

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Recordkeeping and Reporting for the MSA

- The Centers for Medicare and Medicaid Services (CMS) has issued guidelines governing how MSAs are to be handled in order to assure future eligibility for injury-related Medicare benefits.

- Recordkeeping and reporting is cumbersome.

Examples:

- Submit a yearly accounting of all expenditures from the MSA to Medicare including receipts.
- Determine which medications are Medicare-covered expenses and contact the doctor to find an appropriate substitution if the medication is not a covered expense.
- Monitor ongoing medical treatments and review any newly prescribed treatments or medications to ensure compliance with CMS regulations.
- Find Medical providers and pharmacies willing to accept payment based on the pricing method selected in the MSA documents and approved by Medicare.
What is a First-Party Pooled Special Needs Trust?

- Created within the Omnibus Reconciliation Act of 1993
  - 42 USC 1396p(d)(4)(C)

- Managed by a non-profit organization like CCT who can delegate investment advice to a financial institution

- Beneficiaries must be people with special needs

- Beneficiaries do not have to receive Medicaid or SSI

- Separate accounts maintained for each individual, but investments may be pooled together

- Created by the individual, parent, grandparent, guardian or a court

- Must contain payback provision at beneficiary’s death
How Does a Pooled Trust Operate?

• Trust Administrator/Non-profit Organization makes disbursement decisions
  • Income and principal is distributed on behalf of the Beneficiary at the sole discretion of the nonprofit organization

• Provides access to financial statements either online or by mail for review by the responsible party

• Accepts cash assets only as the funds are pooled

• Most organizations do not accept real estate that would be owned by the trust

• Annually distributes the Schedule K-1 tax form for each Beneficiary’s sub-account

• Available for Court qualification and provides Court accounting when needed
Fees & Funding Requirements for PSNT

- Varies among pooled trusts

- Enrollment Fee
  - e.g. $850-1,500
  - CCT fees range from $550-1,250

- Trust Administration/Investment Fees
  - Affordable ongoing fees when compared to financial institutions and other professional trustee options
  - e.g. CCT charges 0.84% on an annual basis, prorated monthly

- Funding requirements are nominal
  - Initial funding can be as little as $5,000
  - Banks or financial institutions may require accounts to have a minimum of $350,000-$500,000 for a stand-alone special needs trust
What can the trust pay for?

*Examples include, but are not limited to:*

- Medical and Dental Services not covered by insurance
- Caregiver Expenses
- Eyeglasses, Hearing Aids, and Prosthetic Devices
- Pre-paid Burial Expenses
- Computer and Internet Services
- Clothing
- Home Modifications
- Educational Expenses
- Television and Telephone Services
- Home Furnishings
- Vehicle & Transportation
Are any distributions prohibited?

- Distributions must be for the sole benefit of the beneficiary
- If receiving SSI, distribution cannot be for food or shelter or in cash
Remainder Policy

• **Subject to Medicaid Payback** - remaining funds at death of beneficiary are subject to reimbursement to state(s) for medical assistance paid on behalf of the beneficiary.

  **Remainder policies after Medicaid is paid varies greatly among pooled trust organizations**

  - CCT distributes to the named designated successor beneficiaries
  - Some retain a percentage of remaining funds and then distribute the remainder to the designated successor beneficiaries
  - Some retain all

  **Important to ask when researching pooled trust organizations!**
Is a First-Party Pooled Special Needs Trust the right option for your client with a special need?

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tbody>
<tr>
<td>Is the litigation award more than $5,000?</td>
<td>?</td>
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<tr>
<td>Does your client currently receive or may need to qualify for SSI and Medicaid in the future?</td>
<td>?</td>
</tr>
<tr>
<td>Due to the nature of the special need, could the individual benefit from a Trust Administrator?</td>
<td>?</td>
</tr>
<tr>
<td>Is an experienced Trust Administrator available to manage the trust prudently and have knowledge of the rules governing SSI and Medicaid?</td>
<td>?</td>
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</table>
How CCT and MSA-Meds Can Help

• Provide one-stop administration for your client
  • CCT contracts with companies whose business it is to manage the MSA account within the First Party Pooled Special Needs Trust

• CCT has 27 years of experience administering PSNTs and protecting government benefits when needed

• These companies have the expertise in managing the complicated requirements for workers’ comp and liability clients in compliance with Medicare law and the strict CMS regulations
Medicare Set-aside Allocations: Protecting Your Clients and Your Practice
Colleen M. Fowler, Esq., MSCC, CMSP
Chief Legal Officer

Andre S. Hinchman, CMSP
CEO
Protecting Your Clients and Your Practice:

• Negotiate the Term of the MSA to ensure it is properly:
  1. Allocated;
  2. Funded; and
  3. Administered

• Protect Your Client and Your Practice at Settlement:
  1. Document Your Client’s Understanding of Terms; and
  2. Negotiate Proper Settlement Language
Do not allow your client to sign the CMS release until after you review and approve the MSA proposal.
Practice Tip # 2

The MSA Allocation is not a fair depiction of your client’s future medical expenses!
• Take a full history of your client’s medical treatment before beginning settlement negotiations. Do not rely on the Vendor hired by the Insurance Carrier to value your client’s future medical benefits!
Non-Medicare covered expenses that may have been payable under state workers’ compensation laws are excluded and must be negotiated separately.
Medicare covered expenses include:

- Doctor’s visits
- Diagnostic tests
- Steroid injections
- Hospitalizations
- Surgery
- Morphine pumps
- Spinal cord stimulators
- Physical therapy
- Intermittent skilled home health care
- “Medically necessary” durable medical equipment
- Medications prescribed for FDA approved use
Non-Medicare Covered Expenses:

- Dentures
- Glasses
- Hearing aids
- Travel expenses to medical appointments
- Custodial care
- Long term inpatient care facilities
- Medical equipment considered convenience items
- Medications prescribed “off label”
Practice Tip #3.

Negotiate the **Amount** of the MSA Allocation!
Is the MSA prepared by the Insurance Carrier’s Vendor sufficient?

• If the MSA projection is not sufficient, and funds become exhausted, Medicare will begin paying bills for the work injury **only** if all the funds were spent according to Medicare’s strict guidelines.
• Payment of medical bills is not 100%.

• Your client will be subject to co-payments of up to 20% for services.

• There are also co-payments for prescription medications, including the donut hole.
Your Client’s Out-of-Pocket Expenses under a Standard Part D Drug Plan in 2017

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<th>For drug cost between</th>
<th>Your client pays</th>
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<tr>
<td>$0 to $400</td>
<td>100%</td>
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<tr>
<td>$400 to $3,700</td>
<td>25%</td>
</tr>
<tr>
<td>$3701 to $4,950</td>
<td>40% for brands and 51% for generics</td>
</tr>
<tr>
<td>Over $4,950</td>
<td>The greater of 5% or $3.30 for generics and $8.25 for brands</td>
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## Closing the Coverage Gap

<table>
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<tr>
<th>Year</th>
<th>% Client pays for brand-name drugs in the donut hole</th>
<th>% Client pays for generic drugs in the donut hole</th>
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<td>2014</td>
<td>47.5%</td>
<td>72%</td>
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<tr>
<td>2015</td>
<td>45%</td>
<td>65%</td>
</tr>
<tr>
<td>2016</td>
<td>45%</td>
<td>58%</td>
</tr>
<tr>
<td>2017</td>
<td>40%</td>
<td>51%</td>
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<tr>
<td>2018</td>
<td>35%</td>
<td>44%</td>
</tr>
<tr>
<td>2019</td>
<td>30%</td>
<td>37%</td>
</tr>
<tr>
<td>2020</td>
<td>25%</td>
<td>25%</td>
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• Perform your own evaluation of your client’s current medical treatment. Then compare your client’s current treatment to the projected treatment in the MSA.

• Treatment not included in the MSA projection may be:
  • Outside the standard treatment protocols
  • Deemed not work related by the Vendor
  • Denied by the Insurance Carrier
  • Not covered by Medicare
Please Note:
The MSA amount CMS will approve does not necessarily represent the true cost of your client’s future medical treatment!
Are the number of allotted services sufficient?

- 4 physician visits per year
- 24 physical therapy sessions over LE

Were the “as needed” medications projected appropriately?

- Assess the past pharmacy and medical history
- Is your client’s condition improving or getting worse?
- Has the medication gone up or down in the past 3-6 months?
Is the pricing fair and reasonable?

- If brand medication is being taken, brand medication should be priced.

- Medicare allows the use of the least expensive generic NDC for a given medication.

- Your client may not be able to purchase this NDC at a pharmacy.
• Re-packaged medications will be priced at the lowest priced generic AWP for non re-packaged medications.

Note: Physician Dispensing most often uses re-packaged medications. Your client may not pay for re-packaged medications from his/her MSA Account and will need to make an alternate arrangement after the MSA Account is established.
<table>
<thead>
<tr>
<th>Product Name</th>
<th>Manufacturer/Distributor</th>
<th>Code</th>
<th>Identifier</th>
<th>Package Size</th>
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**Ten Additional Different Manufacturers at $1.33100 (Done to show brand name to lowest cost generic)**

<p>| Gabapentin   | CAMBER PHARMACEUTICALS, INC. | NDC 31722-0222-05 | 500s ea     | Y            | 1.33310 |
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| Gabapentin   | EXELAN PHARMACEUTICALS, INC. | NDC 76282-0322-05 | 500s ea | Y            | 1.33310 |
| Gabapentin   | AMNEAL PHARMACEUTICALS LLC | NDC 53746-0102-10 | 1000s ea   | Y            | 1.33200 |
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| Gabapentin   | AUROBINDO PHARMA USA, INC. | NDC 65862-0199-01 | 100s ea    | Y            | 1.33010 |
| Gabapentin   | NORTHSTAR RX LLC           | NDC 16714-0662-01 | 100s ea   | Y            | 1.33000 |
| Gabapentin   | SOLCO HEALTHCARE US, LLC  | NDC 43547-0266-10 | 100s ea   | Y            | 1.33000 |
| Gabapentin   | SOLCO HEALTHCARE US, LLC  | NDC 43547-0266-50 | 500s ea   | Y            | 1.33000 |
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| Gabapentin   | TEVA PHARMACEUTICALS USA   | NDC 45963-0556-11 | 100s ea   | Y            | 1.32960 |
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| Gabapentin   | NORTHSTAR RX LLC           | NDC 16714-0662-02 | 500s ea  | Y            | 1.32960 |
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<table>
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<th>Product Name</th>
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Medications prescribed “off label” are not covered by Medicare and will not be included in the MSA allocation.

Common examples:

• Lyrica
• Lidoderm
Lyrica

Generic Name: pregabalin

Dosage Form: capsule, oral solution

Indications and Usage for Lyrica

Lyrica is indicated for:

- Management of neuropathic pain associated with diabetic peripheral neuropathy
- Management of postherpetic neuralgia
- Adjunctive therapy for adult patients with partial onset seizures
- Management of fibromyalgia
- Management of neuropathic pain associated with spinal cord injury
Lidoderm

Generic Name: Lidocaine

Dosage Form: Patch

Lidoderm®

(Lidocaine Patch 5%)

Rx Only

INDICATION AND USAGE

Lidoderm is indicated for relief of pain associated with post-herpetic neuralgia. It should be applied only intact skin.
Practice Tip # 4

Negotiate Proper Settlement Language!
• Review settlement terms to ensure that if CMS counters lower your client is paid the difference between the proposed MSA allocation and the CMS approved allocation.

• Make sure to include all diagnoses in the description of injury that will be covered by the MSA.
Practice Tip #5

Beware of MSA Accounts funded by Annuity Payments!
• Annuity Payments complicate temporary exhaustion of MSA Accounts.

• Annuities may also include language that yearly payments will stop at the death of your client (Reversionary Interests).
Document your clients’ understanding and acceptance of the risk of self administration of their MSA Accounts!
MSA Allowable Administrative Expenses:

- Photocopying charges
- Mailing fees/postage
- Banking fees directly related to the account
- Incremental tax paid on the interest income earned by the MSA Account

*Legal fees and professional administrative fees are not allowable expenses!*
Reimbursement Rates:

Bills must be paid from the MSA Account based on the pricing method used in calculating the MSA:

• usual or customary charges or the workers’ compensation fee schedule for services

• Redbook AWP for prescriptions
Medicare Covered Expenses:

Funds from the MSA Account may only be used to pay for treatment covered by Medicare, even if they are otherwise related to the injury.
Penalty for Misspending Funds:

If medical treatment is paid at rates higher than the **pricing method** used in calculating the MSA or if payments are made for non-allowable expenses, Medicare will not pay bills for the injury until the improperly spent funds are returned to the MSA account and properly exhausted.
Accounting Requirements:

• Self Administered Accounts: Claimant must submit “Self attestation” forms annually beginning one year from establishment of the MSA. Detailed records of all transactions should be kept for 7 years.

• Professionally Administered Accounts: A detailed accounting must be submitted on an annual basis.

• See MSAmeds.com for an updated copy.
Protecting Your Client and Your Practice at Settlement:

• Document that your client fully understands the settlement terms including the MSA provisions; and

• Negotiate proper settlement language
Hire a Professional Administrator to best protect your clients and yourself!
If the MSA will be self administered then have your client sign a document acknowledging that:

• you have explained the rules for administering a MSA Account properly;

• your client understands the penalty for not spending MSA funds appropriately;
• your client understands all of Medicare’s rules regarding what treatment may be paid from a MSA Account, including:
  
  o Related to the work injury
  o Otherwise covered by Medicare
  o Paid according to the pricing method approved by CMS
• your client accepts sole responsibility for properly administering the MSA funds; and

• your client understands that you will not represent him/her in future proceedings before Medicare involving the improper spending of MSA funds.

• If a hearing is held, elicit testimony from your client to establish understanding of the MSA Administration rules and the penalties for non-compliance.
Update on LMSAs

• Beginning on October 1, 2017, CMS has directed the Administrative Contractor to begin to track the existence of any LMSAs related to a claim and deny payment for items or service that it deems should be paid from that LMSA
CMS has also issued a Change Request (CR) dated June 8, 2017 stating that CMS will establish two new set-aside processes:

- Liability Insurance Medicare Set-Aside Arrangement (LMSA)
- No-Fault Insurance Medicare Set-Aside Arrangements (NFMSA)

No guidelines have been issued to date!
Colleen M. Fowler, Esq., MSCC, CMSP
colleen@MSAmeds.com

Andre S. Hinchman, CMSP
andre@MSAmeds.com

855-MSA-meds
P.O. Box 190 Barnesville, PA 18214

www.MSAmeds.com
Questions?

Colleen M. Fowler, Esq., MSCC, CMSP
colleen@MSAmeds.com

Andre S. Hinchman, CMSP
andre@MSAmeds.com
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P.O. Box 190 Barnesville, PA 18214
www.MSAmeds.com

Joanne Marcus, MSW
jmarcus@trustCCT.org

Karen Dunivan, J.D.
kdunivan@trustCCT.org
804-740-6930
P.O. Box 29408 Richmond, VA 23242
www.trustCCT.org