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The Honorable Diane M. Strickland, Chair
Boyd Graves Conference
809 Oakwood Drive, SW
Roanoke, VA 24015

Re: Committee Report on Medicare Set Aside Issue

Dear Judge Strickland:

Our committee, consisting of Peter DePaolis, Pierce Rucker, Art Donaldson, Brian Dolan, Bill Poff and myself, met via telephone conference to discuss the issue of Medicare set asides and how they might affect trials or settlement discussions and to determine whether any particular action should be taken by the Boyd Graves Conference at this time. Art Donaldson was particularly helpful in bringing knowledge and experience to our committee, as most of us had not dealt with Medicare set asides, or MSA's, in our respective practices. MSA's have been required in workers' compensation cases for several years, but until July 1st of this year had not been applied to personal injury cases. In the workers' compensation environment, when MSA's were first required, the system was not entirely clear or established as to how these set asides would be created or approved. Considerable delay was encountered as the procedures were put in place. We assume that a similar system will be used in personal injury cases, however, no regulations or detailed rules have been established. Until the details of the process have been determined, we anticipate the likelihood of long delays in getting an MSA approved. A Medicare set aside will require the parties to establish a plan for using benefits obtained from settlement or verdict to cover anticipated future medical costs that will be paid by Medicare. Although we have always accounted for liens representing medical costs *already* paid by Medicare, we have not been required to create a plan for future costs. In the worker's comp environment, a proposed plan for future medical costs is created, often by a company specializing in this service, then is submitted for approval by CMA. Once approved, arrangements must be made for the set aside funds to be managed.

The greatest concern as recognized by our committee is the extent to which attorneys will be able to resolve pending cases where a MSA needs to be established. Obviously, the amount required to be set aside will be a significant

consideration during settlement discussions with a client. There may simply be instances in which a case cannot be resolved until the MSA amount is approved. With no clear procedures in place in personal injury cases for accomplishing this, at present, we have no real expectation of how long the process might take. Our committee was concerned about cases that will need to be tried simply because the MSA can't be established within a reasonable time sufficient to give the parties an opportunity to engage in meaningful settlement discussions. We discussed whether trial judges were aware of these new requirements with respect to MSA's and would be understanding of the dilemma facing both sides. The committee agreed that no legislative action or rule change would be appropriate at this time regarding the issue. We also agreed that the best course of action would be to insure that trial judges were aware of MSA's and how they might impact our ability to resolve cases in a timely manner.

When our committee met, we knew that the Judicial Conference would be taking place shortly thereafter. We made contact with those persons in charge of the conference schedule, hoping to make some sort of presentation on the issue. However, given that the length of the Judicial Conference had already been shortened considerably, there was no opportunity to add a discussion of MSA's to the schedule. We also inquired about whether written materials might be submitted, but the deadline for such submissions had already passed.

We are hopeful that at our meeting in October we can inquire as to the experiences of attorneys and judges related to MSA's in personal injury cases, and whether anyone has encountered any particular difficulties as yet. The full conference may wish to carry over this issue for further consideration at some point in the future once we have determined how MSA's might in reality affect our ability to resolve cases, and ultimately, trial dockets.

Very truly yours,

Lisa P. O'Donnell

Cc: Peter DePaolis
Art Donaldson
Brian Dolan
William Poff
Pierce Rucker

Addendum to Report

Since our committee last met and discussed these issues, Art Donaldson has brought to our attention the following:

1. The new rule for mandatory reporting by insurance carriers etc. to Medicare has been moved to the first quarter of 2010 (April 1 perhaps).
2. There is no requirement that MSA's be set up in any liability case, however, carriers are gun shy and don't believe they have no liability until it is proven, in writing, by Medicare that their only obligation is to report, not prepare or otherwise provide for or require the MSA itself.
3. The only liability that carriers have is the failure to report settlements to Medicare. ($1,000 per day per beneficiary)
4. The liability to Medicare for failure to set up an MSA at this time does not even fall upon plaintiffs' attorneys – the liability to Medicare falls solely on the beneficiary.
5. The plaintiff's counsel's liability, if any, appears to be to the beneficiary for failure to advise about the consequences of not setting up an MSA.
6. There still are no rules, regulations or safe harbors we can rely on.