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Medicare Set Aside/Workers' Compensation

By Benjamin A. Leonard March 9, 2015

A recent bankruptcy ruling has defined WCMSAs as "trusts." Due to the lack of any real definition of MSAs in Federal law, it has always been assumed an MSA is operated as a trust and therefore should be treated as one. However, as has been noted previously, the "wild west" nature of MSA guidance from CMS has never been definitive about what an MSA is, and how it is to be treated. Now, however, a PA Bankruptcy decision has provided us with the answer. Yes, an MSA is a trust. The claimant in In re **Steven M. Carr, v. Jesus Arellano**, Chapter 13 Case No. 1:14-bk-00990 MDF, USBC (M.D OF PA) sadly managed to blow through a settlement of his WC claim in the amount of approximately $277,750.00 in the span of about 3 years. He filed for bankruptcy in PA but MD law was applied in determining if the MSA corpus was a part of the Bankruptcy estate as he settled his WC claim in MD. Without getting into the irrelevant bankruptcy details of the litigation, the court first noted under MD law **"A trust is a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary." Lewis v. Alexander**, 685 F.3d 325, 332 (3rd Cir. 2012). The Court next noted an MSA is most alike an express trust, and determined whether or not the MSA was an express trust (a trust established for an express reason) under MD law, looking to see if the following existed (and finding the MSA met the elements): 1) a subject-matter; 2) a settlor, competent to create a trust; 3) a person capable of holding the subject-matter as trustee; and 4) a beneficiary, for whose benefit the property is being held. See **Sieling v. Sieling**,135 A. 376, 382 (Court of Appeals of Maryland 1926) From here, the Court looked to the intent of the parties. It cited provisions of the CMS website, and also noted MSAs are created in order to consider the interests of Medicare in the conclusion of a workers' compensation claim via settlement. The language of the settlement agreement in question was noted to have specifically allocated funds for the specific purpose of providing medical care for the claimant in order to prevent a shifting in that burden from the parties to Medicare. Thus, the elements above (subject matter – the amount to prevent the burden shift, settlor/ trustee – the claimant, and beneficiary – the claimant, although arguably also Medicare) were established, and the MSA was deemed to be a trust (and not part of the Bankruptcy estate). For the practitioner, this should give multiple guidance points: 1. While only MD law is cited, express trusts exist in most states in various forms, therefore outlining the 4 different requirements to establish an express trust in your settlement agreement might not be a bad idea. If nothing else, it gives clearer guidance as to the intent of the parties regarding the MSA and settlement. 2. Federal courts are very closely examining the intent of the parties in settlement, therefore, everyone needs to be very clear about the terms of settlement in the documents prepared. When in doubt, the language dispute will likely be resolved in favor of the claimant (see the **Cole-Hoover** matter). 3. If reversionary language is used in settlement documents, and this practitioner **strongly** urges that it not be, tax implications from a trust versus those from treating the MSA otherwise might be different, and any reversionary funds should be handled through a tax expert. 4. Shoehorning on the latter point, a trust is essentially a contract, therefore, if the MSA is a trust, and the claimant expires, the corpus of the trust may or may not have to pass through probate court depending on the jurisdiction(s) involved. Again, probate and tax experts should be consulted on this if there are concerns about this by the parties. 5. The designation of the amounts as a trust should provide additional cover for the parties involved outside of the trustee of the MSA when concerns arise about the funds being exhausted. 6. If there are financial concerns for the claimant, a third party administrator should be considered. If you would like further information or have questions, please contact Benjamin A. Leonard at bal@boviskyle.com.