

## National Conference of Insurance Legislators (NCOIL)

### Resolution in Support of S. 2731, The Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2014

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*Adopted by the NCOIL Executive Committee on November 23, 2014, and by the Workers' Compensation Insurance Committee on November 21, 2014. Sponsored for discussion by Rep. Bill Botzow (VT)*

**WHEREAS**, through workers' compensation, employers fulfill their statutory duty to provide all reasonable and necessary medical care when workers are injured on the job, at no cost to the worker, as well as cash benefits replacing lost wages, for what can be for life; and

**WHEREAS**, when an worker who is a Medicare recipient (or about to become a recipient) is injured on the job, both the insurer and Medicare may have responsibility for future medical expenses covered by both workers' compensation and Medicare, costs of which are primarily the responsibility of workers' compensation pursuant to the Medicare Secondary Payer Act; and

**WHEREAS**, when a worker has both workers' compensation and Medicare coverage, the Centers for Medicare & Medicaid Services (CMS) is responsible for ensuring that Medicare is the secondary payer, in cases when a workers' compensation claim is settled and the settlement forecloses payment by the employer's workers' compensation insurer for future medical services; and

**WHEREAS**, a workers' compensation Medicare Set-Aside (MSA) arrangement is an amount of settlement funds allocated in each settlement to be used solely by the injured worker for Medicare-covered expenses; and

**WHEREAS**, CMS has established standards for the creation and review of such proposed allocations in settlement agreements without any specific statutory authority, the application of which is subjective and inconsistent; and

**WHEREAS**, CMS routinely rejects proposed MSA settlement agreements without providing adequate explanation; and

**WHEREAS**, CMS has published a series of MSA policy statements since 2001, all outside the normal rulemaking process, and thereby precluding notice and the opportunity to comment; and

**WHEREAS**, CMS determinations of the adequacy of an MSA, because of the lack of meaningful criteria as well as inconsistency, are an impediment to conducting business; and

**WHEREAS**, there is no means to appeal an adverse determination; and

**WHEREAS**, CMS approvals can be delayed for months and at times over a year, preventing injured workers from settling their claims and returning to work; and

**WHEREAS**, the delays and uncertainty have resulted in the inability of employers and injured workers to settle and close their claims expeditiously, higher costs for insurers, higher employer premiums reflecting insurers' higher costs, MSA funding in amounts higher than under state workers' compensation laws, and an unknown future liability to CMS; and

**WHEREAS**, S. 2731, The Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2014, was introduced in the United States Senate to address several desirable reforms to the Medicare Secondary Payer Act and the MSA review process; and

**WHEREAS**, reforms to the Medicare Secondary Payer Act would protect the interests of Medicare and CMS while decreasing costs, administrative burdens, and confusion for employers, insurers, state workers' compensation systems and injured workers; and

**WHEREAS**, reforms supported in S. 2731 would amend the Medicare Secondary Payer Act to establish clear criteria for when an MSA should be reviewed; create certainty as to the rules for calculating an MSA; provide an appeals process for parties to CMS determinations; provide optional direct payment to CMS for the set-aside to Medicare; and provide certainty for state-approved settlements; and

**WHEREAS**, S. 2731 proposes to allow the settlement process to move forward while eliminating millions of dollars in administrative costs that harm workers, employers (especially small business), insurers, and CMS; and

**WHEREAS**, NCOIL supported resolutions in 2008 and 2012 that endorsed proposed legislation to reform the Medicare Secondary Payer Act; and

**WHEREAS**, since that time, organizations representing employees, employers, insurers, legal professionals, and other stakeholders involved in the settlement process have continued highlighting the need for an improved approach to addressing Medicare Set-Asides.

**NOW, THEREFORE, BE IT RESOLVED** that the National Conference of Insurance Legislators (NCOIL) endorses reforms to the Medicare Secondary Payer Act, as proposed by S. 2731, and encourages Congress to enact S. 2731 before adjourning this year; and

**BE IT ALSO RESOLVED** that a copy of this resolution be submitted to Congressional leadership and to the Senate Finance Committee, the House Committee on Ways and Means, and the House Energy and Commerce Committee, as well as to state legislative leadership throughout the country.