

ALERTS AND UPDATES

Medicare Secondary Payer Reporting and Repayment Obligations: Is Relief on the Way?

April 22, 2010

The Medicare Secondary Payer Enhancement Act of 2010 (MSPEA)¹ was introduced in Congress on March 9, 2010, and would amend the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) statute to address many of the concerns raised by counsel for plaintiffs, defendants and others who are likely to be affected by MMSEA's reporting requirements. MMSEA requires all settlements of claims for Medicare beneficiaries to be reported to the Centers for Medicare and Medicaid Services (CMS), beginning in the first quarter of 2011.² The MSPEA legislation is sponsored by five congressmen and is under consideration by the House Committee on Ways and Means and the House Committee on Energy and Commerce.

MSPEA would give rise to significant changes to the MMSEA and Medicare Secondary Payer statutes, with a goal of making it easier for Responsible Reporting Entities (RREs) to satisfy their reporting and repayment obligations to the CMS. These changes would include giving RREs and others the right to request a final demand from Medicare before a payment is made and the ability to make an estimated payment. MSPEA would also make fines for failing to properly report a payment discretionary and would create safe harbors to protect RREs that made a good-faith effort to report a payment.

RREs Could Make Estimated Payments or Request Final Demands from Medicare 120 Days Before Expected Payments

A noteworthy provision of MSPEA is that it would give RREs the right to request from the Secretary of the U.S. Department of Health and Human Services (HHS) a "final demand for reimbursement" any time within 120 days before the expected date of the settlement, judgment or payment. CMS would have 60 days to respond with a final demand, which would remain valid for 60 days after it is received by the requesting party. If CMS does not provide a final demand of the amount it believes is owed to Medicare by the plaintiff after a request is made, then Medicare would be deemed to waive its right to recover from the plaintiff. This is a significant change that would simplify the repayment and reporting process, since the ability to request a final demand for reimbursement would allow all parties to know the precise amount owed to Medicare before a settlement is agreed upon or a payment is made. At present, only the plaintiff can request the amount Medicare believes is owed, and requests can be made only after the case is resolved.

For RREs and plaintiffs' counsel that do not request a final demand from CMS before a settlement is reached or a judgment is entered, MSPEA would provide RREs an alternative method to satisfy Medicare's right of reimbursement. MSPEA would give RREs the right to estimate the total owed by the plaintiff and to pay this amount to the appropriate trust fund. If Medicare believes that the payment is deficient, it would be required to notify the RRE of this deficiency within 75 days; otherwise, Medicare would waive the right to collect any additional money. MSPEA provides an appeal process for RREs or beneficiaries who believe that CMS incorrectly calculated the amount owed.

If MSPEA is enacted, CMS would be permitted to collect a fee of \$30 each time a payment is submitted to CMS or a request for a final demand is made, with the caveat that an RRE would not be charged this fee twice if it first requests a final demand and subsequently makes a payment.

Fines for Failing to Report Would Be Discretionary, and MSPEA Would Create Reporting Safe Harbors

Some RREs have concerns about the existing language in MMSEA that sets mandatory fines at \$1,000 per day, per claim, for payments that are not properly reported to CMS. MSPEA would make this fine discretionary and require CMS to consider "the intentional nature of the violation" before determining the amount of any fine. If enacted, this provision of MSPEA may help protect RREs from incurring large fines in cases where a good-faith effort was made to report a payment to CMS, but for some reason the report was deficient.

MSPEA would also require the Secretary of HHS to promulgate rules creating safe harbors. If RREs follow all of the steps outlined in these rules, they would not be fined for failing to report a payment to CMS. The bill requires the Secretary to solicit proposals for safe harbors and then give the public an opportunity to comment on the proposed rules before they become effective. MSPEA would also impose a three-year statute of limitations, which would begin running as soon as CMS is notified of a payment to a Medicare beneficiary.

Exemption for Small Payments

MSPEA would permanently exempt payments of less than \$5,000 from triggering a repayment obligation, making it possible to settle small claims without having to go through the process of determining whether Medicare has any claim to all or part of the payment. This change would provide an opportunity to settle smaller claims, especially if Medicare would otherwise have the right to recover part of the payment, and may also make RREs and plaintiffs' attorneys feel more comfortable releasing payments to Medicare beneficiaries.

Conclusion

Although the enactment of MSPEA may alleviate many of the difficulties that some RREs anticipate from the implementation of the MMSEA reporting requirements, the bill is still being considered by congressional committees. It is unknown at this time whether the proposed MSPEA will be enacted. Since RREs must report all payments made after October 1, 2010, RREs may want to continue developing procedures to comply with the current MMSEA reporting requirements, while tracking the progress of MSPEA in Congress. RREs and others affected by the MMSEA reporting requirements should also consider any further guidance from CMS, as its guidance has evolved over time.

For Further Information

If you have any questions about this *Alert* or would like more information about recent MMSEA developments, please contact [Sharon L. Caffrey](#); [Kenneth M. Argentieri](#); [Christopher L. Crosswhite](#); [Philip R. Matthews](#); any of our [Products Liability and Toxic Torts attorneys](#), [Insurance and Reinsurance attorneys](#), [Healthcare attorneys](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. H.R. 4796.
2. For more information on MMSEA and the reporting obligations it creates, see "Medicare Secondary Payer Statute: New Reporting Requirements for Products Liability and Toxic Tort Clients," by Sharon Caffrey, Christopher

Crosswhite and John Lyons, *New Jersey Law Journal* (December 8, 2009), available at http://www.duanemorris.com/articles/new_medicare_statute_products_liability_3500.html.