

ALERTS AND UPDATES

Medicare Secondary Payer Statute: Reporting Obligations Delayed, but Uncertainty Remains

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Recently, the Centers for Medicare and Medicaid Services ("CMS") stated that the obligation to report payments made to Medicare beneficiaries as a result of verdicts or settlements resolving liability claims has been postponed until January 1, 2011.¹ Although this delay is likely to provide some relief for the many organizations that have been preparing to comply with the reporting obligations for payments made since January 1, 2010, it also creates uncertainty that may potentially complicate litigation and settlement negotiations for the next year.

Medicare Secondary Payer Reporting Is Delayed for Nine Months

On February 26, 2010, CMS posted on its website a new version of its *MMSEA [Medicare, Medicaid, and SCHIP Extension Act of 2007] Section 111 Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Worker's Compensation User Guide* for Responsible Reporting Entities ("RREs").² The *User Guide* states that RREs will not have to begin making quarterly reports to CMS until the first quarter of 2011. Reports during the first quarter of next year will include information on payments made from October 1, 2010, through December 31, 2010. The new *User Guide* states that it is now optional for RREs to report payments made prior to October 1, 2010, but it does not provide guidance on when it would be appropriate for RREs to report payments made during the first three quarters of 2010. RREs should be aware that Medicare's right of recovery for any medical care it paid for still remains in effect—only the date by which RREs must begin reporting payments to CMS has changed.

CMS has stated that RREs should be registered and in the process of testing their systems to ensure that their data files are compliant with CMS's complex specifications. All payments made to Medicare beneficiaries after October 1, 2010, must be included in the first data file, which RREs will be required to submit to CMS during a specific week in the first quarter of 2011. RREs that have not yet registered with CMS may want to do so promptly and also begin testing to ensure that their systems are compliant with CMS, since MMSEA Section 111 provides for a \$1,000-per-day-per-claim penalty against RREs that do not make a timely report.

Litigation and Settlements: Uncertainty Is Likely to Continue

Until CMS's unexpected announcement that MMSEA Section 111 reporting requirements have been delayed for nine months, considerable uncertainty had existed in litigation, especially in settlement negotiations where the defendant determined that a report to CMS was necessary. CMS has provided limited guidance on when payments are reportable, especially for those involved in complex products liability and toxic tort litigation. This uncertainty has at times led to disagreements between plaintiffs' attorneys and defense counsel, often complicating settlement negotiations. Some RREs and their attorneys hope that CMS will use the nine-month delay to develop detailed guidance that will allow all parties to understand when a payment is reportable.

Many defense counsel have settled cases since the beginning of 2010 under the belief that payments to Medicare beneficiaries must be reported to CMS. Settlement agreements in these cases often included provisions setting forth the reporting obligations and procedures that would be undertaken by the parties to ensure that Medicare liens are fully satisfied. RREs are no longer under an obligation to report these payments to Medicare, since payments made only after October 1, 2010, must be reported. However, many settlement agreements reached during January 2010 and February 2010 required plaintiffs' counsel to determine the amount of any stake Medicare has in the settlement, and to ensure that Medicare is paid before disbursing any of the settlement proceeds to the plaintiff.

Medicare's Right of Recovery Still Remains in Effect

Although the deadline for RREs to report payments to CMS has been delayed, Medicare's right to recover the amounts paid for care from plaintiffs' counsel and defendants still remains in effect during all of 2010. In December 2009, Medicare filed suit against plaintiffs' attorneys and defendants in the U.S. District Court for the Northern District of Alabama, claiming that plaintiffs' counsel and defendants are liable under the Medicare Secondary Payer statute for all medical expenses that Medicare conditionally paid on behalf of 907 plaintiffs who were Medicare beneficiaries.³ Under the Medicare Secondary Payer statute, the United States can collect double-damages if plaintiffs' counsel or defendants do not reimburse Medicare in a timely fashion. Due to the potentially substantial risks to defendants who fail to ensure that Medicare's liens are satisfied, defendants may wish to consult with legal counsel knowledgeable in Medicare law if plaintiffs' counsel refuses to satisfy Medicare's liens before disbursing settlement funds to their client.

Conclusion

Some defendants are optimistic that the nine-month delay in implementing the MMSEA Section 111 reporting requirements will give CMS time to develop guidance that would permit RREs, attorneys and other involved parties to better understand their obligations under Section 111. Developing procedures that clarify RREs' obligations, especially in the products liability and toxic torts area, may ensure that all payments to Medicare beneficiaries are properly reported to CMS and should allow for litigation and settlement negotiations to proceed as smoothly as possible.

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](#); any of our [Products Liability and Toxic Torts attorneys](#), our [Insurance and Reinsurance attorneys](#), our [Healthcare attorneys](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. 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.
2. The new *User Guide* is available at: <http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3022210.pdf>.
3. *United States v. Strickler*, No. CV-09-PT-2423-E, Complaint filed December 1, 2009 (N.D. Ala.).