NEWSSTAND

Extraterritorial Applicability of Medicare Secondary Payer Reporting Requirements to Foreign Insurers

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All US insurance companies that make direct claims payments to US residents who are Medicare beneficiaries are, or will soon be, required by Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173) (Section 111) to report these payments to the Centers for Medicare & Medicaid Services (CMS). Although CMS states that Section 111 applies equally to foreign carriers, it is not clear whether the requirements will be enforceable against them.

Background
Section 111 added new mandatory reporting requirements for group health plans (GHPs) (42 U.S.C. 1395y(b)(7)) and for Liability Insurance (including Self-Insurance), No-Fault Insurance, and Workers' Compensation plans, collectively referred to as "non-group health plans" (NGHPs) (42 U.S.C. 1395y(b)(8)), pertaining to when claims involving Medicare beneficiaries need to be reported to CMS. Section 111's purpose is to reinforce Medicare's status as a secondary payer for coordination of benefits purposes, and to prevent Medicare from paying for the same services for which reimbursement is available under other plans.

Section 111 became effective July 1, 2009, and all GHP "responsible reporting entities" (RREs) were required to begin reporting electronically by October 1, 2009. NGHP RREs are currently in a testing period and all will be required to begin reporting between April 1, 2010 and June 30, 2010, based on a schedule determined by CMS's Coordination of Benefits Contractor.

There are many policy, procedural and technical issues still to be resolved relating to Section 111, and CMS has been accepting emailed comments and questions and holding frequent "Town Hall Teleconferences" in its effort to identify gaps and ambiguities in its published guidelines. Some of the more important issues have been addressed by CMS in a series of Alerts.

Applicability to Foreign Insurers
One of the most interesting unresolved legal issues is whether Section 111 gives CMS the right to assert extraterritorial jurisdiction on foreign liability insurance companies who make direct claims payments to US residents. Although Section 111 itself is silent regarding its potential applicability to foreign carriers, CMS has stated that Section 111 applies to them. CMS's December 29, 2009 Alert ("Registration Guidelines for Liability Insurance (Including Self-Insurance), No-Fault Insurance, or Workers' Compensation Responsible Reporting Entities (RREs) Who Are Foreign Entities") states:

Foreign entities will follow the same registration and reporting procedures, and have the same responsibility and accountability for data as domestic RREs. The delay in registration for foreign entities does not change the July 1, 2009 reporting date requirements associated with "Ongoing Responsibility for Medicals" (ORM) or the January 1, 2010 reporting date requirements associated with "Total Payment Obligation to Claimant" (TPOC) amounts.

The CMS Alert further "encourages foreign entities that do not have a U.S. TIN [Tax Identification Number] or EIN [Employer Identification Number] to apply at this time for a U.S. EIN" in order to be ready to register by April 1, 2010 for reporting, which will presumably be required of them later in 2010.

Analysis

There is a long-standing presumption in the US against extraterritorial jurisdiction, dating back to the Supreme Court case *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), and federal courts have consistently followed Foley in denying extraterritorial application of statutes without a clear congressional expression of intent to the contrary. Notwithstanding CMS's understandable interest in having Section 111 apply to all insurers, wherever located, it is not clear how the law could be enforced against a foreign insurer that pays claims to US residents but that has no official US presence. If the insurer does not market its products within the US or to US residents, even being publicly identified as a scofflaw might have little effect on its business. The issue would become more complicated, however, and the range of potential consequences successively more difficult to predict, in the following scenarios:

- A Section 111 violator domiciled in another country could have a US branch, or a related legal entity that is domiciled or does business in the US
- The foreign insurer could have a broker or agent doing business in the US
- The foreign insurer could have, under the same corporate umbrella, a technically unrelated sister entity that does business in the US
- The foreign insurer could use a US-based third party administrator to process its claims[1]

In any of the foregoing fact situations (and undoubtedly others), even if the courts were to deny extraterritorial application of Section 111, it remains to be seen whether a foreign insurer might be subject to indirect enforcement of Section 111 through an affiliate or agent. In addition, a foreign insurer that markets its products in the US, which might otherwise be inclined to ignore its Section 111 reporting responsibilities, might be justifiably concerned that a technical violation of Section 111 would result in its name appearing on a list of violators and tarnish its reputation.

Conclusion

The possible extraterritorial application of Section 111 is but one of the difficult legal questions that will need to be addressed by CMS, and perhaps the courts, in the months and years ahead. All foreign insurers who pay claims to US residents would be well advised to monitor CMS's forthcoming public releases for further guidance on these complex issues.

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[1] Section 111 provides the TPAs are RRes only for GHPs, and not for NGHPs.