PUBLICATION

Significant Changes Announced in Mandatory Reporting of Liability Settlements, Judgments and Payments

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After several false starts on September 30, the Centers for Medicare & Medicaid Services (CMS) posted a notice on October 3 that included new guidance and several alerts outlining significant changes in mandatory reporting of liability settlements, judgments and payments.

Background: CMS had been actively working on several last-minute policies in advance of the October 1 compliance deadline for the mandatory reporting of all liability settlements involving a Medicare beneficiary, The agency issued several significant alerts amending the Section 111 requirements as a part of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), and last provided updated guidance through the User Guide version 3.2 issued in August 2011.

The latest notice highlighted the newest changes and contained the following information:

- An alert delaying Section 111 reporting for certain liability insurance (including self-insurance) total payment obligation to the claimant settlements, judgments, awards, or other payments;
- Policy guidance related to Exposure, Ingestion, and Implantation Issues and December 5, 1980;
- An alert related to Qualified Settlement Funds, under Section 468B of the Internal Revenue Code (IRC); and
- A policy memorandum for liability insurance (including self-insurance), on the acceptance of the treating physician's certification, and its impact on the issue of protecting Medicare's interests with respect to future medicals.

I. Delay in Section 111 Reporting Requirements

The most significant change is the introduction of new reporting thresholds which will provide much needed relief to many of the mandatory reports. The alert delayed Section 111 reporting for certain liability insurance (including self-insurance), TPOC settlements, judgments, awards, or other payments. The implementation date is based on the TPOC amount and is illustrated in the following table:

TPOC Amount	TPOC Date On or After	Section 111 Reporting Required in the Quarter Beginning
TPOCs over $100,000	October 1, 2011	January 1, 2012
TPOCs over $50,000	April 1, 2012	July 1, 2012
TPOCs over $25,000	July 1, 2012	October 1, 2012

All TPOCs over minimum threshold	October 1, 2012	January 1, 2013

The content of this alert supersedes the content of Version 3.2 of the User Guide. CMS did not change any other MMSEA Section 111 implementation dates.

II. Policy Guidance Related to Exposure, Ingestion, and Implantation Issues

CMS has struggled with the application of the December 5, 1980 Medicare Secondary Payor date application in the context of Section 111 MMSEA reporting. For cases which involve continued exposure to an environmental hazard, continued ingestion of a particular substance, or implantation of a medical device, CMS has received several industry comments pointing out the issues associated with the prior interpretations.

The much anticipated policy guidance sets forth three situations in which Medicare will assert a recovery claim against settlements, judgments, awards, or other payments, and the MMSEA Section 111 mandatory reporting rules must be followed:

- Exposure, ingestion, or the alleged effects of an implant on or after December 5, 1980 is claimed, released, or effectively released.
- A specified length of exposure or ingestion is required in order for the claimant to obtain the settlement, judgment, award, or other payment, and the claimant's date of first exposure plus the specified length of time in the settlement, judgment, award or other payment equals a date on or after December 5, 1980. This also applies to implanted medical devices.
- A requirement of the settlement, judgment, award, or other payment is that the claimant was exposed to, or ingested, a substance on or after December 5, 1980. This rule also applies if the settlement, judgment, award, or other payment depends on an implant that was never removed or was removed on or after December 5, 1980.

In addition, the guidance sets forth three criteria where Medicare will not assert a recovery claim and therefore, no MMSEA Section 111 reporting is required. For further details on the policy guidance, click **here**.

III. Limited MMSEA Reporting Exception to Qualified Settlement Funds (QSFs)

In response to questions brought up during the April 6, 2011 conference call regarding Responsible Reporting Entity (RRE) requirements during bankruptcy proceedings, CMS announced a limited MMSEA Section 111 reporting exception related to QSFs. The exception applies to RREs for certain TPOC settlements, where funds have been paid into a QSF under Section 468B of the IRC prior to October 1, 2011. MMSEA reporting is not required when all of the following are met:

- The settlement, judgment, award or other payment is a liability insurance (including self-insurance) TPOC amount; where there is no Ongoing Responsibility for Medicals (ORM) involved; and
- The settlement, judgment, award, or other payment will be issued by a QSF under Section 468B of the IRC, in connection with a state or federal bankruptcy proceeding; and
- The funds at issue were paid into the trust prior to October 1, 2011.

The CMS alert makes note that this exception only applies in these limited circumstances when all of the above criteria are met. Therefore, it is likely that if one of these criteria is not satisfied (i.e. the payment funds at issue were paid into the trust after October 1, 2011), the exception does not apply. **Click here** to see the alert.

IV. Acceptance of Treating Physician's Certification/Liability Medicare Set Aside

CMS issued a policy memorandum stating that when the beneficiary's treating physician certifies in writing that the treatment related to the liability insurance (including self-insurance) settlement has been completed as of the date of the settlement and that future medical items/services will not be required, Medicare considers that particular settlement satisfied. If the beneficiary receives additional settlements, he or she must obtain a separate physician certification. What is most interesting about this policy memorandum is the introduction of the concept of a Liability Medicare Set Aside, a concept previously not provided for by CMS. **Click here** to see that policy memorandum.

V. Further Guidance Expected

CMS has also noted that further changes and alerts should be expected, some coming before the end of the month. While liability and workers' compensation TPOCs under $5,000 are not required to be reported prior to January 1, 2013, CMS has indicated that beginning this month, CMS will implement an option to pay a fixed percentage of certain physical trauma-based liability cases with settlement amounts of $5,000 or less. RREs can expect information on this option to be posted as an alert this month, on the MSPRC website.

VI. Compliance Reminders

Yet again, on the Town Hall teleconference to discuss MMSEA reporting, CMS admonished listeners regarding the compliance obligations. On the last Town Hall call on September 21 (the transcript of which has not yet been released), CMS stated that incorrect reporting was considered "non-compliant." RREs must be very careful in ensuring that all fields are accurately reported. RREs who have delegated reporting should be careful to ensure their agents are paying careful attention to details.

Please see our prior Baker Donelson alert on this subject here.

If you have questions or need any additional information about how the changes in mandatory reporting of liability settlements and judgment payments may affect you or your company, contact your Baker Donelson attorneys or any of the following attorneys in the Firm's health or litigation practice groups.