

Section 111 Insurer Reporting and MSP Reimbursement

In 2009, we assembled a multidisciplinary team of attorneys from our Insurance and Health Care practices to address the implementation of new Medicare reporting requirements for liability insurers (including self-insured entities), no-fault carriers, and workers' compensation plans (collectively, Non-Group Health Plans or NGHPs) and Group Health Plans (GHPs) under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). MMSEA amended the Medicare Secondary Payer (MSP) statute. Since 1980, the MSP statute has designated NGHPs and GHPs as primary payers when coordinating benefits with Medicare. "Section 111 reporting" facilitates the Centers for Medicare & Medicaid Services' (CMS) recovery of past medical expenses (what are called "conditional payments" in MSP regulations), or its refusal to pay future medical costs, of Medicare beneficiaries who receive NGHP or GHP payments for the same bodily injuries or emotional distress.

CMS was slow to build its Section 111 program and lulled many into a minimum necessary compliance mode. Recent developments in Section 111 law and agency enforcement require that casualty and health care insurers review and update their Section 111 practices to recognize their MSP liabilities and minimize their MSP risks. These developments include recognition by a growing number of federal courts that Medicare Advantage (MA) Plans and Medicare Part D Prescription Drug Plans, just like CMS, may enforce their Medicare secondary payer status and, if necessary, under the private right of action granted by the MSP statute, sue NGHPs and GHPs for reimbursement of the Medicare plans' primary payment of Medicare items and services.

MA Plans are private, managed care companies that compete for Medicare beneficiaries with the Original, fee-for-service Medicare program administered by the federal government. Part D Plans, also private entities, offer prescription drug coverage to Medicare beneficiaries insured by either Original Medicare or MA Plans. The new reality is that both MA Plans and Part D Plans are stepping successfully into the secondary payer recovery shoes of CMS; and with Section 111 reporting information shared by CMS, they are demanding reimbursement of mistaken primary payments from casualty and health care insurers.

We assist clients in understanding their Section 111 reporting and MSP reimbursement obligations, implementing effective regulatory compliance programs, structuring claims settlement to address MSP obligations, and, when necessary, appealing Medicare reimbursement demands. We work with both domestic and overseas casualty and health care insurers on a full range of matters, including:

- Mediating Section 111 reporting and MSP reimbursement obligations between insured and claimant;
- Negotiating settlement terms that (i) ensure claimant delivery of data required for Section 111 reporting, (ii) address responsibility for Medicare reimbursement, and (iii) avoid duplicative payment liability to claimant and Medicare;
- Addressing liability for future medical expenses and whether to use, and seek CMS approval for, a Medicare Set-Aside (MSA) arrangement;
- Identifying the correct "responsible reporting entity" (RRE) for settlements involving insured risk pools, self-insured retentions, excess liability insurance, mass torts, and/or trust administration;
- Rejecting CMS's misclassification of casualty insurance products (e.g., Accident & Health) as GHPs;
- Analyzing the extraterritorial reach of Section 111 to overseas carriers;
- Responding to Medicare reimbursement demands, including litigating administrative appeals;
- Self-reporting MSP compliance challenges, including the misreporting of Section 111 information and the underpayment of primary payer responsibility; and
- Anticipating and answering reimbursement demands of Medicare Advantage and Medicare Part D prescription drug plans.

Contact Us

Visit our Section 111 Bulletins for additional information and to review our archive of Section 111 publications covering major MSP developments since 2009, including "Setting the Record Straight: Dispelling Medicare Myths in Tort Settlements" published by *DRI's for the Defense* and "Upping Your Game – Medicare Secondary Payer Developments Say It's Time".

Kathryn Bucher, Chair
202.719.7530 | kbucher@wiley.law

Published Articles & Section 111 Bulletins

Our Health Care Practice publishes Section 111 Bulletins that provide timely updates addressing notable Town Hall discussions and other Section 111 developments. To sign up to receive these updates, [click here](#).

For any questions about the Bulletins, please contact, Kathryn Bucher.