



TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

CLIENT UPDATE

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**MEDICARE'S SECTION 111 REPORTING PROGRAM:
*UPDATES ON MASS TORT REPORTING,
REGISTRATION TIMELINE, AND MORE***

A recent amendment to the Medicare Secondary Payer Statute requires that certain insurance arrangements report to the Secretary of the Department of Health and Human Services information the Secretary deems necessary to facilitate proper coordination of benefits with the Medicare program.

Compliance with the "Section 111 Rules" (a reference to the statutory cite) is now well under way. Reporting entities were asked to register with Medicare by September 30, 2009. Starting January 1, 2010, companies (or their designated agents) must take training on data submission procedures and be prepared to actively report to Medicare by April 1, 2010 at the latest. [\(A complete Section 111 Resource Guide is available.\)](#)

In response to the many substantive and technical questions regarding compliance with the reporting requirements, the Centers for Medicare and Medicaid Services ("CMS") continues to provide updates and clarifying instruction for liability providers, workers' compensation plan administrators, and others.

CMS has recently convened a Working Group to address the reporting challenges associated with Mass Tort Claims. CMS also held its monthly Town Hall-style teleconference on September 30, 2009. This Client Update shares the important news and highlights from these events.

Status of Reporting Rules for Mass Tort Claims

The Mass Tort Working Group has been meeting weekly by teleconference to exchange ideas on how to adapt mass tort litigation work flows to the new Section 111 reporting rules. Some mass tort practitioners held out hope that CMS will exempt mass tort cases from the reporting rules, but this is highly unlikely to occur. CMS is firmly of the view that there is no inherent basis to exclude mass tort cases and payments from the Section 111 program. That said, CMS is willing to consider some modification of the reporting rules to accommodate some of the peculiar challenges and practices encountered by mass tort litigants.

The challenging features of mass tort litigation which may potentially impact the ability of liability insurers (including self-insurers) to report the required data elements in a timely fashion include:

- Not knowing with specificity the product(s) at issue in the litigation by type or manufacturer, nor the date, time and location of alleged exposure (this is especially true for premises-based exposure claims).
- Payments are sometimes made to settlement Funds or Trusts rather than to an individual plaintiff and counsel directly and therefore, the entity making payment may not know until late, if at all, the identity of the ultimate recipient of the settlement funds, and the actual amount paid.
- Delay in identifying the recipient leads to an inability to accurately and timely determine if the recipient is a Medicare beneficiary.
- If settlement dollars are paid into a Fund, to be administered by a court or law firm, the time to disburse those funds may be months later, well beyond the CMS mandated time parameters for Section 111 reporting.

CMS is therefore inviting comments and suggestions on how to modify – not eliminate – the Section 111 program for mass tort litigation. CMS may consider extending the deadline to report the details of a mass tort settlement to enable the Responsible Reporting Entity (RRE) to gather the necessary detail, and perhaps couple that with a requirement that the RRE

“alert” CMS to the fact that a mass tort settlement has been reached.

CMS is particularly aware of the challenges for reporting on settlements that are currently “in the pipeline”: that is, settlements have been agreed to, release papers may already have been exchanged, the check(s) may already have been issued and transmitted. Compiling the data needed to report these “pipeline” payments may be extremely difficult. CMS is aware of these issues and may offer some reporting relief.

While some have suggested that plaintiffs’ attorneys or Settlement Fund administrators have superior knowledge of the ultimate payment details and should, therefore, become the designated RRE and be made to report, this is very unlikely to occur. Constrained by the statutory definitions, CMS representatives do not believe it is feasible to compel plaintiffs’ attorneys or other Funds to assume reporting obligations.

Practice Tip: Faced with the prospect of reporting, it is incumbent on all practitioners to be aware of, plan for, and facilitate the reporting obligations under Section 111. When engaging in settlement negotiations – starting now – insurers and self-insurers are strongly advised to make the disclosure of information needed for Section 111 reporting a term and condition of the settlement. Plaintiff’s counsel should be required to disclose: the settlement recipient’s full name, Medicare number, social security number, DOB, full and complete address (down to the zip code plus four digits); complete name and address of the individual attorney of record – a law firm name, alone, is not good enough; and, identifying information, including full name, address, social security number for all claimants (in the event the Medicare beneficiary is deceased).

Challenges Presented by the “Product Liability” Fields (Field Numbers 58-63) on the Record Layout

CMS representatives have also spent considerable time with the Mass Tort Working Group discussing the portion of the Section 111 report form that calls for disclosure of information about products that may have caused or contributed to cause an injury, illness or incident (field numbers 58-63 on the claim input file detail record). The information requested (type of product, brand and generic name, model number, serial number) is not always known during the claims handling process, even at the time of settlement/payment, and this is especially true in the Workers’ Compensation setting.

CMS representatives explained why this information is important: certain product events are associated with common injury allegations and well recognized patterns of medical services, costs and expenses. Accordingly, knowing the product details, down to the level of model and serial number, helps to facilitate a more tailored Mandatory Secondary Payer recovery process. CMS can more readily identify the medical payments that are apt to be subject to recovery and reimbursement. Acknowledging the challenges this represents to certain RREs, CMS is accepting comments and suggestions for revising the “product liability” reporting fields. Suggested modifications under review include:

- Restricting the event circumstances that would require reporting of product details;
- Limiting the level of detail that will need to be reported;

- Eliminating these fields from the Workers’ Compensation claim reports;
- Changing the Field nomenclature: move away from the broad reference “product liability” to more precise and limiting terminology.

CMS representatives emphasize that these are just some suggestions that CMS is considering internally; no decisions have yet been made.

Other Highlights from the September 30, 2009 Town Hall Call

1. Registration may continue beyond September 30, 2009.

CMS confirmed that it will not impose a penalty on companies that did not meet the registration deadline of September 30, 2009. If companies have not yet registered, they should do so promptly and they absolutely must be ready to begin the testing phase in 2010 Q1 and be ready to move into full production mode Q2.

2. Finalizing the definition of RRE.

On July 31, 2009, CMS issued an ALERT and circulated DRAFT language that provided additional detail regarding who/what entity is a Section 111 responsible reporting entity (RRE) for liability insurance (including self-insurance), no fault insurance, and Workers’ Compensation. CMS invited public comment on the proposed language. When final, this language will replace the existing Section 7.1 of the Non-Group Health Plan User Guide regarding “Who Must Report.” As of September 30, 2009, CMS representatives indicated that

CMS is still reviewing the comments; a date for final agency approval was not offered.

3. What to do when a plaintiff refuses to provide HICNs and/or SSNs.

Some reporting entities have advised CMS that they are having difficulty in obtaining HICNs and SSNs from claimants. On August 24, 2009, CMS provided model language to assist reporting entities in obtaining this information. During the September 30, 2009 teleconference, CMS clarified that it does not expect reporting entities to use the model language routinely, but rather, the model language should be used as part of an ongoing effort when it becomes necessary to impress on claimants their regulatory obligation to cooperate with Medicare's coordination of benefits and recovery efforts. CMS realizes that some claimants simply won't cooperate and will refuse to sign the model language acknowledgement. Reporting entities should always document their files as to the efforts made to obtain required information from claimants.

Reporting tip: Even if individual claimants refuse to cooperate, the information needed to report (HICN and SSN) may appear on physician and provider bills (particularly the uniform claim form). RREs are expected to consult all available sources for data to satisfy their reporting obligations.

4. Important issues still under review.

Hospital Write-Offs – CMS is continuing to meet with industry representatives and is actively working on final language that will clarify the reporting obligations for bill write-offs and other service recovery practices

which commonly occur in hospital and health care settings.

Clinical Trials – CMS indicates they are still reviewing the reporting obligations for clinical trial sponsors who assume responsibility for payment of expenses if trial subjects suffer injury or incur expense arising out of their participation in a clinical trial.

CMS is still considering the reporting obligations in these situations. We will update you as soon as reporting decisions are announced.

As the time for active reporting of liability settlements, payments and awards draws near, Tucker Ellis & West LLP will continue to share important Section 111 program updates as they become available. We also invite your questions and comments as we strive to provide the guidance you need to be successful.

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