



Young Lawyers Section

WHAT IS MMSEA?



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To understand what the MMSEA is, one must first understand what a Medicare Set Aside is. Medicare Set Asides¹, at the present time, are required in Workers' Compensation cases and necessitate a claimant to set aside a portion of their settlement to pay for future Medicare covered injury care before Medicare pays dollar one. A recent law passed by Congress and a corresponding appropriation of money² for enforcement of the MSP may play a role in the decision by the government of whether to extend the concept of Medicare Set Asides to liability settlements. On December 29, 2007, President Bush signed into law the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA").³ The purpose of this legislation

(specifically Section 111), as expressed by its sponsor Chuck Grassley (R-IA), is to

"[C]ontinue to improve accountability in the Medicare Program. There are situations when Medicare is not the primary payer for a beneficiary's health care, but it is currently difficult to identify these situations. This legislation will improve the Secretary's ability to identify beneficiaries for whom Medicare is the secondary payer by requiring group health plans and liability insurers to submit data to the Secretary."⁴

Part of this Act, Section 111, extends the government's ability to enforce the Medicare Secondary Payer Act.⁵ As of July 1, 2009, an applicable plan (liability insurer, self insurer, no-fault insurer and workers' compensation carriers) shall determine whether a claimant is a Medicare beneficiary ("entitled") and if so provide certain information to the Secretary of Health and Human (hereinafter "Secretary") Services when the claim is resolved.⁶

Under MMSEA, the insurers described above, must report the identity of the Medicare beneficiary to the Secretary and such other information as the Secretary deems appropriate to make a determination concerning coordination of benefits, including any

applicable recovery of claim.⁷ Failure of an applicable plan to comply with these new requirements will incur a *civil money penalty of \$1000 for each day of noncompliance* with respect to each claimant.⁸ These new reporting requirements will make it very easy for CMS to review settlements to determine whether Medicare's interests were adequately addressed by the settling parties.

The problem with the MMSEA is that it raises quite a few questions. One author has raised a very important question with this legislation and that is what the definition of entitlement is.⁹ The Act does not define that term and so does an insurer just have to report those currently entitled to Medicare (a Medicare beneficiary)? Does an insurer have to report someone that has applied for Social Security Disability who will have future eligibility since they will have future entitlement? Another very important question is what will need to be reported besides the identity of the Medicare beneficiary. The determination of what information will be required to be reported will eventually be cleared up once announced by the Secretary. In addition, there is no clarity concerning the manner, frequency or the form of the reporting requirements. Of more importance is the question of why does the government want this data and what will they do with it. The most important question for trial lawyers is whether this will impact how liability settlements are negotiated and whether it signals the consideration of a future requirement to enforce set asides in liability settlements.

Through the collection of this data, the government will now have the information at their disposal to examine liability settlements to see if the burden is being shifted to Medicare when a secondary payer exists. If that is the intent, collection of information to review settlements where Medicare's interests are not adequately considered, the government could use that information to decide to pursue enforcement of the set aside requirement outside of workers' compensation settlements. Creating a reporting obligation, providing for stiff fines and appropriating money for the purpose of enforcing the new Act seems to signal the government's seriousness regarding this issue. For the time being, there are no answers to all of these questions and only time will tell the impact of the MMSEA on the settlement of personal injury cases.

¹ According to CMS, all parties to a workers' compensation settlement "have significant responsibilities under the Medicare Secondary Payer (MSP) laws to protect Medicare's interests when resolving WC cases that include future medical expenses."

² CMS goes on to say that "[t]he recommended method to protect Medicare's interests is a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) ..." See CMS website at http://www.cms.hhs.gov/WorkersCompAgencyServices/08_setasiderelatedtopics.asp.

³ The Act provides an appropriation of \$35,000,000 for enforcement. "(c) Implementation - For purposes of

implementing paragraphs (7) and (8) of §1862(b) of the Social Security Act, as added by subsection (a), to ensure appropriate payments under title XVIII of such Act, the Secretary of Health and Human Services shall provide for the transfer, from the Federal Hospital Insurance Trust Fund established under §1817 of the Social Security Act (42 U.S.C. 1395i) and the Federal Supplementary Medical Insurance Trust Fund established under section 1841 of such Act (42 U.S.C. 1395t), in such proportions as the Secretary determines appropriate, of \$35,000,000 to the Centers for Medicare & Medicaid Services Program Management Account for the period of fiscal years 2008, 2009, and 2010.”

⁴ Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173). This Act was passed by the House on December 19, 2007, and by a voice vote in the Senate on December 18, 2007.

⁵ Congressional Record, U.S. Senate, December 18, 2007, S15835, paragraph 9.

⁶ Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Matthew L. Garretson, *One More Thing to Worry About in Your Settlements: The Medicare, Medicaid and Schip Extension Act of 2007* (2008)



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