



August 11, 2009

RE: IMPORTANT MEDICARE SET ASIDE INFORMATION.

Dear Fellow Trial Lawyer:

In cases involving Medicare beneficiaries, attorneys for both the plaintiff and defendant are required to report certain information to the Centers for Medicare and Medicaid Services (CMS). In addition, any case settlement or judgment must reimburse Medicare where the Trust Fund has made conditional payments for medical costs. Under the Medicare Secondary Payer Act, attorneys have been settling cases involving liability claims without completing a Medicare Set Aside (MSAs) to account for future medical costs. However, attorneys representing claimants in workers' compensation cases have been preparing MSAs on a case-by-case basis.

It has come to our attention that some defense firms and insurance providers are now claiming that CMS requires MSAs in liability cases pursuant to Section 111 reporting requirements included in the Medicare, Medicaid & SCHIP Act of 2007 (MMSEA), Public Law No. 110-173. This is **false**. Section 111 contains reporting requirements for responsible reporting entities¹ (RREs) only. Section 111 does not impact or change the requirements for plaintiffs' attorneys.

Moreover, statements from CMS, and other federal entities, make clear that the agency does not require set-asides for liability claims. Since the MMSEA's passage, CMS has held several Town Hall teleconferences to discuss the Section 111 requirements. During the March 24, 2009 call, Barbara Wright, CMS' Acting Director of the Division of Medicare Debt Management, made several statements reiterating that Section 111 has no impact on liability MSAs.² For example:

- In response to a question as to whether liability set-asides will be required under Section 111, she said "the point is the set-aside process is totally separate from the Section 111 reporting process. As we've said in more than one call we don't anticipate changing our routine recovery process." (Transcript, pg. 24)
- When explaining that worker's compensation agreements use a formal review process which makes set-asides recommended, she said that was in contrast to liability agreements. Liability "does not have the same formal review process although our regional offices will consider review of proposed liability set-aside amounts depending

¹ The term, RREs, encompasses defendants and insurers, but it does not include plaintiffs' attorneys.

² The entire Town Hall transcript can be found at:
<http://www.cms.hhs.gov/MandatoryInsRep/Downloads/MMSEA111March24NGHPTtranscript.pdf>.

on their particular work load and whether or not they believe significant dollars are at issue.” (Transcript, pg. 24).

In addition, CMS also has released several Alerts explaining Section 111, which do not indicate any intent to require MSAs for liability claims. For example:

- “Unless you are a business entity which qualifies as [a required reporting entity (RRE)] for purposes of Section 111, you do not need to initiate any specific actions in connection with Section 111.” (CMS Alert, 2/23/09).³
- “The new Section 111 requirements do not change or eliminate any existing obligations under the MSP statutory provisions or regulations.” (CMS Alert, 2/23/09).

Moreover, the Congressional Research Service (CRS) provided Congress with an “objective and non-partisan analysis” analysis of the MMSEA. As there was no legislative history regarding the bill, the CRS research report is the most reliable analysis of the MMSEA, including the Section 111 reporting requirements.

CRS’ analysis of the Section 111 reiterates that it is a reporting requirement, and makes no mention of the need for set-asides in liability cases. The Section 111 analysis states, in part:

This provision requires an insurer or third-party administrator for a group health plan (and in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary) to (1) secure from the plan sponsor and participants information required by the Secretary for the purpose of identifying situations where the group health plan is or has been a primary plan to Medicare, and (2) submit information specified by the Secretary. If an insurer or third-party administrator for a group health plan fails to comply, then a \$1,000 per day civil monetary penalty will be imposed for each individual for which information should have been submitted.⁴

If CRS believed that the legislative language implies any Congressional endorsement of liability set-asides, it would have been included in this analysis.

We hope this information will be useful in your settlement negotiations. We will keep you apprised of any changes regarding this issue. In the meantime, if you have additional questions, please contact Linda Lipsen, Senior Vice President for Public Affairs at 202-965-3500 x. 305.

Sincerely,

Anthony Tarricone
President

³ This CMS Alert can be found at: <http://www.cms.hhs.gov/MandatoryInsRep/Downloads/RevisedSection111022309.pdf>.

⁴ The entire CRS report can be found at: http://assets.opencrs.com/rpts/RL34360_20080207.pdf.