

## Section 111 Insurer Reporting and MSP Reimbursement

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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), which 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 its 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 counsel 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:

- CMS's long-awaited imposition of civil money penalties (CMPs) on GHPs and NGHPs that fail to meet their Section 111 reporting obligations, as detailed in the agency's Final Rule issued in October 2023; and
- Recognition by a growing number of federal courts that Medicare Advantage (MA) Plans and Medicare Part D Prescription Drug Plans, 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, armed with the Section 111 reporting information shared by CMS, are demanding reimbursement of mistaken primary payments from casualty and health care insurers.

We work closely with our colleagues in the firm's nationally recognized Insurance Practice to provide Section 111 advice on novel and complex Section 111 issues to both domestic and overseas casualty and health care insurers. We also assist clients in stepping back and understanding their underlying Section 111 reporting and MSP reimbursement obligations, implementing effective regulatory compliance programs to ward off the imposition of CMPs, structuring claims settlements to address MSP obligations, and, when necessary, appealing Medicare reimbursement demands.

Our Section 111 client matters have included:

- Mediating Section 111 reporting and MSP reimbursement obligations between insurers and claimants;
- Negotiating settlement terms that (i) ensure claimant delivery of data required for Section 111 reporting, (ii) address responsibility for Medicare reimbursement, and (iii) avoid an insurer's 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.

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## Published Articles & Section 111 Bulletins

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We publish Articles and Section 111 Bulletins that provide updates on notable Section 111 developments. To sign up to receive these updates, [click here](#). To review our extensive archive of Section 111 publications covering major Section 111 and Medicare Secondary Payer developments since 2009, including "Setting the Record Straight: Dispelling Medicare Myths in Tort Settlements" published by *DRI's for the Defense*, [click the links below](#).