

ALERT

Section 111 Bulletin: CMS Town Hall Teleconference and Recent Alert Further Muddy the Waters on Section 111 Reporting and Mass Torts Issues

October 25, 2011

On October 19, 2011, the Centers for Medicare & Medicaid Services (CMS) held a Town Hall teleconference for Non-Group Health Plans (NGHPs) related to implementation of Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007. Representatives from the Agency took questions concerning the four guidance documents released by CMS on or around September 30, 2011, but were unwilling to venture much beyond the printed words. See our prior Bulletin for more detail on each of these Alerts.

One of the Alerts addresses so-called "mass torts" issues, more specifically, insurer reporting of liability settlements involving allegations of "continued exposure to an environmental hazard or continued ingestion of a particular substance" on or after December 5, 1980, the effective date of the Medicare Secondary Payer (MSP) statute ("Mass Tort Alert"). Several callers questioned an insurer's obligation to report mass torts settlements in which allegations of post December 4, 1980 exposure are made with respect to multiple defendants collectively, but discovery fails to establish such exposure for at least certain defendants individually. CMS's answers were less than clear but implied that CMS will not be pulled into a review of the evidence but will instead determine if reporting is required from a review of the allegations and terms of the ultimate release. The Alert states that only when all of the following three criteria are met will a Responsible Reporting Entity (RRE) not be required to report, and CMS will not assert a recovery claim:

Authors

Kathryn Bucher
Partner
202.719.7530
kbucher@wiley.law

Practice Areas

Health Care
Insurance
Section 111 Insurer Reporting and MSP
Reimbursement

- All exposure or ingestion ended, or the implant was removed before 12/5/1980; and
- Exposure, ingestion, or an implant on or after 12/5/1980 was not claimed and/or specifically released; and,
- There is either no release for the exposure, ingestion, or an implant on or after 12/5/1980; or where there is such a release, it is a broad general release (rather than a specific release), which effectively releases exposure or ingestion on or after 12/5/1980. The rule also applies if the broad general release involves an implant.

One caller specifically questioned the equity of requiring an insurer to report a payment settling allegations of exposure spanning the period 1940 through 1990 when the insurer's policy only provided coverage through 1979. CMS replied that it "still has a claim" (presumably a potential claim for conditional payments although CMS did not say against which entity or individual) because the claimant made and settled allegations of post December 4, 1980 exposure. CMS explained that whether the insurer would need to report the payment would be determined by working through the reporting exception above. CMS also has stated on prior calls that an insurer can have an obligation to report but not have an obligation to reimburse Medicare for conditional payments. In fact, CMS stated in this call that determinations of conditional payment liability would be made, if needed, "on the back end." To the extent reporting is required where an insurer's policy ended before December 5, 1980, the fact that coverage ended before the effective date of the MSP statute would, at a minimum, have to be considered by CMS "at the back end"; however, this process still would result in significant, unjustified burdens with respect to pre-December 5, 1980 policies.

Another caller asked CMS to define the term "broad general release" used in the quoted language from the Alert, but CMS representatives declined to provide further clarification of this phrase, saying that the "memo speaks for itself."

A third caller posed a scenario where a claimant sued multiple defendant employers but did not allege post-December 1980 exposure. One of the defendants, however (and presumably as a defense), argued there was post-December 1980 exposure. CMS implied that it would not consider the argument advanced by the other defendant as an "allegation of post-December 5, 1980 exposure" that triggered reporting, although there remains no bright line rule for this situation.

When one caller suggested that CMS hold a separate call to discuss challenging reporting scenarios, CMS instead directed anyone with a specific mass torts issue to email the question to the Resource Mailbox with "12/5/80 memo" noted in the subject line.

The call did not shed any more light on unanswered questions concerning the limited reporting exception announced on September 30, 2011 for TPOC (total payment obligation to a claimant) amounts where a settlement, judgment, award or other payment will be issued by a Qualified Settlement Fund (QSF) in connection with a bankruptcy proceeding and the funds at issue were paid into the trust before October 1 of this year. In particular, CMS did not address questions about reporting and MSP liability in pending cases, such as bankruptcy proceedings where there are active appeals challenging the approval of plans involving

the creation of a trust that may not be funded pending resolution of appeals. Further, there was no acknowledgement of continuing concerns about who should and will serve as the RRE in these situations. This point remains highly controversial in bankruptcy cases. Similar issues concerning the identification of the proper RRE also may exist in other settings where an insurer payment may later be used (by a trust account or policyholder, for instance) to fund individual settlements with specific claimants.

The discussions during the teleconference reinforced continuing confusion over Section 111 reporting, particularly in the mass torts context. The recent Alerts clearly have not resolved all of the outstanding concerns of the insurance industry.

Our Section 111 Team routinely covers the Section 111 NGHP teleconferences held most months by CMS, and we send periodic Alerts to our clients addressing notable Town Hall discussions and other Section 111 developments. We also maintain a searchable electronic database of town hall transcripts back to October 2008. Please let us know if you would like more information about any of the Section 111 topics discussed in this Alert. You also may access our Section 111 webpage and other Section 111 Bulletins and articles we have published at www.wileyrein.com/section111.