

ALERT

Section 111 Bulletin: Section 111 Town Hall Call Again Addresses MSP Recovery Rights of Medicare Advantage Plans Against Casualty Insurers

March 26, 2012

On March 22, 2012, the Centers for Medicare & Medicaid Services (CMS) held a Section 111 Town Hall Teleconference for Non-Group Health Plans (NGHPs) to discuss policy and technical questions related to Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). The Agency dug in its heels on its longstanding interpretation of Medicare Advantage (MA) Plan recovery rights under the Medicare Secondary Payer (MSP) statute, discussed the possibility of exempting Section 111 reporting where an amended complaint removes allegations of bodily injury and/or emotional distress, and chided Responsible Reporting Entities (RREs) for excessive use of the "no injury" (NOINJ) code.

MSP Recovery Rights of Medicare Advantage Plans

There was renewed discussion on the call about the recovery rights of MA Plans against NGHPs. MA Plans are established under Part C of Medicare and offer a managed care alternative to traditional Medicare coverage under Parts A and B. CMS informed one caller that although the Medicare Secondary Payer Recovery Contractor (MSPRC) does not pursue conditional payment recoveries on behalf of MA Plans, CMS does share information from Section 111 reporting with the plans so they can pursue their own recoveries. Another caller pointed out that although Department of Health and Human Services regulations may assume that MA Plans have the same recovery rights as the government under traditional Medicare, some courts have held that MA Plans in fact do not have the same rights under the MSP statute as the government when pursuing recovery claims against

Authors

Kathryn Bucher
Partner
202.719.7530
kbucher@wiley.law

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primary payers. As we have reported previously, the U.S. District Court for the Eastern District of Pennsylvania recently joined a growing number of federal courts in rejecting a MA Plan's assertion of a federal private right of action against casualty insurers under the MSP laws. CMS responded with the Agency's standard retort that, regardless of the mixed case law on this issue, the MA Plans do have rights to recover their past payments from NGHPs. This question will likely be the subject of additional litigation because MA Plans will begin receiving more information from CMS as Section 111 reporting gradually increases in volume, and thus they will begin pursuing recoveries from primary payers on a larger scale.

Amended Complaints that Remove Allegations of Bodily Injury and Emotional Distress

In response to a question about a settlement where the only reference to bodily injury or emotional distress was in the original, and now outdated, complaint, CMS confirmed that it is still considering an exemption from reporting where the original complaint alleges bodily injury or emotional distress, but the complaint is amended to remove such allegations. Although CMS is concerned about granting reporting exceptions that may permit plaintiffs, defendants, and insurers to evade liability under Section 111 and the MSP statute, court filings and judicial oversight should provide sufficient assurance of accuracy and truthfulness to counter such concerns.

Excessive Use of the NOINJ Code

The representative on the call from the CMS Coordination of Benefits Contractor (COBC) reported that a significant number of RREs accepting ongoing responsibility for medical expenses (ORM) are misusing the NOINJ code, which apparently was designed only for use where a settlement releases the carrier from liability for medical expenses but the plaintiff has not actually suffered physical injury or emotional distress and, accordingly, there are no applicable ICD-9 diagnosis codes. Instead the COBC representative stated that RREs are using the NOINJ code as a default code instead of taking the time to match the plaintiff's injury to an available ICD-9 code. The representative warned RREs to immediately stop using the NOINJ code as a default code and referred RREs to section 11.2.5.1 of the current version of the NGHP User Guide for more information on proper use of the code. Although some RREs may be using this code inappropriately, its alleged widespread use is more likely indicative of the lack of meaningful reporting exceptions for claims that do not involve allegations of or give rise to payments for bodily injury or emotional distress. Under current Section 111 guidance, broad general releases alone (without underlying allegations of bodily injury or emotional distress) can trigger reporting. Because such releases are an industry standard among liability carriers, CMS is requiring many insurers to bear the costs of reporting when their settlements will never trigger CMS MSP recovery rights. CMS's enactment of a reporting exception for claims payments that do not compensate for or specifically release bodily injury or emotional distress (which it has said it is considering) would go a long way toward reducing the confusion over use of the NOINJ code.

The next Town Hall Teleconference will be held on April 24, 2012, and will address both technical and policy issues.

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.