James E. Logan & Associates, Ltd.

Settlement Consultants

Executive Summary

First in a Series

<u>*Medicare, Medicaid, and SCHIP Extension Act of 2007*</u>
(MMSEA)

On December 29, 2007, President Bush signed into law an important Act that will impact liability settlements and their negotiations. The Act is titled <u>Medicare, Medicaid, and SCHIP Extension Act of 2007</u>. It is an extension of the Social Security Act (42 U.S.C. 1395) that was passed by Congress in the early 1980's. The portion of the Extension Act that relates to liability settlements can be found on pages 15 through 22, Section 111, Medicare Secondary Payor. The specific references to liability settlements begin on page 18, Section 8. Attached is a copy of the new Act.

BACKGROUND: When the original Social Security Act was passed, there was a requirement that parties to settlement must protect Medicare's interests, as Medicare was secondary to any other available health care plan. Protecting Medicare's interests included reimbursement for any "conditional payments" made by Medicare, as well as protecting Medicare from payment of future treatment that they might otherwise have to make. For twenty years, the Act was difficult to enforce. In the late 1990's, the Secretary of Health and Human Services established an administrative agency known as the Centers for Medicare and Medicaid Services, commonly referred to as CMS. Among other things, Secretary Thompson directed CMS to promulgate rules for the enforcement of the Medicare Secondary Payor statute (42 U.S.C. 1395y(b)). Beginning in the early part of this decade, CMS created rules that primarily related to workers' compensation settlements. Essentially, this required repayment of any conditional payments made, as well as the creation of Medicare Set-Aside Allocations, commonly called MSA's. Attached is a document titled <u>Medicare Set-Asides At a Glance,</u> which provides an overview of the rules established by CMS for workers' compensation settlements.

A few years ago, CMS created a Director's position that oversees liability settlements. The position was to promulgate rules that would apply to liability settlements and to enforce those rules. The fact that Congress passed the Extension Act suggests the assignment was difficult to achieve without further legislative support. Similar difficulty was experienced when CMS attempted to promulgate rules for workers' compensation settlements.

PROVISIONS OF THE NEW ACT: The primary provisions that apply to liability settlements can be found on Pages 15 to 22 under Section 111, Medicare Secondary Payor. The pertinent portions of the Act begin on Page 18, Section 8.

Section (8)(A) States that 18 months after the enactment of this paragraph, an applicable plan shall -
- (i) determine if a claimant is entitled to Medicare benefits; and
- (ii) if the claimant is entitled, submit information described in subparagraph (B) in a form and manner specified by the Secretary.

DISCUSSION: This section of the Act does not describe when the claimant shall be deemed to be eligible for Medicare benefits. This is a significant issue. In the workers' compensation rules, CMS

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states that the person must be eligible for Medicare at the time of settlement or within 30 months from the date of settlement. This will be an important requirement to note once rules are published regarding liability settlements.

Section (8)(B) REQUIRED INFORMATION - provides that required information is –

(i) the identity of the claimant for which the determination under subparagraph (A) was made; and

(ii) such other information as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim.

DISCUSSION: (B)(ii) has no specificity as to what information should be sent, where it should be sent, and when. It seems likely CMS will follow their current rules for workers' compensation claim settlements; however, there will be some differences because of the issues surrounding liability settlements and workers' compensation settlements.

There are two important terms contained in the second part of this section. The first is *coordination of benefits*. That is a term most often found in health and auto no-fault policies and it simply means that Medicare is secondary to any and all other health care plans of every type as defined in the Medicare Secondary Payor statute.

The second term is *recovery claim*. The Medicare Secondary Payor statute gives Medicare a statutory claim (not a lien) that enables them to collect 100% of the conditional payments made to a Medicare beneficiary. While under certain circumstances the claim might be negotiable, as a general rule our experience has been CMS, on behalf of Medicare, seeks to recover 100 cents on the dollar. This is an area of the statute that is and has been in effect for decades, but rarely enforced except with workers' compensation settlements. This is an area that all parties to a settlement, including the attorneys, need to pay immediate attention to, as the recovery provisions of the Medicare Secondary Payor Act are already in effect and referred to in the Act and could result in double damages being assessed if Medicare's interests are not protected by the settling parties.

Section (C) TIMING – provides that information shall be submitted within a time specified by the Secretary after a claim is resolved through a settlement, judgment, award, or other payment (regardless of whether or not there is a determination or admission of liability).

DISCUSSION: This may be the most problematic section of the new Act. It certainly gives rise to a multitude of questions. When a settlement agreement is reached between parties or when a judgment or award is affirmed, it is generally held that the settlement is final. The Medicare Secondary Payor statute holds that all parties to a settlement must protect Medicare's interests and they are held accountable until such a time as Medicare determines its interests have been protected. In the workers' compensation arena this is a unilateral decision by CMS without provisions for appeal. The Extension Act specifies the information shall be submitted post settlement (or after a claim has been resolved through a judgment or award). The degree to which one or more parties are negligent and liable in the accident is unimportant to CMS and all parties to the settlement are required to protect Medicare's interests.

Questions surface concerning how to handle small settlements of liability disputes, due to modest policy limits, multiple defendants, or large non-Medicare damages, so that Medicare's interests are

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adequately protected. One need only think of a settlement involving a quadriplegic whose only recovery can come from a $100,000 policy. Attorney fees, costs, non-Medicare damages, such as lost income, and non-economic losses will have to be taken into account. It is unclear what formula CMS will apply when the cost of past and future care is so high and the settlement so low. We also don't know what CMS will do if the judgment or award is within the policy limits but is too small to protect Medicare's interests? Will Medicare be able to approach the defendant's insurer and require them to pay more than the actual judgment? Unquestionably there are many more questions looming that will only be answered after the rules are published.

Section (E) ENFORCEMENT – provides that an applicable plan that fails to comply with the requirements of subparagraph (A) shall be subject to a civil penalty of $1,000 for each day of non-compliance with respect to each Claimant. This penalty is in addition to the penalties outlined in the Medicare Secondary Payor statute.

DISCUSSION: Clearly such severe penalties will motivate all parties to a settlement to make every effort to comply with the requirements of subparagraph (A).

CONCLUSION

This Act will unquestionably impact the manner in which liability claims involving Medicare eligible claimants/plaintiffs are negotiated and arranged. Not until the Secretary of Health and Human Services, through CMS, promulgates rules, will it be possible to know exactly how this Act will be addressed. It seems reasonable to anticipate that CMS will take a similar approach as they have with workers' compensation settlements. There will likely be some differences in the rules due to the nature of workers' compensation settlements verses liability settlements.

Through our dealings with CMS and in handling Medicare Set-Aside Allocations over the past five years, we have learned that defendants and/or their insurers can find no protection through indemnity and hold harmless agreements contained in settlement documents. Medicare has a statutory right to assert claims against any settlement involving a Medicare beneficiary who has or will receive Medicare benefits. All parties to the settlement remain obligated to protect Medicare's interests.

Although subparagraph (A) does not require the submission of information for eighteen months (July 1, 2009), it is important that the parties to a settlement consider the establishment of processes to determine if a claimant is eligible for Medicare benefits before settlement agreement is reached and if so, whether or not any conditional payments have been made. If they have, the settlement agreement should include a provision for reimbursement to Medicare. Keep in mind that the Medicare Secondary Payor statute has been in effect for more than two decades. The Extension Act has drawn specific attention to liability claims and recovery actions and does not delay or excuse the compliance with the requirement to reimburse Medicare for conditional payments. Failure to do so could result in penalties being assessed up to and including double damages.

For more information or assistance, please contact Jim Logan at 248-865-3900. James E. Logan & Associates, Ltd. periodically publishes Executive Summaries for distribution among its clientele and others with whom it does business with the understanding that information contained herein should not be acted upon without first seeking independent legal advice.

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