THE SMART ACT AND ITS IMPACT UPON MEDICARE CLAIMS BY PRO SE CLAIMANTS

THE SMART ACT

The 2013 Smart Act was motivated by a mutual frustration of plaintiff attorneys, defense attorneys, and insurers in attempting to settle claims in which the claimant was a Medicare beneficiary. It was difficult to settle cases without knowing exactly how much Medicare was owed, the process of finding out the conditional amount was long and laborious, and the final demand wouldn't be issued until after CMS was provided notice of a settlement.

The SMART Act will allow insurers to settle claims more efficiently, particularly with pro se litigants. To take advantage of these amendments, insurance companies must register to use the Medicare Secondary Payer Recovery Portal (MSPRP). The MSPRP allows many of the steps previously completed through written and telephone correspondence to be completed online, including obtaining the final Medicare lien amount. This guide will assist insurers in registering for the MSPRP, obtaining the final lien amount, and taking advantage of other changes enacted through the SMART Act.

Determination of Reimbursement Amount Through CMS Website

The Act requires the Secretary to maintain and make information available online for all claims that relate to a potential settlement, judgment, award or other payment.[1] The MSPRP fulfills this mandate, and can be accessed at https://www.cob.cms.hhs.gov/MSPRP/.[2] Insurers can access the beneficiary's account through the portal.[3] The accounts must be "as complete as possible" and include the provider name, diagnosis codes, dates of service and conditional payment amounts.[4] Accounts must also accurately identify which claims and payments are related to a potential settlement, judgment, award or other payment.[5] The Secretary must update all information within 15 days after the date of payment.[6]

The MSPRP is designed to accelerate the resolution of liability insurance, no-fault insurance, and workers' compensation Medicare recovery cases by giving attorneys, insurers, beneficiaries, and third party administrators the ability to access and update case-specific information online.[7] The MSPRP allows users to perform the following actions electronically through the portal:

- Submit proof of representation and consent to release authorization requests and supporting documentation;
- Request updates to the conditional payment amount and copies of a current conditional payment letter;

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[1] Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012, 112 P.L. 242, 126 Stat. 2374, 2376.
[2] *Medicare Secondary Payer Recovery Portal*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cob.cms.hhs.gov/MSPRP/ (last visited July 22, 2013).
[3] 126 Stat. at 2376.
[4] Id.
[5] Id.
[6] Id.
[7] *How to Get Started on the Medicare Secondary Payer Recovery Portal (MSPRP)*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cob.cms.hhs.gov/MSPRP/help/howTo/getStarted.htm (last visited July 22, 2013).

- Dispute claims included in a conditional payment and upload supporting documentation; and
- Submit case settlement information and upload supporting documentation.

Additionally, the MSPRP permits the insurer to download a statement of reimbursement amounts on payments for claims relating to a suit, and, if certain procedures are followed, use that statement as the final conditional payment amount subject to reimbursement.[8]

Registering for the Medicare Secondary Payer Recovery Portal

To utilize the MSPRP, the insurer must create a corporate account which will allow multiple people within an organization to work cases related to multiple beneficiaries.[9] Each user on the corporate account must be designated as an account representative, account manager, or account designee.[10]

An account representative is someone who has the legal authority to bind the organization to a contract and the terms of MSPRP requirements.[11] The account representative will be able to initiate account registration, receive the "Personal Identification Number" for the account, provide the PIN to the AM, approve and amend the Profile Report, and bear the ultimate accountability for the information submitted on the MSPRP.[12] The account representative cannot access the portal as a user, so this individual should not be someone who needs the ability to access and work accounts.[13] Furthermore, a user can play only one role on the MSPRP, requiring the account representative and account manager to be different people.[14]

After determining who will serve as the account representative, the insurer is ready to register with the MSPRP. The individual who completes the registration will need the EIN for the corporation, corporation name, business mailing address, and contact information for the account representative.[15] An EIN/TIN can only be used once for a single corporate account registration on the MSPRP.[16] Once step one of the registration process is complete, a letter will be sent to the account representative containing the PIN and MSPRP Account ID, both of which the account manager will need to complete setup.[17]

Each MSPRP account must have an account manager, designated by the account representative.[18] The account manager should be the individual who will manage other user's access to cases on a day-to-day basis.[19] The account manager is also responsible for updates to

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[8] 126 Stat. at 2376.
[9] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Id.
[15] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7. This can be accomplished by going to https://www.cob.cms.hhs.gov/MSPRP and clicking New Registration.
[16] Id.
[17] Id.
[18] Id.
[19] Id.

the account information.[20] Account managers will be authorized as users on the site, and may complete tasks related to recovery cases on the MSPRP, invite other users to register, and function as account designees.[21]

Once the PIN and MSPRP Account ID have been received and the account manager has been chosen, the account manager can log in to the MSPRP and complete step two of the account setup.[22] Only the account manager may complete the account setup process.[23] During the account setup process, the account manager must: confirm the information provided during initial registration; enter the account ID and associated PIN; enter their own name, account mailing address, phone number, and email address; accept the user agreement and privacy policy; and create their own login id and password for the MSPRP.[24]

Once the account manager has succe3ssfully completed account setup, he or she may begin sending invitations to employees to register as account designees.[25] Account designees assist the account manager with the case recovery process.[26] Corporate accounts may have up to 100 account designees.[27] An account designee must be invited by an account manager to obtain a login id and gain access to the account on the MSPRP.[28] After registering and logging on to the site, account designees will be presented with a list of accounts to which the account manager has granted them access.[29]

After the information provided during account setup has been processed and validated, the account representative or account manager will receive an e-mail notification containing the Profile Report.[30] The account representative must review, sign, and return the Profile Report within 60 business days.[31] The account will be automatically deleted on the 60th business day if the Profile Report is not received within the timeframe.[32]

Use of Timely Web Download as Basis for Final Conditional Amount

After creating an account and uploading the appropriate authorization, the insurer should obtain a Consent to Release Authorization from the pro se litigant, allowing the insurer to access the litigant's account.[33] The signed authorization can be uploaded through the MSPRP.[34] After

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[20] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7.
[21] Id.
[22] Id.
[23] Id.
[24] Id. Individuals who are already registered in the Workers' Compensation Medicare Set-aside Portal or Coordination of Benefits Secure Website do not need to re-register; their login information will work for the MSPRP. While an individual cannot have multiple roles on different MSPRP accounts, an individual can have different roles on the WCMSP or Section 111 COBSW sites.
[25] Id.
[26] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7.
[27] Id.
[28] Id.
[29] Id.
[30] Id.
[31] Id.
[32] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7.
[33] Id.
[34] Id.

uploading the authorization, the insurer should provide Medicare with notice of an anticipated settlement date.[35] Notice may not be provided any sooner than 120 days prior to the anticipated settlement.[36] After providing notice, the secretary will have 65 days, termed the "secretarial response period," to make updates and changes to the account.[37] While 65 days is the standard secretarial response period, the response period can be extended an additional 30 days if the secretary determines additional time is required to address claims for which payment has been made.[38] Once the secretarial response period has elapsed, the "protected period" begins.[39] The last statement downloaded during the protected period and within the three days prior to the date of settlement or judgment constitutes the final conditional amount subject to reimbursement.[40]

If there is a discrepancy with the statement of reimbursement amount, the insurer must provide documentation of the discrepancy and a proposed resolution to the discrepancy.[41] The Secretary must then make a determination within 11 business day after receipt of such documentation as to whether or not there is a reasonable basis to include or remove claims on the statement of reimbursement.[42] If the Secretary determines within the 11 day period there is a reasonable basis to include or remove claims on the statement of reimbursement the Secretary must respond in a timely manner by agreeing to the proposed resolution or by providing documentation showing with good cause why the proposal is not being accepted and establishing an alternate discrepancy resolution.[43] If the Secretary determines within the 11 day period there is not a reasonable basis to include or remove claims on the statement of reimbursement, the proposal is rejected.[44] If the Secretary fails to make a determination in the 11 day period, the insurer's proposal to resolve the discrepancy is accepted.[45]

The above detailed process is not, however, an appeals process.[46] The Act separately requires the Secretary to promulgate regulations to establish a right of appeal and an appeals process for any determination regarding payment for an item or service for which the Secretary is seeking to recover conditional payments from an applicable plan.[47]

***Final conditional amounts will not be available through the MSPRP until October 2013.*[48]

Single Threshold Amount Exception

[35] 126 Stat. at 2375-76.
[36] Id.
[37] Id. at 2377-78.
[38] Id.
[39] CENTERS FOR MEDICARE AND MEDICAID SERVICES, *supra* note 7.
[40] 126 Stat. at 2377.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Id.
[46] 126 Stat. at 2377.
[47] Id. at 2378.
[48] Mark Popolizio, Esquire, *SMART Act Update: CMS to Release Proposed SMART Act Regulations this Fall*, ISO CROWE PARADIS MSP NEWS BRIEF, July 2013, at 2, http://img.en25.com/Web/ISO/%7B04906073-ac3d-4ccb-af75-219eaf590529%7D_Official_ISO_Crowe_Paradis_July_2013_Newsletter.pdf.

The insurer should learn the annual single threshold amount each year to ensure it does not reimburse Medicare in circumstances where the total amount due to the claimant is less than the single threshold amount. The annual single threshold amount is the amount which a settlement, judgment, award or other payment must meet to trigger a requirement of the primary plan to repay the conditional payments to Medicare.[49] If the single threshold amount is not met, the plan is not required to reimburse Medicare for conditional payments.[50] The single threshold amount is to be an estimated average amount which Medicare will expend in collection of conditional payment reimbursements. For purposes of the single threshold amount, any responsibility for ongoing expenses for medical payments are to be disregarded, and the amount utilized for calculation of the threshold shall include only the cumulative value of the medical payments made in the settlement.[51]

The SMART Act requires the Secretary to establish by November 15 of the preceding year an annual single threshold amount for settlements, judgments, awards, or other payments arising from liability insurance.[52] The single threshold amount will first be applicable in 2014, thus the 2014 amount should be announced by November 15, 2013.[53]

Statute of Limitations

Once a settlement is reached, Medicare should be notified immediately to start the clock on the statute of limitations. The SMART Act instills a three year statute of limitations on actions brought by the U.S. government seeking reimbursement for conditional payments.[54] The statute of limitations begins on the date CMS receives notice of a settlement, judgment, award, or other payment.[55] Thus, the sooner CMS is notified of the settlement, the sooner the insurer will be certain that it has settled all of its liabilities that will arise from a claim. This amendment went into effect on July 10, 2013.[56]

Civil Penalties

The SMART Act also seeks to lessen civil monetary penalties associated with reporting requirements.[57] Previously, a compulsory $1,000 fine was imposed on any party for failing to comply with the reporting requirements for each day of noncompliance per claimant.[58] The Act amends this legislation by making the penalty and the penalty amount discretionary.[59] Pursuant to the Act, the Secretary is responsible for taking a series of steps to determine what actions will and won't be subject to penalty.[60] These steps will be completed in September 2013.[61]

Ethical Considerations

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[49] 126 Stat. at 2378.
[50] Id.
[51] Id. at 2379.
[52] Id.
[53] 126 Stat. at 2379.
[54] Id. at 2381.
[55] Id.
[56] Id.
[57] Id. at 2380.
[58] 42 U.S.C. § 1395y(b)(8).
[59] 126 Stat. at 2380.
[60] Id.
[61] Id.

There is a rising trend among state ethical committees to hold releases which require a plaintiff attorney to hold an insurer harmless null and void.[62] Amongst those states are North Carolina, Wisconsin, Indiana, Tennessee, Ohio, and Florida.[63] Typically states take this stance because of a belief the attorney takes on an inappropriate financial interest in a settlement that includes such a provision, as well as causing the plaintiff attorney to provide financial assistance to clients.[64] The same trend crosses over to agreements regarding liens or subrogation interests under the MSP Act.[65] To avoid the need for such agreements, insurers should request claimants execute a Section 111 Reporting Verification form as part of discovery, or at the very least inquire about the individual's status as a potential beneficiary under oath at a deposition.[66] Furthermore, while Medicare set-asides are not "required" in the liability setting, the Third Circuit has held that workers' compensation regulations apply equally to third-party liability claims.[67] As such, a prudent insurer will investigate the need for a Medicare set-aside early on, and continue to monitor and consider any extenuating factors that many impact Medicare status.[68] Ultimately, the responsibility to ensure the settlement is in compliance with the MSP statute falls on both parties as there are negative consequences for both sides if the settlement is not in compliance; Medicare is more likely to pursue to the insurance company than the individual litigant in pursuit of reimbursement.[69]

ITS IMPACT UPON MEDICARE CLAIMS BY PRO SE CLAIMANTS

When settling a claim with a pro se litigant, it will be necessary for the carrier to take on the role of plaintiff attorney in notifying Medicare through the Coordination of Benefits Contractor and working with the Medicare Secondary Payer Recovery Contractor to obtain the final conditional amount and ensure the lien is settled. The changes and benefits of the MSPRP provided by the SMART Act will prove to be an incredibly valuable tool in this process.

Pro Se Claimants Factors to Consider:[70]

- Medicare Beneficiaries – if the claimant is a Medicare beneficiary, Medicare should immediately be notified of the claim through the Coordination of Benefits Contractor.
- Medicare Advantage beneficiary – If the claimant has a Medicare Advantage beneficiary, the plan should be put on notice of the claim. Medicare Advantage organizations have a private right to recover through the MSP Act which entitles them to recovery and double damages in the same way as Medicare if a lawsuit and settlement or judgment are not reported pursuant to Section 111.

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[62] Aaron Frederickson, *The Medicare Secondary Payer Act: Ethical Considerations in Settling Cases*, BENCH & BAR OF MINNESOTA (June 13, 2012), http://mnbenchbar.com/2012/06/secondary-payer-act/.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Id.
[68] Aaron Frederickson, *The Medicare Secondary Payer Act: Ethical Considerations in Settling Cases*, BENCH & BAR OF MINNESOTA (June 13, 2012), http://mnbenchbar.com/2012/06/secondary-payer-act/.
[69] Id.
[70] Aaron Frederickson, Alice M. Sherren, Todd Scott, Remarks during the Minnesota Lawyers Mutual Presents: The Medicare Secondary Payer Act: Ethical Considerations in Settling Cases (July 25, 2013).

An insurer should prioritize finding out whether or not a claimant is a Medicare or Medicare Advantage beneficiary early on in the litigation process so the Coordinator of Benefits can be notified. The Coordination of Benefits Contractor will then forward the information to the Medicare Secondary Payer Recovery Contractor, who will assess the conditional payment amount subject to reimbursement, as well as any set-aside amounts if necessary. While a Medicare Set-Aside is never required, it is required that Medicare's interests be protected in the case of recovery for future medical expenses.[71] A Medicare Set-Aside Trust is the simplest way to ensure those interests are protected.[72]

Medicare Set-Aside Factors:[73]

- Age – If the claimant is nearing the age of 65, the insurer should consider whether there is a possibility the individual will still be treating when they become Medicare eligible, or if there are future medical expenses which will be incurred after the claimant becomes a Medicare beneficiary.
- Severity of Injuries – After two years on disability, an individual becomes Medicare eligible. If a claimant is so severely injured as to create the possibility the claimant will be on disability for two years, the insurer should consider creating a Medicare Set-Aside Trust for future medical expenses.
- Life Care Plan – If a claimant has a life care plan, or specific care is expected to be necessary throughout the remainder of the claimant's life, a Medicare Set-Aside may be necessary.
- Worker's Compensation – If any workers' compensation is anticipated, a Medicare Set-Aside should also be considered.

In the case of pro se litigants, the burden of structuring the settlement will also fall on the insurer. This will require obtaining the conditional payment amount. This can be done through the previously described MSPRP steps, or by telephone or written correspondence. The prudent insurer will structure the settlement to either require money in the amount of the conditional payment lien be designated for Medicare in the release, allowing the insurer to issue the check to Medicare as well as the claimant, or require evidence of a zero-balance conditional payment lien as a condition of the settlement.[74] While the insurer can require the plaintiff hold the insurer harmless for any future Medicare claims, the practicality of enforcing such a provision is limited.[75] Furthermore, a plaintiff may not understand the potential ramifications of failing to reimburse Medicare, such as losing benefits, and such a misunderstanding could give rise to future litigation.[76]

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[71] Id.
[72] Id.
[73] Id.
[74] Id.
[75] Id.
[76] Aaron Frederickson, Alice M. Sherren, Todd Scott, Remarks during the Minnesota Lawyers Mutual Presents: The Medicare Secondary Payer Act: Ethical Considerations in Settling Cases (July 25, 2013).

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