

MSA Insider



Getting You to Settlement

December 2010 - Year in Review

Your Premiere Compliance Solution

Medicare Secondary Payer Compliance - YEAR IN REVIEW

This has been a tumultuous year for Medicare Secondary Payer Compliance and it shows no signs of slowing down. This article will review some significant developments in Medicare Secondary Payer Compliance over the past year, actions MedAllocators has taken in response and what to watch for in 2011.

MMSEA, Section 111 Reporting – Delays and More Delays

2010 started with an expectation that Section 111 reporting would start on April 1, 2010. However, on February 16, 2010, CMS announced it would again delay implementation until January 1, 2011. And then just last month, CMS announced that while mandatory reporting would start for workers' compensation and no-fault as of January 1, 2011, mandatory reporting for liability would be delayed until January 1, 2012 (Voluntary reporting is still encouraged by CMS). The mandatory look back date for reporting Liability settlements, judgments and awards has also changed to October 1, 2011.

MedAllocators' Actions

MedAllocators continues to adapt and update our Section 111 mandatory reporting platform, MA Reporter, to address these changes and educate our clients. We have already begun to actively query CMS to determine Medicare eligible claimants and have provided this information to our clients so they can begin to proactively address these files in regard to lien resolution and settlement needs. When CMS is finally ready to fully implement Section 111 reporting MedAllocators will be ready.

What to Watch for in 2011

Importantly, we will see how well CMS's Section 111 reporting system technically works and if there are errors how quickly these errors are resolved. Also, CMS still has not fully addressed the reporting of Mass Torts claims and it is expected more detailed answers will be provided in the coming year.

Medicare Set-Asides – High Cost of Prescription Drugs

The story of Medicare Set-Asides (MSAs) this year has been the significantly increased amount for prescription drugs. It is generally agreed that CMS practices in pricing of prescription medications since June 2009 has been in many cases unreasonable. Most notably has been the pricing of medications which are intended for short-term or occasional use, for the claimant's lifetime. We have advocated CMS take an approach that considers medical standards, evidence-based information from Thomson Reuters DRUGDEX, FDA/manufacturer guidelines and other reasonable medical sources. CMS did issue a memo in May advising non-Medicare covered medications should not be included in MSAs, although its affect has been mixed given CMS's broad definition of Medicare covered medications.

MedAllocators' Actions

MedAllocators responded to the May 2010 CMS memo by reviewing all counter-highers received post-June 1, 2009 to determine whether reductions were appropriate and with the client's approval submitted these to CMS for re-pricing.

MedAllocators' NEWS:

Thank you to all of our valued customers for a great 2010!

We look forward to assisting you for all of your compliance needs in 2011!

Have a Safe and Enjoyable Holiday Season!

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While the May 2010 policy was a good start, much more must be done. MedAllocators will continue to advocate for policy changes, but the fact remains if one wants an MSA approved by CMS, one must work within the procedures and policies set by CMS, reasonable or not. Consequently, MedAllocators' has developed a multi-pronged approach to addressing the high cost of prescription drugs in MSAs:

MedAllocators Addendum: Soon after MSA prescription amounts began to increase, MedAllocators introduced an Addendum to our MSA reports in late 2009 which we continue to use today. The Addendum allows our client to know prior to the MSA submission to CMS medications and treatments which may result in a counter-higher by CMS so as to take appropriate action.

Client Education: We have educated our clients both on an individual basis as well as through formal presentations (in person and via webinars) on how these changes have affected MSA pricing and how we can work together to limit the MSA amount.

Worksheets and Sample Forms: MedAllocators provides worksheets for clients to use to identify open-ended medications and treatments which could lead to higher MSA amounts. Further, sample letters to physicians are available to address these medication issues.

MedAllocators Focused On-Site Nurse Review: If so requested and permitted under law, MedAllocators will set up an RN visit with the treating physician to meet face-to-face in developing an outline of future medical treatment and prescription medications.

MedAllocators Resolution Unit: We have recently introduced a resolution unit within MedAllocators with telephonic and field staff trained in negotiating with medical professionals to resolve MSA cost drivers.

What to Watch for in 2011

The big question is whether CMS will become more reasonable in allocations for prescription drugs in MSAs. Beyond this issue lies what perhaps may be an even larger one, namely MSAs in liability claims. Thus far CMS has officially recognized a Liability MSA and allowed its regional offices discretionary review of liability MSAs. However, thus far no formal policy has been issued like what exists for workers compensation. We will watch for any further guidance in 2011.

Medicare Conditional Payments – New Forms and Procedures

The recovery of Medicare conditional payments by CMS's contractor MSPRC has not changed significantly in the past year. In 2009 MSPRC introduced some new forms and procedures and after some initial bumps, the process has become smoother in 2010.

MedAllocators' Actions

Following the introduction of the new forms and procedures by MSPRC we have educated our clients regarding their use for resolving conditional payments. Also, as a result of the volume of conditional payment evaluations we handle, MSPRC provided us a single contact person to communicate with in regard to resolution of conditional payment issues. This has cut down the time our staff must spend waiting to get through to MSPRC resulting in quicker turnaround time for conditional payment investigation and resolution.

What to Watch for in 2011

The primary purpose of Section 111 mandatory reporting is to prevent Medicare from paying when it should not be paying and to seek recovery of Medicare conditional payments for which Medicare claims another entity is responsible. Consequently, with the initiation of reporting in 2011 we will be watching how CMS and MSPRC uses this massive amount of information to increase its efforts and recovering conditional payments.



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Significant Cases Involving the Medicare Secondary Payer Act

There have been some significant cases over the past year in regard to the Medicare Secondary Payer act which are of note:

U.S. v. Stricker - Clarifies Statutes of Limitations for Medicare Secondary Payer Recovery in Liability

On December 1, 2009 the federal government filed suit in U.S. District Court for the Northern District of Alabama against corporate defendants and their insurers and the attorneys who represented claimants in a class action case which settled in 2003. The settlement involved 907 claimants who were Medicare beneficiaries and for which the government claimed it was owed reimbursement under the Medicare Secondary Payer Act. On September 30, 2010 the court issued a decision finding the following:

- ◇ In regard to the corporate defendants and their insurers the statute of limitation is three years from the date the executed settlement agreement was approved by the state court.
- ◇ In regard to the claimant attorneys the statute of limitations is six years from the date they received payment from the class action settlement.

Based upon the court's holding on the statutes of limitations, the December 1, 2009 filing by the federal government was untimely, thus the case was dismissed.

Bradley v. Sebelius – Limits Medicare Recovery in Wrongful Death Action

In this case which arose out of Florida, Medicare attempted to recover \$22,480.89 from the settlement of a wrongful death action. A state probate court ordered that Medicare could recover \$787.50, after determining the total value of the claims of the decedent's children. On September 29, 2010, the U.S. Court of Appeals for the 11th Circuit issued a decision in which it held Medicare was bound by the state probate court's decision. In so doing, the court stated that medical expenses and costs recovered by the estate were subject to the Medicare Secondary Payer Act while the amounts recovered by the surviving children was not subject to the Medicare Secondary Payer Act. This case applies primarily to these types of wrongful death actions, however, *Hadden v. U.S* (below) may have a larger impact.

Hadden v. U.S. – Will CMS be Forced to Recognize Comparative Fault and Other Defenses?

In short, the issue is whether Medicare can be forced to adjust its demand for recovery of conditional payments based upon comparative fault or other defenses in a case. At the federal district court level the court ruled in favor of CMS in that even though the plaintiff received far less than the value of the case, Medicare could still assert a demand to recover 100% of its conditional payments. This case is now awaiting the issuance of a decision on appeal before the U.S. Court of Appeals for the 11th Circuit. A decision in favor of Hadden, the Medicare beneficiary, will have far-reaching consequences for Medicare's right to recover against a settlement.

Tomlinson v. Landers & Zaleppa v. Seiwell - Medicare not required to be included on check

Two cases this year addressed the issue of whether Medicare can be included on the verdict/award payment or settlement check. The first case, *Tomlinson v. Landers*, arose in federal court in Florida. In that case the court held there is no statute or regulation that requires Medicare be named on the settlement check. The second case, *Zaleppa v. Seiwell*, arose in Pennsylvania state court. In that case the court held Medicare could not be named on a check paying a verdict/award.

It should be noted that these decisions only applied in specific jurisdictions and do not represent some national rule. Nonetheless, if Medicare is to be named on the settlement check then this is an issue which should be negotiated as part of settlement as the carrier cannot assume it has the right to place Medicare's name on the check.

Proposed Legislative Changes to Medicare Secondary Payer Act

The Medicare Secondary Payer Enhancement Act of 2010 was introduced in Congress this year with the primary purpose of streamlining the Medicare conditional payment recovery process. Unless passed in the December lame duck session of Congress it is likely this legislation will again be pushed in the spring of 2011. MedAllocators fully supports this legislation.