

The SMART Act: A Bipartisan Attempt to Make the MSP Act Workable

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On January 10, 2013, President Obama signed into law H.R. 1845, which includes the Strengthening Medicare and Repaying Taxpayers Act of 2011 (SMART Act).¹ The SMART Act amends several portions of the Medicare Secondary Payer (MSP) Act that apply to non-group health plans, including liability insurance (including self-insurance), no-fault insurance and workers' compensation plans (together, NGHPs). Although the SMART Act makes significant substantive and procedural amendments to the MSP Act, many practical issues will continue to bedevil parties trying to settle a personal injury claim.

THE MSP ACT

Under the MSP Act, Medicare does not pay for health care items and services to the extent that payment has been made or can reasonably be expected to be made by certain types of other insurance, including group health plans or NGHPs (together, primary payers). However, Medicare can make "conditional payments" for those items and services if a primary payer does not pay promptly. When the Medicare beneficiary receives a settlement or other payment with respect to the injury for which Medicare paid conditional benefits, the MSP Act requires the settling parties to repay Medicare before any funds are given to the Medicare beneficiary.

To strengthen the ability of the Centers for Medicare & Medicaid Services (CMS) to enforce and recover conditional payments, the MSP Act was amended in 2007 as part of the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) so that insurers are required to submit to CMS mandatory quarterly reports of every settlement, judgment, award or other payment made to a Medicare beneficiary.

Unfortunately, under CMS's current procedures, parties are unable to obtain the final conditional payment amount from CMS until after the claim settles. The uncertainty over the final conditional payment amount can unnecessarily delay settlement of claims involving Medicare beneficiaries as parties are often forced to settle with an estimate of the final conditional payment amount and then wait months to obtain the actual amount before settlement funds are ultimately disbursed. As a result, efforts to satisfy the MSP Act's obligations often result in settlement negotiations becoming acrimonious and protracted as settling parties struggle to protect their interests without having complete information.

THE SMART ACT

Title II of the SMART Act consists of five sections, each of which is intended to streamline the settlement process:

Section 201

- **Web Portal.** The Act requires CMS to establish and maintain a password-protected website through which Medicare beneficiaries and insurers can access updated conditional payment information so settling parties can determine how much is owed to CMS during the settlement process.
- **Expedited Repayment.** The Act outlines a process by which settling parties may obtain the final conditional payment amount before settlement. If the parties provide CMS notice within 120 days of an expected date of settlement, CMS has 65 days (which can be extended for another 30 days at CMS's discretion) to provide the final conditional payment amount. After the 65-day or 95-day period, whichever is applicable, the parties can download from the website a "statement" of the final conditional payment amount owed to CMS. The parties may rely on the amount set forth on the statement if settlement occurs within 120 days of the

¹ The SMART Act consists of two separate bills – the Medicare IVIG Access Act (H.R. 1845) and the Strengthening Medicare and Repaying Taxpayers Act of 2011 (H.R. 1063). The two bills were combined for passage.

notice, the statement was downloaded within three business days of the settlement, and the statement was the last one downloaded from the website.

- **Resolution of Discrepancies.** If a Medicare beneficiary believes there is a discrepancy with a statement, he or she may contest the disputed conditional payments by providing documentation and a proposal to resolve the discrepancy to CMS. CMS then has 11 business days after receipt of the documentation to determine whether to include or remove the payments on the statement. If CMS does not make a determination within this time frame, the Medicare beneficiary's proposal will be deemed accepted.
- **Right of Appeal.** The Act also requires CMS to promulgate regulations establishing a right of appeal and a timely appeals process under which NGHPs may appeal determinations by Medicare of its entitlement to conditional payment repayment. The NGHP's right to appeal can be taken without the Medicare beneficiary's consent although the NGHP is required to notify the beneficiary of its intent to appeal.

Section 202

- **Threshold.** Beginning in 2014, if a settlement, judgment, award or other payment falls below the annual minimum threshold set by CMS, then a liability insurer or a self-insurer will not be required to repay Medicare or report the settlement under 42 U.S.C. § 1395y(b)(8). The threshold will not apply to claims involving ingestion, implantation or exposure. The Act also requires CMS to set thresholds for workers' compensation and no-fault cases.
- Section 202 codifies CMS's current practice as CMS published a minimum recovery amount of \$300 in early 2012. It is unlikely that threshold will rise significantly, if at all.

Section 203

- **Mandatory Reporting Penalties.** The Act makes the MMSEA's mandatory civil monetary penalty of \$1,000 per day per claim for noncompliance discretionary.
- Section 203 of the Act also requires CMS to promulgate regulations specifying situations where the penalty will not be imposed.

Section 204

- **Identifying Information.** Section 204 of the Act directs CMS to modify the MMSEA's existing reporting requirements so that NGHPs are permitted but are not required to access or report a Medicare beneficiary's social security number or health care identification number. This change is a major concession by CMS to continuing pushback from Medicare beneficiaries at being required to provide their social security number.

Section 205

- **Statute of Limitations.** The Act establishes a three-year statute of limitations for conditional payment recovery actions brought by the government against an insurer or other third party. The three-year limitation period begins to run from the date CMS receives notice of a settlement, judgment, award or other payment under the MMSEA reporting process.

Takeaways

The SMART Act provides several welcome amendments to the MSP Act that should provide some comfort to NGHPs and others that have been struggling to satisfy the MSP Act's requirements when settling claims involving Medicare beneficiaries. Settling parties should now have a clearer understanding of the amount of conditional payments that will have to be returned to Medicare, a less rigid penalty structure for violations of the MMSEA reporting requirements, and a more clearly defined statute of limitations. However, the SMART Act leaves unresolved issues such as the obligation to address payment for the medical care of post-settlement incident-related injuries or illnesses (future medicals), and the treatment of plaintiffs who are not Medicare beneficiaries at the time of settlement, but may become beneficiaries shortly thereafter. It is possible those questions may be answered at the regulatory level when CMS issues its final rule on future medicals.

If you would like additional information about the SMART Act or help in complying with the MSP Act's requirements, please contact:

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