

NEW MEDICARE LAWS WILL FORCE SIGNIFICANT CHANGES TO SETTLEMENT PROCESSES

Beginning July 1, 2009, the landscape of bodily injury settlements involving Medicare recipients will be altered drastically. In December 2007, President Bush signed into law the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"). This legislation greatly expands the duties of insurers under the Medicare Secondary Payer Act ("MSPA") and will shift the burden of satisfying MSPA requirements from injured parties to insurance entities. In particular, MMSEA greatly expands reporting requirements for settlements involving Medicare recipients. MMSEA is a matter of great concern to insurers and their defense counsel as it will substantially alter requirements under the MSPA for liability insurance (including self-insurers), no fault insurance, and workers' compensation insurance.

The MSPA was passed by congress in 1980 to help ensure the Medicare program was operated in a cost effective manner. Under the MSPA, the Centers for Medicare and Medicaid Services ("CMS") is the federal agency responsible for administering the

Medicare program. The MSPA shifts the cost burden of treatment from Medicare to other entities when other "primary" insurance is available. Under the MSPA, a "primary plan" is defined as a group health plan or larger group health plan, workers' compensation law or plan, automobile or liability insurance policy or plan (including a self-insured plan) and no fault insurance. 42 U.S.C. sec. 1395y(b)(2)(A)(ii). The MSPA states that Medicare may not make a payment when "payment has been made, or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance." 42 U.S.C. sec. 1395y(b)(2)(A).

Under the current system, insurance carriers have been able to satisfy their obligations under the MSPA by requiring that injured parties and their attorneys satisfy all liens out of settlement proceeds. Typically, this was handled with simple contractual clauses in settlement releases. Under the terms of the release, the burden was on the injured party to satisfy Medicare liens, and the released party had no further obligations. Beginning on July 1, 2009, this system will change dramatically, and insurers will face significant consequences if they and their counsel are not well versed in the new reporting requirements of MMSEA.

The pertinent section of the MMSEA is Section 111. It adds mandatory reporting requirements to the Sec-

retary of Health and Human Services. The new requirements do not alter existing rules which pertain to whether Medicare or another entity is the primary payer. Instead, this amendment simply allows CMS to better enforce the rules. Beginning on July 1, 2009, new reporting requirements for liability insurance (including self-insurance), no fault insurance, and workers' compensation insurance will go into effect. 42 U.S.C. 1395y(b)(8). The reporting requirements will require that insurers determine whether a claimant (including an individual whose claim is unresolved) is entitled to Medicare benefits, and if so, to submit certain information about the claimant to the Secretary of Health and Human Services in a form and manner specified by the Secretary of Health and Human Services. 42 U.S.C. 1395y(b)(8)(B)(i), (ii).

The penalties for non-compliance are substantial. If a liability insurer (including self-insurers), no fault insurer, or workers' compensation insurer fails to comply with the reporting requirements, they will be subject to a civil penalty of \$1000 for each day of non-compliance with respect to each claimant. 42 U.S.C. 1395y(b)(8)(E)(i). Furthermore, failure to confirm that the Government was reimbursed may lead to a recovery action that could result in insurance carriers paying double damages plus interest in addition to the penalty for delayed reporting. 42 U.S.C. 1395y(b)(2)(B)(iii).

Unfortunately, the specific infor-



mation that will be required by the Secretary of Health and Human Services has not yet been delineated, and it is highly possible that the information required by the Secretary could be quite extensive. Thus, it will be important for insurers and their defense counsel to plan appropriately for the new reporting requirements prior to July 1, 2009. Insurers and their defense counsel must work together to develop and implement internal plans, policies, and procedures that identify Medicare claimants and ensure that they will not be subject to the significant civil penalties discussed above.

Although the requirements of MMSEA may be producing more questions than answers at this time, Kalbaugh, Pfund and Messersmith promises to stay at the forefront of this issue. As a Char-

ter Member of the National Retail and Restaurant Defense Association (NRRDA), Kalbaugh, Pfund and Messersmith is in a unique position to work with nationally recognized leaders on this subject, stay on the cutting edge of Medicare Set-aside issues, and implement that knowledge in our relationships with our clients. Our professional affiliations with outstanding organizations such as NRRDA, put us in the unique position to offer exciting learning opportunities to our clientele. On March 6, 2009, NRRDA is sponsoring a Webinar entitled "Navigating Medicare Secondary Payer Compliance - Now and in the Future". This event is not limited to Retail or Restaurant entities, and it will be a valuable and timely learning experience for all who participate. For more information about the NRRDA Webinar, or if you wish to register, please visit the following

web address:

<https://comp08.eventcenter-live.com/cfm/ec/register/reg.cfm?BID=1&RegID=F62D1F59>.

Kalbaugh, Pfund and Messersmith is committed to guiding our clients through the inevitable uncertainty that will surround the post July 1, 2009 settlement environment. If you have further questions, please contact the President of the NRRDA, Brian Cafritz of Kalbaugh, Pfund and Messersmith at Brian.Cafritz@kpmlaw.com or 804-320-6300.



KALBAUGH, PFUND & MESSERSMITH, P.C. wishes to thank our clients and friends for allowing us the opportunity to earn your business. If you are not currently a client of our firm and would like more information on our progressive and aggressive approach to the practice of law, please call or e-mail Bill Pfund at 804-320-6300 or bill.pfund@kpmlaw.com. We also invite you to visit our website at www.kpmlaw.com for valuable information and links.

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