

New Medicare Secondary Payer Legislation – A Win For Beneficiaries And The Medicare Trust Fund

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For years, the Medicare Secondary Payer (MSP) process has frustrated the ability of Medicare beneficiaries and companies to resolve disputed claims. Whether the disputes have involved workers compensation claims, general tort claims, or no-fault claims (such as auto insurance), settlements have been delayed, if not prevented, due to the uncertainties of how much was owed to Medicare for its payments on behalf of a beneficiary for treating the injury that was the subject of the claim. The problem was a classic “chicken-egg” dilemma: Medicare took the view (and not unrightly so) that until disputing parties settled a claim it was not “secondary”. Thus, Medicare could not calculate the amount owed, while parties could not settle without knowing how and with how much to resolve their undefined Medicare liabilities.

The problem has become more acute since 2008, when Congress amended the MSP statute to require insurers and self-insureds to report to Medicare every settlement involving a beneficiary or face a strict liability penalty of \$1,000 per day per claim. As concerns grew, many began walking away from the settlement table altogether – beneficiaries and the claimants’ bar who were no longer willing to navigate the complexities of a dense bureaucracy, and defendants who could no longer settle with a residual undefined contingent exposure. Ironically, the bureaucracy and complex system harmed the very entity MSP was intended to benefit – the Medicare Trust Fund; if cases do not settle, funds are not available to reimburse Medicare.

Fortunately, relief is on the horizon. On March 14, 2011, Congressman Tim Murphy (R-Pa) and Congressman Ron Kind (D-Wi) introduced bipartisan legislation to remedy these, and several other, aspects of the broken MSP system. Under this novel legislation, called the Strengthening Medicare and Repaying Taxpayers (SMART) Act, H.R. 1063, Medicare will be authorized to provide timely notice of MSP obligations to settling parties before settlement, thus facilitating quick and efficient resolution of claims. More specifically, the government will have to provide the “conditional payment” amount within 65 days of a request, so that parties can settle their cases and account for the MSP repayment. By creating this “fast track” MSP process, the legislation will remove much of the uncertainty and complexity of settling workers compensation and other cases.

The SMART Act, supported by a coalition known as “MARC,” fixes a number of other MSP problems as well. For example, it will eliminate the use of social security numbers in the MSP “Section 111” reporting process and create enforcement discretion around reporting penalties, it will give all parties to the settlement a right of appeal on Medicare determinations, it will finally designate a clear statute of limitations for MSP claims, and it will implement a system exempting from MSP compliance those cases where the government’s recovery costs will exceed the expected MSP recovery – thus saving taxpayers money and allowing small dollar settlements to be more easily resolved. The legislation will not only save taxpayers dollars, but it will also allow the Medicare Trust Fund to receive additional revenue faster than today’s system.

While the SMART Act has received acclaim from all quarters, one writer has suggested that the effect of the bill will be to cut conditional payments because parties will be able to settle cases more effectively. While lawyers may wish to debate the philosophy of whether the workers compensation system works today, that has nothing to do with the reality that MSP today is creating problems for all. Everyone agrees that today’s bureaucracy is creating a lose-lose-lose – for beneficiaries, companies, and the Trust Fund. The SMART Act’s solution will reverse that harm and create a functional system that works for all.

For more information on the SMART Act, go to www.marccoalition.com. Readers can support the SMART Act by writing your Members of Congress and urging them to co-sponsor this important legislation. Click on the MARC Advocacy Corner on www.marccoalition.com and send your letter of support today!

About the Author

David Farber is a partner at the law firm of Patton Boggs LLP. He serves as counsel to the MARC Coalition, and has been involved in Congressional advocacy around Medicare Secondary Payer issues. The opinions expressed in this article are those of Mr. Farber alone, and should not be attributed to Patton Boggs LLP or any of its clients.