

**Tort Claims Webinar**

**Legal Sherpa: Guide to Managing Tort Claims and Cases, and Reimbursing Medicare, under New Medicare Rules**

***Speakers:***

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**WWHGD**

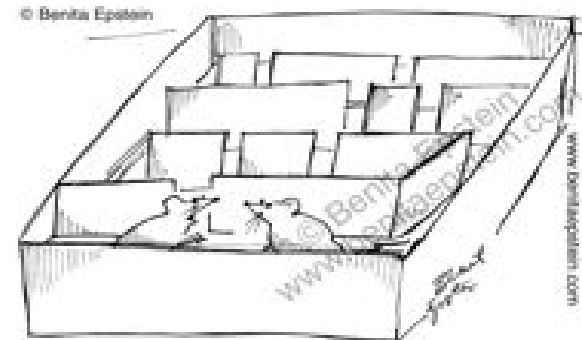
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## Content

- **Topics of Discussion**
  - ***Focus is on third-party liability claims, not workers' compensation (WC) claims***
    - Statutes and Legislative History
    - Compliance Logistics
      - *Reporting Mechanics under SCHIP*
      - *MSP Repayment Rules*
    - Navigating the Maze: Practical Tips

## House-Keeping

- **Highly complex, and complicated**
  - ***Statutes***
  - ***Regulations***
  - ***Case law***
  - ***CMS documents***
    - Alerts
    - Memoranda (e.g., Patel Memorandum)
    - Medicare MSP Manual
    - March 16, 2009 SCHIP User Guide
  - ***4,411 acronyms***
    - [www.cms.hhs.gov/apps/acronyms](http://www.cms.hhs.gov/apps/acronyms)
      - *We use 13 acronyms*



"This is easier than navigating through Medicare."

## **Statutes and Legislative History**

- **Great Society Program**
  - ***Administered by Social Security Administration (SSA) but later transferred to CMS***
  - ***Enacted in 1965***
    - Provided coverage for those 65 and older
    - Was primary source of payment even when another source of coverage existed
      - *Except for WC injuries where Medicare was secondary*
    - Costs far exceeded expectations
  - ***Medicare Secondary Payer Act (MSP), in 1980***
    - Purpose to reduce costs
    - MSP made Medicare secondary payer

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- **Statutes and Legislative History (con't)**
  - ***Medicare Secondary Payer Act (MSP)***
    - Before 2003 worked like this:
      - If other insurance, Medicare could not pay, except to provide secondary coverage
      - If primary plan failed to pay, Medicare made “conditional” payment
        - *Could sue for reimbursement, double damages*
          - » “Super Lien”
    - Recovery options: limited to beneficiary or insurance plan
      - *Health Ins. Ass’n of Am., Inc. v. Shalala, 23 F.3d 412, 427 (D.C. Cir. 1994) (concluding that statute allowed “recovery only from an insurer” or beneficiary)*
        - » Promoted self-insurance

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- **Statutes and Legislative History (con't)**
  - ***Medicare Modernization Act (MMA) of 2003***
    - Critical amendments, current law
    - Revised to reach self-insured businesses and settlements
      - *E.g., any business that pays settlement or judgment*
        - » Reach settlement funds, and
        - » Attorneys who receive payment, including
        - » Possibly defense counsel
      - *Even if no judicial determination of liability*
    - Strengthened reimbursement right
      - *Under §1395y(b)(2)(A)*
        - » Past payments, and many argue future medicals

**Payment that “has been made, or can reasonably be expected to be made”**



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- **Statutes and Legislative History (con't)**

- ***After MMA***

- Reimbursement right rarely exercised
      - *Result: standard response was contractual indemnity*
    - Medicare continued to hemorrhage
      - *\$43 billion in erroneous payments (1991-1998)*
      - *42 million covered, increasing 10,000 per week*
      - *78 million expected by 2012*
      - *In 2006 federal report, authors stated*
        - » “Without further reforms,” Medicare will swallow 11 percent of GDP

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- **Statutes and Legislative History (con't)**
  - ***Medicare, Medicaid and SCHIP Extension Act of 2007 (SCHIP)***
    - Enacted to force compliance
      - *Impact: \$1.74 billion*
    - Policy shift
      - *Responsible Reporting Entity (RRE): You*
      - *RRE must determine Medicare eligibility and report*
        - » Extensive data share, timing deadlines
        - » Estimated 375 hours for set-up process
        - » Duty to report non-delegable
    - Failure to comply
      - *Penalty of \$1,000 per day (per claim) for noncompliance*



## **Compliance Logistics**

- **Impacts most businesses, but not every claim**
  - *Estimated 25% of tort claims*
  - *For compliance purposes, look for*
    - Medicare beneficiaries
      - *Age 65 or older*
        - » 16% of Medicare beneficiaries are under 65
      - *SSD benefits*
      - *End stage renal disease (dialysis)*
      - *ALS (Lou Gehrig's disease)*
  - ***Two aspects to compliance:***
    - SCHIP reporting mechanics
    - MSP payment rules

## **SCHIP Reporting Mechanics**

- **Mandatory reporting**
  - ***Determine Medicare eligibility, and report payment obligation in e-format***
    - RRE registration
      - *Before September 30, 2009*
    - Logistics
      - *For status check, use “Query System”*
        - » Name, gender, D/O/B and SSN
        - » Response in 45 days, but payment history goes to beneficiary, unless consent
      - *Pre-payment reporting*
        - » If payment expected, must put CMS contractor on notice (42 CFR § 411.25(a))
        - » If no liability or expectation, no report

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- **SCHIP Reporting Mechanics (con't)**

- ***Logistics***

- After payment

- *Full report with 100+ categories of information*

- *Cannot avoid report by clever drafting*

- » *E.g., “no medicals” or internal allocations*

- *All settling parties must report*

- » But excess insurer not RRE if payment not made to beneficiary

- No exception for nuisance value settlements

- *Except: during start-up period, no reports for*

- » \$5,000 and below, in 2010

- » \$2,000 and below, in 2011

- » \$600 and below, in 2012

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- **SCHIP Reporting Mechanics (con't)**
  - ***Logistics***
    - Record-keeping
      - *Mandatory 10 years*

## **MSP Repayment Rules**

- **To avoid liability and penalties must be cautious**

- ***Timing***

- Duty to report triggered by payment or J/S/A (TPOC)
- Recovery demand letter issued *after* J/S/A report
  - *Right to reimbursement accrues at time of payment*
- Beneficiary must pay within 60 days of receipt of funds
  - *If no repayment, RRE “must” repay Medicare*
    - » If not, subrogation, direct action and private action

- ***Reimbursement Amount***

- Medicare has right to full award or settlement
  - *Regardless of settlement characterization*
  - *Regardless of contributory negligence*
    - » Only exception: special verdict

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- **MSP Repayment Rules (con't)**

- ***Recovery Calculation***

- May reduce lien by attorney's fees (42 CFR §411.37)
    - May seek hardship waiver (42 CFR §411.28)
    - Medicare has authority to compromise (31 U.S.C. §3711)
      - *Only CMS' regional offices can settle*
    - No current intent to recover future Medicare payments
      - *See Medicare MSP Manual, Ch. 7, 50.5 ("there should be no recovery of [such]" after liability settlement)*
        - » Standard recovery letter only speaks of past expenses, *see id.*, Ch. 7, 50.5.2.1
      - *Decision at own peril – no safe harbor*
      - *Must adequately protect Medicare's interest*
      - *Nearly all recommend MSA*



## **Navigating the Maze: Practical Tips**

- **No clear strategy for handling/resolving claims**
  - ***Practical reality: can't settle, can't sue***
    - Rules discourage some suits
      - *But for others, only encourage suit and trial*
  - ***Can't sweep Medicare obligations under rug, and must educate Plaintiff's Bar and others***
  - ***Recommendations***
    - Must involve Medicare early
      - *For claimants without counsel, work both sides of fence*
      - *Discovery*
        - » Early Query
        - » SSA-3288 (SSA Release Consent)/ HIPAA Release
        - » Research liens/ conditional payments (CPR)

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- **Navigating the Maze: Practical Tips (con't)**

- ***Recommendations***

- Discovery

- *Medicare-specific RFPs/ interrogatories*

- *Need these records*

- » Claims payment history

- » Medical/ pharmacy records and bills

- » IMEs and second opinions

- » MMI, impairment, future needs reports

- To assess Medicare exposure and settlement value

- *Obtain allocation report, which includes*

- » Medicare status/ information

- » Medical narrative

- » Cost analysis





- **Navigating the Maze: Practical Tips (con't)**

- ***Recommendations***

- Settlement analysis

- *Set aside for future medicals (CSA)?*

- *If yes, decide on funding and administration*

- » Lump sum

- » Structured

- » Custodial or self administration

- Post-settlement

- *When to fund settlement?*

- » “Settlement proceeds should not be disbursed until Medicare’s claim has been satisfied.” (MSP Manual, Ch. 7, 50.4.1)

- » Fact-sensitive decision

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- **Navagating the Maze: Practical Tips (con't)**
  - ***Recommendations***
    - When to fund settlement?
      - *If prior to Medicare recovery letter*
        - » Indemnification, and
        - » Issue 2 checks, or
        - » Issue 1 check and hold Medicare payment in reserve or place in trust
      - *Other possible options*
        - » Interpleader
        - » Declaratory judgment (if legal question)

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