

Compliance Today – March 2018 Navigating Medicare Secondary Payer compliance and False Claims Act liability

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The Medicare Secondary Payer Act (MSP) places certain responsibilities on insurers, employer health plans, and healthcare providers. Non-compliance with the MSP can result in monetary penalties and government enforcement action. Currently, the MSP is garnering attention as an enforcement tool under the False Claims Act (FCA).^[1] This article gives a general overview of the MSP, discusses requirements for compliance, describes recent MSP enforcement actions under the False Claims Act (FCA), and gives some key takeaways to reduce potential liability.

The Medicare Secondary Payer Act basics

The MSP affects providers, employer-sponsored group health plans (GHPs), liability and no-fault insurers, workers' compensation funds and plans (collectively, non-group health plans, or NGHPs), and Medicare beneficiaries. Generally, the MSP:

- Requires that Medicare be a secondary payer if a beneficiary carries certain types of employer sponsored health plans;^[2]
- Prohibits the Centers for Medicare and Medicaid Services (CMS) from making payments for Medicare-covered services if payment has been made, or can reasonably be expected to be made, by a another payer;^[3] and
- Allows CMS to make “conditional payments” to the beneficiary if there is a delay in reimbursement from another entity for a covered service.^[4]

Notably, Congress also enacted a parallel MSP provision that applies to state Medicaid plans.^[5] Special rules apply to Medicare beneficiaries covered under a GHP,^[6] and Medicare is generally the secondary payer for these covered services when a beneficiary is entitled to Medicare.

In an effort to assist primary payers and providers in determining Medicare's payer status, CMS established a Coordination of Benefits (COB) system that collects beneficiary coverage data. The Benefits Coordination & Recovery Center (BCRC) administers the COB by ensuring the accuracy of the Common Working File (CWF), a CMS database that stores information regarding MSP data and investigations. CMS shares this data with other payers to ensure proper claim submission to Medicare.

Conditional payments

Medicare will make a conditional payment to a beneficiary if there is a delay in payment by the primary payer to keep the beneficiary from experiencing a gap in coverage.^[7] Subsequently, Medicare may pursue reimbursement of conditional payments from:

- A beneficiary or other party, if both a primary and conditional payment were received;
- A primary payer, if a conditional payment was made pursuant to liability insurance settlements, disputed claims under group health plans, workers' compensation plans, or no-fault insurance; and
- The beneficiary or provider, if the filing of an improper claim resulted in a conditional payment, unless the claim was a result of false information provided by the beneficiary and the provider complied with certain regulatory procedures.

These conditional payments must be reimbursed to Medicare within 60 days of receipt of payment. If a primary payer or provider fails to pay back the conditional payments, CMS may assess double damages.

Both beneficiaries and their fiduciary agents, such as attorneys, can be sued for recovery of improperly retained conditional payments. In one such case, a Medicare Advantage (MA) plan operated by Humana made a conditional payment to a beneficiary injured in a motor vehicle accident.^[8] The beneficiary sued several insurance companies for payment, resulting in a settlement and the disbursement of settlement funds to the beneficiary's attorney. Humana issued a demand letter to the beneficiary, seeking reimbursement for its conditional payment, which it alleged was partly contained in the settlement amount. When the beneficiary failed to pay, Humana commenced a lawsuit against both the beneficiary and the beneficiary's counsel to recover the funds. On a motion to dismiss by the beneficiary's attorneys, the court ruled that the MSP allowed the MA plan to pursue recovery of conditional payments and double damages against beneficiary's counsel, as "plain language fails to limit the parties against whom suit may be maintained" and that there is a private right of action that a MA can use to recover conditional payments pursuant to 42 USC §1395y(b)(3)(A).^[9]

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