



New Federal Mandates Impacting Professional Lines Beyond Healthcare Reform

**IMPORTANT IMPLICATIONS OF THE MMSEA/  
MEDICARE SECONDARY PAYER ACT THAT  
STRETCH BEYOND HEALTHCARE LINES**

# MEET THE PRESENTERS



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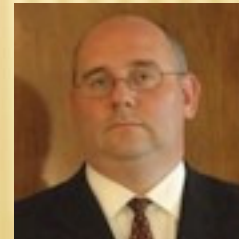
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# **OVERVIEW OF MMSEA SECTION 111**



# OVERVIEW OF MMSEA SECTION 111

- ✘ Medicare pays health care of enrolled individuals age 65 and older, certain disabled individuals and those with permanent kidney failure
  
- ✘ Section 111 mandates an unprecedented claims dialogue between Medicare and most non-Group Health Plan (NGHP) insurers as defined by Medicare
  - + Liability insurers (includes self-insured entities)
  - + No-fault insurers
  - + Workers' compensation plans

# OVERVIEW OF MMSEA SECTION 111

- ✘ Requires these entities to report:
  - + Payment of most claims filed by Medicare beneficiaries arising out of **bodily injury**: both lump sum payments and payment of future medicals
  - + Responsible reporting entity (RRE) to report such payments and supporting claims data:
    - ✘ Electronically with CMS software
    - ✘ On a quarterly basis
    - ✘ Commencing Q2 2010
- ✘ GHPs have a similar reporting Section 111 obligation

## WHY A MANDATE?

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- ✘ Coordination of Benefits (COB)
- ✘ Until 1980, Medicare was primary payer of most medical expenses of Medicare beneficiaries
- ✘ Under the MSP Statute, Group Health Plans and P&C Insurers (NGHPs) became the primary payers



# WHY A MANDATE?

- × The 1<sup>st</sup> Problem: Medicare estimates it leaves ~ 3M NGHP claims/yr. on table
  - + Doesn't know NGHP claim exists so pays first, or
  - + Pays because NGHP claim won't be resolved soon
- × The 1<sup>st</sup> Fix:
  - + MSP Statute permits Medicare to recoup its mistaken or “conditional payments” from:
    - × NGHPs
    - × Medicare beneficiaries/their counsel
    - × Providers

# WHY A MANDATE?

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- ✘ The Next Problem:
  - + Medicare must find the NGHPs and Medicare beneficiaries
  - + Before Medicare beneficiaries become judgment proof
  - + No Medicare money to ferret out NGHPs
- ✘ The Latest Fix: Section 111 reporting



## RISKS FOR INSURERS UNDER SECTION 111

- ✘ Double or Treble Claims Payments
  - + Once to claimant
  - + Once or twice to Medicare
- ✘ What portion of a settlement, judgment or award can CMS recoup?
  - + CMS believes it's not bound by parties' settlement allocation to medical expenses, even if court approved
  - + CMS must respect special verdicts
  - + Release language may be determinative

# RISKS FOR INSURERS UNDER SECTION 111

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- × Section 111 Penalties
  - + Enforcement
  - + Safe harbors
- × Increase in Bad Faith Claims
- × Fraud Investigations and Litigation

# **THE CHALLENGES OF SECTION 111**



# WHO MUST REPORT?

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- × “Responsible Reporting Entities” (RREs)
  - + “Applicable Plans”
  - + For NGHPs, this means:
    - × Liability insurance plans, including self-insured entities
    - × No-fault insurance plans
    - × Workers’ compensation laws or plans
  - + Clear link to MSP Statute and CMS intent to seek recoupment from NGHPs
    - × Applicable Plans are the “Primary Plans

# LIABILITY INSURERS

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- × Third-Party Coverage: General Liability and Professional Liability Lines
- × Professional Liability Lines: Key is bodily injury and scope of **release**
  - + D&O Lines
    - × Most exclude bodily injury but look for carve backs
    - × Employment Practices Liability Insurance (EPLI)
      - \* Less than 1/10 of 1% of policies cover bodily injury
      - \* Are emotional distress claims released?
  - + E&O Lines
    - × Medical malpractice
    - × Health care professionals
    - × Hair professionals
    - × Tanning salons
    - × Agents and brokers
- × CMS reportedly is giving consideration to a PL reporting exception

# LIABILITY INSURERS

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## × Self-Insured Entities

- + “An **entity** that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance or otherwise) in whole or in part.”
- + *Any* deductible or self-insured retention amount qualifies as self insurance
- + Self-insured is the RRE if:
  - × Pays the claimant directly and the settlement, judgment or award is less than the deductible or
  - × Pays the entire claim and is reimbursed by insurer
- + Insurer is the RRE if:
  - × Amount of payment exceeds deductible and insurer pays claimant the amount above deductible, regardless of whether insured pays deductible to claimant or insurer



# LIABILITY INSURERS

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- ✘ Application to Overseas Insurers
  - + Long-standing presumption against extraterritorial application of Section 111
  - + Informal CMS guidance appears to ignore presumption
    - ✘ Currently appears to require reporting by all overseas insurers
  - + Foreign insurer registration process still being developed for insurers with no TIN/US address
  - + Compromise coming? Ongoing dialogue with Lloyd's Subscription Market and others in London Market

# NO-FAULT INSURERS

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## × No-Fault Insurance

- + “Insurance that pays for medical expenses for injuries sustained on the property or premises of the insured, or in the use, occupancy, or operation of an automobile, regardless of who may have been responsible for causing the accident.” (CMS User Guide)
- + First Party Policies
  - × Accident (Occupational Accident, Student Accident)
  - × Automobile
  - × Travel
  - × Home Owners

# NO-FAULT INSURERS

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- × Claimant (NGHP User Guide)
  - + For purposes of the [mandatory insurer reporting requirements[, a “claimant” includes: 1) and individual filing a claim directly against the applicable plan, 2) an individual filing a claim against an individual or entity insured or covered by the applicable plan, or 3) an individual whose illness, injury, incident, or accident is/was at issue in “1)” or “2)”.



# NO-FAULT INSURERS

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- ✘ Applicable Plan (Section 111 MMSEA)
- ✘ [M]eans the following laws, plans, or other arrangements, including the fiduciary or administrator for such law, plan, or arrangement:
  - (i) Liability insurance (including self-insurance)
  - (ii) No-fault insurance
  - (iii) Workers' compensation laws or plans

# NO-FAULT INSURERS

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- ✘ Did Congress intend to include first party coverage as a secondary payer in the 1980 MSP legislation?
- ✘ CMS guidance currently requires insurers to report:
  - + All claims involving/releasing bodily injury
  - + Where policy fits the CMS definition of no-fault insurance
  - + Ignores industry definition of no-fault

# WORKERS' COMPENSATION PLANS

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- ✘ Plans and CMS have a long tortured history of dialogue and sharing of claims data
- ✘ Intent: identify and protect Medicare's interest before WC settlement
- ✘ No rulemaking – only informal guidance
- ✘ Genesis of MSAs



## CHALLENGES OF IDENTIFYING MEDICARE BENEFICIARIES

- ✘ Difficulty in obtaining HICN, SSN, and other information from adverse parties who are not in privity of contract with insurers
- ✘ Tools
  - + Queries
  - + Model CMS Letter to Claimants
- ✘ When CMS returns query files to insurers as a “Non-Match” is it not known if the individual is not a Medicare beneficiary or whether the information submitted was simply incorrectly
- ✘ Risk of Bad Faith Claims

# MECHANICS OF REPORTING

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- ✘ Registration, Testing, Reporting
  - + Registration deadline extended three times so far:
    - ✘ July 31, then September 30, then December 31, 2010
  - + Registration is not required if “no expectation of having claims to report”
  - + CMS advises allowing a full quarter for testing data transmissions to CMS/COBC
  - + Must register before can test
  - + CMS will assign each RRE a 7-day reporting window in Q2 2010

# MECHANICS OF REPORTING

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- ✘ Who Reports? The Responsible Reporting Entity
  - + Entity may report only for self and subsidiaries
  - + Sister companies may not report for each other



# MECHANICS OF REPORTING

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## × Key Players

### + Authorized Representative

- × Performs initial registration for RRE, but will not later have access to the RRE account
- × Must have authority to bind the company; must be employee of RRE; cannot be agent
- × Designates the Account Manager, approves account setup, and receives COBC notifications related to non-compliance with Section 111 reporting requirements

### + Account Manager

- × Complete the account set up tasks, manages the RRE's profile, and can transmit and review files
- × Can appoint and remove Account Designees

### + Account Designee

- × Can upload, download, transmit, and review files, but cannot be an Authorized Representative or Account Manager for the same RRE ID

# MECHANICS OF REPORTING

- ✘ Understanding “When” to Report – Reporting Triggers
  - + TPOC – Total Payment Obligation to Claimant
    - ✘ TPOC payments must be reported for TPOCs on or after January 1, 2010
    - ✘ What is TPOC?
    - ✘ TPOC Monetary Exemptions
  - + ORM – On-Going Responsibility for Medicals
    - ✘ ORM reporting based on a July 1, 2009 date, and includes where ORM existed prior to July 1
    - ✘ What is ORM?
      - ★ “Assuming ORM”
      - ★ “Terminating ORM”
    - ✘ Exceptions to ORM
      - ★ Qualified Exception – the “look back” period
      - ★ WC Exception
      - ★ Special Exception

# **CHALLENGING CLAIMS ISSUES**



# CHALLENGING CLAIMS ISSUES

## × Runoff and Long-Tail Issues

### + Post-1980 Exposure Issue: No MSP liability prior to December 1980

- × Only report if the Date of Incident is on or after December 5, 1980
- × If case involves exposure, only report if exposure after December 5, 1980 was alleged, established, or released
- × Exposure defined by CMS as “physical,” not “legal”
- × CMS will pursue an insurer of pre-1980 risks if a claim alleges exposure continued on or after December 5, 1980
- × CMS takes issue with broad releases of liability for any and all exposure, even if no factual support for post-1980 exposure

### + Acquired Beneficiary Status: If claimant was not a Medicare beneficiary as of date of incident, but becomes Medicare eligible and insurer makes any payment afterwards, insurer must report payment to CMS

# CHALLENGING CLAIMS ISSUES

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## ✘ Mass Tort Claims

- + Unique reporting challenges
- + Class action settlements may not apportion settlement contributions by claimant
- + Settlement funds may be put into trust and payout to claimant determined by trustee

# CHALLENGING CLAIMS ISSUES

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- ✘ Structured Settlements: Must You Use Them?
  - + CMS and DOJ have acknowledged that Medicare Set-Asides are not required by MSP statute or Section 111
  - + Business reasons may support use of a structured settlement; decrease risk that CMS will need to recoup conditional payments from insurer



# CHALLENGING CLAIMS ISSUES

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- ✘ Other Settlement Considerations for Decreasing MSP Recoupment Risks
  - + Limiting scope of releases
  - + Seeking indemnifications from claimants and counsel
  - + Inviting CMS to settlement table to identify its interest
  - + Impleading CMS
- ✘ Lessons and Fears from Workers' Compensation Settlements

# QUESTIONS?

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# KATHRYN BUCHER



Ms. Bucher has 25 years of experience representing insurers, health care entities and government contractors regulated by Medicare and other federal health programs. She leads Wiley Rein's Section 111 Mandatory Insurer Reporting practice.



# KATHRYN BUCHER



Kathryn regularly advises insurers on matters arising under the Medicare Secondary Payer Act, including application of the new Medicare reporting obligations to P&C insurers and mitigation of the related risk that Medicare will demand reimbursement from those reporting of Medicare's prior payments to Medicare beneficiaries.

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Kathryn earned her B.A., *cum laude*, from the University of Vermont and her J.D. from Cornell Law School

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Mark Popolizio, J.D. is a Senior Account Executive for NuQuest/Bridge Pointe. Prior to joining NuQuest/Bridge Pointe, Mark practiced law for ten years concentrating in the areas of workers' compensation defense and insurance defense litigation.



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Mark also served as Medicare counsel for a national TPA. While in private practice, Mark represented numerous carriers, third party administrators and self insureds. In addition to his workers' compensation and Medicare practices, Mark served as the Executive Director of the Negotiated Workers' Compensation Insurance Program (NWCIP) which is an alternative dispute resolution system under the Florida workers' compensation act.

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Mr. Carucci earned his B.S. from Fairfield University and his J.D. from St. John's University School of Law



# THANK YOU



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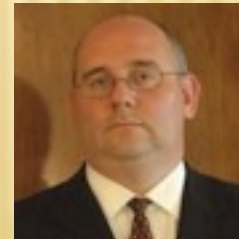
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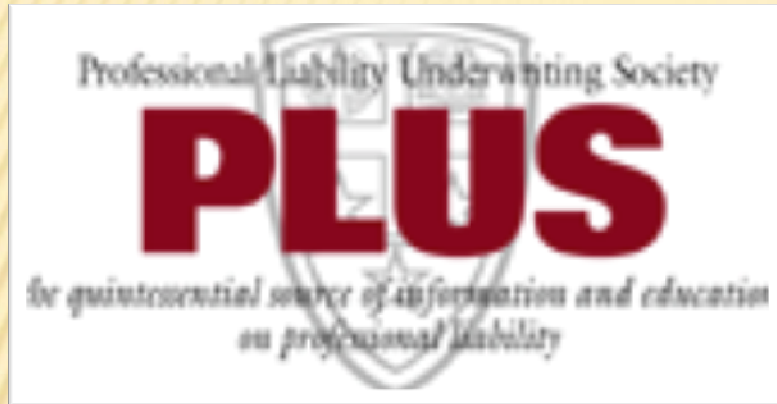
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