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## What is MMSEA Section 111 and How Does it Affect Me, My Practice and My Clients? By Katrina J. Valencia, Esq.

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MMSEA Section 111 is the Medicare Secondary Payer Statute amended by Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA"). Beginning on January 1, 2010, extensive new Medicare reporting obligations apply to all insurance companies, self-insured businesses, and any other business that make payments to Medicare beneficiaries as a result of litigation claims. These businesses—referred to as Responsible Reporting Entities ("RREs")—are required to report all payments to Medicare beneficiaries over \$5,000, including settlements and payments made as a result of litigation. The reporting requirements have been implemented so that Medicare can determine whether it has a lien on any portion of a settlement or payment. Failure to report can result in significant financial penalties totaling over \$1,000 a day.



### Who is Required to Report?

The RREs do the actual reporting of payments to the Center for Medicare and Medicaid Services ("CMS"). This process begins with a query to CMS to determine whether the plaintiff is, in fact, a Medicare beneficiary. However, the RREs cannot perform the query without specific information obtained from the plaintiff, and forwarded from either plaintiff or defense counsel. The RREs are required to provide to CMS either the plaintiff's Medicare Health Insurance Claim Number ("HICN") or Social Security Number ("SSN"). While the RREs may submit either, it is preferable to submit both to ensure a match if the plaintiff is in the system. In addition to the HICN and the SSN, the RREs are required to submit the plaintiff's last name, his/her date of birth, and gender.

### What Does this Mean for You as an Attorney?

#### As Plaintiff Counsel:

You Need to Get An Early Start: Once you sign up a client immediately determine whether the individual is a Medicare recipient and if there is currently an outstanding Medicare lien. How do you go about this?

- (1) Ask your client if they are a Medicare beneficiary. A Medicare eligible plaintiff or claimant is someone who is 65 years of age or older, someone who is under the age of 65 with certain disabilities or someone suffering from end-stage renal disease. While you are at it, ask them if they receive Medicaid (or your state's version of Medicaid such as Medi-Cal in California). This will save you time in the long run as each lien will require repayment. Create a form for your client to fill out and sign, verifying the following information: (a) date of birth; (b) social security number; (c) Medicare Health Insurance Claim Number; (d) the existence of a Medicare Lien; and (e) whether Plaintiff qualifies for Medicare. Provide such form to defense counsel at the onset of litigation. This simple act of kindness will go a long way in facilitating a quick (and less painful) settlement should your case be headed that way. Remember, if your client is a beneficiary, you cannot properly settle the claim without informing Medicare. It is better to determine the required information early rather than later when the case is in settlement negotiations.
- (2) Confirm receipt of any Medicare benefits paid to your client by sending a written request to the CMS at the outset of litigation, and again as the case progresses.

**As Defense Counsel:**

**As Soon as You Receive the Complaint:**

- (1) Prepare a letter to plaintiff's counsel referencing the MMSEA Section 111 reporting requirements, and outlining the impact on their client as a potential Medicare beneficiary. Along with such letter enclose narrowly tailored discovery requests which focus on the information needed for the RREs to perform their query.
- (2) In addition to obtaining this information in written discovery at the onset of litigation, make sure to obtain any updated information that may exist at the time of the plaintiff's deposition.
- (3) Prior to any discovery cut-offs, serve supplemental requests to obtain the most updated Medicare information.

If, for whatever reason, plaintiff's counsel or their client refuses to provide the requested information either through written discovery or at deposition, defense counsel may need to seek court intervention to compel this required information.

**How to Determine Any Medicare Lien Amount?**

So now that you have determined the claim involves a Medicare beneficiary, it's been reported to CMS; what's next? As counsel, make sure to stay in contact with CMS to ensure that a lien amount is forthcoming. Be aware that the lien amount is always in flux; each time plaintiff seeks treatment, the amount of the lien will change. Upon receipt of the "final lien," both Plaintiff and Defense counsel must review and evaluate each charge, and determine if the charge is related to treatment for the injuries at issue. Services provided must be examined to confirm that the treatment and billing is claim-related and reasonable.

**What if the Settlement is not Reported?**

RREs can face penalties of \$1,000 per day per claimant/plaintiff whose Medicare status is not fully reported to CMS. The remedies Congress gave CMS also include the right to bring an independent cause of action to recover its conditional payment from "any or all entities that are or were required to make payment." The government is also entitled to seek recovery of double damages if it brings an independent cause of action.

To avoid being penalized, the ultimate goal for RREs, attorneys, and beneficiaries is to understand this: when there is coverage primary to Medicare, Medicare must be notified of such coverage and Medicare must be reimbursed when appropriate.

**What is the Impact on You and Your Client?**

Attorneys and Medicare beneficiaries are subject to penalties if Medicare is not reimbursed. Attorneys are now exposed to increased legal malpractice insurance rates as ethical rules may be violated by failing to notify CMS of payments--even if the attorney was not aware the claimant was a beneficiary--since the attorney "should have known," through appropriate inquiry/discovery, that Medicare would have a lien.

Attorneys can guard themselves by providing the RREs and/or client with the information required for reporting, ensuring the RREs and/or client performs the required query and by reporting all settlements to CMS. Attorneys can further protect themselves by putting Medicare's name on settlement drafts and getting written confirmation that Medicare's interests have been protected. Note that even an airtight indemnity clause on a settlement release or a hold harmless agreement will not protect an attorney outright, because CMS, as a governmental entity, has a "super lien" on all payments made. Furthermore, if your client is the Medicare beneficiary, he/she risks termination of all benefits if he/she fails to protect Medicare. Therefore, the most important role as counsel, second only to reporting, is to make sure all

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claimants/plaintiffs are aware of the law and the risks associated with non-compliance. Finally, while the above is an overview of MMSEA requirements and provides recommendations to simplify the process, it is not a complete guide to navigating the ever changing landscape of Medicare reform.

I recommend each attorney review the MMSEA User Guide which can be found and downloaded for free from this [link](#). For additional information refer to this [link](#). Email questions or comments to Katrina Valencia @ [valenciak@slmclaw.com](mailto:valenciak@slmclaw.com)

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