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SMART Act Becomes Law

By [Gary Wickert](#) | February 7, 2013

Sanity Restored To Medicare Secondary Payer Liability

The 112th Congress had a lot on its plate – from the “fiscal cliff” to Hurricane Sandy relief. It passed legislation on the former but not the latter, and some people feel it should have been the other way around. However, no matter your politics, Democrats and Republicans agree completely on one piece of legislation passed by Congress over the Christmas holiday.

With only three “no” votes in the House and unanimous passage in the Senate, Congress passed H.R. 1845, including legislation known as the “Strengthening Medicare and Repaying Taxpayers Act” (SMART Act). The Act will improve the efficiency of the Medicare Secondary Payer (MSP) system and process, by requiring the Centers for Medicare and Medicaid Services (CMS) to streamline its process, eliminating the uncertainty and costly delays in settling claims and providing funds to the beneficiaries sooner. The bill was signed into law on January 10, 2013.

Clients and friends of Matthiesen, Wickert & Lehrer, S.C. may recall my 2010 article, “[Subrogation and Medicare Set-Asides](#)“. It recounts in some detail the

problems created in December 2007 when Congress enacted § 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), which required any entity making a payment to a Medicare beneficiary to report that payment to the CMS.

Section 111 created a new enforcement tool for CMS to pursue MSP claims through a new reporting requirement and a shift in compliance responsibilities upon the regulated community of group health plans, workers' compensation plans and insurers, liability insurers, self-insureds, and others. It became a tremendous pain in the derriere, complicating claims adjusting and subrogation practices, and holding up settlements in even small claims.

The SMART Act intended to effect major changes and provides more efficiency and certainty to the MSP process for non-group health plans, workers' compensation carriers, and primary payers. This means it is aimed squarely at Medicare liens and the potential liability to CMS which lingered when litigation, third-party actions or [workers' compensation claims were settled](#).

The Act effectuates changes important and beneficial to trial lawyers, their clients and primary payers, which is why the Act is universally applauded on both sides of the bar and the political aisle. Plaintiffs and their attorneys should benefit from a provision locking in the Conditional Payment amount for three months. Primary payers will benefit from safe harbor provisions for RRE reporting.

BENEFITS TO PRIMARY PAYERS (INSURERS)

One of the biggest obstacles for carriers and subrogated insurers was the overriding question as to whether an injured plaintiff or claimant was Medicare eligible – the lynchpin for all of the administrative nightmares previously associated with the MSP law.

The CMS had created a Query System to determine whether individuals are Medicare eligible; however, that system was reliant on Medicare numbers and Social Security Numbers (SSNs). It will be interesting to see if CMS can develop a workable system that avoids such personal information.

The SMART Act will help primary payers by creating a "safe harbor" where the primary payer is unable to obtain the plaintiffs' SSNs after a good faith effort. This change was necessitated by plaintiffs' refusal to provide their Medicare numbers or SSNs due to privacy concerns. Medicare numbers are often just as "private" as SSNs because they are generally the SSN followed by a letter.

In addition to eliminating the use of SSNs and Medicare numbers, the SMART Act creates a three-year statute of limitation for all MSP claims. The new three-year statute of limitations for MSP recovery actions accrues from the date of receipt of the Section 111 report, which makes that date our new best friend.

BENEFITS TO PLAINTIFFS

The passage of the SMART Act is also applauded by trial lawyers. The key benefit for plaintiffs and their attorneys is the new ability to “lock in” Conditional Payment amounts prior to settlement. If the Medicare Secondary Payer Recovery Contractor (MSPRC) is provided with enough time to calculate the Conditional Payments prior to settlement, and, if they are informed of the settlement less than three months after its determination of Conditional Payments, the MSPRC cannot increase that amount thereafter. In theory, this is good news, but it remains to be seen whether the MSPRC can comply with such a system. It is possible we could end up with even longer waiting periods for the initial Conditional Payment letter.

Nonetheless, this three month lock-in period should be well-received by plaintiff attorneys as it should take some of the guessing game out of MSP compliance. However, it is important to remember the SMART Act does not effect or create MSA rules. The SMART Act also requires CMS to set a monetary threshold under which the MSP rules will not apply – giving a green light once again to the typical smaller settlements involving personal injuries.

BENEFITS TO EVERYONE

Under the new Act, CMS would have 65 days from the receipt of a request to provide the Medicare reimbursement amount, which can be extended 30 days after additional notice is provided to CMS with respect to a failure to respond to the initial request. After this period, the parties can rely on the reimbursement amount available on the CMS website.

Effective January 1, 2014, certain liability claims will be exempt from reporting and reimbursement if the claim falls below the annual threshold as calculated by the Secretary of Health and Human Services (HHS). Civil penalties for non-compliance with mandatory insurance reporting requirements will now be discretionary and “up to” \$1,000 for each day of non-compliance with respect to each claimant. CMS is also now mandated to implement a reporting process so that responsible reporting entities do not have to access or report SSNs or Health Identification Claim Numbers (HICN).

OTHER BENEFITS OF THE SMART ACT

The American Association of Justice (AAJ) has provided a nice section-by-section summary of some of the changes made by the SMART Act. CMS is required to maintain a secure web portal with access to claims and reimbursement information. The web portal must meet the following requirements:

- Payments for care made by CMS must be loaded into the portal within 15 days of the payment being made.
- The portal must provide supplier or provider names, diagnosis codes, dates of service, and Conditional Payment amounts.
- The portal must accurately identify that a claim or payment is related to a potential settlement, judgment, or award.
- The portal must provide a method for receipt of secure electronic communications from the beneficiary, counsel, or the applicable plan.
- Information transmitted from the portal must include an official time and date of transmission.
- The portal must allow parties to download a statement of reimbursement amounts.

The Reimbursement Process

The SMART Act requires parties to notify CMS when they reasonably anticipate settling a claim (any time beginning 120 days before the settlement date). CMS then has 65 days to ensure the portal is up to date with all of the appropriate claims data. CMS can have an additional 30 days on top of the 65 days to update the portal if necessary. At the expiration of the 65 and potentially the 30-day periods, the parties may download a final Conditional Payment amount from the website. The final Conditional Payment amount is reliable as long as the claim settles within three days of the download.

Resolution of Discrepancies

CMS is required to provide a timely process to resolve any discrepancies regarding the amount to be reimbursed. An individual can provide the Agency with

documentation to establish that the web portal is not reflecting an accurate reimbursement amount. CMS is required to respond to this documentation within 11 business days. If CMS does not make a determination within 11 days, the reimbursement amount as calculated by the beneficiary becomes the final Conditional Payment amount.

Appeals

CMS must draft regulations that give applicable insurance plans limited appeal rights to challenge final Conditional Payment amounts. These appeal rights are only applicable in the event CMS attempts to collect reimbursement from the plan. Beneficiaries must be given notice of any appeal undertaken by an insurance plan. Existing appeal rights for beneficiaries remain the same.

Section 202 (Claims Threshold for Collection)

CMS, with input from the Government Accountability Office (GAO), is required to calculate and implement a threshold amount for liability claims (excluding ingestion, implantation, and exposure claims) only. The threshold amount will be based on the costs to CMS for collecting an average claim. If an amount owed is under that threshold amount, CMS is barred from seeking repayment. The threshold will be calculated and adjusted annually.

Section 203 (Reporting Requirements)

CMS has discretion in applying reporting penalties on insurance companies. Previously, any reporting error by an insurer was subject to a \$1,000 a day penalty. The SMART Act amends the statute to allow for discretion in the amount of the penalty based on the severity of the violation.

Section 204 (Use of Social Security Numbers in MSP Reporting)

CMS is required to modify plan reporting requirements within 18 months so that plans do not have to use SSNs or Health Identification Claim Numbers (HICN). CMS may have an additional 12 months if it affirms to Congress it needs more time. This provision addresses several policy concerns related to privacy and reporting problems.

Section 205 (Statute of Limitations)

CMS only has three years from the time they are notified of a settlement to seek payment for medical services provided. This provision will eliminate a CMS push for a six-year statute of limitations that had recently been argued in the 11th Circuit.

Subrogation counsel should still be consulted on larger subrogation cases involving future medical and MSP issues. However, it sure is nice for a change when Congress realizes it has done something dumb and actually goes back and fixes the mistake. The SMART Act is estimated by the Congressional Budget Office (CBO) to save taxpayers \$45 million over ten years.

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