

Client Bulletin

August 2009

Additional Responsibilities for Those Liable to Medicare Beneficiaries

Pursuant to recent legislation, companies and insurers face new responsibilities to the U.S. government when they find themselves liable for an illness, injury or accident to individuals receiving Medicare benefits. For example, a company may be required to report payments made to an employee who receives Medicare for an on-site injury. A company may also be liable when it finds itself in litigation with a Medicare beneficiary. If a company pays a damages award arising out of a claim for personal injury, for example, to a plaintiff (or potential plaintiff) who receives Medicare, it may be required to report payment of the settlement or judgment. Additionally, insurance carriers may be required to report claims not only based on coverage under group health plans, but also based on coverage for the insured's negligence which results in injury to a Medicare beneficiary.

Generally, under the "Medicare, Medicaid, and SCHIP Extension Act" (MMSEA), Medicare is responsible for the medical costs of a Medicare beneficiary only if a company or insurer is not liable for payment of those medical costs. Thus, companies and insurers who could be considered liable are designated as "primary payers" under the MMSEA. Under the new "Medicare Secondary Payer Mandatory Reporting Requirements," of the MMSEA, those companies and insurers must now report to the Center for Medicare and Medicaid Services (CMS) any such payments made to a Medicare beneficiary.

The purpose of the new reporting requirements is to enable CMS to protect against Medicare overpayment or mistaken payment for Medicare-covered items and services to Medicare beneficiaries. Thus, payment by a company or

insurer to a Medicare beneficiary, for an illness, injury or accident, triggers a responsibility to report the payment to CMS.

The regulations are currently in the registration and testing phase and companies will begin reporting in March 2010 and all companies will be required to have registered and begin reporting by July 2010. To ensure compliance with the new regulations, companies and insurers should implement procedures to determine whether an individual who makes a claim which can be reasonably expected to pay for medical or health care costs is a Medicare beneficiary. The penalty for noncompliance will be hefty: \$1,000 per day for each claimant.

The particular circumstances of the claim or award will dictate the information that must be reported and, in any event, will include the identity of the Medicare beneficiary and the amount of the award.

Who Must Report?

The new Medicare reporting requirements apply to: (1) liability insurance, (2) no-fault insurance, and (3) workers' compensation insurance.

"Liability insurance" includes a self-insured entity, which is not only a business that carries its own risk, but also a company that fails to obtain insurance. Additionally, a business is considered "self-insured" for those amounts it must pay to a claimant under its insurance, such as a deductible or co-payment, thus potentially triggering a duty to report to CMS the payment of that deductible or co-payment.

Even when it is clear that the reporting requirements apply to a company or insurer, determining who is the "Responsible Reporting Entity" is an additional, and often cumbersome, process, especially when several different entities share responsibility for payment to a claimant.

One example is if a company is responsible for a deductible amount and its insurance carrier is responsible for the remainder of the claim. In that case, if the carrier pays the claimant in full directly and the company reimburses its carrier for the deductible, the insurance carrier, not the company, should report. On the other hand, when the company pays the claimant directly, and its insurance carrier reimburses it, the company must report.

In the case of excess or reinsurance, the same principles apply and the salient question is who actually remits payment to the claimant. Accordingly, where a claimant is paid directly by both an insurer and an excess insurer or re-insurer, each insurer is responsible for its own reporting.

In the context of the settlement of a lawsuit with multiple defendants, an agreement to have one of the defendant's insurers issue payment to satisfy the settlement does not shift the responsibility to report solely to that insurer. Each defendant remains responsible for its own reporting.

Application of the Reporting Requirements to Foreign Companies

The regulations are silent as to whether a foreign company or insurer will be considered a Responsible Reporting Entity. CMS has informally stated that entities "associated with multi-national organizations" must report. The responsibility for an overseas company or insurer to report, however, may depend on, among other things, the extent to which it does business in the U.S., the location of the incident giving rise to liability, the residence of the Medicare beneficiary or where payment is made. When an overseas company or insurer finds itself liable to a person who receives Medicare benefits, it should consider and carefully assess whether it is also required to report the payment on that claim.

Conclusion

As noted above, companies and insurers must begin to implement procedures to ensure that they identify whether a claim against them involves a Medicare beneficiary and comply with the new reporting requirements to avoid substantial sanctions. Further, when an illness,

accident or injury of a Medicare beneficiary gives rise to a legal action, defense counsel must be sure to find out whether the illness, accident or injury at issue involves a Medicare beneficiary.



If you would like more information regarding the MMSEA's Reporting Requirements or the topics discussed in this Client Bulletin, please contact:

Bartholomew J. Banino, Esq.
Allison M. Surcouf, Esq.
Condon & Forsyth LLP
7 Times Square
New York, New York 10036
Tel: (212) 894-6700
Fax: (212) 370-4453
E-mail:
bbanino@condonlaw.com
asurcouf@condonlaw.com