dri™ The Brief Case: DRI Committee News
March 2023 | Volume 2 Issue 3

Medicare Myth Busting: Mandatory Medicare Reporting Misconceptions & Mistakes: Part I

Civil Monetary Penalties: Who is the Responsible Reporting Entity?

By Barrye Panepinto Miyagi and John Cattie

Executive Summary: This article is intended for entities, insurers, and third-party administrators handling claims where medical expenses are alleged or released via settlements, judgments, and/or other payments. The article focuses on properly identifying the entity responsible for submitting a mandatory Section 111 report. If you have ever dismissed the obligation to evaluate Section 111 reporting obligations because "my insurer or Third-Party Administrator handles these issues," this article is for you. The authors provide a laymen's discussion of a common misconception about Section 111 reporting: specifically, what entities are responsible for reporting and reporting errors.

In 2007, Congress enacted Medicare Secondary Payer ("MSP") reporting requirements, often referred to as MMSEA or Section 111. 42 U.S.C. § 1395y(b)(8). The reporting requirements affect liability insurers (including self-insurers), no-fault insurers, and workers' compensation insurers who are involved in claims where medical expenses are alleged or resolved. Generally, federal law requires a Section 111 report when a payment obligation exists that includes medical expenses with a Medicare beneficiary. Under existing law, Medicare may impose civil monetary penalties ("CMPs") up to $1,000 per day, per claimant, for failure to submit a Section 111 report.

In 2012, Congress passed the Strengthening Medicare and Repaying Taxpayers Act, (the "SMART Act"). SMART Act of 2012, Pub. L. No. 112-242, 126 Stat. 2380. The SMART Act requires that Medicare clarify when and under what circumstances CMPs may be issued. The Section 111 Proposed Rule is pending with the White House Office of Information and Regulatory Affairs ("OIRA"), with a pending release date on or before February 18, 2024.

Entities who are insured and/or who use a third-party administrator ("TPA") may believe they have no accountability for Section 111 reporting. Many believe that an insurer or TPA insulates their company from CMPs.

We challenge our readers to review this article and examine the circumstances under which their clients may be responsible for Section 111 reporting. Understanding who is responsible for reporting may save your clients up to $1,000/day per claimant.

An Overview of Section 111 Reporting

Section 111 reports help Medicare properly coordinate health care benefits. The reports include data on settlements, judgments, or other payments and are submitted

electronically to the Centers for Medicare & Medicaid Services ("CMS") through the Section 111 Coordination of Benefits Secure Website. In addition to providing Medicare with information about entities that may be responsible for incident-related medical expenses, the reports provide Medicare with information needed to seek reimbursement from the claimant, the defendant, and/or the defendant's insurer. Reporting is mandatory under certain circumstances. Only a Responsible Reporting Entity ("RRE") (usually a defendant and/or its insurer) who has registered with CMS to Section 111 report or an entity or person designated as a reporting agent by the RRE may submit reports.

In general, the law requires reporting when there is a payment obligation to the claimant. RREs must report any payment to a claimant that is (or was) Medicare eligible where medical expenses are claimed and/or released or the settlement, judgment, award or other payment has the effect of releasing medicals. Importantly, the trigger for submitting a Section 111 report is rarely the payment date, and late Section 111 reports may result in CMPs.

Two types of Section 111 reports exist: Total Payment Obligation to the Claimant (referred to as a "TPOC") and Ongoing Responsibility for Medicals ("ORM"). In some cases, the law requires reporting both a TPOC and ORM.

When resolving claims with Medicare-eligible persons who asserted or released medical expenses, RREs are required to report TPOCs. RREs are required to report ORM in certain workers' compensation and no-fault claims (such as mandatory medical payments ("Med Pay") and/or personal injury protection ("PIP"). When reporting ORM, the RRE indicates (in the Section 111 Reporting Portal) that it has assumed ORM. If (and when) ORM may be terminated, the RRE must enter an ORM termination date. Reporting ORM provides CMS with notice that the RRE is paying a claimant's incident-related medical expenses. When ORM is properly terminated, Medicare resumes payment.

CMS excludes certain TPOCs from Section 111 reporting. The current Section 111 reporting monetary threshold is $750.00, except in exposure, ingestion, and implantation cases. All exposure, ingestion, and implantation claims are reportable regardless of the amount of the resolution. [Settlements and judgments and other payments which fall within the December 5, 1980, policy are also not reportable. The December 5, 1980, policy is not addressed in this article.]

Fact Pattern

Jimmy James, a Medicare beneficiary, often shopped at the local supermarket (the "Supermarket"). In January of 2022, he inhaled vapors emanating from the Supermarket kitchen as a result of a small fire. He subsequently became ill and treated at a local hospital. Since he was a regular at the Supermarket, he made an informal claim to the manager. Mr. James and the Supermarket agreed that James would accept a $500.00 Supermarket voucher for his damages. Mr. James did not sue the Supermarket, but he did file suit against the Manufacturer of the kitchen equipment which caught fire (the

"Manufacturer"). Mr. James settled with the Manufacturer for $100,000 about the same time that he received his voucher from the Supermarket. Protection Insurance ("Protection") insured the Supermarket, and the policy included a $1,000.00 deductible. Rejection Insurance ("Rejection") insured the Manufacturer, and the deductible was met.

Because Jimmy accepted a voucher and because the Supermarket was insured, the Supermarket did not submit a Section 111 report. The Supermarket put the risk manager of Protection on notice of the claim, advising that it resolved the claim by issuing a voucher. Protection did not submit a Section 111 report because it issued no payment. The Manufacturer assumed that Rejection Insurance would handle Section 111 reporting for the $100,000 settlement. Rejection did not report because of an exclusion in its policy.

Who was responsible for Section 111 reporting? The Supermarket? Protection? The Manufacturer? Rejection? Who is at risk of CMPs? What if a TPA handled personal injury liability claims asserted against the Supermarket?

Who is the RRE?

Numerous factors determine whether an entity is an RRE, and thus responsible for Section 111 reporting. The mere fact that an entity is insured does not necessarily exclude the entity from RRE status. A company must consider a few fundamental questions when evaluating whether an insurer (or other entity) is the RRE or otherwise responsible for the company's Section 111 reporting.

The Applicable Plan is responsible for reporting. Ctrs. For Medicare & Medicaid Servs., Dep't of Health & Human Servs., MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (including Self-Insurance), No-Fault Insurance, and Workers' Compensation User Guide ("NGHP User Guide"), Appendix H. (Version 7.0 Jan. 9, 2023). Applicable Plan is defined broadly at 42 U.S.C. § 1395y(b)(8)(F). The definition of Applicable Plan is somewhat vague and subject to interpretation. In a general sense, the Applicable Plan is the entity that is responsible for paying the claim. Where a company is self-insured for a claim, the company is the RRE. When a company is insured for a claim, the determining factors on whether a company or its insurer is the RRE is the type of insurance the carrier provides and who physically funds the settlement. Other important factors include whether the policy includes a deductible, Self-Insured Retention ("SIR"), or other types of insurance. Consider the following examples:

The Supermarket and Protection – Who's the RRE?

Example 1: Supermarket deductible not met: Although the Supermarket is insured for the incident, the $1,000.00 deductible has not been met because the claim was resolved with a $500 store voucher. CMS considers the deductible self-insurance. NGHP User Guide, Ch. III § 6.1.3. If we consider this an exposure-related incident (recall Mr. James

fell ill after inhaling vapors), there is a Section 111 reporting obligation, and the Supermarket is the RRE. As a practical matter, Protection may agree to submit the Section 111 report on behalf of the Supermarket (even if payment was made to Mr. James with a voucher). However, if there is an error, CMS might choose to impose CMPs against the Supermarket.

Example 2: Supermarket deductible met: Assume the case resolves for $2,500 (over the deductible), and that Protection issues the check to Mr. James. Protection is responsible for reporting both the deductible and any amount in excess of the deductible. NGHP User Guide, Ch. III §6.1.3.

Example 3: Self-Insured Retention: Assume the case resolves for $2,500, there was an SIR of $50,000, and the Supermarket paid the claimant. CMS distinguishes traditional SIR policies from policies where deductibles were met. NGHP User Guide, Ch. III § 6.1. Since the claim resolved under the SIR and the Supermarket paid the claim (with or without a voucher), the Supermarket is the RRE and is responsible for Section 111 reporting. If the SIR had been met and a claim paid, payers should evaluate which entity paid the claimant and/or the claimant's attorney. This is discussed in greater detail, below.

Example 4: Other types of insurance: Companies may become confused when there are other types of insurance or where an insurer reimbursed it for a claim. If the Supermarket had other types of insurance, the entity that pays the claimant or the claimant's counsel, is the RRE. NGHP User Guide, Ch. III § 6.1.3. For example, if there is re-insurance, stop-loss insurance, excess insurance or umbrella insurance, the entity that actually paid claimant or claimant's counsel is the RRE.

Example 5: Reimbursements where the insurer has responsibility beyond a certain limit: Assume the Supermarket pays Mr. James but receives reimbursement from Protection later in the year. In this case, the Supermarket is the RRE. NGHP User Guide, Ch. III § 6.1.3. While Protection may, as a courtesy, submit the Section 111 report, the Supermarket bears the risk for potential CMPs if there are errors or omissions in the report.

Example 6: Failure to notify insurer of claim: Assume the policy between the Supermarket and Protection included a deductible which had been met. Further, assume that the Supermarket never notified Protection of the claim. If Protection was not placed on notice of the claim, the Supermarket is the RRE regardless of whether the claim is within or in excess of the deductible. NGHP User Guide, Ch. III § 6.1.3.

Example 7: Fronting Policies: With "fronting policies," the insurer ultimately retains no risk under the policy. The insured and the insurer both expect that the insured will retain the ultimate risk for all claims. With a fronting policy, where the Supermarket pays the claim, the Supermarket is the RRE. Where Protection pays the claim, Protection is the RRE. NGHP User Guide, Ch. III § 6.1.5.

The Manufacturer and Rejection

As mentioned in the fact pattern, Rejection denied the claim due to an exclusion in the policy. As a practical matter, entities must consider if they are insured for a claim in the first place.

Example 1: Claim denied: If Rejection denied the claim, the Supermarket is the RRE and responsible for the Section 111 report. Where there is no coverage, there should be no expectation that an insurer is the RRE.

Example 2: Reservation of Rights: Assume Rejection agreed to defend the case under a reservation of rights subject to its review of additional information. In this case, the Supermarket and Rejection should specifically discuss Section 111 reporting obligations to ensure that the proper entity reports correct information.

Workers' Compensation

Identifying the RRE in workers' compensation claims is similar to the process described above, as long as the applicable law authorizes an employer to purchase insurance from a carrier and the employer does so. However, where the applicable workers' compensation law or plan establishes an agency with sole responsibility to resolve and pay claims, the established agency is the RRE. NGHP User Guide, Ch. III § 6.1.12.

Where the applicable law or plan authorizes employers to self-insure, purchase insurance, and also establishes a State or Federal agency with sole responsibility to resolve and pay claims, there are numerous factors, that must be considered. Those factors are similar to the examples addressed above in liability cases. NGHP User Guide, Ch. III § 6.1.12.

Multiple Defendants

What if the Supermarket and the Manufacturer entered into a settlement agreement with claimant? May the Manufacturer pay Mr. James and submit a Section 111 report that covers both the Manufacturer and the Supermarket?

The Manufacturer cannot report for the Supermarket. The agreement to have one defendant pay Mr. James and submit a Section 111 report for the total settlement amount does not shift RRE responsibility to the defendant issuing payment. All RREs are responsible for their own reporting. Further, where there is joint and several liability for the payment, each defendant must report the total, not just its share, of the settlement. NGHP User Guide, Ch. III § 6.1.7.

Third Party Administrators

Use of Recovery Agents and Reporting Agents: Many companies hire recovery and/or reporting agents to process and/or report their claims. Although an RRE may contract

with a recovery or reporting agent, the RRE may not, by contract or otherwise, limit its reporting responsibility. By way of example, assume Protection hires a TPA to process all of its claims and to Section 111 report. Pursuant to CMS guidance, if Protection is the RRE, Protection is responsible for errors and omissions in reporting. NGHP User Guide, Section 6.2.

Exceptions where Recovery Agent may be an RRE: CMS does acknowledge limited exceptions where a recovery agent may also be the RRE. The NGHP User Guide uses State established "assigned claims funds" as an example. Where a State agency designates an authorized insurance carrier to resolve and pay claims using State-provided funds without State Agency review or approval, the designated insurance carrier is the RRE. If the State agency retains review or approval authority, the State agency is the RRE. Per CMS, this is a rare situation. NGHP User Guide, Section 6.1.10.

Who is Responsible for CMPs?

This answer is simple. The RRE is responsible for CMPs. Companies must understand whether the company or its insurer is the RRE. An incorrect assumption can result in a significant financial risk.

The examples in this article pave the way for additional questions. The authors welcome questions and look forward to drafting the final part of this series when OIRA releases the final regulations addressing CMPs.

Disclaimer: This article is accurate as of February 21, 2023, and is intended for general information purposes only. Information posted is not intended to be legal advice.

Barrye Panepinto Miyagi is a Partner at the law firm of Taylor, Porter, Brookes & Phillips, L.L.P. and the Practice Group Leader for Taylor Porter's MSP Compliance Group. Barrye is certified as an MSP Fellow, and she works in all areas of MSP compliance. She has over 25 years of litigation experience and over 15 years of experience in the MSP arena. Barrye received her BS and her JD from Louisiana State University.

John Cattie is the Managing Member of Cattie & Gonzalez, P.L.L.C. He focuses his legal practice on Medicare Secondary Payer issues, including mandatory insurer reporting, conditional payment resolution, and future medical exposure/Medicare Set-Asides. He is a past chair of DRI's MSP Task Force, serving as Executive Editor for DRI's Defense Practitioner's Guide to Medicare Secondary Payer Issues. He received his BA from the University of North Carolina and his JD/MBA from Villanova University.