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Your Compliance Will Be Rewarded:
USDOJ Settles Case with Plaintiff Law Firm for Failure to Repay Medicare Conditional Payments

"If you think compliance is expensive, try non-compliance"
Former U.S. Deputy Attorney General Paul McNulty

Executive Summary: On June 18, 2018, the United States Department of Justice ("USDOJ") announced a settlement that directly affects parties resolving certain insurance claims with Medicare beneficiaries. The USDOJ settled a case against a plaintiff personal injury law firm based in Philadelphia, PA which had failed to repay Medicare for conditional payments pursuant to the Medicare Secondary Payer ("MSP") Act. If the firm violates the terms of the settlement agreement, the USDOJ left the door open to use the federal False Claims Act ("FCA") to impose additional penalties.

While the settlement involves one bad actor in the entire system, it highlights the need for a higher standard of MSP compliance. All plaintiff law firms, insurance carriers and self-insureds need to establish an MSP compliance program, as suggested by the USDOJ, to ensure the USDOJ cannot punish them in a similar manner. Working with an experienced MSP lawyer is the best way to establish that program in the most compliant way possible.

The Problem: Plaintiff Law Firm Neglects Statutory Obligation to Repay Medicare.

The MSP Act imposes a significant hurdle to parties attempting to resolve certain insurance claims. The MSP Act broadly prohibits Medicare from making payment for a beneficiary's medical expenses where payment has been made or can reasonably be expected to be made under a workers' compensation plan, an automobile plan, a liability insurance plan (including self-insurance) or a no-fault plan. *42 U.S.C. § 1395y(b)(2)(A)(ii)*.

This broad prohibition applies both with respect to past medical expenses as well as future medical expenses. With respect to past medical expenses, the applicable statutory text reads, "Payment … may not be made … with respect to any item or service to the extent that … payment … can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) …" *Id*. With respect to future medical expenses, the applicable statutory text reads, "Payment … may not be made … with respect to any item or service to the extent that payment has been made … under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) *…" Id*.

There is one exception to this broad statutory prohibition known as a "conditional payment." Congress authorizes the United States Department of Health & Human Services and its Secretary to make a conditional payment on behalf of a Medicare beneficiary when payment has not been made and cannot reasonably be expected to be made. *42 U.S.C. § 1395y(b)(2)(B)(i)*. As the Centers for Medicare and Medicaid Services ("CMS") is a sub-agency of the United States Department of Health & Human Services, the Secretary delegates the task of making conditional payments and running the MSP program to CMS.

Under certain circumstances, Medicare has a right to recover any conditional payments made. However, this recovery right is not automatic. Two (2) things must occur for CMS to recover a conditional payment. First, a primary plan or payer must accept responsibility for a claimant's medical expenses. *42 U.S.C. § 1395y(b)(2)(B)(ii)*. Second, that responsibility must be evidenced by a judgment, a compromise for release, or other means. *Id*. Unless both events occur, CMS has no right of recovery for conditional payments.

Apparently, a plaintiff personal injury law firm in Pennsylvania (the "Firm") did not adhere to the MSP Act and its statutory obligations. According to the USDOJ, the Firm was settling cases for Medicare enrolled clients without verifying/resolving conditional payments. Over time, Medicare discovered these debts (presumably via mandatory insurer reporting pursuant to *42 U.S.C. § 1395y(b)(8))*. It then asserted its recovery rights against the beneficiary and/or Firm for those conditional payments. *42 U.S.C. § 1395y(b)(2)(B)(ii).* Ultimately, Medicare referred the matter to USDOJ when the debt remained unresolved. *42 U.S.C. § 1395y(b)(3).* From there, it was a matter of time before the USDOJ used all possible avenues to get the Firm to pay.

The Deal: Plaintiff Law Firm Settles with USDOJ to Avoid Steeper Penalties.

The Firm and the USDOJ agreed to the following: 1) the Firm repays Medicare a lump sum amount of $28,000; 2) the Firm has one person internally in charge of paying all MSP debts on behalf of the Firm's clients; 3) the Firm trains that employee so that all MSP debts are handled in a timely manner; and 4) the Firm reviews any outstanding debts with that designated employee every six months or less to ensure MSP compliance. If the Firm slips, the USDOJ reserved the right to use the FCA to penalize the firm. https://www.justice.gov/usao-edpa/pr/philadelphia-personal-injury-law-firm-agrees-start-compliance-program-and-reimburse (*last visited June 25, 2018*).

While the target here was a plaintiff personal injury law firm, the entire insurance settlement community should feel the aftershocks from this announcement. USDOJ's involvement should be unsettling for all. In fiscal year 2017, the USDOJ collected $2.4 billion in fraudulent healthcare payments. https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 (*last visited June 21, 2018*). These include those submitted by medical providers when treating a Medicare enrolled patient. Medicare interprets the MSP Act to prohibit payment of such bills in the first place when another primary plan/payer exists. When Medicare is forced to pay/chase, its efforts are sometimes successful. Other times, it may refer the matter to the United States Department of the Treasury ("USDOT") for collection. Other times, as happened here, it may refer the matter to the USDOJ for enforcement.

USDOJ and the False Claims Act: A Primer.

The USDOJ has the authority to pursue a wide variety of actors for violations of the MSP Act. This includes but is not limited to medical providers, hospitals, physicians, insurance carriers, self-insureds, attorneys and beneficiaries. *42 C.F.R. § 411.24*. Its most potent weapon is the False Claims Act. *31 U.S.C. § 3729, et seq.* In addition to the double damages exposure under the MSP Act, the federal government may file a claim under the FCA to address fraud in a federal program such as Medicare. The FCA provides

for treble damages and a mandatory penalty of $10,781.40 and $21,562.80 per false claim (based on inflationary adjustments). *Id*.

FCA liability is based in part on a party's attempt to conceal or avoid an obligation to pay the federal government. The FCA defines a false claim as follows: "any person who… knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000… plus three times the amount of damages which the Government sustains because of the act of that person." *31 U.S.C. § 3729(a)(1)(G)*.

The FCA permits private persons known as relators to file civil actions known as qui tam actions to recover damages on behalf of the government from any person who: (1) Knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the armed forces of the United States a false or fraudulent claim for payment or approval; (2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government. *31 U.S.C. § 3729(a)(1) – (2)*.

The knowing avoidance by a practitioner of the obligation to repay CMS for conditional payments made to a Medicare-enrolled beneficiary constitutes a false claim. As it relates to the "knowing" or "scienter" element under the FCA, knowledge includes reckless disregard or deliberate ignorance. *31 U.S.C. § 3729(b)*. Under the FCA, "specific intent" to defraud is an element in this analysis. The FCA defines culpable persons as those who avoid or cause the avoidance of the obligation to pay money to the government. *31 U.S.C. § 3729(a)*.

It cannot be said that the USDOJ's potential use of the FCA in the MSP context comes without warning. According to former Assistant U.S. Attorney Robert Trusiak, in an open letter written to the Western New York bar, the words of the MSP statute provide that Medicare "shall be reimbursed for the medical expenses upon a tort settlement involving a Medicare beneficiary." *Letter, Trusiak: State courts not an out on MSP, Robert Trusiak, Assistant U.S. Attorney, dated March 25, 2010*. The federal government's "commencement of suit for the failure to secure an administrative adjudication from CMS concerning the existence and/or amount of the repayment obligation" shares the two important litigation goals of "deterrence and punishment." *Id*. As explained by Trusiak: "It may be necessary for the United States to pursue its double damage remedy in federal court to vindicate these litigation goals of deterring MSP misconduct by others and punishing MSP violations for the continued recklessness in failing to pursue an administrative adjudicatory. It is important to recognize any federal double damages suit will address the panoply of MSP misconduct by the practitioner rather than address only a single case."

The announcement from the USDOJ makes clear the serious nature of these offenses. Of note and concern to stakeholders should be the amount of the settlement. Here, the USDOJ appears willing to use the FCA against the Firm when it has settled for $28,000. In the grand scheme of things, $28,000 is not a large amount for a Medicare conditional payment obligation, especially considering the amount is intended to resolve more than one debt owed. Some readers will think about those cases where they

had one case where the debt owed was $28,000 or more. Application of the FCA to MSP debts does not appear to be limited to only the "big ones."

Plaintiff Takeaways: Develop an MSP Compliance Program to Avoid USDOJ Scrutiny.

Obviously, plaintiff attorneys need to take notice here and take a look in the mirror. While Medicare conditional payment issues can be frustrating, tedious or even delay potential settlements, they cannot be ignored. Gone are the days when one could ignore the issue and it would simply go away. Processes are in place which ensure Medicare will find out about your client's settlement.

Medicare Knows About Settlements with Medicare Beneficiaries.

As a threshold matter, understand that Medicare will discover that you have settled a case involving a Medicare beneficiary. Not may discover but will discover. Remember that the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA" or "MIR") requires that every insurance carrier or self-insured entity report certain information to Medicare when they resolve a claim involving a Medicare beneficiary that accounts for medical expenses. *42 U.S.C. § 1395y(b)(8)*. When that report does not happen on a timely basis, Medicare has the discretion to penalize that entity up to $1,000 per day per claimant for its failure to report. *Id*. So, Medicare receives information about the settlement whether you provide it to them or not.

Upon receipt of that report, Medicare will search its database. It looks for claims paid on behalf of that beneficiary that match the certain ICD-9/10 codes reported by the defense post-settlement. From there, if Medicare finds any conditional payments that have not yet been reimbursed, Medicare will pursue repayment. Now, under some circumstances, we know it will refer the matter to the USDOJ. With that said, you can pay Medicare some now when you settle your case, or you can pay Medicare more later.

An Attorney's Ethical Obligations Extend to MSP Issues.

The MSP Act poses plaintiff attorneys problems not only from the practical perspective but also the ethical perspective. When a law firm does not reimburse Medicare for conditional payments paid on behalf of their client, are the attorneys of that firm abiding by their state's rules of professional conduct? Every state has some version of the following rules, but here are a few from the American Bar Association ("ABA") Rules of Professional Conduct to think about:

> **Rule 1.1** Competence "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
>
> **Rule 1.3** Diligence "A lawyer shall act with reasonable diligence and promptness in representing a client."
>
> **Rule 1.4** Communications (b) "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

> **Rule 1.15** Safekeeping Client Property (d) "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."
>
> https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (*last visited June 21, 2018*).

When a plaintiff law firm fails to reimburse Medicare for conditional payments made, are the lawyers of that firm acting competently? Are they acting diligently? Are they communicating properly with the client? Are they safekeeping client property? Or, are they in violation of the ABA Rules of Professional Conduct? Certainly, these are questions best left to be answered by your state's ethics bar or committee. From this perspective, though, there appear to be multiple ethics violations.

ABA Formal Opinion 481 Reinforces the Need for the Attorney to Get It Right.

Recently, the ABA raised the stakes. In Formal Opinion 481 (A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error), the ABA's Standing Committee on Ethics and Professional Responsibility concluded that Model Rule of Professional Conduct 1.4 requires an attorney to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_481.authcheckdam.pdf (*last visited June 26, 2018*). "An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; … "*ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 481*. Along those same lines, "[a] lawyer may not withhold information from a client to serve the lawyer's own interests or convenience." *Id*. Formal Opinion 481 affirms the need to disclose material errors to current clients, though that same obligation does not extend to former clients. *Id*.

The question for attorneys in light of Formal Opinion 481 is this: "Does it constitute material error to ignore the MSP Act's past or future medical provisions and debts that may result from those provisions?" Most assuredly, that answer must be 'yes'. For cases where medicals are in play, Formal Opinion 481 encourages the prudent practitioner to confront the MSP issues proactively.

An MSP Compliance Program Addresses the USDOJ's Concerns.

Understanding the potential operational and ethical missteps described above, the solution set forth by the USDOJ makes sense. By having a single employee in charge of all MSP debt issues, training that employee properly and reviewing all outstanding MSP debts on a regular basis, the USDOJ is creating an MSP compliance program at the Firm.

An MSP compliance program is certainly not a new concept. Myself and others have been supporters of such programs for upwards of a decade. MSP compliance programs allow a firm to utilize a formal internal process for addressing potential MSP issues on every single case. The MSP compliance program views each case on its own merits, vetting it for potential MSP concerns and puts certain steps in motion to ensure those concerns will be addressed by the conclusion of the case. By affirmatively addressing all potential MSP issues as part of a formalized approach, a plaintiff firm can almost assuredly avoid any potential FCA allegations from USDOJ in the future while meeting all ethical obligations.

MSP compliance programs may take several forms. Some firms will choose to create their own process internally. If you take this approach, you should make sure that you ask an experienced MSP lawyer to vet your process and fill in the blanks for you. Some firms will choose to ask an experienced MSP lawyer to create a MSP compliance program on behalf of the firm. Some firms will use an experienced MSP lawyer as their MSP compliance program, hiring that lawyer to handle all MSP issues on their behalf. They could pay that experienced MSP lawyer on a case-by-case basis or keep the MSP lawyer on retainer. No matter what route you choose, it's imperative to get a MSP compliance program in place so your fate does not mirror that of your colleagues in Pennsylvania.

Defense Takeaways: MSP Compliance Programs Will Protect You From USDOJ.

While the USDOJ focused its scrutiny on a plaintiff personal injury law firm in Pennsylvania in this particular case, it could have just as easily been directed elsewhere. To avoid scrutiny from the USDOJ, defense entities (*i.e.*, insurance carriers, self-insureds, outside defense counsel and in-house counsel) should think about the following:

Mandatory Insurer Reporting Means Potential Conditional Payment Issues.

With MIR under the MMSEA over ten (10) years old, one would think everyone understands one basic thing. If an insurance carrier or self-insured (through its Responsible Reporting Entity or "RRE") must submit a report to comply with MIR, there is a potential Medicare conditional payment exposure. While Medicare cannot pay a bill for someone not enrolled in Medicare, it can pay a bill for a Medicare beneficiary. Potentially, it can seek reimbursement for that payment.

How in the world did the defendants settling cases with the Firm allow cases to be closed without verifying/resolving Medicare conditional payments? You know those entities submitted a report to Medicare to comply with MIR. They're not going to risk the $1,000/day penalty Medicare could impose for failure to report. When you know you have to submit a MIR report post-settlement, you need to make sure Medicare is reimbursed for any conditional payments made. It's as simple as that.

The MSP Act and the regulations promulgated by Medicare providing its official statutory interpretation allow Medicare to seek reimbursement of conditional payments from the primary plan/payer. *42 U.S.C. § 1395y(b)(2)(B)(ii).* While it's true that the current contractor handling conditional payments for Medicare in the auto and liability insurance context first seek reimbursement from the beneficiary, that does not preclude Medicare from seeking reimbursement from the primary plan/payer. *42 C.F.R. § 411.24(e)*. Deferring the conditional payment issue to the plaintiff attorney with no assurances or

confirmation that those will be handling compliantly is a dangerous approach. You need to make sure that the plaintiff's attorney handles Medicare conditional payments compliantly.

MSP Compliance Programs Work for Defense Entities Too.

The MSP compliance program concept envisioned by the USDOJ works for defense entities as well as plaintiff law firms. While Medicare will not directly speak with insurance carriers, self-insureds or their agents in an auto or liability insurance case unless it has obtained a consent to release from the Medicare beneficiary, there are certain foundational concepts upon which a defense-oriented MSP compliance program should be built:

1) You should receive evidence from plaintiff's counsel that it has established a record with Medicare before mediation. That record could be evidenced by a Rights & Responsibilities letter issued by Medicare. Even better, it could take the form of a conditional payment letter issued by Medicare. Either way, you know with certainty that Medicare is aware of the pending claim.
2) During the mediation, you should agree with plaintiff's counsel how Medicare conditional payments will be addressed. While Medicare frowns upon having its name listed as a payee on the settlement check (as supported by multiple court decisions), the parties should be clear with respect to how Medicare will be paid. Will defense pay Medicare directly once it knows the final demand figure? Will the parties agree to a hold back amount that plaintiff's counsel will pay from its trust account once she has a final demand figure? Will plaintiff's counsel hold all settlement proceeds in trust until she has a final demand figure? The final solution here is less important than the fact that the parties have discussed and agreed to a specific approach. Failure to agree to a specific approach could be grounds for the settlement to be voided.
3) Don't forget about future medicals during the mediation. If future medicals have been claimed/pled by the Medicare beneficiary and will actually be incurred post-settlement, how does plaintiff's counsel intend to address the future medical provisions of the MSP Act? MSP debts can accumulate pre-settlement, post-settlement, or both. While it is highly unlikely that Medicare could ultimately recover successfully against a defense entity for future MSP debts incurred post-settlement, you can eliminate this possibility by making sure the release incorporates how plaintiff's counsel will address that issue. You might not agree with the method plaintiff's counsel chooses to address the issue, but the important thing from your perspective is that the issue is addressed in some way, shape or form, and that plaintiff's counsel is who must address that issue.
4) Obtain evidence of satisfaction as a condition subsequent to the settlement agreement. What you need for your file to make sure it stays closed is proof that Medicare has been reimbursed in full for what it demanded in its final demand letter. The best-case scenario is that you receive the letter from Medicare indicating that it has been paid in full and closed its file. However, that letter does not come in every case. It should be sufficient for your purposes that you have the final demand letter from Medicare and you have proof from plaintiff's counsel that payment of the final demand amount has been made timely to Medicare for the full amount demanded.
5) Account for potential MSP conditional payment appeals. While Medicare may issue a final demand figure, it could be one that plaintiff's counsel disagrees with and wishes to appeal.

There are no issues with her pursuing that appeal, and that appeal should not delay your final settlement. However, make sure to build provisions into the release that account for that potential and that you still receive final evidence of satisfaction, no matter how long the appeal lasts or the final results of the appeal.

There are many more tenets to the most successful MSP compliance programs. These serve as the foundation of those programs upon which you can build one that best fits your organization.

How to Build Your MSP Compliance Program.

Similar to a plaintiff firm's MSP compliance program, your MSP compliance program may take one of several forms. You can create your own program internally. If you do so, make sure that you ask an experienced MSP lawyer to play devil's advocate and vet your program. You may choose to ask an experienced MSP lawyer to create a MSP compliance program on your behalf. Why recreate the wheel when an established MSP compliance program can simply be molded to your specific needs? Others will use an experienced MSP law firm as their MSP compliance program, hiring that firm to handle all MSP issues on their behalf. They could pay that firm on a case-by-case basis or keep the firm on retainer. No matter what route you choose, the time is now to get a MSP compliance program in place.

Conclusion.

You've heard this before. Let this serve as a cautionary tale. While you may have had smooth sailing, MSP wise, for years, you never really know what Medicare or USDOJ is up to behind the scenes. Your job is to ensure a closed file will, in fact, stay closed. Applying an *ad hoc* approach to MSP compliance obviously fails at some point in time. A closed file demands more attention and effort.

Now is the time to get organized. Now is the time to get serious about this. Today, the USDOJ penalized a plaintiff personal injury firm in Pennsylvania. Tomorrow, USDOJ could penalize you. YOU can make sure that never happens to you. Your compliance will be rewarded.

Cattie, P.L.L.C. is a law firm that focuses its practice on MSP compliance issues. Our mission is to extinguish a client's future medical exposure under the MSP Act. To accomplish that, we help clients: 1) verify/resolve Medicare conditional payment obligations arising from date of injury to date of settlement; and 2) address future medical obligations which may arise from date of settlement going forward (*i.e.*, Medicare Set-Aside (MSA) issues). Cattie clients know that a closed file will remain closed for good by trusting our legal advice.

Cattie is now accepting new clients. We'd be honored to help protect your clients and you from the federal government. Let us craft and execute the MSP compliance program that best fits your needs. See why 91% of Cattie clients tell us they will recommend us to a friend or colleague for their next Medicare issue. Call us, email us or Tweet at us to learn more about how Cattie provides A Higher Standard of MSP Compliance.