Medicare Reporting and Reimbursement Compliance Issues in Mass Products Liability Cases in which Exposure on or after December 5, 1980, is Generally Alleged, Established, and/or Released.

By: Lynn O. Frye, Jackson Kelly PLLC
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Under the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA"), defendants or their Responsible Reporting Entities ("RRE's) will be required to electronically report to Medicare most settlements, judgments, awards and other payments in excess of $5,000 which are made to satisfy liability claims asserted by or on behalf of Medicare beneficiaries. The deadline by which such electronic reporting must begin was recently extended until January 1, 2011, and will apply to payment obligations assumed on or after October 1, 2010. *See* MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting for Liability (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation USER GUIDE Version 3.00 (February 22, 2010) (the "User Guide"), p. 6.

However, the Centers for Medicare and Medicaid Services ("CMS") has identified an important exception to this reporting requirement: CMS has determined, as a matter of policy, that since the provisions of the Mandatory Secondary Payer Act ("MSP") under which Medicare is entitled to reimbursement in such liability cases did not go into effect until December 5, 1980, it will not recover monies from settlements, judgments, awards, or other payments in exposure cases in which the exposure did not continue on or after that date. *Id.* at 87. When applying the December 5, 1980 exception to "claims involving 'exposure,' CMS has said that this means that there was no exposure on or after December 5, 1980, ***alleged, established, and/or released.*** If any exposure for December 5, 1980, or a subsequent date was ***claimed or released***, then

Medicare has a potential recovery claim and the RRE must report for Section 111 purposes." *Id.* at 86. (Emphasis added.)

The CMS requirement that RRE's report any payments made in cases in which exposure on or after December 5, 1980, has been "alleged, established, and/or released" creates some thorny compliance issues with respect to Medicare repayment and reporting in certain mass products liability cases. As CMS has explained, the application of the December 5, 1980 exception must be examined with respect to each individual defendant. "For example, if an individual is pursuing a liability insurance (including self-insurance) claim against 'X,' 'Y,' and 'Z' for asbestos exposure and exposure for 'X' ended prior to December 5, 1980, but exposure to 'Y' and 'Z' did not; a settlement, judgment, award or other payment with respect to 'X' would not be reported" whereas any such payments made by Y or Z would be. *See* User Guide at 86-87. However, in a number of jurisdictions, plaintiffs routinely file mass complaints alleging products liability claims arising out of exposure to various products or chemicals over many decades. Such complaints often include general allegations which are asserted on behalf of all plaintiffs and against all defendants, even though each plaintiff has not actually been exposed to each defendant's product. In many instances, the initial disclosures provided by plaintiffs list the same extended exposure period as to all of the defendants rather than the specific dates or years during which the plaintiff actually claims to have been exposed to each individual defendant's product. In such cases, it is not until depositions are taken and further evidence is developed through discovery that the parties determine the actual dates upon which the exposure to a particular defendant's product is alleged to have occurred.

Consider, for example, a mass complaint which sets forth the name and inclusive dates of employment for each of a long list of plaintiffs, including John Smith, along with general

allegations that the plaintiffs were occupationally exposed to the defendants' products throughout the entire course of their careers. In an individual fact sheet, Mr. Smith lists the same inclusive dates of his entire employment (from 1955 to 1995) as the time period during which he was exposed to each defendant's product instead of separating out the specific dates upon which he actually claims to have been exposed to each defendant's product. Later, during his deposition, Mr. Smith admits that the only time he actually claims to have been exposed to Defendant X's product was during 1967 when he worked for a particular company at a particular site.

Assume that CMS has made conditional payments for medical expenses incurred by Mr. Smith in connection with illnesses he has alleged to have been caused by his exposures to all of the defendants' products. If Mr. Smith settles his case with Defendant X, must that defendant report this settlement under MMSEA Section 111, and does Medicare have a right to be reimbursed out of those settlement funds? CMS has determined, as a matter of policy, that since the provisions of the MSP under which Medicare is entitled to reimbursement in such liability cases did not go into effect until December 5, 1980, it will not recover monies from settlements in exposure cases in which the exposure did not continue on or after that date. *Id.* at 87. Clearly, there is no evidence of actual exposure to Defendant X's product on or after December 5, 1980. Nevertheless, CMS maintains that a defendant must report any claim in which exposure on or after December 5, 1980, has been "alleged, established, and/or released" and that Medicare has a potential recovery claim in cases in which exposure on or after that date has been "alleged and/or released."

Do the general allegations made against all defendants in the complaint and the broad initial disclosures listing the same exposure dates as to each defendant constitute "allegations" of

post-December 5, 1980 exposure that are specific enough to trigger the reporting and repayment requirements with respect to this particular defendant? Even though the value of any settlement reached will be based upon the actual exposure established by the evidence, does a general release that covers all claims made in the case in order to allow the defendant to buy its peace qualify as one in which post-December 5, 1980 exposures have been "released"? Could the parties and plaintiffs' counsel (who qualify under the MSP as recipients of settlement monies when they receive contingency fees from settlements) be held liable under the MSP for failure to reimburse Medicare under such circumstances? Could a defendant be fined under MMSEA Section 111 for failure to report settlements in such cases? These questions remain up in the air.

A working group of counsel representing plaintiffs, defendants, and insurers has raised these issues with CMS and has urged CMS to change its "alleged, established, or released" language in the User Guide to make it clear that no reporting or repayment is required when there is no evidence of exposure with respect to a particular defendant on or after December 5, 1980. Some have suggested that the language be changed to state that no reporting is required when there is uncontroverted evidence that no exposure occurred with respect to a particular defendant on or after the trigger date. Thus far, however, CMS has not modified its language. Indeed, CMS representatives confirmed during recent Town Hall Meetings that, while they expect to be "looking at the issue some more," CMS has not yet addressed any further changes to the current language in the User Guide relating to the December 5, 1980 exception and they cannot provide any guidance as to whether CMS will implement any changes to that language in the future. *See* Transcript of February 25, 2010 CMS Town Hall Meeting, p. 29-30; Transcript of March 16, 2010 CMS Town Hall Meeting, p. 40-41.

Given CMS's position, what can parties and their counsel who are trying to negotiate settlements in compliance with the MSP and MMSEA Section 111 do to protect themselves in such instances? Some parties argue that, since the provisions in the MSP entitling Medicare to reimbursements from liability settlements did not become effective until December 5, 1980, there is no legal authority for CMS to require any reimbursements from or reporting of payments made for claims in which there is no evidence of exposure on or after that date. They have chosen not to reimburse or report to Medicare, and they are carefully documenting their decisions based on the evidence that is in the record. Still others have attempted to address this issue by stating in their releases that their settlements are predicated only upon exposures to asbestos-containing products occurring prior to December 5, 1980. However, the operative language used by CMS is "alleged, established, and/or released." Such release language does not address the fact that the pleadings or other court papers have *alleged* exposure on or after December 5, 1980. That is why others take the position that, as long as the current language in the User Guide remains, they intend to report the claims and seek waivers of repayment obligations from Medicare when there is no evidence of exposure on or after December 5, 1980.

Unless and until more guidance is provided by CMS, one of the most effective ways to avoid these Medicare headaches and risks to all parties and their counsel in mass products liability cases may be one which is already within the control of the plaintiffs and their counsel. If accurate information relating to the specific dates of exposure to the individual defendants' products is available and set forth in the pleadings and disclosure documents in mass cases, all of these issues go away. There will be no Medicare reimbursement or reporting obligations for any settlements reached with defendants for whom no exposure on or after December 5, 1980, was

arguably alleged, and all parties will be on notice that such obligations may exist for defendants to whose products such exposure was alleged.

There will, of course, be cases in which it will be impossible for plaintiffs' lawyers to determine the dates upon which their clients were exposed to particular defendants' products until after substantial discovery has been undertaken. In such instances, plaintiffs' counsel should carefully craft all pleadings and disclosures to avoid *"alleging"* that the plaintiffs were exposed to all defendants' products over an entire period (for example, through the clients' entire periods of employment) when such claims might not, in fact, be accurate. For instance, a plaintiff's counsel might aver in the Complaint that, at different times throughout his career, which ran from 1955 to 1995, John Smith was exposed to the various defendants' products. The same basic information as to John Smith has been conveyed, but the subtle difference in the wording may avoid the argument that the complaint alleged that Mr. Smith was exposed to a particular defendant's product throughout his entire career.

In those instances in which specific information can be gathered by careful client interviews and researching the claims before cases are filed or disclosures are made, such extra work on the front end could protect all of the parties from potential Medicare repayment claims and avoid reporting issues when settling cases in which there is clearly no exposure to a particular defendant's products on or after December 5, 1980. It could also shield plaintiffs' counsel from potential malpractice claims brought by clients from whom Medicare is demanding reimbursement out of settlements when exposure on or after December 5, 1980, was alleged even though a reasonable investigation of the facts would have shown that no exposure could have occurred on or after the trigger date. One final word of caution: CMS has also made it very clear that its enforcement arm will not tolerate "creative pleading" in which court papers or releases

are crafted in such a way as to avoid actual, recognized obligations to Medicare. An example of such a document might be a release which disclaims any exposure on or after December 5, 1980, when, in fact, evidence has actually been introduced in the case to show that exposure to a particular defendant's product continued on or after the trigger date. As always, the key to avoiding Medicare compliance issues is careful, good faith investigation and accurate drafting on the part of all parties.

Lynn Oliver Frye is a Member of Jackson Kelly PLLC and serves on its Executive Committee. Ms. Frye's practice is focused upon the defense of toxic tort cases and class actions involving product liability and premises liability theories. She is the National Coordinating Counsel for several asbestos defendants and has served as local counsel in national pharmaceutical litigation involving breast implants, contraceptives, diet drugs and hormone therapy. Ms. Frye has also represented numerous chemical and manufacturing defendants in state and federal court cases involving a wide variety of other products including pesticides, herbicides, pulp mill products, acrylates, acrylamide, benzene, toluene, lead, methyl isocyanate, tobacco and silica. She is a member of the Defense Research Institute and its Product Liability, Drug and Medical Device and Toxic Torts and Environmental Law Committees; The Torts & Insurance Practice and Litigation Sections of the American Bar Association and the Litigation Section's Mass Torts Litigation Committee; and the Defense Trial Counsel of West Virginia.