# Common Myths about the Medicare Secondary Payer Act and *Section 111* of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("Section 111")

**By Barrye Panepinto Miyagi, Partner, Taylor Porter**
barrye.miyagi@taylorporter.com
225.381.0207
Medicare Compliance Practice

Sample case facts: Plaintiff and spouse sue multiple defendants due to plaintiff's alleged exposure to asbestos in Louisiana from 1970 through 1985. Plaintiff and spouse are both Medicare eligible. Spouse was not exposed, was not injured and her claim is limited to loss of consortium. Plaintiff is insured by a Medicare Advantage Plan ("MA Plan"), Medicare Part C. The case is getting close to trial and will likely settle.

The Centers for Medicare & Medicaid Services ("CMS") has advised it has not paid any medical expenses related to the injuries asserted in the suit.

Defendants are all considered to be Responsible Reporting Entities ("RRE") pursuant to Section 111.

**Common Myths about the Medicare Secondary Payer Act ("MSP")**

**Myth:** Since the CMS has advised, in writing, that it has no record of paying plaintiff's medical expenses, the parties may resolve the case with no further inquiries as to Medicare's interests.

> **Fact:** The CMS and federal case law hold that MA Plans have the same reimbursement rights as Medicare. Unfortunately, when the CMS reports that it has no record of paying

plaintiff's medical expenses related to the suit, it is usually only referring to Medicare Part A and Medicare Part B. Since plaintiff was insured by a MA Plan, the MA Plan has the same reimbursement right as Medicare. Failure to reimburse the MA Plan may result in double damages and interest.

**Myth:** Plaintiff is insured by a private insurer. Since that insurer has not placed the parties on notice of its potential claim, the private insurer has no reimbursement right.

**Fact:** Many parties assume, when plaintiff's medicals are being paid by a private insurer, that Medicare has no interest in the settlement or judgment. If a plaintiff is Medicare eligible, and a private insurer is paying his medical expenses, then the private insurer may be a MA Plan. The issue should be vetted before settlement or trial and certainly before funding a settlement or satisfying a judgment.

**Myth:** The MSP only applies to settlements. "I'll try this case so there will be no Medicare-related reimbursement or reporting requirements."

**Fact:** The MSP applies to both settlements and judgments.

**Myth:** One of the defendants in the case settled with plaintiffs for less than $750.00. Because there is a $750.00 recovery threshold, the parties do not need to reimburse Medicare.

**Fact:** This recovery threshold does not apply to settlements for implantation, ingestion or exposure. Thus, while the settling defendant is not required to Section 111 report, Medicare maintains a reimbursement right and the parties should take steps to assure that Medicare is reimbursed.

**Myth:** Although plaintiff is Medicare eligible, Medicare did not pay for medical expenses related to the lawsuit. Accordingly, defendants do not need to report any settlement or satisfaction of judgment pursuant to Section 111.

**Fact:** If the injured party is a Medicare beneficiary and payments for medicals are claimed and/or released, or the settlement, judgment, award, or other payment has the effect of releasing medicals, then defendants must Section 111 report.

**Myth:** Plaintiff counsel assures me he will report any settlement to Medicare. Defendant/RRE does not need to report.

**Fact:** Plaintiffs and Defendants have separate and distinct reporting responsibilities.

**Myth:** If multiple defendants enter into a settlement with plaintiff and there is one release, any one of the defendants may Section 111 report for the others.

**Fact:** Each defendant/RRE has a separate reporting obligation.

**Myth:** If multiple defendants who are solidarily or jointly and severally liable enter into settlement with plaintiff and there is one release, then each defendant should report only its share of the settlement.

> **Fact:** When defendants jointly settle a case and the defendants may be solidarily or jointly and severally liable, each defendant should report the total settlement, not just its share.

**Myth:** Since the spouse was not injured and only suffered loss of consortium, settlement and payment to her does not have to be reported.

> **Fact:** Since spouse is Medicare eligible and will receive a payment for claims asserted and/or released, the payment to her must also be reported. If she did not suffer her own personal injury, defendants would use a diagnosis code of NOINJ. CMS cautions that this code is only appropriate in limited circumstances.

**Myth:** Defendant/RRE may send a letter to or call Medicare to Section 111 report.

> **Fact:** Defendant/RRE must register to Section 111 report and report pursuant to Section 111.

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