

MEDICARE SECONDARY PAYER REPORTING: EXTRATERRITORIAL APPLICABILITY OF REQUIREMENTS TO FOREIGN INSURERS

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Background. Section 111 added new mandatory reporting requirements for group health plans (“GHPs”) (42 U.S.C. 1395y(b)(7)) and for Liability Insurance (including Self-Insurance), No-Fault Insurance, and Workers’ Compensation plans, collectively referred to as “non-group health plans” (“NGHPs”) (42 U.S.C. 1395y(b)(8)), pertaining to when claims involving Medicare beneficiaries need to be reported to CMS. Section 111’s purpose is to reinforce Medicare’s status as a secondary payer for coordination of benefits purposes and to prevent Medicare from paying for the same services for which reimbursement is available under other plans. The original Secondary Payer Statute, 42 U.S.C. Sec. 1395y, already applied to workers’ compensation claims since the inception of the Medicare program in 1965, and to liability, automobile and no-fault insurance claims since the statute was amended in 1980.

Many policy, procedural and technical issues relating to Section 111 have had to be resolved, and CMS has been accepting emailed comments and questions and holding frequent “Town Hall Teleconferences” in its effort to identify and eliminate gaps and ambiguities in its published guidelines. Some of the more important issues have been addressed by CMS in a series of published Alerts.

Section 111 reporting became effective on July 1, 2009, and most GHP “responsible reporting entities” (RREs) were required to begin reporting electronically by October 1, 2009. NGHP RREs are currently in a testing period that has been extended to December 31, 2010, due to the lingering confusion, as well as technical difficulties. All NGHP RREs will be required to begin reporting between January 1, 2011 and March 31, 2011, based on a schedule determined by CMS’s Coordination of Benefits Contractor.

Applicability to Foreign Insurers. Perhaps the most interesting unresolved legal issue involving Section 111 is whether it gives CMS the legal right to assert extraterritorial jurisdiction on foreign liability insurance companies who make direct claims payments to U.S. residents. Although Section 111 itself is silent regarding its potential applicability to foreign carriers, CMS has stated informally that Section 111 does apply to them. CMS’s December 29, 2009 Alert (“Registration Guidelines for Liability Insurance (Including Self-Insurance), No-Fault Insurance, or Workers’ Compensation Responsible Reporting Entities (RREs) Who Are Foreign Entities”) stated:

Foreign entities will follow the same registration and reporting procedures, and have the same responsibility and accountability for data as domestic RREs. The delay in registration for foreign entities does not change the July 1, 2009 reporting date requirements associated with “Ongoing Responsibility for Medicals” (ORM) or the January 1, 2010 reporting date requirements associated with “Total Payment Obligation to Claimant” (TPOC) amounts.

The effective date for ORM reporting has since been delayed but remains retroactive to January 1, 2010, while TPOC reporting obligations will now be effective October 1, 2010.

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CMS's December 29, 2009 Alert further "encourage[d] foreign entities that do not have a U.S. TIN [Tax Identification Number] or EIN [Employer Identification Number] to apply at this time for a U.S. EIN" in order to be ready to register for reporting. CMS's revised Section 111 implementation timeline now provides for foreign RREs to register beginning April 5, 2010, but no specific deadline for their registration has been imposed as of April 30, 2010. In a subsequent Alert dated February 24, 2010, CMS promised to issue additional guidance regarding reporting by foreign insurers; however, such guidance had not yet been issued by April 30, 2010. Despite the continuing uncertainty as to their obligations, foreign RREs will still be required to begin reporting in the first quarter of 2011.

Analysis. There is a long-standing presumption in the U.S. against extraterritorial jurisdiction, which has its roots in the Foreign Commerce Clause of the Constitution. The presumption was strengthened in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), in which the Supreme Court held that the Eight Hour Law, requiring overtime payments to contractors in contracts to which the U.S. is a party, is inapplicable in foreign countries "over which the United States has no direct legislative control." Federal courts have consistently followed *Foley* in denying extraterritorial application of statutes without a clear congressional expression of intent to the contrary.

Notwithstanding CMS's understandable financial interest in having Section 111 apply to all insurers, wherever they are located, it is doubtful that CMS will have sufficient manpower to devote to attempting to enforce Section 111 overseas. From a practical standpoint, it is not clear how the law could be enforced against a foreign insurer that pays claims to U.S. residents but that has no official U.S. presence. Importantly in this era of data breaches, the requirements of Section 111 directly conflict with the privacy laws of a number of other countries, so CMS should not expect to receive any assistance in its enforcement efforts. If an insurer that elects not to comply with Section 111 does not market its products within the U.S. or to U.S. residents overseas, even being publicly identified in the U.S. as a scofflaw would likely have little effect on its business. The issue would become even more complicated, however, and the range of potential consequences successively more difficult to predict, in the following scenarios:

- A Section 111 violator domiciled in another country could have a U.S. branch or a related legal entity that is domiciled or does business in the U.S. In such event, the branch or affiliate might be directly vulnerable to an enforcement action by CMS.
- The noncompliant foreign insurer might have a business relationship with a broker or agent that conducts business in the U.S. While brokers and agents do not have primary responsibility for Section 111 reporting, it is easy to imagine new regulations being promulgated that would forbid them to market insurance policies of non-compliant foreign insurers to U.S. residents.
- The noncompliant foreign insurer might have, under the same corporate umbrella, a technically unrelated sister entity that conducts business in the U.S. Despite the absence of potential legal liability in the U.S., in the event of noncompliance with Section 111 by the foreign insurer, the public relations cost to its similarly named affiliate would be difficult to quantify.
- The noncompliant foreign insurer might contract with a U.S.-based third-party administrator to process its claims. While Section 111 provides that TPAs are RREs only for GHPs, and not for NGHPs, expanding Section 111's reporting requirements to U.S.-based TPAs of foreign insurers that violate Section 111 does not seem implausible.

In any of the foregoing fact situations (and undoubtedly others), even if the courts were to deny extraterritorial application of Section 111, it remains to be seen whether a foreign insurer might be subject to indirect enforcement of Section 111 through an affiliate or agent. In addition, a foreign insurer that markets its products in the U.S., which might otherwise be inclined to ignore its Section 111 reporting responsibilities,

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might be justifiably concerned that a technical violation of Section 111 would result in its name appearing on a list of violators and tarnish its reputation.

Conclusion. The possible extraterritorial application of Section 111 is but one of the difficult legal questions related to Section 111 that will need to be addressed by CMS, and perhaps the courts, in the months and years ahead. All foreign insurers who pay claims to U.S. residents would be well advised to monitor CMS's forthcoming public releases for further guidance on these complex issues.
