Medicare and the Medicare Secondary Payer Act

1.1 INTRODUCTION

In 1980, prompted by rising Medicare costs, Congress passed a series of provisions referred to collectively as the Medicare Secondary Payer Act (MSP Act), establishing Medicare as a “secondary payer” to certain other insurance plans referred to as “primary plans.” Prior to the MSP Act, Medicare was the primary payer (i.e., Medicare paid first) for its beneficiaries’ claims with limited exceptions—such as situations where claims were covered by workers’ compensation. The MSP Act was enacted to shift the responsibility for payment of medical expenses from Medicare to a much broader list of private sources of coverage. The goal was to ensure that if Medicare beneficiaries received coverage from another entity, Medicare would not bear the primary burden for covering their healthcare expenses, thus reducing the amount of Medicare expenditures.

1. See 42 U.S.C. § 1395y(b). Under Section 1862(b)(2) of the Social Security Act (42 U.S.C. § 1395y(b)(2)), payment may not be made under Medicare for covered items or services to the extent that payment has been made, or can reasonably be expected to be made promptly, under a workers’ compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance.

Post enactment of the MSP Act, Medicare cost-saving efforts initially focused on coordination of benefits between private sources of coverage and Medicare. Medicare’s contractors, as well as healthcare providers, are tasked with properly screening and identifying situations where other healthcare insurance is available and Medicare does not have primary payment responsibility for a claim. Medicare’s contractors are also tasked with recovering Medicare’s payments in situations where Medicare pays a claim improperly.

Over time, subsequent amendments to the MSP Act eventually expanded Medicare’s status as secondary payer and the program’s ability to recover expenditures to the personal injury context. Today, the law is clear that alleged tortfeasors or their insurers that pay a settlement, judgment, or award to a Medicare beneficiary in connection with a claim for medical expenses are included in the list of entities defined as “primary plans” to which Medicare is deemed a secondary payer. When Medicare makes a payment where a primary plan or payer exists, that payment is conditioned on an expectation of reimbursement if a primary plan or payer accepts responsibility (but not necessarily liability) for the beneficiary’s medical expenses. If Medicare’s recovery claim is not repaid, Medicare can seek recovery from virtually everyone involved in a personal injury claim, including the beneficiary, defendant/insurer, attorneys, and healthcare providers.

Despite the simplicity of the MSP Act’s purpose, achieving compliance with the laws and supporting regulations has been difficult and created confusion and debate among parties handling personal injury claims. The MSP provisions are often considered vague and subject to continuous revision from court rulings and agency guidance, which is subject to even

3. Coordination of benefits, identifying and correcting improper payments, and preventing fraud and abuse continue to be a major focus of the government’s efforts to preserve the Medicare trust funds. For additional information on these topics, see CMS, Coordination of Benefits, https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Coordination-of-Benefits.html. See also U.S. Department of Health & Human Services, Stop Medicare Fraud, https://www.stopmedicarefraud.gov/.

further interpretation by parties attempting to resolve the issues in practice. This book will assist the reader in understanding the obligations stemming from the MSP Act and supporting regulations as they impact parties litigating and resolving personal injury claims.

1.2 BACKGROUND ON THE MEDICARE PROGRAM

Medicare was established in 1965 to provide federally funded health insurance to people age 65 and older. The program later expanded to include people under the age of 65 with permanent disabilities receiving Social Security Disability Insurance (SSDI) payments, people with end-stage renal disease (ESRD), and people with amyotrophic lateral sclerosis (ALS or Lou Gehrig’s disease). Medicare benefits and recovery efforts are administered by the Centers for Medicare and Medicaid Services (CMS), an agency of the U.S. Department of Health and Human Services.

The majority of this book is devoted to explaining Medicare’s secondary payer recovery rights under Medicare Parts A and B, “traditional Medicare,” but the program is comprised of four separate parts: Part A, Part B, Part C, and Part D.

Medicare Part A helps cover inpatient hospital, skilled nursing facility, some home health services, and hospice care. The majority of beneficiaries do not pay a monthly premium for Part A because they paid Medicare taxes while working. Beneficiaries who do not qualify for premium-free Part A may be able to buy Part A coverage if they meet certain conditions. Approximately 55 million individuals were enrolled in Medicare Part A in 2015.

Medicare Part B helps cover medically necessary services such as lab tests, physician visits, outpatient care, some home healthcare services, and
