

**LAW ALERT:
SMART ACT AND ITS IMPLICATIONS FOR SETTLEMENTS WITH
MEDICARE BENEFICIARIES**



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This law alert is to advise you of the Strengthening Medicare And Repaying Taxpayers (SMART) Act that was signed into law on January 10, 2013. The SMART Act is aimed at making the settlement with a Medicare beneficiary go smoothly. The new law will allow parties to determine the dollar amount of conditional payments before the claim is settled. Medicare will only go after conditional payment amounts that warrant the investigation. The new law also establishes a statute of limitations period. The focus of the SMART Act is to shorten the process and make it more efficient for all parties involved to understand what is required of them in order to go through with a settlement. The SMART Act is estimated to reduce Medicare spending by \$45,000,000 over the next 10 years. Given the new provisions, parties can have greater confidence in settling the claim knowing that all conditional payments are known prior to settlement. Five important provisions of the SMART Act include:

- Prior to the settlement parties can demand a statement of reimbursement amount allegedly owed to Medicare up to 120 days before settlement.
- A threshold is established on the smallest amount of conditional payments Medicare will pursue. Medicare will issue this low threshold dollar amount annually no later than November 15.
- The \$1,000 per day fine for failure to report is changed from a mandatory fine to a discretionary fine.
- If Medicare does not respond within a set period of time, they may forfeit their claim.
- A three year statute of limitations is established.

Further highlights of the SMART Act and best practice tips are provided here.

Determination of Reimbursement Amount Prior To Settlement.

The SMART Act will allow parties to know the exact conditional payment amount allegedly owed to Medicare prior to the settlement. Under the Act, prior to the settlement parties can demand a statement of reimbursement amount owed to Medicare up to 120 days before settlement. Accordingly, parties must have a 'reasonable expectation' of settling the claim.

Advance planning and follow up are required in order to ensure that the conditional payment amount is known at the time of the settlement. Once the parties request the conditional payment amount, CMS will have 65 days to provide the parties with the amount of the conditional payments allegedly owed. If CMS does not respond within the 65 day window, the parties may send a second notice to CMS advising them of their failure to supply the statement of reimbursement amount. Should CMS not respond within 30 days, CMS will forfeit the claim. However, CMS will not forfeit the claim if they can show that 'exceptional circumstances' existed causing the failure to provide the statement of reimbursement amount. Nevertheless an 'exceptional circumstance' will be so difficult to show as "not more than one percent of the repayment obligations under this sub clause would qualify as exceptional circumstances", according to the new Act.

Medicare must respond to disputes over the validity or accuracy of conditional payments within 11 business days of receipt of the proposed resolution by the disputing entity or the proposed resolution will be deemed accepted. However, if a party disputes the Medicare's conditional payment amount, and Medicare does respond, the number in Medicare's response is final, and cannot be appealed.

The SMART Act also directs the Secretary to establish an appeal process, and determine rights to appeal any conditional payment made under the SMART ACT, where CMS is seeking additional payments. This prospective appeal process is separate and distinct from the newly enacted dispute resolution process described above. Barring any complications, this portion of the new law should go into effect in mid April 2013.

Fiscal Efficiency and Revenue Neutrality

In order to ensure that Medicare is using their resources carefully and prudently, the SMART Act will establish a threshold of the smallest amount of conditional payments it will pursue. Medicare will issue this low threshold dollar amount annually no later than November 15. As a result, small value cases should be easier to settle. It is imperative that the conditional payment amount be known as the case progresses and that it be compared with the number that Medicare will publish annually.

Reporting Requirement Safe Harbors

The \$1,000 per day fine for failure to report is changed from a mandatory fine to a discretionary fine.

The phrase "shall be subject" was changed to read "may be subject to a civil money penalty of up to \$1,000 for each day of noncompliance". The SMART Act reads that "the severity of each such penalty shall be based on the knowing, willful, and repeated nature of the violation.

Statute Of Limitations

The SMART Act also attaches a three year statute of limitations. CMS may not bring an Action "...with respect to payment owed unless the complaint is filed not later than 3 years after the date of the receipt of notice of a settlement, judgment, award, or other payment. The statute of limitations will not begin to toll unless the receipt of notice or settlement is complete. An incomplete or incorrect submission will not toll the statute of limitations.

Best Practice Tips

Given the possibility that the conditional payments may be waived due to Medicare's failure to provide a timely answer, it is imperative that follow up be timely and calendared. Parties should determine early on who will be the party to send out the notices to CMS and who will do the follow up. If all parties are sending the notices, then CMS can just pick whatever dates fit their needs. For example, let's assume that the insurance company sends a notice to Medicare on January 2, 2013, the defense counsel sends one out on January 10, 2013 and the plaintiff sends one on February 1, 2013. If CMS responds to the parties on March 20, 2013, they will be late on their response to the insurance company and defense counsel, but they will be timely on their response to the plaintiff. As you can see, this will cause confusion and additional delays.

Know your settlement date. CMS will calculate the settlement date from either the date of a Judgment, Settlement Agreement or check. Often, when the parties settle a case, these events do not occur on the same date. We recommend being proactive in negotiating terms of settlement agreements as early as

possible, including candid conversations between the parties regarding the insurer's internal procedures for issuing settlement drafts.

We also recommend determining how CMS will be reimbursed at the time of the settlement. For example, will Medicare's name go on the settlement check, how and when will Medicare be reimbursed, who will negotiate the conditional payment amount, who will send the check to Medicare and so on. The more detail that is discussed and agreed upon before the settlement, the less headaches there will be after the settlement. Too often this type of detail is not addressed and it causes delays and unnecessary complications.

Finally, we recommend evaluating the advantages and disadvantages of opting to use either the dispute process or the appeals process where there are discrepancies or errors in the final conditional payment amount. Depending on the amount of discrepancy, one process may be more advantageous than the other.

We hope this law alert is informative and useful to your claims handling. For additional information on the SMART Act or assistance with your matters, please contact the members listed below or your Luks & Santaniello [contact](#).

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