NERA
ECONOMIC CONSULTING

At A Glance

Using Statistical Analyses to Evaluate the Impact of MMSEA Section 111

Background on Medicare Section 111

Beginning in 2011, defendants and insurance companies with personal injury related tort liabilities are required to comply with Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). To do so, they will need to report all personal injury tort settlements with Medicare-eligible claimants to Centers for Medicare and Medicaid Services (CMS).

The Section 111 reporting requirement was designed to help Medicare enforce the provisions of the Medicare Secondary Payer Statute (MSPS), enacted in 1980, under which Medicare is designated as the "secondary payer" in instances when another entity may be considered responsible for payment of the Medicare beneficiary's incurred costs. Although the companies most obviously affected by MSPS and MMSEA are private health insurance companies and self-insured businesses, defendants and insurance companies with personal injury-related tort liabilities are also considered to be responsible "primary payers" under the statute. Plaintiffs' law firms also have an obligation to report settlements made for clients covered by Medicare.

After settlements are reported, CMS will match the lists of tort settlements reported by defendants against Medicare beneficiary claims paid and is expected to seek reimbursement for these claims. The statute appears to allow CMS wide latitude in how to proceed. They may choose to go in the first instance to the plaintiffs directly and/or to plaintiffs' law firms: even if settlement payments have been distributed to plaintiffs, Medicare may still seek reimbursement from plaintiffs' law firms for medical costs paid (*United States v. Harris*, No. 5:08-cv-00102-FPS, 2009 WL 891931; N.D.W. Va.; 26 March 2009). This may lead plaintiff firms to withhold the medical-cost-related portion of settlements from their clients in order to send payments directly to Medicare. Should CMS fail to collect from plaintiffs or their law firms, however, the statute allows Medicare also to seek reimbursement from defendants and insurance companies for payments made to settled claimants. Medicare might also deny future medical claims related to an injury for which a claimant received a prior settlement.

All claims that are settled or approved by a court after 1 October 2010 that exceed a minimum value must be reported, as long as the injury—or exposure to the product alleged to have caused the injury—occurred after 4 December 1980, the MSPS enactment date. The minimum values for reporting start at settlements of 5,000 in 2010-2011, and decline to $600 by 2013. Cases where the company has assumed responsibility for ongoing medical costs as of 1 January 2010 must also be reported to CMS.

Cost Implications

The potential costs of these new requirements to players involved in the personal injury tort arena are large. For example, even if a defendant has paid a settlement or judgment amount to the plaintiff in a personal injury tort case, Medicare has the right to demand payment of medical

costs from that defendant—leading to the risk that a company will pay twice for the same claim. Moreover, if legal action is undertaken to get reimbursement, Medicare may collect *double* damages from the defendant company, in addition to the amount already paid to the plaintiff. On top of this, failure to comply with the reporting requirements can lead to stiff penalties of $1,000 per plaintiff per day.

Statistical Analysis of Questions Arising from Section 111 Compliance

Companies with personal injury tort liabilities are struggling with the implications of this new reporting requirement for purposes of their financial reporting and reserves, as well as for ongoing and future settlement negotiations. Similarly, plaintiffs' law firms face uncertainty about how the change should affect their settlement and litigation strategy, as well as how to determine their potential obligations to track and reimburse Medicare costs. Many of the questions raised by MMSEA regarding personal injury settlements and judgments have yet to be resolved definitively by the CMS, leaving companies with a list of outstanding questions and statistical issues, including:

- Which, if any, of the potential parties—plaintiffs, plaintiffs' law firms, defendants, and insurers—is likely to be targeted by CMS for reimbursement?
- Assuming the amount of the settlement exceeds incurred medical costs, will CMS be able to demand reimbursement for the full amount of those costs, even if the (implicit or explicit) portion of the settlement attributable to such costs was lower? What is the likelihood settlements will, in fact, exceed expected medical costs for a given disease or injury?
- Assuming CMS is only entitled to collect the portion of settlements attributable to medical costs, how will that proportion be determined? Settlements may also include payments for lost income and pain and suffering, for example, and in cases where the plaintiff is known to be Medicare-eligible, the medical cost component of the settlement may be small or non-existent.
- How will defendants' and plaintiffs' law firms' incentives and negotiation strategies change in light of these new regulations? Will defendants attempt to ratchet down settlements to hedge the risk that they may be targeted by CMS and otherwise double-pay? Will plaintiffs' attorneys attempt to increase demands either to make up for any portion that will need to be remanded to the CMS or to pay for future medical costs if coverage will be denied because plaintiffs received a prior award for the injury?
- To the extent that injuries related to the settlement are ongoing, will defendants or plaintiffs' law firms be required to set aside reserves for future medical expenses related to the injury/disease that CMS may attempt to collect? If so, how will these reserve amounts be established and do these reserves need to be distinct from other mass tort liability reserves?
- How will the CMS seek reimbursement for medical costs when the same plaintiff/beneficiary receives settlements from multiple defendants for the same injury? Will respondents be allowed to develop models of cost-sharing?
- Will trusts for bankrupt defendants, common in torts such as asbestos and silica, be responsible for a portion of the Medicare costs? If so, will these payments be offset against solvent defendant payments (or vice versa)?

In this uncertain environment, NERA's statistical and epidemiological analysis can help companies assess how these new reporting requirements may affect their financial reserves for pending and future liability, which may need to be earmarked or adjusted for any estimated CMS payments. For example:

- We can estimate the portion of aggregate indemnity payments expected to be paid to claimants who are also eligible for Medicare reimbursement, and the portion of the settlements that are likely attributable to medical costs. Such analyses incorporate disease progression and mortality.
- Assuming CMS will demand reimbursement for all incurred medical costs in situations where the settlement amount exceeds these costs, we can provide detailed estimates of expected medical costs for various injury and disease categories. We can also estimate the frequency with which settlement amounts are likely to be higher or lower than the estimated medical costs. The analysis can be done for current payments as part of the settlement process, as well as for projected future payments.

- If defendants have or assume ongoing responsibility for medical payments in some circumstances, we can model the timing of such future payments and thus estimate the discounted cash value of the payments in present value terms, controlling for trends in medical cost inflation.
- We can help develop models to use in settlement negotiations in light of this new regulatory environment.

Key Areas of Expertise

NERA has substantial expertise in a number of areas related to tort liability estimation and forecasting that are potentially relevant to MMSEA Section 111.

Analysis of Claims Data and Forecasting: NERA has analyzed historical claims data in a wide variety of mass tort and product liability litigation contexts. These include liabilities arising from building products (such as asbestos), medical products (including pharmaceuticals and medical devices), and an array of other torts. Our analyses include the identification of recent trends in filings and settlements. Using these analyses, we have developed models to project trends in future claim filing and resolution patterns.

Development of Models of Disease Progression and Mortality: Using data from epidemiological studies, medical and demographic literature, and government data sources, NERA has developed models to project the likely incidence of disease or injury in relevant populations. In addition, we have modeled the likely progression of various diseases from exposure to diagnosis to death, incorporating aggregate demographic information on mortality into our models. These models may be inputs to forecasts of future claims.

Development of Models of Settlement Valuation: Using information on historical settlement drivers and plaintiff-specific characteristics, NERA has developed settlement models. Inputs to these models may include direct estimates of medical costs for particular injuries or diseases, jurisdictional characteristics, and estimates of alleged lost income for particular plaintiffs. NERA has also analyzed verdict data in a wide variety of tort cases, identifying medical cost components of jury awards.

Development of Insurance Allocation Models: NERA has conducted insurance allocation analysis of historical, pending, and future claims for purposes of settlement negotiations, reserve reporting, and merger and acquisition discussions.

Management of Large Datasets: NERA has designed a process for and overseen the extraction of relevant data from claims files to create comprehensive databases for use in quantitative analyses, including forecasting future filings, valuation of claims, and allocation of claims to insurance coverage.

Analysis of Policy Changes and Judicial Innovations on Litigation Outcomes: By identifying the costs and incentives that drive litigation activity, NERA has modeled how the litigation environment is impacted by legislation and judicial rulings. Using these models in conjunction with historical data, we have evaluated the impact of such policy changes on future filings and settlements.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. With its main office in New York City, NERA serves clients from more than 20 offices across North America, Europe, and Asia Pacific.

Contacts

Dr. Denise Martin
Managing Director
Tel: +1 212 345 5296
denise.martin@nera.com

Mary Elizabeth Stern
Director
Tel: +1 914 448 4054
mary.elizabeth.stern@nera.com

Dr. Stephanie Plancich
Associate Director
Tel: +1 212 345 7719
stephanie.plancich@nera.com