



Medicare Year in Review 2023

*Key Events, Claims Impact, and
What's Ahead for 2024!*

Verisk Web Seminar Series
Presented by Casualty Solutions

December 4, 2023

Today's Presenters

Mark Popolizio, J.D.

VP, MSP Compliance
Casualty Solutions, Verisk

Sid Wong, J.D.

VP, Policy
Casualty Solutions, Verisk

Today's Objectives

- Provide a high-level, non-exhaustive overview of key Medicare events in 2023
 - ***“there’s a little something for everyone!”***
- Key topics we will cover
 - ✓ Section 111 penalties and reporting updates
 - ✓ CMS recovery updates
 - ✓ WCMSA updates and trends
 - ✓ What’s up in DC?
- Taking it to the streets!! Poll Questions!!
- Watchlist items – 2024

Section 111 User Guide Updates

Section 111 User Guide Updates

Unsolicited Response File – Versions 7.0, 7.1, and 7.2

Basics

- Started July 2023 – RREs can “opt-in” to this process (only available to file submitters – not offered to DDE reporters)
- Opt-in via the Section 111 Coordination of Benefits Secure Website (COBSW) application to receive a monthly NGHP Unsolicited Response File.
- Optional process – but CMS has urged RREs to opt-in and participate in this process.

What is this process about?

- CMS allows the Medicare beneficiary (or their authorized representative) to make updates to the **ORM termination date**
 - ✓ Note: these parties will NOT be allowed to delete the ORM coverage record

What information will CMS provide the RRE?

- CMS provides info re: updates to ORM records originally submitted in the last 12 months and allow RREs to either update their own internal data or contact the BCRC for a correction. On its webinar, CMS stated if the update is inaccurate, the RRE should submit a correction on their next Section 111 file.

Resource: [Understanding CMS’s Section 111 NGHP Unsolicited Response File Q&A resource](#)

Poll Question #1

Section 111 User Guide Updates

Recovery Agents – Version 7.0 (January 9, 2023)

- Recovery agents need written authorization to pursue post-demand actions
- Recovery agents may now view the Open Debt Report on the MSPRP, if the agent has an active MSPRP account with a TIN matching one submitted on the RRE's TIN Reference File

CP13 Soft Edit – Policy Limit Decrease – Version 7.0 (January 9, 2023)

- The CP13 soft edit policy limit amount has decreased from \$1000 to \$500.
- CMS has updated the CP13 soft edit error code accordingly so that an error will only be where the submitted No-Fault Insurance Limit is less than \$500.

TIN Reference File/Go-Paperless – Version 7.0 (January 9, 2023)

- The Go Paperless Indicator is no longer required when submitting the Recovery Agent TIN (Field 25) (Appendix G).

Section 111 User Guide Updates

Subscription Insurance Policies – Version 7.1 (April 24, 2023)

- **CMS clarifies who bears reporting and other responsibilities for Subscription Insurance Policies.**
 - ✓ Situation where “two or more insurers enter into an agreement whereby the risk of the insurance policy is spread among the various insurance entities in some agreed-upon ratio.” Represents a relatively small segment of the NGHP Section 111 reporting population
- Per CMS: the entity designated as the “lead insurer” is considered the RRE and that entity holds the sole reporting responsibility in these subscription policy scenarios.
- ✓ CMS states that “the lead insurer, as the sole RRE, will be responsible for all applicable reporting, recovery, and benefits coordination requirements that presently exist, regardless of the existence of any other co-insurer that may enter into a subscription arrangement or similar contract with the lead insurer.”

Section 111 User Guide Updates

“NOINJ” Code (Liability Claims) – Version 7.2 (June 5, 2023)

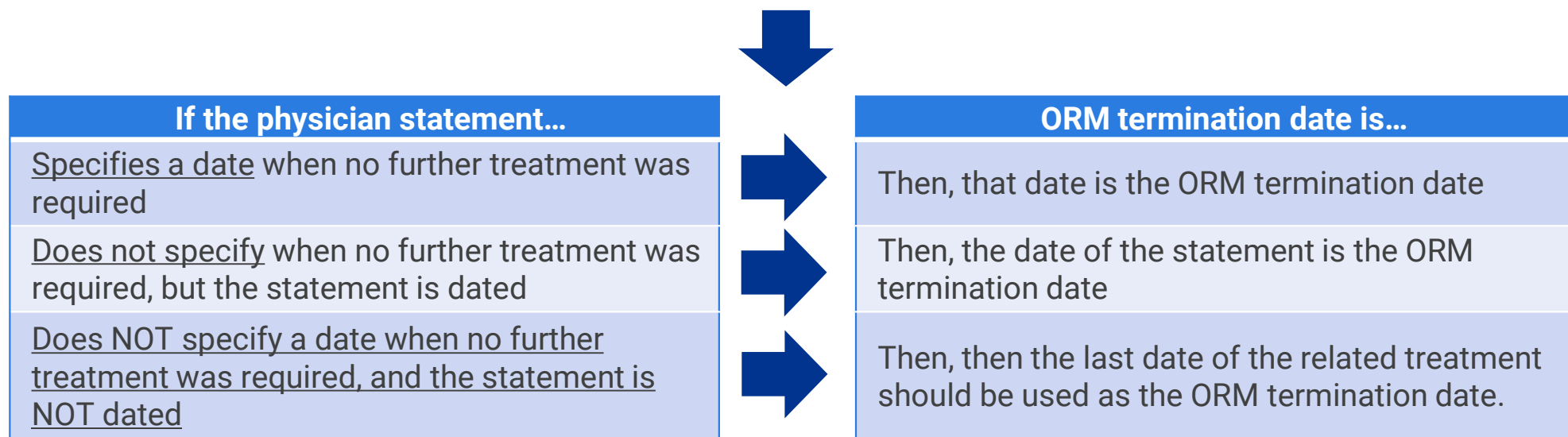


Reporting of “NOINJ” codes for qualifying liability claims is now **OPTIONAL**

- This relates to certain liability claims where typically there is no associated medical care and the claimant has not alleged a situation involving medical care or a physical or mental injury.
- CMS cited examples:
 - ✓ Loss of consortium
 - ✓ Errors or omissions
 - ✓ Directors and officers
 - ✓ Wrongful action related to employment status
- Reporting in these scenarios is no longer required but, should an RRE opt to report, they must continue to follow CMS’s longstanding guidelines. See, User Guide Chapter IV, Section 6.2.5.2

Physician Statement – ORM Termination “Date” – Version 7.2 (June 5, 2023)

- **Refresher:** Per CMS, the RRE can terminate ORM “if [they] have a signed statement from the injured individual’s treating physician that he or she will require no further medical items or services associated with the claim/claimed injuries... .” MMI is not enough!
- If you can get this statement, the question becomes ... what is the ORM termination date?
- Per CMS’s new update ... the ORM termination date is determined as follows:



CMS Plans to Use TPOC Reporting to Collect WCMSA Data Points

Key Points (Currently)

- Will apply only to WC cases involving Medicare beneficiaries
- Will apply to **all** WCMSAs (whether or not submitted to CMS for review)
- Will apply regardless of WCMSA amount or if settlement meets CMS's \$25k WCMA review threshold
- Voluntary testing will be available
- New errors (both hard and soft edits) will be introduced

Projected Timelines (Tentative Dates)

- **Early 2024** – Updated file layout to be provided and new error codes will be introduced
- **Fall 2024** – Testing will be made available
- **January 2025** – Final implementation

RREs will Need to Report the Following Information through the Claim Input File

1. WCMSA Amount
2. WCMSA Period
3. Lump/Annuity Indicator
4. Initial Deposit Amount (settlements using a structure/annuity)
5. Anniversary (Annual) Deposit Amount – settlements using a structured settlement/annuity)
6. Case Control Number – (optional, but CMS encourages)
7. Professional Administrator EIN – (optional but CMS encourages)

- **Section 111/WCMSA compliance impact?**
- **How could these changes impact compliance practices?**

Coming Soon ... TPOC/WCMSA “Question and Answer” Resource!!

CMS Releases Section 111 Penalties Final Rule!!

Section 111 Civil Money Penalties (CMPs) “Final Rule”

Key Points

- ✓ Final Rule = official Section 111 penalty provisions/regulations
- ✓ **10/11/23 – releases the Section 111 civil money penalties (CMPs) “final rule”**
- ✓ Effective date: 12/11/23; Applicable date: 10/11/24 –
- ✓ CMS says first penalty imposition will start October 2025

Final Rule – Key Points

- CMS has now limited potential penalties to only “untimely reporting of TPOC or ORM”
- CMS did NOT finalize two of their proposals!
- CMS tweaked the “good faith safe harbor” criteria
- RREs will get notice – RREs will have appeal rights

Compliance Pointers

- Understand CMS’s final rule/regulations
- Evaluate your practices – how are you doing?
- Improve your reporting practices where necessary

Resource: [CMS releases new Section 111 penalties FAQ resource](#)

When can CMS impose Section 111 CMPs?

- ✓ Under the final rule, the single basis for potential CMPs is untimely TPOC and ORM reporting.
- ✓ CMPs can be imposed where the RRE “[f]ails to report any beneficiary record within 1 year from the date of [TPOC], or the effective date where [ORM] been assumed by the entity.”

CMS comments re: “timeliness”

- Noncompliance is defined as any time CMS identifies a new beneficiary record that was not reported to CMS timely.
- Timeliness is defined as reporting to CMS within 1 year of the date “a settlement, judgment, award, or other payment determination was made (or the funding of a settlement, judgment, award, or other payment, if delayed), or the date when an entity’s Ongoing Responsibility for Medicals (ORM) became effective.” Fed. Reg. Vol. 88, at 30370 (Oct. 11, 2023).
- What do we need to consider?

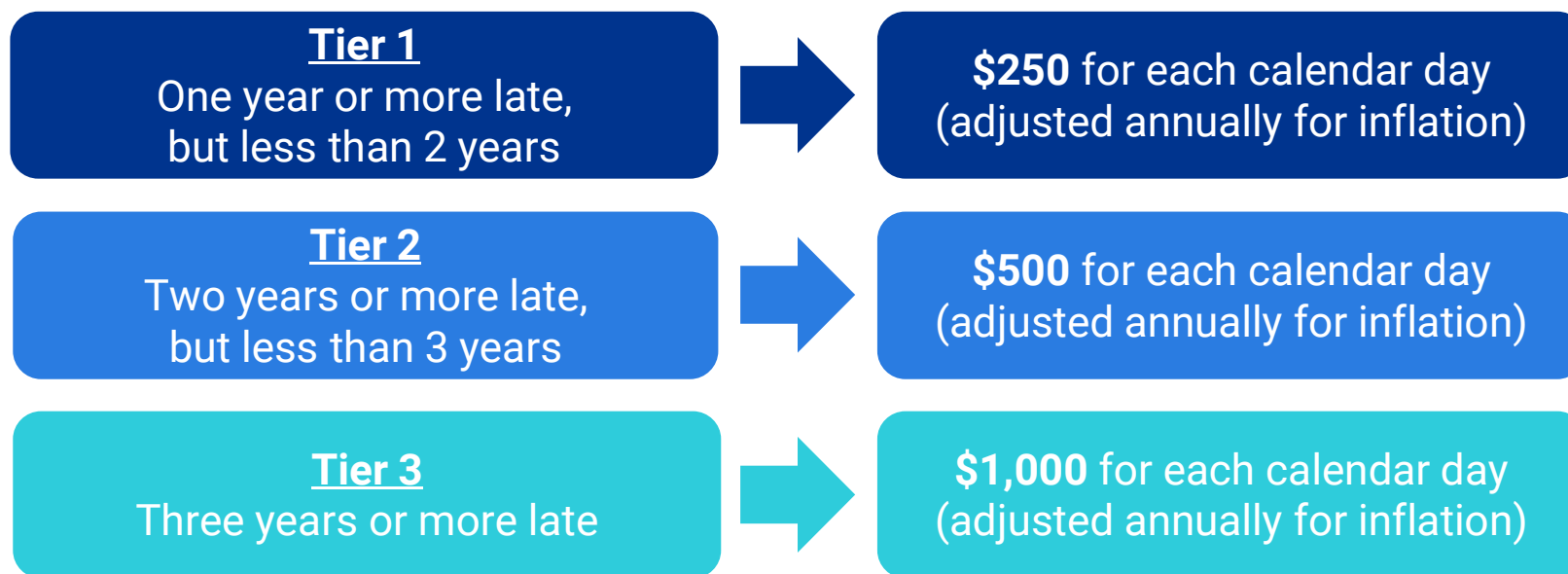
CMPs Penalty Calculation



CMS will use a “tiered” approach to penalize RREs as follows:



“The longer you are late, the more you will pay!!”



Max Penalty for single instance of non-compliance will not exceed \$365,000 (adjusted annually for inflation)

CMS's "Good Faith" Compliance Safe Harbor Criteria

1.

RRE has communicated the need for the **Big 5 data points** to the individual and his or her attorney, or other representative, if applicable, or both.

2.

RRE has requested this information from the individual and his or her attorney, or other representative (if applicable), at least three times

- a. Once in writing (including electronic mail);
- b. Then at least once more by mail; and
- c. At least once more by phone or other means of contact in the absence of a response to the mailings.

3.

RRE has not received a response OR has received a written response from the individual or their attorney or representative that clearly and unambiguously declines or refuses to provide any portion of the Big 5 data, then no additional communications are required.

4.

Efforts to obtain the MBI or SSN (or the last 5 digits of the SSN) –including any written rejection correspondence – must be retained for a minimum of 5 years.

When CMPs will NOT be Imposed

1. Good Faith Compliance Safe Harbor criteria is met

2. RRE complies with any reporting thresholds or any other reporting exclusions.

3. CMS/Contractor Delays

4. **Certain CMS Policy/Procedural Changes** – the incident of noncompliance is associated with a specific reporting policy or procedural change on the part of CMS that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 12 months, should CMS be unable to provide a minimum of 6 months' notice prior to implementing such changes)

CMPs Final Rule – Other Points

Notice

RREs will get “notice” and can present “mitigating evidence”

Appeal

RREs can “appeal” – Administrative appeals process

Statute of limitations

- Per CMS, “we may only impose a CMP within 5 years from the date when the noncompliance occurred.”

CMS – Future Activity

CMS to hold future CMPs webinars

Working Through the Grey

Some grey areas remain

CMPs / Go-Live

- Effective Date
- Application Date
- CMS – first CMPs imposed
- Remaining Questions/Issues

Poll Question #2

Poll Question #3

CMS (Part A/B) Conditional Payment Recovery Claims

CMS releases NGHP Applicable Plans Appeals Reference Guide

Key Points Addressed

- ✓ First version release!
- ✓ Provides a refresher on the 5-level administrative appeals process.
- ✓ **Focus heavily on Level 1 – Redetermination Process**
- ✓ Basic appeal submission requirements
- ✓ Appeal types and required supporting documentation
- ✓ Lists common appeal types filed and the required supporting documentation
- ✓ Several references re: the importance of accurate Section 111 reporting

Claims Considerations

- Critical insurers understand CMS's administrative appeals process
- Understand the requirements and deadlines
- CMS's contractors generally adhere strongly to applicable deadlines

Resource: [CMS Releases NGHP Applicable Plan Appeals Reference Guide](#)

CMS Increases Settlement Amount for Fixed Percentage Demand Calculation Option

Key Details

- **Fixed Percentage Option –**
 - ✓ **Offered to claimants and their attorneys** to help streamline the conditional payment recovery process.
 - ✓ A claimant or their attorney can request that CMS accept 25% of the total settlement amount in satisfaction of Medicare’s conditional payment recovery.
 - ✓ Effective 10/2/23 – Settlement amount for the “Fixed Percentage Demand Calculation Option” raised **from \$5,000 to \$10,000**

Eligibility Criteria

- Liability insurance (including self-insurance) settlement, judgment, award or other payment is related to an **alleged physical trauma- based incident**;
 - ✓ Total settlement is for \$10,000 or less,
 - ✓ Must elect within the required timeframe
 - ✓ Medicare has not issued a demand letter or other request for reimbursement and
 - ✓ Claimant has not received (and does not expect to receive) any other settlements, judgments, awards, or other payments related to the incident.

Other Considerations

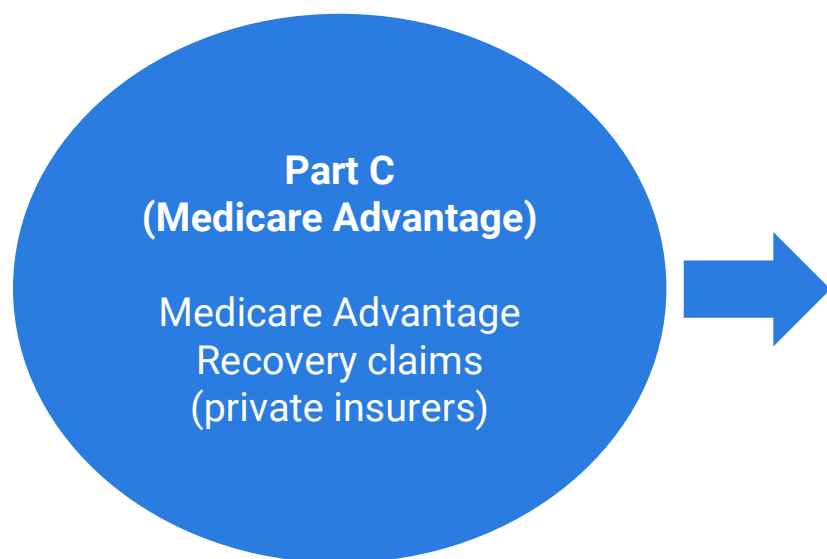
- Must be submitted to Medicare in writing.
- If approved by CMS, the **beneficiary may not seek an appeal or waiver.**
- CMS uses the gross settlement amount and **does not reduce for attorney’s fees and costs.**
- Does not apply to Part C or Part D claims.

Resources

- See, CMS’s website [here](#).
- [CMS increases settlement amount for Fixed Percentage Calculation Option](#)

Medicare Advantage Plans (MAPs)

Medicare Advantage Plans (Part C) Recovery Claims – Nutshell



MAPs – Highlights
<ul style="list-style-type: none"> • <u>Medicare Advantage Plans (MAPs) are Medicare plans provided by private insurers – NOT by CMS</u>
<ul style="list-style-type: none"> • <u>Over 4,000 plans nationally</u>
<ul style="list-style-type: none"> • 28 million people are enrolled in a MAP – almost 50% of all Medicare beneficiaries – why so popular?
<ul style="list-style-type: none"> • Top three MAP providers = United Healthcare (27%), Humana (18%), and BC/BS (14%)
<ul style="list-style-type: none"> • MAPs have recovery rights <ul style="list-style-type: none"> ✓ Medicare Advantage statutes and regulations ✓ Alert: the courts in some jurisdictions have also allowed MAPs to sue for “double damages” ✓ CMS, BCRC, and CRC are <u>NOT</u> involved in the recovery process – you must deal directly with the MAP (or its recovery company)

Medicare Advantage (2022): Enrollment Rates

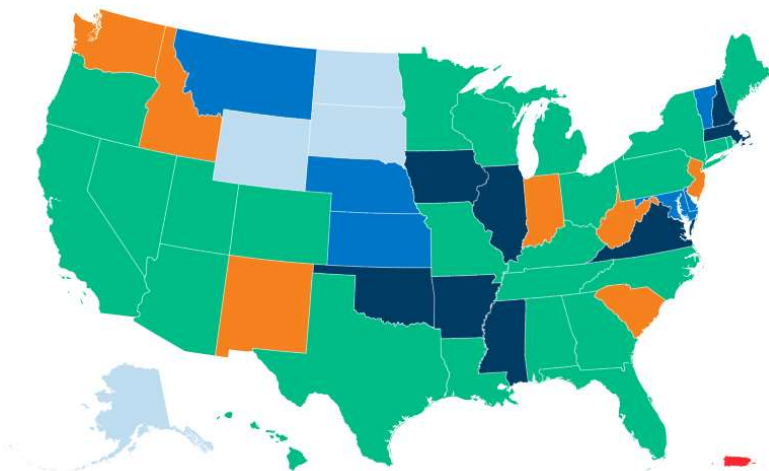


Figure 6

Share of Beneficiaries Enrolled in Medicare Advantage in 2022, by State

■ < 20%
 ■ 20%–30%
 ■ 30%–40%
 ■ 40%–50%
 ■ 50%–60%
 ■ ≥ 60%

MAP Enrollment – Taking a Closer Look...

- Puerto Rico MAP enrollment is 93%
- Twenty-four (24) states have MAP enrollment rates of at least 50%: AL, AZ, CA, CO, CT, FL, GA, KY, LA, ME, MI, MN, MO, NC, NV, NY, OH, OR, PA, RI, TN, TX, UT, WI
- Seven states have MAP enrollment rates of at least 40%: ID, IN, NM, PA, SC, WA, WV
- Medicare Advantage enrollment is relatively low (less than 20%) in four states: Alaska, North Dakota, South Dakota, and Wyoming.

Do MAPs Have Recovery Rights?

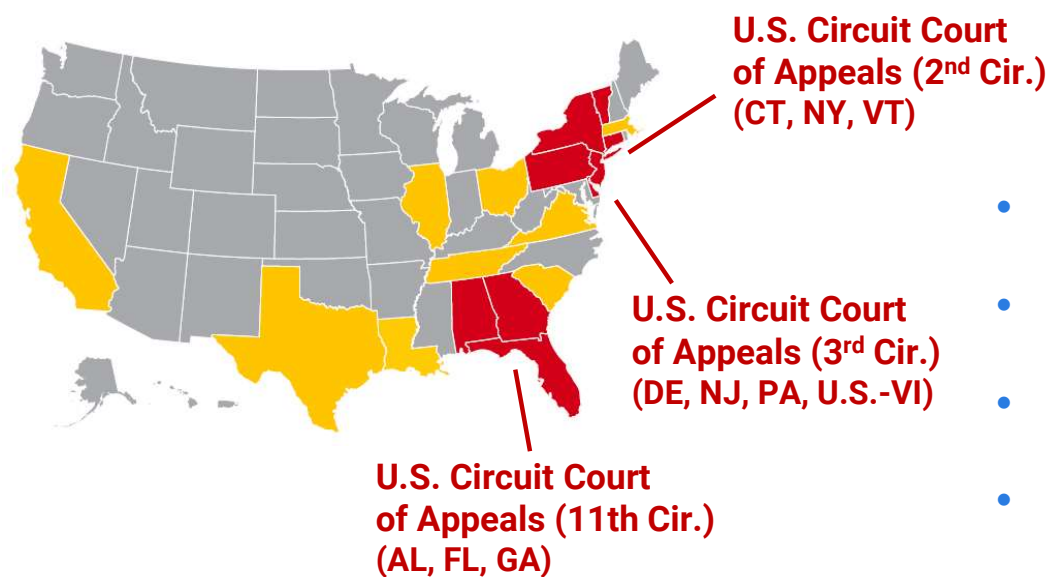
MAP Stats/
Regulations?

**Yes – MAPs may
“bill” or “charge”**

Double Damages
under the MSP?

**Depends on
Jurisdiction**

Medicare Advantage Plans: “Double Damages” Issue



Can Medicare Advantage Plans sue for double damages?

- **Red** – U.S. Circuit Courts of Appeals = “Yes”
- **Yellow** – U.S. District Court(s) = “Yes”
- **Gray** = Double damages not yet addressed
- Question: How about D Plans?

MAPs 2023 – Selected Cases

Section 111 Reporting

Insurer's Section 111 reporting alone is **not** enough to establish standing to sue for “double damages”.

- *MSP Recovery Claims, Series LLC v. Hereford Ins.*, 66 F.44th 77 (2d Cir., April 19, 2023)
- *MSP Recovery Claims Series 44, LLC v. Arbella Mutual Insurance Company*, 2023 WL 3481496 (D. Mass. May 16, 2023)
- *MSP Recovery Claims, Series LLC v. Travelers Indemnity Company*, 2023 WL 4744753 (D. Connecticut, July 6, 2023)

But see, *MSP Recovery Claims Series 44, LLC v. Bunker Hill Insurance Company*, 2023 WL 4744739 (D. Massachusetts, July 25, 2023)

MAPs 2023 – Selected Cases

Preemption

The MSP statute **does not** pre-empt insurer's contractual claims filing decline or Florida's pre-suit demand requirement.

- *MSP Recovery Claims, Series LLC v. United Automobile Insurance Company and Covington Specialty Insurance Company*, 60 F.4th 1314 (11th Cir. February 22, 2023)

Statute of Limitations

- Four-year SOL per 28 USC 1658 governed the MAP's private cause of action claim.
U.S. District Court of Massachusetts finds 11th Circuit's decision in *MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co.*, 43 F.4th 1259 (11th Cir. 2022) persuasive.
- Court does not decide SOL issue – needs for facts
- *MSP Recovery Claims Series 44, LLC v. Bunker Hill Insurance Company*, 2023 WL 4744739 (D. Massachusetts, July 25, 2023)

MAPs 2023 – Resources

- [The United States District Court for Massachusetts rules that a MAP assignee has standing to assert a private cause of action \(PCA\) claim and that a four-year statute of limitations governs PCA actions](#)
- [The United States District Court for Connecticut dismisses a Medicare Advantage claim for “double damages” – rules that insurer’s Section 111 reporting not sufficient to establish standing](#)
- [The United States District Court for Massachusetts dismisses a Medicare Advantage claim for “double damages” – rules that insurer’s Section 111 reporting does not establish standing to sue](#)
- [The Eleventh Circuit dismisses a Medicare Advantage “double damages” lawsuit – court rules the MSP statute does not preempt insurer's claims-filing deadline or Florida’s no-fault pre-suit demand](#)

Poll Question #4

WCMSAs

WCMSAs – CMS eliminates time limit for Amended Review

Key Points

- ✓ WCMSA Reference Guide (Version 3.9, May 15, 2023).
- ✓ **CMS has removed the maximum time limit for eligibility re: Amended Review Process.**
- ✓ Provides additional opportunities to use this process going forward to potentially reduce prior CMS WCMSA approvals for qualifying cases – “second bite at the apple”
- ✓ How can this process help?

Current Amended Review Criteria

1. Allowed one time;
2. CMS has issued a conditional approval/approved amount at least 12 months prior;
3. Settlement has not occurred (case is still open); and
4. Projected care has changed at least 10% or \$10,000 (whichever is greater from the initially approved amount)

Resource: [CMS releases the WCMSA Reference Guide \(Version 3.9\)](#)

Poll Question #5

Intrathecal Pumps, Spinal Cord Stimulators, and Peripheral Nerve Stimulator Replacements

Key Points

- ✓ WCMSA Reference Guide (Version 3.9, May 15, 2023)
- ✓ **CMS amends calculation re: frequency of intrathecal pump, spinal cord stimulator, and peripheral nerve stimulator replacements in WCMSAs (Section 9.4.5)**
- ✓ CMS changes their historical calculation re: these items

NEW – CMS's Calculation Per Reference Guide 3.9

- If an intrathecal pump, spinal cord stimulator, and peripheral nerve stimulator has not already been placed, CMS will assume that the device will be placed within the first year following settlement.
- **Practical claims impact**
 - ✓ CMS has adjusted their calculation to subtract one year from the injured worker's life expectancy for device placement before dividing the remaining whole number by 7 (or 9 years for rechargeable devices) and rounding down to determine the revision frequency.
 - ✓ Thus, CMS is leveraging the assumed placement in one year to potentially increase the number of intrathecal pump, spinal cord stimulator, and peripheral nerve stimulator replacements in WCMSAs.
 - ✓ Example: Claimant with 24-year life expectancy would expect CMS to include *one placement and **THREE** replacements* in their WCMSA.

Other WCMSA Updates

Other updates made in WCMSA Reference Guide (Version 3.9, May 15, 2023)

- All WC letters currently signed with [CMS's] Director of Financial Services Group name and signature image have been updated to reflect the current CMS customer service contact information (Appendix 5).
- The CMS Regional Offices are no longer responsible for approving initial determinations. Process language and contact information have been updated throughout the guide (Sections 9.0, 9.4.6, 9.5, and 18.0, and Appendix 5).
- The 94585 ZIP code has been added to the Walnut Creek Medical Center in the table listing major medical centers (Appendix 7).

WCMSA – Yearly Life Table Update

- CMS announced that beginning April 29, 2023, it will use the new 2020 CDC Life Table to calculate adjusted life expectancies in WCMSAs (Table 1: Life Table for the total population: United States, 2020)
- The table correlates a person's age with anticipated life expectancy, so CMS uses it to determine the appropriate length of medical treatment.
- Download the current 2020 life table [here](#).

What's Up in DC?

What's Up in DC?

Key Points

- ✓ May 2023 – **The Repair Abuses of MSP Payments (RAMP) Act** was re-introduced into the U.S. House and U.S. Senate.
- ✓ **The RAMP Act:**
 - **Proposes to modify the Medicare Secondary Payer (MSP) Act’s “private cause of action” statute by eliminating non-group health plans from its application.**
- ✓ What is the Private Cause of Action (PCA) provision?
- ✓ Significance?
- ✓ Status?

Resource: [The RAMP Act is re-introduced in Congress](#)

Poll Question #6

Coming Soon: *Medicare Watch List 2024!*

Be on the lookout for our annual report that covers our thoughts and projections for 2024!



Questions and Feedback

MondayWebSeminars@verisk.com

Contact Us

Mark Popolizio, J.D.
mpopolizio@verisk.com

Sid Wong
swong@verisk.com

Next Session

Monday, Dec . 11
2p.m. ET

2023 U.S. Hurricane Season Review

verisk.com/ws

No part of this presentation may be copied or redistributed without the prior written consent of ISO. This material was used exclusively as an exhibit to an oral presentation. It may not be, nor should it be relied, upon as reflecting a complete record of the discussion.