

# THE NEW MSA REPORTING REQUIREMENT AND THE PROBATE PRACTITIONER

by Michele P. Fuller

Many probate practitioners advise and support litigation firms and obtain probate court approval of pre-suit settlements. There is a new CMS (Center for Medicare and Medicaid Services) reporting requirement, Section 111 of the Medicare, Medicaid & SCHIP Extension Act (MMSEA), 42 USCS §1395(y)(b)(8), effective July 1, 2009 that we need to be prepared to advise litigation firms and the court when serving as Guardian Ad Litem. Practitioners are already accustomed to resolving Medicare and Medicaid liens for *past* medical services before finalizing a settlement in liability and PIP cases. However, as of July 1, 2009 they must also consider *future* medical expenses for their client and evaluate whether their client's situation triggers the new reporting requirement. This has generated wide discussions among settlement planning attorneys and structured settlement professionals whether this triggers the use of Medicare Set Aside accounts in these cases now and in the future. Unfortunately, CMS has enacted this new requirement without any regulations or procedures, and common review and enforcement practices may vary regionally. There are differing opinions among professionals as to the impact of the new reporting requirements and the effect on our clients. However, CMS officials reportedly comment that the purpose of the enactment is to ensure that any funds allocated for future medicals are to be spent before any claims are submitted to Medicare for payment, and CMS is to be notified when future medicals were a consideration in reaching the settlement. Colleagues reportedly have encountered clients with large settlements who have already had Medicare refuse to pay providers.

An insurer has to report the settlement to CMS if the Plaintiff is: (1) a current Medicare beneficiary, or reasonably expected (i.e. a pending appeal) to qualify for Medicare within 30 months of settlement, **and** (2) the settlement is over Two Hundred Fifty Thousand Dollars (\$250,000.00.) If the claimant meets the threshold for reporting, liability insurers, including self-insured entities, must complete a questionnaire/notice of the settlement and submit it electronically to CMS. Failure to do so is a \$1,000/day penalty per claim. The Department of Justice is enforcing these requirements against all parties to the settlement, including Plaintiff counsel, and the Plaintiff themselves. All of us who advise counsel or the court with regard to settlement agreements need to be vigilant for our clients and the beneficiaries, and be aware of future developments as CMS forms policies to implement and enforce the new requirements.