

May 25, 2011

**MEDICARE SECONDARY PAYER RECOVERY CONTRACTOR ISSUED ALERT:  
RIGHTS AND RESPONSIBILITIES AND DEMAND LETTERS TEMPORARILY SUSPENDED**

The Centers for Medicare and Medicaid Services (“CMS”) through its contractor, the Medicare Secondary Payer Recovery Contractor (“MSPRC”), follows a protocol for obtaining reimbursement of Medicare conditional payments. Essentially, any Medicare payments are “conditioned” on repayment by any other primary source. The reimbursement protocol, referred to as the Conditional Payment Recovery Process, involves a dialogue between CMS contractors and the beneficiary, including the Rights and Responsibilities Letter, and ultimately ending in a Final Demand Letter itemizing any Medicare conditional payments. Under the current protocol, the beneficiary is required to repay Medicare within 60 days of the Final Demand Letter. If payment is not made, interest accrues and recovery actions are initiated.

**Effective on or about May 23, 2011, the MSPRC has suspended the issuance of these letters in order to review and possibly revise their content.**

The MSPRC continues to work on pending cases where the Rights and Responsibilities Letter has already been issued. If the Rights and Responsibilities Letter has not been issued in a case, an itemization of conditional payments will not be generated until the suspension is lifted. In effect, the MSPRC has stopped the Conditional Payment Recovery Process for cases where a Rights and Responsibilities Letter has not been issued. **However, all parties must continue to adequately consider Medicare’s interests in claims involving Medicare beneficiaries.**

This suspension is temporary. Nonetheless, you should anticipate a delay in all cases involving Medicare beneficiaries.

The suspension of the Conditional Payment Recovery Process comes on the heels of the *Haro v. Sebelius*<sup>1</sup> decision in the U.S. District Court of Arizona. The court found MSPRC’s procedure of demanding payment within 60 days of the Final Demand Letter coupled with the threat of recovery actions – only where the beneficiary legitimately disputed Medicare’s reimbursement claim – to be beyond CMS’ statutory authority. Additionally, the court found CMS’ requirement that plaintiff

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<sup>1</sup> *Haro v. Sebelius*, No. CV-09-134-TUC-DCB (D. Az. 2011)

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attorneys withhold settlement proceeds in order to repay disputed conditional payments to be beyond its statutory authority. The court enjoined Medicare from continuing these procedures in its Conditional Payment Recovery Process nationwide. The Department of Justice will most certainly appeal this decision.

#### STRATEGIC RECOMMENDATIONS DURING SUSPENSION

We recommend placing even greater emphasis on our long-standing recommendation for discovery of medical bills. Obtaining a complete set of the claimant's medical bills allows the defense to estimate Medicare's payments. This does not allow us to determine what Medicare will claim in its Final Demand Letter, but it does allow us to estimate Medicare's actual interest and to take necessary precautions to properly consider Medicare's interest at the time of settlement, judgment, or award. These precautions may include additional closing documents to require the escrow of certain settlement proceeds to eventually pay Medicare's reimbursement claim – in order to avoid the penalty of double payment by the primary payor or a recovery action by Medicare.

*Haro* is not a model of clarity. We anticipate plaintiffs' attorneys may interpret the holding broadly.<sup>2</sup> Because of this, the defense must address Medicare compliance issues at the beginning of the claim and negotiate the handling of conditional payments before the claim is settled.

We are closely monitoring the progress MSPRC makes in reviewing its procedure to comply with *Haro*, pending its probable appeal. We will continue to provide updates of any changes in the Conditional Payment Recovery Process.

Sincerely,

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<sup>2</sup> Plaintiff attorneys will likely argue Medicare has no direct recovery rights against plaintiff attorneys under *Haro v. Sebelius*. This is in direct contradiction to *U.S. v. Harris*, 2009 W.L. 8919 31 (N.D. W.Va.).