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MMSEA Section 111 and Asbestos Litigation: The Advantages of Dealing with the "Elephantine Mass"

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The passage of Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA Section 111" or "the Act") was motivated, at least in part, by the government's inability to track payments to Medicare beneficiaries for injuries compensated in mass tort cases. Of the hundreds of thousands of asbestos lawsuits filed, and the billions of dollars recovered by plaintiffs, why wouldn't the Medicare system, as a secondary payer, attempt to ensure that it was being reimbursed for medical costs associated with prior asbestos exposure?

Asbestos litigation is well established and historically significant. It has been described by Supreme Court Justice David Souter as "an elephantine mass" defying "customary judicial administration"[i], and has led courts throughout the country to streamline litigation procedures, appoint liaison counsel for both plaintiffs and defendants, establish case management orders, standardize discovery, and establish unified judges to preside over entire asbestos dockets. These litigation mechanics of this "elephantine mass," in fact, can be, and are being, used to defendants' and plaintiffs' advantage in establishing litigation solutions and protocols to facilitate compliance with MMSEA Section 111. In the process, plaintiffs' counsel and defense counsel have encountered several areas of disagreement regarding the meaning the MMSEA Section 111 guidelines. The solution to these disagreements can be reached through employment of the litigation mechanisms developed to handle asbestos litigation as we await explicit guidance from the Centers for Medicare and Medicaid Services ("CMS"), which may come only after corporations are required to comply with the Act. Such "litigation machinery" includes the

selection of liaison counsel, the establishment of Case Management Orders (CMOs), and designation of dedicated "asbestos judges."

Many corporate defendants have been involved in asbestos litigation for decades, causing them to be in their excess insurance coverage and thereby making the defendant-corporations themselves Responsible Reporting Entities ("RREs"). Consequently, many defendants (rather than their insurers) have to comply with the Act and therefore need to instruct the attorneys representing them with a strategic approach for complying with MMSEA Section 111.

I. Asbestos Litigation Mechanics can be Utilized for MMSEA Section 111 Compliance

To ease the burden of MMSEA Section 111 on defendant-corporations, discovery provisions in asbestos CMOs can be amended to include a streamlined process by which a defendant, or RRE, can gather all necessary information for MMSEA Section 111. Though every defendant, or insurer, is bound to have different structures and processes for their compliance with MMSEA Section 111, crafting a unified approach in a CMO will mitigate case by case efforts to gather required reporting information. The result will be cost savings for the defendant-corporation, and well facilitated cooperation by plaintiff's counsel. If liaison counsel has been appointed for defendants and plaintiffs, the parties can collaborate on behalf of their respective colleagues in order to establish an agreeable and efficient way to comply with MMSEA Section 111. During this process, briefing the "asbestos judge" on MMSEA Section 111, what it means, and why it is important, will undoubtedly ease approval of such an amendment to a CMO. Thus, the established litigation machinery (e.g. liaison counsel, CMO's, and dedicated asbestos judges) will assist in the reduction of defense costs associated with gathering MMSEA Section 111 information and will reign-in any counsel with erroneous/diverging interpretations of the law.

II. Current Conflicts Among Asbestos Litigators

Asbestos litigators throughout the country have embarked on the CMO-revision process despite CMS' inability to clarify ambiguities in the MMSEA Section 111 guidelines as they relate to mass tort litigation. Such ambiguities include the volume of reporting (due to the unreliability of reporting exemptions) and whether the gathering of information is necessary in certain cases.[ii] Most important to asbestos litigators is that cases with exposures that pre-date December 5, 1980 do not have to be reported under MMSEA Section 111.[iii] However, this exemption is coupled with the caveat that any exposure "alleged, established, and/or released"[iv] on or after December 5, 1980 triggers the reporting requirement. Plaintiffs' counsel continue to argue that exposure exclusively pre-dating December 5, 1980 is excluded from the reporting requirement. Therefore, they refuse to provide the relevant required reporting information to defendants. This conflates defendant's obligation to report with plaintiff's necessity to reimburse a lien (because plaintiff's counsel do not need to reimburse Medicare for exposure pre-dating December 5, 1980).

Additionally, plaintiffs' counsel have argued that letters from CMS pre-dating MMSEA Section 111 which establish that their particular clients have no outstanding Medicare lien, exempt the RRE from having to report information about that particular plaintiff. In its recent "town hall" teleconferences, CMS has repeatedly emphasized that even where there is no outstanding lien, if the plaintiff has recovered money in a lawsuit where he or she released medical expenses, the reporting requirement still stands.

Because of its voluminous nature, asbestos litigators are in a position to lead the way in developing discovery practice and litigation strategies to facilitate and expedite compliance with MMSEA Section 111. Collection of the information required to report under MMSEA Section

111 is arguably easier in asbestos lawsuits because existing CMOs can be expanded to allow inclusion of information required under MMSEA Section 111. If the asbestos bar can reach an up-front compromise on the disagreements between plaintiffs' and defense counsel, asbestos litigation will be in the best position to seamlessly "go live" with reporting in 2011. Asbestos litigators, and their clients (and insurers) are likely the most effective group to succeed in seeking clarification or developing a strategy in the absence of CMS clarification. Perhaps the "elephantine mass" that is asbestos litigation, and the strategies that have been developed to accommodate its defiance of "customary judicial administration," will yield effective processes and solutions for MMSEA compliance.

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[i] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[ii] Many jurisdictions have at least begun the process of amending CMO's, including, but not limited to, Delaware, Florida, Madison County, Illinois, Massachusetts, New York, and West Virginia.

[iii] Relevant Medicare Secondary Payer provisions were enacted on December 5, 1980 and are enforceable on injuries (and exposures) that occurred on or after that date.

[iv] Centers for Medicare & Medicaid Services, MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting Liability Insurance (Including Self-Insurance) No-Fault insurance, and Workers' Compensation USER GUIDE Version 3.0, 86-87(2010).