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Medicare Liens 2011: Information vs. Speculation

Presented to the Primerus Young Lawyers Group
Sylvius von Saucken, Esq.

August 23, 2011

Agenda

1. New Medicare Insurer Reporting Rules
2. Dealing with Misinformation
3. Strategies and Practice Tips

Garretson Resolution Group



Boring, but Important.

MSP: The Medicare Secondary Payer Act



History...

✓ MSP – December 5, 1980

✓

What it means...

✓



- After 30 years of evolution focused largely on plaintiff obligation....
- MMSEA “closes the loop”, by involving the defense / payer in the process

✓

- MSP Reform Act (intro 5/09)
- New CP procedures (eff. 10/1/09)

2011 MSP Compliance = 2 Obligations

“What do you mean by closing the loop?”

- ✓ REPORTING OBLIGATION [NEW]
 - Accountable Party is the Defendant
- ✓ RESOLUTION OBLIGATION [OLD]
 - Accountable Party is the Plaintiff & Plaintiff Counsel



To sum it up...

- Each settling party now has a role.
- Our objective today is to illustrate what each role is (and what it's not).

2011 MSP Resolution = 2 Obligations

“Consider and Protect”

✓ Past Interest (Date of Injury)

➤ **Verify and re**

✓ Future Interest (Date of Service)

➤ **Determine IF**

case/claim specific facts AND document the file

➤ **By making this determination:**

- Medicare’s future interest considered and protected
- Parties are MSP compliant (statute and regs)
- Claimant’s Medicare benefits are protected



Today's Objective:

To demonstrate how to address these obligations in a compliant manner.

New Settlement Concerns

Common reactions to MSP changes. Overreaction or reasonable “belt & suspenders”?

- Not settling/paying without putting Medicare’s name on the check

- Not settling
- Aside from
- Confusing
- Deferring
- Reimbursement



A quick note...

Each of these topics will be covered in today's presentation.

For more in-depth analysis as well as practice tips, be sure to review your handout.

Set

- Adding overly-strict language to the settling release

The Big Shift

All this change is causing...

- ...shift away from reliance on “indemnification” clauses alone...
- ...to affirmative obligation to address liens before disbursing as condition of settlement



What it means...

- Requires starting much earlier
- Requires formal verification of entitlement

A Big Statement

If you know you are going to have to deal with it in the end, why not start addressing it in the beginning?

Completion in 30 to 45 days from settlement?

Practice Tip #1:

Start Early

- Is it possible? *"But I have had cases going on with Medicare for over a year!"*
- 100 – 120 days start to finish if done
- (so, you can only achieve completion in 30 to 45 days from settlement if you start early)

What Has Changed?

The Medicare, Medicaid and SCHIP Extension Act of 2007 (“MMSEA”)

Before we go on, a quick lesson in Medicare-talk ...



- CMS – Centers for Medicare & Medicaid Services
- RRE – Responsible Reporting Entity
- MIR – Mandatory Insurer Reporting
- HICN – Medicare Health Insurance Claim Number
- COBC – Coordination of Benefits Coordinator
- CPL – Conditional Payment Letter
- MSA – Medicare Set Aside

MIR

CPL

MMSEA

42 U.S.C. 1395y (b)(8)

✓ Insurers (“RRE’s”) must engage in a two-step process:

- Step 1: Determine whether a claimant (including an individual whose claim is unresolved) is entitled to Medicare benefits.
- Step 2: If the claimant is determined to be entitled, submit certain information about the claimant to the Secretary of Health and Human Services

MMSEA: A Verification Tool

How has the MMSEA changed what defendants / insurers (a/k/a RRE's) now need to settle cases?

- ✓ CMS will request 50+ data points from RREs:
 - Injured Party data (name, contact info, DOB, SSN, HICN)
 - Primary Plan data (type, name, contact info, policy #, claim #, limits)
 - Policy Holder data (name, self-insured)
 - Injured Party/Claimant Attorney data
 - Injury data
 - Resolution data (settlement, amount, claim resolution, funding)



Practice Tip #2: Collaborate & Stipulate to these data points.



What will happen if you don't?

- Medicare repaid but not 100% satisfied.
- Common working file includes "extra" medicals reported by insurer to Medicare.
- But those expenses remain unpaid, leading to more work to fix later.

MMSEA

Changing Habits – Defense/Insurers

- ✓ Puts them on Medicare's radar
- ✓ Lien resolution is now important to Defense/Insurers
 - Unrepresented claimants
- ✓ *US v. Stricker* complaint / dismissal (timing questions)
- ✓ MMSEA has led to changes in the process by which claims are paid

New Concerns for Defendants: *Stricker*

U.S. v. Stricker

No. CV-09-PT-2423 (E.D.N.D. Ala.2009)

- Why all the fuss? (Medicare's SOL)
- Case Overview (8-2003 - 12/1/09 - 9/30/10)
- ✓ Effect:
 - *United States Government seeks recovery from the insurers and the other settling parties for funds paid as settlement proceeds in a mass tort liability settlement*

New Concerns for Settling Parties: *Stricker*

Effects of *U.S. v. Stricker*

- ✓ Raises timing concerns re: Medicare compliance in light of this recent complaint/dismissal, especially when coupled with new MMSEA “settlement reporting” requirements for insurers
- ✓ So, does putting Medicare’s name on the check fix this problem?
- ✓ If not, who should resolve the claims?

Settlement Considerations

So, should Medicare's name be put on the settlement check?

- Does this offer protection?

- This

- Medic

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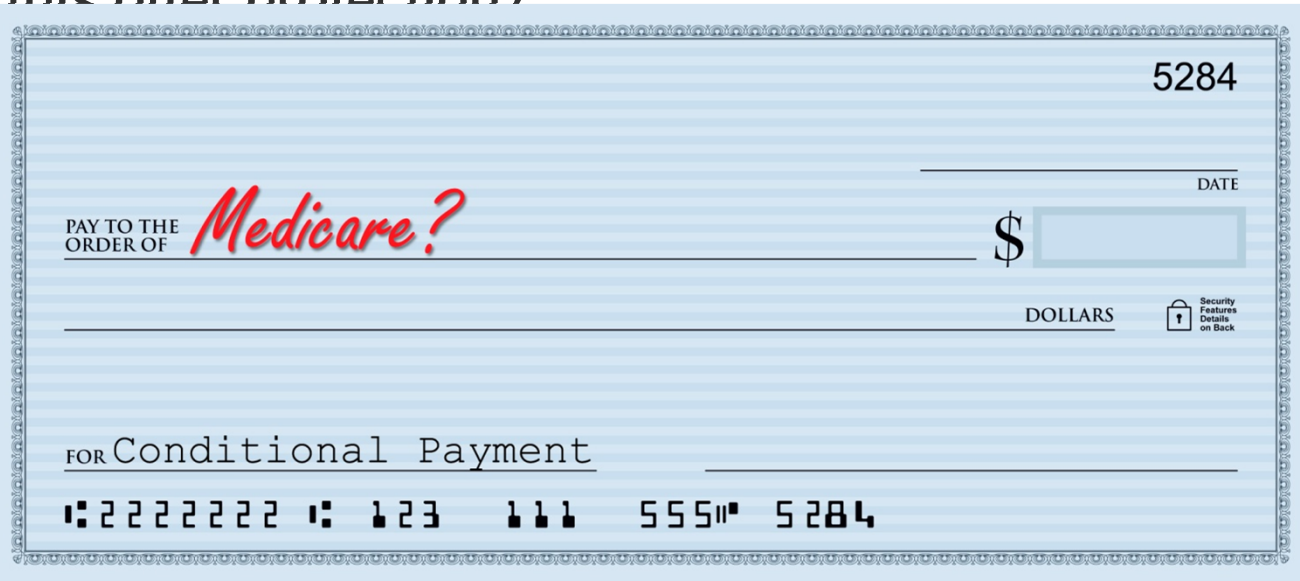
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- Court held fed law doesn't mandate this

- So, unless specifically bargained for, can't be done.



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Settlement Considerations

So, should Defendant just negotiate the claim and pay it directly?

- Problem with this approach is that to resolve, Medicare needs information from Plaintiff attorney to offset final claim amount by procurement costs (i.e. proportionate reduction for attorney fee and case costs).
- What about waivers or post-settlement compromise?
- What incentives to go through levels of appeals or other remedies?

MMSEA: A Verification Tool

Q: What's the first step every insurer will take?

A: Verify claimant's Medicare status with CMS' QUERY ACCESS System

- RRE tool to determine Medicare Entitlement Status of claimants
- RRE provides limited data (SSN/HICN, 1st initial of first name, 1st 6 characters of last name, gender and DOB)
- Confirms entitlement status
- Tip – This only requires 5 data points and not all 50+

MMSEA: A Verification Tool

Q: If Query Access only take 5 data points, when should the other data points be provided?

• Parties may consider sharing only limited data set prior to settlement for purpose of Query Access, with understanding all other points will be shared if settlement occurs and claimant is beneficiary

- Many people debate the sharing of SSN
 - Recognized exception to privacy laws
 - It is the central data point
 - Other approach might be to share response from MSPRC to plaintiff's initiation of tort recovery record

MMSEA: A Verification Tool

Seeger v. Tank Connection

(2010 WL 1665253)

- ✓ Plaintiff refused to provide relevant info regarding Medicare enrollment
- ✓ Court found that defense met its burden of proving relevance of information requested (*i.e.*, MMSEA)
- ✓ Court determined plaintiff suffers no harm from providing information and orders plaintiff to provide HICN or SSN and other identifying information to defense

MMSEA

Changing Habits – Plaintiff's Counsel

MMSEA poses no additional obligations; HOWEVER...

- ✓ Need internal protocols for verification and resolution
- ✓ Need to collaborate on data point reporting!
- ✓ Educate claimants



Practice Tip #3:

Demonstrate that the resolution process has already started.

(It's better to get Final Demand in 45 to 70 days than to wait 20+ weeks if Medicare's name is put on the check!)

Collaboration in Practice

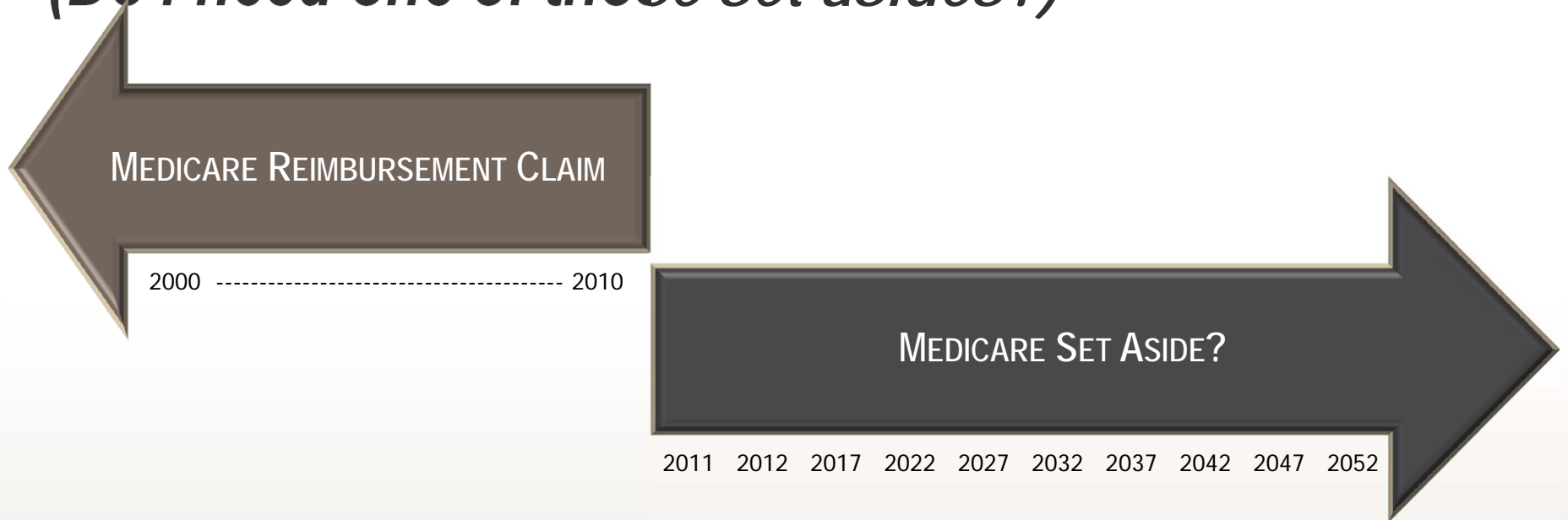
The Asbestos Settlement Example

We are utilizing a 6 step process to get money flowing after settlement:

1. Settlement agreement contains representations and warranties
2. Plaintiff shares evidence tort recovery record has been opened with Medicare (i.e. results of entitlement search)
3. Defendant pays settlement proceeds to counsel
4. Counsel agrees to hold back all net proceeds until conditional payment amount received from Medicare (not necessary to hold back attorney fees/expenses because Medicare allows offsets for those)
5. Counsel then holds back conditional payment amount plus reasonable buffer and distributes balance
6. After final resolution, plaintiff provides proof of satisfaction back to defendant

MSP Reimbursement for Future Medicals

What About Future Payments?
(Do I need one of those set asides?)



Q: What's my MSP obligation re: future medicals?

A: Determine IF a Medicare Set Aside (MSA) is appropriate under your case/claim specific facts and DOCUMENT THE FILE accordingly.

WHAT Exactly Is a Medicare Set Aside?



Before we go on, a quick lesson in Medicare-talk ...

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MSAs

MSP Regulations (42 C.F.R. §411.46)

ALL settlements must “adequately consider” Medicare’s interest, no shifting of Medicare to be primary payer for past & future medical care.

- Medicare will not pay for any medical expenses related to an injury after settlement until the time the portion of the settlement allocated to future medical expenses covered by Medicare is fully exhausted

In sum.



- Clear with WC “Medical” apportionment
 - Not so clear in liability settlements involving general release of all types of damages (pain and suffering, wage, medical, derivative losses, etc)
 - All we can do is use framework in comp and apply it to liability until any statutory guidance is provided.
 - In so doing, you will notice the comp regulations focus on “allocation” language when looking at this issue.
 - Medicare is intended to be secondary – even in future payments.
- No BURDEN SHIFTS!

How Did MSA Concept Originate?

- ✓ Adopted by CMS in 1995 as preferred method to deal with WC cases
- ✓ No enforcement until CMS distributed July 2001 memo to WC primary payers
- ✓ To date, CMS distributed sixteen memos outlining MSA process when settling WC case
 - Memos can be found at CMS website

Why are MSAs important?

- ✓ To be MSP compliant, both past and future interests must be “considered”
 - Even when MSA is not needed, document file to memorialize efforts at “considering” Medicare
- ✓ MSAs are a piece to the MSP compliance puzzle
 - Protect Medicare’s interest
 - Protect claimant’s Medicare benefits

MSA Case Law – MSA Appropriate

Big R Towing (2011 WL 43219)

- ✓ Jones Act settlement where Court found LMSA for \$52,500 out of \$150,000 gross settlement was reasonable. Why?
 - Parties presented medical testimony identifying futures
 - Parties previously agreed to let court determine MSA allocation based on evidence presented
 - Court ratified what parties had already determined, but put a number to it. Therefore, MSA was created by the parties themselves, not the court.

Does Defense Have Any Liability for Future Medicals?

Important Points...



✓ Current
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✓ § 1395y
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✓ The MS
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- CMS website says Medicare's reimbursement focus is on "entities that received" payment, not entities that made payment

(http://www.cms.gov/WorkersCompAgencyServices/02_workerscompensationoverview.asp#TopOfPage).

- But, statutory language arguably includes payments made or "to be made", which has some commentators concerned about future payment liability.

made. Even an insurer's reporting obligations stops where the person is not a Medicare beneficiary at the time of settlement.

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EA),

If the MSA Question Won't Go Away...

- ✓ First, try to agree on parties' roles (who does what)
- ✓ Second, try getting the experts together
- ✓ Third, discuss Medicare compliant language to insert into settlement agreement, and if needed, a Lien Release on Administrator (in mass tort cases)
- ✓ Fourth, if stuck with Hobson's choice, get a MSA evaluation
 - i.e. Parties at a stalemate with MSA, no settlement, but there is a desire to nevertheless settle
 - In which case, submitting to Regional Office may help
- ✓ Finally, have clients acknowledge all of this in writing



Practice Tip #4:
Take an educational approach if MSA question persists.

But Can/Should Attorneys Indemnify?

- Depends on jurisdiction
- Review state bar ethics opinions
- 15 states that do not or arguably do not permit attorneys to indemnify:

- Alabama
- Arizona
- California
- Florida
- Illinois
- Indiana
- Kansas
- Missouri

- New York
- North Carolina
- Oklahoma
- Ohio
- South Carolina
- Tennessee
- Vermont
- Wisconsin

Medicare Plans (other related issues)

- Everything discussed before is Federal Medicare Part A and B.
- But significant number of beneficiaries are opting for Part C (Medicare Advantage, MCOs, etc.)
- So what happens if claimant goes on to part C during pendency of his/her personal injury claim?

Medicare Plans (continued)

○ Medicare Advantage (Part C Plans) – What are they?

- CMS contracts with private carriers to provide benefits for Medicare eligible individuals
- Private carriers will contend they exercise the same rights as the Secretary and such plans enjoy federal preemption. 42 CFR 422.100(f) & CMS Managed Care Manual CH 4, Sec.

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Take Note...

- Both types of plans do share a common characteristic; neither one is resolved through the Medicare Secondary Payer Recovery Contractor (MSPRC). The private carrier or their authorized representative must be dealt with directly in resolving the plan's interest.

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○ Supplemental

- Picks up
- There is no contractual relationship with Medicare and thus no statutory rights of recovery
 - Treat as ordinary insurance policy (rights based upon policy language and state law).

What Can I Do Now?

What can I do now to implement a comprehensive strategy for healthcare compliance in my firm or company?

The Takeaways

1. Improve Case / Claims Intake Process
2. Internal Education – Attorneys and Staff
3. Educate Your Clients
4. Update Fee Agreement
5. Seek Third Party Assistance

Improve Case / Claims Intake Process

In every case, the parties must...

- ☑ Determine the parties' affirmative obligations (verify, notify, resolve, report, satisfy, etc.);
- ☑ Assess third party recovery rights (Medicare, Medicaid, private, ERISA, etc.);
- ☑ Audit and analyze all reimbursement claims to "carve out" items unrelated to claims;
- ☑ Decide who should pursue relevant administrative or legal remedies, such as damage allocation, waivers, and compromises, to ensure the appropriate "net" recovery for the injured individual; and
- ☑ Address other healthcare-related settlement issues, such as the propriety of Medicare Set Asides (MSAs).

Improve Case / Claims Intake Process (continued)

- Screening and questionnaires
- Simply “yes” / “no” is no longer sufficient
- Need enrollment dates
- Detail regarding plan elections (A, B, C, D)
- See sample questionnaire attached to article “Sharpening Your Most Important Tool...”

For more guidance as well as a sample questionnaire, download:

“Sharpening Your Most Important Tool: Does Your Retainer Agreement Still Cut It?”

Available in **Practice Tips** section of Learning & Resource Center at www.garretsongroup.com

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"Garretson makes it easy. The services of his firm allow me to take a complicated, time-consuming issue off my plate – and I'm protected from liability at the same time. I have a settlement resource who I always trust to do the right thing."
— Andrew Finkelstein, Esq.

- Lien Resolution
 - Claims Administration
 - Settlement Allocation
 - National Probate Coordination
 - National Bankruptcy Coordination
 - Medicare Set Asides (MSAs)
 - MMSEA Compliance Information
- In the News
 - Practice Tips / Published Works
 - Request a Publication
 - Ask The Experts Blog
 - Submit Your Question
 - Events
- Local Firm Heads Up 9/11 Compensation
The Cincinnati Enquirer
- Local Firm Handling 9/11 Claims
WKRC-Fox 19 Cincinnati
- Garretson to Handle World Trade Center Claims
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- Payments Outlined in Ground Zero Suit
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The new regulations may focus on defendants, but they will impact all parties.

As you know, [GFRG] has provided Medicare/Medicaid lien services for [14 of my clients]... Please forward me a bill for your services. I will be happy to send you a check. I have found that you and [GFRG] are exceptional and outstanding. It has been a pleasure to work with you. Thank you.

-J. Franklin Long, Law Offices of J. Franklin Long

Latest Updates

- GFRG's Client Advisory Update on Registration for Foreign Entities issued 1/5/10.
- Form to help clients obtain the Social Security and/or Medicare insurance number of the injured party. (PDF)
- MMSEA Collaboration Tool: ICD 9 Injury/Event Codes
- Guide to MMSEA Key Terms and Acronyms
- Data Elements Insurers Should Report to CMS updated 5/20/09
- GFRG's Client Advisory Update on RRE Reporting of Multiple TPOC Amounts issued 4/9/09.
- GFRG's Client Advisory Update on Reporting Requirements issued 3/26/09.
- Act II: Reporting Obligations for Settling Insurers where Medicare is a Secondary Payer: The MMSEA
- Dealing with Misinformation regarding Medicare Set Asides in Liability Settlements.
- GFRG's Client Advisory Update on MMSEA Procedural Changes issued 5/11/09.

Frequently Asked Questions

Click here for our Frequently Asked Questions.

- What is the MMSEA and how will it affect my practice?
- When does the MMSEA take effect?
- What will be required under the MMSEA?
- How will the MMSEA impact personal injury and mass tort settlements?
- What guidance has CMS given so far?

Also, note that we have a dedicated MMSEA Compliance page on our website:
www.garretsongroup.com/mmsea

Educating Your Clients

Provide educational materials to clients

Request a copy of

The point is.

- To better educate and manage their estate
- Let clients know how to help speed up the process (provide complete information)



Go to www.garretsongroup.com and click on Request a Publication

Update Your Fee Agreement

Fee Agreement Language

- “We understand that current laws with regards to (Healthcare Providers) may require all parties involved in this matter to compromise, settle, or execute a release of Healthcare Providers’ separate claim for reimbursement / lien for past and future payments prior to distributing any verdict or settlement proceeds.
- We agree that the law firm may... hire separate experts / case workers who assist with resolving any Healthcare Providers’ reimbursement claims or liens for past and/or future injury-related medical care.
- The expense of any such service shall be treated as a case expense and deducted from our net recovery and shall not be paid out of the law firm’s contingent fee in this matter.”



Questions?

513.794.0400

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Thank You

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