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Medicare Seeks to Safeguard Its Share of "Future Medicals" from Liability Settlements

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The Centers for Medicare & Medicaid Services ("CMS") has issued an advance notice of proposed rulemaking ("Notice"), soliciting comments on options for how beneficiaries and their attorneys can comply with Medicare Secondary Payer ("MSP") obligations related to certain liability awards or settlements.[1] Specifically, the Notice addresses the requirement that Medicare remain secondary to liability settlements in regard to medical expenses incurred after the date of settlement (referred to as "future medicals" in the Notice).

By way of background, the MSP rules govern situations in which Medicare is the secondary payer to another party, meaning that the other party has primary responsibility for paying the medical claims of a Medicare beneficiary and that those benefits must be exhausted before Medicare is responsible for paying a claim.[2] For example, a liability payer, such as the insurer of a tortfeasor who causes an injury to a Medicare beneficiary, is generally considered a primary payer under the MSP rules. Under certain conditions, Medicare may make conditional payments if the liability insurer will not pay promptly, but then Medicare has the right to recover when a payment is eventually made by the liability insurer.

Although the Notice does not directly address the Section 111 MSP reporting program, which has been the subject of our prior alerts, CMS indicated that the Notice was triggered by the implementation of that program. Specifically, CMS stated that Section 111 reporting requirements have "sensitized affected parties to other MSP obligations, specifically reimbursement obligations that have been long ignored or overlooked. As a result, affected parties are requesting clarity regarding 'future medicals' MSP obligations and how to resolve them."[3] CMS also noted that although a voluntary Medicare Set-aside Arrangement review process already exists to address future medicals in certain workers' compensation cases, there is not currently a similar process for settlements, judgments or other awards (referred to collectively as "settlements" in the Notice) deriving from automobile, liability, no-fault and self-insurance.

The proposed idea is that "if an individual or Medicare beneficiary obtains a 'settlement' and has received, reasonably anticipates receiving, or should have reasonably anticipated receiving Medicare covered and otherwise reimbursable items and services after the date of 'settlement,' he or she [would be] required to satisfy Medicare's interest with respect to 'future medicals'" according to one of the options outlined below.[4]

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[1] 77 Fed. Reg. 35917 (June 15, 2012).

[2] *See* 42 C.F.R. § 411.20 *et seq*.

[3] 77 Fed. Reg. at 35919.

[4] *Id.*

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Proposed options 1-4 would be available to Medicare beneficiaries as well as individuals who are not yet beneficiaries:

1. The individual would be financially responsible for future medicals until the settlement proceeds are exhausted, meaning that Medicare would not be responsible for any such payments. The individual would essentially be administering the settlement proceeds him/herself, subject to Medicare's right to request documentation as part of its program integrity efforts.

2. Medicare would agree not to pursue recovery for future medicals in certain situations in which no chronic illness/condition or major trauma is involved, as long as certain specified criteria are met. The rationale behind this option is that these situations are ones in which future medical care is unlikely to be necessary at all. In this regard, key proposed terms such as "chronic illness/condition" and "major trauma" are defined to target situations in which there is a presumption that future medical care will be required. For example, the latter definition would use the Injury Severity Score to evaluate the extent of an injury in order to predict whether future medicals are likely to arise. CMS has requested comment on what a maximum settlement amount should be for eligibility to use this option.

3. The individual would provide an attestation from his/her treating physician as to a "Date of Care Completion," indicating that no future medicals are required by the condition giving rise to the settlement. We note, however, that in CMS teleconferences related to Section 111 implementation, callers have indicated that doctors may be unwilling to make such attestations.[5]

4. The individual would submit a proposal for a Medicare Set-aside Arrangement similar to the process currently used for workers' compensation settlements.[6] In short, this process involves setting aside a fund of money out of which future medicals are paid, and Medicare is not responsible for payments until the fund is exhausted. In this regard, CMS indicated in the Notice that it is already receiving many requests from liability insurers for official review of their settlements.

Options 5-7 would be available only to people who are Medicare beneficiaries at the time of settlement:

5. The beneficiary would be able to obtain a final conditional payment amount from Medicare in regard to future medicals before entering into certain smaller settlements. CMS indicated that it already offers the following options for settlement of Medicare recovery claims, and it solicited comments for improving or expanding this process to address future medicals. Specifically, for certain settlements of $300 or less, Medicare elects not to pursue recovery. For certain settlements of $5,000 or less, the beneficiary has the option to resolve Medicare's recovery claim by paying Medicare 25% of the gross settlement amount. For certain settlements of $25,000 or less where the beneficiary can demonstrate that care has been completed, the beneficiary may self-calculate Medicare's recovery claim amount, subject to review and acceptance by Medicare.

6. The beneficiary would make an upfront payment to Medicare, calculated based on whether or not the payer has Ongoing Responsibility for Medicals ("ORM"), a term used to describe

[5] *See* CMS, *Transcript of NGHP Section 111 Teleconference* at 49-51, Feb. 23, 2012.

[6] *See* 42 C.F.R. § 411.40 *et seq.*; *see also* https://www.cms.gov/Medicare/Coordination-of-Benefits/WorkersCompAgencyServices/wcsetaside.html

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situations (typically in the workers' compensation or no-fault context) in which the liability insurer will continue to be the primary payer in regard to future medical care. Specifically, if the insurer is responsible for ORM, the upfront payment would be the estimated cost of all future medicals. This option could be characterized as an alternative to a Medicare Set-aside Arrangement, but instead of setting aside a fund to be administered, the payment would be made upfront to achieve final resolution of the Medicare claim.

On the other hand, if the insurer has not accepted ORM, the upfront payment would be calculated as a specified percentage of "beneficiary proceeds" from the settlement, defined to exclude procurement costs and recovery of conditional payments already made by Medicare. CMS has solicited comments on what an appropriate percentage might be and whether either of these lump-sum options would be used by beneficiaries.

7. If the beneficiary has obtained a compromise or waiver of recovery from Medicare in regard to prior claims, Medicare might also choose to waive recovery of future medicals. CMS did not provide other details about how it might exercise its discretion under this option.

CMS has requested comments on these ideas as well as suggestions for other methods for facilitating the MSP recovery process in regard to future medicals. The deadline for comments is August 14, 2012. Insurers who provide liability coverage may want to evaluate the proposed ideas from a business perspective and submit comments to the government. Interested parties are also invited to propose other ideas that might work better for them while still ensuring that Medicare's interests are protected in regard to future medicals.

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