FUTURE MEDICALS IN LIABLITY CASES

The Issue: The Center for Medicare and Medicaid Services (CMS) has stated on numerous occasions that there is an obligation to protect Medicare's interest in the payment of future medical costs arising from liability claim settlements. CMS, however, has neither defined this obligation, nor demonstrated a legal basis for such position. The MSP statute is clear that CMS should have no role in such issues, as the Agency is prohibited from paying for healthcare up to the amount of available settlement or other third party funds for such costs of care. It is the MARC Coalition's position that that CMS is prohibited from recovering amounts allocated to non-medical loss in liability settlements.[1]

In 2012 CMS published in the Federal Register an Advanced Notice of Proposed Rulemaking (ANPRM) seeking input on how to address MSP future medicals in liability cases. 77 Fed. Reg. 35917 (June 15, 2012). MARC submitted comments on the ANPRM in August 2012 – before the SMART Act was enacted. In September 2013, CMS submitted to the Office of Management and Budget (OMB) a draft proposed rule for review and approval prior to publication in the Federal Register. In response, MARC, along with several other stakeholders, met with OMB urging a delay or elimination of the Rule. Among other arguments, MARC advised OMB that it was premature for CMS to pursue such a vast rulemaking until the SMART Act was implemented. In October 2014, CMS withdrew its proposed rule.

The Background: When Congress enacted the MSP statute in 1980, it explicitly prohibited Medicare from paying for future medical care that was the subject of a settlement or judgment: "Payment under this title may not be made . . . with respect to any item or service to the extent that payments has been made, or can reasonably be expected to be made, with respect to the item or service . . . " 42 U.S.C. § 1395y(b)(2)(A). The statutory language is clear -- if funds are available from a settlement to cover a future medical payment, then CMS is prohibited from paying for the health care. There is no provision of the MSP statute that allows CMS to govern or regulate future medicals, even by a voluntary policy guidance. In contrast, CMS has the authority to accept allocations of liability settlements between medical and non-medical claims (as Agency guidance has already done for court-ordered allocations). Such allocations are particularly important given the nature of liability cases, which typically involve both bodily injury and property damage claims. Only by expanding the use of private allocations will beneficiaries understand how much they need to expend from the settlement before Medicare benefits resume.

[1] *Bradley v. Sebelius,* 621 F.3d 1330 (11th Cir. 2011), *but see U.S. v. Hadden,* 661 F.3d 298 (6th Cir. 2012).

Notwithstanding the clarity of the law, CMS has attempted through proposed regulation to create a scheme to address future medicals in liability settlements. Although we do not know the precise contents of the proposed rule pending at OMB, we can assume that the CMS proposal will require the imposition of a "set-aside" like arrangement, subject to CMS approval, before a liability settlement can be concluded. As a result, the CMS proposed rule, if finalized, will impose greater costs, and greater delay, in the liability settlement process, which in turn will negatively impact litigants' ability to settle cases in the first instance. Essentially, CMS's action will likely will harm litigants, and its own ability to collect "conditional payments" for past Medicare payments, from settlements by introducing complex new rules affecting so-called "future medical" requirements.

The MARC Position: CMS has no statutory authority to regulate future medicals in liability cases, and that any such effort will negatively impact the ability of litigants to settle cases. For these reasons, MARC opposes any such regulation, either by rulemaking or as a matter of Agency policy. MARC does, however urge CMS to take immediate action to recognize settling parties' fair voluntary allocation of personal injury and other liability action settlement funds between medical and non-medical losses to provide certainty for beneficiaries as to the amount that must be exhausted before Medicare may resume payment of medical benefits for illness and/or injuries related to the claim. MARC takes no position on the question of Medicare Set-Asides in Workers' Compensation cases, and is neutral on the merits of H.R. 1982 (113th Cong.), the Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2013.