

Medicare Secondary Payer and Future Medicals (CMS-6047)

Stakeholder Presentation to OIRA – March 9, 2022

OMB Should Reject the Proposal to Publish a Future Medicals Proposed Rule

- All Stakeholders Oppose CMS' Expansion of Future Medicals Policy into Liability and No-Fault Cases
- CMS Lacks Statutory Authority to Regulate "Future Medicals"
- The Proposed Rule Will Harm Medicare Beneficiaries
- The Proposed Rule Will Make It Impossible to Settle Claims
- The Proposed Rule Will Harm the MSP Program
- Liability and No Fault are Different than Workers Compensation

What Are “Future Medicals”?

- When a Medicare beneficiary resolves a liability, workers compensation, or disputed auto claim, then Medicare must be reimbursed for any medical care related to the accident or injury that was made prior to the settlement, judgment or award.
- CMS has a working program that accepts reimbursement for medical care received until the point of settlement.
- CMS now proposes to expand this program to specifically regulate care that may be covered under the settlement after the date of the agreement.
- Example: Acme auto insurance accepts responsibility to pay 40% of past costs and continue to pay 40% of future medical claims for Jane, an injured Medicare beneficiary up to the policy limits given that the Acme's policyholder, Bob, was 40% responsible for the accident

CMS Lacks Statutory Authority to Regulate “Future Medicals”

- The Statute is clear that Medicare may not make payment where “payment 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)(ii)
 - This language directly and explicitly applies to future medicals for which an insurer or self-insured has accepted responsibility
- CMS assertion that it has such authority under the “conditional payment” provisions of the statute (1395y(b)(2)(B)(i)) is plainly wrong
 - the conditional payment provisions speak to actual payments – not future payments
 - Section “(A)(ii)” quoted above directly speaks to future payments
- CMS has repeatedly acknowledged its workers compensation “future medical” program is voluntary
 - “Voluntary” programs do not belong in regulation

MSP Stakeholder Community Strongly Opposes Rulemaking

- The entirety of the MSP stakeholder community have forcefully urged CMS *not* to launch a “Future Medicals” program, and are today urging OMB to reject the Proposed Rule.
 - This includes beneficiaries, plaintiffs’ lawyers, defense lawyers, insurers, self-insured, third-party administrators, and claims adjusters.
 - CMS Future Medicals Rule has been opposed by numerous Beneficiary advocacy groups, groups representing individuals with brain & spinal injuries, long term care residents and many others.
- GAO, when examining the MSP system, did not call for a Proposed Rule.

A Rule Will Harm Medicare Beneficiaries

- If CMS promulgates a future medicals regulation, Beneficiaries will not only lose the opportunity to settle their medical claims, but will also lose settlement of their property damage, pain and suffering damages, and other damages
- A Future Medicals Rule will leave Medicare Beneficiaries without the benefit of their Medicare coverage, pushing them into the open market and paying copayments and deductibles on provider retail prices.
- A Future Medicals Rule will bar beneficiary access to settlement funds for medical care that may not be needed in the future
- A Rule interrupts Beneficiary Medicare coverage for claims that may or may not be related to the accident or injury in question

The Proposed Rule Will Make It Impossible to Settle Liability Claims

- Medicare has no ability to calculate or take account of “allocation of fault” principles inherent in any liability or disputed auto claim
 - There is no formula or fixed dollar amount that can be used as a proxy for future medical claims
- Medicare has no ability to calculate or account for compromise of claims in disputed no fault cases
- Medicare’s view that it is entitled to 100% of all settlement dollars, leaving beneficiary with reduced settlement proceeds for other damages, badly inhibits settlements

Medicare Remains Primary If Claims Do Not Settle

- If cases do not settle, Medicare remains primary
 - In “conditional payment” cases, Medicare remains primary until an insurer or self-insured pays a settlement, judgment or award to a beneficiary
 - Complicating the settlement process with a new “future medical” regime that inappropriately ties up beneficiary funds will damage the settlement process and result in many cases being unable to settle
 - Both plaintiffs’ lawyers and claims adjusters feel compelled to advise beneficiary of complexities of WCMSA process, leading beneficiaries to walk away from disputes – and leaving Medicare primary
 - When beneficiaries learn about CMS’s view that 100% of settlement funds are available to reimburse Medicare, many walk away from their claims for fear of having to dispute with Medicare when future medicals are needed and how much will be needed

Liability and No Fault Are Not Workers Comp.

- CMS today operates a Voluntary Workers' Compensation "Medicare Set-Aside Program"
 - We presume that pending Proposed Rule does not address this program or make it mandatory
 - The WCMSA program is itself badly broken, causing settling parties to develop "non-submit" MSAs, which CMS cannot navigate
- Workers' Compensation is a Strict Liability, No Fault Program with Clear Future Medical requirements
- In stark contrast, Liability and No Fault (Auto) Are Fundamentally Different
 - Liability and many auto cases depend upon findings of proportional "fault" by the respective parties to a conflict – which the CMS future medicals regime ignores and cannot accommodate
 - There is no "formula" to calculate future medical liabilities
 - Nearly all liability and many auto cases never involve future medical payments
 - Even those few cases that involve future liability are not amenable to a formulaic or other determination of future medicals
 - There is no way to apply a future medicals policy to multi-defendant cases
 - No Fault and Liability have Policy Limit Caps

OMB Should Reject the CMS Proposed Rule

- CMS Lacks Statutory Authority for Rulemaking
- The Rulemaking is bad Policy
- There is No Need for Rulemaking
 - No-one is Asking for Rulemaking
- OMB Should Reject the Proposed Rule, and Urge CMS to Abandon “Future Medicals” Efforts
 - Instead, CMS should modernize the badly outdated regulations
 - Regulations were last updated in 1995 and many conflict with the Program today
 - Instead, CMS should modernize its badly outdated MSP system
 - Correct misuse of ICD codes, as GAO requested