CMS Abruptly Withdraws NPRM for Future Medicals and Medicare Secondary Payer

By: Stephen P. Laitinen, Esq.

On October 8, 2014, the Centers for Medicare & Medicaid Services (CMS) withdrew its Notice of Proposed Rulemaking (NPRM) that it had previously submitted to the Office of Management and Budget (OMB). On August 1, 2013, CMS submitted a NPRM to the OMB relating to CMS' intent in addressing Medicare Secondary Payer and future medical costs for workers' compensation, automobile, liability insurance (including self-insurance) and no-fault claims. CMS' notice of withdrawal, without public comment, can be found here: http://www.reginfo.gov/public/do/eoDetails?rrid=123255. Industry observers fully expect that CMS will redesign the NPRM and resubmit it to the OMB at a future date.

The NPRM was expected to outline how Medicare's interest should be protected (per the Medicare Secondary Payer Act [42 U.S.C. § 1395y(b)(2)]), in cases where future medical care is claimed or effectively released in a settlement, judgment, award, or other damages payment. While CMS has guidelines in place for the handling of future medical expenses in workers' compensation cases, until final rules are released in the liability context, there are no similar standards for claims involving self-insureds and automobile, liability, and no fault coverage. This has created confusion in courts across the country, where conflicting judicial decisions have been reached.

By way of backdrop, CMS began the process of issuing these proposed regulations in June 2012, when it released an Advanced Notice of Proposed Rulemaking (ANPRM) for these types of claims. By originally submitting a NPRM for the OMB's review, it became apparent that CMS intended to take the next step in the regulatory approval process. The most well-known part of the rulemaking focused on allocations in liability cases, which would have been the first official guidance published by CMS with regard Medicare Set-Aside Arrangements, or liability MSA's.

In July 2014, John V. Cattie, Jr., the Chair of Defense Research Institute's Medicare Secondary Payer (MSP) Task Force, met with government officials, as part of the public commentary process. During that meeting, Cattie stressed that any future medicals rule proposed by CMS, which creates requirements for addressing future costs of care in liability settlements, judgments or other payments, must have clarity for all stakeholders. This includes which stakeholders are responsible to ensure Medicare remains a secondary payer for Medicare-covered, injury-related future medical expenses. Absent such clarity, Cattie strongly recommended that the proposed rules be returned to CMS until such clarity could be achieved.

CMS' discreet withdrawal of the NPRM may be attributed to one of two things occurring: 1) CMS may no longer believe that is has a statutory right to not pay certain future medical expenses (i.e., no more liability MSA's); or 2) CMS heeded the clarion call that the NPRM needs further precision, and is now taking appropriate steps under the Administrative Procedures Act to provide that clarity.

The upcoming guidelines are expected to pinpoint the circumstances in which and the actions settling parties should take to ensure that Medicare remains a secondary payer post-settlement. In the meantime, CMS' withdrawal of the NPRM does not change the analysis for how to best deal with future cost of care questions arising in liability settlements. Although CMS has, at present, chosen not to clarify when and how parties can take Medicare's future interests into account in liability cases, the MSP laws still mandate that Medicare remain the secondary payer, both in pre-settlement and post-settlement situations.

Practitioners and clients should carefully review each fact-specific case on its merits, to determine if an MSA is warranted, viewed within the prism of the current statutory, regulatory and administrative guidance from CMS, as well as the relevant case law. This includes identifying whether a settlement pays dollars for injury-related future costs of care, which would otherwise be Medicare-covered. Documenting the file with these conclusions, along with an underlying rationale for doing so, arguably represents a "best practices" methodology for managing that risk in today's ever-evolving environment. Stay tuned for future developments.

About the Author

Steve Laitinen is a partner at Larson • King, LLP. Steve, an "AV Preeminent" rated lawyer in Martindale-Hubbell, the highest lawyer rating for both skills and ethics, was admitted to the Minnesota Bar in 1993. Steve represents clients in professional liability and medical malpractice disputes, among other areas of the law, and is a frequent lecturer and author.