"The SMART Act Requires Expansion of Defendants' Administrative Remedies – A Potential Benefit or Foreshadowing Pursuit of Defendants by CMS?"

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Introduction:

Last year the topic of Medicare secondary payer regulations became a focal point after the enactment of the Strengthening Medicare and Repaying Taxpayers (SMART) Act. The SMART Act's primary purpose is to streamline compliance with federal regulations governing secondary payer obligations. SMART lays out a series of modifications to the current recovery process utilized by the Centers for Medicare and Medicaid Services (CMS) and establishes deadlines for CMS to implement the changes.

While the SMART Act's emphasis is primarily geared towards a plaintiff-Medicare beneficiary's role in the recovery process,[3] it also requires that CMS develop a new appeals process for defendants and their insurers, also known as "primary plans."[4] Section 201 of the SMART Act requires CMS to develop an appeals process through which defendant-primary plans being directly pursued for secondary payer reimbursement claims can challenge the amount allegedly owed to CMS.

This article briefly discusses the current CMS recovery process, describes the expansion of appeal rights proposed for defendant-primary plans and examines why the recovery process might be changing.

The Direct Right of Action Statute – How CMS Can Pursue Defendants Directly and Why They Generally Haven't So Far:

The Medicare Secondary Payer Act[5] (MSP Act) gives CMS the right to reimbursement for medical payments it makes for the treatment of a plaintiff-beneficiary. The right functions as a lien and attaches to any settlement, judgment or other award that may resolve a related third-party liability action. The lien and a separate and distinct "direct right of action"[6] provision of the MSP Act give CMS the right to recover not only from a plaintiff-beneficiary but also from a defendant-primary plan. In other words, the direct right of action provision gives CMS the ability to forego pursuit of a plaintiff-beneficiary and pursue a defendant-primary plan directly.

Although the direct right of action provision has been in effect since the enactment of the MSP Act, CMS has almost exclusively pursued the plaintiff-beneficiary for secondary payer recovery claims. The likely reason for this is that a plaintiff-beneficiary and his or her attorney usually have the most to gain by ensuring that a CMS recovery claim is satisfied. The plaintiff-beneficiary wants to ensure the claim is resolved so he or she can collect funds from the settlement and continue receiving Medicare benefits, and the attorney wants to collect their fees.

Defendant-primary plans are typically less involved in the recovery process because they control the settlement purse strings. A defendant-primary plan is able to delay settlement or issuance of a settlement check until the plaintiff-beneficiary produces evidence that the CMS recovery claim is being resolved.

The changes required by Section 201 of the SMART Act could foreshadow CMS plans to start utilizing the direct right of action statute to pursue defendant-primary plans more frequently. If that is the case, it will be important to understand the rights defendant-primary plans currently have and how CMS plans to expand them.

Medicare Recovery Actions and the Administrative Appeal Process:

Currently, if Medicare, through its recovery contractor, pursues a defendant-primary plan directly for a secondary payer recovery claim, the defendant-primary plan has a right to dispute the amount allegedly owed to Medicare. This dispute process allows a defendant-primary plan to question whether certain medical expenses are related to the accident that is the basis of the underlying third-party liability action.

This right to dispute is similar to what a plaintiff-beneficiary is allowed under the secondary payer provisions if pursued directly by Medicare; however, if a plaintiff-beneficiary is not satisfied with the results of a dispute, he or she has the option to pay the amount allegedly owed under protest and seek further review of the recovery claim via a 5-step administrative appeal process.[7]

On December 27, 2013, CMS issued a Notice of Proposed Rule Making (NPRM) that proposes granting defendant-primary plans it pursues directly the right to utilize the same multilevel appeals process previously only available to plaintiff-beneficiaries.[8]

The process includes:

Level 1: A redetermination of the amount owed performed by the recovery contractor;
Level 2: A reconsideration of the amount owed by a Qualified Independent Contractor (QIC);
Level 3: An Administrative Law Judge (ALJ) hearing;
Level 4: A review by the Departmental Appeals Board (DAB) Medicare Appeals Counsel (MAC); and
Level 5: Federal district court review.

The NPRM also explains how CMS plans to implement the proposed change in process and that certain regulations will be revised to govern an appeal by a defendant-primary plan. Here's what you will need to know if the proposed rule becomes final:

- A defendant-primary plan will only have access to the multilevel appeal process if CMS pursues them directly for the recovery claim by naming the defendant-primary plan as the debtor in a CMS Notice of Initial Determination letter.[9]

- A defendant-primary plan will not have a right to intervene or assert an appeal in a case where CMS pursues a plaintiff-beneficiary directly.

- A plaintiff-beneficiary will receive notice that a defendant-primary plan being directly pursued by CMS has exercised its right of appeal. Notice to a plaintiff-beneficiary will only be sent at the redetermination level of appeal.

- A plaintiff-beneficiary will not have the right to challenge the amount alleged owed CMS if a defendant-primary plan is pursued directly by CMS.

- CMS's decision to pursue a defendant-primary plan directly is not appealable by any party.

- A defendant-primary plan can appoint a third party to represent them in the recovery process in the same way that a plaintiff-beneficiary currently can.

Conclusion:

Although the changes proposed in the NPRM have not been finalized,[10] it is important that defendant-primary plans and their attorneys understand their options when being pursued directly by CMS for a secondary payer recovery claim. As it currently stands, a defendant-primary plan has the right to dispute the amount allegedly owed, but if the defendant-primary plan disagrees with the amount thereafter it has no other administrative remedies.

If the proposed rule becomes final, defendant-primary plans will have access to the same multilevel appeal process currently available to plaintiff-beneficiaries. What remains to be seen is whether the potential expansion of rights of defendant-primary plans is a sign that CMS plans to begin directly pursuing the plans more frequently than it has in the past, and what effects doing so might have on third-party liability litigation involving secondary payer obligations.

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[3] The Act proposes upgrades to the Medicare beneficiary claim reporting portal, heightened security measures to protect beneficiaries' personal information, and an easier dispute process with faster resolution timelines.

[4] Primary plan means a group health plan or large group health plan, workers' compensation law or plan, automobile or liability insurance policy or plan (including self-insurance) or no fault insurance.

[5] 42 U.S.C. §1395y(b)

[6] 42 U.S.C. §1395y(b)(2)(B)(iii)

[7] The process is found in 42 CFR Part 405, Subpart 1.

[8] The NPRM can be read in its entirety by accessing the Federal Register online at: www.gpo.gov/fdsys/pkg/FR-2013-12-27/html/2013-30661.htm

[9] Note that sending a defendant-primary plan a courtesy copy of an Initial Determination Letter issued directly to a plaintiff-beneficiary will not trigger the defendant plan's right to appeal.

[10] CMS accepted comments on the NPRM until February 25, 2014. At the submission of this article, the proposed rule had not been finalized; however, in the coming months CMS should issue a final rule to be published in the Federal Register. The final rule will then become effective.