wiley

ALERT

Section 111 Bulletin: CMS Final Rule Establishing Right of Appeal for Medicare Secondary Payer Determinations Raises Important Issues for Liability Insurers

March 6, 2015

On February 27, 2015, the Centers for Medicare & Medicaid Services (CMS) issued a final rule implementing the provisions of the Strengthening Medicare and Repaying Taxpayers (SMART) Act of 2012 that grant Non-Group Health Plans (NGHPs) the right to appeal CMS "initial determinations" that Medicare be reimbursed for its "conditional payment" of past beneficiary medical expenses. The final rule, which reflects only minor changes from the proposed rule issued by CMS on December 27, 2013, will go into effect on April 28, 2015. 80 Fed. Reg. 10,613 (Feb. 26, 2015).

In short, the rule establishes an administrative appeal right and eventual judicial review for NGHPs that largely mirror the current appeal process afforded Medicare beneficiaries who contest Medicare reimbursement (recovery) demands. Under the Medicare Secondary Payer (MSP) statute, NGHPs are a category of "applicable plan" and are defined as "liability insurance (including self-insurance), no fault insurance, and workers' compensation laws or plans." The appeals process that will become available to NGHPs will have five levels: (1) a redetermination by the contractor issuing the MSP recovery demand; (2) a reconsideration by a Medicare Qualified Independent Contractor; (3) a hearing by an Administrative Law Judge at the Department of Health and Human Services (HHS); (4) a review by the HHS Medicare Appeals Council; and finally, (5) judicial review.

Authors

Kathryn Bucher
Partner
202.719.7530
kbucher@wiley.law

Practice Areas

Section 111 Insurer Reporting and MSP Reimbursement

Under Section 1862(b)(2)(B)(ii) of the Social Security Act, CMS has the right to pursue recovery of conditional payments through a direct cause of action against the beneficiary, the applicable plan (also referred to as the primary plan or primary payer), ***or*** any other entity receiving proceeds from the payment by the applicable plan. (An NGHP is an applicable plan.) There is no order of precedence that CMS must follow. Indeed, during rulemaking, CMS rejected the suggestion of one commenter that the parties to an NGHP settlement be allowed to specify which individual or entity CMS must designate as the "identified debtor" and then pursue for reimbursement, or at least which debtor CMS must pursue first, e.g., the beneficiary where the applicable plan has already paid that individual. CMS also declined to permit an appeal of its decision of which applicable plan (e.g., there may be multiple settling NGHPs) to pursue first.

Under the final rule, an NGHP's right of appeal will be triggered only when CMS asserts a reimbursement demand directly against the NGHP as the identified debtor. CMS declined to permit NGHPs a right of appeal where Medicare has asserted a demand against the beneficiary, just as it declined to allow beneficiaries the right to participate in an NGHP's appeal. It explained that "an identified debtor and a potential identified debtor do not always have the same interests or present the same issues on appeal." 80 Fed. Reg. 10,613 (emphasis added).

The motivation behind the NGHP requests was a desire for efficiencies and a concern that the Agency not later seek to bind NGHPs to determinations made in appeals in which they had had no right to participate. CMS attempted to address this concern, but not the desire for efficiencies, by replying in the final rule that "[i]f we issue a demand to an identified debtor and later determine that it is appropriate to pursue recovery of some or all of the conditional payments at issue from a different identified debtor, *a new separate demand will be issued, with appeal rights appropriate to the identified debtor in the new recovery demand*." 80 Fed. Reg. 10,613 (emphasis added). The potentially duplicative appeals contemplated by the final rule are wasteful and inefficient, but the Agency's decision to permit a separate appeal by the NGHP would appear to avoid the risk that the NGHP will be bound by determinations made in an appeal from which it was excluded, which would present obvious due process concerns. For example, if Medicare makes a determination that an NGHP payment compensated a beneficiary for an injury for which Medicare paid medical costs, the NGHP should have a right to introduce evidence that proves otherwise.

Another potentially critical question left open by the final rule is the extent to which NGHPs may access beneficiary medical information to support effective appeals. In response to concerns raised by commenters that "applicable plans should have access to beneficiary medical records, including an ability to unmask data on CMS' web portal," the Agency responded that "[t]hese comments are outside the scope of this rule as they are not related to the proposed appeal" and added that "[i]f we pursue recovery directly from the applicable plan, the applicable plan will be provided with all information related to the demand." 80 Fed. Reg. 10,615. Without defining the category "all information related to the demand," CMS has left in question whether NGHPs attempting to challenge overbroad assertions regarding the scope of conditional medical payments will have access to all information that may be relevant to the NGHP's appeal or only the information that the Agency deems relevant to support its demand. If CMS takes a narrow view of the information that it will make available, the appeals rights afforded NGHPs under the final rule could prove to be illusory, leaving NGHPs

no alternative but to challenge the Agency's final determinations in the courts.

* * * * *

Our Section 111 Team routinely covers CMS's Section 111 NGHP Town Hall Teleconferences, and we send periodic Section 111 Bulletins to our clients addressing notable Town Hall discussions and other Section 111 developments. We also maintain a searchable electronic database of Town Hall transcripts back to October 2008. Please let us know if you would like more information about any of the Section 111 topics discussed in this Section 111 Bulletin. You also may access our Section 111 webpage and other Section 111 Bulletins and articles we have published at www.wileyrein.com/section111.