Secondary payer predicament; U.S. Justice Department Probes Insurers that billed Medicare as primary payer

BY: Mark Taylor

The U.S. Justice Department is investigating insurers who allegedly defrauded Medicare by billing the federal program as the primary payer—instead of a secondary payer—for their group health plan members who are also Medicare beneficiaries.

In addition, a former high-ranking HHS official said insurers might not be the only targets. Mac Thornton, a former chief counsel to the HHS inspector general, said hospitals also could face scrutiny in the government's widening probe.

Under the Medicare secondary payer (MSP) law, which has been on the books since 1968 and was expanded several times in the 1980s and 1990s, Medicare is a secondary payer for most working beneficiaries covered by group health insurance plans; patients with end-stage renal disease and other disabilities already covered by private insurance; and accident victims with auto insurance policies or workers compensation.

As the secondary payer, Medicare is responsible for paying only what remains after the primary insurer has been billed, such as deductibles and copayments, a much smaller portion of the medical bills.

Thomas Coons, a former CMS lawyer now in private practice with the Baltimore office of Ober/Kaler, said the issue is not new.

''It's been percolating for a number of years,'' Coons said. ''There has long been a tension between insurance companies who have public and private business and (the) CMS over whether those organizations are fully prosecuting their obligations under the MSP rules.''

Coons said whistleblowers partially explain why the payment issues are now on the government's radar. ''The government becomes interested when cases of abuse are brought to their attention and even more interested when the issues were supposed to have been resolved but were not,'' he said.

Earlier this year the U.S. attorney in Philadelphia joined a whistleblower lawsuit filed by Elizabeth Drescher against Pennsylvania Blues plan Highmark, alleging that the insurer improperly paid claims for some of its beneficiaries and the group health plans it administers as a secondary payer, thus sticking the primary bill to Medicare in violation of the law. While Highmark is the only named defendant, the lawsuit remains partially under seal and sources familiar with the
case, who spoke on condition of anonymity, said other insurers would be named later.

In 1995, 67 Blues plans settled a civil Medicare secondary payer lawsuit the government filed against them for $115 million-paying $27 million in cash and agreeing not to resubmit $88 million worth of claims the plans said Medicare owed them. Highmark predecessors Blue Cross of Pennsylvania and Pennsylvania Blue Shield were among the defendants in that case, and the settlement was the launching point for the whistleblower suit filed by Drescher, a former Highmark project manager hired in 1996 to develop and implement a Medicare secondary payment compliance program for the company to correct the earlier billing and payment errors.

After the 1995 settlement, a CMS official said the changes in billing mandated by the agreement with the Blues plans would save Medicare more than $100 million annually. But healthcare lawyers and government officials now say that not only have these billing changes not been made, but the problem could be significantly larger, worth several hundred million dollars a year in Medicare payments that private insurers should be picking up.

The companies that settled were obligated to correct and minimize improper MSP payments. In her Highmark lawsuit, Drescher alleged that she reported the potential MSP liability to her superiors, and the company's chief executive officer even attended an executive committee presentation on the looming problem and alleged failure of the company to correct its billing systems. She alleged that the company's data processing systems deliberately failed to capture the actual number of employees at companies whose group health plans Highmark administered. That's key to the issue because there are several exceptions under the secondary payer law. For example, Medicare is the primary payer for beneficiaries working for companies with fewer than 20 employees and for disabled beneficiaries under 65 who work for companies with less than 100 employees that are covered by group health plans. If Highmark did not track the number of employees, then Medicare would always be the primary payer, regardless of the size of the employee group.

''Highmark, as a private insurer or administrator, improperly paid MSP claims as secondary when it should have paid them as primary,'' the government lawsuit alleged.

Drescher said in the suit that her concerns were dismissed and that she was demoted, moved to a windowless office and reassigned to a supervisor who was once her peer. In 2000 she filed her whistleblower suit under the federal False Claims Act.

''We're talking tens of millions of dollars, potentially as much as $100 million,'' Drescher's Houston attorney, Mitch Kreindler, said, referring to payments Medicare made that should have been picked up by Highmark. ''The Medicare secondary payer statute has been on the books a long time. And Highmark can't say they didn't know about it because they signed a settlement to correct their deficiencies eight years ago.''

At the time of the lawsuit's unsealing earlier this year, Highmark spokesman Michael Weinstein said the company had cooperated fully with
the federal government. 'And we strongly disagree with any characterization that we intentionally underpaid claims for Medicare beneficiaries,' Weinstein said.

William Breskin, chief Washington counsel for the Blue Cross and Blue Shield Association, said the association is aware of the lawsuit but would not comment on it.

Coons said HHS' inspector general has made the issue a priority and views uncollected MSP dollars as a potential area of considerable waste and abuse.

''Government tends to go after the low-hanging fruit,'' Coons said. ''And if everyone played by the rules and complied, Medicare could save millions of dollars annually.''

Thornton said hospitals also could be on the hook in cases like this.

'''Hospitals have obligations to collect accurate insurance billing information under the Medicare secondary payer statute, and if they fail to collect that data or don't act properly when billing for services, they could face liability under the False Claims Act,'' said Thornton, now in private practice with the Washington law firm Sonnenschein, Nath & Rosenthal.

'''This is a real vulnerability for hospitals,'' he added. ''It's a good time for hospitals to perform a scrub of their MSP procedures to ensure that the system is working correctly, the proper insurance coverage information is being collected, sent to the right places and acted upon.''

Ellen Pryga, director of policy development for the American Hospital Association, said she doubted whether hospitals would face the same liability as insurers on the secondary payer issue. Pryga said hospitals already require every Medicare beneficiary to complete a 25-question MSP questionnaire for every inpatient admission. ''The claims cannot be processed unless the form is attached,'' Pryga said.

She said the AHA has suggested the CMS reduce the paperwork for hospitals and Medicare beneficiaries and is exploring an Internet subscription software program that would allow hospitals to tap into a database to determine patient insurance coverage in lieu of repeatedly filling out and submitting MSP forms.

'''There is a recognition that the current system Medicare uses to collect this information doesn't function very well and is very inefficient for them and for us,'' she said.

A Justice Department source who asked not to be named said the issue is complex because the CMS has traditionally relied on its fiscal intermediaries to sort out MSP issues. Those contractors have conflicts of interest, however, because many also operate HMOs and administer private group health plans. Lisa Murtha, an attorney and chief compliance officer for the Children's Hospital of Philadelphia, said hospital compliance officers have been aware of the MSP issues for years.
"The issue of Medicare secondary payment is absolutely an area that affects payers and providers alike, and compliance officers need to be aware of the MSP law requirements and educate members of hospital organizations about those requirements," said Murtha, a former officer of the Health Care Compliance Association.

Whistleblower lawyer Stephen Meagher of the San Francisco office of Phillips & Cohen said his firm has been approached by several whistleblowers seeking to sue insurers under the False Claims Act over secondary payer issues.

"This is an area in such flux right now as organizations try to shift the billing responsibilities and administrative functions out of the government and into private pay," Meagher said. "But I think it's a potentially fruitful area.''

GRAPHIC: Mac Thornton, left, says hospitals also could be scrutinized; whistleblower lawyer Stephen Meagher says several people have approached him regarding lawsuits on secondary payer issues. * Kreindler: "We're talking tens of millions of dollars."

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