August 14, 2012

Ms. Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-6047-ANPRM
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850


Dear Administrator Tavenner:

The undersigned organizations are pleased to comment on the Advanced Notice of Proposed Rulemaking (“ANPRM”) on the Medicare Secondary Payer and “Future Medicals,” CMS-6047-ANPRM, issued on June 15, 2012. On behalf of the undersigned and our respective members, we applaud the Centers for Medicare & Medicaid Services (“CMS”) for taking thoughtful and deliberative steps to incorporate public comment on improving the process by which beneficiaries can ensure that the interests of Medicare are satisfied in the course of a settlement proceeding. However, we ask that any final rule regarding the Medicare Secondary Payer (“MSP”) process and future medicals clarify that all requirements of the final rule apply solely to Medicare beneficiaries. This final rule should not alter, amend, or expand the current liability standards of settling insurers and self-insured companies (“self-insureds”).

Background

According to the ANPRM, CMS seeks to “ensure that the process related to ‘future medicals’ is understandable, efficient, and reflects industry practice, while protecting beneficiaries and the Medicare Trust Funds.” Current CMS policy, along with industry practice with respect to settling insurers and self-insureds, only allow CMS the right to seek reimbursement from the primary payer for payments already made by CMS as of the date of the settlement. CMS does not have the right to seek reimbursement with respect to payments made subsequent to the settlement. We ask that CMS expressly affirm this policy in any final rule.

We acknowledge that the ANPRM is directed at “beneficiaries and their attorneys or other representatives.” We believe that this statement generally supports current CMS policy and industry practice, which recognize that settlements extinguish insurers’ or self-insureds’ liability with respect to future medicals. However, we respectfully request that CMS provide additional, unambiguous clarification to any final rule by explicitly stating the limitation on insurers’ and self-insureds’ liability. Such clarification would prevent any potential disruption in current industry practice that might arise from misperceptions since the general operating
principle for much of the Medicare Secondary Payer Act, which provides that if a beneficiary fails to reimburse Medicare for payments made, CMS has the right to seek reimbursement from the primary payer.

Furthermore, creating any unnecessary ambiguity as to the liable party with respect to future medicals runs counter to the purpose of the ANPRM, as specifically stated by CMS. The explicit goal is to provide tools in the settlement process that the beneficiary can use to avoid being unwittingly subject to recovery for conditional payments made by CMS on their behalf following a settlement. The very nature of the rule acknowledges that the beneficiary is responsible for future medicals and should therefore be equipped to mitigate their future liability. However, failing to clarify the limitations of such liability would interject uncertainty into civil litigation regarding such claims.

Settlements Are Vital Civil Litigation Tools and Require Continued Confidence in Their Finality

Settlement agreements are an indispensable facet of the civil litigation system, providing settling parties with the ability to be made whole or to terminate liability without engaging in costly, long, and burdensome trials. Achieving finality through litigation, in particular through settlements, is a bedrock principle of the civil justice system. If finality in litigation is uncertain, the civil justice system will face significant upheaval. In many, if not most cases, insurers and self-insureds involved in civil litigation pursue settlement as a means of achieving a final outcome and ensuring no further liability exists. As noted above, some settlements are entered into despite ongoing disputes with respect to liability, solely as a means of terminating an issue and relinquishing even just potential liability. Imposing even a modicum of uncertainty upon settlements that include Medicare beneficiaries with potential ‘future medicals’ would create a substantial disincentive for pursuing these otherwise swift, efficient, and effective legal tools in such cases.

A clarifying statement in the final rule would provide significant assurance to insurers and self-insureds that current industry practice persists and would foster the continued pursuit of settlement agreements, as discussed further below. By and through settlements, insurers and self-insureds fulfill and terminate their responsibility to make payments for settlement-related medical care. Furthermore, insurers and self-insureds often agree to settlements in situations where liability remains disputed and in which they do not concede responsibility for any medical claims. The persistence of this industry practice is predicated on the unambiguous continuation of current CMS policy that acknowledges settlements terminate insurers’ and self-insureds’ liability with respect to beneficiaries’ “future medicals” by transferring such liability to the settling beneficiaries.

It is critical, therefore, that any final rule clearly and unequivocally state that settling insurers and self-insureds retain no liability for post-settlement payments made by CMS on behalf of a beneficiary, in order to ensure absolute clarity with respect to this issue and maintain incentives for pursuing settlements. Any rule issued by CMS regarding post-settlement obligations by Medicare beneficiaries should reinforce the finality of settlement agreements and promote the use of settlements in civil litigation as a cost-effective, minimally burdensome
option for insurers, self-insureds, and beneficiaries. CMS has an opportunity, through this rulemaking, to accurately reflect and support the continuation of current industry practice by providing express clarification that the liability for future medicals rests with beneficiaries alone. We respectfully request that the Agency provide settling parties with such certainty.

Conclusion

We greatly appreciate your consideration of these comments in response to the ANPRM. Again, we applaud CMS for seeking public comment on ways to streamline and improve the process by which beneficiaries can ensure that the interests of Medicare are satisfied in the course of a settlement proceeding. We wish to reiterate the importance of clarifying in any final rule regarding future medicals that all requirements apply solely to Medicare beneficiaries and their attorneys or other representatives. This final rule must specifically clarify that it does not alter, amend, or expand the current liability standards that settling insurers, self-insureds, and their agents are subject to with respect to future medicals following a settlement. CMS could ensure the ongoing use of settlements as an efficient and minimally burdensome litigation tool and uphold industry practice by simply stating that, in the case of a lump sum settlement, settling insurers and self-insureds retain no liability for future medicals and that CMS will only pursue recovery for conditional payments made after a settlement from beneficiaries in receipt of a settlement.

Sincerely,

American Coatings Association
American Insurance Association
DRI – The Voice of the Defense Bar
Federation of Defense & Corporate Counsel
Greater Pittsburgh Chamber of Commerce
International Association of Defense Counsel
Lawyers for Civil Justice
National Association of Manufacturers
Ohio Chamber of Commerce
Pennsylvania Business Council
Pennsylvania Chamber of Business and Industry
Pennsylvania Manufacturers’ Association
Property Casualty Insurers Association of America
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