Medicare Secondary Payer Update: SPARC, Liability Claim Enforcement, and Other Issues

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Agenda

• Medicare Advocacy Recovery Coalition (MARC) Background
• MSP – Recent Changes and the SMART Act
• Current Regulatory Challenges
• Where We Go From Here
  – The SPARC Act
What is the Medicare Advocacy Recovery Coalition (MARC)?
What is the MARC Coalition?

- The Medicare Advocacy Recovery Coalition (MARC), [www.marccoalition.com](http://www.marccoalition.com), is the leading national Medicare Secondary Payer (MSP) advocacy group dedicated to MSP legislative and regulatory reform.
- Formed in September of 2008 by a group of industry leaders who saw a critical need to improve the MSP system.
- Membership represents virtually every sector of the MSP regulated community, including plaintiffs and defense attorneys, brokers, insureds, insurers, insurance and trade associations, self-insureds and third-party administrators.
- MARC continues to be the leading voice in communicating with Congress, the Executive Branch, and the White House on “Section 111” reporting issues.
- MARC also has been successful in building collaborative partnerships with a broad base of national stakeholder organizations. Through these partnerships MARC has created strong support for its legislative priorities for MSP reform and improvement in Congress.
MARC’s Legislative Accomplishments
The SMART Act – Passed in 2012

• Introduced 2010, passed 2012, signed into law January 2013

• Created an Expedited Pathway to Repay Medicare During, not After, Settlement

• Set A Threshold Below Which Settlements Are Exempt

• Fixed the Reporting “Section 111” Penalty

• Eliminated Use of SSNs

• Established a Clear Statute of Limitations
SMART Act – Implementation

• Portal – A work in progress
  – May 2015 – CMS Announced “Multifactorial Authentication”
  – January 2016 – Portal Launched
  – BUT CRC Is Impeding Access to Data
  – Licenses per User (max 100) still a problem

• Penalty Rulemaking
  – No proposed rule

• Thresholds
  – CMS Consistently Missing Deadlines
  – Congressional Inquiry Results in Incomplete Answers
The Regulatory Issues –
What Are They And What is MARC Doing About Them
**MARC’s Regulatory Policy Issues**

1. Delays and Pending Claims/CRC-CBRC Coordination – Operational Breakdown – Working with CMS to Resolve the Following:
   - Not setting up files or developing them without phone calls
   - Mixed/conflicting messages amongst analysts
   - Communication issues between the CRC/ BCRC and setting up duplicate files BCRC/CRC
   - Not attaching documents to files that are sent causing delays in development
   - Not issuing final demands for $0 FD
   - Lack of vetting Medicare charges related to the accepted claims
2. ORM - Ongoing Responsibility for Medicals
   • Key data point in the Medicare reporting process.
   • Established at time of acceptance of the claim based on the line of business
   • An ORM indicator must be established if claim involves ORM at time responsibility is accepted
   • Usually set automatically with an option for adjuster override
   • Electronic reporting process takes 140+ data points

3. Treasury MSP Debt Collection: Active Treasury inventory of CMS MSP debt claims is 33,700 cases, 2.5% of all Treasury debt collection cases, representing $111.5 M of Treasury collections, which is .5% of Treasury dollar value
Regulatory Issues – What MARC is Doing (continued)

4. LMSAS: Origins of LMSAs are found in WCMSA program
   ◦ Created by CMS Memorandum dated July 23, 2001 (the so-called “Patel” memo), and updated since
   ◦ June 15, 2012 – CMS publishes ANPRM soliciting ideas on eight different proposals (77 Fed. Reg. 35917)
   ◦ Proposals confusing at best
   ◦ September 2013 – Draft Proposed Rule Created
      -MARC met with OIRA urging withdrawal of rulemaking
      -CMS withdraws proposed rule
LMSAs Continued – CMS June 2016

• June 8, 2016 CMS LMSA Announcement:

  “The Centers for Medicare and Medicaid Services (CMS) is considering expanding its voluntary Medicare Set-Aside Arrangements (MSA) amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year. Please continue to monitor CMS.gov for additional updates.”

• MARC convened stakeholder meeting September 23, 2016 to formulate response and follow-up meeting on June 8
Medicare Advantage (Part C) and the Prescription Drug Benefit (Part D)

- Medicare Advantage (Part C)
  - Capitated per member/per month model

- Private Insurers Provide Coverage under MA Plans
  - Humana, Aetna, United, Cigna, etc.

- What is Covered by MA Plans?
  - Part A + Part B + add ons

- MA Plans Are Growing
  - Predicted to be near 50% of all Medicare in coming years

\[\text{What is the future outlook for Medicare Advantage?}\]
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\[\text{NOTE: CBO is Congressional Budget Office, DACT is CMS Office of the Actuary.}\]
MSP and the Part D Program

• Medicare Advantage (Part C) Plans Have Been Increasingly Aggressive In Pursuing MSP Collection Against A Broad Range of Entities
  – Self-Insureds – In Re Avandia (3rd Cir. 2012) -- (GSK)
  – Insurers – Humana v. Farmers (W.D. Tx. 2014), Humana v. Western Heritage (11th Cir. 2016)

• There is a legislative opportunity, in 2017, to advance a solution to this issue that clarifies the rules of the road for everyone
  – Part D Prescription Drug Plans, Settling Parties, their Counsel, CMS, and Vendors
Emerging Issues — MSP Recovery LLC Claims

• What are these cases

• Who is MSP Recovery LLC

• Some Recent Decisions
  – Granting Class Actions
  – Rejecting Class Actions

• The Class Actions
  – MAO I (no fault claims)
  – MAO II (“payment” claims)
The SPARC Act – Why is it needed

• In 2003, when passing the Medicare Modernization Act (“MMA,” or the “Part D Statute”), Congress created a Part D MSP rule.

• The statute simply incorporated by reference the Part C (Medicare Advantage) MSP Rules, which are not a fit.
  – The “Part C” laws are completely vague, and have led to federal court “double damages” gotcha claims

• Part D Plans today face a vague and uncertain “pay and chase” regime, allowing plans to bill providers and settling parties for future, and possibly past, health care costs.

• Settling claims with Medicare beneficiaries are unable to reimburse Part D Plans for funds that may be owed to them, leaving Part D Plans unable to collect funds they may be owed, beneficiaries exposed to future claims, and settling parties unable to close out claims.

• The Part D MSP law is unfair for all involved – Part D Plans (PDPs), settling parties, and beneficiaries.
The SPARC Act – What Will It Do?

• The Part D MSP law can be modernized to create a “win-win-win” for all stakeholders.

• The Secondary Payer Advancement, Rationalization and Clarification (SPARC) Act of 2017, H.R. 1122, will:
  – Clarify that the Part D program is secondary to other available sources of payment, rather than create a “pay and chase” regime;
  – Give Part D Plans a clear right of subrogation, but eliminate any federal cause of action for double damages
  – Allow Part D Plans to waive collection on claims where the cost of recovery is greater than the amount to be recovered. Avoid “underwater” claims collection;
  – Require CMS to timely provide Part D Plans with settlement data, so that the Plans can timely assert any claims for recovery at the time of settlement, rather than months or years later;
  – Leverage the “expedited repayment portal” for Part D claims as well.
Conclusion – Where Do We Go From Here?

• The CMS Regulatory Issues will Continue to Drive Cost

• Medicare Advantage Litigation Landscape unclear
  – MSP Recovery cases will expand, and trigger new litigation wave

• Legislative Reform will need All Stakeholder Support and Effort
  – SPARC
  – Medicaid
  – CMS Reform

• You Can Engage and Make the Difference – Join MARC!