



CMS/ Center for Medicare and Medicaid Innovation (CMMI)
Mr. Brad Smith, Deputy Administrator and Director
7500 Security Blvd.
Baltimore, MD 21244

Re: Value-Based Care (VBC): Accounting for Medical Expenses in Medical Malpractice Awards

Dear Deputy Administrator Smith,

We write to request formal confirmation that "CMS set-asides" should be included in any reconciliation between CMS and groups participating in CMS value-based care programs ("Participants.") As you know, such set-asides represent dollars paid out by CMS to treat medical expenses that are later recouped in a medical malpractice award.

If Participants incur this cost, we believe this money should be rightfully credited back to them. Otherwise, CMS would receive a windfall, and Participants a double penalty.

Background

Medical Expenses

Medical expenses have been the subject of much debate throughout the history of medical professional liability litigation. Insurance is a major reason.

Expenses for medical care are primarily paid by insurance companies ("Payors") as they accrue. Payors can be CMS, private health insurers, auto insurers, workers compensation insurers or even self-insured employers. Patients pay a small percentage of these costs (although co-pays, deductibles and co-insurance can be expensive.)

Medical malpractice awards are typically paid by medical professional liability insurers (MPLIs).

The "damages" that make up a medical malpractice award take several forms, often categorized as either "economic" or "non-economic."

Non-economic damages include pain and suffering, loss of consortium and loss of companionship. Economic damages include loss of wages and medical expenses - both past and future.

Allocating the medical expense portion of damages (for non-CMS beneficiaries) falls under the collateral source rule.

Collateral Source Rule (CSR)

The decision on how medical expenses get divided has been removed from juries. Conventional wisdom suggests that jurors would be inappropriately influenced if they knew whether an insurance company would pay the damages.

Consider a jury having to choose between a plaintiff displaying serious injuries and a physician who worked hard to treat the injuries. If the jury thought the physician could lose his or her livelihood by rendering a large award, it might not do so. But if the jury knew an *insurance company* was going to pay for the care of the injured plaintiff, it might rule differently.

To remove these emotional conflicts in juror deliberations, the CSR was created. This rule prevents attorneys from introducing any evidence of insurance (or a “collateral source” of payment) at trial.

Jurors do not determine which party gets reimbursed for medical expenses; state and federal laws do.

State Law:

State law varies, but proscribes that one of the following is entitled to recover medical expenses that become part of a jury award:

1. The Payor: This rule allows the health insurer to be reimbursed for monies paid.
2. The MPLI: Under the banner of “tort reform,” this rule uses expenses paid by a Payor to offset the total award (ex: a jury renders a \$500,000 verdict, but a Payor already paid \$200,000 in medical expenses. The MPLI would only pay to the plaintiff \$300,000.
3. The Plaintiff: some states allow patients to recover the entire amount, including money for medical costs already paid by a third party.

In no instance above would any party pay twice.

Federal Law

As Federal law trumps State law, CMS is not subject to the CSR.

CMS always recovers incurred medical expenses following a negligence award. Indeed, as part of medical malpractice trials, CMS submits an expense report that serves as a lien against future recoveries (“CMS lien” or a CMS “set-aside.”)

Prior to value-based care programs, in no instance would any party pay twice.

Paying Twice Under a Value-Based Care (VBC) Program

Under a fee-for-service construct, it makes sense for CMS to keep these funds. However, under value-based programs, CMS is only responsible for expenses up to the “target price.” Expenses above the target price come out of the Participants’ funds. Therefore, any award for which CMS has a lien should be apportioned based on who incurs the cost.

If CMS retains all such incurred expenses from an award, it would adversely impact Participants in two ways. First, because Participants assume financial responsibility for a portion of the reimbursed amount. It would thus be unfair for CMS to keep money designed to reimburse the party who actually incurred the costs. Participants should receive this money.

Second, because Participants fund the medical malpractice insurance, which pays back the medical expenses. Withholding the money from Participants creates an inadvertent “double penalty.”

Groups should not have to pay twice for the same expense merely because they participate in a CMS VBC program.

Example: Oncology practice participating in OCM (“Participant”) treats a patient with stage-2 breast cancer. The adjusted target price (reimbursement) is \$30,000. Due to complications, the total cost of care is \$150,000. ***Participant loses \$120,000 on this patient due to \$150,000 treatment cost. $(\$150,000) + \$30,000$ reimbursement = $(\$120,000)$.***

The patient then sues Participant for medical malpractice and is awarded \$500,000, \$150,000 of which is for past medical expenses. CMS is reimbursed that \$150,000 (CMS “set aside”). Participant loses \$500,000 (either directly or through med mal insurance premiums), which includes $(\$150,000)$ for past medical expenses.

Double Penalty for Value-Based Care Participation:

1. Care cost charged to Participant via OCM: $(\$120,000)$.
 2. Award amount for same care costs attributed to Participant $(\$150,000)$.
- Total charge on \$150,000 in medical care = $(\$280,000)$.**

Remedy: CMS reconciliation. CMS credits \$120,000 recoupment to Participant. Final Accounting: **Participant cost on \$150,000 in medical expense = \$150,000.**

CMS can ensure that groups are not doubly penalized for taking risk under its VBC programs. CMS can help groups better manage their risks globally and in turn further embrace new VBC programs through proper accounting and reconciliation.

Respectfully, we request confirmation that – if a medical professional liability award includes medical expenses covered by CMS, but incurred by a medical group as a result of its participation in a value-based care program, the group will be reimbursed in proportion to its expenditure.

We appreciate your attention to this matter and welcome the opportunity to discuss the issue in greater detail.

Thank you,



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