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6325 Security Boulevard  
Baltimore, MD 21207

Date: March 12, 1996

From: Director  
Office of Chronic Care and Insurance Policy, BPD

Subject: Charges to Beneficiaries and Handling of Improper Collections by  
Providers and Suppliers when Medicare is Secondary Payer to Liability  
Insurance ACTION

To: All Associate Regional Administrators  
Attn: Division of Medicare

The purpose of this memorandum is to address questions about what providers of services and suppliers (as defined in 42 CFR 400.202 to include physicians) may charge beneficiaries when Medicare is secondary payer to liability insurance and how contractors (intermediaries and carriers) should handle incorrect collections by providers and suppliers when Medicare is secondary payer to liability insurance. These questions arose following our release of a memorandum on August 21, 1995 which stated our policy regarding the options available to providers and suppliers when Medicare is secondary to liability insurance. Please provide this information to your contractors and ask that they share it with providers and suppliers (including physicians).

## CHARGES TO BENEFICIARIES FOR MEDICARE COVERED SERVICES

### REMINDERS:

- Where a provider/supplier has reason to believe that it provided services to a Medicare beneficiary for which payment under liability insurance may be available, the provider/supplier:
  - Within the 120-day "promptly" period, must bill only the liability insurer, unless it has evidence that the liability insurer will not pay within the 120 day promptly period. If it has such evidence, it may bill Medicare for conditional payment, provided it supplies documentation to support the fact that payment will not be made promptly.
  - After the 120-day promptly period has ended, may, but is not required to bill Medicare for conditional payment if the liability insurance claim is not finally resolved.
    - = If it chooses to bill Medicare, it must withdraw claims against the liability insurer or a lien placed on the beneficiary's settlement.
    - = If it chooses to continue its claim against the liability insurance settlement, it may not also bill Medicare.
- The provider or supplier may not collect payment from the beneficiary until **after** the proceeds of liability insurance are available to the beneficiary. Liability insurance is not the primary payer until **after** payment is made by liability insurance.

This discussion of charges to patients addresses charges for Medicare covered services.

Provider participates in Medicare or is a Nonparticipating Emergency Hospital or a Foreign Hospital with an Election to Bill Medicare

Provider bills Medicare--Must accept the Medicare approved amount as payment in full and may charge beneficiaries only deductible and coinsurance or

Provider pursues liability insurance--May charge beneficiaries actual charges, up to the amount of the proceeds of the liability settlement but may not collect payment from the beneficiary until after the proceeds of liability insurance are available to the beneficiary.

Supplier (includes physicians) participates in Medicare

Supplier bills Medicare--Must accept the Medicare approved amount as payment in full and may charge beneficiaries only deductible and coinsurance or

Supplier pursues liability insurance--May charge beneficiaries actual charges, up to the amount of proceeds of the liability settlement but may not collect payment from the beneficiary until after the proceeds of liability insurance are available to the beneficiary.

Supplier (includes physicians) does not participate in Medicare

Assigned claim by nonparticipating supplier

Supplier bills Medicare--Must accept the Medicare approved amount as payment in full and may charge beneficiaries only deductible and coinsurance or

Supplier pursues liability insurance--May charge beneficiaries actual charges, up to the amount of the proceeds of the liability settlement but may not collect payment from the beneficiary until after the proceeds of liability insurance are available to the beneficiary.

Unassigned claim by nonparticipating supplier

Supplier may charge beneficiaries no more than the limiting charge and may collect without regard to whether the liability insurance is available to the beneficiary.

**Charges to Beneficiaries for Services not Covered by Medicare**

Services for which there is no Medicare coverage available regardless of who furnishes them - May charge and collect actual charges from beneficiaries without regard to whether the proceeds of liability insurance are available to the beneficiary.

Services of Foreign Hospitals that Have no Election to Bill Medicare - May charge and collect actual charges from beneficiaries without regard to whether the proceeds of liability insurance are available to the beneficiary.

Services of Foreign Suppliers (including physicians) - May charge and collect actual charges from beneficiaries without regard to whether the proceeds liability insurance are available to the beneficiary.

**CONTRACTOR HANDLING OF INCORRECT COLLECTIONS BY PROVIDERS OR SUPPLIERS WHEN THEY WRONGLY COLLECT PAYMENT FROM BOTH MEDICARE AND LIABILITY INSURANCE**

As we indicated in our memorandum of August 21, 1995, where a provider or supplier chooses to bill Medicare for conditional payment, it **must** cease all attempts to collect payment from the proceeds of the liability settlement (including any liens it may have placed against any settlement). We have become aware that, in the absence of direction on this issue, some providers and suppliers have billed and been

paid by Medicare and have also continued to pursue collection of payment from liability insurance. The continued pursuit of collection of payment of actual charges from the proceeds of liability insurance after the provider or supplier has billed Medicare violates the provider agreement (for providers of service, except in the rare nonparticipating provider case), the participation agreement (for suppliers that participate) and the assignment agreement (for suppliers that do not participate but do take assignment on the instant claim). Therefore, the collection of actual charges from the proceeds of liability insurance after Medicare has paid for the services is an incorrect collection.

We have been advised that, in a number of cases, providers and suppliers have attempted to refund the Medicare payment to the contractor but the contractor has refused to accept it, advising the provider that the provider has incorrectly collected the payment from the beneficiary and should refund it to the beneficiary, from whom the Medicare program will recover its conditional payment. While this accurately reflects the correct policy regarding recovery of conditional Medicare payment after payment has been made by liability insurance, it results in a convoluted and confusing collection effort in cases in which the provider or supplier wants to refund Medicare.

In this limited circumstance, the contractor should accept the payment being offered by the provider or supplier as being made on behalf of the beneficiary who has the obligation to refund the conditional Medicare payment to Medicare. The contractor must send explanatory notices to the provider or supplier and to the beneficiary regarding the portion of the incorrect collection that the provider or supplier has refunded to Medicare and the amount that it must refund to the beneficiary.

The notice to the provider or supplier should advise that when the provider or supplier submitted an assigned bill to Medicare, it agreed to limit to the Medicare allowed amount its charge for Medicare covered services it furnished. The notice must state that the provider or supplier must therefore refund to the beneficiary the payment made by the liability insurer for Medicare covered services that exceeds the Medicare allowed amount. It should inform the physician or supplier that to refund to Medicare is considered to be repayment on behalf of the beneficiary, that the provider or supplier may keep any amounts due from the beneficiary for deductible and coinsurance or noncovered services and that any excess insurance payment must be refunded to the beneficiary. The notices furnished to providers of services must also comply with 42 CFR Part 411 Subpart D and Part A Intermediary Manual Section 3401.

By submitting the assigned bill, the provider or supplier voluntarily gave up its right to collect actual charges for Medicare covered services from the beneficiary (either directly from the beneficiary after settlement of the liability claim or indirectly from the liability insurance payer). Hence the provider or supplier no longer has a right to be paid in excess of the Medicare allowed amount and can bill the beneficiary only for the applicable deductible, coinsurance amounts and any noncovered amounts. The provider or supplier, in accord with its assigned claim, must refund the beneficiary any amount collected in excess of the Medicare payment for the services and amounts for which the beneficiary is otherwise liable.

The notice to the beneficiary must advise that the provider or supplier has paid Medicare on behalf of the beneficiary for the Medicare covered services for which liability insurance is the primary payer and for which the beneficiary would otherwise have to refund Medicare. The notice to the beneficiary must advise that the provider or supplier is obligated to refund any amount paid for Medicare covered services that is in excess of the Medicare allowed amount, less deductible and coinsurance and amounts for which the beneficiary would be liable if Medicare were the only payer. The notice to the beneficiary must also state that the provider or supplier has been notified of this obligation to make refund. The notice must inform the beneficiary that Medicare will pay its pro rata share of procurement costs and must advise the beneficiary of the procedures to follow to claim Medicare's share of the procurement costs.

The notice must advise the beneficiary of his or her right to appeal Medicare's decision that Medicare is secondary payer to liability insurance and also must advise the beneficiary that he or she may also ask for waiver of the repayment that the provider or supplier has made on his or her behalf, regardless of whether he or she chooses to appeal the Medicare decision. The notice must advise the beneficiary that, if the appeal is won or if waiver is granted, the contractor will refund to the beneficiary all or some of the payment made by the provider or supplier on the beneficiary's behalf from the proceeds of the liability insurance settlement. The notice must indicate that the amount of refund, if any, will depend upon the circumstances of the case and the contractor's findings.

Medicare contractors should advise providers and suppliers of this information when feasible, given the current funding constraints. Regional Office staff's questions on these issues should be directed to Anita Heygster on (410) 786-4486.

/s/

Thomas E. Hoyer

Director

Office of Chronic Care and Insurance Policy, BPD

Attachment (*The attachment to this document is the August 21, 1995 Memorandum to All Associate Regional Administrators on "Provider and Supplier Billing When Medicare Is Secondary Payor to Liability Insurance -- INFORMATION." This memorandum, with attachment, is posted separately on CMS' web-site.*)

