LILLESAND MEMO TO ELDER, DISABILITY AND PERSONAL INJURY LAW ATTORNEYS:

Emma Hemness alerted us to the following informational bulletin from CMS describing Medicaid changes passed by Congress and signed by the President as part of the bipartisan budget deal. Two important provisions that affect our practice:

1) a temporary reprieve for the termination of the QI program which paid Medicare Part B premiums for low income people, and

2) the big one, Section 202(b), is the reversal of the U.S. Supreme Court's *Ahlborn* and *Wos* decisions which had significantly reduced Medicaid liens on PI settlements to a fraction of their full amount. It appears that by this bipartisan agreement, Congress seeks to recover every dollar Medicaid spends from poor, unfortunate victims of medical malpractice or personal injury awards. As if we needed one, this significantly encourages us to avoid Medicaid health insurance upfront for our clients and get them real private health insurance before the accident/illness so that they are not left subject to dollar-for-dollar Medicaid liens against the PI settlement as well as pay-on-death total liens from Special Needs Trusts and estate recovery liens – three bites of the apple as it were. There is no repayment to private health insurance companies on termination of a trust or on death, and they negotiate TP liens. Fortunately, Section 202(b) does not take effect for nine months (10-1-14).

The CMS Bulletin, a copy of the Medicaid lien statute, and incorporation of the amendment in the statute follow, along with a very brief explanation of the QI program issue.

David Lillesand
David@LillesandLaw.com

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard,
Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

CMCS Informational Bulletin

DATE: December 27, 2013

FROM: Cindy Mann
Director

SUBJECT: Medicaid Provisions in Recently Passed Federal Budget Legislation

This informational bulletin describes Medicaid provisions in the budget agreement, HJ.Res.59, recently passed by Congress and signed by the President on December 26th. There are several Medicaid provisions included in this agreement.

Section 202 – Medicaid Third-Party Liability

The legislation makes three changes to Medicaid third-party liability law to affirm Medicaid's position as payer of last resort. All three changes would be effective on October 1, 2014.

First, it amends section 1902(a)(25)(E) to allow a state to delay payment for prenatal and preventive pediatric care for 90 days after the date the provider initially submitted a claim to the third party payer, if the state determines doing so is cost-effective and will not adversely affect access to care.

Second, it amends section 1902(a)(25)(F) to allow a state to delay payment for 90 days for services where child support enforcement is being carried out; however, the state could continue to make payment within 30 days, if it found that to be cost-effective and necessary to ensure access to care. These amendments modified mandatory exceptions to the requirement that State Medicaid agencies reject medical claims when another entity is legally liable to pay the claim. A state should reduce expenditures, to the extent that providers are fully compensated by insurance carriers, and should also reduce administrative burden, by having fewer claims to initiate against health insurance carriers.

Third, the legislation makes changes to sections 1902(a)(25), 1912 and 1917. The changes give states the ability to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses, and it establishes an option for states to place liens against Medicaid beneficiaries' liability settlements.

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[From the Act as passed]

THE AMENDMENT:

(1) STATE PLAN REQUIREMENTS.—Section 2 1902(a)(25) of the Social Security Act (42 U.S.C. 3 1396a(a)(25)) is amended—

(A) in subparagraph (B), by striking ''to the extent of such legal liability''; and

(B) in subparagraph (H), by striking ''payment by any other party for such health care items or services'' and inserting ''any payments by such third party''.

(2) ASSIGNMENT OF RIGHTS OF PAYMENT.—Section 1912(a)(1)(A) of such Act (42 U.S.C. 1396k(a)(1)(A)) is amended by striking ''payment for medical care from any third party'' and inserting ''any payment from a third party that has a legal liability to pay for care and services available under the plan''.

(3) LIENS.—Section 1917(a)(1)(A) of such Act (42 U.S.C. 1396p(a)(1)(A)) is amended to read as follows:

''(A) pursuant to—

''(i) the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

''(ii) rights acquired by or assigned to the State in accordance with section 1902(a)(25)(H) or section 1912(a)(1)(A), or''.

[David: I have incorporated the amendment into the statute. The subsections that are changed, or new provisions added are highlighted in yellow, and the specific provisions that are deleted are ~~strikethroughs~~ and new language added shown as underlines. The non-highlighted subsections are provided for context.]

THE AMENDMENT APPLIED TO THE STATUTE:

42 USC § 1396A - STATE PLANS FOR MEDICAL ASSISTANCE

(a) Contents

A State plan for medical assistance must—

(25) provide—

(A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, self-insured plans, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1167 (1)]), service benefit plans, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service) to pay for care and services available under the plan, including—

> **(i)** the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and
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> **(ii)** the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall be integrated with, and be monitored as a part of the Secretary's review of, the State's mechanized claims processing and information retrieval systems required under section 1396b (r) of this title;

(B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance ~~to the extent of such legal liability~~;

(C) that in the case of an individual who is entitled to medical assistance under the State plan with respect to a service for which a third party is liable for payment, the person furnishing the service may not seek to collect from the individual (or any financially responsible relative or representative of that individual) payment of an amount for that service

> **(i)** if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1396o of this title), or

(ii) in an amount which exceeds the lesser of

(I) the amount which may be collected under section 1396o of this title, or

(II) the amount by which the amount payable for that service under the plan (disregarding section 1396o of this title) exceeds the total of the amount of the liabilities of third parties for that service;

(D) that a person who furnishes services and is participating under the plan may not refuse to furnish services to an individual (who is entitled to have payment made under the plan for the services the person furnishes) because of a third party's potential liability for payment for the service;

(E) that in the case of prenatal or preventive pediatric care (including early and periodic screening and diagnosis services under section 1396d (a)(4)(B) of this title) covered under the State plan, the State shall—

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to the liability of a third party for payment for such services; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(F) that in the case of any services covered under such plan which are provided to an individual on whose behalf child support enforcement is being carried out by the State agency under part D of subchapter IV of this chapter, the State shall—

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to any third-party liability for payment for such services, if such third-party liability is derived (through insurance or otherwise) from the parent whose obligation to pay support is being enforced by such agency, if payment has not been made by such third party within 30 days after such services are furnished; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(G) that the State prohibits any health insurer (including a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1167 (1)], a self-insured plan, a service benefit plan, a managed care organization, a pharmacy benefit manager, or other party that is, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service), in enrolling an individual or in making any payments for benefits to the individual or on the individual's behalf, from taking into account that the individual is eligible for or is provided medical assistance under a plan under this subchapter for such State, or any other State;

(H) that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to ~~payment by any other party for such health care items or services~~ any payments by such third party;

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42 USC § 1396K - ASSIGNMENT, ENFORCEMENT, AND COLLECTION OF RIGHTS OF PAYMENTS FOR MEDICAL

CARE; ESTABLISHMENT OF PROCEDURES PURSUANT TO STATE PLAN; AMOUNTS RETAINED BY STATE

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall—

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to ~~payment for medical care from any third party~~ any payment from a third party that has a legal liability to pay for care and services available under the plan;

42 USC § 1396P - LIENS, ADJUSTMENTS AND RECOVERIES, AND TRANSFERS OF ASSETS

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—

~~**(A)** pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or~~

(A) pursuant to

(i) the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(ii) rights acquired by or assigned to the State in accordance with section 1902(a)(25)(H) or section 1912(a)(1)(A), or

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For the Elder Law Attorneys, note temporary extension of QI Program:

Section 1201 – Temporary Extension of the Qualifying Individual (QI) Program

The legislation extends the QI program through March 31, 2014 and allocates $200 million for that period. The QI program helps pay Medicare Part B premiums for certain low-income beneficiaries. Congress will need to act again before March 31st to ensure funding is in place for the remainder of the year.

The full text of the legislation can be found here: http://beta.congress.gov/113/bills/hjres59eah3/BILLS-113hjres59eah3.pdf Go to page 31 for the lien section.