

# Keeping Up With Medicare ...

## *How CMS' New Policies Are Impacting Everyday Claims Practice*

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# Today's Objectives

- Practical Medicare/MSA level set
- Keeping up with CMS' moving targets
- Making it Work Better – Strategies and Approaches
- Questions/Answers

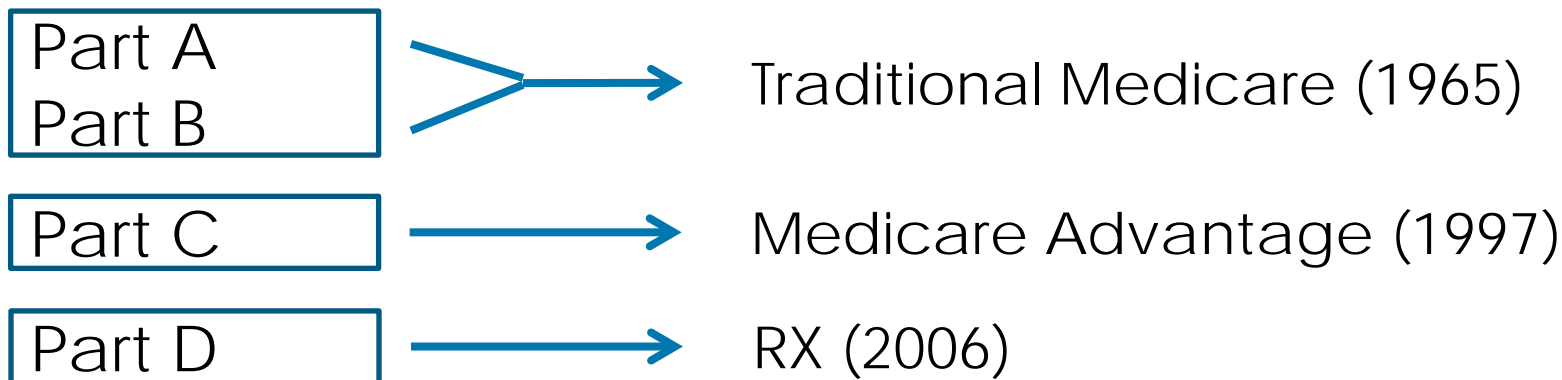
# Part I: Medicare Warm Up



# Medicare Level Set

- Federal health insurance program
- Provides medical benefits for certain people:
  - 65 years old or older
  - People who are awarded SSD
  - People who have ESRD or ALS

- Medicare has 4 parts:



- Medicare vs. Medicaid (Medi-Cal in California)



# Thinking "Inside" The Cubes

**Section 111**



Electronic Reporting of claims

**Conditional Payments**



Reimbursing Medicare for past payments of medical bills

**Future Interests**



Medicare Set Aside

**Medicare Advantage Plans**



What is the nature/extent of MAP lien rights?

Part II:  
Section 111 Reporting –  
Update



# Section 111 Update

- **Penalties**
  - Still waiting for CMS to issue its formal Section 111 penalties proposals
    - CMS released an ANPRM in December 2013, but no word since then.
- **Recent “TPOC” threshold change**
  - Starting 1/1/17, TPOC amounts greater than \$750 must be reported (all lines)

# Part III: Conditional Payments





# Medicare's Recovery Rights

- **What triggers Medicare's rights?**
  - When primary payer “demonstrates responsibility”
- **Who can Medicare pursue?**
  - Party who “makes” and/or “receives” primary payment
- **When can Medicare demand reimbursement?**
  - Settlement and/or PRIOR to settlement when ORM
- **How much?**
  - Lesser of primary payment and conditional payment amount (less procurement costs)
  - Special recourses:
    - Double damages (private cause of action)
    - Dep't of Treasury Action
    - Third party private cause of action



# New CRC Process – Status & Impact

## What is this change all about?

- CMS now uses two contractors to pursue recovery:
  - **BCRC**: when they are pursuing the claimant (and in some cases the primary payer on recovery actions started pre 10/5/15).
  - **CRC**: when they are pursuing the primary payer

## What does this mean for every day claims?

- CMS is now starting to pursue reimbursement against the primary payer **PRIOR** to settlement **in ORM situations**.
  - Significance?
  - Current Status?
  - How could this impact WC cases?



# CRC Practice Pointers

## 1. Understand the new landscape:

- CMS (through CRC) may now seek recovery of conditional payments PRIOR to settlement where claims payer has ORM.
- It does not matter if the case is not ready to settle, will never settle, or cannot settle ----- all that matters is ORM.

## 2. Be Vigilant!

- All CPN and other notices from CMS, CRC, etc. must be reviewed immediately to determine if action is needed (i.e. the notice says you must respond/object within 30 days)
- If you miss the stated deadline, the CPN will convert to a demand.

## 3. Take Action! -

- If you receive a CPN – address it immediately!! Time is of the essence!



# Appealing CP Claims ...

## New “Applicable Plans” Appeal Process

### – What?

- Claims payers can now file formal legal appeals to challenge Medicare conditional payment claims

### – When?

- Claim payer is named as the debtor in CMS’ demand and the letter is dated 4/28/15 or later.

### – How?

- Five (5) level administrative appeals process (includes federal court review)

### – Consideration Points



# Court Rules Against Medicare

## The CIGA cases:

- *CIGA v. Burwell* (C.D. Calif. Jan. 5, 2017)
- *CIGA v. Price* (C.D. Calif. May 3, 2017)

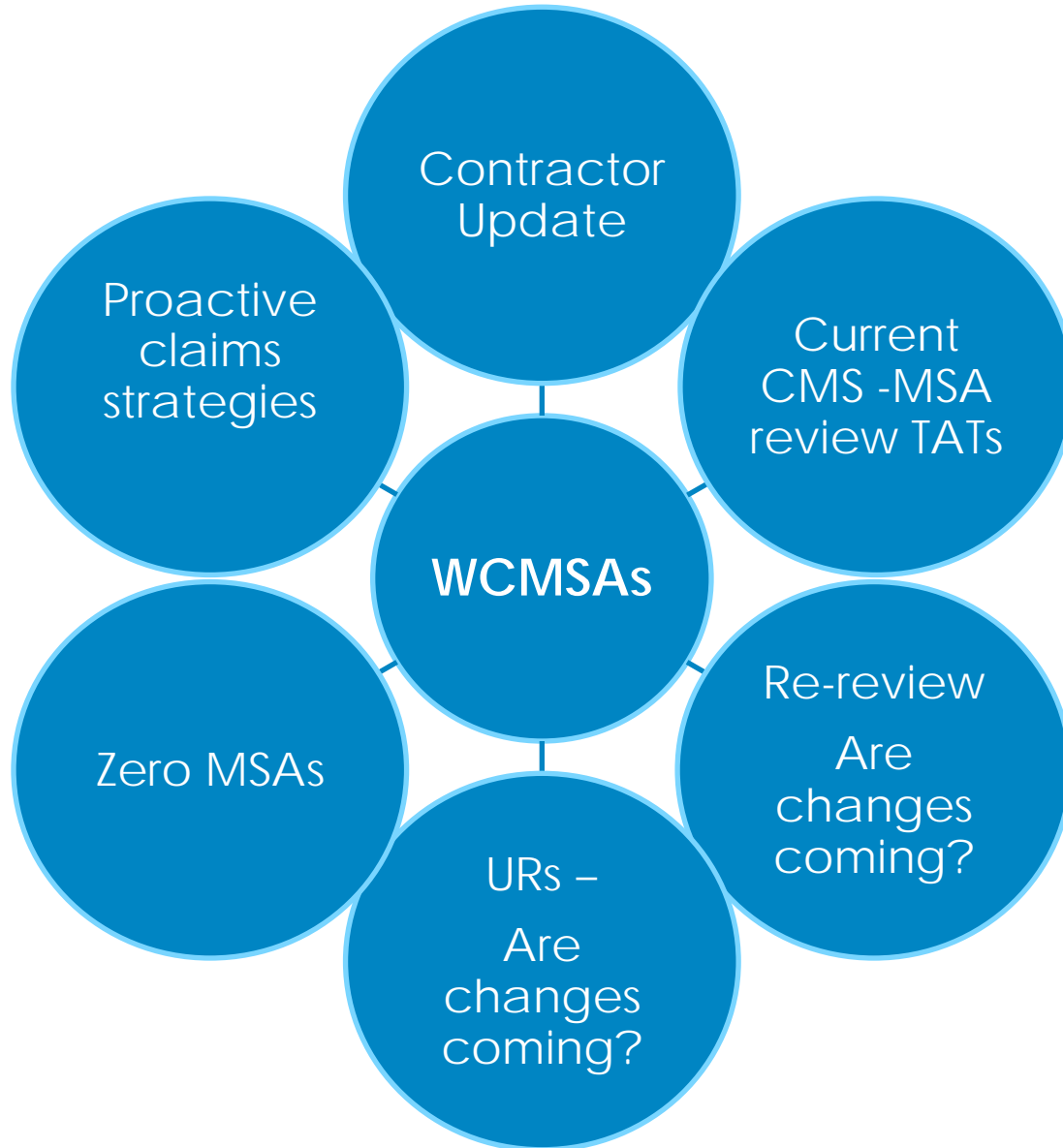
## Ruling:

- Court declares a particular CMS conditional payment recovery billing practice unlawful.
- Court rules as follows:
  - Sets aside the disputed claims at issue
  - Issues a prospective “declaratory order” finding CMS’ practice unlawful.
  - But, does not issue a permanent injunction
    - Trial set for September on this issue

# Part IV: WCMSA Updates



# WCMSA – Focus Issues



# Part V Liability MSAs





# CMS LMSA Releases & Statements

Town Hall statements

Regional Office statements (i.e.) Dallas

**2011** | LMSA “memo”

**2012** | Advanced Notice of Proposed Rulemaking (ANPRM)

**2013** | Notice of Proposed Rulemaking (NPRM)

**2014** | CMS withdraws NPRM (we are back to square one)

**June 2016** | Industry Update – CMS ready to “revisit” LMSAs

**Dec 2016** | WCRC bid

**2017** | Change Request 9893



## When the Dust Settles ... (As of May 2017)

What we know ...	What do <u>not</u> know ...
<ul style="list-style-type: none"><li>• CMS apparently interested in “revisiting” MSAs for liability and other non-group health claims</li><li>• We see some “behind the scenes” preparation for possible expansion of MSAs to liability and no-fault claims<ul style="list-style-type: none"><li>• WCRC bid</li><li>• CR 9893</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Exactly “what” CMS may be contemplating from a substantive, policy standpoint</li><li>• Exactly “how” CMS plans to develop whatever planned expansion is contemplated</li><li>• Exactly “when” any planned expansion will be implemented – “go live” date</li></ul>

# Part VI

## Medicare Advantage Plans (MAPs)



# MAPs – Issues & Questions

- **MAP Background**

- Number of MAP beneficiaries increasing
- Roughly 30% of Medicare beneficiaries are enrolled in a MAP

- **Key Questions:**

- What is the nature/extent of MAP recovery rights?
- **Do MAPs have private cause of action (PCA) rights under the Medicare Secondary Payer (MSP) statute to sue parties in federal court for “double damages?”**
  - This question goes before the court in 2012 in a case called *In re Avandia ...*
  - How did the court rule? Where are we now?



# MAP Game Changer

*In re Avandia*, 685 F.3d 353 (3<sup>rd</sup> Cir. 2012)

- 3<sup>rd</sup> Circuit is ..... DE, NJ, PA and US-VI.
- Humana argues that the PCA statute under the MSP is applicable to MAPs.
  - **Third Circuit agrees – rules MAPs have PCA right under the MSP! They can sue parties for double damages!**
  - Court rules that the “plain text” of the MSP’s PCA provision affords these rights.
- What has happened since then?



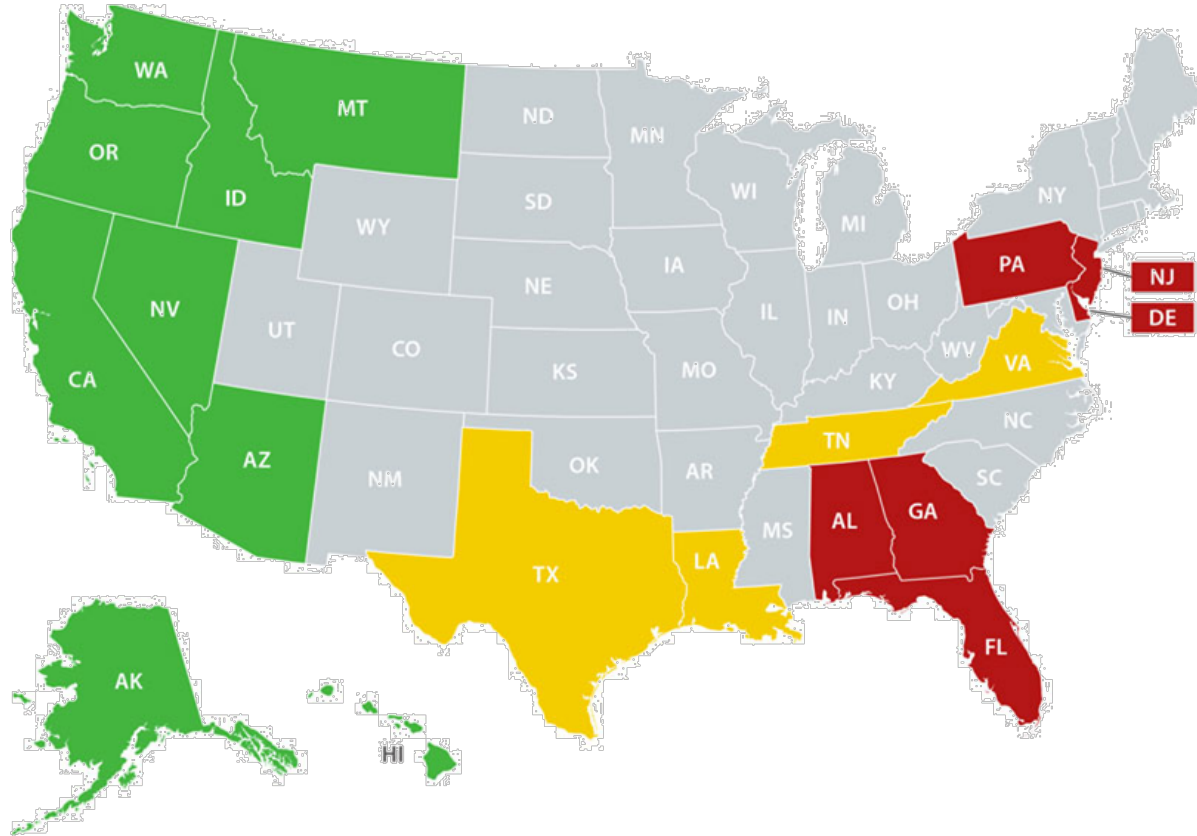
# The Game Changer...

## Post Avandia ...

- We have seen federal courts in other jurisdictions basically follow the Avandia ruling and rationale ...
  - *In re Avandia*, 685 F.3d 353 (3<sup>rd</sup> Cir. 2012)
  - *Humana v. Farmers*, 2014 WL 7239426 (W.D. Tx Sept. 24, 2014)
  - *Collins v. Wellcare*, 2014 WL 7239426 (E.D. La Dec. 14, 2014)
  - *Humana v. Paris Blank*, 2016 WL 2745297 (E.D. Va., May 10, 2016)
  - *Humana v. Western Heritage*, 2016 WL 4169120 (11<sup>th</sup> Cir. August 8, 2016)



# Where Does This Leave Us?



Local courts have not favored Medicare Advantage plans seeking to request payments from primary insurers.

Local courts have offered some protection for Medicare Advantage plans seeking to request payments from primary insurers.

States have definitively sided with Medicare Advantage plans when they seek to collect payments from primary insurers.



# Practical Considerations

1. Growing MAP enrollment.
2. No centralized way to determine what “type” of Medicare a claimant has (had).
3. Claimants can switch programs and plans.
4. Pay attention to the jurisdiction!!!!!!
5. Best practices!! How should you handle??





# Questions?



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