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# HCFA Rulings

Department of Health  
and Human Services

Health Care Financing  
Administration

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Ruling No. 87-4

Date: June 1987

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**HCFA Rulings** are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous statutory or regulatory provisions relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, and related matters.

**HCFA Rulings** are binding on all HCFA components, the Provider Reimbursement Review Board and Administrative Law Judges who hear Medicare appeals. These decisions promote consistency in interpretation of policy and adjudication of disputes.

This ruling reverses in part HCFAR 79-4 regarding Medicare payment for services with respect to which payment has been or could reasonably be expected to be made under the Federal Tort Claims Act.

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HCFAR 87-4-1

MEDICARE PROGRAM

Hospital and Supplementary Medical Insurance Benefits (Part A and B)

**Payments Under Medicare and Awards Under the Federal Tort Claims Act**

HCFAR 87-4

**Purpose:** This Ruling modifies HCFA policy regarding Medicare payment for services with respect to which payment has been or could reasonably be expected to be made under the Federal Tort Claims Act.

This Ruling rescinds HCFAR 79-4 in part. For reader comprehension HCFAR 79-4 is included as an appendix.

**Citations:** Sections 1862(a)(3) and 1862(b)(1) of the Social Security Act (42 U.S.C. 1395y(a)(3) and 1395y(b)(1)); 42 CFR 401.108; 42 CFR 405.312, 405.322 and 405.324; 52 FR 26088; 52 FR 35145.

**Pertinent History:** A beneficiary entitled to hospital insurance benefits under Part A of title XVIII of the Social Security Act (the Act) was admitted to a hospital for the treatment of injuries received as the result of the negligence of a driver of a U.S. mail truck. The hospital and medical services were covered under Part A, and HCFA therefore reimbursed the hospital under title XVIII of the Act. Afterwards, the U.S.

Postal Service approved an award for damages suffered by the beneficiary under the terms of the Federal Tort Claims Act (FTCA). This award included an amount to reimburse the beneficiary for hospital and medical expenses.

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#### HCFAR 87-4-2

The question raised by this case is whether the payments awarded under the FTCA represent payment by a governmental entity and are of the type excluded under section 1862(a)(3) of the Act or whether they represent payment under a liability insurance policy or plan (including a self-insured plan) and are of the type excluded under section 1862(b)(1). (Generally, those sections mandate that no Medicare payment may be made for supplies or services that are paid for by a governmental entity or under a liability insurance policy or plan.) We originally addressed the issue of FTCA payments in 1969 as a Social Security Ruling (SSR 69-8). It was later published as a HCFA Ruling, HCFAR 79-4.

Where payment has been made to an individual under the FTCA for expenses incurred for medical and hospital services that are also covered under title XVIII of the Act, HCFAR 79-4 states that the services are not considered to have been "paid for directly or indirectly by a governmental entity" for purposes of the exclusion in section 1862(a)(3) of the Act. (Services for which payment is excluded under section 1862(a)(3) of the Act include services furnished to prisoners and to veterans for whom a State furnishes free care in a State-run home.) That portion of HCFAR 79-4 is affirmed, as there has been no subsequent change in the statute or regulations that would prompt a different conclusion. The implementing regulations of section 1862(a)(3) of the Act appear at 42 CFR 405.312.

The second part of HCFAR 79-4 states that the Act does not preclude payment under both the Medicare program and the FTCA. HCFA Ruling HCFAR 79-4 contains the following statement: "... there is nothing inconsistent with simultaneous reimbursement under the program and from other sources (with the sole exception of the priority of workmen's compensation payments), since title

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#### HCFAR 87-4-3

XVIII is in the nature of social insurance." Consequently, the position taken in HCFAR 79-4 was that tort liability payments under the FTCA were to satisfy the injured party's claim for losses, and that, even though part of a payment might be to cover medical expenses that Medicare had paid or would pay, the injured party (Medicare beneficiary) could keep the entire FTCA payment. We are revising this portion of HCFAR 79-4 because such duplicate payments are inconsistent with the purpose of section 1862(b)(1) as amended since publication of HCFAR 79-4.

Because of HCFA's past policy that Medicare would pay for services without regard to FTCA payments, Medicare's payment has not been disputed. However, courts have considered whether FTCA payments should be paid without regard to the amount of any Medicare payments, applying a tort law equitable doctrine applicable in some states, called the "collateral source rule". The rule permits an injured party to recover medical expenses from a tortfeasor, despite reimbursement

of those expenses to the injured party, if the reimbursement is from a "collateral source" and not from a tortfeasor. Generally, Medicare payments have been considered a collateral source and not been applied to reduce FTCA payments. See e.g. *Berg v. United States*, 806 F.2d 978, 984-86 (10th Cir. 1986). Our changed policy, required by the legislative changes discussed below, will mean that Medicare payment will not be made, or if made, will be a conditional payment subject to recovery out of any FTCA award. See e.g., *Buckner v. Heckler*, 804 F.2d 258, 259 (4th Cir. 1986). Thus, cases such as *Berg v. United States*, supra, will no longer occur.

In recent years, Congress has amended Title XVIII of the Act to preclude payment by Medicare when certain other types of insurance, including tort liability

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HCFAR 87-4-4

insurance, should be paying for the services. Title XVIII now recognizes a priority of other insurance coverage, including tort liability insurance, by providing in section 1862(b)(1) that:

Payment under this title may not be made with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made promptly (as determined in accordance with regulations), with respect to such item or service, under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance. Any payment under this title ... shall be conditioned on reimbursement to the appropriate Trust Fund ... when notice or other information is received that payment ... has been or could be made under such a law, policy, plan, or insurance. In order to recover payment made under this title ... the United States may bring an action against any entity which would be responsible for payment ... or against any entity (including any physician or provider) which has been paid ... under such law, policy, plan, or insurance, and may join or intervene in any action related to the events that gave rise to the need for such item or service. The United States shall be subrogated ... to any right of an individual or any other entity to payment ... under such a law, policy, plan, or insurance.

Under the regulations implementing the amended statute (42 CFR 405.322), payments under the FTCA are not explicitly mentioned as a form of tort liability insurance.<sup>1</sup> However, they are clearly the type of duplicate payments that Congress wants to end. Reimbursement under both the Medicare program and the FTCA is inconsistent with that purpose.

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<sup>1</sup> On July 17, 1985, HCFA published a notice in the Federal Register (50 Fed. Reg.28988) regarding HCFA's interpretation of certain changes made by the Deficit Reduction Act of 1984 (Pub. L. 98-369). The notice stated that those changes were self-implementing and notified the public that conflicting regulations would no longer apply pending clarification and revision to conform to the statutory changes. As applied until now to payments under the FTCA, 42 CFR 405.322 is not consistent with the provision of the law which limits Medicare payment when payment is also made under liability insurance. HCFA will modify the regulation to eliminate that inconsistency.

Furthermore, under current Medicare rules, amounts payable because of a tort liability by self-insured entities such as State and local governments, are taken into account before Medicare may make any payment for medical expenses stemming from the tort, except when the amounts are payable under the FTCA. Thus, in situations that are identical except for the fact that the tortfeasor in one instance is the Federal government and in the other is not, Medicare is the first payer in one (in the case involving the Federal government) but is second payer in the other (in the case involving any entity except the Federal government). Such a result is clearly at odds with the provision of amended section 1862(b)(1) of the Act limiting payment for expenses payable by liability insurance. Moreover, Congress has not expressed any intention to make an exception to §1862(b)(1) for FTCA payments.

This ruling also reverses the holding in HCFAR 79-4 that title XVIII provides neither subrogation rights nor any other right of reimbursement from third-party tortfeasors. Such rights were established by the amendments made to section 1862(b)(1) in 1980 by Pub. L. 96-499, and expressly clarified in 1984 by Pub. L. 98-369.

**Ruling:** It is held that reimbursement under the Medicare program when payment has been made or could reasonably be expected to be made promptly under the Federal Tort Claims Act is precluded to the extent of such payment by section 1862(b)(1) of the Social Security Act, which prohibits payment under Medicare for services for which payment has been made or can reasonably be expected to be made promptly under a liability insurance policy or plan (including a self-insured plan). It is further held that if Medicare has already made a payment for services

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HCFAR 87-4-6

for which liability exists under the Federal Tort Claims Act, Medicare may recover its payments directly from the Federal entity responsible for such payments, or from anyone who has been paid by the responsible entity with respect to such services. This Ruling supersedes HCFAR 79-4 except for its conclusion that payments under the FTCA do not constitute payments by a "governmental entity" for purposes of the exclusion in 1862(a)(3) of the Act.

**APPENDIX:** HCFAR 79-4

**EFFECTIVE DATE:** June 18, 1987

SECTION 1803, 1862(a)(3) and 1862(b).--COVERED HOSPITAL SERVICES--  
SIMULTANEOUS REIMBURSEMENT UNDER TITLE XVIII OF SOCIAL SECURITY ACT  
AND AS PART OF AWARD UNDER FEDERAL TORT CLAIMS ACT

HCFAR-79-4

Where an award under the Federal Tort Claims Act for damages suffered by a Part A beneficiary included amounts to reimburse him for hospital and medical expenses also covered under title XVIII of the Social Security Act, held, (1) payments under the Federal Tort Claims Act do not constitute payments by a "governmental entity" for purposes of the exclusion in section 1862(a)(3) of the Social Security Act; (2) the Health Care Financing Administration is given no right to recover such amounts (i.e., the right of subrogation) or any other form of reimbursement from third-party tortfeasors by title XVIII of the Act; and (3) the beneficiary is permitted reimbursement under both title XVIII and the Federal Tort Claims Act, since there is nothing inconsistent with simultaneous reimbursement under the program and from other sources (with the sole exception of the priority of workmen's compensation payments), since title XVIII is in the nature of social insurance.

A beneficiary entitled to hospital insurance benefits under Part A of title XVIII of the Social Security Act was admitted to a hospital for the treatment of injuries received as the result of the negligence of a driver of a U.S. mail truck. The hospital and medical services were found covered under Part A, and reimbursement therefore was made to the provider-hospital pursuant to the provisions of title XVIII of the Social Security Act. Thereafter, an award for damages suffered by the beneficiary was approved by the Post Office Department under the terms of the Federal Tort Claims Act. This award included an amount to reimburse the beneficiary for hospital and medical expenses. However, the Post Office Department is withholding a portion of the award from the beneficiary, equal to the amount paid the hospital under title XVIII, pending advice as to its disposition.

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Two questions are raised by the instant case: (1) whether the health care payments awarded under the Federal Tort Claims Act represent payment by a government entity and are therefore excluded from coverage under section 1862(a)(3) of the Social Security Act; and (2) whether title XVIII of the Social Security Act gives the health insurance program the right to recover from the third-party tortfeasor (Post Office Department) that portion of the tort claim award intended to reimburse the beneficiary for hospital and medical expenses incurred.

Where payment has been made to an individual under the Federal Tort Claims Act for expenses incurred for medical and hospital services which are also covered under title XVIII of the Social Security Act, such services are not considered to have been "paid for directly or indirectly by a governmental entity" for purposes of the

exclusion in section 1862(a)(3) of the Social Security Act. Rather, such payments constitute payment of damages by a third-party tortfeasor for which reimbursement may also be made under title XVIII.

The right of the United States to recover from third-part tortfeasors financial expenditures made by it pursuant to legal requirement in connection with the medical care of an injured individual must devolve from an act of Congress. (United States V. Standard Oil, 67 S. Ct. 1604 (1947)). As a consequence of the opinion of the Supreme Court in the Standard Oil case, there was enacted the Federal Medical Care Recovery Act, 42 U.S.C. 2651 et seq., which establishes a right in the United States to seek recovery from third-person tortfeasors for the reasonable value of medical services furnished directly by the Federal Government to an individual who suffered injury as a result of the action of such third persons. However, there are

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no provisions in title XVIII of the Social Security Act establishing subrogation rights in the Secretary of Health, Education, and Welfare or otherwise authorizing him to accept reimbursement out of awards under the Federal Tort Claims Act for health insurance payments he made for services covered under Medicare.

In this regard, it may also be noted that only in respect to workmen's compensation does title XVIII of the Social Security Act recognize a priority of other insurance coverage by providing in section 1862(b) that:

Payment \* \* \* may not be made with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made \* \* \* with respect to such item or service, under a workmen's compensation law or plan of the United States or a State. Any payment under this title with respect to any item or service shall be conditioned on reimbursement to the appropriate Trust Fund established by this title when \* \* \* payment for such item or service has been made under such a law or plan.

Furthermore, the nature of title XVIII reimbursement as social insurance--in contrast to those "government payments" specified by the Federal Medical Care Recovery Act--is emphasized by the provision of section 1803 of the Social Security Act that:

Nothing contained in this title shall be construed to preclude any State from providing or any individual from purchasing or otherwise securing, protection against the cost of any health services.

Thus, it is specifically recognized that there is nothing inconsistent with simultaneous reimbursement to the beneficiary from sources other than title XVIII -- with the sole exception of the above-quoted provision excluding title XVIII payment in the event of workmen's compensation coverage.

Accordingly, it is held that payments under the Federal Tort Claims Act do not constitute payments by a "governmental entity" for purposes of the exclusion in section 1862(a)(3) of the Social Security Act; title XVIII of the Social Security Act provides no right of subrogation or any other form of reimbursement from third-party tortfeasors; and, with the sole exception of the priority of workmen's compensation payments, there is nothing inconsistent with simultaneous reimbursement under the Medicare program and from other sources since title XVIII is in the nature of social insurance.

(X-refer to SSR 69-8)