

# Avoiding Legal Landmines While Navigating The DME Cash-Pay Landscape

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# Introduction

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- ▶ Historically, DME suppliers have taken assignment and billed Medicare.
- ▶ Because of reimbursement cuts, competitive bidding, and other factors, many suppliers are finding the assignment model to be unsustainable.
- ▶ As a result, an increasing number of suppliers are gravitating to selling items for cash.
- ▶ It is acceptable for suppliers to sell items for cash.....so long as legal guidelines are met.

# Poll Question

- ▶ What percent of your business is cash pay?
  - A. 0-24%
  - B. 25-49%
  - C. 50-74%
  - D. 75-99%
  - E. 100% (Cash only)

# Presentation Outline

- ▶ Products that may or may not be covered and their cash-pay eligibility
- ▶ Federal laws and regulations that may impact cash-pay transactions
- ▶ Terms and conditions in health insurer-supplier contracts that may impact cash-pay transactions
- ▶ Legal business entity structures to consider
- ▶ When an ABN or waiver should be used
- ▶ Establishing pricing policies
- ▶ The importance of finding an experienced advisor to help you navigate this landscape

# Never Covered By Medicare

- ▶ Medicare places no restrictions on the sale, for cash, of items never covered by Medicare.
- ▶ This is true regardless of whether or not the selling supplier has a Medicare PTAN.

# Not Covered By Commercial Insurance Plan

- ▶ Assume that a customer, covered by a commercial insurance plan, desires to pay cash for an item not covered by the plan.
- ▶ If the supplier is a contracted provider/supplier with the plan, then the supplier will need to examine its contract with the plan to determine if the supplier has restrictions on its ability to sell the non-covered item for cash. It is unlikely that the plan will place restrictions on the sale of non-covered items.
- ▶ If the supplier is not a contracted provider/supplier with the plan, then the supplier will not be prohibited from selling the non-covered item for cash.

# Covered Item



# No Coverage for Duplicate Item

- ▶ Medicare and most commercial insurance plans will deny coverage for a duplicate or “same or similar” item on the basis that the second item is not considered medically necessary

# Covered by Medicare/Non-Part B Supplier

- ▶ Assume that a supplier does not have a Medicare PTAN.
- ▶ If the supplier fails to obtain a signed ABN for items sold to a Medicare beneficiary that notifies the purchaser that (i) the supplier is not a Medicare supplier and (ii) Medicare will not pay for the item, then the supplier can be required to refund the purchase price to the beneficiary, unless the supplier can demonstrate that the purchaser was otherwise provided adequate notice such as signs posted in a prominent location with that language.

# Suppliers without a PTAN

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- ▶ A PTAN number identifies a supplier in the Medicare claims processing system
- ▶ Suppliers that do not have a PTAN are not contracted to service Medicare patients, therefore Medicare will not make payment
- ▶ Suppliers must have patients sign an ABN or post a public notice informing patients they are not a contracted Medicare supplier and Medicare will not pay for items purchased from that supplier
- ▶ If the patient wants to receive an item from the supplier, he/she may pay out of pocket
- ▶ The supplier should have the patient sign an ABN informing them that Medicare will not pay for items to transfer the financial liability to the patient

**Example of disclaimer for the ABN's (E) "Reasons Medicare May Not Pay" box:**

**"Medicare will pay for items furnished to you by a supplier of medical equipment and supplies only if the supplier has a Medicare supplier number. Payment for such items furnished to you by a supplier which does not have a supplier number is prohibited under the Medicare law. We do not have a Medicare supplier number, therefore, Medicare will not pay for any medical equipment and supplies which we furnish to you."**

# Medicare Covered Product, Part B Supplier, & Bene in CBA

- ▶ Assume that a supplier has a Medicare PTAN.
- ▶ If the supplier is a competitive bid (“CB”) contract supplier, and if the Medicare beneficiary resides in a CBA covered by the supplier’s CB contract, and if the item the beneficiary wants is covered by the supplier’s CB contract, then the supplier must take assignment (i.e., the supplier cannot sell the item to the beneficiary for cash).
- ▶ If the supplier is not a CB contract supplier, and if the Medicare beneficiary resides in a CBA, and if the item the beneficiary wants is covered by CB, then the supplier can sell the item to the beneficiary for cash if the beneficiary signs an ABN acknowledging that Medicare will not pay for the item since it is being provided by a supplier without a competitive bid contract.

# Medicare Covered Product, Part B Supplier, & Bene outside CBA

- ▶ Assume that a supplier has a Medicare PTAN, and assume that the customer desires to pay cash for an item covered by Medicare, but that is not covered by CB.
- ▶ If the supplier is a Medicare “participating” supplier, then the supplier is required to take assignment.
- ▶ For the remainder of the slides, assume that (i) the supplier is a “non-participating” Medicare supplier and (ii) the item the customer desires to purchase is not a CB item. If a supplier is non-participating, then on a Medicare claim-by-claim basis, the supplier can decide whether to (i) take assignment or (ii) require the beneficiary to pay cash.

# Covered by Medicare/Part B Supplier

- ▶ The supplier can sell a Medicare “purchase item” to the beneficiary for cash. The supplier can charge the beneficiary more than the Medicare allowable.
- ▶ The supplier can charge the beneficiary less than the Medicare allowable. In so doing, the cash price should not be less than 17% off the Medicare allowable unless the supplier can document that its cost savings (in not having to bill Medicare) justify a discount off the Medicare allowable that is greater than 17%.
- ▶ If the supplier sells a Medicare “purchase item” to the beneficiary for cash, then the supplier must submit a non-assigned claim to Medicare and Medicare will reimburse the beneficiary 80% of the Medicare allowable for covered items.

# Covered by Medicare/Part B Supplier

- ▶ If the supplier rents a Medicare “capped rental item” to the beneficiary for monthly cash payments, then the supplier can charge the beneficiary **more** than the Medicare allowable.
- ▶ The supplier can charge the beneficiary **less** than the Medicare allowable. In so doing, the monthly rental payment should not be less than 17% off the Medicare allowable unless the supplier can document that its cost savings (in not having to bill Medicare) justify a discount off the Medicare allowable that is greater than 17%.
- ▶ If the supplier rents a Medicare “capped rental item” to the beneficiary for monthly cash payments, then the supplier must submit monthly non-assigned claims to Medicare and Medicare will reimburse the beneficiary 80% of the Medicare allowable for covered items. The supplier must also have the beneficiary sign a claim authorization for each month’s rental.
- ▶ If the supplier sells a Medicare “capped rental item” to the beneficiary for a one time lump-sum cash payment, then Medicare will not reimburse the beneficiary for any portion of the purchase price, as Medicare requires the payment category to be followed.

# Suppliers with a PTAN and item is medically necessary

- If an item is medically necessary, only suppliers without a competitive bidding contract supplying a competitive bid item to a patient residing or traveling to a competitive bidding area may contemplate a cash sale to a patient with an ABN, among other options.

Does Supplier have Competitive Bidding ("CB") Contract?	Are both Product and Patient subject to CB?	Participating Supplier Options	Non-Participating Supplier Options
Yes	No	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> </ul>	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> <li>Bill Medicare as unassigned</li> </ul>
No	No	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> </ul>	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> <li>Bill Medicare as unassigned</li> </ul>
Yes	Yes	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> </ul>	<ul style="list-style-type: none"> <li>Bill Medicare as assigned</li> </ul>
No	Yes	<ul style="list-style-type: none"> <li>If eligible, bill Medicare as grandfathered supplier</li> <li>Refer patients to CB contracted supplier</li> <li>Execute ABN and bill patient cash</li> </ul>	<ul style="list-style-type: none"> <li>If eligible, bill Medicare as grandfathered supplier</li> <li>Refer patients to CB contracted supplier</li> <li>Execute ABN and bill patient cash</li> </ul>



# Advanced Beneficiary Notification (“ABN”)

# Proper and Improper Use of ABN

- ▶ An ABN is not required just because a Medicare supplier provides a Medicare-covered item to a beneficiary on a non-assigned basis (i.e., the beneficiary pays cash for the item).
- ▶ The supplier should have the Medicare beneficiary sign an ABN only when the supplier reasonably believes that Medicare will not pay for a covered item.

# Commercial Insurance Plans

# Covered Items with Commercial Insurance Plans

## Non-Contracted Relationship

- ▶ If the item is covered by the customer's commercial insurance plan, and if the supplier is not a contracted provider/supplier with the plan, then the supplier will not be prohibited from selling the item for cash, although there may be state out-of-network laws requiring supplier compliance.

## Contracted Relationship

- ▶ If the item is covered by the customer's commercial insurance plan, and if the supplier is a contracted provider/supplier with the plan, then the supplier will need to examine its contract with the plan to determine if the supplier has restrictions on its ability to sell the item for cash to the customer.
- ▶ Some examples of common terms and conditions that may restrict cash pay transactions include:
  - ▶ Requirement to accept assignment
  - ▶ Requirement to obtain a denial before billing member
  - ▶ Requirement to obtain a signed financial liability waiver or disclaimer

# Poll Question

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- ▶ What percent of your payor contracts currently require your company to accept assignment of claims?
  - A. 0-24%
  - B. 25-49%
  - C. 50-74%
  - D. 75-99%
  - E. 100% (we accept assignment of claims for all payors)

# Coverage and Contract Status

# Scenarios: Can HMEs engage in cash pay?

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Is the Item medically necessary?	Patient's payor and supplier are contracted	Patient's payor and supplier are not contracted
No	Typically Yes, but contracts may require HME supplier to get a denial from payor first and/or have patient sign a financial liability waiver or ABN before allowing cash payment.	Yes, if compliant with all other pertinent laws and regulations.
Yes	Typically no, but this is dependent upon contract terms and conditions. Carve outs and exceptions may apply	Yes, if compliant with all other pertinent laws and regulations. If Medicare is the payor, federal regulations require written notification to Medicare beneficiaries that Medicare will not cover their purchase.

# Nondiscrimination



# Nondiscrimination

- ▶ There is a CMS rule that states that CMS can terminate a supplier's PTAN if the supplier "places restrictions on the persons it will accept for treatment and it fails either to exempt Medicare beneficiaries from those restrictions or to apply them to Medicare beneficiaries the same as to all other persons seeking care." 42 C.F.R. § 489.53 (a)(2)
- ▶ For example, assume that Products A and B are Medicare-covered items under the same HCPCS code. Assume that the Medicare allowable is \$100. Assume that the cost for the supplier to purchase Product A from the manufacturer is \$120. Assume Product A is better quality than Product B, and the cost for the supplier to purchase Product B from the manufacturer is \$60.

# Nondiscrimination

- ▶ Lastly, assume that the reimbursement from commercial insurers for Products A and B is \$160.
- ▶ Under the nondiscrimination rule, the supplier cannot adopt a policy that Product A is unavailable to Medicare beneficiaries but is available to patients of commercial insurers.
- ▶ However, the supplier can adopt a policy that says that Product A is only available to a patient if the reimbursement it receives is \$160 or more. This policy does not discriminate against Medicare beneficiaries because the policy applies to all patients equally across the board.

# Nondiscrimination

- ▶ If the patient's insurer (commercial or Medicare) requires the supplier to bill on an assigned basis for all products, then Product A is only available to the patient if the insurer pays at least \$160.
- ▶ If the patient's insurer does not require assignment and if the insurer pays less than \$160 for Product A, then the supplier can sell Product A to the patient for \$160 or more on a non-assigned basis.

# Separate Legal Entity for Retail Business

# Separate Legal Entity for Retail Business

- ▶ Assume that John Smith owns ABC Medical Equipment, Inc., a Medicare Part B supplier. There is wisdom to Smith setting up ABC Retail Sales, Inc., which will not have a PTAN nor commercial insurance contracts.
- ▶ When a customer wants a particular quality of product and level of service, then he can pay cash to ABC Retail. Conversely, if a customer wants Medicare or a commercial insurer to pay for the product, then he can obtain the product from ABC Medical.
- ▶ To reduce the risk of a creditor/claimant attempting to “pierce the corporate veil,” it is important the two entities remain separate from each other:

# Separate Legal Entity for Retail Business

- ▶ Separate bank accounts
- ▶ No comingling of company funds
- ▶ Separate employees. If an employee of one company also performs services for the other company, then the companies will need to sign a Shared Employee Agreement.
- ▶ If one company provides services to the other company, then the companies will need to sign a Services Agreement.
- ▶ Ideally, the companies should have separate physical locations. However, ABC Retail can be co-located at the ABC Medical facility, but it is wise for there to be a physical delineation between ABC Medical and ABC Retail.

# Separate Legal Entity for Retail Business

- ▶ The two companies can refer to each other so long as (i) there is not a formal or informal cross-referral arrangement and (ii) direct or indirect remuneration is not paid to the referring company.

# Separate Legal Entity for Retail Business - Advantages

- ▶ ABC Medical has exposure to Medicare recoupments. If ABC Retail is only a division (or “dba”) of ABC Medical, then a large recoupment against ABC Medical can adversely affect the retail business. On the other hand, if ABC Retail is a separate legal entity, then recoupment liability imposed against ABC Medical should not directly affect ABC Retail.
- ▶ In the future, if Smith desires to sell one of the businesses, then he has the flexibility of engaging in either a stock sale or an asset sale.



# Conclusion

- ▶ The DME supplier has the right to sell items for cash. In doing so, if the supplier adheres to the guidelines set out above, then the risk of running into trouble with a government agency or a commercial insurer will be reduced.
- ▶ An experienced health care attorney may help you better understand how to mitigate your risks.

Questions?

# THE END

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