

Physicians Question Whether CMS' Part B Drug Proposal Plan Usurps Clinical Judgment, Cripples Specialists: Medicare's overhaul of the way it reimburses doctors for more than \$20 billion worth of outpatient drugs they administer each year has drawn criticism from physicians. Financially, although some physicians will receive higher payments, the current plan is economically disastrous to a handful of specialties, particularly oncologists, ophthalmologists and rheumatologists. Those specialists, who earn substantial shares of their revenue from Medicare's longstanding method of paying them a drug's average sales price, or ASP, plus 6%, will see a significant decrease in reimbursements. Critics of the bill argue that this is another example of the government inserting itself in patient care and usurping the care physicians provide to their patients. The CMS, however, states that their decisions do not impact patient care as physicians may still prescribe the same drugs. The plan is based on a study from the Medicare Payment Advisory Commission, academic studies and models already adopted by private payers. Policy experts who support the plan argue that the payment structure derived from Part B drugs has created a perverse incentive that needed to be ended. Medicare has been moving away from fee for service to value-based payment models but until now policy experts were surprised that it had yet to target drug spending. Under a second phase of the pilot, the CMS intends to test a "menu of value-based purchasing options." The purpose of the second phase is to hopefully allow the CMS to enter into voluntary agreements with drug manufacturers to link patient outcomes with price adjustments, which would give Medicare some say in determining the prices it pays for drugs.

Doctors Contemplate Delicate Talks As Medicare Pays for End-Of-Life Counseling: Medicare's new policy will reimburse doctors for giving end-of-life advice during a senior's annual wellness visit or in a routine office visit. Nurse practitioners and physician assistants will also be reimbursed for speaking with patients about end-of-life issues. Although Medicare's policy has broad support from health providers and patient groups, neither physicians nor the American Medical Association ("AMA") foresee a surge in end-of-life planning among Medicare's more than 50 million enrollees. The AMA, which supports Medicare's new policy, projects that Medicare will reimburse fewer than 50,000 counseling sessions in 2016. Under the rule, physicians can now bill Medicare \$86 for an office-based, end-of-life counseling session with a patient for as long as 30 minutes; however, there are no rules on what doctors must specifically discuss during those sessions. For example, physicians can advise patients seeking guidance on completing advance directives, such as if or when they want life support measures such as ventilators and feeding tubes, and how to appoint a family member or friend to make medical decisions on their behalf if they cannot. A similar reimbursement plan was previously discussed in 2009, as part of the congressional debate over the Affordable Care Act. In 2009, though, the proposal to have Medicare pay for such discussions sparked political controversy and fueled concern that they would lead to so-called "death panels" that could influence decisions to avoid medical care. Expectedly, the proposal was quickly dropped from the Affordable Care Act.

New York Appellate Court Holds Medical Staff Bylaws are Not a Contract: In *Meyer v. North Shore-Long Island Jewish Health System, Inc.*, -- N.Y.S.3d --, 2016 N.Y. Slip. Op. 01651, 2016 WL 886206 (2d Dept. 2016), the New York Supreme Court, Appellate Division, Second Department, affirmed the Supreme Court, Nassau County, dismissing a physician's claim for breach of contract against the hospital system. The physician, whose medical staff privileges at the defendant hospital system had been terminated, claimed the hospital had failed to follow the procedures set forth in the medical staff bylaws, and thereby breached its contract with the physician and the implied covenant of good faith and fair dealing under that contract. The Appellate Division held that "[t]he North Shore defendants conclusively established that the Medical Staff Bylaws relied upon by the plaintiff did not constitute a valid contract." 2016 WL 886206 at *2. As no valid contract existed as a matter of law, the Court found that the physician's breach of contract claim must be dismissed, and the absence of a valid contract also resulted in the dismissal of the physician's claim of breach of the implied covenant of good faith and fair dealing. In some states, courts have held that medical staff bylaws do constitute a contract between the medical staff, or individual members of the medical staff, and the hospital. In New York, courts have held that a hospital may not violate its own bylaws or ignore the protections provided to physicians in the bylaws when it acts to discipline a physician or to terminate or reduce a physician's privileges, but New York courts have not specifically held that the bylaws constitute a contract. In the Meyer case, a New York appellate court has expressly held that medical staff bylaws do not constitute a contract.

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