Medicare’s billion-dollar headache

The SMART Act has been introduced in both the House and the Senate. | AP Photo

By MATT DOBIAS | 3/26/12 10:32 PM EDT

It’s not easy to get lawmakers interested in an obscure and complex part of the Medicare law, especially when their minds are clearly on other topics, like the upcoming election.

But a loose coalition of K Street types that includes trial lawyers, the U.S. Chamber of Commerce and advocates for seniors wants to breathe life into a congressional effort to pass legislation that would streamline the Medicare secondary-payer process — a tedious name for a billion-dollar headache.

Basically, all concerned agree that when an insurer other than Medicare — think auto insurance or liability — is responsible for medical bills, they should pay them. But Medicare’s clumsy system for calculating and obtaining those payments is driving everyone nuts and often drags out attempts to reach settlements and avoid courtroom clashes.

Legislation to fix it, known as the SMART Act — Strengthening Medicare and Repaying Taxpayers Act — has been introduced in both the House and the Senate. They’ve picked up bipartisan support, but it’s still not clear they have the momentum to get something enacted this year.

“We hope that the bills get passed and that this is the year,” said David Farber, an attorney with Patton Boggs whose client, the Medicare Advocacy Recovery Coalition, has pushed for the overhaul. ”We have deep congressional interest in this issue.”

Medicare, in almost every instance, is the primary payer for medical services for people 65 and older and some of the disabled. But in some cases, such as auto accidents, on-the-job injuries or slip-and-fall accidents, Medicare becomes the secondary payer. It may be billed first and pay for the immediate care — but the medical costs are really somebody else's primary responsibility. So Medicare has the right to recoup them from the responsible party.

For instance, if a senior is injured in a car accident, the hospital bills Medicare. But if there's a settlement, or if the case goes to court and a person is awarded damages, Medicare has a right to recoup at least some of what it paid. The settlement also must take into account future Medicare costs that could arise from the condition or injury.

And it's at this point, Farber and others say, that the process breaks down, leaving attorneys, Medicare beneficiaries and businesses in the lurch. Legal settlements stall.

And the disconnect costs Medicare money — always a good way of stirring congressional interest. The Congressional Budget Office estimates that Medicare loses around $1.1 billion every decade largely because of the lax or complicated reporting procedures. Not a huge item within Medicare, but still a billion is a billion. And some who track this issue believe the real number is even higher.

One core problem is that Medicare is woefully unprepared to track down or manage such claims, Farber said. Until 2007, the outside parties didn't even have to tell Medicare whether a claim had been settled. So the model for the Center for Medicare & Medicaid Services was "pay and chase." But it was more commonly "pay and don't chase," because the chasing process was just too cumbersome.

CMS acknowledges that it's working on the secondary payer problem but declined to comment on any specifics.

The situation began to change when Congress approved new mandatory reporting requirements for some health plans in 2007. But implementation was delayed, so the provisions only recently took hold. And according to the groups behind the SMART bill, the 2007 fixes didn't, well, fix it. The whole process is still very slow.

"Everybody is frozen in place," Farber said. "The CMS model is wrong on this. The CMS has to figure out how much it owes, and then it has to notify the parties." And it needs to do so within a reasonable time period — which he said hasn't been happening.

Jason Matzus, a partner with the Pittsburgh law firm Raizman Frischman & Matzus, describes a catch-22 scenario. It is nearly impossible, Matzus says, for a plaintiff's attorney to get an estimate of the medical charges Medicare is responsible for — and that's the number needed to calculate a settlement.

"I'm trying to represent the Medicare beneficiary when it comes time to talk about a settlement or have it go to trial," Matzus said. "If you don't have the [claims] information, it's tough to do

that. It's tough to appropriately assess the full value of a medical liability claim when Medicare hasn't provided you the amount of its lien."

Dissatisfaction with the system brought together groups that seldom work in lock step, including the American Association for Justice, the Chamber of Commerce and the Medicare Rights Center. The bills were introduced, and last summer the House Energy and Commerce Committee held a hearing on the topic.

The SMART Act would require Medicare repayment amounts to be fully disclosed to beneficiaries before a final settlement. The bills would also put a three-year time limit on claims and prevent Medicare from pursuing amounts so small that it costs more money to administer than is repaid. One case that made the rounds in legal circles involved less than $2 in Medicare costs but still bollixed up a settlement.

Even with the bipartisan support, however, it's unclear whether Congress will slot the bills on the legislative calendar. But Farber sees some encouraging signs.

"It's been difficult to explain the issue because of its complexity," Farber said. "But now that Congress understands the issue, everybody from leadership on down is interested on working to fix this."