

Make Permanent New York's Third Party Liability Demonstration Project



The Problem: Payment determinations for home care services for dually-eligible Medicare/Medicaid patients are often extremely difficult to resolve. This is because the Medicare coverage criteria for home health care are highly susceptible to differences in federal/state/provider interpretation. This causes significant conflict, administrative burden and costs to all parties involved. As a result, the home care community in states like New York, which has made exemplary commitments in home health care, are most severely affected by the vagaries of the Medicare/Medicaid payment determination process.

In this complicated process, the U.S. Centers for Medicare and Medicaid Services (CMS) has held the position that providers determine which payor — Medicare or Medicaid — to bill for the patient's coverage. Providers, forced to rely on Medicare's subjective home health payment rules, make the best and most informed judgment possible. However, providers are then caught in the middle of the Medicare/Medicaid claims adjudication practices between the federal and state governments. CMS contractors (who have jurisdiction over Medicare) decide which of the provider's claims to Medicare will ultimately be paid, while the state (who administers Medicaid) squeezes the provider from the other side, imposing a retroactive review of provider claims and seeking a recoupment for any Medicaid claims that the state independently contends Medicare should have paid. To add to the complexity and burden, because of the policy of "Medicaid as payor of last resort," the state has further contended that providers should submit every or nearly every paid home health Medicaid claim for dually-eligible patients to Medicare to ensure there are no possible "missed" claims where Medicare might pay (forcing even the submission of those claims which, based on the provider's interpretation, are clearly not Medicare-coverable). The result is a costly and debilitating administrative nightmare for providers, the state and the federal government and its Medicare contractors who must adjudicate an avalanche of claims, the majority of which (between 80% and 90%, based on the most recent New York State data) will never be paid by Medicare.

The TPL Solution: To address this problem, CMS in 2003 entered into an agreement with New York and other state governments (Connecticut and Massachusetts), known as the Third Party Liability (TPL) Demonstration Project. Under this agreement, instead of having the state and federal governments conduct a claim-by-claim analysis to determine whether home health services should have been Medicare's or Medicaid's responsibility, the TPL Demo instead employed a streamlined, alternative process that serves the best interests of all parties.

The TPL has proven to be a fair, efficient and manageable method of determining payment responsibility for dually-eligible patients. Instead of a case-by-case adjudication of **all** claims, with providers forced in the middle, the TPL uses a sampling of claims and an interactive process between CMS and the states to settle payment responsibility — a process between the two payors, and conducted **by** the payors. Its purpose is only focused on a "coordination-of-benefits"-type examination, removing providers from the middle of the Medicare/Medicaid officials' dispute. There is no questioning as to whether the patient was eligible for services, received services, or that services were necessary.

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New York's home health agencies rely on the TPL not only for the essential administrative and cost relief it provides, but also to assure payment for services delivered to dually-eligible home care patients. The State of New York is a strong partner in supporting this initiative, believing that the TPL is an efficient and balanced approach to determining Medicare/Medicaid payment obligations. The TPL also benefits access to care for patients, as providers are no longer forced to dislocate their clinical staff — and disrupt other aspects of their operation — in order to meet the administrative task of juggling payment determination between two governmental entities who are ultimately responsible for paying the claims.

The original TPL project contract between CMS and the New York State Department of Health covered federal fiscal years (FFY) 2000 to 2004 and was subsequently extended to include FFYs 2005 to 2007. Requests by New York State's Medicaid officials to make permanent or at least continue the TPL were until recently denied by CMS, leaving the TPL expired as of claims submitted through **September 30, 2007**.

Due to CMS's extension denial, and in the TPL's absence for FFY 2008 Medicare claims, home care providers, during a highly compressed time period (October to December 2009), were forced to submit demand bills to Medicare for over 30,000 cases, costing these agencies and the system a projected \$31 million dollars of unrecoverable administrative expense, millions of copies of provider records and thousands of hours of clinical nursing time diverted from patient care. This was an extraordinarily wasteful, debilitating and totally avoidable process.

Recent Response From CMS: In response to unyielding advocacy by New York State, the provider community and the Congressional Delegation, CMS granted a limited extension of the TPL through FFY 2010. The CMS extension is minimal and includes many unacceptable contingencies and requirements (including a 15% withhold of Medicaid matching funds for the state as a contingency sanction), furthering the unfairness to all parties that would be avoided by a straight continuation of the TPL. Providers and state officials are seeking a reasonable and straight-forward extension of the TPL, at least until the submission and Congressional analysis of CMS's final project report, not expected until 2014 at the earliest.

- ▶ **Recommendation:** HCA has drafted legislative language to continue the TPL and urges Congressional action to require CMS to make permanent or significantly extend New York State's Third Party Liability (TPL) Demonstration Project.