Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: California Department of Health Services
Docket No. A-97-062
Control No. CA-97-002-ADM
Decision No. 1644

DATE: January 27, 1998

DECISION

The California Department of Health Services (California or DHS) appealed a determination by the Health Care Financing Administration (HCFA) disallowing $3,082,750 in federal financial participation (FFP) claimed under title XIX (Medicaid) of the Social Security Act (Act). The disallowed amount represented sums claimed by California for expenditures to county welfare departments, under a program known as "County Bounty," as an incentive for the counties to identify Medicaid cases where the claimants had other health care coverage. HCFA determined that the County Bounty program payments were incentive payments to the counties to carry out a responsibility the counties already had, under the Act and the State Medicaid plan, to furnish information to DHS, so that reimbursement of the County Bounty payments would duplicate reimbursement already received by California for this responsibility. HCFA further found that the County Bounty payments were not reasonable because they did not represent reimbursement for reasonable costs incurred in furnishing such information, but rather were calculated without reference to the costs incurred in furnishing information to DHS. HCFA also found that FFP in these payments was not authorized under section 1903(p) of the Act.

For the reasons discussed below, we find that, under section 1902(a)(25)(A) of the Act and the implementing regulations, California and the counties were already required to determine if Medicaid beneficiaries had other health care coverage, and that FFP was already being paid pursuant to section 1903(a)(7) of the Act for such efforts. Moreover, no other section of the Act specifically authorizes FFP in such payments. Thus reimbursement of the County Bounty program payments would duplicate payments of FFP already authorized under other provisions of the Act. Accordingly, we sustain the disallowance.

Statutory and Regulatory Background

The Act provides that a state participating in the Medicaid program will be able to claim FFP for administrative expenses at a rate of 50 percent for those amounts "found necessary by the Secretary for the proper and efficient administration of the State plan." Section 1903(a)(7) of the Act. The Act further contains a provision known as Third Party Liability (TPL) which requires that a State Medicaid plan provide --

> that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan, including--
> (i) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and
> (ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties . . . .

Section 1902(a)(25)(A) of the Act.

The regulations which implement the statutory TPL provisions are located at 42 C.F.R. Part 433, Subpart D. The regulations provide that the State or local agency--

> must take reasonable measures to determine the legal liability of the third parties who are liable to pay for services furnished under the plan. . . .

42 C.F.R. § 433.138(a). The regulations further require that the State agency must reimburse a local agency "for the reasonable costs incurred in furnishing information" to the State Medicaid agency. 42 C.F.R. § 433.138(i). Any expenditures incurred by the State agency in carrying out the requirements of Subpart D are eligible for FFP at a rate of 50 percent. 42 C.F.R. § 433.140(b).

Factual Background [1]

In the State of California, the Medicaid program is known as Medi-Cal. Concerned that its efforts had identified less than four percent of Medi-Cal eligibles as having some other type of health insurance coverage (OHC), while the national average health insurance identification rate of Medicaid eligibles was eight percent, DHS conceived of paying incentives to counties as a method of encouraging the identification of OHC. Legislation was enacted to allow

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[1] The information in this section is taken from pages 2 - 5 of California's appeal brief and is undisputed by HCFA.

implementation of the County Bounty program as a pilot plan to increase identification of OHC. California Ex. B. California included the County Bounty program in the update to the State TPL Action Plan California submitted to HCFA in September 1993. HCFA Ex. 2.[2]

Under the County Bounty program, California entered into contracts with 54 county welfare departments, effective March 1, 1993. These contracts required the counties to develop and submit to California a plan to improve third-party health insurance identification by all county staff engaged in obtaining OHC information, including staff of AFDC cash grant and Medi-Cal medically needy programs. For each valid, complete Health Insurance Questionnaire containing TPL information where the health care coverage was not already known to the state and was in effect, California would pay $50, the "bounty."

The objective of the County Bounty program was to increase statewide OHC identification from just under four percent to eight percent over a two-year period by paying incentive payments to county welfare departments. Increased OHC identification was projected to result in annual net Medi-Cal savings of approximately $50 million each to California and the federal government. Once OHC is identified, the program is able to code beneficiaries' Medi-Cal cards and thus avoid paying Medi-Cal claims for the beneficiary until the other source of health insurance coverage has been billed and has paid to its limit. Under the County Bounty program, DHS gave training on the identification of OHC to 7500 front-line eligibility workers in 25 counties representing 77 percent of the total Medi-Cal population, and it succeeded in reducing the declining rate of identification of OHC.

California subsequently claimed FFP for payments made to county welfare departments for the County Bounty program for the calendar quarters ended September 30, 1993 through June 30, 1995. When the expected results for the County Bounty program were not realized, California elected not to renew the program when the county contracts expired in June 1995.

Parties' Arguments

California contended that FFP was properly claimed here because the County Bounty program was a "reasonable measure," as contemplated by section 1902(a)(25) of the Act, for determining the legal liability of third parties to pay for medical services furnished by Medi-Cal. California further declared that HCFA should share in the payment of incentives under the County Bounty program since HCFA shares in other incentive payments to other governmental and private entities in the State of California performing TPL efforts. See section 1903(p) of the Act. California also argued that HCFA in effect officially endorsed the County Bounty program when it accepted changes to California's TPL Action Plan.

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[2] Under 42 C.F.R. § 433.138(k), a state is required to develop an action plan for pursuing TPL claims, and the action plan must be integrated with the mechanized claims processing and information retrieval system.

HCFA acknowledged that FFP is available, under 42 C.F.R. § 433.140(b), for expenditures made in carrying out TPL requirements and that a state is required to reimburse a local agency, under 42 C.F.R. § 433.138(i), for the reasonable costs incurred in furnishing TPL information to the state Medicaid agency. HCFA maintained, however, that the County Bounty payments did not represent reimbursement for reasonable costs incurred by the counties, but rather were, under the state statute that created the program and the contracts with the counties, incentive payments made in addition to the regular reimbursement the counties received from DHS for performing TPL functions under the State Medicaid plan. HCFA asserted that, as the bounty payments were not reimbursement for reasonable costs and therefore not expenditures incurred by California in carrying out the requirements for TPL identification set forth in 42 C.F.R. Part 433, Subpart D, they do not qualify for FFP. HCFA also denied that it had ever agreed to pay FFP for the County Bounty program when it approved changes to California's TPL Action Plan; in fact, HCFA noted that it had specifically notified California that the allowability of FFP for County Bounty payments was questionable.

Discussion

I. The County Bounty program was not a "reasonable measure" within the meaning of section 1902(a)(25)(A) of the Act.

California argued that when Congress included the word "all" ahead of the phrase "reasonable efforts" in section 1902(a)(25)(A), it was a clear expression of congressional intent that states not only comply with those TPL requirements specified in statute and regulations, but also employ other reasonable measures which fit the goal of encouraging third party collections. California further contended that section 1902(a)(25)(A) allows states flexibility in designing innovative and unique measures to accomplish the goal of cost savings by capturing the maximum third party resources, and California maintained that the County Bounty program was such a measure. California also argued that courts have recognized that the reasonableness of a measure depends on whether the measure is cost effective, and it quoted New York State Dept. of Social Services v. Bowen, 661 F.Supp. 1537 (S.D.N.Y. 1987), as follows:

> Neither the statute nor the legislative history provides the explicit definition for the term "reasonable measures;" however, the statutory scheme does indicate that much of Congress' concern for "reasonable measures" was, in fact, related to the cost-effectiveness of the measures.

New York at 1552 - 53.[3] California contended that, given the realities of the county welfare office eligibility process, the County Bounty program was a reasonable, cost-effective measure that reversed the downward trend in OHC identification.

California explained that at the time the County Bounty program was being developed, counties in the state were faced with exploding caseloads but limits on staff hiring, with the result that TPL activities were given a very low priority. According to California, the counties, confronted by DHS's charge of low OHC reporting rates, responded that they were not being compensated enough to do TPL work along with their other responsibilities. California added that the counties had no financial incentive to save the Medi-Cal program money through increased OHC identification because Medi-Cal is funded totally by the state and Federal governments. California declared that the theory of the County Bounty program was that if the counties saw a new source of revenue, county managers would put more pressure on welfare directors to do more in the TPL area. Thus, according to California, the County Bounty program was a reasonable response to the low TPL reporting rate by county eligibility workers who were overworked, overburdened, and understaffed, and the costs of the program should therefore be eligible for FFP. California asserted that it expended several million dollars in the County Bounty program and succeeded in reversing the decline in identification of OHC. California therefore maintained that FFP should be allowed for the County Bounty program, since FFP is available at the 50 percent rate for a State Medicaid agency's expenditures in carrying out TPL requirements, one of which is the identification of OHC.

There is no disputing California's assertion that section 1902(a)(25) provides that states should "take all reasonable measures" to ascertain TPL, nor that 42 C.F.R. § 433.140(b) allows FFP at the 50 percent rate for expenditures incurred by a state carrying out TPL activities. The fact remains, however, that reimbursement for local agencies is limited to reasonable administrative costs incurred in furnishing OHC information to the State Medicaid agency. 42 C.F.R. § 433.138(i). California did not establish that, in paying a flat rate bounty of $50 per OHC identification, there was any reasonable relation to the actual costs incurred in obtaining an OHC identification. Under California's theory, any amount, however large and without any relationship to the costs incurred, a state proposed to pay a county as a bounty to increase its OHC effort would qualify for FFP. Clearly this is unreasonable on its face.

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[3] This case concerned an attempt by the New York State Department of Social Services to act as a subrogee of a dually entitled Medicare beneficiary/Medicaid recipient and pursue an administrative hearing and even judicial review of Medicare Part A determinations of noncoverage of extended care services. In rejecting New York's arguments, the Court stated that Congress' intent in enacting section 1902(a)(25)(A) was to reduce federal and state expenditures and New York's position would result in an increase in administrative hearings and civil litigation against the federal government, both of which would be financed in part by federal funds. At 1554.

Moreover, the County Bounty program did not represent an allowable cost because the program paid the counties extra money to perform a task which was already being charged to the Medicaid program as part of the eligibility workers' salaries. Under California's State Medicaid plan, counties were already charged with the responsibility of collecting health insurance information during the initial eligibility application process:

> The collection of health insurance information is performed during the initial application and redetermination process. County eligibility and SSA staff ask the applicant whether health insurance is available. Where an indication of insurance exists, the applicant, or the parent or guardian of the applicant is given a health insurance form to complete. The county welfare departments use the Health Insurance Questionnaire (DHS 6155) form and SSA uses the TPL Information Statement (SSA-8019-U2) form to collect and report applicant health insurance information to the Department. The county eligibility workers are also responsible for noting coverage in the eligibility case file and coding the recipients' case records on the automated Medi-Cal Eligibility Date System (MEDS) with Health Insurance indicator codes.

HCFA Ex. 1, at 2.

Under the standard County Bounty contract, the counties were required to --

> obtain, complete and submit to the State a valid Health Insurance Questionnaire . . . Form DHS 6155 . . . for each Medi-Cal case consisting of at least one beneficiary covered by TPL.

California Ex. C at 5, ¶ 3. Thus, a county was awarded a bounty for completing a DHS 6155 form, a task the county was already charged with under the State Medicaid plan and for which it was already receiving funding pursuant to section 1903(a)(7) of the Act. Accordingly, any payment a county received under the County Bounty program would in effect duplicate reimbursement for activities the county was already required to perform.

California argued that the County Bounty program made counties willing to make their eligibility workers available for training relating to TPL identification. The county agreements showed that for the most part the counties did provide training and some counties put identification of TPL as a function in the eligibility workers' work performance appraisals. However, neither of these efforts exceeded what the counties were already supposed to be doing, and in any event, all efforts being undertaken in ascertaining TPL information were already being reimbursed under the Act.

If, as California argued, the counties had no financial incentive to provide TPL information to DHS or were faced with staffing shortages that prevented them from performing their TPL responsibilities, a solution would have been, as suggested by HCFA, to restructure the payment

the counties received under the State Medicaid plan to reflect more generously the counties' "reasonable costs" in furnishing TPL information to DHS. HCFA even conceded that if this had been done, FFP would have been available under 42 C.F.R. §§ 433.138(i) and 433.140(b). HCFA Brief at 20. But here, through the County Bounty program, California in effect paid the counties twice for the task of identifying OHC. Hence we find that the County Bounty program was not a "reasonable measure" within the meaning of section 1902(a)(25)(A) and duplicated reimbursement already provided under the Act for precisely the same activities performed by the county employees.

II. The County Bounty program is not analogous to the incentive programs permitted under section 1903(p) of the Act.

While acknowledging that there is no specific language in the Act or regulations that allows for an incentive program such as the County Bounty program, California nevertheless argued that there is no prohibition in federal law or regulation against the implementation of this type of a program as a reasonable measure for increasing the identification of TPL resources. California contended that HCFA's position in this disallowance was inconsistent with its payment of FFP for contingent fees to contractors and incentive payments to political subdivisions, such as district attorney's offices, which assist California in its TPL efforts. California referred to section 1903(p) of the Act, which entitles a political subdivision of a state that enforces and collects medical support obligations owed to Medicaid beneficiaries on behalf of the State Medicaid agency up to 15 percent of any amount collected from the federal share of the payments. Furthermore, California maintained that incentive contracts which have been found allowable by HCFA are not strictly related to the contractors' costs, but are based upon a percentage of actual TPL cash recoveries. California Ex. I. California argued that incentive payments to counties under the County Bounty program are analogous to contractors' contingent fees and are no less a reasonable measure to ascertain TPL.

HCFA questioned California's attempt to find an analogy between the County Bounty program and the incentive payments of section 1903(p).

California's attempt to liken the County Bounty program to the TPL efforts under the incentive provision of section 1903(p) of the Act is not persuasive. First, the activities at issue here are simply not covered by section 1903(p). There are important distinctions between section 1902(a)(25)(A) and section 1903(p) TPL activities. In evaluating California's argument here, we note at the outset that California has paid scant attention to the basic fact that, by statute and regulation, it and its legal subdivisions, the counties, were already required, prior to the commencement of the County Bounty program, to determine the legal liability of third party health insurers. While the State Medicaid agency has an obligation through its participation in the Medicaid program, i.e. its acceptance of FFP, to pursue TPL, the entities to which incentive payments are made do not have such an obligation. In New York State Dept. of Social Services, DAB No. 673 (1985), the Board discussed the difference between the two efforts:

> The incentive provision [of section 1903(p)] is specific and narrow. Under the broader mandate of section 1902(a)(25)(A) of the Act, both the State and local agencies have an affirmative duty to take all reasonable efforts to establish third party liability and seek reimbursement. This general duty predated the incentive provision of section 1903(p) by a decade.
>
> While section 1902(a)(25)(A) contains a general requirement for enforcement and collection efforts, section 1903(p) authorizes an incentive payment for only a portion of potential enforcement and collection actions.

At 2 - 3.

In its reply brief California disputed HCFA's assertion that California was relying on the authority of section 1903(p) as analogous support for the County Bounty program and insisted that its argument was that the Medicaid statute does not preclude incentive payments to local governments in addition to those payments authorized under section 1903(p). Reply Brief at 8 - 9.

The difficulty with this position is that Congress explicitly stated under what circumstances incentive payments that qualified for FFP could be made, and California did not cite any authority in the Act for paying this incentive amount. Since the Act explicitly delineates what actions are eligible for incentive FFP, FFP is limited to only those circumstances. If Congress wanted other types of TPL enforcement activities to qualify for FFP, it would have said so as it did when it enacted section 1903(p).

III. <u>HCFA did not approve federal funding for the County Bounty program.</u>

California further contended that HCFA agreed that the County Bounty program was reasonable when HCFA approved the updated changes to the statutorily mandated State TPL Action Plan on December 22, 1993. California Ex. E. We find this position untenable. California's proposed update to its TPL Action Plan was a 43-page document, with less than half of one page devoted to the County Bounty program. HCFA Ex. 2, at 11. The purpose of the Action Plan was to describe the actions and methodologies California would follow to identify and pursue TPL, including the integration of such efforts with California's Medicaid management information system. There is no mention in the Action Plan of whether and how California would calculate and claim FFP for its actions. We conclude that HCFA's approval of the update to California's TPL Action Plan was not tantamount to explicit approval for FFP in the County Bounty program because the approval itself gave no such indication. Moreover, HCFA <u>on the same day</u> notified California that it was deferring payment of FFP for California's first claim under the County Bounty program. HCFA Ex. 3. HCFA's letter specifically stated, "Such incentive payments may not qualify for FFP under provisions of the Social Security Act." <u>Id</u>. When the approval of the Action Plan update is considered in conjunction with this letter, it is clear that HCFA did not agree to fund the County Bounty program. Rather, the status of FFP for the County Bounty

program was left undetermined pending further HCFA review, with California put on notice of HCFA's doubts about the allowability of FFP for the County Bounty program.

Conclusion

For the reasons discussed above, we sustain the disallowance.

/s/
Donald F. Garrett

/s/
Norval D. (John) Settle

/s/
M. Terry Johnson
Presiding Board Member