What Happens to Payments to Health Care Providers Participating in Medicare When the Medicare HI Trust Fund Reaches Exhaustion?

When is Medicare's Hospital Insurance Fund Expected to be Insolvent?

The projected exhaustion of the Medicare Hospital Insurance Trust Fund (HI) raises a question regarding whether that possibility would affect the right of providers to receive full payment for services rendered, because Section 1815(a) of the Social Security Act, 42 U.S.C. section 1395g(a), states that "... the provider of services shall be paid ... from the Federal Hospital Insurance Trust Fund..."

According to nonpartisan experts, the Trust Fund could be insolvent in the near future.

- The Chief Actuary of the Medicare program has warned insolvency could hit the HI Trust Fund as soon as 2016.[1]
- The nonpartisan Congressional Budget Office projects the Medicare HI Trust Fund will be insolvent in 2022.[2]

How does Medicare's Hospital Insurance Fund Work?

The Medicare HI Trust Fund is an account maintained on the books of the U.S. Treasury. The system operates on a "pay-as-you-go" basis; current workers and their employers pay taxes on wages, and the self-employed pay taxes on self-employment income. Taxes paid into the HI Trust Fund – along with General Revenue and Medicare enrollee premiums in SMI Trust Fund -- now finance benefits and services for today's beneficiaries.

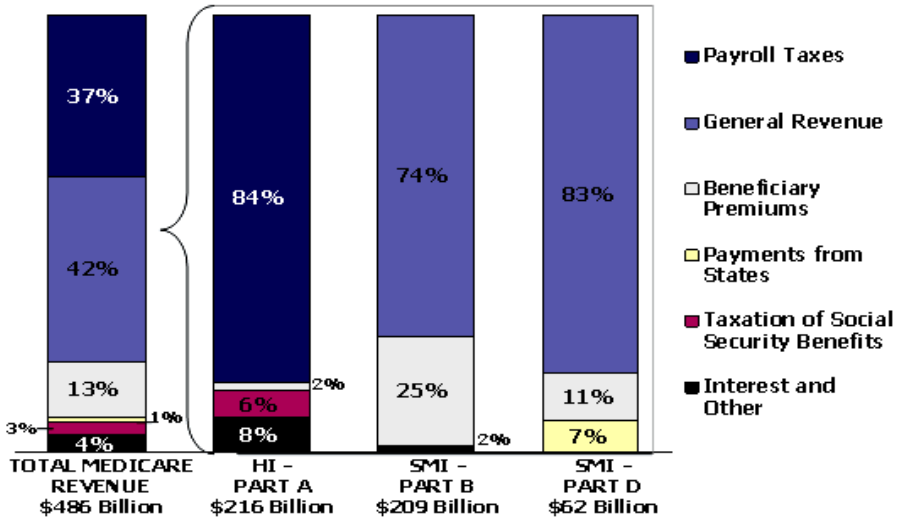

Table from the Congressional Research Service.[3]

What Would Happen If the Trust Fund Became Insolvent?

According to legal analysis from the Congressional Research Service:[4]

> "The practical function of the HI trust fund is that it permits the continued payment of bills in the event of a temporary financial strain (e.g., lower income or higher costs than expected) without requiring legislative action. As long as the HI trust fund has a balance (i.e., there are securities credited to the fund), the Treasury Department is authorized to make payments for Medicare Part A services. If the trust fund is not

[1] https://www.cms.gov/ReportsTrustFunds/downloads/tr2011.pdf
[2] Congressional Budget Office's January 2012 *Budget and Economic Outlook: FY 2012-2022,* http://www.cbo.gov/publication/42905.
[3] 2011 Report of the Medicare Trustees, Table II.B1, and the Kaiser Family Foundation. Note that totals may not add to 100% due to rounding.
[4] Davis, Patricia. "Medicare: History of Insolvency Projections," Congressional Research Service, June 1, 2011 (RS20946)

able to pay all of current expenses out of current income and accumulated trust fund assets, it is considered to be *insolvent*.

"To date, the HI trust fund has never become insolvent, and there are no provisions in the Social Security Act that govern what would happen if that were to occur. For example, there is no authority in law for the program to use general revenue to fund Part A services in the event of such a shortfall.

"In their 2011 report, the Medicare trustees project that the HI trust fund will be exhausted in 2024. At that time, HI would continue to receive tax income from which some reimbursements for health services could be paid; however, there would be insufficient funds to pay for all Part A reimbursements to providers. Unless action is taken prior to that date to increase revenue or decrease expenditures (or some combination of the two), Congress would need to pass legislation that would provide for another source of funding (e.g., general revenues or increased taxes) to make up for these deficits."

Because Medicare is An Entitlement, Will the Program Still Pay Providers, Even if Insolvent?

The Medicare program is a statutory entitlement program. Entitlement authority has been defined as "authority to make payments (including loans and grants) for which budget authority is not provided in advance by appropriation acts to any person or government if, under the provisions of the law containing such authority, the government is obligated to make the payments to persons or governments who meet the requirements established by law."[5] Budget authority is the authority provided by law to enter into obligations that will result in immediate or future outlays involving federal government funds.[6]

According to a publication of the Government Accountability Office, formerly the General Accounting Office:

> Congress occasionally legislates in such a manner as to restrict its own subsequent funding options.... An example ... is entitlement legislation not contingent upon the availability of appropriations. A well known example here is Social Security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."[7]

Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation. An otherwise eligible, legitimate provider would remain legally entitled to the balance.[8] An entitlement by definition legally obligates the United States to make payments to any entity who meets the eligibility requirements established in the statute that creates the entitlement.

Antideficiency Act May Prohibit Administration From Taking Actions To Keep Paying Providers

As a legal analysis by the Congressional Research Service notes:[9]

> "A provision of the Antideficiency Act, 31 U.S.C. § 1341, however, prevents an agency—in this case the Centers for Medicare and Medicaid Services—from paying more in reimbursements for health care services than the amount available in the source of funds available to pay the reimbursements for health care services, in this case from the Hospital Insurance Trust Fund. Section 1341, in relevant part, provides that:
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> > An officer or employee of the United States government or of the District of Columbia government may not—
> > (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

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[5] 2 U.S.C. §§ 622(9) and 651(c)(2)(C).
[6] 2 U.S.C. § 622(2).
[7] Government Accountability Office, Office of the General Counsel, I *Principles of Appropriations Law* 3-49 (3d ed. 2004), available at http://www.gao.gov.special.pubs/d04261sp.pdf.
[8] *Id.* at 3-49, n. 40.
[9] Swendiman, Kathleen. "Social Security Reform: Legal Analysis of Social Security Benefit Entitlement Issues," Congressional Research Service, June 13, 2011.

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; ...."

The Antideficiency Act prohibits making expenditures either in excess of an amount available in a fund or before an appropriation is made. Therefore, it appears to bar paying more money in reimbursements to providers than the amount of the balance in the Medicare HI Trust Fund primarily because, as noted earlier, payments shall be made to providers from the HI Trust Fund.

Again, the Congressional Research Service explains:[10]

> "Violations of the Antideficiency Act are punishable by administrative and criminal penalties. An officer or employee who violates the act's prohibitions is subject to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office.[11] An officer or employee who knowingly and willfully violates the act can be fined not more than $5000, imprisoned for not more than two years, or both."[12]

Could Legal Action From Providers Force Medicare to Pay Them?

If the Medicare Hospital Insurance Trust Fund should become insolvent (i.e., unable to pay scheduled payments to providers in full on a timely basis), it appears that providers who should file suit to be paid the difference between the amount that receipts allow paying and the full reimbursement amount to which they are entitled would not be likely to succeed in getting the difference. CRS notes:

> "The Supreme Court in *Reeside* v. *Walker*,[13] held that no officer of the government is authorized to pay any debt due from the United States, whether reduced to a court judgment or not, unless an appropriation has been made for that purpose. To support its holding, the Court cited Article I, § 9, clause 7 of the Constitution, which states that, 'No money shall be drawn from the Treasury, but in consequence of appropriations made by law. The Court reaffirmed this principle in *Office of Personnel Management* v. *Richmond*."[14]

Consequently, unless Congress amends applicable laws, it appears that Medicare enrollees would have to wait until the Trust Funds receive an amount sufficient to pay full reimbursement for health services to receive the difference between the amount that can be paid from the Trust Funds and the full reimbursement amount.

So What Does This All Mean for Providers If Insolvency Actually Occurs?

Medicare's Hospital Insurance program is a statutory entitlement program. Part A Medicare enrollees have a legal right to receive health insurance services if they meet the Medicare Part A eligibility requirements and providers must be paid.

Congress, however, has reserved the "right to alter, amend, or repeal any provision of the Social Security Act (which includes Title 18 which created the Medicare programs) and the U.S. Supreme Court has affirmed Congress's power to modify provisions of the Social Security Act in *Flemming v. Nestor*[15] and subsequent court decisions.[16] Congress may modify provisions of Medicare law as it exercises its constitutional power to provide for the general welfare. For example, Congress could raise the age of eligibility for enrollees for Medicare coverage.

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[10] Swendiman, Kathleen. "Social Security Reform: Legal Analysis of Social Security Benefit Entitlement Issues," Congressional Research Service, June 13, 2011.
[11] 31 U.S.C. § 1349.
[12] 31 U.S.C. § 1350.
[13] 53 U.S. (11 How.) 272, 275 (1850).
[14] 496 U.S. 414, 424-426 (1990).
[15] 363 U.S. 603 (1960).
[16] Swendiman, Kathleen. "Social Security Reform: Legal Analysis of Social Security Benefit Entitlement Issues," Congressional Research Service, June 13, 2011.

When the Medicare Hospital Insurance Trust Fund is exhausted (i.e., unable to pay full reimbursements for health services on time), the Medicare program (CMS/HHS) would not be able to pay providers their full payments at that time because the Social Security Act states that providers shall be paid only from the Hospital Insurance Trust Fund.

CMS officials are bound by the Antideficiency Act, which prohibits paying amounts that exceed the amount available in the source of funds available to pay them. Although the legal right of providers to receive full payments would not be extinguished by the insufficient amount of funds in the Hospital Insurance Trust Fund, a court suit to obtain the difference between the amount in them available to pay partial reimbursements for health services and the full reimbursement amount would not be likely to succeed in getting the difference.

The Supreme Court has held that no officer of the government may pay a debt whether reduced to a court judgment or not unless Congress has appropriated funds to pay it. Consequently, unless Congress amends applicable laws, it appears that hospital providers would have to wait until the HI Trust Fund receives an amount sufficient to pay full reimbursement for Medicare Part A services to receive the difference."