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RIGHTS OF RECOVERY OF MEDICARE PART C PLANS PURSUANT TO THE MEDICARE SECONDARY PAYER ACT

Executive Summary

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Warning! Medicare Part C plans are gaining traction in their quest to have the exact same rights as traditional Medicare insofar as the Medicare Secondary payer Act

Under the MSP, 42 U.S.C. § 1395y(b)(2), Medicare is prohibited from paying for accident-related treatment caused by the fault of another person or entity, i.e., a "primary plan." The only exception to this prohibition on payment concerns Conditional Payments, which are pre-settlement payments made by Medicare that must be reimbursed upon settlement. This reimbursement obligation extends to primary plans and entities that receive payment from primary plans (such as a plaintiff's counsel).

The legal landscape is not as clear, however, in a third-party liability case where the claimant is a beneficiary of a Medicare Part C plan, or MAO. For instance, the Ninth Circuit (*Parra*) and the Sixth Circuit (*Care Choices*) have held that MAO plans do not have a federally-created cause of action against insureds under the MSP. Rather, those courts have instructed that MAOs must include subrogation clauses within their contracts, which the plans may later seek to enforce through state court action.

On the other hand, CMS, the Third Circuit (*In re Avandia*), and at least two district courts within the Fifth Circuit (*Collins*; *Humana*) have taken the position that the MSP—more specifically, § 1395y(b)(3)(A)—provides MAOs a direct, private cause of action against a primary payer, as well as

the right to seek double damages. The significance of these decisions is that MAOs do not have to pursue their reimbursement or subrogation rights in state courts, and the amount in controversy is irrelevant as federal question jurisdiction exists. Additionally, from a practical standpoint, CMS apparently has taken the position that MAOs have rights and duties that duplicate those of traditional Medicare. Consequently, MAOs would have a cause of action against a "primary plan" and "an entity that receives payment from a primary plan," and MAOs could be expected to reduce their recovery to account for attorney's fees and other legal expenses. Further, for parties to third-party liability claims, it follows that, like a traditional Medicare claim, they would be obligated to notify a MAO of a pending claim involving a MAO beneficiary, and the parties could face double-damages liability for a failure to provide payment to a MAO.

The following is a more detailed analysis of this subject.

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RIGHTS OF RECOVERY OF MEDICARE PART C PLANS PURSUANT TO THE MEDICARE SECONDARY PAYER ACT[i]

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The Medicare Secondary Payer Act, as Applied to Traditional Medicare (Parts A & B)

The Medicare Secondary Payer Act (MSP), 42 U.S.C. § 1395y(b)(2), is the source for Medicare's rights of recovery in third-party liability cases. The MSP provides in relevant part:

> (A) In general
>
> Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that--
>
> (i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1) [group health plans], or
>
> (ii) payment has been made, or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.
>
> In this subsection, the term "primary plan" means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance, to the extent that clause (ii) applies. An entity that

> engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

§ 1395y(b)(2)(A). In short, a "primary plan" can be the liability insurer for the defendant, a workers' compensation insurer, or an uninsured defendant. It is this writer's belief that Congress intended to include any defendant that does business that falls within the broad scope of the "Commerce Clause."[ii]

In other words, Medicare is prohibited from paying for accident-related treatment caused by the fault of another person or entity (i.e., a "primary plan"). If a Medicare beneficiary makes a liability or workers' compensation claim against a third party for reimbursement of medical expenses, Medicare is legally prohibited from paying these expenses. Of import is the fact that Subparagraph A—"In General"—contains no time limitation on the prohibition. Rather, this prohibition on payment is lifted only when the "primary plan" is exhausted via the payment of Medicare-eligible expenses related to the claim. Consequently, Medicare is prohibited from paying for any accident-related treatment so long as a "primary plan" has this responsibility; this prohibition continues even after settlement.

Conditional Payments, § 1395y(b)(2)(B)

The only exception to the aforementioned prohibition on payment by Medicare is found in Subparagraph B, entitled "Conditional Payment." Conditional Payments are pre-settlement payments made by Medicare that must be reimbursed upon settlement.[iii] Very important, but misunderstood, language in Subparagraph B expressly states that repayment of conditional payments is required:

> [A] primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service.

§ 1395y(b)(2)(B)(ii) (emphasis added).[iv] The Medicare beneficiary has the option of pursuing, through an appeal, a waiver of the recovery of conditional payments; however, the appeal must follow the settlement.[v] Waivers are not easy to obtain.[vi]

Medicare Part C Plans and the MSP Act

Medicare Part C Plans (Medicare Advantage Organizations, or MAOs) are the creature of other statutes: 42 U.S.C. §§ 1395w-21(a)(1) and 1395mm(e)(4). The rights of recovery of MAO plans in third-party liability cases are the subject of very differing opinions. For instance, some federal courts addressing the issue have held that MAO plans do not have a federally-created direct right of action against insureds under the MSP.[vii] *See, e.g., Parra v. PacifiCare of Ariz., Inc.,* 715 F.3d 1146, 1153-54 (9th Cir. 2013); *Care Choices HMO v. Engstrom*, 330 F.3d 786, 791 (6th Cir. 2003).

The Centers for Medicare & Medicaid Services (CMS), however, has taken a different view. *See* 42 C.F.R §§ 417.452, 422.108, and 427.454. On December 5, 2011, in response to *Care Choices* and several other federal and state court decisions, CMS issued a memorandum, stating in relevant part:

> In recent decisions, several courts have challenged Federal regulations governing these collections. Specifically, several MAOs have not been able to take private action to collect for [MSP] services under Federal law because they have been limited to seeking remedy in State court.
>
> CMS regulations at 42 CFR § 422.108 describes MSP procedures for MAOs to follow when billing for covered Medicare services for which Medicare is not the primary payer. These regulations also assign the right (and responsibility) to collect for these services to MAOs. Specifically, § 422.108(f) stipulates that MAOs will exercise the same rights of recovery that the Secretary exercises under the Original Medicare MSP regulations in subparts B through D of part 411 of 42 CFR and that the rules established in this section supersede any State laws. Additionally, the MSP regulations at 42 CFR § 422.108 are extended to Prescription Drug Plan (PDP) sponsors at 42 CFR § 423.462. Accordingly, PDP sponsors have the same MSP rights and responsibilities as MAOs.
>
> Notwithstanding these recent court decisions, CMS maintains that the existing MSP regulations are legally valid and an integral part of the Medicare Part C and D programs.

Following the above memorandum, the Third Circuit departed from cases like *Care Choices* and held that the MSP provides MAOs (there, Humana) a direct, private cause of action against a primary payer (there, the defendant GlaxoSmithKline), as well as the right to seek double damages. *In re Avandia Mktg.,* 685 F.3d 353, 365-67 (3rd Cir. 2012); *see* § 1395y(b)(3)(A).[viii] The Third Circuit explained that, while § 1395y(b)(2)(B)(iii) is expressly limited to actions by the United States, the plain text of § 1395y(b)(3)(A) establishes "a private cause of action for damages" anytime a primary payer fails to make required payments and places no additional limitations on which particular plaintiff may bring suit.

While the Fifth Circuit has not addressed the issue, two district courts within the circuit have. *See Collins v. Wellcare Healthcare Plans, Inc*., No. 2:13-cv-6759, 2014 WL 7239426 (E.D. La. Dec. 16, 2014); *Humana Ins. Co. v. Farmers Tex. Cnty. Mut. Ins. Co*., No. 1:13-cv-611, 2014 WL 6663522 (W.D. Tex. Sept. 24, 2014). In *Collins*, Judge Eldon Fallon—one of most respected legal minds in this writer's opinion—addressed numerous complex yet important issues common to all sides of a personal injury case. In his opinion, Judge Fallon referred to the legal issues as "obscure legal terrain." (We can all agree on that point.)

Judge Fallon's decision in *Collins* ultimately came down on the side of the Third Circuit's decision in *Avandia*. He also addressed some other legal points that are important.

(1) <u>Do MAO plans have a federal question cause of action?</u>

On this issue, Judge Fallon noted as follows:

> The MAO Statute states that a MAO "*may* . . . *charge* . . . the insurance carrier, employer or other entity which under such law, plan, or policy is to pay for the provision of such services such individual to the ex-tent that the individual has been paid under such law, plan, or policy for such services." 42 U.S.C. § 1395w-22(a)(4) (emphasis added). This language is distinguishable from the language found in the MSP, which states a "primary plan, and an entity that receives payment from a primary plan, *shall* reimburse the appropriate Trust Fund." 42 U.S.C. § 1395y(b)(2)(B).

2014 WL 7239426 at *9 (emphasis in original). He further noted that:

> Some courts have held that no cause of action exists under 42 U.S.C. § 1395mm(e)(4), a provision that governs HMOs and contains almost identical language to the MAO Statute. *See Engstrom*, 330 F.3d 786; *Nott* [*v. Aetna U.S. Healthcare, Inc.*], 303 F. Supp. 2d 565 [(E.D. Pa. 2004)]. These courts emphasized that Congress explicitly created a private cause of action in the MSP statute and did not use the same, forceful language in the HMO statute. These Courts have held that HMOs must include subrogation rights within their contracts.

Id.

Notwithstanding the lack of this type of recovery language in Wellcare's plan, Judge Fallon, siding with the Third Circuit (*Avandia*) and the Western District of Texas (*Humana*), held that Wellcare had a federal question cause of action pursuant to the MSP Act.

The upshot is that the Sixth and Ninth Circuits have held that there is no federal question cause of action, whereas CMS, the Third Circuit, and two district courts within the Fifth Circuit have held that the MSP—a federal act—is controlling. This writer assumes that the Fifth Circuit will side with Judge Fallon, thereby setting the stage for a Supreme Court review of the issue.

(2) Who does the MAO plan have a claim against?

If the MSP Act is followed, then a MAO plan has a cause of action against the "primary plan" and "an entity that receives payment from a primary plan." § 1395y(b)(2)(B)(ii). In *Avandia*, the "primary plan" was GlaxoSmithKline, the manufacturer of the allegedly defective drug. In *Collins*, the plaintiff received (tort) settlement funds from a primary plan (an automobile or insurance policy).[ix] The funds were then held in the plaintiff's attorney's trust account. In both cases, the MAO sought reimbursement and double damages per § 1395y(b)(2)(B)(iii)[x] and (b)(3)(A). Section 1395y(b)(3) is an enforcement provision; it provides in relevant part that:

> There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

§ 1395y(b)(3)(A).

CONCLUSION:

MAOs are gaining traction in their pursuit to assert
Federal Question claims pursuant to the MSP.

The significance of this is that MAOs will no longer have to pursue their reimbursement/lien/subrogation rights in state courts, and the amount in controversy is irrelevant as federal question jurisdiction exists under 28 U.S.C. § 1331.

What other questions still exist?

(3) Do MAO plans have rights to post-settlement protection (namely, something akin to Medicare Set Asides)?

As discussed above, the MSP prohibits Medicare from paying for Medicare-eligible expenses related to an accident until the primary plan, or the funds received from a primary plan, are properly exhausted, whether before or after resolution of the underlying claim. The same question remains unanswered insofar as MAO plans are concerned. It is abundantly clear that there is no statutory, regulatory, or caselaw requirement for the parties in a liability action to enter into a Set Aside arrangement. It follows that MAO plans do not have greater rights than Medicare vis-à-vis Set Asides.

See also 42 C.F.R. § 422.108 (rights and responsibilities of MAOs under the MSP).

(4) Do MAO plans have an obligation to assist in attorney's fees and other recovery costs?

Two sources are noteworthy regarding this issue:

• CMS's memorandum of December 5, 2011, which stated in pertinent part that "[42 C.F.R.] § 422.108(f) stipulates that MAOs will exercise the same rights of recovery that the Secretary exercises under the Original Medicare MSP regulations in subparts B through D of part 411 of 42 CFR and that the rules established in this section supersede any State laws."

• 42 C.F.R. § 411.37 (entitled "Amount of Medicare recovery when a primary payment is made as a result of a judgment or settlement") provides as a general rule that "Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section" if two criteria are satisfied. § 411.37(a)(1).

It logically follows that if traditional Medicare allows for recovery costs, MAO plans should be subject to the same regulation.

(5) Do the parties to a liability claim have the duty to notify MAOs of the claim?

It is this writer's opinion that if the Fifth Circuit and/or the Supreme Court agrees with the decisions in *Avandia*, 685 F.3d 353, *Collins*, 2014 WL 7239426, and *Humana*, 2014 WL 6663522, the parties will have the same obligations to notify MAOs of a pending claim as they owe to Medicare. Although there exists no clear guidance on this issue, CMS seemingly has taken the position that MAOs have rights and duties that are parallel to those of Medicare.

(6) Assuming the courts ultimately agree with the *Avandia* and *Collins* decisions, what are the possible consequences for failing to notify and pay a MAO?

One must also look at the risk of failing to notify and reimburse a MAO: double damages. In *Avandia* and *Collins*, the MAOs pursued a direct right of action pursuant to § 1395y(b)(3), which provides for double damages. As noted by Judge Fallon in *Collins*:

> This Court has already determined that Wellcare has a private cause of action pursuant to [§ 1395y(b)(3)(A)], but the cause of action does not automatically afford a right to double damages. Rather, a primary plan must *fail* to provide reimbursement in order to afford an MAO the right to pursue double damages. Failure connotes an active dereliction of a duty, and the award of double damages is intended to have a punitive effect on plans who intentionally withhold payment. As the Ninth Circuit noted, "[t]he private cause of action was intended to allow private parties to vindicate wrongs occasioned by the failure of primary plans to make payments." *Parra*, 715 F.3d at 1154-55. . . .

> A failure to provide reimbursement does not describe the situation in the instant case, and the intended punitive remedy of double damages is therefore not appropriate. Collins' duty to reimburse Wellcare only arose once she received her tort settlement, and when this occurred, Collins placed the money claimed by Wellcare into a trust. Collins therefore did not conceal the money or spend the money, but rather separated the funds until a court determined which party had a rightful claim over the funds. This action does not comport with the Court's understanding of a "failure to provide payment," and the Court reads the plain language of 42 U.S.C. § 1395y(b)(3)(A) to mean that double damages is only available in the "the case" of a plan that satisfies the condition of "failure to provide payment."

2014 WL 7239426, at **15-16 (emphasis in original).

In *Avandia*, Humana sued GlaxoSmithKline, the defendant, for double damages based on a failure to reimburse. In *Collins*, Wellcare asserted a counterclaim against the injured claimant for the same. It is this writer's belief that if these decisions are upheld, all parties to a liability claim involving a MAO participant, as well as the claimant's attorney,[xi] are subject to the double-damages rule.

(7) Assuming the courts ultimately agree that MAOs are simply duplicates of Medicare,

- Is the process fair to the plan participant?
- Have the courts bitten off more than they can chew?

Assume that an MAO plan member has an accident. Liability is very questionable but damages are significant. Further assume that the plaintiff/member had significant preexisting conditions that were not affected by the accident. The plaintiff/member and MAO disagree on the amount to be reimbursed to the MAO.

Following Judge Fallon's reasoning, the plaintiff/member who disputes a claim against an MAO must first exhaust all administrative remedies. The Federal Court is without jurisdiction, and the plaintiff/member must pursue her grievance according to the plan documents.[xii]

However, the MAO can pursue its recovery rights in Federal Court pursuant to federal question jurisdiction. The result of the decisions allowing a direct right of action in favor of MAOs may be that small dollar claims by MAOs may end up in a federal court, with the MAO making claims for the amount allegedly past due, plus double that amount against the parties to a state court claim.

SUMMARY

In summary, it seems that there are a lot of unanswered questions and issues that flow from CMS's position and the cases mentioned herein. Indeed, enterprising attorneys will find a lot more to these issues than was discussed herein. For the near term, it is recommended that parties to a liability

claim, including the plaintiff's attorney, should be aware of the potential consequences when a MAO plan is involved. Hopefully the Supreme Court will recognize the dilemma with which all parties are confronted and provide a resolution of these pressing issues.

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[i] The Kaiser Family Foundation has issued a good, non-legal discussion of the why's and wherefores of Medicare Part C plans. *See* http://kff.org/medicare/fact-sheet/medicare-advantage-fact-sheet/.

[ii] Article I of the United States Constitution empowers Congress "[t]o regulate Commerce with foreign nations, and among several States, and with the Indian tribes." U.S. Const. art. I, § 8(3). The term "commerce" as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states, including purely social communications between citizens of different states by telegraph, telephone, or radio, and the mere passage of persons from one state to another for either business or pleasure.

[iii] There are certain circumstances under which Medicare is not entitled to recover. For example, in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010), Medicare paid the medical expenses incurred during the plaintiffs' father's three-month hospital stay prior to his death; the plaintiffs later made a wrongful death claim against the father's nursing home, asserting abuse and neglect. The Eleventh Circuit reversed the decisions of the HHS Secretary and the district court and held that the heirs were not responsible for reimbursement of Medicare's expenses. In other words, the court disagreed with the district court's holding that the medical expenses paid on behalf of the decedent had been "conditional payments." The court reasoned that "Florida courts have repeatedly held that proceeds from a wrongful death action are not for the benefit of the estate, rather, that they are the property of the survivors and compensation for their loss. Here the children's right of action under the [Florida Wrongful Death Act] is an individual's property right, not derived from the estate." *Id*. at 1335 (internal citations omitted).

[iv] *See also* 42 C.F.R. § 411.22(a) ("A primary payer, and an entity that receives payment from a primary payer, must reimburse CMS for any payment if it is demonstrated that the primary payer has or had a responsibility to make payment."). Plaintiff's counsel is considered "an entity that receives payment" and thus can be held responsible for repayment of conditional payments. *See Haro v. Sebelius*, 747 F.3d 1099, 1116-17 (9th Cir. 2014). In *Haro*, the Ninth Circuit stated:

> The statutory scheme also creates a cause of action by which the United States may recover from a primary plan or "from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity." [] § 1395y(b)(2)(B)(iii). We refer to this part of the Medicare statutory scheme as the "cause of action provision." The cause of action provision allows the United States to seek reimbursement from "the beneficiary herself." *Zinman* [*v. Shalala*], 67 F.3d [841,] 844-45 [(9th Cir. 1995)]; *see also* 42 C.F.R. § 411.24(g) (**Medicare "has a right of action to recover its payments from any entity, including a beneficiary . . . [or] attorney . . . that has received a primary payment.").**

747 F.3d at 1105 (emphasis added); *see also United States v Harris*, No. 5:08-cv-102, 2009 WL 891931, **4-5 (N.D. W.Va. Mar. 26, 2009) (holding that beneficiary's attorney was individually liable for reimbursing Medicare the amount of conditional payments), *aff'd*, 334 F. App. 569 (4th Cir. 2009).

[v] This writer requested a pre-settlement waiver based on equitable grounds, namely, that the amount to be received by the plaintiffs would be exceedingly small compared to the amount of the lien. A representative of the Benefit Coordination and Recovery Center (BCRC) advised via telephone that such a request could only be filed after the settlement and the final demand by CMS. In other words, the BCRC cannot handle legal issues.

[vi] *See Hadden v. United States*, 661 F.3d 298 (6th Cir. 2011); 20 C.F.R. § 404.506.

[vii] *See* 28 U.S.C. § 1331 (federal question jurisdiction).

[viii] Section 1395y(b)(3)(A) provides that "[t]here is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A)."

[ix] *See* 42 C.F.R. § 411.22 (Reimbursement obligations of primary payers and entities that received payment from primary payers). That regulation provides:

> (a) A primary payer, and an entity that receives payment from a primary payer, must reimburse CMS for any payment if it is demonstrated that the primary payer has or had a responsibility to make payment.
> (b) A primary payer's responsibility for payment may be demonstrated by—
> (1) A judgment;
> (2) A payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary payer or the primary payer's insured; or
> (3) By other means, including but not limited to a settlement, award, or contractual obligation.
> (c) The primary payer must make payment to either of the following:
> (1) To the entity designated to receive repayments if the demonstration of primary payer responsibilities is other than receipt of a recovery demand letter from CMS or designated contractor.
> (2) As directed in a recovery demand letter.

See also 42 C.F.R. § 411.24(g) (recovery of conditional payments).

[x] The MSP provides the Government with a statutory right of action to recover conditional payments:

> In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. **The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity.** In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.

§ 1395y(b)(2)(B)(iii) (emphasis added).

[xi] *See Haro v. Sebelius* and *United States v Harris*, *supra,* footnote iv.

[xii] *See* 42 U.S.C. § 1395w-22(c)(1)(H), (f); 42 C.F.R. § 422.560.