

Understanding Medicare Advantage Plans and Their Right to Reimbursement

LITIGATION AT SUNRISE

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Franklin P. Solomon, Cherry Hill, NJ

MEDICARE SUBSTITUTE PLANS (Medicare Advantage)

- * Medicare Advantage (formerly Medicare+Choice) is privately issued insurance subsidized by the government, offered in lieu of “traditional” Medicare.
- * MA plans typically offer additional benefits, such as expanded medical expense and prescription drug coverage.
- * MA plans are specifically governed by Part C of the Medicare statute

MAO as Secondary Payer

- * Where payment would be secondary under the Medicare Secondary Payer Act, a Medicare Advantage organization may charge, in accordance with the charges allowed under a law, plan, or policy described in such section—
 - * (A) the insurance carrier, employer, or other entity which under such law, plan, or policy is to pay for the provision of such services, or
 - * **(B) such individual to the extent that the individual has been paid under such law, plan, or policy for such services.**

Care Choices HMO v. Engstrom, 330 F.3d 786 (6th Cir. 2003)

- * Part C statute does not create a private cause of action to enforce reimbursement claims.
- * Part C statute does not confer any affirmative right to reimbursement; any reimbursement claim must be based on contract provision.
 - * *See also Nott v. Aetna*, 303 F.Supp.2d 565 (EDPA 2004)
- * *Comment: To the extent MA plan contract may require reimbursement, it is properly limited by the Part C Secondary Payer provision.*

Parra v. Pacificare of Arizona, Inc., 715 F.3d 1146 (9th Cir. 2013)

- * Reiterates holdings of *Engstrom* and *Nott*.
- * Neither statutory reference to MSPA nor 42 CFR §422.108(f), granting MAOs “the same rights to recover ... that the Secretary exercises,” create any substantive right to a private cause of action.
- * Medicare Act does not authorize creation of a common law of subrogation for plan claims.

In Re Avandia, 685 F.3d 353 (3d Cir. 2012)

- * Allows MAOs to access “private cause of action” provision under MSPA, 42 U.S.C. § 1395y(b)(3)(A).
- * By its terms, private cause of action is exercisable only against a “primary plan” that has failed to make payment.
 - * *But see Collins v. Wellcare*, 2014 WL 7239426 (E.D. La.)

Humana Medical Plan v. Western Heritage Ins. Co., 832 F.3d 1229 (11th Cir. 2016)

- * Follows 3d Circuit's *In Re Avandia* decision
- * Allows MAO to bring claim against liability carrier under MSPA private cause of action
- * Assesses double damages for liability carrier's failure to "provide for appropriate reimbursement"
 - * Insurer had constructive knowledge and ability to discern nature of coverage
 - * Holding funds in trust doesn't suffice

The Litigation Ahead

- * ***Humana Ins. Co. v. Paris Blank LLP***, 187 F.Supp.3d 676 (E.D. Va. 2016)
 - * Denies motion to dismiss MAO's claim against plaintiff's attorney under MSP private cause of action
 - * Double damages

The Litigation Ahead

- * ***MSPA Claims 1, LLC v. Century Surety Co.***, 2017 WL 99828 (S.D. Fla., March 15, 2017)
 - * Class action may proceed against a liability insurer under MSPA for its alleged failure to reimburse a Medicare Advantage plan when settling personal injury claims made by plan enrollees.

MSP Private Cause of Action

*** 42 U.S.C. § 1395y(B)(3)(A):**

“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).”

MSP Private Cause of Action

- * *Bio-Medical Applications of Tenn. v. Central States*, 656 F.3d 277 (6th Cir. 2011)
 - * Provider sued health plan as participant's assignee
- * *In Re Avandia*, 685 F.3d 353 (3d Cir. 2012)
 - * Medicare Advantage plan sued mass tort defendant
- * *Michigan Spine & Brain Surgeons v. State Farm Auto*, 758 F.3d 787 (6th Cir. 2014)
 - * Provider sued automobile no-fault insurer
 - * ***a primary plan fails to reimburse when it “causes Medicare to step in and (temporarily) foot the bill”*** (quoting *Bio-Medical*).

MSP Private Cause of Action

- * No-Fault and Liability Insurers are Named Defendants
 - * No-fault insurance coverage provided by defendant PIP CARRIER – or – liability insurance coverage provided by defendant LIABILITY CARRIER is a “primary plan” with respect to Medicare for payment of medical expense benefits on behalf of plaintiff
- * MSP Private Cause of Action is NOT a qui tam action.
- * Must be brought on behalf of a claimant who has actually suffered a loss.

Pleading the MSP Private Cause of Action

- * As a direct and proximate result of the failure and refusal of defendant PIP/LIABILITY CARRIER to make payment with respect to items and services required for diagnosis and treatment of the injuries incurred by plaintiff in the aforesaid accident, plaintiff has been required to seek and rely on conditional benefits of the Medicare program, which has exposed and will in the future expose plaintiff to additional costs and financial liability, including but not limited to liability to the Medicare program, all to the detriment of plaintiff.



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