MEDICARE ADVANTAGE PLANS

Third Circuit Rules that Medicare Advantage Plans Have Right to Private Cause of Action under MSP

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In January 2012, we published an article in the *Logan Letter* informing you that the U.S. District Court for the Southern District of Florida issued a decision in the matter of *Humana Medical Plan, Inc. vs. Mary Real* (Case No. 10-21 493-Civ-Cooke/Bandstra) that concluded Medicare Advantage Plans ("MAP") could not assert the same recovery rights under the Medicare Secondary Payer (MSP) statute as Congress provided to the Department of Health and Human Services. On June 28, 2012 the Third Circuit U.S. Court of Appeals rendered a conflicting decision in the case of In *re: Avandia Marketing, Sales Practices and Products Liability Litigation GlaxoSmithKline, LLC and GlaxoSmithKline, PLC No. 11-2664.* Humana was appealing a decision made by the U.S. District Court for Eastern Pennsylvania, which essentially came to the same conclusion as found in *Humana.*

In reaching its decision, the Court concluded that the Medicare Secondary Payer statute (42 U.S.C. §1395y(b)(3)(A)) did in fact give Humana the right to a "Private Cause of Action." The section of the statute the Court relied upon reads in part…

> *Private cause of action. 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).*** [emphasis added]

It is curious that the Court reached this decision because Paragraph (2)(A)(iii) makes it clear that only the United States can take action to recover payments. The section provides…

> *iii.* ***Action by United States****.* [emphasis added] *In order to recover payment under this title action against any or all entities that are or were required or responsible…to make payment with respect to the same item or service (or any portion thereof) under the primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity.*

It is interesting to note that any action required to be taken to enforce federal statutes can only be taken by the U.S. Attorney General. Neither Congress or this statute has granted any other governmental entity or agency such power and they clearly have not granted the same authority to the private sector.

The Court's decision also contains the following statement:

> CMS regulations state that an "MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter." 42 C.F.R. § 422.108. The plain language of this regulation suggests that the Medicare Act treats MAOs the same way it treats the Medicare Trust Fund for purposes of recovery from any primary payer. In this circumstance, we are bound to defer to the duly-promulgated regulation of CMS.

The Code of Federal Regulations (CFR) are created and used by executive agencies of the government to "clarify" the intent and scope of federal statutes, which an agency is charged with administrating or enforcing. Statutes are the actual laws passed by Congress; regulations are the terms and conditions that describe how the statutes will be administered or enforced. It is beyond Congress' ability to be experts in every field that it may be called upon to legislate. Federal agencies are charged with the faithful implementation and enforcement of the laws [statutes] passed by Congress. That said, these same agencies do not have the power or authority to convey that which Congress bestowed upon them to the private sector. In other words, because the MSP statute does not address anything about Medicare advantage plans or organizations, CMS does not have the authority to give MAP the same recovery rights as Congress granted to the Secretary of Health and Human Services. Even then, the Secretary of Health and Human Services must refer the recovery action to the U.S. Attorney General.

While it is true that Medicare risk plans have been in operation since 1972, eight years before the MSP statute was signed into law, that statute makes no mention of Medicare risk plans, advantage plans or advantage organizations. The Court concluded that since the phrase "private cause of action" was contained in the statute, it must apply to private insurers. By all appearances, it seems the court mistakenly relied more on 42 C.F.R. § 422.108 to draw this conclusion than it did on the statute itself.

In most, if not all, jurisdictions across the country, the MAP sells a policy to Medicare beneficiaries that have been approved by each state's insurance department. Recovery rights are traditional subrogation liens and managed within the state judicial system. Several federal cases support this approach including *Care Choices HMO v. Engstrom, 330 F. 3d 786(6th Cir. 2003); Nott v. Aetna v. U.S. Healthcare Inc., 303 F.Supp.2d 565 (E.D. Pa. 2004); and Parra v. PacificCare of Arizona, Inc. No. CV 10-008-TUC-DCB, 2011 WL 1119736 (D.Ariz., March 28, 2011)*.

It seems clear that the Third Circuit has rendered a decision that is at odds with decisions made by its colleagues in the Sixth Circuit and other jurisdictions. That, coupled with the importance of the topic, should cause the United States Supreme Court to grant a Petition for Certiorari. In the meantime, as you monitor this decision that is only applicable in the federal courts of the Third Circuit, it is worth urging caution as you address each subrogation claim. We underscore the advice we provided in January, which was to request a copy of the Medicare Advantage Plan's policy language that allows them to assert a subrogation lien. Once you have validated the nature and extent of the lien, you should handle the claim in the same manner as you would any other health care insurer's lien. If the MAP asserts a claim for interest or double damages pursuant to the terms of the MSP, we recommend you seek immediate legal counsel.

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