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Call to Action on the Private Cause of Action

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General MAP Background

Under Part C of the Medicare Act, a Medicare beneficiary may elect to receive benefits through a private Medicare Advantage Organization (MAO) that has a contract with the government to provide these benefits on its behalf.

CMS pays the MAO a fixed amount per enrollee, to provide Medicare benefits.

- 42 USC §§1395w-21, 1395w-23

MAO delivers Medicare benefits and assumes the risks related thereto.

- *Collins v Wellcare Health Plans*, 73 F.Supp.3d 653 (ED La. 2014).

But just like Medicare, MAOs must identify primary payers and seek reimbursement when appropriate.

- §1395w-22(a)(4), 42 CFR 422.108

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MAO as Secondary Payer

Just like traditional Medicare, when MAO determines a primary plan has not made or cannot reasonably be expected to make payment, MAO may make a conditional payment that may be subject to reimbursement by the primary plan.

§ 1395w-22. Benefits and beneficiary protections
(a)(4) Organization as secondary payer

[MAO may] charge or authorize the provider of such services to 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.

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§ 422.108 Medicare secondary payer (MSP) procedures.

(a) Basic rule. CMS does not pay for services to the extent that Medicare is not the primary payer under section 1862(b) of the Act and part 411 of this chapter.

(b) Responsibilities of the MA organization. The MA organization must, for each MA plan -

(1) Identify payers that are primary to Medicare under section 1862(b) of the Act and part 411 of this chapter;

(2) Identify the amounts payable by those payers; and

(3) Coordinate its benefits to Medicare enrollees with the benefits of the primary payers, including reporting, on an ongoing basis, information obtained related to requirements in paragraphs (b)(1) and (b)(2) of this section in accordance with CMS instructions.

§ 422.108 Medicare secondary payer (MSP) procedures (con't)

(c) Collecting from other entities. The MA organization ***may bill***, or authorize a provider to bill, other individuals or entities for covered Medicare services for which Medicare is not the primary payer, as specified in paragraphs (d) and (e) of this section.

(d) Collecting from other insurers or the enrollee. If a Medicare enrollee receives from an MA organization covered services that are also covered under State or Federal workers' compensation, any no-fault insurance, or any liability insurance policy or plan, including a self-insured plan, the MA organization ***may bill***, or authorize a provider to bill any of the following -

(1) The insurance carrier, the employer, or any other entity that is liable for payment for the services under section 1862(b) of the Act and part 411 of this chapter.

(2) The Medicare enrollee, to the extent that he or she has been paid by the carrier, employer, or entity for covered medical expenses.

(e) Collecting from group health plans (GHPs) and large group health plans (LGHPs). An MA organization ***may bill*** a GHP or LGHP for services it furnishes to a Medicare enrollee who is also covered under the GHP or LGHP and ***may bill*** the Medicare enrollee to the extent that he or she has been paid by the GHP or LGHP.

§ 422.108 Medicare secondary payer (MSP) procedures (cont.)

(f) MSP rules and State laws. Consistent with § 422.402 concerning the Federal preemption of State law, the rules established under this section supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to MA plans. A State cannot take away an MA organization's right under Federal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer. The 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***.

Subpart B - Insurance Coverage That Limits Medicare Payment: General Provisions (§§ 411.20 - 411.39)

Subpart C - Limitations on Medicare Payment for Services Covered Under Workers' Compensation (§§ 411.40 - 411.47)

Subpart D - Limitations on Medicare Payment for Services Covered Under Liability or No-Fault Insurance (§§ 411.50 - 411.54)

Why Not GHP?

Subpart E - Limitations on Payment for Services Covered Under Group Health Plans: General Provisions (§§ 411.100 - 411.130)

Private Cause of Action

If the primary plan fails to make payment, MSP Act provides for 2 separate private causes of action:

- 42 USC § 1395y(b)(2)(B)(iii) exercised by the United States
- 42 USC § 1395y(b)(3)(A) exercised by others who can demonstrate standing

Because MAOs only have the recovery rights of the Secretary and are not extended the full resources of the federal government, they must use the latter to seek redress in federal court

MSP is NOT a qui tam statute so standing is most often the fatal flaw

Private Cause of Action

(3) Enforcement
(A) 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).

(1) Requirements of group health plans

(2)(A) Medicare secondary payer – 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 payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1)…

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In re Avandia Mktg., Sales Practices & Prods. Liability Litig., 685 F.3d 353 (3rd Cir. 6/28/12).

- Appeal from US District Court for the Eastern District of PA ruling that the MAO could not recover due to express language of statute granting only the United States the right to file suit [District Court found that the statute's silence on the existence of a private right of action for MAOs "does not create ambiguity, but rather indicates [Congress's] intent not to create a private right of action for MAOs].

- MAOs must file private cause of action under § 1395y(b)(3)(A), not § 1395y(b)(2)(B)(iii) which is limited to the United States.

- Appellate court stated that even if it were to find that the provision was ambiguous, it would defer to the regulations issued by CMS which make clear that the provision extends the private cause of action to MAOs (*Chevron*).

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Medicare
7500 Security Boulevard, Mail Stop C4-21-26
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

CENTER FOR MEDICARE

DATE: December 5, 2011

TO: Medicare Advantage Organizations and Prescription Drug Plan Sponsors

FROM: Danielle R. Moon, J.D., M.P.A.
Director, Medicare Drug & Health Plan Contract Administration Group

Cynthia Tudor, Ph.D.
Director, Medicare Drug Benefit and C&D Data Group

SUBJECT: Medicare Secondary Payment Subrogation Rights

The purpose of this memorandum is to summarize and convey our support for our regulations giving Medicare Advantage organizations (MAOs) and Prescription Drug Plan (PDP) sponsors the right, under existing Federal law, to collect for services for which Medicare is not the primary payer. 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 Medicare Secondary Payer (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.

CMS' response to failed litigation was to keep pursuing it

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Comment: Two commenters requested that the M+C regulations provide that Medicare secondary payer regulations apply generally to M+C organizations. One of these commenters also favored a cross reference to the Medicare overpayment regulations.

Response: M+C organizations are to apply only the Medicare secondary payer (MSP) rules as found in section 1852(a)(4) of the Act and in § 422.108. Other MSP provisions do not apply to M+C organizations, and they do not have recourse to them. However, M+C organizations are expected, as provided under § 422.108(a), to look to section 1862(b) of the Act and 42 CFR Part 411 to determine whether Medicare or some other party is the primary payer.

Since section 1852(a)(4) of the Act and § 422.108 are the only MSP provisions that apply in the M+C context, M+C organizations would pursue their Federally authorized claims under State law. Federal preemption of State laws in the MSP context would occur only to the extent a State law would prohibit an M+C organization from complying with what the Federal rules authorize (that is, from billing and recovering from specified third parties, and from beneficiaries to the extent they have received third party payments that are primary to Medicare under MSP rules). These recoveries are not made on behalf of the United States and, therefore, the Federal overpayment rules cited by the commenter do not apply.

CMS stated in its response that MAOs claims lie in state court

Humana Medical Plan, Inc. v. Western Heritage Insurance Company, 2016 U.S. App. LEXIS 14509 (11th Cir. 2016).

- Court found that the settlement triggered Western Heritage's responsibility to pay Medicare even though it is what terminated its liability to claimant
- Western Heritage knew about MAO debt, therefore had obligation to independently reimburse Medicare and already paying Mrs. Reale irrelevant due to 42 CFR 411.24(i)
- Entitled to full demand because beneficiary failed to timely appeal – administrative process forever waived
- Double damages "required" in private causes of action under 1395y(b)(3)(A) because statute says "shall be in an amount double the amount otherwise provided."
- Distinguished by: Netro v. Greater Balt. Med. Ctr., Inc.891 F.3d 522, 2018 U.S. App. LEXIS 14835. Double damages meant for recalcitrant payers, not those trying to pay but amount in dispute

SO WHERE DOES THIS LEAVE US?

- MA is the same as Medicare, but it's not
- MA obligated to exclude & entitled to recover, but without access to all the resources or rights of the federal government
- Courts believe Congress meant to give MA a PCA even though express language to the contrary, particularly since CMS said so
- However CMS also stated that MA recoveries lie in state count, but conveniently forgot
- No court in any jurisdiction has been willing to challenge Avandia

Take advantage of the ambiguity in the world. Look at something and think what else it might be.

Roger von Oech

There is no greater impediment to the advancement of knowledge than the ambiguity of words.

~ Thomas Reid

Neurosis is the inability to tolerate ambiguity.

Sigmund Freud

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…with a Colossal Waste of Judicial Resources

Meet

Plaintiffs:

MSP Recovery, LLC
MSPA Claims I, LLC
MAO-MSO Recovery II, LLC
MSP Recovery Claim Series, LLC

Sampling of Federal Judges:

Federico A. Moreno (14) S.D. Florida, Miami
Ursula Ungaro-Benages (11) S.D. Florida
Cecilia M. Altonaga (10) S.D. Florida
Edwin G Torres (8)
Charles R. Wilson (6). 11th Cir App.
Jill Anne Pryor (5) 11th
Patricia A. Seitz (5) S.D. Florida
Christina A. Snyder (5) C.D. Ca. (Farmers)
Joe Billy McDade (5) C.D. IL (State Farm)
Robert Nichols Scola Jr. (4) S.D. FL
Kathleen Mary Williams (4) S.D. FL
Marcia G. Cooke (4) S.D. FL
K. Michael Moore (3) S.D. FL (Tower Hill)
Joan A. Lenard (3) S.D. FL
James Lawrence King (3) S.D. FL
Adalberto Jordan (3). 11th Cir App
Paul L. Abrams (3) C.D. CA (Farmers)
R. Lanier Anderson (1) 11th Cir App

Sampling of Defendants:

USAA
Travelers
ACE
State Farm
Farmers
QBE Holdings
Plymouth Rock Assur.
AIX Specialty
Auto-Owners
Hanover
Esurance P&C
Dairyland Ins.
Northland Ins.
Liberty
Mt. Hawley Ins.
Amica Mutual
Mercury
First Acceptance
Philadelphia Indem.
Infinity
Owners Ins.
Allstate
Northland Ins.
Ameriprise Ins.
Metro P&C
Southern-Owners Ins.
OneBeacon
Sentry
Sentinel
Am. Transit Ins.
Chubb
Safeco
Scottsdale
Sec. National
Ocean Harbor
IDS

Pharma Defendants:

Boston Sci. Corp.
Sanofi Aventis
CR Bard
Alere
Cook
Boehringer Ingelheim
Eli Lilly
Jazz Pharma
Warner Chilcott
Mallinckrodt
Coloplast

STANDING

MSP not qui tam so must have standing, and have it at the time of filing

Must demonstrate injury-in-fact, that the injury in question is fairly traceable to the defendant's challenged action, and that the injury is one that could be redressed by a favorable decision.

Alleging pattern of behavior to avoid repayments without providing many particulars

From the outset of this litigation, the question of standing has been hotly disputed - did not name any exemplar beneficiaries or their corresponding assignor Medicare Advantage Plans. Some cases have 1 token beneficiary to argue there's more where that came from if just given permission to fish

ASSIGNMENT

Plaintiffs operating off of an assignment of the MAO's recovery rights – they own the right to seek reimbursement of the debt

Assignment is a property right, not contract right
- couldn't be repudiated by receiver

Assignment must be valid at time of filing

- Early cases failed because several subsequent assignments to related entities occurred despite not being approved by the assignor per contract
- Only MAO has the right to recover, so assignment from downstream entities such as MSO not adequate
- Later obtaining assignment from the MAO that the MSO operates under still insufficient since didn't have it at the time of filing

Doesn't want to disclose assignees because he doesn't have them yet – hoping class certification will encourage other MAOs to participate

NOTICE

Alleged obligation to notify MAO just as Primary payer would CMS

Alleging pattern of behavior to avoid payments – because they did not notify the MAO, it was implied they were intentionally avoiding reimbursement

- No statutory obligation to notify MAO / only to notify CMS
- MAO will get subset of that reported data eventually from CMS, but in no way is the payer obligated to report it directly

Alternatively, plaintiffs also allege proper reporting to equate to admission of responsibility for reimbursement

- Section 111 only requires that RRE identify insurance claims involving Medicare beneficiaries and report them. It does not necessarily mean the RRE suddenly accepts unlimited liability for payments

STATUTE OF LIMITATIONS

Alleged statute of limitations of 6 years starting at point upon which MAO becomes aware of debt

Using Manning precedent, based upon False Claims Act

- Since that time, SMART Act was passed removing uncertainty
- Even if FCA was available, would not be available to MAO as its payments are not improperly induced overpayments made by the federal government

SMART Act SOL is 3 years from the date that CMS received Section 111 reporting data from the RRE (regardless of when MAP received it from CMS)

CLASS ACTION

Wants to pursue this as a class so not to have to actually prove responsibility or actual damage (and make lots more attorneys' fees)

<u>Need to prove:</u>

Numerosity – class so numerous that joinder impracticable
Commonality – questions of law or fact common to class
Typicality – claims or defenses common to the class
Adequacy of Counsel – fairly and adequately protect interests of the class
Predominance – questions common to class predominate over questions as to individual members of the class
Superiority – better than other methods to resolve

Only 2 cases certified, then later overturned on appeal (Ocean Harbor & IDS)

DAMAGES

Allege they don't have to prove anything other than MAO was not paid (legal distinction of 1395y(b)(2)(B)(iii) demonstration of responsibility vs. 1395y(b)(3)(A) failure to pay)

- Claim everything following DOL and force defendant to disprove the unrelated or noncompensible
- Claim right to recover full charges rather than what MAO actually paid (literal reading of 42 CFR 411.31)
- Class argument is that it's too burdensome to ferret out all of the details so just assume MAO is entitled when a data match occurs

DOUBLE DAMAGES

Originally target of litigation was Florida PIP (no-fault), so intent was to recover 2x state law mandated PIP limit of $10,000

- Argued that even if exhausted limits, still have to pay because its Medicare
- Attempted to preserve right to double damages by filing suit while demand letters were still in the mail (Home Depot/Estate of McDonald theory)
- Some courts ruling mandatory to double / Other more recent cases said meant for recalcitrant payers

LEGAL ISSUES YET TO ARISE

Because cases stuck at procedural aspects, no merits arguments have been made

- If parity with Medicare is really the issue, then understand that Medicare can't bring cases with the ease that these MAOs are (federal debt)
- Not only do the MAOs' statutorily authorized limited powers of Secretary apply only to Subparts B – D of title 411, but can executive branch powers even be "assigned" to private entities?
- Insurance law, WC law, state law – federal preemption cannot supersede the law that gives rise to the reimbursement obligation (due process)
- Medicare beneficiaries enrolled in Part C have greater recovery rights than those enrolled in Parts A & B?? (equal protection)

TAKE AWAYS

Negotiate in good faith

- You know medical treatment was obtained, you can tell someone paid & you figured out it wasn't Medicare proper - so keep looking
    - Ask for a copy of the Medicare card
    - Start calling around
    - Ask medical providers for billing information

TAKE AWAYS

Communicate

You've received a demand letter, but:

- You don't have a claim on file
- Treatment not related to your claim
- No information provided in demand, only amount demanded
- Claim closed / Policy limits exhausted already
- You still don't think MAOs are entitled to reimbursement

Respond – demonstrate for the courts that you were willing to investigate and would ultimately reimburse if responsible

- Ask for more information
- Explain why you don't believe you are responsible

TAKE AWAYS

Understand

MAOs are in as adverse position in this process as we are

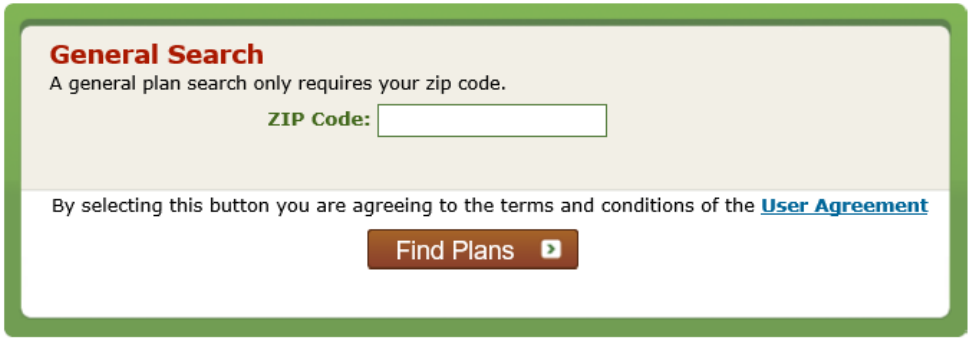
Don’t receive real time Section 111 data from CMS and don’t receive all the data reported

MAOs aren’t bound by federal debt recovery laws so have more flexibility

Appreciate the good faith effort to cooperate

Beneficiary/Attorney Won't Identify Plan?

CMS Medicare Plan Finder



https://www.medicare.gov/find-a-plan/questions/home.aspx

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Contacting MA Plans (Alternatives to Contact Centers)

UnitedHealth Optum (866) 876-2791	**Aetna** (Acquired by CVS) The Rawlings Group (502) 587-1279 CVS (Silverscript) Part D claimsescalation@cvscaremark.com
Kaiser The Rawlings Group (502) 587-1279 Equian (Acquired by UnitedHealth 2019) (800) 598-2488	**Anthem** Meridian Resource Group (800) 645-9785 mrcadmin@meridianresource.com
Cigna-HealthSpring (Acquired Express Scripts Part D) The Rawlings Group 1-855-744-0223	**Others** Ask for Subrogation, COB or Legal Dept.

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Contacting Humana

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