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INSURERS MUST FERRET OUT CLAIMS INVOLVING MEDICARE ADVANTAGE ORGANIZATIONS OR RISK PAYING THREE TIMES

By Daniel R. Lever

This article discusses a case that involves secondary payments made by a Medicare Advantage Organization ("MAO"), which may lead to insurers paying three times for the same damages. Two federal circuits and numerous federal district courts now agree that a liability insurer can still be found responsible for reimbursing an MAO, even if there is a contrary agreement of the parties regarding the responsibility for the reimbursement of secondary payments. Moreover, pursuant to federal regulations, any recovery by an MAO must be in double damages, which would result in the tortfeasor's liability insurer paying three times for the same damages. Further, although not yet explicitly held by any court, the federal regulations applicable to a liability insurer are equally applicable to self-insured companies. Accordingly, it is imperative that an insurer, whether self-insured or otherwise, (1) complete its own due diligence into secondary payments and the existence of an MAO and (2) take steps to ensure that an MAO is reimbursed before settling a case.

Recently, the U.S. Court of Appeals for the Eleventh Circuit explicitly held that the Medicare Secondary Payer Act ("MSP") allows a Medicare Advantage Organization ("MAO") to sue a tortfeasor's liability insurer in federal court to recover secondary payments not reimbursed by the beneficiary.[1] And an MAO's right to sue exists even if the tortfeasor's liability insurer's settlement agreement specifically contemplates these damages. Moreover, the Eleventh Circuit ruled that any recovery by an MAO *must be in double damages*, which resulted in the tortfeasor's liability insurer paying three times for the same damages!

The Eleventh Circuit's ruling should cause immediate concern for liability insurers and self-insured companies[2] settling cases that involve secondary payments generally and MAOs specifically. However, the Eleventh Circuit's ruling is not novel and comports with an opinion issued by the Third Circuit over four years ago, which has also been adopted by many other district courts.[3] But now that two circuits have explicitly recognized that the MSP allows an MAO to assert a private cause of action against a tortfeasor's liability insurer to recover secondary payments, it is clear that insurers must ferret out claims involving MAOs or risk paying three times. The following article explains the history and meaning of the MSP and an MAO, addresses the recent opinion of the Eleventh Circuit and its extension to self-insured companies, and sets forth best practices to minimize an insurer's risk of paying three times.

What is the MSP and what is an MAO?

Traditional Medicare consists of Parts A and B of the Medicare Act. These are the fee-for-service provisions entitling eligible persons to have the Centers for Medicare & Medicaid Services ("CMS") directly pay medical providers for their hospital and outpatient care. Part C is the Medicare Advantage program under which Medicare-eligible persons may elect to have an MAO (rather than CMS) provide Medicare benefits. Part D provides for prescription drug coverage, and Part E contains generally applicable definitions and exclusions. One such exclusion is the MSP.

The MSP states that when the primary plan does not fulfill its duties, the Secretary of Health & Human Services may make a payment conditioned on reimbursement. If the Secretary makes a conditional payment, the primary plan must reimburse the Secretary. The MSP also establishes and defines a government cause of action to recover from a primary plan. The MSP does not mention MAOs and refers almost exclusively to the Secretary, the United States, and the Medicare trust fund.

Part C, also known as the Medicare Advantage program, was enacted in 1997, 17 years after the MSP and 11 years after the MSP private cause of action. Under the Medicare Advantage program, a private insurance company, operating as an MAO, administers the provision of Medicare benefits pursuant to a contract with CMS. CMS pays the MAO a fixed fee per enrollee, and the MAO provides at least the same benefits as an enrollee would receive under traditional Medicare.

Humana v. Western Heritage Background

Humana Medical Plan, Inc. ("Humana") operates as an MAO. In January 2009, Mary Reale, a Humana Medicare Advantage plan enrollee, was injured at Hamptons West Condominiums ("Hamptons West"). Ms. Reale sought medical treatment for her injury, and her medical providers billed Humana. Humana paid $19,155.41.

In June 2009, Mary Reale and her husband sued Hamptons West in Florida state court for her injury. In March 2010, while the Reales' suit was pending and in light of a pending settlement between Hamptons West and the Reales, Humana issued to Ms. Reale an Organization Determination[4] in the amount of $19,155.41. The basis for Humana's reimbursement request was the MSP. Although an administrative appeal process was available, no party appealed Humana's Organization Determination.

On April 20, 2010, in return for $115,000.00 from Hamptons West and its liability insurer, Western Heritage Insurance Co. ("Western"), the Reales released Hamptons West and Western. The Reales represented in the settlement agreement that there was no Medicare or other lien or right to subrogation. The Reales also agreed to indemnify Hamptons West and Western against any Medicare or other lien or right to subrogation.

Humana then sought reimbursement for the $19,155.41. First, Humana sued the Reales and their attorney. However, Humana voluntarily dismissed that action after the court held that an MAO does not have a private cause of action to recover reimbursement from a beneficiary under the MSP.[5]

Although the record is not clear, it appears that Western and Hamptons West learned of Humana's efforts to seek reimbursement for the previously undisclosed payments and, in response, attempted to make Humana a payee on the settlement draft to the Reales. The Reales refused and sought sanctions against Hamptons West for failing to comply with the settlement agreement. Thereafter, Hamptons West agreed to a stipulated order under which Humana would not be a payee on the check, but the Reales' attorney would hold $19,155.41 in trust pending resolution of the Reales' litigation. Hamptons West and Western then tendered the $115,000.

On June 4, 2010, the Reales sued Humana in state court seeking a declaration as to the amount they owed Humana. Applying Florida law regarding collateral indemnity and subrogation, the trial court held that Humana was entitled to $3,685.03. Humana appealed, and in December 2015, Florida's Third District Court of Appeal reversed for lack of jurisdiction.

Having failed to secure reimbursement from Ms. Reale, Humana sued Western in federal court. On December 29, 2014, Humana moved for summary judgment. On March 16, 2015, the district court granted summary judgment in favor of Humana, finding that the MSP private cause of action is available to an MAO and that Humana is entitled to double damages, $38,310.82.[6] The district court entered judgment in favor of Humana, and Western appealed.

Humana v. Western Heritage: The Eleventh Circuit Decision

The Eleventh Circuit affirmed and held that the MSP private cause of action provision permits an MAO to sue a primary plan that fails to reimburse an MAO's secondary payment. In other words, an MAO under Part C has the same right as the federal government under Part B to sue a primary plan for damages under the MSP if the primary plan funds a settlement but fails to reimburse the MAO for secondary payments.

In reaching this conclusion, the court first determined that the MSP private cause of action is available "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)."[7] The court then reasons that although paragraph (2)(A) does not expressly obligate primary plans to make payments, the defined term "primary plan" presupposes an existing obligation (whether by statute or contract) to pay for covered items or services. Therefore, a primary plan "fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraph[ ] ... (2)(A)," when it fails to honor the underlying statutory or contractual obligation.

The court then concluded that the above mentioned paragraphs work together to establish a "comprehensive MSP scheme." Paragraph (2)(A) alters the priority among already-obligated entities and contemplates primary plans fulfilling their payment obligation. Paragraph (2)(B) addresses the Secretary's options when a primary plan fails to fulfill its payment obligation. And paragraph (3)(A), the MSP private cause of action, grants private actors a federal remedy when a primary plan fails to fulfill its payment obligation, thereby undermining the secondary-payer scheme created by paragraph (2)(A). The court then specifically held that the MSP private cause of action provision was broad enough to permit an MAO to sue a primary plan that fails to reimburse an MAO's secondary payment. The Eleventh Circuit explained that it saw "no basis to exclude MAOs from a broadly worded provision that enables a plaintiff to vindicate harm caused by a primary plan's failure to meet its MSP primary payment or reimbursement obligations."

Double Damages – Forced to Pay Three Times

Having found that Humana could bring its claim under the MSP private cause of action provision, the Eleventh Circuit addressed the district's court entry of summary judgment and award of double damages. First, the court held that the MSP private cause of action not only permits, but requires an award of double damages when a primary plan fails to provide for primary payment or appropriate

reimbursement. The court explained that, unlike the government's cause of action under Part B, the private cause of action provision uses the mandatory language "shall" to describe the damages amount, which is a mandate rather than an option. Second, the court rejected Western's argument that the amount of damages were in dispute. In doing so, the court pointed out that the damages were statutorily fixed and that an administrative appeals process was not initiated by any of the parties.

Extension to Self-Insured Companies

The Eleventh Circuit's opinion could be read narrowly to support an argument that it only applies to "liability insurers." However, the court further states, citing to 42 U.S.C. § 1395y(b)(3)(A), that the "MSP private cause of action is available '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).'"[8] Federal regulations define a "primary plan" as "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."[9] Federal regulations further state that 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."[10] Accordingly, it appears that an MAO's right to bring a cause of action to recover secondary payments also extends to self-insured companies.

Lessons Learned

The Eleventh Circuit rejected several arguments made by Western that are important lessons learned. *First*, the court rejected Western's argument that it did not fail to provide for payment or appropriate reimbursement because Western attempted to make Humana a payee on the settlement check but was ordered instead to pay $19,155.41 into trust pending resolution of a dispute regarding the amount of Humana's entitlement. Obtaining guidance from the CMS regulations, the court held that Western's payment to Ms. Reale or any other party is insufficient to extinguish its prospective reimbursement obligation to Humana. The court explained that if a beneficiary or other party fails to reimburse Medicare within 60 days of receiving a primary payment, the primary plan "must reimburse Medicare even though it has already reimbursed the beneficiary or other party."[11] The court determined that this regulation applies equally to an MAO.[12] Accordingly, 60 days after Western tendered the settlement to the Reales and their attorney, because no party reimbursed Humana, Western became obligated to directly reimburse Humana.

Second, the court rejected Western's argument that it did not fail to provide for payment or appropriate reimbursement because Western lacked constructive knowledge that Medicare made a payment. The court was quick to note that Western's first argument forecloses its second and stated that Western's attempt to list Humana as a payee on the settlement check indicates that Western had actual knowledge of Humana's lien. The court also rejected Western's attempt to evade this conclusion by asserting its ignorance of Humana's status as an MAO. The court saw no value in this distinction, determined that Western had actual knowledge of Humana's claim, and noted that, as a settling party in tort litigation, Western had the ability to discern the precise nature of Ms. Reale's health insurance coverage.

Best Practices

This case highlights the fact that an insurer can still be found responsible for reimbursing an MAO even if there is a contrary agreement of the parties regarding the responsibility for the repayment of secondary payments. Therefore, simply including vague protective wording in a release is not enough. Instead, an insurer must complete its own due diligence into secondary payments and the existence of an MAO. And, as the Eleventh Circuit points out, Florida Rules of Civil Procedure specifically allow an insurer to obtain discovery on these issues.[13]

Accordingly, written discovery requests related to MAOs should be served and an independent investigation into the existence of an MAO for each and every plaintiff or claimant should be completed. If secondary payments were issued, the best practice is for an insurer to make a direct payment to an MAO. Alternatively, a holdback could be negotiated prior to settlement, which would require the plaintiff or claimant to issue payment to the MAO. However, based upon the Eleventh Circuit's recent opinion, it is imperative that the holdback is negotiated prior to settlement and that the release specifically state the terms of the holdback and payment. Otherwise, you may be forced to pay three times for the same damages.

(Endnotes)

1. *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 26 Fla. L. Weekly Fed. C 591 (11th Cir. 2016).
2. The Eleventh Circuit's holding in *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.* is narrowly worded in that it states that an MAO has the right to bring a private cause of action against a "liability insurer." However, as explained in this article, it appears that an MAO's right to bring a cause of action to recover secondary payments also extends to self-insured companies.
3. *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 685 F.3d 353 (3d Cir. 2012).
4. An "Organization Determination" is any decision made by a Medicare health plan regarding: (1) Receipt of, or payment for, a managed care item or service; (2) The amount a health plan requires an enrollee to pay for an item or service; or (3) A limit on the quantity of items or services.
5. The district court actually dismissed Humana's complaint for a lack of subject matter jurisdiction, however, the district court later vacated its order after Humana moved the district court to correct or amend the order. The district court scheduled a hearing to consider Humana's motion. On the date of the hearing, Humana voluntarily dismissed its action against the Reales and their attorney.

6. *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 94 F.Supp.3d 1285 (S.D. Fla. 2015).
7. 42 U.S.C. § 1395y(b)(3)(A).
8. Emphasis added.
9. 42 U.S.C.A. § 1395y (West).
10. *Id.*
11. 42 C.F.R. § 411.24(i)(1).
12. 42 C.F.R. § 422.108(f).
13. Fla. R. Civ. P. 1.280(b)(2) ("A party may obtain discovery of the existence and contents of any agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments made to satisfy the judgment.").

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