Dickie McCamey
ATTORNEYS AT LAW

10/23/2019 | Articles

Ninth Circuit holds Guaranty Fund is not an MSP Primary Payer

On October 10, 2019, the United States Court of Appeals for the Ninth Circuit held in *Cal. Ins. Guar. Ass'n. v. Azar* that Medicare could not seek reimbursement for conditional payments from the California Insurance Guarantee Association ("CIGA"). This case was last discussed here in 2017 regarding issues of bundled payments in demands for reimbursements by the Centers for Medicare & Medicaid Services ("CMS"). This prior decision has not been impacted by the current opinion. As a refresher and a matter of course, it is best at the outset to define who the parties to this matter are, as such classification will play a role in the discussed decision.

CIGA is a state guaranty fund that protects the public in the event of an insurer's insolvency. As the Court notes, every state has some similar fund that insures against losses caused by an insolvent insurer being unable to fulfill its duties to its policyholders. Insurance companies in California are required to pay premiums to CIGA. When an insurer becomes insolvent and a policyholder of that insurer files a claim under their policy, CIGA steps in to administer and fund the claim if there is no additional secondary insurance available. CIGA's protections are limited to claims made by the original policyholder and do not apply to assignees or subrogated claims. Under California law, CIGA is prohibited from paying "any obligations to a state or to the federal government." Cal. Ins. Code § 103.1(c)(4).

Medicare is a health insurance program funded and administered by the federal government. Under the Medicare Secondary Payer Act ("MSPA"), Medicare is barred from paying for an enrollee's treatment when there exists a "primary" plan that can be reasonably expected to make payments for that treatment. The law defines a "primary" plan to include "a workmen's compensation law or plan, an automobile liability insurance policy or plan (including a self-insured plan) or no fault insurance." 42 U.S.C. § 1395y(b)(2)(A). In other words, when a Medicare beneficiary's treatment is covered under a "primary" insurance plan, as defined in the law, Medicare becomes "secondary" to that plan and is not available to pay for the beneficiary's care. Medicare can, however, make payments on a conditional basis if the primary plan does not or cannot promptly pay for the beneficiary's care. In that situation, Medicare makes the conditional payment and then later seeks reimbursement for the conditional payment from the responsible primary plan.

The interplay between California's state guaranty fund and the MSPA was the focus of the Ninth Circuit's recent opinion. CIGA administered and funded workers' compensation claims on behalf of multiple insolvent workers' compensation insurers. Several of the workers' compensation claimants were enrolled in Medicare, and Medicare paid for treatment related to these claimants' injuries, later demanding reimbursement from CIGA. Medicare argued that CIGA was the primary payer for the claimants' medical expenses related to their work injuries and that CIGA was thus obligated to repay Medicare's conditional payments as per the MSPA.

The district court held that CIGA was indeed the primary plan for the workers' compensation claims that it was administering and that Medicare was owed reimbursement for the conditional payments that it made related to these claims. Furthermore, the district court found that any provisions in California state law that conflicted with the MSPA, including the prohibition against CIGA paying "any obligations to a state or to the federal government," were preempted by federal law. CIGA appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the district court and held that CIGA was not obligated to reimburse Medicare for its conditional payments. The crux of their holding was the finding that CIGA did not fall within the meaning of "primary plan" under Medicare regulations because CIGA is not a "workers' compensation law or plan." To the contrary, the

Ninth Circuit held that CIGA is *insolvency* insurance and an "insurer of last resort," only assuming responsibility for another insurance company's claims when there is no other insurer, such as an excess insurer, available to fund those claims. *CIGA v. Azar,* 2019 U.S. App. LEXIS 30039, *12.

Importantly, unlike a workers' compensation insurer, the Court distinguished CIGA by noting that they do not provide coverage for workers' compensation claims under some obligation imposed by law to cover employees for work injuries. It does not stand in the place of the insolvent workers' compensation insurer. Instead, its function is to disperse funds to the insured, and this obligation is triggered not by a work injury but by a policyholder's insolvency. Its responsibilities in handling workers' compensation claims differed from the workers' compensation insurer. For example, CIGA was not liable for the tortious mishandling of a claim. The Ninth Circuit also held that it made little sense to interpret the phrase "primary plan" to refer to a payer of *last* resort, such as CIGA, and pointed out that there exists other insurance coverages that were *not* primary to Medicare (namely Medicaid).

The Ninth Circuit's holding stands for the proposition that Congress did not intend for the MSPA to disrupt and preempt state insolvency fund laws, an intent expressed by Congress and cited by the Court in their opinion. State guaranty funds such as CIGA are not insurers in the conventional sense. The losses that the funds protect against are different than the losses that workers' compensation, automobile, and no-fault insurance protect against. The MSPA and Medicare regulations do not define a "primary plan" to include insolvency insurers, and as such Medicare is not secondary to insolvency insurers and cannot demand reimbursement for its conditional payments from those insurers.

However, not all state insolvency insurance laws operate in the same way as CIGA, and as such, whether a state guaranty fund will be found to be a "primary plan," and thus primary to Medicare, will depend on the specifics of the state plan. As such, it is important to note that the scope of this decision is limited to within the Ninth Circuit. As the Court cited, Rhode Island's statute provides that, upon an insurer being declared insolvent, the state fund is "deemed the insurer to the extent of the obligations [under the policy] of the covered claims." R.I. Gen. Laws § 27-34-8(a)(2). Therefore, in Rhode Island, the state fund stands in the shoes of the insolvent insurer and is thus a "primary plan" under the MSPA. *See U.S. v. R.I. Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). As a primary plan, Rhode Island's plan may be responsible for reimbursing Medicare's conditional payments.

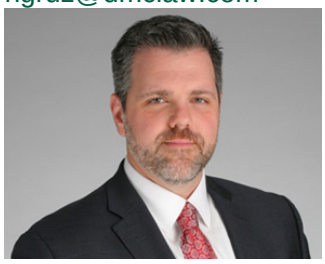
The key takeaway from the Ninth Circuit's opinion is that, if the state fund functions like an insurance company, it will be treated like one. *CIGA,* 2019 U.S. App. LEXIS 30339, *19. One aspect of this opinion that does not seem to be directly addressed by the Court is the fact that CIGA "alerted CMS" that some of the claims it was administering involved Medicare beneficiaries. Given the procedural history here regarding the prior disputed conditional payment handling issues, one may presume that CIGA reported specific cases through Medicare's Section 111 reporting process. As part of this process, CIGA's actions could reasonably be interpreted as CIGA functioning as a primary payer and responsible reporting entity. This would certainly be the behavior and function of an insurance company. This type of analysis would have to occur on a case-by-case basis, but it certainly could present an impossible situation for state guaranty funds, forcing them to decide whether to comply with Section 111 requirements, and potentially risk a finding that they are the claim's primary payer, or not report claims and potentially face heightened recovery from CMS.

As noted above, this matter is a continuation of litigation in the Ninth Circuit involving CIGA and the Department of Health and Human Services, the department that oversees CMS. We last addressed this case in 2017 when CIGA asserted that CMS' practice of billing primary payers for "bundled" and unrelated services as part of their conditional payment recovery efforts was unlawful. Specifically, CIGA asserted that CMS could not bill primary payers for unrelated services that were provided contemporaneously with services for which CIGA had accepted primary payer status. The Court agreed with CIGA, declaring CMS' interpretation of the underlying regulations at issue and their practice of billing the primary payer for all services provided by the treating physician, regardless of whether they

were claim related, to be unlawful. This decision does not disrupt the prior declarations of the Ninth Circuit, and CMS cannot make a primary payer assume responsibility for care outside the scope of the underlying claim. It is important to remember, though, that these cases are only binding within the Ninth Circuit, although they have significant persuasive value in other jurisdictions and arguments regarding primary payer status in conditional payment recoveries continue to be recommended.

The Dickie, McCamey & Chilcote Medicare Compliance Group is available to your organization with all aspects of MSP compliance, including the resolution of Medicare and MAO conditional payment issues. If you have any questions, please feel free to contact us.

Nathan J. Gruz
412-392-5582
ngruz@dmclaw.com



Benjamin M. Basista
412-392-5493
bbasista@dmclaw.com

W. Brian Rambin