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Welcoming 'Downstream Actors' to Medicare Advantage Litigation: MAO/DA Litigation, Liability and Protection Efforts

The Eleventh Circuit's recent decision in *MSP Recovery Claims v. Ace American Insurance Co.* extended the long, complicated and expanding chapter of Medicare Secondary Payer Act ("MSP") litigation over who can sue under the statute's private cause of action double damages provision. However, while this particular chapter may have more momentary clarity, the full story has yet to be written.

The present litigation involves the MSP's "double damages" provision. The basic premise of the MSP is that Medicare should not be made to pay for medical costs when some other payer, such as a workers' compensation or automobile insurer, has primary payment responsibility for those costs. Medicare can pay for these medical costs on a conditional basis, in which case the primary payer is obligated to reimburse Medicare in a timely manner. If the primary payer does *not* reimburse Medicare within the statutory timeframe, Medicare is allowed to seek double its conditional payment under the MSP's "double damages" right of action.

In the Third Circuit's landmark 2012 decision *In re Avandia Mktg*., 685 F.3d 353, Medicare Advantage Organizations ("MAOs") were found to have the same right as Medicare to sue for double damages under the MSP's "private cause of action." MAOs are private insurance plans that provide Medicare coverage under Medicare Part C. In their 2016 holding in *Humana v. Western Heritage*, 832 F.3d 1229, the Eleventh Circuit considered the same issue and agreed with the Third Circuit, finding that MAOs could bring suit for double damages when primary payers failed to reimburse conditional payments and expanded MAO rights beyond the ruling from *In re: Avandia.* With two federal Circuit Courts in agreement, a new avenue for recovery actions under the MSP, and a new headache for primary payers, was born.

The *Humana* decision also meant that assignees of MAOs could bring double damages lawsuits against delinquent primary payers. However, an open issue after *Humana* was whether "downstream actors" that contracted with MAOs could seek double damages under the MSP. A quagmire of litigation in the years following *Humana* hinged on this very question. The common actor in these actions was a law firm based out of Miami that had formed a dizzying number of "recovery" entities. These entities were essentially collection agencies that purported to hold the right to sue insurance companies for double damages under the MSP based on a contractual agreement with an MAO or a company that had contracted with an MAO.

The Eleventh Circuit's holding involved two such entities, MSP Recovery Claims, Series LLC and MSPA Claims, 1 LLC, who appealed dismissals of their claims against six insurance agencies. Although the individual circumstances of each case differed, the central premise was the same: the Plaintiffs claimed that the insurance agencies were involved in some claim with an MAO, had never paid up on a conditional payment, and that through assignment or some other corporate maneuvering or contracting, the Plaintiffs' held the MAO's right of action for double damages under the MSP. Importantly, the Plaintiffs did not in every case hold direct assignments from the MAOs; instead, the Plaintiffs also held rights assigned by contractors of MAOs such as independent physician associations and management organizations. The Eleventh Circuit described these non-MAO organizations as "downstream actors."

The lower courts had dismissed Plaintiffs' multiple cases, which were consolidated on appeal, for a number of reasons. Some lower courts dismissed the Plaintiffs' actions because of a defect in the assignment of rights from the

MAOs to the Plaintiffs. Other lower court decisions found that the Plaintiffs, holding assigned rights from "downstream actors," did not have any statutory right to sue under the MSP. The Eleventh Circuit's decision on this latter "downstream actor" issue is the important one for future litigation in the MSP arena.

The basic question was just *who* can sue under the MSP. Prior case law has established that Medicare and MAOs are afforded the right to sue under the MSP. Case law has also established that MAOs can assign their rights under the MSP to third parties. On the other end of the spectrum, a bevy of case law has stood for the proposition that the MSP is not a "qui tam" provision such that a person totally unrelated to the underlying injury can sue for damages. Clearly there has to be some relation between the plaintiff and the underlying conditional payment to access the MSP's right of action for double damages. The issue in *MSP Recovery Claims* was where to draw the line, and the Eleventh Circuit's holding moves the line further away from the parties involved in the underlying conditional payment and towards third party collection agencies. The Eleventh Circuit reversed the lower court decisions based on the statutory rights of the Plaintiffs, finding that downstream actors holding assigned rights from non-MAOs that had made conditional payments could sue for double damages under the MSP. The holding was based both not only on the statutory text of the MSP but also the purpose of the MSP's double damages provision: to strongly incentivize primary payers to timely reimburse Medicare and MAOs for conditional payments. The Eleventh Circuit's holding also modified the lower court dismissals based on defects in the assignment so that the dismissals were without prejudice, meaning the Plaintiffs could re-file the actions.

Quick practical points:

- The Eleventh Circuit's holding may expand the pool of litigants in MSP actions beyond Medicare, MAOs, and primary payers to include companies that contract with MAOs. This may spark more MSP litigation as recovery or collection agencies may be better situated and more motivated than MAOs to discover unreimbursed conditional payments and seek recovery on those debts.
- More litigation will have to work through the courts to actually have an impact on who can and cannot sue under the MSP. The Eleventh Circuit's ruling is not the law of the land, nor did it work out any issues to finality. However, with the threat of more litigation ahead, settlements of alleged MSP claims may be on the horizon.
- Primary payers are now put in a truly terrible position of having a responsibility to potentially repay an MAO or "downstream actor" ("DA") without really knowing at the time of settlement if the MAO or DA exists, how many may exist, the timeframe that the injured beneficiary had coverage with the MAO/DA, how to contact them, if the contract between the MAO/DA permits the recovery noted in the Eleventh Circuit decision, etc. The decision virtually creates a "gotcha" scenario where a ghost lien holder can appear out of nowhere, proclaim "you knew they were on Medicare when the case settled" to a primary payer, and sue for double damages.
- Injured Medicare beneficiaries and their counsel can now officially care less about disclosing MAOs to primary payers because they seem to have no repercussions for not doing so (though I would argue plaintiff's attorneys have liability as they would to Medicare under the MSP). As a result, it'll be incumbent on defense attorneys and defendants to structure settlements with needed safeguards.
- Primary payers may have to push to get an MAO to provide a copy of contracts that they have with beneficiaries and DAs before settlement. Will this actually occur? Probably not, but it may be a valid pressure point to push on to show the absurdity in a primary payer needing to do a DNA analysis of a plaintiff's Medicare plan history before settlement. To put it more simply … carriers and primary payers are going to need assurances that whatever steps that they are taking are the appropriate steps to paying all Medicare lien holders.
- There is a real question here as to if the entities bringing the cases in the Eleventh Circuit are seeing a one hit lottery ticket in the litigation or looking for actual reform in MAO/DA recovery. It would seem that the litigation can't persist over time because carriers/payers are going to react with settlement safeguards that will make these types of cases less prevalent and therefore less profitable.

- The Eleventh Circuit's ruling is going to put equal pressure on the plaintiff's bar and the primary payers. Primary payers won't want to settle without assurances that all MAOs/DAs have been contacted and paid. Plaintiff lawyers may claim that their client doesn't know the plans that they are enrolled in or simply won't want to take the time/effort to find out. Obviously this will cause a delay in settlements. When Section 111 reporting entered into the picture in 2007/2008, thousands of hours were spent by me as a Medicare attorney to primary payers and the payers local defense counsel informing courts and plaintiff's attorneys about why our clients were putting the brakes on settlements until all Medicare compliance measures were accounted for as part of the settlement. Similar time and effort may need to be put into the MAO/DA lien verification and resolution process. As I once told a plaintiff's attorney in a room full of Medicare industry experts, government officials, and primary payers, "if you want my clients to pay you faster then give us all of the information that we need and stop putting primary payers on the wrong side of the "v." in MSP suits." Too simple? Not really. Plaintiff's firms (and their brethren) can't be part of the problem and then object to the primary payer's solutions/need for solutions. Primary payers need to set standards and stick with them when it comes to the MAO/DA conditional payment process.
- Should all MAO/DA plans now be part of the settlement? Does an MAO have to disclose all DAs that may have an interest in the settlement? The point being that if a MAO/DA wants to bring a private cause of action claim for double damages, shouldn't primary payers know that MAOs/DAs exist? Shouldn't the MAOs and DAs have some responsibility in the process? For instance, shouldn't a MAO/DA provide a list of itemized charges for dispute/confirmation, or should they just be able to kick down the front door with a lawsuit with all charges/payments being accepted as tied to the claim/settlement?

Workers' Compensation Considerations:

In general, workers' compensation carriers do not seem to be a primary target for MAO/DA suits. This is likely due to most workers' compensation defendants paying for ongoing claim related medical as a function of the claim. As a result, there aren't likely many conditional payments being made by a MAO/DA or, if there are conditional payments made by a MAO/DA, they are likely de minimus. Now, I could be wrong and workers' compensation claims could currently be flying under the radar because the firms bringing the MAO/DA cases don't have enough data to turn on the litigation spigot just yet. In reality though, if all appropriate claim related medical is paid during the life of a workers' compensation claim, then there shouldn't be many, if any, conditional payments to reimburse to a MAO/DA at the time of settlement.

Now, it is probably appropriate to mention that the actual existence of conditional payments may not matter at this state of MAO/DA litigation. Current MAO/DA litigation seems to be driven by data that documents the existence of Medicare beneficiaries who are enrolled in a MAO plan and have settled a claim (workers' compensation or other) and NOT an actual ledger of alleged conditional payments per claim (though sample conditional payments are noted in complaints). Given that, it is imperative that workers' compensation responsible reporting entities have their "data house" in order to serve as a barrier to a potential MAO/DA suit, or as a means of an appropriate substantive defense. That means that RREs need to have a proper process in place to electronically verify Medicare beneficiaries, to report ORM/terminate ORM as appropriate and to limit ICD-10 codes to the actual injury or illness where ORM is assumed/terminated or that comprise a TPOC. Expansive codes, or the reporting of non-industrial codes can significantly increase liability in multiple areas of Medicare compliance — especially, in the sue first, ask questions later world of MAO lawsuits.

Workers' compensation primary payers should also be cognizant of the difference between Medicare compliance enforcement/treatment of accepted and denied workers' compensation claims. In my opinion, the biggest potential threat of an MAO lawsuit to workers' compensation carriers/self-insurer could be the settlement of denied claims. From a Medicare standpoint, an RRE does not report a qualifying denied workers' compensation claim to Medicare until there is a settlement or a claim is admitted/found compensable. Assuming the case remains denied through the date of settlement, then medical payments made by an MAO/DA pre-settlement could result in a sizable post-settlement conditional payment recovery. Typically, Medicare will assert a conditional payment against the settling

claimant when a denied claim is resolved. However, there is not an obligation for a MAO/DA to assert a recovery through a similar pecking order.

So how should workers' compensation defendants proceed? Cautiously. I would recommend that carriers do internal checks to confirm that they are capturing all qualifying claimants as Medicare beneficiaries in their Section 111 query process. Assuming that to be the case, a downstream analysis should be completed to confirm that claims staff and counsel are asking the right questions pre-settlement to establish a record of the claimant's Medicare plans, disclosures about the plans, etc. As noted, ORM acceptance/termination and TPOC reporting dates and the ICD-10 codes reported need to be accurate. Additionally, protective language should be put into release agreements regarding the claimant's representations regarding all Medicare plans that the claimant is enrolled in, or has been enrolled in at the time of settlement. Finally, the self-insured and insurance industries need to make some collective noise on the issue.

Most primary payers are adamant that they want a case closed at settlement with all lien holders paid (even if it costs them a little extra to settle the claim). They want the claimant to be made whole and for there to be no loose ends that will cause the claim to re-enter their atmosphere at any point down the road. However, as noted, there is no transparency about when a claimant is enrolled in an MAO plan, switches from one MAO plan to another, the downstream actors that may have rights within an MAO's claim, etc. Given that, in addition to undertaking general Medicare compliance measures, carriers and self-insured entities should do their diligence regarding the on-going legislative efforts on this issue, make it a point to educate the claimant's bar regarding their MAO/DA responsibilities, and to likewise educate courts/commissions about primary payer's burdens and difficulties in identifying MAO plans and potential downstream actors. Sound difficult? Burdensome? Yes. Worth it? Well, it beats being named in a class action for double damages!

As with prior NCSI articles, we welcome questions, comments, and concerns about our analysis.

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