

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 Plaintiff, : CASE NO.:
 :
 v. : 3:17-CV-1193
 :
 RICHARD C. ANGINO, ESQUIRE, :
 :
 ANGINO LAW FIRM, P.C. f/k/a :
 Angino & Lutz P.C. f/k/a :
 Angino & Rovner, P.C., and :
 :
 GLORIA TROSTLE, as Administratrix :
 of the ESTATE OF DAVID A. :
 TROSTLE :
 :
 Defendants. :

**DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT
AND AFFIRMATIVE DEFENSES**

NOW COME, Defendants and files this, their Answer to Plaintiff's Complaint and Affirmative Defenses as follows:

1. This is a civil action by the United States of America for declaratory judgment and money damages to recover amounts due and owing to the Centers for Medicare & Medicaid Services ("CMS"), a component of the United States Department of Health & Human Services, by virtue of charges the Medicare program paid on behalf of beneficiary David A. Trostle, but for which the Medicare program was not ultimately responsible.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

PARTIES

2. Plaintiff is the United States of America.

ANSWER: Admitted.

3. Defendant Richard C. Angino, an attorney, represented Mr. Trostle in the matter entitled *David A. Trostle And Gloria L. Trostle v. Bloomfield Pharmacy, Inc., et al.*, No. 2013-527 in the Perry County Court of Common Pleas of Pennsylvania. Defendant Angino's office is located at 4503 North Front Street, Harrisburg, PA 17110-1799.

ANSWER: Admitted.

4. Defendant Angino Law Firm, P.C. is the current employer of Defendant Richard C. Angino and is located at 4503 North Front Street, Harrisburg, PA 17110-1799. Defendant Angino Law Firm, P.C. (as of 2014) and Angino & Rovner, P.C. (1983-2014). Defendant Angino and the defendant law firms will be referred to herein as the "Angino Defendants".

ANSWER: Admitted.

5. Defendant Gloria L. Trostle is the Administratrix of the estate of David A. Trostle.

ANSWER: Admitted.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1345, 42 U.S.C. § 1395y(b)(2), and 42 C.F.R. Part 411. Venue is proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events giving rise to the claim in this action occurred in this District.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

**RELEVANT MEDICARE STATUTORY
AND REGULATORY PROVISIONS**

7. The Medicare program, which was enacted in 1965, is a federally funded program of health insurance for the aged, the disabled, and persons suffering from end stage renal disease. 42 U.S.C. §§ 1395-1395iii (the Medicare Act). The Secretary of HHS (the Secretary), acting through the Administrator of the CMS, has overall responsibility for the program.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

8. In 1980, Congress enacted the Medicare Secondary Payer statute (MSPS), which requires insurers to make the primary payment for services

rendered to Medicare beneficiaries, leaving the Medicare program to provide benefits only as a “secondary” payer. *See* 42 U.S.C. § 1395y(b).

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

9. The MSPS uses two mechanisms to protect Medicare funds and ensure that Medicare is the secondary payer. First, it prohibits Medicare from making payments for covered medical items and services if payment has already been made or can reasonably be expected to be made by another source, or “primary plan,” such as the insurers that paid the settlement in this case. *See* 42 U.S.C. § 1395y(b)(2)(A)(ii). Second, when a primary plan cannot be expected to make payment promptly, the MSP provisions permit Medicare to pay – but conditions payment. 42 U.S.C. § 1395y(b)(2)(B)(i). The payments Medicare makes in these circumstances are referred to as Conditional Payments.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

10. Medicare has a right to recover Conditional Payments from either the primary plan or an entity that received payment from a primary plan. Such entities

include beneficiaries and attorneys who represent them. 42 U.S.C. § 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.24(g).

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

11. After a beneficiary reports a settlement to Medicare, the agency responds with notifications of the amount of reimbursement due. *See e.g.*, Exhibit 1, CMS's Initial Determination dated August 14, 2014. A beneficiary dissatisfied with Medicare's determination has the right to request a redetermination from the contractor who made the initial determination, then a reconsideration by a Qualified Independent Contractor (QIC), followed by a hearing before an Administrative Law Judge (ALJ), and a request that the Medicare Appeals Council (MAC) review the ALJ decision. 42 U.S.C. § 1395ff(b) and (c); 42 C.F.R. §§ 405.940, 405.960, 405.1000, 405.1100. An individual must obtain a decision from the MAC before suing Medicare in federal district court. 42 C.F.R. §§ 405.1130, 405.1136; 42 U.S.C. § 405(g). If an individual fails to timely appeal at any level of review, the most recent agency decision becomes binding. *See e.g.*, 42 C.F.R. §§ 405.958, 405.978, 405.1048, 405.1130.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

FACTUAL ALLEGATIONS

12. On or about July 8, 2011, upon information and belief, a pharmacy dispensed the incorrect drug to Mr. Trostle, causing him to suffer lithium toxicity, which put him in a coma for two weeks and required a 66-day stay in various hospitals. Medicare paid \$84,353.00 of the related medical charges.

ANSWER: Admitted in part that a pharmacy dispensed the incorrect drug to Mr. Trostle, causing him to suffer lithium toxicity, which put him in a coma. Denied in part as the averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

13. In March 2013, the “Angino Defendants” informed Medicare that Mr. Trostle was pursuing a third-party claim related to the lithium toxicity, and asked Medicare to identify medical charges related to his injuries. Exhibit 2, Correspondence from Angino-Rovner dated March 28, 2013.

ANSWER: Admitted.

14. CMS responded with an interim amount of Conditional Payments of \$725.00, and subsequently announced a second interim amount of \$1,212.00.

Exhibit 3, CMS Correspondence dated May 20, 2013, at 5; Exhibit 4, CMS Correspondence dated May 22, 2014, at 5. On both occasions, CMS informed Mr. Trostle that if the case involved ingestion, which Mr. Trostle's case did, the interim amount stated was incorrect, and requested that Mr. Trostle contact Medicare.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

15. Upon information and belief, the Angino Defendants knew or should have known that Medicare paid more than \$1,212.00 for the 66-days Mr. Trostle spent in the hospital related to the lithium toxicity.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

16. The "Angino Defendants" proceeded to settlement of the personal injury case without contacting Medicare to determine whether the Conditional Payment amounts noted in CMS's letters were accurate. The parties settled the claims for \$225,000.00.

ANSWER: Admitted in part that the parties settled the claims for \$225,000.00. Denied in part, as the averments contained in this paragraph contain

conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

17. When the Angino Defendants reported the settlement, Medicare performed a further review of its paid claims, and identified \$84,353.00 in medical charges related to the lithium toxicity. Exhibit 1, CMS's Initial Determination, dated August 14, 2014, at 7. Medicare reduced its claim by its share of the attorney's fees and, in a letter dated August 14, 2014, notified the "Angino Defendants" and Mr. Trostle that it was due \$53,295.00 from the settlement proceeds. *Id.* at 1. Medicare indicated that payment was due in 60-days.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

18. Medicare's letter explained how to appeal Medicare's determination. *Id.* at 3-4, 12.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

19. The "Angino Defendants" responded to Medicare's letter by arguing that Mr. Trostle was required to pay only \$1,577.00. Exhibit 5, Trostle's Request for Redetermination, dated August 26, 2014. Medicare interpreted this letter as a

request for redetermination – the first level of the administrative review process. 42 C.F.R. §§ 405.940 – 405.958.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

20. Medicare considered Mr. Trostle’s appeal and denied it, informing the “Angino Defendants” and Mr. Trostle of its redetermination decision. Exhibit 6, CMS’s Redetermination Decision dated October 15, 2014 at 1. Again, Medicare explained how to appeal the decision, notifying Mr. Trostle that he had 180-days, or until April 18, 2015, to write to Maximus Federal Services (“Maximus”), the Qualified Independent Contractor, to appeal the agency’s decision. Id. at 1-2.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

21. Defendants failed to file a timely appeal to Maximus. Consequently, the agency’s redetermination decision became binding on Mr. Trostle. 42 C.F.R. § 405.958.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

22. To date, this debt has not been paid.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

23. Upon information and belief, Defendant Trostle or the Angino Defendants received payment of \$225,000.00 from the primary plans. The MSPS and its implementing regulations therefore authorize the United States to recover the amount due Medicare from the Defendants. 42 U.S.C.A. § 13957(b)(2)(B); 42 C.F.R. § 411.24(g).

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

24. Because this debt has not been repaid within the required 60-day time period, CMS is also entitled to receive interest on this debt under 42 U.S.C. § 1395y(b)(2)(B) and 42 C.F.R. § 411.24(m)(2). The rate of interest accruing on this debt is 9.625% per year as provided for under 42 C.F.R. § 405.378(d) and CMS's Initial Determination dated August 14, 2014. Exhibit 1 at 4, § V.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

25. Moreover, because the United States has expended litigation costs because the “Angino Defendants” and Defendant Trostle have opposed recovery of this debt, the United States will not pay its share of the attorney’s fees and costs. Instead, in accordance with 42 C.F.R. § 411.37(e)(1), the principal amount of the debt is now the Conditional Payment amount of \$84,353.00.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

CAUSES OF ACTION

COUNT ONE

(Recovery of Medicare Secondary Payments 42 U.S.C. § 1395y(b)(2)(B); 42 C.F.R. § 411.24(g))

26. The United States brings this cause of action against all Defendants under the Medicare laws and regulations. 42 U.S.C. § 1395y(b)(2)(b); 42 C.F.R. § 411.24(g).

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

27. As detailed more fully in the allegations set forth above, which are incorporated herein, the Defendants are liable for a Conditional Payment amount of \$84,353.00, plus interest at the rate of 9.625% from August 14, 2014.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

WHEREFORE, the United States of America respectfully requests that the Court (1) enter judgment in its favor declaring that the United States is entitled to reimbursement from Defendants for the medical charges Medicare paid on behalf of David Trostle related to the lithium toxicity he experienced in July 2011, as alleged hereinabove, (2) enter judgment in its favor in the amount of \$84,353.00 plus interest at the rate of 9.625% from August 14, 2014, and (3) award such other relief as the Court may deem appropriate, including, but not limited to, costs.

ANSWER: Denied. The averments contained in this paragraph contain conclusions of law and fact to which no response is required. If a response is deemed required, the averments contained herein are denied.

AFFIRMATIVE DEFENSES

(Collateral and Equitable Estoppel-Detrimental Reliance)

28. The parties are waiting for a decision from the Third-Circuit Court with respect to issues in this case.

29. Plaintiff should be barred from recovery of the full amount of \$84,353.00 plus interest that it is alleging it is entitled to, based on a theory of collateral and equitable estoppel.

30. Defendant specifically requested information regarding the amount of medical charges related to his injuries on a number of occasions.

31. CMS responded with an original amount of Conditional Payments of \$725.00, and subsequently announced a second amount of \$1,212.00. CMS did not respond with any further amounts until *after* Mr. Trostle settled his case.

32. Defendant Angino Law Firm settled Mr. Trostle's case, on his behalf, for a total of \$225,000.

33. Defendant Angino Law Firm notified Plaintiff that Mr. Trostle's case had settled, it was not until after this notice that Plaintiff increased the amount due from \$1,212.00 to \$84,353.00, stating that it was demanding \$53,295.00 out of the \$84,353.00.

34. Defendants relied on the amount provided by CMS in settlement negotiations on Mr. Trostle's behalf, Defendant Angino Law Firm informed Plaintiff of such, and indicated Defendants therefore opposed the substantial increase in amount owed.

35. Defendants' reliance was justified, as the figures came straight from Plaintiff at Defendants' specific request.

36. Plaintiff claims that Mr. Trostle was aware that the number could change if his case was an ingestion case. However, Plaintiff was already aware, or

should have been aware, that Mr. Trostle's case was an ingestion case. Defendants' reliance was therefore reasonable.

37. Additionally, it was not foreseeable that the final amount owed to Plaintiff would increase by over \$50,000.00 when previous increases were for only a few hundred dollars, making Defendant's reliance on Plaintiff's numbers even more reasonable in settlement negotiations.

38. Defendants were harmed by its reliance on Plaintiff's numbers, as Defendants would have requested a much higher amount from the liability defendants, and would not have agreed to \$225,000 with the original defendants had "Angino Defendants" known that Plaintiff was going to increase its stated amount by nearly 4,400%.

39. Plaintiff should therefore be estopped from recovering anything higher than the original \$1,212.00, that Defendants relied upon in settling Mr. Trostle's case on his behalf.

40. This is a case of mutual mistake of fact involving defendants and prior liability defendants.

41. Even if this Court disagreed that Plaintiff is not entitled to more than \$1,212.00, Plaintiff should be estopped from recovering more than the \$53,295.00 demand it made after the settlement.

42. Defendants again relied on Plaintiff providing them with accurate numbers.

43. Once Defendant received notice that Plaintiff was demanding \$53,295, Defendants in good faith escrowed \$19,596.00 and held a check in Plaintiff's name in the amount of \$33,750 pending litigation, totalling \$53,346.00, slightly more than enough to cover the Plaintiff's demand. **Exhibit A, Exhibit B.**

44. Once again Plaintiff drastically increased its initial demand. This time in the amount of roughly \$30,000.00; increasing the amount from \$53,295.00 to \$84,353.00.

45. Defendants have been harmed by their actual and reasonable reliance on Plaintiff's demand of \$53,295.00 as this is roughly the amount it set aside to pay Plaintiff, in case this matter resolves in Plaintiff's favor.

WHEREFORE, Defendants, by counsel, denies Plaintiff is entitled to judgment or to any of the relief sought, and respectfully requests that judgment be entered in its favor and against Plaintiff on all counts set forth in the Complaint, and that Defendants be awarded its costs incurred in defending this action, along with such other relief as this Court deems equitable and just.

Respectfully submitted,

ANGINO LAW FIRM, P.C.

by: /s/ Richard C. Angino
Richard C. Angino, Esquire
Attorney I.D.: 07140
4503 N. Front Street
Harrisburg, PA 17110
P: 717-238-6791
rca@anginolaw.com
Attorney for Defendants

CERTIFICATE OF SERVICE

I, Dawn M. Foehrkolb, Legal Assistant and an employee of the Angino Law Firm, P.C., hereby certify that the foregoing document Defendants' Answer to Complaint with Affirmative Defenses was electronically filed with the Clerk of the Court for the United States District for the Middle District of Pennsylvania using the CM/ECF system with electronic notice upon the following:

Bruce D. Brandler, U.S. Attorney
D. Brian Simpson, Assistant U.S. Attorney
U.S. Attorney's Office
228 Walnut Street
Suite 220
Harrisburg, PA 17108
D.Brian.Simpson@usdoj.gov

Dated: August ^{2nd} 2, 2017



Dawn M. Foehrkolb, Legal Assistant
to Richard C. Angino, Esquire

EXHIBIT - A

Job Profit Detail

September 23, 2009 through August 1, 2017

Date	Source Name	Memo	Amount
Richard Angino Trostle, David A			
04/11/2013	Karen M. Ryle, RPh, MS	expert fee	-1,000.00
05/20/2013	Proth of Perry County		-68.75
10/24/2013		Faxes - 10/24/2013	-15.00
01/29/2014		sas envelope	-0.48
05/02/2014		IVE - RCA	-16.00
05/09/2014	ADR Options, Inc.	mediation deposit	-350.00
05/12/2014		Postage	-2.45
05/12/2014		Faxes - 05/12/2014	-2.00
05/16/2014		Faxes - 05/16/2014	-4.00
05/19/2014		Faxes - 05/19/2014	-2.00
05/28/2014	ADR Options, Inc.	J. Ricchiuti, Esq. mediation	-1,076.00
06/20/2014		Long Distance	-20.00
06/20/2014		Photocopies	-553.75
06/20/2014		Postage	-94.65
07/09/2014		Mileage	-29.70
07/14/2014		Faxes - 07/14/2014	-2.00
07/18/2014	Proth of Perry County	file stip. of dismiss. w/ prejudice	-7.95
07/28/2014		Postage - SAS Envelopes	-0.48
08/05/2014		Mileage	-24.20
08/06/2014		fee + exp. reimb.	78,750.00
08/06/2014		Deposit	4,092.40
09/10/2014		Faxes - 09/10/2014	-3.00
02/18/2016	Bank of America - AKA	Middlet District of PA complaint filing	-400.00
04/22/2016	Pacer Service Center	electronic records	-6.50
04/28/2016	Post Master	Priority Mail - Trostle	-25.65
01/09/2017	Pacer Service Center	electronic records 10/1/2016 - 12/31/2016	-10.90
Total Trostle, David A			79,126.94
Total Richard Angino			79,126.94
TOTAL			79,126.94

EXHIBIT - B

Sedgwick CMS Inc. On Behalf Of
 Fresenius Medical Care Holdings Inc
 Professional Liability Account
 P.O. Box 14478
 Lexington, KY 40512-4478

DRIGIN 2300207 DATE 08/18/2015 CHECK NO. 1016009373 63-8655/2660

000002 00000 00000 1016009373 00001 OF 00001 CCM 150818 7255

PAY *THIRTY THREE THOUSAND SEVEN HUNDRED FIFTY*
 AND 00/100 DOLLARS

TO THE ORDER OF
 MEDICARE SECONDARY PAYER RECOVERY CONTRACTOR
 BENEFICIARY
 DAVID A TROSTLE HICN A194266701 CASE 20131
 26090 25756 NGHP

\$33750.00

Citibank, N.A.
 Miami, FL

VOID AFTER 60 DAYS

Bob Blackhouse

DOCUMENT CONTAINS A TRUS WATERMARK, DO NOT CASH IF THE WATERMARK IS NOT VISIBLE SEE REVERSE SIDE FOR COMPLETE SECURITY FEATURES

⑈ 1016009373⑈ ⑆ 266086554⑆ 3200621321⑈

LAVIN, O'NEIL, CEDRONE & DISIPIO

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OF COUNSEL

WRITER'S E-MAIL ADDRESS:
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August 25, 2015

Certified Mail (7013 1090 0000 3695 1591)

Return Receipt Requested

Richard Angino, Esquire
Angino & Lutz, P.C.
4503 North Front Street
Harrisburg, PA 17110-1799

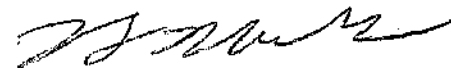
RE: David Trostle v. Bloomfield Pharmacy, Inc., et al.
Perry County CCP No.: 2013-527
Our File Number: 02612-0232616

Dear Mr. Angino:

On October 31, 2014, I sent a letter enclosing a check made payable to Medicare. I mentioned that in the event the check expired while your Medicare appeal was pending that I would send a replacement. Enclosed is the replacement settlement check #1016009373 in the amount of \$33,750.

In the event the enclosed check expires while your appeal process is pending, please advise my office and it will arrange for the issuance of a new check appropriate for the circumstances at that point.

Very truly yours,



Ricky M. Guerra

RMG/ceb

Enclosure

cc: Hugh P. O'Neill, Esquire

RJ