It's Time to Cross That Bridge

Reimbursement Rights of Medicare Advantage Organizations

By David M. Melancon

Given these uncertain times, closely monitoring the evolving reimbursement rights of MAOs is the prudent course of action until the appellate court in your jurisdiction, or the Supreme Court of the United States, has had an opportunity to weigh in on the issue.

Undoubtedly, the reaction of most of you and your clients to the enactment of the Medicare, Medicaid and State Child Health Insurance Program (SCHIP) Extension Act (MMSEA) reporting requirements and their effect on Medicare's recovery rights was akin to the five stages of grief—denial, anger, bargaining, depression, and finally acceptance. Having traversed through this valley of traditional Medicare compliance issues, you now have confronted Medicare "Advantage Plans," the most recent area of concern in the Medicare compliance arena. This article will provide an overview of Medicare "advantage organizations" (MAOs), an analysis of the reimbursement or lien rights of those plans, and offer some practical suggestions to ensure that you protect an MAO's interest in a settlement.

Medicare Advantage Organizations

The Medicare Advantage Program, codified in Part C of the Medicare statute, was established by Congress to allow Medicare enrollees the option of contracting with private companies, or Medicare Advantage Organizations (MAOs), for Medicare benefits rather than receiving benefits directly from the government. 42 U.S.C. §1395w-21(a). Under the program, the Centers for Medicare and Medicaid Services (CMS) pay MAOs a fixed amount for each of its enrollees, and in turn, the MAOs administer benefits directly to those enrollees. 42 U.S.C. §1395w-23. The MAOs assume all of the risks associated with insuring their enrollees and are required to provide their enrollees all of the benefits covered under Parts A and B of the Medicare statute. 42 U.S.C. §1395w-22(1)-(2). Providing additional benefits and coverage options are some of the policy reasons behind the creation of Part C and its expansion. 42 U.S.C. §1395w-22(3). And, most MAO plans also include Part D prescription drug coverage. Ctrs. for Medicare & Medicaid Svcs., *Medicare & You 2013*.

Typically, a person can join an MAO if he or she is eligible for Medicare Part A and Part B and he or she lives in the plan's service area. *Id*. at 72. Individuals enrolled in an MAO may switch to traditional Medicare and then back to an

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MAO during designated enrollment periods. Total enrollment in MAOs has tended to increase, and dramatically so, since 2006. It therefore should be anticipated that you will encounter on a more frequent basis plaintiffs who are or who have been enrolled in an MAO, traditional Medicare, or both, during the time period relevant to your cases. In those circumstances, all the parties involved in a case involving an MAO enrollee—the plaintiff, the plaintiff's attorney, the defendant, whether an insurance carrier or a self-insured defendant, and defense counsel—have a vested interest in protecting an MAO's lien interest.

Reimbursement Rights of Medicare Advantage Organizations

While there is a general agreement that an MAO has a contractual right to seek recovery of expenses paid to a Medicare beneficiary under Part C of the Medicare statute, the existence of a private right of action to enforce that claim in federal court under the Medicare Secondary Payer (MSP) statute has been more controversial. MAOs contend that they have rights as a secondary payer under the MSP statute to seek recovery of paid expenses. On the other hand, beneficiaries and primary payers argue that the MSP statute does not confer a private cause of action on behalf of an MAO. To frame this debate properly, it is important to have a basic understanding of the relevant federal statutory framework.

MAOs have argued that they have a private right of action to pursue reimbursement under two provisions of the Medicare Act: (1) section 1395w-22(a)(4), the "MAO statute," and (2) section 1395y(b)(3)(A), which establishes a "private cause of action." The MAO statute specifically grants MAOs a right of reimbursement. This is codified in 42 U.S.C. §1395w-22(a)(4), which provides that an MAO may

> charge or authorize the provider of such services to charge… (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.

This statute, however, is silent on how and when an MAO may "charge" or otherwise collect such secondary payments. In other words, it is unclear whether MAOs have a federal cause of action to recover, or whether MAOs are merely permitted to include subrogation provisions in their contracts with their enrollees setting forth the parameters of enforcing their reimbursement rights.

In addition to the right of reimbursement contained in the MAO statute, the private cause of action contained in the MSP statute provides the United States with an independent right to recover double damages from a responsible entity that refuses to reimburse the trust fund. The private cause of action applies in the case of a primary plan that fails to provide for primary payment. 42 U.S.C. §1395y(b)(3)(A). Complicating matters is the MAO statutory language that makes general reference to the MSP statute but does not specifically incorporate the MSP's secondary payer provisions or remedies. Further complicating matters is a CMS regulation that mandates that MAOs exercise the same rights to recover from primary payers as the Medicare Secretary. 42 C.F.R. §422.108(f). The CMS has interpreted this regulation to mean that MAOs have both "the right and the responsibility to collect from primary payers using the same procedures available to traditional Medicare." Ctrs. for Medicare & Medicaid Svcs., Dep't of Health and Human Svcs. Memorandum, Medicare Secondary Payment Subrogation Rights (Dec. 5, 2011)). This ambiguity in the statutory language has resulted in courts struggling to define the extent of an MAO's secondary payer rights, particularly whether the private cause of action provision contained in the MSP statute extends to MAOs.

Early Court Decisions

The first generation of cases that addressed whether MAOs have a right to bring a private cause of action to enforce their reimbursement rights held that because the Medicare Advantage statute does not contain a provision that specifically sets out a private cause of action similar to §1395y(b)(2)(B)(iii) of the MSP statute, Congress did not intend to create such a cause of action for MAOs. On this point, the case *Nott v. Aetna U.S. Healthcare, Inc.*, 303 F. Supp. 2d 565 (E.D. Pa. 2004), is illustrative. There, the plaintiff filed a putative class action arguing that Aetna did not have the right to enforce its contractual subrogation claim against the plaintiff's personal injury recovery because such recovery violated the Pennsylvania Motor Vehicle Financial Responsibility Law. Aetna removed the case to federal court, and in response, the plaintiff filed a motion to remand, arguing that there is no federal question jurisdiction since her claims arose under state law.

These decisions demonstrate that until very recently courts were not willing to acknowledge that an MAO had a statutory right to bring a cause of action for reimbursement of medical costs.

Id. at 565, 566. In ruling on the plaintiff's motion to remand, the court examined whether the Medicare Act preempted the plaintiff's state causes of action. *Id.* at 567. In conducting its analysis, the court looked at 42 U.S.C. §§1395w-22(a)(4) and 1395m(e)(4), noting that both provisions "authorize, but do not require, a Medicare HMO insurer to include in its contract a provision for reimbursement of money paid on behalf of its insured from the insured's recovery under another insurance policy or plan." *Id.* at 567, 568. The court held that the language of these provisions demonstrates that "Congress did not create a federal scheme under the Medicare Act for the civil enforcement of a Medicare-substitute HMO's subrogation rights arising out of its own contract. Rather, the Act merely permits HMOs to include a right of subrogation in their own contracts with Medicare beneficiaries." *Id.* at 570. The court compared these relevant provisions with 42 U.S.C. §1395y(b)(2)(B)(ii), which specifically grants the United States the right to bring a civil action to recover secondary payments made by traditional Medicare.

Id. at 571. In contrasting the statutory provisions, the court concluded that Congress did not include a similar provision allowing HMOs the right to bring a federal cause of action to pursue their contract rights. *Id*. Because the language of §§1395w-22(a)(4) and 1395m(e)(4) permits but does not mandate that HMOs contract for subrogation rights, the enforcement of such rights amount to a contractual dispute, rather than a federal question. *Id*. at 571–72. *See also Parra v. PacifiCare of Ariz*., No. 10 Civ. 8, 2011 WL 1119736 (D. Ariz., Mar. 28, 2011) (holding that the statute enacting Medicare Advantage Program does not incorporate the provisions of the Medicare statute that created a private right of action to recover medical payments paid on behalf of Medicare beneficiaries and an MAO, therefore, cannot state a federal claim for relief); *Phillips v. Kaiser Found. Health Plan, Inc*., No. C 11-02326 CRB, 2011 WL 3047475 (N.D. Cal. July 25, 2011) (holding that while federal law sets forth an MAO's secondary payer rights, it does not provide a federal cause of action to recover reimbursement from a Medicare Advantage Plan. Instead, such plans must use the state court to pursue reimbursement through, for example, a contract claim); *Ferlazzo v. 18th Avenue Hardware, Inc*., 33 Misc. 3d 421, 929 N.Y.S. 2d 690 (N.Y. Sup. Ct. 2011) (holding that a Medicare Advantage Plan's right to reimbursement does not stem from the Medicare statute, but rather from the private contract made with a Medicare beneficiary); *Konig v. Yeshiva Imrei Chaim Viznitx of Boro Park, Inc*., 2012 WL 1078633 (E.D.N.Y. Mar. 30, 2012) ("Medicare laws offer no private right of action—express or implied—to MAOs to enforce any claimed subrogation rights." Rather, the Medicare statutes simply authorize the Medicare Advantage providers to contractually create subrogation rights; they do not have a private right of action to sue upon their subrogation rights.).

These decisions demonstrate that until very recently courts were not willing to acknowledge that an MAO had a statutory right to bring a cause of action for reimbursement of medical costs. Instead, the courts were inclined to find that the Congress only granted MAOs the right to include subrogation clauses in their contracts with enrollees. Accordingly, in the states that have legislation protecting settlement and lawsuit proceeds, the MAOs were blocked from seeking reimbursement that traditional Medicare would otherwise be entitled to obtain.

In re Avandia Decision

A seismic shift in the jurisprudential landscape occurred with the decision *In re Avandia Marketing Sales Practices and Products Liability Litigation*, 685 F.3d 353 (3rd Cir. 2012), *writ denied*, 133 S. Ct. 1800, 685 F.3d 353 (2013). In this case, the Third Circuit Court of Appeals held that MAOs such as Humana have a private right of action under the MSP statute, and Humana could file a lawsuit for double damages against Glaxo for failing to reimburse Humana for medical expenses related to its enrollees' Avandia-related injuries. In doing so, the court reversed the district court, which had held that while the MAO statute referenced the MSP statute, it did not adopt or incorporate the statute, and thus "the private cause of action within the MSP Act did not apply to MAOs, nor did the secondary payer provision in the MA statute create a private right of action for MAOs," and there was no implied private right of action for the plans. *Id*. The Third Circuit's reversal was primarily based on two grounds. First, the court concluded that the plain text of the MSP statute, 42 U.S.C. §1395y(b)(3)(A), "sweeps broadly enough to include MAOs," and second, even if the statute was ambiguous, "deference to CMS regulations" require the court to "find that MAOs have the same right to recover as the Medicare Trust Fund does." *Id* at 357.

In support of its position that the plain text of the MSP's private cause of action provision affords MAOs private cause of action rights, the Third Circuit noted that the language of 42 U.S.C. §1395y(b)(3)(a) includes the right to seek double damages for nonpayment or nonreimbursement of conditional payments to be made under any part of the Medicare Act and not just payments made under Parts A and B. Thus, because "the MSP Act and its private cause of action provision do not attach any narrowing language to 'payments made under this subchapter,' that phrase applies to payments made under Part C as well." *Id*. at 360. The court then distinguished the cases cited by Glaxo and the district court—*Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir. 2003), *Nott v. Aetna U.S. Healthcare, Inc.,* 303 F. Supp. 2d 565 (E.D. Pa. 2004), and *Bio-Medical Applications of Tenn., Inc. v. Central Studies Health and Welfare Fund*, 656 F.3d 277 (6th Cir. 2011)—on the basis that none of those decisions involved an MAO asserting a private right of action under §1395y(b)(3)(A). *Id*. at 362–63.

Lastly, the court ruled that even if the 42 U.S.C. §1395y(b)(3)(a) text was considered to be ambiguous, *Chevron* deference principles supported the conclusion that courts must treat MAOs the same way as Medicare in terms of their reimbursement rights. *Id*. at 365–66 ("[E]ven if the statute's text were deemed to be ambiguous, we could apply Chevron deference and would reach the same conclusion.") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984)). The court reasoned that "[t]he plain language of [42 C.F.R. §422.108] suggests that the Medicare Act treats MAOs the same way it treats the Medicare Trust Fund for purposes of recovery from any primary payer." 685 F.3d at 366. The court determined that it was bound to defer to this regulation. *Id*. As support for this deference, the court considered other CMS statements indicating that MAOs should have the same "recovery mechanism available" to them as "original Medicare." *Id*. In doing so, the court focused on that part of 42 C.F.R. §422.108(f) stating that an "MA [Medicare Advantage] organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the SP regulations in subparts B through D of part 411 of this chapter." *Id*. Relying on a recent CMS memorandum, the court noted that the CMS interprets §422.108 "to assign MAOs 'the right (and responsibility) to collect' from primary payers using the same procedures available to traditional Medicare." *Id*. (citing Ctrs. for Medicare & Medicaid Svcs., Dep't of Health and Human Svcs. Memorandum, Medicare Secondary Payment Subrogation Rights (Dec. 5, 2011)). Accordingly, the Third Circuit reversed the district court's dismissal of Humana's lawsuit and remanded the case for further proceedings.

In sum, the Third Circuit found that MAOs have the same recovery rights as traditional Medicare based on a plain reading of the MSP statute, the legislative history and policy goals of the Medicare Advantage Program, and in deference to Medicare's interpretation of the MSP statute and related regulations.

Post-*Avandia* Decisions

Although there have been several cases concerning MAO reimbursement rights, none of them has directly followed the *Avandia* decision. Not surprisingly, cases within the Third Circuit's jurisdiction have acknowledged the reimbursement rights of MAOs as articulated in the *Avandia* case. *See Robinson v. Land-O-Sun Dairies, LLC*, No. 4456; 2012 WL 5129649 (Pa. Com. Pl. Sept. 19, 2012) (citing the *Avandia* decision *in dicta* to note that the Third Circuit has "read the MSPA to enable private causes of action in certain situations involving MAOs, [which] clearly allows for more flexibility in asserting private causes of action regarding Medicare reimbursement.").

Other cases from New York have addressed whether the MAO statute preempts New York's anti-lien statute. For example, in *Potts v. Rawlings Co., LLC*, 897 F. Supp. 2d 185 (S.D.N.Y. 2012), the court was presented with the question of whether the Medicare Act preempted New York state statute, GOL §5-335, which prohibited MAOs from seeking reimbursement from settlement proceeds obtained by their enrollees. In arguing that preemption does not apply, the Medicare Advantage (MA) enrollees asserted that the Medicare Act does not create a private cause of action for MAOs. The court ultimately decided that the enrollee's argument failed on preemption grounds because "given the broad express preemption clause in the Medicare Act, whether there is a private right of action for MA organizations is immaterial to the question of whether GOL §5-335 is preempted." *Id.* at 196. Similarly, in *Trezza v. Trezza*, 104 A.D.3d 37 (N.Y. App. Div. 2012), the court, addressing the same statute at issue in *Potts*, held that the statute was preempted by the Medicare Act. *Id.* at 38. As support for its conclusion, the court relied on the express preemption provision within the Medicare Advantage Act, 42 U.S.C. §1395w-26(b)(3), and the federal regulations within 42 C.F.R. §422.108(f), which prohibit states from restricting MAOs' right to bill for services for which Medicare is not a primary payer. *Id.* at 47, 48. Before doing so, however, the court noted, "there is no statutory right to reimbursement in favor of Medicare Advantage insurers…. Instead, Part C only furnishes statutory authorization for insurers such as [MAO defendant] to include reimbursement provisions in their agreements with enrollees." *Id.* at 45. *See also Meek-Horton v. Trover Solutions, Inc.*, No. 11-6054; 2013 WL 25888, at *5 (S.D.N.Y. Jan. 2, 2013) (holding that in Part C of the Medicare Act, Congress expressly preempted all but a number of state laws, and GOL §5-335 does not fall within the limited category of state laws exempted from preemption). While there was some general discussion in these opinions about whether MAOs had a private cause of action to assert their reimbursement rights, ultimately the courts never reached the merits of this issue because it was found to be immaterial to the preemption question.

The next federal appellate court case to address reimbursement rights of Medicare Advantage organizations was the Ninth Circuit in *Parra v. Pacificare of Ariz., Inc.*, 715 F.3d 1146 (9th Cir. 2013). The *Parra* case involved a lawsuit filed by survivors of a personal injury claimant who sought a declaratory judgment that the MAO defendant, PacifiCare, was not entitled to reimbursement of the medical expenses that it paid on behalf of the decedent from the wrongful death benefits paid to the survivors by a third-party insurer. PacifiCare counterclaimed, arguing that its rights to reimbursement stemmed from its contract with the decedent and from the Medicare Act. *Id.* Specifically, PacifiCare argued "that it has a private right of action to pursue reimbursement under two provisions of the Medicare act: (1) §1395w-22(a)(4) (the 'MAO Statute') and (2) §1395y(b)(3)(A) (the MSP 'Private Cause of Action')." *Id.* at 1153. The district court dismissed the MAO's claim under the Medicare Act for failure to state a claim and declined to exercise supplemental jurisdiction over the contract claim.

The appellate court first addressed PacifiCare's reimbursement rights under the MAO statute and held that Congress did not create for MAOs a federal cause of action to enforce reimbursement rights. Rather, the statute merely allows MAOs to include contractual provisions designating that its coverage is secondary to other plans and reserving their rights to seek recovery from a primary plan that refuses to reimburse them. *Id.* at 1154. Next, the court rejected PacifiCare's argument that in accordance with the precedent set by *In re Avandia*, 685 F.3d at 353, it had a private right of action under §1395y(b)(3)(A) to seek reimbursement from the decedent's survivors. *Id.* The court distinguished the case from *In re Avandia* on the basis that in that case, the MAO sought reimbursement from a primary payer that failed to provide payment, and here the third-party insurer tendered the full amount of the insurance policy with a designation that a portion of the funds be held in trust during the pendency of the parties' dispute. The court further held that §1395y(b)(3)(A) limits the private cause of action to "the case of a primary plan which fails to provide for primary payment." Thus, "[t]he Private Cause of Action was intended to allow private parties to vindicate wrongs occasioned by the failure of primary plans to make payments" and "was not intended to apply to a primary plan which, for all intents and purposes, has interpleaded a subject to conflicting claims." *Id.* Accordingly, the Ninth Circuit affirmed the dismissal of the MAO's claims for reimbursement.

As part of this process, you should also require that a plaintiff's counsel provide written confirmation from Medicare that it has no interest in the settlement.

Pending Cases

In addition to the reported decisions already discussed, the author knows of two pending cases involving the reimbursement rights of MAOs. The first case, *Humana Ins. Co. v. Farmers Texas County*

Mutual Ins. Co., 13-cv-00611-LV (W.D. Tex.), is pending in the United States District Court for the Western District of Texas. There, Humana sued two insurance company defendants to recover payments that it made on behalf of its enrollees. Humana contends that the coverage that it provides is secondary to the no fault insurance plans maintained by several of its enrollees. And, Humana claims a right to sue for double damages in accordance with the Medicare secondary payer private cause of action granted by 42 U.S.C. §1395(b)(3)(A). Humana also claims the right to "charge" these expenses under the Medicare Advantage Act, 42 U.S.C. §1395w-22(a)(4). The defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing, among other things, that the MSP Act does not permit MAOs, such as Humana, to pursue a private right of action, and Humana has not otherwise shown that it meets the statutory requirements for asserting such a claim.

On February 26, 2014, the magistrate judge issued a report and recommendation that the district judge grant the defendants' motion. On the issue of whether an MAO had a private right of action under §1395y(b)(3)(A) to assert its reimbursement rights, the magistrate judge agreed with the defendant's position that Congress did not intend to create such a cause of action. The magistrate judge was persuaded by the fact that Congress chose to use mandatory language in the MSP statute and permissive language in the MAO provision and the fact that Congress could have expressly included a private right of action within the MAO MSP provision. Furthermore, the magistrate judge was not convinced by Humana's plea that the federal regulations resolve the ambiguity in the statutes since the statutes were not ambiguous. The magistrate judge therefore concluded that Humana's claim for double damages under §1395y(b)(3)(A) should be dismissed. As of the date that this article was submitted for publication, Humana had not filed objections to the magistrate judge's report and recommendations.

The other pending case is *Michigan Spine and Brain Surgeons, PLLC v. State Farm Mut. Auto. Ins. Co.*, No. 13-2430; 2013 WL6823654 (6th Cir. Dec. 23, 2013), in which a health-care provider sued auto insurer State Farm claiming to have a right of action under §1395y(b)(3)(A). In this case, a woman was involved in a car accident and was treated by the health-care provider plaintiff. State Farm denied payment of the health-care costs, and an MAO paid for the services. The health-care provider plaintiff argued that in accordance with §1395y(b)(3)(A), it had a right to bring this lawsuit for double damages. In the district court, State Farm successfully argued that the private cause of action created by §1395y(b)(3)(A) is limited to lawsuits against group health plans, large group health plans, or non-group health plans that denied coverage on the basis of Medicare eligibility. On appeal, the health-care provider plaintiff argued that was not the purpose of the MSP scheme. In doing so, the health-care provider cited *Avandia* for support that the private cause of action created by §1395y(b)(3)(A) was "unrestricted… against both GHP and NGHP for recovery of conditional payments." 2013 WL6823654, at *31–32 (citing *Avandia*, at p. 13). The appellant's brief was filed on December 23, 2013, and a decision is expected sometime in mid-2014.

Practical Suggestions for Addressing Medicare Advantage Organization Claims

While the nature and extent of the recovery rights of MAOs remain unsettled, particularly outside of the Third Circuit, the recent *Avandia* decision increases the likelihood that MAOs nationwide will assert more aggressively that they have the same recovery rights as does Medicare under the MSP statute. Even assuming that an MAO has such a right, however, the manner in which a particular MAO will apply the *Avandia* decision remains uncertain. For example, will MAOs generate conditional payment letters, allow primary payers an opportunity to negotiate the amount of the payments, issue a final demand letter, and follow other protocols established by Medicare? Until MAOs put in place the mechanism for enforcing their recovery rights, and until there is additional guidance from the courts, defense practitioners should be mindful of potential reimbursement claims of MAOs and ensure that a mechanism is in place for satisfying any interest that an MAO may have in an underlying claim.

Proactively addressing the claims of MAOs will relieve much of the uncertainty surrounding their reimbursement rights. Once you and your client determine that a plaintiff is a Medicare beneficiary, you need to determine whether any medical expenses have been paid by an MAO. These issues can become incorporated into your standard discovery practice in your personal injury cases. If a plaintiff was enrolled in an MAO at any time from the time of the relevant injury or illness until resolution of a matter, you should address with your clients and opposing counsel how any MAO claim will be addressed. As part of this process, you should also require that a plaintiff's counsel provide written confirmation from Medicare that it has no interest in the settlement. The reason is that even though a plaintiff may be enrolled in an MAO at the time of a settlement, beneficiaries are allowed to switch back and forth between MAOs and traditional Medicare. This raises the possibility that at some point a plaintiff may have received benefits directly from Medicare, and if so, you will need to ensure that Medicare is reimbursed. Finally, a settlement agreement that you oversee for a client should contain language expressly affirming that it is the obligation of the plaintiff and his or her attorneys to satisfy all claims or liens of any MAO, outline the mechanism for payment of these claims or liens, and include related indemnity language.

Conclusion

Discussion about the nature and extent of the recovery rights of MAOs will continue. MAOs predictably will continue to take the position that they have the same recovery rights as does traditional Medicare under the MSP statute, and the Third Circuit Court of Appeals in the *Avandia* case adopted that position. Federal district courts in other circuits, however, have reached the opposite conclusion, and in those jurisdictions there is limited appellate guidance on the issue. Given these uncertain times, closely monitoring the evolving reimbursement rights of MAOs is the prudent course of action until the appellate court in your jurisdiction, or the Supreme Court of the United States, has had an opportunity to weigh in on the issue.