Simpson Thacher

Memorandum

Medicare Secondary Payer Act Litigation Against Insurers On The Rise

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A law firm that has filed approximately 200 class actions against insurers (including at least 60 in the past month) has indicated that it is readying another 1,500 cases for filing on behalf of $70 billion in claim holders.[1] Workers compensation, auto and liability insurers should take notice of developments in these lawsuits seeking reimbursement for payments made by Medicare Advantage Organizations (MAOs) for the benefit of Medicare beneficiaries.

The background of this litigation begins nearly 40 years ago and has three major components.

I. The MSPA And The Private Cause Of Action

In 1980, Congress passed the Medicare Secondary Payer Act (MSPA) to rein in Medicare costs. The MSPA was designed to shift responsibility for medical payments from Medicare to workers' compensation, no-fault and liability insurers by providing Medicare the right to reimbursement from such insurers when the insurer became responsible for payment by way of a settlement, judgment or other award to the beneficiary. Thus, Medicare became known as a "secondary payer" while other responsible insurers became "primary payers," and the MSPA gave Medicare the right to recover from primary payers "conditional payments" for which Medicare is the secondary payer. Medicare can pursue these claims even in instances where the primary payer insurer paid the amount at issue to the Medicare beneficiary. If Medicare does not receive timely repayment, it can file suit to recover double damages. In 1986, Congress amended legislation to add a private cause of action relating to Medicare beneficiaries whose primary plan had not paid Medicare.

[1] Eric Topor, *Medicare Managed Care Lawsuit Wave Inundating No-Fault Insurers*, BLOOMBERG BNA (Aug. 17, 2017).

II. The Emergence Of MAOs

Over the course of the 1980s and 1990s, a belief developed that the private sector could potentially provide care to enrollees for less money than the government paid. While some of the surplus funds would find their way back to the beneficiaries in the form of benefits beyond those that Medicare provides, the rest would be profit for the private health insurers. As a result, in 1997 and as a way "to harness the power of private sector competition to stimulate experimentation and innovation to create a more efficient and less expensive Medicare system,"[2] Congress enacted Medicare Part C, otherwise known as the Medicare Advantage program.[3] Under Medicare Advantage, private insurers provide Medicare benefits in exchange for a flat, per-enrollee fee.[4] Approximately 178 private health insurers now function as MAOs and cover 18 million beneficiaries—more than 30% of all Medicare beneficiaries—across the country. In 2014, Medicare paid MAOs about $160 billion.[5] Medicare Advantage is an alternative to traditional Medicare Parts A and B. However, it is still Medicare, governed by the Medicare Act and funded through the Medicare Trust Fund.

III. MAOs And The MSPA Private Cause Of Action

It was not always clear whether MAOs could avail themselves of the MSPA private cause of action. But in *Humana Medical Plan, Inc. v. Western Heritage Insurance Co.*[6], the U.S. Court of Appeals for the Eleventh Circuit held that a MAO has a private cause of action under the MSPA to recover conditional payments it made on behalf of Medicare beneficiaries. This has resulted—and we expect to continue to see a significant increase—in litigation seeking to recover conditional payments made by MAOs. We are aware of at least 120 cases filed against insurers by MAOs seeking to recover conditional payments since August 2016. The law in the area is still developing.

Thus far, the litigation has tended to come in two forms. In some cases, plaintiffs seek to recover under the MSPA, alleging that the defendant entered into settlement agreements with MAO beneficiaries and then failed to reimburse the MAOs that initially paid the beneficiaries' medical bills. Other cases focus on state law contract and subrogation recovery theories, alleging that MAOs paid for enrollees' medical benefits that

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[2] *Collins v. Wellcare Healthcare Plans, Inc.*, 73 F. Supp. 3d 653, 660 (E.D. La. 2014) (quoting D. Gary Reed, *Medicare Advantage Misconceptions Abound*, 27 HEALTH L. 1, 3 (2014)).

[3] The program was originally named Medicare+Choice in the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4001, but later renamed Medicare Advantage in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173, § 201. Jennifer Jordan, *Is Medicare Advantage Entitled to Bring a Private Cause of Action Under the Medicare Secondary Payer Act?*, 41 WILLIAM MITCHELL L. REV. 1408, 1409 n.1 (2015).

[4] 42 U.S.C. § 1395w-23 (2012); *see also* 42 C.F.R. § 422.300 (2014).

[5] *Medicare Advantage: Fundamental Improvements Needed in CMS's Effort to Recover Substantial Amounts of Improper Payments*, U.S. GOV. ACCOUNTABILITY OFFICE (Apr. 8, 2016).

[6] 832 F.3d 1229 (11th Cir. 2016).

the defendants had an obligation to pay under no-fault auto insurance policies. In February and April 2017, two Florida state trial courts certified classes of plaintiffs pursuing the no-fault theory. In lengthy decisions, the courts focused on the plaintiff's system for analyzing potential claims and on the allegation that all class members' claims were related to the defendant's common practice and course of conduct.

Apart from the usual challenges of class action litigation, these cases may present additional issues for insurers. It has been reported that historically the government has not treated Medicare Advantage like traditional Medicare.[7] There has been a meaningful lack of communication between the government and MAOs. The government has not shared Mandatory Insurer Reporting (MIR) information with MAOs and, because MAOs keep their own claim information, the government has been unaware of MAO conditional payments. If an insurer were to contact the proper contractor about conditional payments for an enrollee, the insurer generally would simply receive notice that no conditional payments needed to be reimbursed. The contractor would not elaborate that it did not have access to Medicare Advantage records. As a result, an insurer may unknowingly fail to reimburse a Medicare Advantage plan—exposing the insurer to a lawsuit from the MAO for double damages on top of the money it has already paid a beneficiary.

The Simpson Thacher insurance law team is available to consult on the issues raised by this litigation trend. We will keep you apprised of developments in this area.

[7] Jennifer Jordan, *Is Medicare Advantage Entitled to Bring a Private Cause of Action Under the Medicare Secondary Payer Act?*, 41 WILLIAM MITCHELL L. REV. 1408, 1417 (2015).

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