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Federal Courts Remain Consistent—Medicare Advantage Plans do not have a Direct Right of Recovery under the MSP

In Parra v. PacifiCare of Arizona, 2011 U.S. Dist. Lexis 33630, the Court granted summary judgment for lack of subject matter jurisdiction on the basis that the Medicare Secondary Payer Act (MSP) does not create an express Federal right for Medicare Advantage Plans (MAs) to pursue reimbursement. While the Court did note that MAs have the right and obligation to identify primary payers and pursue reimbursement, the MSP does not provide for a private cause of action for MAs to pursue reimbursement from primary payers.

By way of introduction of the case, the Plaintiffs' father and husband were killed when struck by an automobile. The decedent later died from his injuries. The Plaintiffs instituted a wrongful death action against GEICO, the insurer of the driver of the automobile that negligently struck Mr. Parra. Prior to his death, Mr. Parra had accrued \$136,630.90 in medical bills of which his MA, PacifiCare had paid. The Plaintiffs successfully recovered and were tendered the limits of the GEICO policy, which amounted in a settlement of \$500,000 to the Plaintiffs. PacifiCare sought reimbursement and subrogation rights for the \$136, 630.90 it had paid from the Plaintiffs settlement funds.

PacifiCare argued that it had a private cause of action right under the MSP as a Medicare Advantage Plan. The court analyzed 42 USC § 1395y(b)(2)(B)(iii) and ultimately decided that the legislative intent of the MSP was not to provide a private cause of action right for Medicare Advantage Plans. Further, as was discussed in the recent case of Humana Medical Plan, Inc. v. Cooke, 2011 U.S. Dist. LEXIS 8909, only the United States may bring a cause of action for reimbursement against a primary payer. The court was unable to maintain subject matter jurisdiction over the case as there was no Federal question or issue present.

This case also brought about another interesting wrongful death Medicare Conditional Payment issue. Arizona's wrongful death statute does not allow for recovery of medical expenses; therefore, the Plaintiffs' wrongful death action did not make such a claim. Pursuant to the Medicare Secondary Payer Manual, Chapter 7, Section 50.5.4.1.1, Medicare can only pursue recovery for reimbursement in wrongful death action in which there is a claim for medical benefits. Yet, PacifiCare as an MA sought to stand in the shoes of Medicare and pursue reimbursement from the settlement despite the fact that the wrongful death action did not make a claim for medical benefits, yet another one of PacifiCare's failed arguments.



PacifiCare seemingly ultimately will have a vehicle for redress, however, being that the Medicare Advantage Plan's Evidence of Coverage provides for a subrogation right to settlement funds in which it is determined that there was a "...settlement for injuries caused by an act or omission of a third party. . ." This will have to be a matter of contractual interpretation to be ultimately determined in state court, however.

The Parra case again teaches us that Medicare Advantage Plans do not have a direct cause of action for reimbursement under the MSP. The case also further instructs us that the MSP does not provide these plans with a private cause of action for reimbursement. Parties to a settlement in a wrongful death action should be keenly aware of whether the action makes a claim for medical damages and whether the wrongful death statute in the state in which the action is brought permits a claim for medical damages. Claims for medical damages in wrongful death actions will certainly provide a right of recovery from primary plans in traditional Medicare Conditional Payment recovery actions. Claims for medical damages in wrongful death actions will also provide a right of recovery for MAs, but it appears that MAs will have to pursue recovery in state courts.

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