

April 26, 2011

Sullivan v. Farm Bureau The Private Cause of Action Strikes Out Again

In times where CMS has been extremely aggressive regarding recovery of past conditional payments, it is not surprising to see a case in which the Plaintiff seeks reimbursement to Medicare and pursues double damages via a private cause of action, which is provided under the Medicare Secondary Payer Act (MSP Act). That is the scenario that took place in the case of Sullivan v. Farm Bureau, 2011 U.S. Dist. LEXIS 35817. In this case, however, the Plaintiff put the horse before the cart.

On July 14, 2009, the Plaintiff was struck by a vehicle while riding his bicycle. The driver of the automobile had a no-fault insurance policy issued by Farm Bureau Mutual Insurance Company of Michigan (Farm Bureau). The Plaintiff, at the time of the accident, believed himself to be uninsured. Subsequently, the Plaintiff alleged possible coverage by Auto Club Insurance Association (Auto Club). Neither insurance company paid for the Plaintiff's medical expenses, which resulted in payment by Medicare. The Plaintiff filed suit against both insurance companies. The case was removed to federal court by the Defendants, asserting among other grounds, that Count II of the complaint was based on Federal law. Of the two counts asserted, Count II pertained to recovery of amounts paid by Medicare and sought double damages pursuant to 42 U.S.C. 1395y (b)(3)(A), which allows the Plaintiff to seek double the amount claimed. The Plaintiff argued lack of diversity or alternatively sought dismissal of Count II of the complaint in order to avoid imposition of federal jurisdiction. Procedurally, the court granted his request for dismissal of the count as a motion to amend the complaint pursuant to Fed.R.Civ.P.15(a)(2).

In granting the motion, the court provided an analysis as to why the MSP Act claim was premature. Specifically, the court noted that under the MSP Act, Medicare is permitted to make conditional payments if a primary plan has not made or is reasonably expected not to make payment. A no-fault policy (which is the type involved in this case) is considered to be a primary plan under the Act. Medicare is then to be reimbursed "if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service." 42 U.S.C 1395y (b)(2)(B)(i). If Medicare is not reimbursed in a timely manner, a private cause of action can ensue seeking double damages. The motivation for the Plaintiff to pursue such a course is obvious as Medicare is reimbursed and the Plaintiff recovers monies as well.

The court however noted there were two conditions precedent to the filing of such a claim. First, Medicare must have actually made the payments. This fact is not disputed. However, the second condition is that the insurer must be responsible. That responsibility can be demonstrated by judgment, or payment conditioned upon waiver or release of payment for items or services included in a claim against the primary plan or the primary plan's insured regardless of admission of liability. In the case at bar, responsibility had yet to be established, as the case had neither settled nor gone to trial. The court relied upon jurisdictional precedent for their position as well as other federal cases including Glover v. Liggett Group, Inc., 459 F.3rd 1304 (11th Cir. 2006) in which responsibility had also not been established.



Legal Bulletin

The Plaintiff requested that the case be remanded back to state court (including Count II). The court however indicated that the claim was premature whether tried in the Federal or state court system and therefore would be dismissed without prejudice. The Defendants argued for dismissal with prejudice but the court declined to do so as the claim had not been dismissed on its merits. The motion to remand the complaint back to state court intact was denied.

Theoretically, the private cause of action under the MSP Act available to the Plaintiff sounds ominous. However, a review of case law seems to indicate reluctance on the part of the courts to enforce such an action absent a clear indication of responsibility and payment by Medicare. A private cause of action in reference to workers' compensation cases should rarely, if ever, present itself. The compensation arena is too well versed in the pitfalls of past conditional payments to not handle this issue at or before settlement (not to mention if the case meets the guidance for submission to CMS).

Liability cases are another matter. The infrastructure for dealing with past conditional payments so well known in workers' compensation does not exist in liability cases. Knowledge regarding past conditional payment information is typically under the control of the beneficiary. Thus, liability carriers should be aware of what triggers exposure under this cause of action and proceed accordingly. Liability carriers should also keep in mind that Medicare can recover from any responsible party/entity that has received the proceeds of a settlement, judgment or award. This recovery right, pursuant to 42 USC § 1395(y)(b)(2)(B)(iii) includes the Plaintiff/Medicare beneficiary, Plaintiff's attorneys, providers, and other entities.

Take aways from this case:

1. When faced with a private cause of action claim, check to see if both conditions precedent have been met, namely payment by Medicare and establishment of responsibility.
2. When dealing with a Medicare beneficiary, the parties may want to consider this cause of action when drafting settlement documents or releases, especially in liability cases.

For more information, please contact Rochelle Lefler, Executive Counsel, PMSI at Rochelle.Lefler@pmsionline.com or 813.318.6751.