



Private Health Insurance Companies Can Seek Double Damages Remedy Under Medicare Secondary Payer Act

By Sean Sheehan on December 5, 2017
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The U. S. Court of Appeals for the Third Circuit found private health insurers could seek double damages in federal court under the Medicare Secondary Payer Act. *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 685 F.3d 353 (3d Cir. 2012) is believed to be the first appellate case to reach this holding. The Court's reasoning has been adopted by other circuits in similar cases. This case has significant implications for defendants and their insurers who settle cases or pay judgments involving Medicare Part C beneficiaries. Precautions employed to reimburse private health insurers for claim-related medical expenses should be just as complete as those designed to reimburse the Medicare program.

The Medicare health insurance program was established in 1965 when Congress enacted Title XVIII of the Social Security Act. In the beginning, Medicare was the primary provider of health coverage for almost everyone enrolled in the program. With just a few exceptions, this was true even if the beneficiary had insurance under another plan. In an effort to shift costs away from the program, the Medicare Secondary Payer Act of 1980 (MSP) and subsequent statutes reversed these roles. Medicare is now secondary to all other payers; including other health plans, workers' compensation, liability insurance including self-insurance, and no fault plans. All other entities responsible for paying a beneficiary's medical costs must reimburse the Medicare program if the program has first paid these expenses.

Medicare benefits are provided by a number of entities. Benefits under Part A (hospital insurance) and Part B (medical insurance) are provided by the federal government. The U.S. Department of Health and Human Services manages these programs through the Centers for Medicare & Medicaid Services. Part C coverage (Medicare Advantage Plans) is provided by private insurance companies as an alternative to coverage under Parts A and B. Part D coverage (prescription drugs) is also provided by private insurance companies. This dichotomy between public and private Medicare providers lies at the heart of the *Avandia* case. The court was asked to determine the reimbursement rights of Part C coverage providers under the MSP.

GlaxoSmithKline settled hundreds of civil cases involving alleged injuries to those taking a drug it manufactured. Glaxo arranged to reimburse the federal government from these settlements for costs it incurred under Parts A and B for medical treatment received by these plaintiffs. However, Glaxo did not arrange to reimburse private health insurers who provided health coverage to the plaintiffs through Medicare Part C. Humana was one such Part C health insurance provider. Humana alleged it paid its insured's injury-related medical expenses and Glaxo was a primary payer under the MSP due to the settlements it reached in these cases.

Humana sued Glaxo claiming that as a secondary payer, it was entitled to reimbursement from the proceeds of Glaxo's settlements. It also sought double damages from Glaxo under the MSP statute. The District Court held Humana did not have the statutory remedy of double damages, finding that Congress did not intend for this remedy to be available to Part C insurance providers. Humana appealed the District Court's dismissal of its action; the Third Circuit reversed this decision and reinstated the case.

The Third Circuit interpreted the meaning of one of the double damages provisions of the MSP in reaching its decision. It then conducted a further analysis to rebut Glaxo's arguments. The specific section under which Humana sought damages is 42 U.S.C. §1395y (b)(3)(A). This portion of the Medicare Secondary Payer Statute says:

"Private cause of action. There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and 2(a) [the requirements of the Act]."

The Appellate Court noted this provision was part of the MSP statute enacted in 1980 and remained unchanged through various amendments passed since then. The Court found this portion of the Statute unambiguous and without limitation. It also found that this provision does not indicate Congressional intent to prohibit Part C providers' access to the double damages remedy. Rather, the court held the plain text of this statute places no limitation on which private entities may bring such suit for double damages. Thus, private insurers providing Medicare Part C coverage can seek this remedy in Federal Courts.

Medicare Part C was not enacted until 1997. It identifies the private insurers as secondary payers. However, that section of the Medicare statute does not include a private cause of action or double damages remedy as the above-quoted section does. Glaxo argued that by not including the private cause of action language when it established Medicare Part C, Congress did not intend to offer the double damages remedy to Part C providers. The Court rejected this interpretation of the Part C provision. It also noted that when the MSP was passed in 1980, privately provided Medicare risk plans were already established by a 1972 amendment to the Act. It concluded that since Congress was aware of the existence of private Medicare providers when it drafted the MSP statute without limiting this remedy to any specific private party, Congress intended to open this remedy to Part C providers.

Humana has also litigated this issue in the U.S. Court of Appeals for the Eleventh Circuit in *Humana Medical Plan, Inc. v. Western Heritage Insurance Company*, 832 F.3d 1229 (11th Cir. 1996). That Court agreed with the Third Circuit's *Avandia* analysis to also rule that Part C providers can seek double damages under the MSP. In *Western Heritage*, Humana sued an alleged tortfeasor's insurance carrier for failing to reimburse it from the settlement proceeds for the costs of injury-related medical treatment. The Eleventh Circuit affirmed the District Court's summary judgment in Humana's favor.

Humana is very active in this type of litigation throughout the country. In addition to the above referenced suits, it has similar cases pending in federal District Courts against a no fault auto insurer and a Plaintiff's counsel alleging they failed to reimburse it for expenses incurred under Medicare Part C insurance policies. Because of the direction courts have moved in this regard, Defendants and their insurers should take special care to determine a Plaintiff's Medicare Part C enrollment status. These parties should also arrange to reimburse the Part C provider for any claim-related expenses it incurred under its policy.

Tags: Medicare Advantage Plans, Part C, Recovery, Secondary Payer