

February 9, 2011

Medicare Advantage Plans and Reimbursement Per MSP

For some time now there has been ongoing debate as to whether Medicare Advantage Plans (“MA”) enjoy the same standing (and therefore remedies) as Medicare regarding reimbursement from primary plans under the Medicare Secondary Payer Act (“MSP”).

Recently, a federal district court in Florida addressed this issue in the case of Humana Medical Plan, Inc. v. Cooke, 2011 U.S. Dist. LEXIS 8909. By way of background, the Plaintiff sustained a slip and fall accident and ultimately sued the condominium association and their insurer for damages. Humana, a Medicare Advantage Plan (“MA”), made payments in the amount of \$19,155.41. A Medicare Advantage plan, the court noted, is an organization that administers Medicare benefits to Medicare beneficiaries enrolled in the Medicare Advantage program. The Plaintiff recovered more than \$19,155.41 in her lawsuit. The stage was set.

Humana filed an amended complaint against both the Plaintiff and the law firm (Note the inclusion of the firm) seeking reimbursement under the MSP, specifically 42 U.S.C. § 1395y (b) (2). They argued that the above section, coupled with 42 C.F.R. §422.108 (f), entitled it to reimbursement.

The court conducted a thoughtful analysis of both sections and noted that under 42 U.S.C 1395y (b) (2) (B) (i), the Secretary’s authority is limited to making payments “conditioned on reimbursement to the appropriate Trust Fund.” Relying upon an alternate section, the court indicated only the United States is vested with full authority to bring an action for reimbursement, and not the Secretary 42 U.S.C. §1395y (b) (2) (B) (iii).

Under 42 C.F.R. § 422.108(f), an MA organization has the same recovery rights against primary plans as the Secretary exercises under the MSP regulations, subparts B-D, part 411 of this chapter. Humana could not claim this “right” because the court had determined the Secretary did not have the authority to bring such an action in the first place. The court therefore granted the Defendants’ motion to dismiss. (It should be noted that the Defendants raised another argument supporting their motion to dismiss namely 42 U.S.C. §1395mm (e) (4), payments to HMO’s. The court noted Humana did not rely upon or argue this provision but still would have dismissed the case as this section did not confer a private right of action, vesting jurisdiction).



In summary, this case is important for the following reasons:

1. The United States, not the Secretary, has the authority to file suit under the provisions of the MSP Act as cited above. A significant setback for MA's.
2. Discusses some of the parameters of the Secretary's power under the MSP as to Medicare Advantage Plans.

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