

## **Third Circuit Rules that Medicare Advantage Plans have a Private Right of Action Under the Medicare Secondary Payer Act**

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On June 28, 2012, the U. S. Court of Appeals for the 3rd Circuit held that the Medicare Secondary Payer Act (the MSP Act) provides Medicare Advantage (MA) plans the same right as the federal government to bring recovery actions against primary payers (i.e., liability insurers, no-fault insurers, self-insured entities). *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 2012 U.S. App. LEXIS 13230 (June 28, 2012) (*Avandia*).<sup>1</sup>

In *Avandia* two Humana Part C Medicare Advantage plans (MA plans) brought suit against GlaxoSmithKline (GSK), alleging GSK was obligated to reimburse Humana for the costs of medical expenses Humana incurred in treating its insureds for conditions related to GSK's Avandia, a diabetes drug that has been linked to increased risk of heart attack and stroke. As part of the Avandia settlement process, GSK had set aside reserves to reimburse Medicare for the cost of treating claimants' Avandia-related injuries. However, MA plans were not reimbursed under the settlement.

The district court dismissed Humana's action. It found that the statute creating the MA program, which contains its own secondary payer provision, does not grant MA plans a private right of action. In addition, the court concluded that the MSP Act's recovery provisions do not apply to MA plans because the MA secondary payer provisions do not reference or expressly incorporate the enforcement rights

available to the government under section 1395y(b)(2)(B) (iii) of the MSP Act or the MSP Act's private right of action provision under section 1395y(b)(3) *In Re: Avandia Marketing Sales Practices and Products Liability Litigation; Humana v. Glaxo SmithKline*, 2011 U.S. Dist. LEXIS 63544, \*15 (E.D. Pa. June 13, 2011). Thus, the district court found that MA plans had no private right of action against primary plans under the Medicare Act, but could instead bring claims in state court against their enrollees. *Id.* at \*16.

The 3rd Circuit reversed. In doing so, it shifted the focus from the MA secondary payer provisions to the MSP Act's private right of action under 42 U.S.C. § 1395y(b)(3)(A). That section provides, "[t]here 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) . . ." The 3rd Circuit found this provision "broad and unambiguous, placing no limitations upon which private (i.e., non-governmental) actors can bring suit for double damages when a primary plan fails to appropriately reimburse any secondary payer." *Avandia* at \*15. Thus, it held that the MSP Act's private right of action unambiguously provides MA plans with a private right of action.<sup>2</sup> In addition, and contrary to the district court, the

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<sup>1</sup> A copy of the opinion can be located at <http://www.ca3.uscourts.gov/opinarch/112664p.pdf>

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<sup>2</sup> The court also held that even if it were to find the text of the MSP Act's private cause of action to be ambiguous, *Chevron* deference to the CMS MA regulations, which provide MA plans with the same rights of recovery available to traditional Medicare under the MSP Act, required it to reach the same conclusion. *Avandia* at \*12.

3rd Circuit found nothing in the Medicare Advantage statute's secondary payer provision that evidenced a congressional intent to deny MA plans access to the MSP Act's private right of action.

On policy grounds, the 3rd Circuit concluded that denying MA plans the same rights to recover medical expenses from primary payers as congress provided to traditional fee-for-service Medicare would "undermine the very purpose of the MA program." *Id.* at \*25. The court also stated that ensuring MA plans could recover from primary payers by using the private right of action for double damages helped to advance the goals of the MA program.

In its conclusion, the 3rd Circuit firmly stated that "[t]he language of the MSP private cause of action is broad and unrestricted and therefore allows any private plaintiff with standing to bring an action" - including MA plans. Thus, MA plans have a private right of action for double damages to sue primary payers to recover payments for medical treatment of injuries/illness for which the primary payer is responsible.

The *Avandia* decision is critically important to insurers who defend and settle personal injury suits in which the plaintiff/claimant is a Medicare beneficiary. Beyond having to ensure only that Medicare's interests in a settlement have been met (i.e., satisfying Medicare's conditional payments and interest in future medical treatment), insurers subject to suit within the 3rd Circuit are now on notice that they must also deal with any MA plans through which a plaintiff/claimant receives Medicare benefits. Additionally, as this is the first federal Court of Appeals to directly address this issues, those outside the 3rd Circuit may also want to consider the *Avandia* holding when settling claims involving claimants who are MA plan enrollees.

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*Please feel free to contact the author or any member of the Cozen O'Connor Health Law Practice Group if you have any questions or need assistance with Medicare Secondary Payer issues. Contact the author at [gfliszar@cozen.com](mailto:gfliszar@cozen.com) or 215.665.7276.*