



Legal Bulletin

May 25, 2011

Haro v. Sebelius- Medicare Conditional Payment Collection Practices Shot Down in Federal Court

In times when the Center for Medicare & Medicaid Services (CMS) is broadly and according to some commentators, exceeding its authority when attempting to enforce the provisions of the Medicare Secondary Payer Act (MSP), it is refreshing to find an example of CMS being challenged. In *Haro v. Sebelius*, putative class Plaintiffs, Medicare beneficiaries and an attorney representing the beneficiaries challenged CMS' program for reimbursement of Medicare conditional payments under the MSP and were rewarded for their efforts with a win against CMS in Arizona District Court.¹

The Plaintiffs sought a summary judgment that the Secretary's practices are not authorized by Congress, are not a permissive interpretation of the statute, and violated the Due Process Clause of the United States Constitution. The Plaintiffs further sought class certification for persons who are subject (or will be subject) to a MSP recovery demand by the government before a proper determination is made. Finally, the Plaintiffs sought to enjoin CMS from making premature threats of commencing a collection action or from prematurely demanding that attorneys withhold liability proceeds from their clients in certain cases.

In *Haro*, the questions before the Court were purely legal: 1) whether Defendant, Kathleen Sebelius, Secretary of United States Department of Health and Human Services, can require prepayment of an MSP reimbursement claim before the correct amount is administratively determined where the beneficiary either appeals or seeks a waiver of the MSP reimbursement claim, and 2) whether Defendant can hold plaintiff-attorneys financially responsible for MSP reimbursement if they do not hold or immediately turn over to Medicare their clients' injury compensation awards.

¹ This case was permitted to move forward last year when the District Judge granted Plaintiffs' motion to compel (2010 U.S. Dist. LEXIS 38620, April 12, 2010).





The Court found that the statutory scheme created by Congress precluded the Secretary's practices addressed in the aforementioned questions to the Court. Regarding the first question, the Court found that the Secretary's application of the 60-day reimbursement requirement to support immediate collection activities against beneficiaries when the reimbursement claim is in dispute is neither rational nor consistent with the statutory scheme providing for waiver and appeal rights. Further, the Court found that the Secretary's interpretation is not permissible because it unnecessarily chills a beneficiary's right to seek a waiver or dispute to the reimbursement claim and reaches beyond the fiscal objectives and policies of the 60-day reimbursement provision.

Regarding the second question, the Court found that at the very least, since plaintiffs-attorneys' rights and obligations are essentially the same as beneficiaries under the MSP, recovery against an attorney is subject to a final determination pending a waiver request or appeal. The Court found no statutory support, either expressly or indirectly through a review of the legislative history, to support the Secretary's assertion that she has a direct cause of action, pursuant to 42 U.S.C. § 1395y(b)(2)(B)(ii), to recover a reimbursement claim from an attorney that has received payment from a primary plan and has passed it along to the beneficiary. The Court also explored Arizona's Rules of Professional Conduct governing attorneys and opined that it would not be in a client's best interest and would violate the rule of diligence for an attorney to pay an incorrectly calculated reimbursement claim. The Court specifically cited the example of an elderly and disabled client with low income who would be very much affected by such a practice.

The Court concluded its opinion when it granted the plaintiff-beneficiaries request for class certification. Applying the standard factors used in determining class certification, the Court concluded that the plaintiff-beneficiaries met its burden and certified a class consisting of "persons who are or will be subject to MSP recovery, and from whom defendant has demanded or will demand payment of MSP claims before there have been determinations of the correct amounts through the waiver or appeal process."

This is definitely an exciting case that will most likely be appealed by CMS and it will be interesting to see how it will impact future recovery efforts. *Haro* may even inspire additional litigation and efforts by the industry to challenge some of CMS' more aggressive practices and legal interpretations of its statutory authority.





In the end, this decision can be viewed as a victory for all parties as it will hopefully contribute to bringing more clarity to the MSP process and the procedures which CMS must follow. For more information, please contact Heather Schwartz, Corporate Counsel, PMSI at Heather.Schwartz@pmsisettlement.com or 813.612.5504.

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