



June 30, 2011

Pennsylvania District Court – Medicare Advantage Plans Do Not Have Recovery Remedies under the Medicare Secondary Payer Act (MSP)

In the past, it was unclear if Medicare Advantage Plans (MAPs) had recovery rights under MSP. MAPs would issue lien demands claiming that they had recovery rights under the Medicare Secondary Payer Act (MSP) in an effort to obtain reimbursement of payments made by the MAP. Due to the ambiguity surrounding MAPs recovery rights, primary payers would yield to the demands of MAPs to avoid a Federal cause of action by the MAP for recovery before satisfying other lien holders. However, an increasing recent amount of case law is depicting a trend that MAPs do not have direct recovery rights under the MSP in Federal court, and that MAPs must pursue reimbursement of payments in State court just like other traditional lien holders. This holding was brought about again in the case of *In Re Avandia Marketing, 2011 U.S. Dist. LEXIS 63544*, United States District Court, Eastern District of Pennsylvania.

This case involved GlaxoSmithKline (GSK), who is the Defendant in thousands of cases brought by individuals alleging that they suffered personal injury from the use of GSK's diabetes medication, Avandia. On behalf of its MAP plans such as Humana Medical Plan, Inc. and Humana Insurance Co. (Humana), Humana filed a complaint to enforce its claimed rights as a secondary payer under the MSP and to seek reimbursement for costs Humana incurred to cover treatment for Avandia-related illnesses and injuries on behalf of settling MAP enrollees. GSK filed a motion to dismiss the Plaintiffs' claims for failure to state a claim upon which relief can be granted, specifically stating that the MSP does not create a private cause of action for MAPs and therefore the Court does not have jurisdiction over Humana's claim for reimbursement. Additionally, the Plaintiff sought equitable relief, which would compel GSK to provide Humana with a list of settling Humana enrollees.

The court analyzed the MSP, specifically the private cause of action provided under the Act, located at 42 U.S.C. § 1395y(b)(3)(A). The court not only found that the private cause of action right does not apply to an MAP, but also found that the MSP as a whole does not apply to an MAP such as Humana. The court further opined that although MAPs are a secondary payer, the MSP does not provide for a direct cause of action for MAPs to recover conditional payments under the MSP.



The court further found that the silence of Congress regarding private remedies for MAPs within the MSP does not create ambiguity, but rather indicates its intent not to create a private right of action for MAPs, instead leaving MAPs to enforce their rights as secondary payers under the common law of contract. The court further noted that although Humana did not have a recovery right under the MSP in Federal court, Humana was not without a remedy; Humana could bring its claims in the state courts against its enrollees to enforce its secondary payer status under the terms of their insurance contracts.

The court granted the Plaintiff's motion to dismiss and also agreed with GSK that the equitable relief that Humana sought in regard to the list of settling Humana enrollees was not appropriate in this case.

Now that it has become clear that MAPs cannot recover in Federal court, it will be interesting to see how state courts handle liens asserted by MAPs and whether or not they will be given any priority over other lien holders. PMSI will continue to follow this issue.

For more information on this topic, please contact Heather Schwartz, Corporate Counsel, PMSI at Heather.Schwartz@pmsisettlement.com or 813.612.5504.

PMSI—Proven Solutions for Cost Containment

Founded in 1976, PMSI is a leader in developing solutions to control the growth of medical costs in workers' compensation. As one of the nation's largest and most experienced companies focused solely on workers' compensation, we deliver proven solutions for cost containment across the claims lifecycle. PMSI's Pharmacy, Medical Services and Equipment, and Settlement Solutions products deliver quantifiable results and improve the quality of care for injured workers. We provide our customers with the innovation, focus, expertise, analytics and technology needed to successfully deliver workers' compensation benefits.

Pharmacy | Medical Services and Equipment | Settlement Solutions