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Federal Jurisdiction Not Created By Alleged Failure in MSP System

A recent decision out of the Western District of New York demonstrates the lengths that at least one plaintiff attorney will go to in order to seek resolution of claims and attempt to circumvent delays caused by the Medicare Secondary Payer (MSP) system. In *Bond v. The Rothlands*¹, two separate personal injury/negligence cases were joined in the interests of judicial economy. The Court found that the two cases had the same legal issue in common—does the failure of the MSP system to issue a timely conditional payment letter create federal jurisdiction over a negligence case that otherwise belongs in state court?

The plaintiffs in both cases were represented by the same counsel who argued that federal jurisdiction existed for two reasons: 1) that Medicare is taking an overwhelming amount of time to decide whether it wants to assert subrogation rights in liability settlements, so long that it is ignoring its own federal rules and holding up the final payments for cases that otherwise would have settled. The plaintiffs contended that by naming Medicare as a defendant in a federal action, it would force Medicare to make faster decisions about its potential interests; 2) the plaintiffs contended that the extraordinary delay that Medicare causes imposes an unconstitutional taking of settlement awards in violation of the Fifth Amendment to the U.S. Constitution. The various defendants countered that the plaintiffs' frustration with the MSP system by itself does not create a case or controversy that a federal court has the power or authority to resolve.

The two cases involve two basic “slip and fall” simple negligence claims. The first Plaintiff, Morag Bond (Bond), sustained injuries on an entrance/exit ramp at a golf course in Akron, New York. She sustained multiple injuries to her right knee and leg which prompted a complaint filed containing two causes of action: 1) compensation for negligence related to the step on the ramp, but did not seek recovery of medical expenses, and 2) compensation for loss of consortium and services – sought by her husband. Because Bond is a Medicare beneficiary, ensuring that Medicare's interests were protected was required before she could settle her case, despite the fact that Medicare confirmed that it had made no conditional payments for her injuries.

In the second case, the Plaintiff, Sheila Scott (Scott), sustained personal injuries at a dialysis center in Buffalo, New York. Her injuries involved her right knee and right shoulder as a result of a fall on a ramp that serves as the entrance and exit to the premises of the dialysis center. Scott also filed two causes of action in her complaint: 1) negligence related to the ramp, seeking compensation in accordance with the negligence, but did not seek recovery of medical expenses,

¹ 2011 U.S. Dist. Lexis 130716 (WDNY December 7, 2011).



and 2) compensation for loss of consortium and services related to Scott's injuries – sought by her husband. Scott is also a Medicare beneficiary. Both settlements would need to ensure that any conditional payments made by Medicare were satisfied in negotiating their settlements.

Although it was clear that Medicare's interests needed to be considered, the main issue to be addressed by the Court was whether a federal court has the power to assert jurisdiction over an otherwise ordinary negligence case just because the MSP system does not operate as planned. While the Court was not unsympathetic to the plaintiffs' situations, without some federal basis or rationale for moving the case from state court (where personal injury cases are typically decided) to federal court, the Court lacked the authority to hear the case. The Court found that the plaintiffs had not presented any information that would satisfy their burden of establishing subject-matter jurisdiction and that both of the plaintiff's complaints contained common law causes of action arising under state law. If the cases were ever to proceed to trial, the jurors would not need to look at any Medicare statute when reaching their verdicts and would not need to pay any attention to how the MSP system operates. Therefore, the plaintiffs' accusations of negligence and claims of injuries did not therefore arise under any federal law and did not confer subject matter jurisdiction on the federal court. Without subject matter jurisdiction, the matters had to be dismissed.

In concluding its opinion, the Court took note that it understood the plaintiff's frustrations with the MSP system and that the court system could not assist within the case at hand, but that instead, the plaintiffs could look to a federal remedy for their frustrations through the legislative process. The Court noted the Strengthening Medicare and Repaying Taxpayers Act of 2011 (SMART Act)² as an example of the legislative process being utilized to provide reform to the MSP system; namely, a new clause within the legislation that would waive Medicare subrogation rights automatically if Medicare took too long to furnish a conditional payment letter.

The SMART Act has garnered large bi-partisan support and transitioned from the House to the Senate in October of 2011. The SMART Act in addition to the *Bond* case is indicative of current frustrations with the MSP process and the industry's recent outspokenness to effectuate change in order to proceed with settlement closure.

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² H.R. 1063, 112th Cong. § 2 (Mar. 14, 2011).

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