

no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

01.31.11

“Private Causes of Action” Under the Medicare Secondary Payer Act: Double Exposure for No-Fault Carriers or Much Ado About Nothing?

By Drew Broaddus

A recent article circulating among the plaintiffs’ bar suggests that a provision in the Medicare Secondary Payer Act (MSP) can be used as a tool to bolster the value of tort cases. At least one article has called this provision a “diamond in the rough” which can double the value of personal injury cases where payments have been made by Medicare.¹ More recently, Secret Wardle attorneys have encountered multiple cases where plaintiffs have invoked this provision in First-Party No-Fault Complaints.

“The MSP statute was passed in response to a dramatic increase in Medicare expenditures.” *Baptist Mem’l Hosp. v Pan Am. Life Ins. Co.*, 45 F3d 992, 997 (6th Cir. 1995). “In the MSP statute Congress made Medicare coverage secondary to any coverage provided by private insurance programs. It did so in order to lower Medicare costs.” *Perry v United Food & Commercial Workers Dist. Unions*, 405 & 442, 64 F3d 238, 243 (6th Cir. 1995).

The MSP allows Medicare to submit conditional payments to health care providers “if a primary plan ... has not made or cannot reasonably be expected to make payment with respect to such item or service promptly.” 42 U.S.C. § 1395y(b)(2)(B)(i). The primary insurance provider must reimburse Medicare for any such conditional payment “if it is demonstrated such primary plan has or had a responsibility to make payment with respect to such item or service.” *Id.* If Medicare is not timely reimbursed for its conditional payments, the MSP authorizes an action by the government or by a private party to enforce the reimbursement provisions of the statute by seeking double damages against a non-compliant insurer. *Id.*

The MSP provides a private cause of action against a primary payer (i.e., a No-Fault carrier) for damages if a primary payer fails to provide primary payment, or appropriate reimbursement, for payments made by Medicare. A “private cause of action” is a civil claim, outside of the No-Fault or tort arena, which allows applicants to sue the responsible No-Fault carrier for double damages in Federal Court if Medicare is not reimbursed for accident-related medical treatment once liability is established (i.e., at the time of settlement). The specific subpart at issue is 42 U.S.C. § 1395y(b)(3)(A), which states:

There 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) in accordance with paragraphs (1) and (2)(A).

SECRET WARDLE NOTES:

Because the plaintiffs’ bar is drawing attention to the issue, expect to see more complaints that attempt to plead a private cause of action under Medicare Secondary Payer Act (MSP).

Since the MSP presents a federal question per 28 U.S.C. § 1331, defense counsel should consider removing any complaint that is filed in state court and pleads the MSP. The federal court would have supplemental jurisdiction over the related state law (i.e., PIP) claim per 28 U.S.C. § 1367.

Private claims under the MSP are premature unless and until the defendant’s responsibility is established through a verdict, summary disposition ruling, or settlement.

1 <<http://www.jdsupra.com/documents/01e8f919-6ee0-46a6-99af-ca3f03343847.doc>> (accessed January 28, 2011).

CONTINUED...

Recent holdings from the U.S. District Court for the Eastern District of Michigan and elsewhere suggest that § 1395y(b)(3)(A) is not much of a weapon. To the extent that § 1395y(b)(3)(A) presents a threat at all, it is easily disarmed, because appropriate reimbursement can be made at the time liability is determined (i.e., at the time of settlement or verdict). *Glover v Liggett Group, Inc.*, 459 F3d 1304, 1309 (11th Cir. 2006) illustrates this point. *Glover* involved a plaintiff who filed a Medicare secondary payer private cause of action against a cigarette manufacturer for medical expenses paid by Medicare. The case was denied, however, because the primary payer (cigarette manufacturer) had not been held liable for the medical treatment. Thus, it could not be said that the primary payer had failed to provide appropriate reimbursement. The Court held that a private cause of action could be brought only against proven tortfeasors, not against alleged tortfeasors.

Glover was cited in the specific context of a First-Party No-Fault claim in *Geer v Amex Assurance*, 2010 WL 2681160 (E.D.Mich.). In *Geer*, the Court dismissed a claim brought under § 1395y(b)(3)(A) as premature. The Court noted: “There are two important conditions precedent that must be satisfied prior to invoking this cause of action. First, Medicare must have actually made payments on the plaintiff’s behalf. ... Second, the primary insurer must be ‘responsible’ for paying the benefits at issue.” This responsibility may be “demonstrated by a judgment, a payment conditioned upon the recipient’s compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan’s insured, or by other means.” 42 U.S.C. § 1395y(b)(2)(B)(ii); 42 § C.F.R. § 411.22.

The Court in *Geer* found that the requirement to demonstrate the primary insurer’s responsibility to pay applies to the private cause of action. Although previous decisions had addressed the application of § 1395y(b)(3)(A) in tort and workers’ compensation cases, the *Geer* Court found nothing that distinguished those above cases from First-Party No-Fault claims. The Court held that “[a]n MSP claim is not ripe until Defendants’ responsibility has been shown by something akin to a judicial determination or settlement.” 2010 WL 2681160 at *6 (Citation omitted).

While § 1395y(b)(3)(A) is not so powerful a weapon as the plaintiffs’ bar claims, it cannot be ignored either. If Medicare made payment where the established-to-be-primary payer (per a settlement or verdict) should have made payment, Medicare must be reimbursed and cannot be ignored. However, if Medicare is properly reimbursed, the private cause of action under § 1395y(b)(3)(A) evaporates. So long as Medicare’s reimbursement rights are dealt with at the time of settlement, and/or a provision for unknown Medicare expenses is included in the settlement agreement, the private cause of action is not available to the plaintiff. A defendant may obtain considerable protection by including a provision in the settlement agreement stating that the settlement amount includes any and all past medical expenses up to the time of settlement.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline SE, Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2011 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Motor Vehicle Litigation Practice Group Chairs

Thomas J. Azoni
John H. Cowley, Jr.

Editor

Bonny Craft

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for No-Fault Newslines, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner’s Alert – Defense strategies for property owners and managers
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability