A HORSE FOR A DIFFERENT COURSE: FOURTH CIRCUIT DECLINES TO APPLY 60-DAY RULE TO MEDICARE SECONDARY PAYER ACT

Most health care providers caring for federal health care program beneficiaries are familiar with the False Claims Act[1] ("FCA") and its *qui tam* provision,[2] which grants private citizens the right to sue health care providers on behalf of the federal government. The seemingly routine 6+ figure FCA settlements garner much-deserved attention. After all, providers can violate the FCA merely by failing to repay an overpayment to a federal government payor within 60 days of identifying it.[3]

Fewer health care providers are aware of the Medicare Secondary Payer Act ("MSPA") private enforcement provision.[4] This provision grants Medicare beneficiaries the right to sue—for double damages—both primary commercial health plans and health care providers who fail to reimburse Medicare despite a determination that Medicare's initial reimbursement was unwarranted. The MSPA private enforcement provision grants double damages in order to incentivize beneficiaries to pursue money owed to Medicare "and still have money left over to reward him for his efforts."

Recently, the Fourth Circuit Court of Appeals analyzed what constitutes "a failure to pay Medicare" sufficient to give rise to a valid MSPA claim. In this federal court case,[5] the MSPA claim was predicated on a Maryland state court hospital negligence case in which the personal representative of a deceased Medicare beneficiary's estate won a $451,956 jury verdict. However, because Medicare "conditional payments"[6] made up $157,730.75 of that damages amount, the plaintiff was obligated to pass along that portion of the judgment to Medicare. The initial verdict was entered on July 22, 2016. On October 31, 2016, the court granted the hospital's motion to decrease the total damages amount by approximately $60,000. While that motion was pending, the hospital tried to make arrangements to pay the judgment. On November 21, 2016, the plaintiff filed the MSPA suit in the United States District Court for the District of Maryland. The plaintiff's federal case alleged that the hospital violated the MSPA by failing to pay the state court judgment. Sixteen days after the new lawsuit was filed, the hospital paid the amount due. Based on the facts presented, the court considered two questions: (1) whether a private individual has standing to bring a suit under the MSPA; and (2) how quickly a final judgment must be paid to comply with the act.

STANDING UNDER THE MSPA

Because this was a federal case, the plaintiff was required to prove Article III standing. That is, the plaintiff bore the burden of demonstrating: (1) an injury in fact; (2) traced back to the defendant hospital's conduct; (3) which would likely be redressed by the court ruling in her favor. By ruling that this particular plaintiff had Article III standing, the court reaffirmed three important legal concepts.

First, even though the plaintiff was legally obligated to return to the federal government all conditional payments made to the hospital by Medicare, she nonetheless suffered an injury in fact. The court supported this conclusion by analogizing it to "more mundane litigation: If Plaintiff Pam borrows something from Lender Lisa, and Defendant Dan steals it, Pam obviously has standing to recover from Dan."[7]

Second, the plaintiff's right to sue the hospital under the MSPA was not erased simply because the hospital paid the plaintiff after the plaintiff filed the complaint in federal court. Standing is established by the facts alleged in the complaint; if a defendant can moot a plaintiff's standing by paying the plaintiff in reaction to the filing of a lawsuit, it would dismantle the double and triple damages provisions included in statutes such as the MSPA and the FCA, respectively.

Finally, relying upon the Supreme Court's analysis of the FCA, the court held that the plaintiff—a personal representative of a deceased Medicare beneficiary's estate—could exercise the MSPA private enforcement action.[8] After all, the federal government can partially assign the federal government's rights to private citizens by statutes. While the MSPA is distinct from the FCA and other *qui tam* statutes because it does not avail all private citizens with a right to sue on behalf of the federal government, the MSPA nonetheless effects a partial assignment of Medicare's rights to recover conditional payments to a specific class of individuals—Medicare beneficiaries. Extending this enforcement right to the personal representative of a deceased Medicare beneficiary's estate is a practical necessity to effectuate Congress's effort at controlling Medicare costs through enactment of the MSPA.

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TIMELINESS UNDER THE MSPA

The Fourth Circuit affirmed the original holding of the District Court and held that the 37-day span from the day the state court entered the final judgment to the day the plaintiff was paid the judgment in full was timely and not a sufficient amount of time to invoke the MSPA's plain language definition of "failure." As the Fourth Circuit succinctly stated, "[t]here cannot be a failure to pay when there has been payment."[9] The Fourth Circuit went further and explicitly refused to adopt a 60-day rule in the MSPA context. While the FCA now contains an express 60-day rule, the court simply stated that there is no such specific deadline within the MSPA and courts cannot graft a 60-day rule onto the MSPA merely because another statutory provision contains such a rule.

This Fourth Circuit's opinion seemed to find no credibility at all in the plaintiff's argument that the Maryland hospital "failed" to reimburse Medicare. However, the Fourth Circuit gave health care plans and providers fair notice that they must act expeditiously to repay Medicare if repayment is deemed appropriate when it cautioned that "there might at some point be a delay of such length that it would amount to a failure…". Given this warning, health care plans and providers would be wise to take the following steps:

1. Immediately upon learning that a Medicare conditional payment must be returned to the federal program, begin to inquire how that payment can be transmitted, even if taking parallel steps to challenge the initial determination; and
2. Once a final court judgment is rendered, act on a reasonable schedule to compensate a successful Medicare beneficiary plaintiff to protect against a MSPA claim for double damages.

If you have questions about this recent decision or other issues regarding the False Claims Act or Medicare Secondary Payer Act, please contact:

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[1] 31 U.S.C. §3729 *et seq.*

[2] 31 U.S.C. §3730.

[3] 31 U.S.C. §3729(a)(1)(G).

[4] 42 U.S.C. § 1395y(b)(2)(B)(2).

[5] *Netro v. Greater Baltimore Medical Center, Inc.*, 2018 WL 2472789 (4th Cir. June 4, 2018).

[6] A payment Medicare makes for services another payer may be responsible for.

[7] *Netro* at *3.

[8] *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

[9] *Netro* at *5.

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