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no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

Court of Appeals Allows Claimant's Private Cause of Action under Medicare Secondary Payer Act to Proceed against No-Fault Carrier

By: Mark C. Vanneste **June 9, 2015**

SECREST WARDLE NOTES

No-fault insurers must be aware of possible penalty interest and attorney fees when investigating and denying a claim. With a recent unpublished Court of Appeals decision, it is becoming more likely that additional penalties may be awarded to a claimant when Medicare has paid medical bills.

A claimant may be able to sue her no-fault carrier for medical bills that Medicare has already paid and recover *double* the amount. This recent case eases the claimant's requirement to show that the no-fault carrier is "responsible" for payment by indicating that this hurdle may be met simply by being a party to the contract of insurance in the first place. Of course, a no-fault carrier may still contest whether the medical services were reasonable, necessary, and related to the accident.

Since this case is unpublished, it is not binding precedent and, additionally, may proceed to federal court at some point given the issues of federal law involved.

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The Medicare Secondary Payer (MSP) provision of the Omnibus Budget Reconciliation Act of 1980 indicates that Medicare will not provide primary coverage when there is also a "primary payer" such as no-fault insurance. 42 USC 1395y(b)(2)(A)(ii). The Act also indicates that Medicare may make conditional payments with the caveat that these payments are reimbursed by the no-fault carrier.

Under certain circumstances, a claimant may have a private cause of action against the no-fault carrier to recover the funds paid by Medicare on its behalf. As an incentive for the claimant to do so, the Act allows for the recovery of double what was paid by Medicare. The Court of Appeals recently dealt with this private cause of action in *Martha Holmes v Farm Bureau and Jeremy Flechsig*, unpublished opinion of the Court of Appeals, issued May 19, 2015 (Docket No. 320723).

In *Holmes*, the plaintiff was injured when she was rear-ended by another driver. The plaintiff was insured with Farm Bureau for PIP and underinsured motorist coverage. After the accident the plaintiff's medical

and care expenses totaled more than $70,000, which was paid by Medicare and Medicare AARP supplemental insurance. Farm Bureau, the plaintiff's PIP carrier, paid none of the medical expenses.

The plaintiff filed suit against Farm Bureau for underinsured motorist coverage and PIP benefits. Farm Bureau moved for partial summary disposition arguing that all of the plaintiff's medical bills had been paid by Medicare and her Medicare supplemental insurance and, therefore, nothing was owed. The plaintiff argued that, under federal law, Farm Bureau should have paid for the medical bills, not Medicare, and that federal law had created a private cause of action for situations where Medicare had paid for expenses that should have been paid by a no-fault insurer.

The trial court found that the plaintiff's medical coverage under the no-fault policy was coordinated and, therefore, the plaintiff could not look to Farm Bureau for payment of medical expenses which had already been paid by Medicare. Additionally, the trial court reasoned that, even if the policy was uncoordinated, it was up to Medicare, and not the plaintiff, to seek reimbursement for medical expenses paid on the plaintiff's behalf. The plaintiff appealed arguing that her policy with Farm Bureau was in fact uncoordinated and that 42 USC 1395Y(b)(3)(a) specifically created a private cause of action which enabled her to sue Farm Bureau for recovery of medical expenses paid by Medicare on her behalf.

First, the Court of Appeals determined that the plaintiff's policy was, in fact, uncoordinated. The policy specifically indicated that it would be primary and could not be coordinated if the policyholder was receiving benefits from Medicare or Medicaid. Additionally, on the policy's declarations page, boxes next to "primary medical payments" for each of the plaintiff's four vehicles were marked with an "x." The Court interpreted this to mean that the Farm Bureau coverage for each vehicle was primary.

The Court recognized that, despite Farm Bureau's primary status, Medicare had paid all $70,000 of the plaintiff's medical bills. The Court looked to 42 USC 1395Y(b)(3)(a) which expressly allows private citizens, such as the claimant in this case, to bring suit against a primary payer to effectuate recovery of funds expended by Medicare on their behalf.

In arguing that the private cause of action to recover on Medicare's behalf must be dismissed, Farm Bureau relied on a subparagraph of the Act requiring that, as a condition precedent to filing suit, it must be "demonstrated that such a primary plan has or had a responsibility to make a payment." 42 USC 1395y(b)(2)(B)(ii). In response, the Court referred to language in the same subparagraph indicating that the requirement to show "responsibility" may be "demonstrated" by judgment, settlement, or "other means."

According to the Court, "other means" may include a contractual obligation. Therefore, the Court determined that an insurance contract automatically demonstrates a no-fault insurer's responsibility to pay. Since the plaintiff in this case had an insurance contract with Farm Bureau, her private cause of action was allowed to proceed potentially allowing her to recover double whatever was paid by Medicare.

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