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no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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"Private Causes of Action" under the Medicare Secondary Payer Act may proceed in First Party No-Fault cases, even in the absence of "demonstrated responsibility," and regardless of the carrier's basis for denying the claim.

By Drew Broaddus

About three years ago, an article circulating among the plaintiffs' bar suggested that a provision in the Medicare Secondary Payer Act ("MSP") could 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 could double the value of personal injury cases where payments have been made by Medicare.[1] In the years since, Secrest Wardle attorneys have encountered multiple cases where plaintiffs have invoked this provision in First-Party No-Fault suits. This practice is likely to increase in light of a recent decision issued by the U.S. Court of Appeals for the Sixth Circuit, *Michigan Spine and Brain Surgeons v State Farm,* 758 F3d 787 (6th Cir 2014).

"The MSP statute was passed in response to a dramatic increase in Medicare expenditures." *Baptist Mem'l Hosp v Pan Am Life Ins,* 45 F3d 992 (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,* 64 F3d 238 (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 ser-vice." *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.*

SECREST WARDLE NOTES:

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

Because the MSP presents a federal question per 28 U.S.C. § 1331, defense counsel should consider removing any compliant 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.

The Sixth Circuit seems to be in the minority in allowing private MSP claims to proceed prior to "demonstrated responsibility." However, unless and until the U.S. Supreme Court intervenes – or the Sixth Circuit reverses itself in an *en banc* panel – federal courts in Michigan will be bound to follow *Michigan Spine* and *Bio-Medical.*

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, apart from any No-Fault or tort theory, which allows applicants to sue the responsible No-Fault carrier *for double damages* if Medicare is not reimbursed for accident-related medical treatment. The specific subpart at issue, 42 U.S.C. § 1395y(b)(3)(A), 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).

In early 2011[2] we discussed the fact that, despite concerted efforts by the Plaintiff's bar, federal courts had not interpreted the MSP to permit double recovery in private-party personal injury cases where payments had been made by Medicare. The consensus that was emerging as of January 2011

[1] <http://www.jdsupra.com/documents/01e8f919-6ee0-46a6-99af-ca3f03343847.doc> (accessed October 6, 2014).
[2] See *No-Fault Newsline,* January 31, 2011, "'Private Causes of Action' Under the Medicare Secondary Payer Act: Double Exposure for No-Fault Carriers or Much Ado About Nothing?," by Drew Broaddus.

had been: neither an insurer nor a tortfeasor could be exposed to additional liability under the MSP, unless and until its responsibility for the underlying claim was "demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release…." 42 U.S.C. §395y(b)(2)(B)(ii); 42 § C.F.R. § 411.22. See also *Glover v Liggett Group, Inc,* 459 F3d 1304 (11th Cir 2006) and *Geer v Amex Assurance,* 2010 WL 2681160 (ED Mich 2010). However, later that year the Sixth Circuit reached a different conclusion (at least with respect to "traditional insurers") in *Bio-Medical Applications of Tennessee,* 656 F3d 277 (6th Cir 2011). In *Bio-Medical,* the Sixth Circuit expressly disagreed with the reasoning of *Glover* – as well as decisions such as *Geer,* which looked to *Glover* – and instead determined that "demonstrated responsibility" is only a precondition to an MSP suit *brought by Medicare itself.* "Demonstrated responsibility" *is not* a precondition to private MSP "lawsuits against traditional insurers." According to the *Bio-Medical* panel, it is only a precondition to a suit by Medicare brought against a tortfeasor.

Since the insurer in *Bio-Medical* was not a no-fault carrier, the decision left unanswered questions regarding the MSP's application in First-Party No-Fault litigation.[3] However, earlier this year the Sixth Circuit considered the MSP's application, in a First-Party No-Fault case, in *Michigan Spine, supra* at 789. In *Michigan Spine,* the trial court had interpreted *Bio-Medical Applications* to allow for private causes of action under MSP *only* when benefits had allegedly been denied on the basis of Medicare eligibility. In other words, if a no-fault carrier had denied the claim on some other grounds (such as the relatedness of the injury to a motor vehicle accident), no claim under the MSP would exist, according to the trial court. The Sixth Circuit rejected this argument: "[a]lthough the text of the [MSP] is unclear as to whether a private cause of action may proceed against a non-group health plan that denies coverage on a basis other than Medicare eligibility, the accompanying regulations as well as congressional intent indicate that this requirement applies only to group health plans and not to non-group health plans. Therefore, Michigan Spine may pursue its claim under the MSP against State Farm…." *Michigan Spine, supra* at 793.

Although the appellate panel in *Michigan Spine* did not expressly address the issue of "demonstrated responsibility" – i.e., could an MSP claim be pled against an insurer who hadn't yet been found responsible? – at least one District Court has already found that *Michigan Spine* "implicitly supports [the] conclusion" that "demonstrated responsibility" *is not* a precondition to pleading such a claim. See *Nawas v State Farm,* 2014 WL 4605601 (ED Mich 2014). "*Michigan Spine* permitted [an MSP] claim to proceed against the defendant … prior to any judicial determination or settlement against State Farm; in other words, prior to any 'demonstrated responsibility' on the part of State Farm to pay an underlying no-fault claim...." *Nawas, supra,* citing *Michigan Spine, supra* at 787.

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[3]See *No-Fault Newsline,* September 15, 2011, "'Private Causes of Action' Under the Medicare Secondary Payer Act May Proceed Without 'Demonstrated Responsibility' Says 6th Circuit, Declining to Follow Decisions of Other Jurisdictions," by Drew Broaddus.

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