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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 Without "Demonstrated Responsibility" Says 6th Circuit, Declining to Follow Decisions of Other Jurisdictions

By Drew Broaddus

Our January 31, 2011 *No-Fault Newsline*[1] discussed the fact that, despite concerted efforts by the Plaintiff's bar, federal courts had not interpreted the Medicare Secondary Payer Act (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 was: 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. § 1395y(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).

SECREST WARDLE NOTES:

Although not a no-fault case, Bio-Medical's discussion of the MSP's "demonstrated responsibility" requirement will lend support to the plaintiffs' bar. Thus, expect to see more PIP complaints that attempt to assert private causes of action under the MSP.

There are important differences between a no-fault insurer and the defendant in Bio-Medical. A no-fault carrier's responsibility is not automatically demonstrated by the insurance contract. This may present a basis for arguing that Bio-Medical should not apply in PIP cases.

However, this month the Sixth Circuit Court of Appeals reached a different conclusion (at least with respect to "traditional insurers") in *Bio-Medical Applications of Tenn v Central States,* Case Nos. 09-6121 & 09-6169 (for publication). 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." It is only a precondition to a suit by Medicare brought against a tortfeasor.

The Sixth Circuit offered the following reasoning in support of this conclusion: First, the provision's text places a condition only on when primary plans must reimburse Medicare; it does not mention when plans must pay private parties. Second, the structure of the MSP suggests that the provision is limited to the reimbursement of Medicare. Third, the legislative history suggests the same. Fourth, the predominant legislative backdrop was Medicare's (not private parties') failed attempts to bring lawsuits against tortfeasors. Fifth, attempting to apply the "demonstrated responsibility" provision to lawsuits brought by private parties essentially relegates the private cause of action to a super-judgment enforcement mechanism, and no plausible explanation exists, in the Sixth Circuit's view, for why Congress would have sought to limit it in that way.

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[1] "'Private Causes of Action' Under the Medicare Secondary Payer Act: Double Exposure for No-Fault Carriers or Much Ado About Nothing?," by Drew Broaddus

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Interestingly, based in part upon this construction of the MSP, *Bio-Medical* held that no private right of action exists *at all* against *tortfeasors*. For this reason, the court held that the 11th Circuit reached the right result in *Glover* (dismissal of the plaintiff's MSP claim), but for the wrong reasons.

Although not a no-fault case, *Bio-medical* lends considerable support to the argument that a private cause of action exists under the MSP against a no-fault carrier even if the no-fault carrier's responsibility has not been demonstrated. However, certain features of the No-Fault Act arguably make *Bio-medical* distinguishable in this specific context. In *Bio-medical,* the insurer had no legitimate contractual basis upon which to deny liability, apart from the claimant's Medicare eligibility, which the Sixth Circuit easily found to be improper under 42 U.S.C. § 1395y(b)(1)(C). In the context of the No-Fault Act, however, the insurer is only responsible for medical expenses that are related to the motor vehicle accident. MCL 500.3105(1). Even then, the expenses must be reasonable and necessary. MCL 500.3107(1). Unlike the situation in *Bio-medical*, submission of "reasonable proof of the fact and of the amount of loss sustained" is a condition precedent to the insurer's responsibility under the No-Fault Act. MCL 500.3142(2). In other words, a no-fault carrier's responsibility is not automatically demonstrated by the insurance contract, as the court found in *Bio-medical.* For theses reasons, a no-fault carrier is arguably more akin to a tortfeasor – which cannot have exposure under the MSP until it is adjudged to be responsible for the underlying claim (and against whom, *Bio-medical* held, there is no private right of action under the MSP) – and less like the defendant insurer in *Bio-medical.* This is because a no-fault carrier's responsibility is not triggered, per statute, until certain proofs are provided – similar to the way a tort case must be proven in the court. In both situations, the act of making a claim does not itself create responsibility.

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