Medicare . . . Yep It Is Still Boring

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It has been several months since we last posted about Medicare and our client's new reporting requirements. While we are sure you have enjoyed the reprieve, Medicare remains one of those boring things you need to know. However, unlike some other boring things you probably show know about – like how to change a tire for example – Medicare is one that our clients can't avoid (and yes, tire changing can be avoided in innumerable ways, and this writer has used them all!).

So, it is with interest, if not complete enthusiasm (or authority), that we bring you a recent decision by the Eastern District of Pennsylvania from the Avandia MDL – Humana v. GlaxoSmithKline, No. 10-673, slip op. (E.D. Pa. Jun. 13, 2011) – the primary result of which is a finding that while the government created its own federal, private cause of action for reimbursement of Medicare expenses, it did not expressly or impliedly extend that same recourse to private Medicare providers.

Forgive us, but a bit of explanation of the Medicare system is required. We are all familiar with the Medicare Secondary Payer Act ("MSP Act"), 42 U.S.C. §1395y(b), which provides that settling-product liability defendants (considered primary insurers) must reimburse the government for Medicare expenses it incurred related to the alleged injury. We also know that if a settling-product liability defendant fails to reimburse the government, the government has a private cause of action against the settling defendant for double damages. A pretty big stick in the mass tort arena.

What we may not take the time to appreciate is that not all Medicare is provided directly by the government. Most people eligible for Medicare can elect, under Medicare Part C, to receive their Medicare insurance from private insurers known as Medicare Advantage organizations ("MAOs"). MAOs are governed by the Medicare Advantage ("MA") statute, 42 U.S.C. §1395w-21(a)(1), and like the government are afforded secondary payer status (eligible for reimbursement from primary insurers including product liability defendants). Humana, slip op. at 5-7.

If they are both secondary payers entitled to reimbursement, what's the issue? Well, that was Humana's argument – we are the same as the government, a provider of Medicare,

and therefore we can sue a settling-product liability defendant under the MSP Act for failing to reimburse us. But the court didn't agree.

This court and others who have looked at the issue have found that while the MA statute references the MSP Act, it does so only to explain "when a Medicare provider is a secondary insurer, and does not incorporate the *remedies* of the MSP Act." Id. at 7 (emphasis added). In other words, if the government is the Medicare provider, it can sue a settling-product liability defendant for failure to reimburse and potentially recover double damages in a federal private cause of action under the MSP Act. If Medicare coverage is provided by a private insurer, no such cause of action exists and there is no right to double damages. MAO's are not without recourse, they are simply limited to "enforce[ing] their rights as secondary payers under the common law of contract." Id. at 13. (Per the MA statute, an MAO can include in its insurance contract with enrollees a provision that makes the MAO a secondary insurer and therefore, the MAO "*may* seek reimbursement from the primary insurer." Id. at 6.).

So, we laud this decision as protecting our clients from potential suits for double damages; but we also question its impact and implication as we doubt our clients typically gather information on whether plaintiffs are Part A, Part B or Part C Medicare recipients. Maybe the lesson is they should – and they might have to.

To bring it back to the reporting requirements that our clients are all anxiously waiting to go into effect, Humana's complaint also had a claim for equitable relief asking the court to require defendant to identify "every MAO-insured individual with whom [defendant] has settled." Id. at 13. As we suspected, the defendant's response was that it doesn't collect insurance coverage information on settling plaintiffs. Id. Humana argued that the new MSP Act reporting requirements will apply to MAO enrollees as well as government-Medicare recipients. The court declined to resolve the dispute as not ripe because the reporting provision is not yet in effect and the MAO remains in the better position to know who its enrollees are. But with the reporting requirements about to go into effect (presumably), this may be another area where the government has afforded itself a protection it has not extended to the private insurance companies. Whatever the eventual ruling on that issue, the bottom line is Medicare is still boring, still complicated, still (and increasingly) burdensome to our clients, and still unavoidable.