Chair’s Column

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It is my honor and pleasure to serve as the new chair of the Payers, Plans, and Managed Care Practice Group (PPMC PG). It is quite a challenge to follow in the footsteps of exceptional leaders such as immediate past Chair Todd Ebersole, and Lisa Hathaway before him. I had the good fortune of serving on both their teams for the past six years as vice chair of membership, and I’d like to thank them both for their service and mentorship.

I am blessed to be part of an outstanding team of PPMC PG leaders, each of who devotes countless hours to ensuring that the PG delivers unparalleled return for its members’ annual dues investment. For a detailed explanation of your exceptional return on that modest investment, please see our Bill of Sale on the PPMC PG webpage. Now, I’d like to introduce the team behind the Bill of Sale:

Leah B. Stewart, Vice Chair of Education

Leah has returned for her fourth year in this challenging role following prior service as chair of the PPMC PG’s Managed Care Contracting Affinity Group (MCC AG). Leah spearheads the PG’s delivery of high-quality educational programs, including webinars, mini-series, roundtable discussions, and luncheons at in-person programs. We are pleased to sponsor or co-sponsor three PG luncheons this year: in February, at the Physicians and Hospitals Law Institute in Las Vegas; in March, at the Institute on Medicare and Medicaid Payment Issues in Baltimore; and in June, at the 2015 Annual Meeting in Washington, DC. In short, I can assure you that the PG will deliver a year chock-full of payers, plans, and managed care programming leading up to the Institute for Health Plan Counsel in the Fall of 2015!

Robert E. Slavkin, Vice Chair of Publications

Rob has assumed this important role after serving as a co-chair of the PPMC PG’s e-Alert team. Rob marshals the PG’s delivery of high-quality written materials, including executive summaries, in-depth member briefings, and newsletters like this one. Rob also oversees the efforts of Email...
Alert Co-Chairs Ardith M. Bronson and Emily Moseley, who generate timely email alerts on new developments of interest to the PPMC PG community.

**Brian R. Stimson, Vice Chair of Research and Website**

A seasoned PPMC PG veteran, author, and presenter, Brian has returned to lead the PPMC PG’s expansion of our highly reviewed library of tutorials comprised of educational MP3s on topics ranging from ERISA Preemption Basics to Government Investigations of Managed Care Plans and Providers to HIPAA for Health Plan Lawyers. Available 24/7/365, these tutorials are great tools for new lawyers or for those new to a particular topic. In addition to editing and coordinating the PPMC PG’s period feature article in *Connections*, Brian also initially championed the PG’s Twitter presence. Follow @AHLA_PPMC for the latest PPMC PG news and industry developments, and keep an eye peeled for an announcement regarding the PPMC PG’s new social media coordinator.

**Xavier Baker, Vice Chair of Membership**

Xavier is one of the PPMC PG’s two new vice chairs, having previously served as a PPMC PG e-Alert coordinator. He leads the PG’s efforts to broaden and retain our membership by ascertaining what you—our members—are looking for and how we can improve and deliver additional value to you and your practice. Don’t be surprised if you receive an email, letter, survey, or call from Xavier, and, if you do, be sure to take the opportunity to provide feedback—we truly want it and will listen.

**Janice H. Ziegler, Vice Chair of Strategic Activities**

Janice, our other new vice chair, assumed this important position after co-chairing the PPMC PG’s Medicare Advantage and Part D AG. Her quiet leadership and insight have helped our three AGs rapidly expand both their membership and their offerings. Janice oversees a dynamic group of AG co-chairs: Karen R. Palmersheim, a prior PPMC PG speaker and author, chairs our Health Plan AG, leading the charge to ensure that the PPMC PG delivers maximum value and practical benefit to lawyers who represent health plans, both in-house and outside counsel. Look for news on the Health Plan AG’s new Health Plan Liaison Program, in addition to roundtables on topics of particular interest to plan counsel. Darryl T. Landahl, who previously served as contributor to the Medicare Advantage and Part D’s portions of the MCC Toolkit, has assumed the chair of our MCC AG. He will be working to develop new programming of interest to both plan and provider counsel toiling in the ever-changing contracting arena. Elizabeth B. Lippincott, a frequent PPMC PG author and presenter, returns as co-chair of the Medicare Advantage and Part D AG, and Lisa G. Han, another frequent PPMC PG author and speaker, joins her as vice chair. The Medicare Advantage and Part D AG just launched an innovative and well-received Virtual Luncheon Program that offers unique networking opportunities in a time of budget constraints, as well as a forum for discussion of MA/D issues. Remember that membership in any or all of our AGs—and exclusive access to AG content—is free to PPMC PG members.

**Alan Bloom, Discussion List Moderator**

Alan graciously continues his role as moderator of the Payers, Plans, and Managed Care Discussion List. A past president of both of AHLA’s predecessor associations, Alan’s wit and unique insights ensure that the discussion list plays a valuable role in our electronic presence.

By now, I hope you have detected the pattern running through each member of our leadership team: each has voluntarily served the PPMC PG membership in a variety of prior capacities; they have authored articles and email alerts, moderated or presented on webinars, recorded tutorials, assisted with in-person programs, or contributed to discussions. Each has freely shared his or her particular talents with PPMC PG members.

My single regret in my now 27 years as an AHLA member is that I did not become involved in a PG or actively volunteer for the first 15 years of my membership. I now know that like most things in life, the more you contribute to AHLA, the more value you will receive from it. Luckily, you don’t have to waste a single year. Contact information for all PPMC PG leaders is available on our webpage. I encourage you to call or email any of us at any time—we will value and willingly accept whatever talent you choose to contribute!

Best,
Mark
Recent Court Decisions Pave the Way for Medicare Advantage Plans to Recover Statutory Double Damages from Primary Insurers

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The Medicare Secondary Payer (MSP) law, which serves as one of the Medicare program’s main legal tools for controlling costs, makes private insurers and self-insured corporate defendants primarily responsible for paying the medical expenses of Medicare beneficiaries. Failure to comply with the MSP law can expose such “primary plans” to double damages in actions by the United States and private plaintiffs. While private plaintiffs suing under the MSP law have traditionally included Medicare beneficiaries and health care providers, Medicare Advantage Organizations (MAOs) are now bringing their own actions under the MSP law to recoup their payments for the medical expenses of Medicare Advantage members. Although MAOs have encountered numerous setbacks in such litigation, the MSP law is trending in MAOs’ favor. This article explores this legal trend and what it means not only for MAOs, but also for primary plan defendants.

The Structure of the Medicare Program and MSP Law

The Medicare program pays for the medical costs of more than 50 million elderly and disabled Americans, with total annual expenditures topping $580 billion. The Medicare program was created by the Social Security Amendments of 1965, which are commonly referred to as the “Medicare Act.” The Medicare Act is divided into Parts A through E. Parts A and B create the traditional, government-run “fee-for-service program option,” which covers hospital care as well as outpatient and physician services. Part C, which Congress adopted in 1997 and amended in 2003, creates the program now known as Medicare Advantage (MA). The MA program allows eligible participants to opt out of traditional fee-for-service Medicare and obtain similar benefits through health plans sponsored by private MAOs. The MA program now represents a significant percentage of the Medicare marketplace, with approximately one quarter of all Medicare beneficiaries opting to participate in MA plans in 2013. Part D, which Congress adopted in 2003, creates a prescription drug benefit. Finally, Part E contains general provisions applicable to the entire Medicare Act.

In response to rising Medicare expenses, Congress passed the MSP law, 42 U.S.C. § 1395y(b), in 1980. The MSP law, codified in Medicare Part E, states that Medicare plans are “secondary payers” when a beneficiary also is covered by a “primary plan.” Primary plans include group health plans, workers’ compensation plans, automobile or liability insurance policies or plans (including self-insured plans), and no-fault insurance. The definition of Medicare as a secondary payer benefits the public fisc by shifting the cost of covering Medicare beneficiaries to private insurers and self-insured corporations in the first instance.

Notwithstanding its secondary payer status, Medicare will make conditional payments to health care providers when a primary plan “has not made or cannot reasonably be expected to make payment . . . promptly.” The MSP law requires primary plans to reimburse Medicare for conditional payments. To help ensure compliance, the MSP law creates two separate causes of action for double damages against primary plans. If Medicare makes a conditional payment and the primary payer does not reimburse Medicare, then the United States may bring a direct action against the primary plan pursuant to § 1395y(b)(2)(B)(iii). Additionally, a private plaintiff may bring a cause of action against the primary payer under § 1395y(b)(3)(A) (MSP Private Cause of Action Provision). The MSP law does not specify the categories of private plaintiffs who have standing to sue for double damages.

In 1997, Congress included a separate secondary payer provision in Medicare Part C that states that an MAO “may . . . charge or authorize the provider . . . to charge” the primary plan for any services “made secondary pursuant to [§ 1395y(b)(2)].” This permissive language imbues MAOs with the right to charge primary plans, but does not require them to do so. While Part C’s secondary payer provision incorporates the MSP law’s definition of primary payer, it does not reference the MSP Private Cause of Action Provision nor does it purport to establish an independent cause of action for MAOs.

In recent years, MAOs have invoked the MSP law to pursue recoveries against primary plans. MAOs have faced resistance from federal district courts, which have held that MAOs lack standing to sue, but in a promising turn for MAOs, in 2012, the Third Circuit held that MAOs may sue under the MSP Private Cause of Action Provision. Additionally, the Sixth Circuit found that an array of primary plans may be proper defendants in actions under the same provision. Together, these decisions open the door to increased litigation by MAOs under the MSP law.
In re Avandia: MAOs May Sue Under the MSP Private Cause of Action Provision

In In re Avandia, the Third Circuit reversed the order of the district court dismissing a complaint that Humana Insurance Company (Humana) filed against GlaxoSmithKline (GSK) under the MSP Private Cause of Action Provision. GSK was previously the defendant in multidistrict litigation brought by individual plaintiffs who allegedly suffered personal injuries after consuming GSK’s diabetes medication, Avandia. In settling with the individual plaintiffs, GSK set aside funds to reimburse the traditional, fee-for-service Medicare program for costs paid under Medicare Parts A and B. GSK, however, did not reimburse MAOs such as Humana, which had provided the same benefits under Medicare Part C.

In dismissing Humana’s complaint, the district court concluded that the MSP Private Cause of Action Provision did not apply to MAOs. The district court noted that Part C, which specifically governs the MA program, contains its own secondary payer provision that authorizes, but does not compel, MAOs to charge primary plans for the medical expenses of MA plan participants. Further, the district court noted that Part C’s secondary payer provision does not create an independent private right of action. Because Congress adopted specific statutory provisions for the MA program, the district court concluded that the general MSP Private Cause of Action Provision did not apply to MAOs.

On appeal, the Third Circuit refocused the analysis on the language of the MSP Private Cause of Action Provision and its structural relationship to Medicare Part C. As the Third Circuit explained, “[t]he plain text of the MSP private cause of action lends itself to Humana’s position that any private party may bring an action . . . . It establishes ‘a private cause of action for damages’ and places no additional limitations on which private parties may bring suit.’” In other words, the language of the MSP Private Cause of Action Provision authorizes double damages whenever the primary plan fails to pay in accordance with § 1395y(b)(2)(A). “Paragraph (2)(A) . . . consistently refers to payments ‘under this subchapter,’” which would include “payments made under Part C as well as those made under Parts A and B.”

According to the Third Circuit, it was irrelevant that Medicare Part C did not specifically authorize the same remedy because “Humana is not arguing that [Part C] provides a cause of action . . . but that the language of the MSP private cause of action is itself broad enough to encompass an MAO such as Humana, regardless of the existence of [Part C].” Moreover, the result reached by the Third Circuit was consistent with the policy behind the MA program, which was to harness the power of private sector competition to stimulate experimentation and innovation that would ultimately create a more efficient Medicare system. This goal would be impossible to accomplish if MAOs began at a “competitive disadvantage” relative to traditional Medicare because they were unable to consistently recover conditional benefits from primary payers.

The U.S. Supreme Court denied GSK’s petition for certiorari in In re Avandia, and no federal appellate court has reached a contrary holding on the precise issue considered by the Third Circuit. Nevertheless, commentators suggested that the Ninth Circuit reject In re Avandia last year in Parra v. PacifiCare of Arizona. The plaintiffs in Parra were survivors in a wrongful death action. They sued PacifiCare, the decedent’s MAO, for a declaratory judgment that PacifiCare had no private right of action under the Medicare Act and, therefore, could not recover funds that GEICO, the
decedent’s primary plan, had paid jointly to plaintiffs and PacifiCare as part of a personal injury settlement. PacifiCare counterclaimed for reimbursement from the plaintiffs under the Medicare Act. The Ninth Circuit agreed that PacifiCare had no private right of action under Medicare Part C or the statutory provision in Medicare Part E that authorizes direct actions by the United States. At the same time, the Ninth Circuit expressly stated that it was not deciding whether In re Avandia was decided correctly, because it was unnecessary to reach the issue of whether an MAO may sue under the MSP Private Cause of Action Provision. According to the Ninth Circuit, the MSP Private Cause of Action Provision applies only “in the case of a primary plan which fails to provide for primary payment.” Because PacifiCare pleaded no claim against GEICO, and GEICO made a joint payment to the survivors and PacifiCare when it settled with the survivors, the MSP Private Cause of Action Provision was inapplicable. The express language of the opinion, therefore, belies the fact that Parra created a circuit split.

In contrast to the Ninth Circuit, in Humana Insurance Company v. Farmers Texas County Mutual Insurance Company and Mid-Century Insurance Company of Texas, the U.S. District Court for the Western District of Texas did reach the issue of whether an MAO may sue under the MSP Private Cause of Action Provision. In that case, Humana sued State Farm under the MSP Private Cause of Action Provision for reimbursement of payments for the medical expenses of State Farm’s insureds. Magistrate Judge Mark Lane issued a report and recommendation concluding that Humana had no private right of action under the MSP law because Medicare Part C did not authorize one. In a recent order, District Judge Lee Yeakel accordingly found that Magistrate Judge Lane erred in failing to follow In re Avandia and rejected the recommendation to dismiss Humana’s action. Unless Judge Yeakel certifies his decision for interlocutory review, the issue is unlikely to reach the Fifth Circuit in the near future. Thus, for now, there is no circuit split at the appellate level and MAOs in substantially all federal jurisdictions may rely on In re Avandia as persuasive authority for bringing MSP actions against primary plans.

**Michigan Spine: Expanding the Pool of Potential Primary Plan Defendants**

The Sixth Circuit’s recent decision in Michigan Spine & Brain Surgeons, PLLC v. State Farm Mutual Auto Insurance Company is another victory for MAOs favoring an expansive application of the MSP Private Cause of Action Provision. The plaintiff in Michigan Spine was a medical practice that provided approximately $26,000 in treatment to an individual who allegedly was injured during an automobile accident and was insured by State Farm. After State Farm denied coverage on the ground that the injuries resulted from a preexisting condition, the medical practice submitted its claims to Medicare. Medicare approved a conditional payment of only $5,000, which prompted the medical practice to sue State Farm under the MSP law.

The district court dismissed the case for failure to state a claim under **Bio-Medical Applications of Tennessee, Inc. v. Central States Southeast & Southwest Areas Health & Welfare Fund.** According to the district court, **Bio-Medical** limited the availability of the MSP Private Cause of Action Provision to cases against “primary plans” that denied medical claims because of the plan member’s eligibility for Medicare. Because State Farm is a primary plan that denied the medical practice’s claim for reasons unrelated to Medicare eligibility, **Bio-Medical** supposedly foreclosed any recovery under the MSP law.

The Sixth Circuit rejected the district court’s reading of **Bio-Medical**, finding that the district court’s use of the term “primary plans” in **Bio-Medical** was dicta, and that **Bio-Medical’s** restriction of the MSP Private Cause of Action Provision to denials of coverage based on Medicare eligibility applies only in cases against group health plans. Because State Farm is a liability insurer and not a group health plan, the Sixth Circuit held that the medical practice stated a claim under the MSP law by alleging that State Farm denied coverage for reasons unrelated to Medicare eligibility.

In **Michigan Spine**, the Sixth Circuit emphasized that the district court’s approach would “eviscerate the private cause of action as it relates to non-group health plans.” Additionally, the Sixth Circuit noted that other federal appellate courts, including the Third Circuit in **In re Avandia**, had “allowed claims under the [MSP] Act to proceed against non-group health plans without evidence that Medicare eligibility was involved in the benefit decision.” Therefore, **Michigan Spine** thus expanded the types of primary plans that are proper defendants in MSP actions.

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**Share Your Knowledge Through Tutorials**

PPMC PG is seeking attorneys to record tutorials for the PG’s website. The tutorials are 30-60 minutes long, and cover introductory-level managed care topics for a target audience of younger lawyers. PPMC PG records the tutorials in audio format and then makes the recordings available on its website, along with a PowerPoint presentation supplying the related legal citations. Please contact Vice Chair of Research and Website Brian Stimson at brian.stimson@alston.com, or call (404) 881-4972 if you are interested.
Conclusion
Federal appellate decisions under the MSP law are trending in favor of MAO actions for double damages against group health plans, liability insurers, and self-insured mass tortfeasors. MAOs have a viable private right of action under the MSP law, which they may pursue against liability insurers and self-insured mass tortfeasors who fail to make payments for reasons unrelated to Medicare eligibility. This legal trend suggests that growing numbers of MAOs will become increasingly aggressive in recouping payments from primary payers in the coming years.

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8 42 U.S.C. § 1395w-22(a) (4).
11 *In re AvANDia Mktg.,* 685 F. 3d at 359 (quoting 42 U.S.C. § 1395y(b)(3)(A)).
12 Id. at 359, 360.
13 Id. at 361.
14 Id. at 364.
17 Parra v. Pacificare of Arizona, Inc., 715 F.3d 1146 (9th Cir. 2013).
18 Id. at 1154.
19 Id. at 1154–55.
21 Id. at 12–13.
24 Id.
27 Michigan Spine, 758 F.3d at 792.
28 Id. at 792-93.
29 Id. at 793.

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