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June 11, 2018

## Caution: MSP Caselaw Ahead

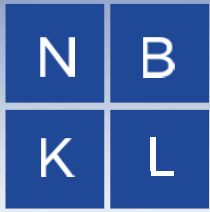
by Rasa E. Fumagalli, JD, MSCC

The text of the Medicare Secondary Payer statute (MSP) has been aptly described by the U. S. Court of Appeals for the Sixth Circuit as “convoluted” and “tortuous.” (*Bio-Medical Applications of Tennessee, Inc. v. Central State’s Southeast and Southwest Areas Health and Welfare Fund*, 656 F.3d 277(6<sup>th</sup> Cir.2011) In light of this, MSP caselaw often requires a more in depth review than other areas in order to fully grasp the meaning and impact of the decisions. For example, in the case of *In re Marriage of Washkowiak*, 2012 IL App. (3d) 110174, (3d Dist. March 7, 2012), a portion of a Medicare Set-Aside (MSA) account was distributed in connection with a divorce. This case does not stand for the proposition that all MSAs would be considered marital property in Illinois. It is instead limited to the facts of the *Washkowiak* claim where the divorce settlement agreement incorporated the claimant’s “net proceeds” from his workers’ compensation settlement and determined the agreed upon distribution of assets.

The recent decision in the *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, case (No 1:17-cv-01541-JBM-JEH, 2018 U.S. Dist. LEXIS 88565 (C.D. Ill. May 25, 2018) is similarly vulnerable to an overly broad interpretation. The case does not stand for the proposition that Illinois won’t allow a Medicare Advantage Organization (MAO) to bring suit under the MSP Act’s Private Cause of Action. Rather, the Court’s dismissal of the Amended Complaint filed by MAO-MSO Recovery due to a lack of subject matter jurisdiction was based on sloppy pleadings.

By way of background, the MAO-MSO Recovery II, LLC action was filed under the MSP Act and is related to several other putative class actions filed around the nation. Although the instant action was filed in March of 2017, the issue of the Plaintiff’s standing to bring the federal suit under Article III has been disputed ever since. The Plaintiffs in this case are four entities: MSP Recovery LLC, MAO-MSO Recovery II, LLC, MSPA Claims 1, LLC and MSP Recovery Claims, Series, LLC. In order to show Article III standing, plaintiff must have “suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and that is likely to be redressed by a favorable judicial decision.” State Farm argued that MAO-MSO Recovery II, LLC is unable to show that they suffered an injury in fact.

The Court agreed with State Farm. In reaching this conclusion, the Court noted that the MSP provisions allow for a Private Cause of Action against primary payers who fail to reimburse secondary payers for conditional payments made on behalf of Medicare beneficiaries. Although the Court noted that the Third and Eleventh Circuits, along with other district courts, have held that a Medicare Advantage Organization (MAO) may sue a primary plan that fails to reimburse the MAO’s secondary payment, the Plaintiff here was not an MAO.



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The Plaintiff's Amended Complaint alleging their right to reimbursement under the MSP is based on a valid assignment of rights from "Health First," an MAO, was also misleading and without merit. First, the Court noted that the "Recovery Agreement" that purported to show the valid assignment of rights was between "Health First Administrative Plans" (HFAP) and only one Plaintiff, MSP Recovery, LLC. The subsequent "Assignment" document wherein MSP Recovery, LLC assigned all its rights from HFAP to MSP Recovery Claims, Series LLC led the Court to conclude that MSP Recovery Claims, Series, LLC was the only possible Plaintiff that may have any "rights" to potentially support standing. The Court then explained that Health First consisted of two separate legal entities: HFAP and Health First Health Plans (HFHP). Of these two entities, only HFHP was an MAO. HFAP was a contractor for the HFHP MAO and as such provided administrative and financial management services. Since Plaintiff's Amended Complaint also referred to Health First as HFAP, it was clear that this entity was bringing the Private Cause of Action. In finding that Plaintiff lacked standing, the Court noted that the Assignment of Rights Agreement was not executed by the HFHP MAO, but was instead executed by HFAP, the administrative contractor for the HFHP MAO. It also looked at the Administrative and Financial Management Agreement that further clarified that HFAP simply provided administrative services for HFHP. In light of this, HFAP did not have any rights to assign to Plaintiffs to support an MSP Private Cause of Action. Since HFAP did not have any rights, Plaintiff did not have any rights and lacked standing under Article III.

The Court also rejected Plaintiff's argument that Maintenance Service Organizations (MSOs) and Independent Practice Associations (IPAs) should be considered to have the same Private Cause of Action rights as an MAO. In doing so, it noted that regardless of whether HFAP would be entitled to bring suit, HFHP is the company that sustained injury by not being reimbursed, not HFAP.

The remainder of the decision focused on whether Rule 11 sanctions should be imposed based on Plaintiff's filing of a knowingly inaccurate Amended Complaint. In dismissing the case with prejudice, the Court gave Plaintiff seven days to show why they should not be sanctioned.

This case highlights the complexity of the MSP Act. We will keep you advised of other pertinent caselaw as it develops in this field.