IADC Committee Newsletter

MEDICAL DEFENSE AND HEALTH LAW

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This month's newsletter discusses a recent Arizona case involving preemption of state anti-subrogation laws by Medicare Secondary Payer provisions in the context of Medicare Advantage plans.

Arizona Court of Appeals Upholds Medicare Advantage Right to Recover Conditional Payments

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The issue of Medicare and Medicare Advantage recovery of conditional payments has taken on more significance in recent years due to increased enforcement of Medicare Secondary Payer ("MSP") and Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA") regulations,[1] as well as increased efforts in general by health insurers and healthcare providers to recover medical expenses from tortfeasors and other secondary sources. In spite of this, many plaintiff attorneys settling medical malpractice and other personal injury lawsuits often still attempt to evade the requirement to protect Medicare's interest in recovering conditional payments made on behalf of Medicare beneficiaries. Many of the attempts to evade this obligation have focused on whether MSP regulations preempt state "anti-subrogation" laws, which bar the subrogation or assignment of personal injury claims. On February 13, 2014, the Arizona Court of Appeals joined other jurisdictions in squarely holding that MSP provisions preempt state anti-subrogation laws, thus upholding the right of Medicare and Medicare Advantage plans to recover medical payments made on behalf of their enrollees from their enrollees' personal injury settlements.[2]

Estate of Etheridge v. Recovery Management Systems, Inc., involved a dispute over whether Mercy Care Advantage, a contracted Medicare Advantage plan, could recover medical expenses paid for its enrollee, Deborah Etheridge.[3] According to the opinion, Etheridge died in September 2007 due to neglect of the nursing home in which she resided prior to her death. Etheridge's estate ("Estate") sued for abuse, neglect, and punitive damages under Arizona's Adult Protective Services Act,[4] and Etheridge's surviving statutory beneficiaries sued for compensatory and punitive damages under Arizona's wrongful death statute.[5] After the Estate and the statutory beneficiaries settled their claims with the nursing home, Mercy Care Advantage sought to recover medical expenses the plan paid for Etheridge's care prior to her death.[6] The parties agreed that, absent preemption, Arizona's anti-subrogation doctrine would bar Mercy Care Advantage's reimbursement claim.[7]

The *Etheridge* court began its analysis by reviewing the statutory framework of Medicare, Medicare Part C, and the relevant MSP provisions.[8] The court noted that MSP legislation made Medicare secondary to any "primary plan" obligated to pay the beneficiary's medical expenses, meaning that Medicare pays healthcare costs only when no other coverage is available through another insurance plan, from a tortfeasor, or otherwise. Thus, if a Medicare beneficiary subsequently recovers from a tortfeasor or other primary plan, the beneficiary must reimburse Medicare for the medical expenses it paid on behalf of the beneficiary.[9]

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[1] *See generally* 42 U.S.C.A. § 1395y(b) (Medicare as a secondary payer provisions).

[2] *Estate of Etheridge v. Recovery Management Systems, Inc.,* ___ P.3d ___, 2014 WL 571948 (Ariz. Ct. App. February 13, 2014).

[3] *Id.*

[4] Ariz. Rev. Stat. Ann. §§ 46-451 *et seq.* (Supp. 2013).

[5] Ariz. Rev. Stat. Ann. §§ 12-611 *et seq.* (2003).

[6] *Etheridge,* 2014 WL 571948 at *1.

[7] *Id.* at *9, n.4 (citing *Lingel v. Olbin,* 198 Ariz. 249, 8 P.3d 1163 (Ct. App. 2000) (neither wrongful death claim nor proceeds from such a claim are assignable prior to judgment or settlement)).

[8] *Id.* at *2.

[9] *Id.* (citations omitted).

In 1997, Congress enacted Medicare Part C, now known as Medicare Advantage, which allows eligible individuals to opt out of traditional Medicare and instead obtain Medicare Part A (inpatient hospital care) and Part B (services and equipment) coverage through private companies approved by the Center for Medicare and Medicaid Services ("CMS").[10] The *Etheridge* court noted that unlike traditional Medicare, Medicare Part C does not, by itself, require reimbursement or create a private right of action to pursue reimbursement.[11] Rather, Medicare Part C authorizes, but does not compel, Medicare Advantage plans to charge a primary plan for medical expenses paid on behalf of a beneficiary when other coverage is available.[12] However, Medicare Advantage plans are made secondary to "primary plans" under the same circumstances as traditional Medicare.[13]

The *Etheridge* court then went on to consider the preemptive effect of Medicare Part C, which contains the following preemption provision:

> The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA [Medicare Advantage] plans which are offered by MA organizations under this part.[14]

Based on this language, the *Etheridge* court held that the plain language of Medicare Part C demonstrate Congress's intent to preempt state law, including state anti-subrogation laws.[15] The court noted that this was also supported by the legislative history of Medicare Part C's preemption provision, which was amended and expanded in 2003 to "clarif[y] that the MA program is a federal program operated under Federal rules. State laws, do not, and should not apply, with the exception of state licensing laws or state laws related to plan solvency."[16] The court also noted that the regulatory framework of Medicare Part C expressly grants Medicare Advantage plans the same rights to recover from a primary plan, entity, or individual that Medicare has under MSP regulations.[17] The

[10] *Id.* (citing 42 U.S.C.A. §§ 1395w-21 to 1395w-27) (other citations omitted).

[11] *Id.* at *3 (citing *Parra v. Pacificare of Arizona, Inc.*, 715 F.3d 1146, 1153 (9th Cir. 2013)).

[12] *Id.* at *4 (citing 42 U.S.C.A. § 1395w-22(a)(4)).

[13] *Id.*

[14] *Id.* (citing 42 U.S.C.A. § 1395w-26(b)(3)).

[15] *Id.* at *4-*5 (citing, *inter alia*, legislative history indicating that the 2003 amendment to Medicare Part C was intended to "clarif[y] that the MA program is a federal program operated under Federal rules. State laws, do not, and should not apply, with the exception of state licensing laws or state laws related to plan solvency").

[16] *Id.* at *4 (internal quotations omitted) (citing legislative history to Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 42 U.S.C.A. § 1395w-26(b)(3), H.R.Rep. No. 108-391 at 557).

[17] *Id.* at *5-*7 (citing 42 C.F.R. § 422.108(f), which provides in part that "[a] State cannot take away an MA organization's right under Federal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer. The MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter."; also citing 42 C.F.R. § 422.402, which contains an express preemption in favor of Medicare Advantage plans: "[A]ll State standards, including those established through case law, are preempted to the extent that they specifically would regulate MA plans, with the exceptions of State licensing and solvency laws.") (internal citations omitted).

court also distinguished other federal statutes that have carved out exceptions to preemption for state common law, whereas Medicare Part C exempts only state laws pertaining to licensing and plan solvency from preemption.[18] Because state anti-subrogation laws do not relate to licensing or plan solvency, they are preempted by Medicare Part C, and Medicare Advantage plans are allowed to recover medical expenses paid on behalf of their enrollees to the same extent as traditional Medicare.

With the ruling in *Etheridge*, Arizona joins numerous other jurisdictions in upholding the right of Medicare Advantage plans to recover benefits paid on behalf of their enrollees from personal injury settlement proceeds, in spite of state anti-subrogation laws. For example, *Potts v. Rawlings Co., LLC.,* was a class action brought on behalf of putative Medicare Advantage enrollees seeking in part a declaratory judgment that subrogation liens asserted by Medicare Advantage plans on their personal injury settlements were invalid.[19] Just as in *Etheridge,* the *Potts* court held that Medicare Part C expressly preempts New York's anti-subrogation statute.[20] The Appellate Division of the New York Supreme Court also reached the same result in *Trezza v. Trezza*.[21] Numerous other courts also have found express preemption of state anti-subrogation laws and other state laws in favor of Medicare Advantage plans.[22] Courts interpreting Medicare Part D, which provides prescription drug benefits and which incorporates the preemption provision of Medicare Part C, have also found express preemption of state laws not related to licensing or plan solvency.[23]

Opposing counsel seeking to avoid reimbursement of Medicare Advantage plans

[18] *Id.* at *5-*6, *8 (distinguishing preemption provisions of Federal Boat Safety Act, 46 U.S.C.A. § 4306; Federal Employee Health Benefits Act, 5 U.S.C.A. § 8902(m)(1); and related case law).

[19] *Potts v. Rawlings Co., LLC.,* 897 F.Supp.2d 185 (2012) (holding that Medicare Part C preempts N.Y. Gen. Oblig. Law § 5-335 (2009), which provides in part as follows: "Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.").

[20] *Id.* The *Potts* court also held that the plaintiffs' claims were barred due to their failure to exhaust administrative remedies. *Id.* at 191-94.

[21] *Trezza v. Trezza,* 104 A.D.3d 37 (N.Y. App. Div. 2012).

[22] *See, e.g., In re Avandia Marketing, Sales Practices and Products Liability Litigation,* 685 F.3d 353 (3rd Cir. 2012) (Medicare Advantage plans had right to bring suit against drug manufacturer under MSP Act to recover expenses for prescription drugs paid on behalf of its enrollees; MSP Act created private cause of action for Medicare Advantage plans to same extent as Medicare); *Meek-Horton v. Trover Solutions, Inc.,* 915 F.Supp.2d 486 (S.D.N.Y. 2013) (Medicare Part C preempts New York anti-subrogation statute); *Phillips v. Kaiser Foundation Health Plan, Inc.,* 953 F.Supp.2d 1078, 1087-90 (N.D. Cal. 2011) (Medicare Part C preempts California state law claims for alleged violation of unfair competition and consumer protection statutes); *cf. also Pacificare of Nevada, Inc., v. Rogers,* 266 P.3d 596 (Nev. 2011) (Medicare Act preempts claims that mandatory arbitration provision in Medicare Advantage plan contract was unconscionable).

[23] *See, e.g., Do Sung Uhm v. Humana, Inc.,* 620 F.3d 1134 (9th Cir. 2010) (Medicare Part D preempts Washington state law claims for breach of contract, unjust enrichment, fraud, and consumer protection law violations arising out of insurer's alleged failure to provide coverage for prescription drugs).

may attempt to cite *Care Choices HMO v. Engstrom* in their continued efforts to avoid Medicare Part C preemption, but defense counsel should take care to point out that *Care Choices HMO* and cases with similar holdings were decided based on an earlier version of the statute.[24] Since the expansion of Medicare Part C's preemption provision in 2003, courts have uniformly held that Medicare Part C preempts state anti-subrogation laws and that Medicare Advantage plans are entitled to recover expenses paid on behalf of enrollees from tort recoveries accordingly.

[24] *See, e.g., Care Choices HMO v. Engstrom,* 330 F.3d 786 (6th Cir. 2003) (holding under previous version of Medicare Part C that Medicare Advantage plan did not have private cause of action to enforce their contractual subrogation rights from proceeds of tort recovery); *Nott v. Aetna US Healthcare, Inc.,* 303 F.Supp.2d 565 (E.D. Pa. 2004) (same).

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