Medicare Advantage Third Party Liability Recovery:
The Good, Bad & Ugly

Overview
- Review Medicare Statutory & Regulatory Scheme
  - Good, Bad or Ugly?
- Decisions and Cases: The Good, Bad & Ugly – Rearranged
  - Bad: No Federal Private Right of Action
  - Ugly: No Federal or State Court Opinion
  - Good: State Anti-Sabro Law Preempted as applied to MAOs
  - MA Plans Same Recovery Rights as Medicare
- Parra v. PacificCare – What will 9th Circuit Do? Good, Bad or Ugly?

Statutory Scheme

The Statutory Scheme: Good, Bad or Ugly?
- If not Bad or Ugly, Certainly Confusing:
  - MA Recovery Right problems stem from a statute that is convoluted, confusing and far from a model of clarity,
    See: Estate of Ursula Thompson, 509 F Supp 2d 213, 236-39 (D Conn 2006)
  - The Medicare Act is among “the most completely impenetrable texts within human experience.”
    Cooper Univ Hosp v. Sebelius, 636 F.3d 44 (3rd Cir 2011) (citation omitted)

The MSP Act - Medicare as Secondary Payer
- MSP Act Secondary Payer Basics
  - Portion of the Medicare Statue passed in 1980
  - Makes Medicare Payor of Last Resort
    - Secondary to other sources: Auto/Liability Plans, WC Plans, No-Fault, Self-Funded
    - Medicare payments are “conditional” – reimbursed from primary plan if medicals due to third party liability
- Medicare’s Third Party Liability Recovery Rights
  - Sabro rights against tortfeasor/entity responsible for payment
  - Reimbursement rights against entity receiving payment
  - United States can bring recovery action

The Repayment/Recovery Provisions:
- §1395y(b)(2)(A)(i) - A primary plan, and an entity that receives a payment from a primary plan, shall reconstitute the appropriate Trust Fund for any payment made if the primary plan has had a responsibility to pay.
- §1395y(b)(2)(B)(ii) - Action by United States - United States may bring an action against any or all entities that are or were required or responsible to make payment under a primary plan. The United States may, in accordance with §1395y(b)(3)(A), seek double damages against any such entity. In addition, the United States may recover from any entity that has received payment from a primary plan or from the proceeds of a primary plan payment to any entity.
- §1395y(b)(3)(A) - Private Cause of Action - There is a private cause of action for damages which shall be in an amount double the amount otherwise provided in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) as required under the MSP.

Medicare Part C: Medicare Advantage Organizations (MAOs)

- Part C of the Medicare Statute - The MA program:
  - Medicare enrollees can receive benefits through private insurers (MAOs) who contract with the government instead of receiving benefits from the government under Medicare Parts A and B.
  - MA plan pays all or part of medical care of its participants in exchange for a fixed (“capitated”) annual per-participant govt payment.
  - MAO administers the Medicare benefits and assumes the risk of insuring the participants (i.e., it pays for the covered medical expenses).

Two Recovery Causes of Actions Under MSP

- §1395y(b)(2)(B)(i) - Specific to Actions Brought by the United States
  - Clear that action can be brought against (1) primary payer and for 2X damages or (2) any entity that received payment from primary plan (i.e., plaintiff/Medicare participant).
- §1395y(b)(3)(A) - Private Action with no Plaintiff Identified
  - Clear that action for 2X damages can be brought against primary payer.
  - Can action be brought against entity that received payment from primary plan?
  - Who brings a private Medicare recovery action?
  - Can an MA plan?

MAO as Secondary Payer

- Part C Contains a Secondary Payer Provision
  - An MAO may (or in the case of the provision of items and services to an individual under an MA plan under circumstances in which payment under this title is made secondary pursuant to section 1395y(b)(3)) charge or authorize the provider of such services to charge:
    - (A) the insurance issuer, employer, or other entity which under such law, plan, or policy is to pay for the provision of such services, or
    - (B) such individual to the extent that the individual has been paid under such law, plan, or policy for such services.

Is §1395w-22(a)(4) a Recovery Provision?

- Cross references conditional/secondary payments MSP Act (1395y(b)(2)).
- Does not contain specific language permitting private recovery action to be brought against (1) primary payer or (2) individual that received payment from primary payer.
  - MAO can “charge” or “authorize the provider of such services to “charge”...

Regulatory Scheme
CMS Regulation & Interpretation

- 42 C.F.R. §422.108
  - "... MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the [MSP]."
    - Regulation’s plain language indicates that MAOs treated the same as Medicare for purposes of recovery from a primary payer
  - CMS Memorandum Re: Medicare Secondary Payment Subrogation Rights (12/5/11)
    - MAOs have same right to collect from primary payers using same procedures available to Medicare

Decisions & Cases

MAOs Have No Federal Private Right of Action

- Care Choices HMO v. Engstrom, 330 F.3d 786 (6th Cir. 2003)

The Bad

"I’m looking for the owner of that horse. He’s tall, blonde, he smokes a cigar, and he’s a pig!"

“If your friends stay out in the dark, they’re liable to catch a cold aren’t they... or a bullet.”

Engstrom & Nott

- Private Medicare insurer’s secondary payer provision did not create a federal private right of action
  - Engstrom: relevant secondary payer provision was §1395mm((4)), as case involved a Medicare-substitute HMO (not an MAO)
  - Nott: court considered if §1395mm((4)) or §1395w-2(2)(4) (MAO-secondary payer provision) created federal recovery claim that would preempt state law
  - Neither involved question of whether §1395y((3)(A)) under MSP Act established federal private right of action for Medicare-substitute insurer

Konig

- MA plan asserted federal-question jurisdiction and removed state court action that sought to extinguish MA plan recovery claim
- Federal court found no federal jurisdiction and remanded to state court
  - Law does not confer federal right of action to MA plan - “no such claim may be brought under the Medicare laws”
    - While Medicare permits government to use to enforce subrogation rights, statute doesn’t “accord [MA plans] the same right” either explicitly or implicitly
  - Like Engstrom and Nott no indication court was evaluating MA plan’s recovery right under §1395y((3)(A))
**Parra (AZ District Court Decision)**

- Much like *Engstrom*—Found no implied private right of action in the MAO secondary payer provisions (§1395w-22(a)(4) & §1395mm(e)).
- Dicta suggested MA plan’s reimbursement claim should proceed in state court as contract claim.
- Did not address argument that MA plan could bring recovery claim under the MSP private cause of action recovery provision (§1395y(b)(3)(A)).

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**The Ugly**

“I’ve never seen so many men wasted so badly.”

“How’s your digestion now?”

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**MAOs Have No Federal or State Law Claim**

**NY Supreme Court Decisions**

- *Ferruzzo v. 18th Ave. Hardware, Inc.*, 2011 N.Y. Misc. LEXIS 4175 (Sup. Ct., Kings County, August 22, 2011)

- *Trezza & Ferruzzo* - MA state law recovery claims extinguished
  - No federal statutory right of action under MAO secondary payer statute (§1395w-22a(4)) for MA plan to pursue reimbursement recovery claim
  - Federal statutory scheme only allows MA plans “statutory permission” to include subrogation rights in its contracts, thereby creating state law subrogation claims
  - NY Gen. Obl. L. §5-335 – Except where there is a statutory right, subrogation/reimbursement claims are prohibited.
  - MA plan’s contract claims are prohibited under NY law
  - Medicare Act does not preempt §5-335

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**The Good**

“Every gun makes its own tune.”

“A golden-haired angel watches over him.”

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**NY Anti-Subro Law Preempted as Applied to MAOs**

MA Plan Has Same Recovery Rights as Medicare


Potts – Preemption of State Law

- Putative class action by MA members seeking declaratory judgment that NY Gen. Bus. L. §3-335 extinguishes reimbursement rights
  - Case sought lien payment refunds collected by MAOs from covered MA participants
- §3-335 Preempted by Medicare Act
  - Act contains broad, express preemption clause
  - Federal law covers MAOs reimbursement rights
  - NY statute would extinguish MAO’s reimbursement rights under Federal law
  - Consequently, “§3-335 preempted as applied to Medicare and MAO reimbursement rights”
    - See also: Cipollone v. Liggett, Index No. 18602/2007, slip op. (N.Y. Sup. Ct., Queens County June 14, 2011)
- MAO private right of action “immaterial” to preemption
  - Private right of action question doesn’t control preemption

Impact of Potts

- Meek-Horton v. Trover Solutions, Inc. d/b/a Healthcare Recoveries, Inc., et al,
  - Another NY MA Reimbursement Refund Class Action
  - Putative class actions that seek refunds of lien payments “wrongfully” collected by MAOs from participants covered by MA plans
  - Will Court follow Potts and dismiss on preemption grounds?

In Re Avandia – MA Recovery Rights Same as Medicare

- Federal Statutory Recovery Action for MA Plans
  - Recognized by 3rd Circuit
    - MSP private cause of action (§1395y(b)(2)(A)) allows private party, including MA plans, to bring recovery action for duplicate payments when primary plan fails to reimburse secondary payer
    - Private cause of action provision broad and unambiguous
  - Decision Supported by Legislative History and Policy
  - Factual/Legal Distinctions from Prior Decisions
    - MA plan asserted its right of action stemmed from the private right of action statute in the MSP Act, §1395y(b)(2)(A), not the MAO secondary payer provision, §1395w-2(3)(D)
    - MA plan pursued recovery from responsible primary payer (GlaxoSmithKline), not from entity-individual who obtained payment from primary payer

What’s Next: Good, Bad or Ugly?

“Can you help me live a little more? I expect good news.”
**Parra v. PacifiCare of Arizona, Inc.**

- Decision Pending in the 9th Circuit
  - Argued October 16th

- 9th Circuit Bring MA Plans GOOD news?
  - Based on *Potts*, are AZ's anti-subro laws preempted?
  - Would preemption give PacifiCare a statutory recovery right?
  - Will *In Re Avandia* extend to reimbursement claims brought against MA participants who have received payment from primary payer?
  - Focus of oral argument and panel's questions