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## MEDICARE SECONDARY PAYER ACT DEVELOPMENTS

In *re Avandia Marketing, Sales Practices, and Products Liability Litigation*, the Third Circuit extended the federal government's right of action under the Medicare Secondary Payer Act ("MSPA") to private insurance companies, 685 F.3d 353, (3rd Cir. 6/28/12). The MSPA was enacted to give the government a cause of action against a primary payer (workers' compensation or automobile/liability policy of insurance) when the primary payer is responsible for the insured's injuries. If the government makes conditional payments for the insured's medical treatments, the primary payer must reimburse the Medicare Trust Fund (the "Fund"). If the primary payer fails to reimburse the Fund, the MSPA gives the government the right of action to bring suit against the primary payer and seek double damages. In *Avandia*, the Third Circuit extended that right of action under the MSPA from the government to private insurance companies. The Third Circuit ruled that the MSPA was written broadly enough to give private, or non-governmental, entities a right of action for double damages when a primary payer fails to reimburse any secondary payer. This decision could further complicate settlements when a Medicare Set Aside is involved.

In *Avandia*, Humana Insurance Company ("Humana") filed suit against GlaxoSmithKline ("Glaxo"), seeking reimbursement from Glaxo for expenses that Humana had incurred treating those insured that were injured by Glaxo's drug, Avandia. Avandia is a type 2 diabetes drug that was linked to an increased risk of heart attack and stroke. A class action lawsuit was filed by Avandia patients against Glaxo. At the time of Humana's suit, Glaxo had paid more than \$460 million in the settlement of claims. While funding the settlements, Glaxo set aside reserves to reimburse the Medicare Trust Fund for payments Medicare made for injuries caused by Avandia. Glaxo, however, did not set aside reserves for payments made by Medicare Advantage Organizations ("MAOs"), such as Humana, for injuries caused by Avandia.

The MSPA is divided into four parts. Parts A and B are government administered Medicare benefits for the aged and disabled. Part C creates Medicare Advantage Plans, which allows Medicare enrollees to obtain Medicare benefits through MAOs, instead of receiving direct benefits from the government under Parts A and B. Part D provides for prescription drug coverage for Medicare enrollees. Thus, while most Medicare-eligible individuals receive Medicare benefits directly from the government under Parts A and B, individuals can elect under Part C to receive benefits through MAOs.

During the settlement of the class action claims, Glaxo included Medicare Set Aside only for payments made by Medicare under Parts A and B of the MSPA. Glaxo did not set aside reserves for payments made by MAOs under Part C. As an MAO, Humana filed suit against Glaxo for reimbursement of costs that Humana had incurred in treating its insured for Avandia related injuries. Thus, the question before the Court was whether Humana had a private right of action under the MSPA to seek such reimbursement. The Third Circuit ruled that it did. The Third Circuit held that the MSPA, 42 U.S.C. 1395, was written broadly enough to give MAOs a private right of action to seek reimbursement.

The Court reasoned that the MSPA was enacted in 1980 to give the federal government a right of action against a primary payer (workers' compensation or automobile/liability policy of insurance), which is responsible for the costs of an insured's medical treatment. If the government makes conditional payments when the primary



December 2012

payer is responsible for the cost of the medical treatment, then the primary payer must subsequently reimburse the Fund. If the primary payer does not reimburse the Fund, the MSPA gives the federal government a right of action against the primary payer for reimbursement and double damages. In *Avandia*, the Third Circuit extended that right of action from the government to MAOs. The Third Circuit ruled that the MSPA was written broadly enough to give private, or non-governmental, entities a right of action for double damages when a primary plan fails to reimburse any secondary payer.

— [Katherine L. Winters](#)

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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