

CAN INDIVIDUALS AND HOSPITALS SUE WRONGDOERS UNDER THE MEDICARE SECONDARY PAYER ACT?

In a recent Sixth Circuit decision,^[1] the Court concluded that an individual Medicare beneficiary, who had successfully sued a tortfeasor for personal injuries he suffered, did not have the right to bring a cause of action under the Medicare Secondary Payer Act ("MSPA").^[2] In effect, the Court concluded that the MSPA did not provide rights equivalent to that of a relator in a qui tam action. The Court left open (somewhat) whether a hospital that was harmed by nonpayment could sue under the MSPA.

MSPA - THE BASICS

Understanding the case requires some background on the MSPA, first adopted in 1980. The MSPA reversed the traditional roles between private insurers and Medicare such that Medicare became the secondary payer source for covered services, while private insurers became the primary payers. However, the MSPA provides for Medicare to make "conditional payments" for covered services if the primary coverage is not expected to promptly pay for the services.^[3] The primary payer then reimburses Medicare if the primary payer is determined responsible for the service and, if reimbursement is not made, Medicare may sue the primary payer.^[4] In 2003, the MSPA was amended to permit actions against tortfeasors if it is demonstrated that the tortfeasor "has or had a responsibility to make payment," such as through a judgment or settlement.^[5] The U.S. government may sue for the reimbursement.^[6] Another earlier-adopted provision in the MSPA outlines the right to a private cause of action against a primary payer who fails to pay and double damages.^[7]

THE COURT'S DECISION

In the recent decision, the plaintiff was a Medicare beneficiary and obtained a judgment in state court against the Metropolitan Government of Nashville and Davidson County ("Metro Nashville") after suffering an alleged injury on its premises. Before the lawsuit, Medicare made conditional payments for certain of the plaintiff's medical expenses. He later sued in federal district court under the MSPA because he claimed Metro Nashville was the primary payer and had not reimbursed Medicare for its conditional payments. He sought double damages under the MSPA.

The district court dismissed the plaintiff's case in part because he lacked standing under the MSPA to bring a private cause of action against a tortfeasor – in this case, Metro Nashville.

After analyzing the 2003 amendments to the MSPA and considering a prior decision of its own, the Sixth Circuit upheld the district court's ruling. The Sixth Circuit noted further that, in the context of torts, "the Medicare beneficiary's injury will likely have been redressed by a state court judgment, and allowing that same injury in federal court would risk turning the MSPA into a super-judgment enforcement mechanism. Surely Congress did not intend for such a result when it, albeit confusingly, amended the MSPA."^[8]

TAKEAWAYS FOR HEALTH CARE ORGANIZATIONS

The Sixth Circuit raised, but gave no official answer, to a different question of interest to health care organizations. It asked whether a hospital or other private party, other than the actual Medicare beneficiary, could sue the tortfeasor under the MSPA where the beneficiary did not receive either a conditional payment from Medicare or payment upfront from the tortfeasor. The Court indicated that the answer was likely "no," but said it was not presented with that question.

If you have any questions or would like additional information about this topic, please contact:

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[references]

[1] *Osborne v. Metropolitan Government of Nashville and Davidson County*, No. 18-6062, 2019 WL 3926095 (6th Cir., Aug. 19, 2019).

[2] 42 U.S.C. § 1395y(b)

[3] 42 U.S.C. § 1395y(b)(2)(B)(i).

[4] 42 U.S.C. § 1395y(b)(2)(B)(ii), (iii).

[5] 42 U.S.C. § 1395y(b)(2)(B)(ii).

[6] *Id.* § 1395y(b)(2)(B)(iii).

[7] 42 U.S.C. § 1395y(b)(3)(A).

[8] *Osborne*, 2019 WL 3926095 at *5.

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