

## CLIENT ALERT

### Third Circuit Holds that MA organizations have a direct right of recovery under the Medicare Secondary Payer (MSP) Act

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The Third Circuit has held that Medicare Advantage organizations (MAOs) have a direct right of recovery against primary payers under the Medicare Secondary Payer (MSP) Act. The Third Circuit decision arises out of a lawsuit brought by Humana, Inc., as an MAO, to recover for medical expenses paid by Humana on behalf of Medicare beneficiaries related to the use of Avandia, a drug marketed by GlaxoSmithKline (GSK). The decision is *In re: Avandia Marketing, Sales Practices and Products Liability Litigation, GlaxoSmithKline, LLC, No. 11-2664 (3rd Cir. June 28, 2012)*.

The court held specifically that the MSP provision in 42 U.S.C. § 1395y(b)(3)(A), provides MAOs with a private cause of action against primary payers. The court's decision is based on the plain text of Section 1395y(b)(3)(A), which establishes "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) in accordance with [the requirements of the MSP Act]."

The court held that the plain text of this provision "sweeps broadly enough to include MAOs," such that MAOs are proper plaintiffs to recover under the terms of the statutory provisions. The court also noted that even if it had determined the statute to be ambiguous on this point, it would have deferred to CMS regulations stating that MAOs have the same right to recover as the Medicare Trust Fund does under the MSP Act.

As the court noted, prior cases in which MAOs had unsuccessfully sought a federal cause of action were not premised on 42 U.S.C. § 1395y(b)(3)(A), but on specific Medicare Advantage provisions of the Medicare Act. The court held that these prior cases were largely irrelevant to deciding the issue before it. The decision gives MAOs an important new tool for attempting to recover from primary payers for Medicare covered expenses, in addition to being able to continue using subrogation and other related legal remedies.

Crowell & Moring attorneys Art Lerner, Barbara Ryland and Amy Tridgell submitted an amicus brief on behalf of America's Health Insurance Plans in support of Humana's position.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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