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Second Circuit Decides in *Woods v. Empire Health Choice, Inc.* that Medicare Secondary Payor Act Is Not a *Qui Tam* Statute – Plaintiff Must Show Individual Injury

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The United States Court of Appeals for the Second Circuit recently held that the Medicare Secondary Payer ("MSP") statute, which requires that payment for medical services for Medicare-eligible individuals must first be made from any available health insurance to the full extent of the coverage provided before Medicare funds are used, is not a *qui tam* statute. *Woods v. Empire Health Choice, Inc.*, 07-4208-cv, – F.3d –, 2009 WL 2245216 (2d Cir., July 29, 2009) ("*Woods*"). The *Woods* decision benefits all health care insurers, health care providers, provider groups and self-insured employers who require Medicare to cover services that are subject to private coverage. The decision also is precedential in the Second Circuit. (The Second Circuit covers New York State, as well as Connecticut and Vermont.)

This ruling is significant because, under *qui tam* statutes, individuals who have not been injured by a defendant, indeed, individuals who have no relationship whatsoever with a defendant, can nonetheless sue the defendant. All that is required is that they allege a breach of the provisions of the *qui tam* statute by the defendant. This is contrary to the fundamental rule that, in order to file a suit against any person of entity, a plaintiff must have "standing." Broadly defined, "standing" means that plaintiffs must be able to allege injury to their person or property caused by the wrongful conduct of the defendant. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Under *qui tam* statutes, the plaintiff is bringing an action on behalf of the government and achieves standing merely on the basis of an alleged injury to the government.

If the MSP statute had been held to be a *qui tam* statute, individuals with whom providers and payers have not had any connection could sue them for alleged violations of the MSP. This ability opens the door to the filing of lawsuits of the type brought under the federal False Claims Act (the "FCA"), 31 U.S.C § 3729 *et seq.* These frequently are pursued by individuals ("whistleblowers"), some of whom troll for indicia of conduct by

businesses with which they may have no dealings but they can spin as involving FCA violations. *United States ex rel. Mergent Servs v. Flaherty*, 540 F.3d 89, 92 (2d Cir. 2008)("*Flaherty").*[1]

The Purpose of The Medicare Secondary Payer Statute

The MSP statute provides that when a Medicare-insured person has other health care coverage, such as employer-sponsored group health plans, private insurance and automobile insurance that covers health care costs, those coverages are the primary payer on services covered by them and Medicare. Medicare always is the secondary payer. Medicare is liable only for any covered cost amount remaining after the payment by the primary payer.

To prevent untoward delays in reimbursement to Medicare insureds and payments to health care providers, Medicare may conditionally pay as if it were primary. However, Medicare must be reimbursed by the primary payer to the full extent the primary's coverage obligation is advanced. Similarly, if a provider receives an advance payment from Medicare that includes the amount payable by the primary payer, and also receives that amount from the primary payer, the provider must reimburse Medicare. If Medicare is not reimbursed, the MSP empowers the government to bring an action against the primary payer or against the provider in order to recoup Medicare's advance. *See Woods* at *2.

The MSP's Right of Action Provisions Are Not Typical of Those Found in *Qui Tam* Statutes

The MSP provides for a private right of action and a federal governmental right. The private right of action provision is as follows:

> There is an established 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) . . .

Id. § 1395y(b)(3)(A). It is this provision of the MSP which the Plaintiff–Appellant in the *Woods* decision relied upon for his argument that the MSP is a *qui tam* statute and, therefore, he was not required to establish standing through allegations that he had been injured by the alleged violation of the MSP. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (plaintiffs must establish that they have standing to bring an action through allegations that the defendant's conduct injured them, their property or an interest).

[1] There is a second less certain aspect to the Second Circuit's decision. It is possible that class action status also may now be difficult to achieve by plaintiffs under the MSP statute: "The distinct language of the MSP strongly indicates that the MSP allows a private party. . .to bring suit in the party's own name to remedy the wrong done to it – namely the failure of a primary plan to make payments required of it on behalf of the private party bringing the suit." *Woods* at *5.–(emphasis added).

Unlike, for example, the *qui tam* statute most commonly used by plaintiffs, the FCA, the federal government has a completely separate right of action under the MSP, and this right does not have any relationship to the private right of action. *Woods* at *5. Under the FCA, when a private plaintiff, referred to as a "Relator," files a lawsuit, there is a mandatory procedure that is designed to provide the government notice of the action and time to decide whether it wants to take over the action from the private plaintiff. *Woods* at *6 *citing* 31 U.S.C. § 3730(b)(2), (3), (4) and § 3730(c). In effect, under the FCA, the private right of action exists only if the government elects not to intervene and take over the prosecution of the FCA case. *Id.* Consequently, under the FCA, a defendant only has to deal with one lawsuit, and its primary adversary may be either the government (when it intervenes) or the private Relator (when the government declines to intervene). Under the FCA, the defendant is subject only to one judgment if it is judicially determined that the defendant violated the FCA. *See Flaherty* at 93. How that judgment is allocated between the government and the Relator is established by the FCA and depends on which of them primarily prosecuted the case. The defendant's satisfaction of that single judgment moots the claims of both the government and the private plaintiff.

In contrast, under the MSP, the defendant can be faced with two separate lawsuits as the plaintiff has no obligation to provide the government with an opportunity to intervene in and take over the plaintiff's case against the defendant. *Woods* at *5*, citing, Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 522 (8th Cir. 2007); 42 U.S.C. 1395y(b)(3)(A). Both can bring and run their own case. Also, unlike the right of action provisions in the FCA, under the MSP, the private plaintiff and the government are entitled to their own separate relief from the defendant. *Woods* at *6. The private plaintiff is allowed to recover twice the amount of the sum established as the responsibility of the primary payer that was unlawfully paid with Medicare funds and not reimbursed to Medicare. The defendant's satisfaction of that judgment has no effect on the government's entitlement to recover the full amount of the judgment entered in its MSP case against the same defendant for the same claim. *Id.*, citing 42 U.S.C. § 1395y(b)(2)(B)(iii), (b)(3)(A).

The Arguments Made In Support of the Proposition That the MSP is a *Qui Tam* Statute

Notwithstanding the foregoing distinctions between the MSP and *qui tam* statutes, in cases across the country, plaintiffs have argued that the MSP statute is a *qui tam* statute. "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Woods* at *8, n.1, quoting *Vt. Agency of National Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2001). These plaintiffs argue that the MSP qualifies for *qui tam* status because their lawsuits help the government enforce the requirements of one of its laws, the MSP statute in this instance, as do *qui tam* statutes. Their contention has been that their lawsuits benefit the Medicare program as well as themselves. *See United Senior Ass'n v. Philip Morris USA,* 500 F.3d 19 (1st Cir. 2007).

The State of the Law at the Time of the District Court's Dismissal of the Woods' Complaint

At the time the District Court entered its decision that the MSP is not a *qui tam* statute in the *Woods* case, only a few other Circuits had reached the issue of whether the MSP is a *qui tam* statute, and those few Circuits had ruled that MSP is not a *qui tam* statute. There were some Circuit decisions in MSP cases, two of which were issued by the Second Circuit, in which the courts' opinions suggested that the MSP has *qui tam*-like characteristics *See Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 522 (8th Cir. 2007), referencing *Glover v. Liggett Group, Inc.*, 459 F.3d 1304 (11th Cir. 2006), and *Mason v. American Tobacco Co.,* 212 F. Supp. 2d 88 (E.D.N.Y. 2002), *aff'd,* 346 F.3d 36 (2d Cir. 2003); *Manning v. Utils Mut. Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001). Consequently, the law was not clearly settled within the Second Circuit, and there were two Second Circuit decisions that included some troublesome comparisons between the MSP and aspects of *qui tam* statutes.

The *Woods v. Empire Health Choice, Inc.* Decision

The Second Circuit panel, which heard and decided *Woods,* did not have to resolve the issue of whether the MSP is a *qui tam* statute in order to affirm the dismissal of the complaint. The opinion provides a detailed description of the procedural history of the case that notes the plaintiff's repeated failures to meet deadlines set by the District Court, which had granted him multiple extensions, including the last extension about which the District Court had very clearly stated that no further extensions would be granted. Instead, the Court undertook a careful analysis in order to address the substantive issue and resolve the ambiguity created by the Second Circuit opinions in *Mason* and *Manning.*

The key points made by the Second Circuit panel in its opinion are:

- The text of the MSP statute does not state that it is a *qui tam* statute. *Woods* at *5.
- The MSP statute is not listed as a *qui tam* statute by the Supreme Court in *Vt. Agency of National Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2001), which was decided after the MSP was enacted and lists all of the *qui tam* statutes existing at the time. *Woods* at *5.
- Key terms expected in a *qui tam* statute are missing - *e.g.,* the private action is brought on behalf of the government by a plaintiff acting in the capacity of a "relator." *Id*.
- There is no mechanism for the government to receive any portion of the recovery from a private action. *Woods* at *3, *6.;
- There are no procedural safeguards to protect the government's interests - *e.g.,* no requirements that the private complaint be filed under seal and served on the government, nor must disclosure of material written evidence be disclosed to the government, *Woods* at *6; the government has no right to intervene and take over the MSP action; and the MSP private plaintiff can settle without the

government's consent. *Id.*; and

- The *Manning* and *Mason* cases did not decide whether the MSP is a *qui tam* statute. *Woods* at *7-8.

Benefit of *Woods* Decision

The *Woods* decision is significant because millions of billing and payment decisions are made every day by providers and payers that involve covered services to Medicare insureds. In the MSP, Congress created two mechanisms through which errors in the allocation of responsibility for the payment of such services could be judicially reviewed and rectified, if necessary. One remedy is available to Medicare insureds who meet traditional standing criteria – *i.e.,* have actually been injured by an error. The other remedy enables the government to obtain relief for its injury. A judicial determination that the MSP is a *qui tam* statute would create a "bounty hunter" remedial provision available to persons who have not been harmed by any violation of the MSP. The predictable effect of a ruling that the MSP were a *qui tam* statute would have been a generation of opportunistic lawsuits requiring a defense at great expense by both providers and payers.

At a time when the fast rising costs of health care are placing in jeopardy this country's health care delivery and coverage system and impeding economic recovery, the additional economic burden resulting from a ruling that the MSP is a *qui tam* statute would have further stressed an already vulnerable system. The Second Circuit's decision in *Woods* not only reflects the clear intent of Congress, this decision also protects payers and providers against lawsuits by opportunistic bounty hunters.

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