

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF KENTUCKY
LOUISVILLE DIVISION

ESTATE OF CLINTON MCDONALD
Vivian McDonald, Administratrix
1747 Bolling Ave.
Louisville, KY 40210-1737
Plaintiff

v.

Case No. 3:12CV-577-S

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA
Saverio M. Rocca
436 Walnut Street, WA0K4
Philadelphia, PA 19106

Serve: Office of the KY Secretary of State
Summons Branch
700 Capital Avenue, Suite 86
Frankfort, Kentucky 40601

Defendant

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THE NATURE OF THE CASE

1. Plaintiff, The Estate of Clinton McDonald, Administratrix Vivian McDonald, brings this action as a “private attorney general” pursuant to the private cause of action provision of the Medicare Secondary Payer Statute (“MSPS”), 42 U.S.C. § 1395y(b)(3)(A), seeking to recover for the Medicare program all the expenditures it made from May 10, 2007 to November 5, 2007 for the health care services rendered to Medicare’s beneficiary Clinton McDonald, for the treatment of injuries he sustained in a workplace accident.

2. The MSPS's function is straightforward -- to relieve Medicare from making payment for covered services if such payment has been or could reasonably be expected to be made by someone else, called the "primary payer" or the "primary plan."

3. The defendant, Indemnity Insurance Company of North America, a Pennsylvania corporation authorized to do the business of insurance in Kentucky, was the workers' compensation carrier for Clinton McDonald's employer, O'Reilly Auto Parts ("Employer"), at the time of the accident.

4. On May 10, 2007, Clinton McDonald was severely injured in a motor vehicle accident while acting within the course and scope of his duties as an employee of O'Reilly Auto Parts, Louisville, Jefferson County, Kentucky. McDonald died on November 5, 2007. Employer challenged whether McDonald's death was a result of the work-related accident.

5. McDonald was a Medicare recipient at the time of the accident. Medicare paid approximately \$180,185.75 for the treatment of McDonald's injuries. (MSPRC Conditional Payment letter attached as Exhibit A).

6. On December 28, 2009 the Commonwealth of Kentucky Workers' Compensation Board ruled that McDonald's death was caused by the work-related accident. (Opinion, Order and Award attached as Exhibit B). The ruling specifically ordered that "[Employer,] and/or its workers' compensation insurance carrier [Indemnity Insurance Company of North America] shall pay medical, surgical, and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability." (Order on Plaintiff's Petition for Reconsideration attached as Exhibit C).

7. As a result of this ruling, Defendant Indemnity Insurance Company of North America became an entity that has or had a responsibility under the MSPS to pay McDonald's health care expenses for the treatment of his accident-related injuries and thus, a primary payer.

8. Nonetheless, from the time of McDonald's work-related accident until his death, Medicare paid for McDonald's health care expenses for the treatment of his accident-related injuries.

9. The role of the plaintiff as a "private attorney general" reflects the public importance of this case, especially to the Medicare program and its beneficiaries.

(a) The Medicare as secondary payer regime was codified by Congress in the 1980s to reduce Medicare expenditures, a role all the more essential with Medicare's financial status in such precarious straits. However, enforcement of the regime, especially reimbursement of improper Medicare expenditures from other parties that should have been primary payers, has been disappointing. The Government Accounting Office ("GAO") reported the lack of progress that has been made in collecting MSP debts, which "arise when Medicare covers expenses related to accidents, malpractice, workers' compensation, or other items not associated with group health plans that are subsequently determined to be the responsibility of another payer."

(b) Accordingly, Congress added the private right of action for double damages to the MSPS "to save the government money by giving private citizens incentives to recover funds erroneously paid by Medicare." Even when Medicare itself lacks the information necessary to collect an MSP debt, that information nevertheless exists in the hands of each Medicare beneficiary who may be a tort victim and who, with the incentive provided by the double damages provision of the MSP statute, can be

motivated to sue as a “private attorney general” to collect that debt even if it is not cost-effective for Medicare to make the effort, and even if the more cumbersome federal bureaucracy is slow to take action

(c) The MSP private right of action, like the qui tam provision of the False Claims Act, empowers private citizens to prosecute cases in which the federal government has overpaid. Citizens file hundreds of qui tam cases under the False Claims Act each year. In FY 2003, a record \$2.1 billion was recovered under the False Claims Act (a 75% increase from FY 2002), and of that sum a staggering 70% was recovered not in suits brought by the government itself but in qui tam actions brought by citizens.

(d) Indeed, Congress has long been committed to the MSPS having exactly such an impact, as was underscored by the retroactive clarification of the MSPS Congress enacted as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Congress’ clarification (retroactive to 1980 when “self-insured plan” was first added to the MSP statute) provided that “an entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance or otherwise) in whole or in part.”

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter pursuant to 42 U.S.C. 1395y (b)(3)(A) and 28 U.S.C. § 1331. Venue is proper under 28 U.S.C. § 1391 (d).

CAUSE OF ACTION

11. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 10 above as though fully set forth herein.

12. As a result of McDonald's work-related accident, defendant was and is an entity which has or had a responsibility to pay for the costs of the health care services provided to McDonald for the treatment of his accident-related injuries and thus, a primary payer.

13. Despite being a primary payer, Defendant has not paid for, or in any other way provided for primary payment of these costs of the health care services provided to McDonald in violation of the MSPS.

14. Plaintiff's attorney handling the third-party liability claim that arose from the accident notified Employer's attorney of the outstanding medical bills paid by Medicare to no avail.

15. Due to defendant's wrongful conduct, Medicare became the primary payer for the costs of the treatment of McDonald's workplace accident-related injuries in violation of the MSPS.

16. Under the terms of the MSPS, Medicare's payment for these costs was conditioned on reimbursement from the primary payer, defendant Indemnity Insurance Company of North America.

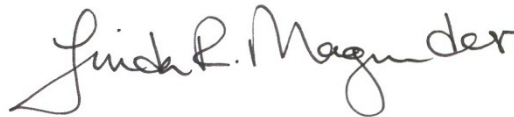
17. As a result, under the private cause of action provision of the MSPS, damages from the defendant should be awarded in an amount twice that of Medicare's payments for the costs of the health care services provide to McDonald to treat his workplace accident-related injuries.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against the defendant as follows:

- a. Awarding the plaintiff damages in an amount double the amount paid by Medicare for the health care services provided to Clinton McDonald to treat his workplace accident-related injuries for which treatment Defendant Indemnity Insurance Company of North America was required or responsible to make payment under the Medicare Secondary Payer Statute;
- b. Awarding the plaintiff attorneys' fees and the costs of this litigation, including interest; and
- c. Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,



s/ Linda R. Magruder

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