

## Trouble in Medicare Advantage paradise? Court victories reveal cracks in the foundation.

By [Marty Cassavoy](#)

When it comes to the Medicare Secondary Payer (MSP) statute, Medicare Advantage organizations (MAOs) have had more than their share of litigation success. It may be of cold comfort, but some of the recent victories have laid bare the contradictions inherent in the MAOs' strategy. The most recent case reveals a split with another federal district court that bears watching. Let's catch up on these cases to reset the table on Medicare Advantage.

### Background

As we have outlined [numerous times](#) over the past few years, Medicare Advantage plans and have incrementally expanded upon the Third Circuit's decision in [In re Avandia](#). That ruling gave Medicare Advantage plans the right to sue in federal court for double damages to recover what it argued were "conditional payments" paid by the Advantage Plan. While *Avandia* set the rules for Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands, a quick succession of cases in Texas, Louisiana, and Tennessee incorporated the *Avandia* rationale at lower court levels. The net result of these cases was that MAOs were free to use the federal courts (with the threat of double damages) as a stick to whack recalcitrant insurers and self-insureds that were reluctant to treat MAOs on the same plane as traditional Medicare.

Two cases even *further* expanded *Avandia* and its progeny. The first, *Humana v. Paris Blank*, was decided in the U.S. District Court for the Eastern District of Virginia. The *Paris Blank* case was an MAO's first major attempt to sue a plaintiff's law firm. The gambit worked. The court in *Paris Blank* ultimately ruled that MAOs like Humana were entitled to sue plaintiff attorney firms in federal court under the MSP's private cause of action provision. Given that Humana's strategy had been to utilize the private cause of action provision in the MSP that addressed failures of "primary payers" (as opposed to beneficiaries and their counsel) to reimburse Medicare, many learned observers raised their eyebrows at this decision. But, since May 2016 (and for now), *Paris Blank* outlines that Virginia plaintiff attorneys are squarely in the crosshairs of MAOs as well.

The other major case is that of *Humana v. Western Heritage*, decided out of the Eleventh Circuit in August 2016. *Western Heritage* closely follows the rationale of *Avandia*, with one major exception. The court in *Western Heritage* ruled that the MSP's private cause of action provision mandated the imposition of "double damages" – regardless of the circumstances involved in the case. The *Western Heritage* expanded the *Avandia* rationale both in practice as well as geographically, as it meant that MAOs held a double damages recovery right in Florida, Georgia, and Alabama in addition to the states outlined above.

### **Recent developments: Possible cracks in the foundation**

Over the last six months, a number of developments have yielded cracks in the MAO foundation, from the bench in federal appeals courts, discovery in state and federal court, and most recently from federal district court in Connecticut. Let's take a look.

### **Dissent in *Humana v. Western Heritage* petition for *en banc* review**

Although the Eleventh Circuit decision in *Western Heritage* was rendered in August 2016, the defendant petitioned for an *en banc* hearing by the full Eleventh Circuit. That request was denied in January 2018, with one judge issuing a well-reasoned [dissent](#) that litigants may do well to closely study. Judge Gerald Bard Tjoflat has served on the Eleventh Circuit Court of Appeals since 1975 and is the longest serving justice on any federal appeals court. His withering dissent laid bare the inherent contradictions in the arguments put forth by MAOs and makes a strong argument that the private cause of action provision of the MSP is being misappropriated by MAOs and their lawyers. Judge Tjoflat argues that the legal theory underpinning *Avandia* and its progeny destroys the long-standing state-law framework that has historically protected MAOs; predicts a rise in litigation by enterprising lawyers representing MAOs; and explains the substantive legal short-comings in the *Avandia* decision, summarizing as follows:

"The statutory right of action cited by *Humana*, the District Court, and the panel majority was not intended to protect MAOs. The policy reasons behind the right of action differ starkly from those which motivated the creation of the Medicare Advantage program. Moreover, the statutory text of the right of action never references Medicare Advantage insurers at all. Nor could it: the right of action predated the Medicare Advantage program, and the statute that codified Medicare Advantage insurers' common law subrogation rights, by seventeen years."

Litigants facing down the barrel of a lawsuit from an MAO – or from an enterprising subrogation law firm with a well-funded and creative investigation scheme – would do well to read Judge Tjoflat's *en banc* dissent. It is perhaps the siren's song that anti-*Avandia* holdouts have been waiting for.

## **Aetna v. Guerrero**

The most recent case – and in many ways the most interesting – was decided March 13, 2018 in the U.S. district court for Connecticut. This case is a bit of a split decision for Aetna, and it yields yet another small fissure in the MAO wall.

### **Facts**

In this case, Nellina Guerrero was a Medicare Advantage enrollee who was involved in an accident at the Big Y Foods store in Monroe, Connecticut. Guerrero sued Big Y and ultimately settled her case for \$30,000. Aetna, who enrolled Guerrero in one of its Medicare Advantage plans, had paid just shy of \$10,000 for medical treatment that it alleged was related to the underlying accident. Prior to the settlement, Aetna had placed Guerrero, her attorneys, and Big Y on notice that it expected to be reimbursed out of the settlement proceeds – with Big Y even agreeing that it would address the “lien” prior to settlement. Nevertheless, Big Y did in fact pay the settlement in full to Guerrero’s attorneys without first paying Aetna.

Thereafter, Aetna sued just about everyone connected to the settlement including Guerrero, her attorneys, and Big Y. Aetna’s lawsuit alleged theories of recovery grounded both in Connecticut state law as well as Federal Medicare secondary payer law. Guerrero, her attorneys, and Big Y all moved to dismiss Aetna’s claim, arguing that Aetna was not entitled to relief under the MSP’s private cause of action provision.

### **Issues and decision**

After first agreeing that Aetna had standing to sue, the court focused on the issue of whether Aetna could wield the private cause of action provision against Guerrero, her attorney’s law firm, and Big Y. The court examined the differences between the MSP’s different right of action provisions: that of the government - subsection (2)(B)(iii) - and that of private actors – subsection (b)(3)(A). The court noted that subsection (b)(3)(A) was “(at a minimum) ambiguous with respect to whether MAOs may bring suit.” Nevertheless, the court found support for MAOs suing under (b)(3)(A) in the *Avandia* decision as well as the existing Medicare regulations, concluding: “that the Private Cause of Action provision unambiguously permits suit by MAOs and, further, that even if it was ambiguous the CMS regulation that addresses MAO enforcement mechanisms, section 422.108(f), grants MAOs the right to sue under the Private Cause of Action provision.” Having determined that MAOs could sue, the court next examined *who* MAOs may sue under the private cause of action provision.

Aetna had sued Guerrero, her attorneys' law firm, her lawyers, and Big Y. Aetna argued that courts outside of Connecticut had allowed MAOs to sue all of these types of defendants under the private cause of action provision. The court examined the plain language of the provision and noted that the statute itself did not specify against whom a lawsuit may be filed, apart from a clear suggestion that the primary payer (in this case, Big Y) may be sued under the provision.

The court ultimately rejected the idea that the private cause of action provision granted MAOs the right to sue Medicare beneficiaries and their attorneys, as follows:

- First, the court noted that: "the plain language of the Private Cause of Action provision, while admittedly vague, suggests that Congress intended suit against only primary plans. . . Had Congress intended to create a cause of action for double damages against beneficiaries who received payment from a primary plan, Congress could simply have created a cause of action when "any entity or person" failed to reimburse an MAO."
- Second, the court distinguished its ruling from prior MAO decisions in Louisiana and Virginia involving law firms and Medicare beneficiaries. The court criticized the Louisiana ruling in *Collins v. Wellcare* and distinguished the decision reached Virginia decision in *Humana v. Paris Blank*. The court noted that "to conclude that beneficiaries and their attorneys may be sued under the Private Cause of Action provision would mean that MAOs would not have rights equal to those of the government, but rather rights greater than those of the government, because the Private Cause of Action provision only provides for double damages."

### **Taken in context**

On the one hand, *Aetna v. Guerrero* appears to be another extension of *Avandia* rationale. Claims payers can now add Connecticut to the list of states with rulings directly addressing the right of MAOs to sue under the MSP's private cause of action provision. However, Judge Janet C. Hall neglected to follow the lead of courts in Louisiana and Virginia and refused to extend this rationale to individual Medicare Advantage enrollees and their attorneys. In that sense, this was not a slam dunk victory for Aetna.

When the dust settles on this case, by our count state and federal courts with jurisdiction in Pennsylvania, New Jersey, Delaware, Florida, Georgia, Alabama, Texas, Louisiana, Tennessee, Virginia, and now Connecticut have all substantively addressed the issue – this includes the Third and Eleventh Circuit decisions. While some have noted that other courts may be warm to this argument (as in *MAO-MSO Recovery LLC v. State Farm* out of Illinois), we will wait for the matter to be addressed head-on before affording that decision any precedential value. Similarly, while we are sure that other federal judges in the Second Circuit (consisting of New York, Vermont, and Connecticut) will be interested in the *Aetna v. Guerrero* decision, we will wait for the appeal before we afford it circuit-wide precedent.



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Nevertheless, we continue to wait for a case that takes Judge Tjoflat's withering dissent to heart and substantively disagrees with the principle that an MAO has a right to federal court. Until that day comes, and ultimately until there is a change in the law, we will continue to watch as MAOs "island hop" their way from state to state until they have successfully imposed their rationale country-wide.

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