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Private Causes of Action Under the Medicare Secondary Payer Act

by Shannon Laymon-Pecoraro, Esq.

The Medicare Secondary Payer Act (MSPA), Section 1862(b) of the Social Security Act, was designed to preserve the Medicare Trust Fund by designating other health providers as primary payers of health care. Under the act, not only can Medicare require another party to pay for health services, but it can also recover payments made by Medicare where another party may be responsible. Such payments are known as a conditional payment. Typically, conditional payments are made to preserve the funds of a Medicare beneficiary with the understanding that Medicare will be repaid when a settlement, judgment, or other monetary payment is received. These conditional payments extend to Group Health Plans, liability insurance, no fault insurance, and Worker's Compensation cases.

The legal system as a whole has had a difficult time in interpreting the complexities of the MSPA. While practitioners have struggled to navigate the compliance maze with little to no guidelines from the Centers of Medicare & Medicaid Services (CMS), the courts have complicated the matter with unpredictability. While courts across the country still cannot agree as to whether the MSPA is "unambiguous" or "impenetrable," substantive precedents are being set throughout the country, and the Supreme Court of the United States has yet to balance the inconsistencies.

As if the problem of compliance were not difficult enough, the United States Court of Appeals for the Third Circuit filed the opinion for *In Re: Avandia Marketing, Sales Practices and Products Liability Litigation* in the summer of 2012. Reversing the decision of the United States District Court for the Eastern District of Pennsylvania, the court gave *Chevron* deference to CMS¹ and held that Medicare Advantage Plans could recover against a primary payer via private cause of action under the MSP. The effect of this ruling extends the MSPA, at least in part, to *private* insurance providers who have contracted with Medicare for reduced rates.

Avandia adds to the ever-mounting problems associated with compliance under the MSPA. Practitioners throughout the country are anxiously awaiting formal guidelines from CMS to answer the ambiguities

Private Causes of Action Under the Medicare Secondary Payer Act (con't)

posed by MSPA. The Hook Law Center, a member of the Special Needs Alliance and National Alliance of Medicare Set-Aside Professionals, regularly assists Personal Injury attorneys and their clients with compliance with the Medicaid and Medicare laws relating to personal injury settlements and judgments.



Motherly Behavior Which Calms

Hook Law Center: Kit Kat, how do mother cats mimic human mothers?

Kit Kat: That's interesting that you would ask, because I just read something about that. A Japanese neuroscientist, Kumi Kuroda, discovered that when she held her new baby son and paced with him in her home, he quickly became calm and content. This rapid change usually happened within seconds, not minutes. That led her to thinking about other types of babies. So in her lab, she next experimented with mouse pups. Mother mice carry their pups by the scruff of the neck. The same thing happened. The pups became calm and compliant, posing in what she calls a "compact posture" with rear legs positioned close to the body. They also hypothesized that this is the reason that cats, squirrels, and other mammals do the same thing. It's an efficient way to carry their offspring, and it has the added benefit of calming them.

However, Kuroda wasn't merely content to observe the change in the mice pups. She actually measured their pulse rates. When carried at the back of the neck, their pulse rate decreased, they made less vocalizations, and they became passive. Further experimentation with human babies in the lab replicated the results she found at home. Those which were rocked while they were carried were the calmest. Those left in the crib were the most unsettled. Those that were held on a person's lap in a sitting position showed moderate levels of calming. So it does appear that we animals and our human caretakers are more alike than many people suspect. She hopes that this information will be useful for both species on how best to care for their young. We animals knew this all along, but it has taken you humans until the 21st century to figure it out!

(Source = Dennis Normile reprinted from [Science NOW](#), "Rocking role: Connection made to carried kittens," in [The Virginian-Pilot](#), 4-21, 2013)



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Upcoming Events

- Hook Law Center will be presenting a seminar on Estate and Long-Term Care Planning at Sentara Virginia Beach General Hospital, 1060 First Colonial Road, Virginia Beach, VA 23454 on **May 20, 2013** at **6:30 p.m.**
- Hook Law Center will be speaking on Reducing Medicare Liens at the Virginia Trial Lawyers Association meeting in Virginia Beach on **May 21, 2013** at **3:00 p.m.**
- Hook Law Center will be presenting at the VSB Trusts and Estates Section - Virginia State Bar - 75th VSB Annual Meeting in Virginia Beach on **June 14, 2013**.
- Hook Law Center will be presenting a seminar on Estate and Long-Term Care Planning at the Norfolk Yacht and Country Club, 7001 Hampton Blvd., Norfolk on **June 19, 2013**.
- Hook Law Center will be presenting a seminar at the Airport Hilton, 1500 North Military Highway, Norfolk, VA 23502 on **July 17, 2013** at **8:00 a.m.**

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