

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUMANA HEALTH PLAN, INC.,

Plaintiff,

v.

HARTFORD CASUALTY INSURANCE
COMPANY,

Defendant.

Case No. 2:17-cv-1407

COMPLAINT

Plaintiff, Humana Health Plan, Inc. (“Humana”), brings this action for declaratory judgment and monetary damages to recover amounts due and owing to Humana, a Medicare Advantage Organization (“MAO”), by virtue of third party payments made to “Enrollee,”¹ a Medicare beneficiary who elected Medicare Advantage coverage from Humana.

¹ Enrollee’s name is known to Defendant but is not being pled in this Complaint to protect Enrollee’s privacy.

PARTIES

1
2 1. Plaintiff, Humana Health Plan, Inc., is a Kentucky corporation with its
3 principal place of business at 500 W. Main St., Louisville, KY 40202. Plaintiff, Humana,
4 contracts with the Center for Medicare and Medicaid Services (“CMS”) to administer
5 Medicare benefits for Medicare beneficiaries who elect to enroll in Medicare Advantage
6 (“MA” or “Medicare Part C”). Plaintiff, Humana Health Plan, Inc., is part of the Humana
7 family of companies.
8

9 2. Defendant, the Hartford Casualty Insurance Company (“Defendant”), is an
10 Indiana corporation with its principal place of business at One Hartford Plaza, Hartford, CT
11 06155. Upon information and belief, Defendant underwrites the AARP Automobile
12 Insurance Program in the State of Washington.²
13

14 3. Pursuant to RCW 4.28.080(7)(a) and RCW 48.05.200, Defendant may be
15 served through the Washington State Insurance Commissioner, P.O. Box 40257, Olympia,
16 WA 98504-0257.
17

18 4. Defendant provided personal injury protection (“PIP”) coverage and
19 uninsured motorist (“UIM”) coverage to Enrollee.
20
21
22
23
24

25 ² If discovery reveals that a different subsidiary or affiliate of The Hartford was responsible
26 for directing these payments, Plaintiff will amend its Complaint to name the appropriate
27 subsidiary or affiliate.
28

JURISDICTION AND VENUE

1
2 5. This action arises under the laws of the United States and involves federal
3 questions. The Court therefore has jurisdiction over the subject matter of this action under
4 28 U.S.C. § 1331.

5 6. Venue is proper in the Western District of Washington because (1) Defendant
6 does business in, and thus resides in, this judicial district and (2) a substantial part of the
7 events or omissions giving rise to this action occurred in this judicial district. 28 U.S.C.
8 § 1391(b) and (c).
9

10 **LEGAL BACKGROUND**

11 7. Medicare is a system of federally funded health insurance for people 65 and
12 older, certain disabled persons, and persons with End Stage Renal Disease. Congress
13 enacted the Medicare Program as Title XVIII of the Social Security Act (“Medicare Act”).
14 42 U.S.C. § 1395 *et seq.* Medicare is an enormous and complex federal program that insured
15 over 55.3 million Americans in 2015 with total expenditures of \$647.6 billion, compared to
16 total income of \$644.4 billion, a deficit of \$3.2 billion.³
17
18

19 8. As set forth below, in response to the rising cost of healthcare paid for by the
20 Medicare program, Congress created the Medicare Advantage program “to harness the
21 power of private sector competition to stimulate experimentation and innovation that would
22 ultimately create a more efficient and less expensive Medicare system.” *In re Avandia*
23
24

25 _____
26 ³ See 2016 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and
27 Federal Supplementary Medical Insurance Trust Funds, p. 7.
28

1 *Mktg., Sales Practices & Prod. Liab. Litig.*, 685 F.3d 353, 363 (3d Cir. 2012) (citing H.R.
2 Rep. No. 105-217, at 585 (1997), 1997 U.S.C.C.A.N. 176, 205–06 (Conf. Rep.)).

3 9. Moreover, and in response to the same concern, Congress determined that, in
4 the event of a bodily injury such as an automobile accident, liability and no-fault insurance
5 policies were to provide the primary source of recovery, with Medicare to be the secondary
6 source of recovery. *See, e.g.*, 42 U.S.C. § 1395y(b)(2).

8 10. However, personal injury settlements frequently involve disputed insurance
9 obligations and occur well after medical expenses have been incurred, meaning that the
10 status of carriers as primary payers is often not known until after Medicare Advantage
11 Organizations (“MAOs”) have issued payments to providers that treated Medicare
12 beneficiaries. MAOs must then seek reimbursement from the Enrollee, and, when the
13 Enrollee refuses to make reimbursement, from the primary payer.

15 11. Where, as here, the primary payer is aware of the existence of a conditional
16 payment, it is in a position to reserve funds and ensure that they are paid directly to
17 Medicare, protecting Medicare and the government from individual enrollees that may
18 disregard their reimbursement obligations and exhaust available settlement proceeds. This
19 is a substantial and widespread problem and contributes to the ongoing annual deficits in the
20 Medicare Trust Funds, which in turn increases the costs borne by elderly and disabled
21 beneficiaries who enroll in Medicare Advantage plans.

24 **The Medicare Act**

25 12. Subchapter XVIII of the Social Security Act—commonly called the Medicare
26 Act—is divided into five “Parts.”

1 13. Part A is automatic and provides hospital and certain other facility benefits.
2 *See* 42 U.S.C. §§ 1395c to 1395i-5. Part B provides medical benefits, and although heavily
3 subsidized by the federal government, is a voluntary program that requires a small premium
4 from the beneficiary. *See* 42 U.S.C. §§ 1395j to 1395w-6. Parts A and B are often
5 collectively referred to as the “original Medicare fee-for-service program option.”
6

7 14. Medicare Part C creates an alternative option for Medicare benefits provided
8 by private contractors. *See* 42 U.S.C. §§ 1395w-21 to 1395w-29. Congress enacted
9 Medicare Part C to “enable the Medicare program to utilize innovations that have helped the
10 private market contain costs and expand health care delivery options.” H.R. Rep.
11 No. 105-217, at 585 (1997) (Conf. Rep.). Congress initially called this program “Medicare +
12 Choice.” *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, Title IV, §§ 4001–4006,
13 111 Stat. 251, 275–334 (Aug. 5, 1997). In 2003, Congress strengthened the program and
14 renamed it “Medicare Advantage.” *See* Medicare Prescription Drug, Improvement, and
15 Modernization Act of 2003, Pub. L. No. 108-173, Title II, §§ 201–241, 117 Stat. at 2176–
16 221.
17
18

19 15. Medicare Part D is the voluntary prescription drug benefit, added in 2003.
20 *See* Title I, §§ 101–111, 117 Stat. 2066, 2071–176 (Dec. 8, 2003) (codified at 42 U.S.C.
21 §§ 1395w-101 to 1395w-154).
22

23 16. The final “Part” of Title XVIII is Medicare Part E, which contains definitions
24 and general provisions applicable to the whole of the Medicare program. *See* 42 U.S.C.
25 §§ 1395x–1395y. The Medicare Secondary Payer law, 42 U.S.C. 1395y(b), is codified in
26 Part E.
27
28

The Medicare Advantage (Medicare Part C) Program

1
2 17. The Medicare Act guarantees eligible beneficiaries the right to elect to
3 receive Medicare benefits either through the original Medicare fee-for-service program
4 option or through a Medicare Advantage plan. *See* 42 U.S.C. § 1395w-21(a). Approximately
5 30% of all Medicare beneficiaries chose to enroll in Medicare Advantage plans.

6
7 18. Medicare Advantage is a federal program, operated under federal rules,
8 funded by federal dollars.

9
10 19. The funds for Medicare Advantage benefits come from the Medicare Trust
11 Funds. *See* 42 U.S.C. § 1395w-23(f). The Medicare Trust Funds expend more than one
12 hundred billion dollars annually to provide Medicare benefits through the Medicare
13 Advantage program.

14
15 20. The Conference Committee that finalized the legislation that became
16 Medicare Part C believed that Medicare Advantage would “eventually eclipse original fee
17 for service Medicare as the predominant form of enrollment under the Medicare program.”
18 Balanced Budget Act of 1997, P.L. 105-33, H.R. Conf. Rep. 105-217, at 638 (July 30,
19 1997).

Medicare Advantage Organizations and the Medicare Secondary Payer Law

20
21
22 21. In 1980, in response to skyrocketing costs, Congress began enacting the
23 provisions that now comprise the Medicare Secondary Payer Law (“MSP Law”), 42 U.S.C.
24 § 1395y(b). The primary intent underlying the MSP Law is to shift the financial burden of
25 health care from the Medicare program to private insurers and thereby lower the overall cost
26 of the Medicare program.
27
28

1 22. The MSP Law is codified as 42 U.S.C. § 1395y(b), in Part E of the Medicare
2 Act, which contains definitions and other general provisions pertaining to the Medicare
3 program as a whole. The terms of the MSP Law make clear that it is applicable to all
4 payments “under this subchapter,” 42 U.S.C. § 1395y(b)(2)(A), which includes payments
5 made by MAOs under Part C of the Act.
6

7 23. Moreover, Part C of the Medicare Act expressly incorporates the MSP Law
8 into the Medicare Advantage program, authorizing an MAO to charge a primary plan or an
9 individual that has been paid by a primary plan “under circumstances in which payment
10 under this subchapter is made secondary pursuant to” the MSP Law (§ 1395y(b)(2)). 42
11 U.S.C. § 1395w-22(a)(4). In so doing, Congress expressed its understanding and intention
12 that the MSP Law applied to Medicare Part C.
13

14 24. The MSP Law creates a federal coordination-of-benefits scheme in which
15 worker’s compensation, liability insurance, and no-fault insurance are primary, and
16 Medicare benefits are secondary. *See* 42 U.S.C. § 1395y(b)(2); 42 C.F.R. § 422.108(b)(3).
17

18 25. When an MAO makes a payment for medical services that are the
19 responsibility of a primary plan under the MSP Law, those payments are conditional,
20 whether the primary plan’s liability was established at the time of the conditional payment
21 or not. Federal regulations define the term “conditional payment” under the MSP Law to
22 mean “a Medicare payment for services for which another payer is responsible, made either
23 on the bases set forth in subparts C through H of this part, or because the intermediary or
24 carrier did not know that the other coverage existed.” 42 C.F.R. § 411.21.
25
26
27
28

1 26. As with any system of coordination of benefits, the Medicare Secondary
2 Payer regime involves both avoidance and recovery. Optimally, when items and services are
3 covered by both a primary plan and by Medicare benefits, the providers submit their charges
4 to the primary payer, and Medicare *avoids* the expense of paying those charges.
5 Alternatively, when Medicare makes a conditional payment for medical services that have a
6 primary payer, regardless of the reason, Medicare may seek to *recover* those conditional
7 payments. *See* 42 U.S.C. § 1395y(b)(2); § 1395y(b)(3)(A).
8

9 27. Because Medicare Advantage is simply another way in which Medicare
10 beneficiaries may receive Medicare benefits, the same MSP rules apply. *See* CMS, Medicare
11 Managed Care Manual, Chap. 4, § 130.3 (Rev. 121, Apr. 22, 2016) (“In the case of the
12 presence of workers compensation, no-fault and liability insurance (including self-
13 insurance), Medicare makes conditional payments if the other insurance does not pay
14 promptly. These conditional payments are subject to recovery when and if the other
15 insurance does make payment.”).
16
17

18 28. CMS has interpreted the MSP Law as it applies to MAOs in a formal
19 regulation, which states that “[t]he MA organization will exercise the same rights to recover
20 from a primary plan, entity, or individual, that the Secretary exercises under the MSP
21 regulations.” 42 C.F.R. § 422.108(f). An entity that receives payment from a primary plan
22 shall therefore be required to reimburse an MAO for conditional Medicare payments.
23

24 29. CMS has further explained that the regulation assigns MAOs “the right,
25 under existing Federal law, to collect for services for which Medicare is not the primary
26 payer” using “the same rights of recovery that the Secretary exercises under the Original
27
28

1 Medicare MSP regulations.” CMS, Memorandum: Medicare Secondary Payment
2 Subrogation Rights (Dec. 5, 2011).

3 30. The MSP Law makes clear that “a primary plan, and an entity that receives
4 payment from a primary plan, shall reimburse” any conditional Medicare payments. 42
5 U.S.C. § 1395y(b)(2)(B)(ii).

6
7 31. The enforcement provision of the MSP Law authorizes a private cause of
8 action to recover primary payments or reimbursements owed under the MSP Law. 42 U.S.C.
9 § 1395y(b)(3)(A). The provision further provides that damages “shall be in an amount
10 double the amount otherwise provided.” *Id.*

11
12 32. An MAO that has advanced Medicare benefits has standing to bring the MSP
13 private cause of action. *Humana Med. Plan, Inc. v. Western Heritage Ins. Co.*, 832 F.3d
14 1229 (11th Cir. 2016); *In re Avandia Mktg.*, 685 F.3d 353 (3d Cir. 2012); *Cariten Health*
15 *Plan, Inc. v. Mid-Century Ins. Co.*, 2015 U.S. Dist. LEXIS 126887, at *14 (E.D. Tenn.
16 Sep. 1, 2015); *Collins v. Wellcare Healthcare Plans, Inc.*, 73 F. Supp. 3d 653, 665 (E.D. La.
17 2014); *Humana Ins. Co. v. Farmers Tex. Cnty. Mut. Ins. Co.*, 95 F. Supp. 3d 983, 986 (W.D.
18 Tex. 2014).

19
20 33. Plaintiff, Humana, has standing under 42 U.S.C. § 1395y(b)(3)(A) to bring
21 this private cause of action to recover double damages from Defendant because (1) Humana
22 made payments of Medicare benefits on behalf of its MA Enrollee, for which Humana was
23 not primarily liable; (2) the PIP and UIM coverage provided by Defendant was a “primary
24 plan” under the MSP Law; and (3) Defendant failed to reimburse Humana.
25
26
27
28

1 34. When Medicare Advantage plans recover reimbursement from primary plans
2 or other liable parties pursuant to the MSP Law, those recoveries help reduce Medicare
3 expenditures by the Medicare Trust Funds. *See* HHS, *Medicare Program; Policy and*
4 *Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit*
5 *Programs*, 75 Fed. Reg. 19678, 19797 (April 15, 2010) (“MAOs that faithfully pursue and
6 recover from liable third parties will have lower medical expenses.”).

8 35. Thus, MSP recoveries by MAOs fulfill the essential purpose of the MSP Law
9 and Medicare Part C—creating a more efficient and less expensive Medicare program.

10 **FACTUAL BACKGROUND**

11 36. On or about May 10, 2014, Enrollee was a passenger in a vehicle that was
12 involved in a serious collision.

14 37. At the time of the collision, Enrollee was eligible for Medicare and had
15 elected Medicare Part C coverage through Humana.

16 38. Enrollee received Medicare benefits for injuries sustained in the collision.
17 Specifically, Humana has expended at least \$161,853.14 in conditional payments on
18 Medicare claims submitted on behalf of Enrollee for medical services rendered as a result of
19 the collision.
20

21 39. The other driver in the collision was uninsured, triggering coverage under
22 Defendant’s UIM policy.
23

24 40. On February 19, 2015, Humana sent Defendant written notice of its right of
25 recovery under the MSP Law.
26
27
28

1 41. In or around December 2015, Defendant entered into a settlement with
2 Enrollee.

3 42. Under the MSP Law, “A primary plan’s responsibility for such payment may
4 be demonstrated by . . . a payment conditioned upon the recipient’s compromise, waiver, or
5 release (whether or not there is a determination or admission of liability) of payment for
6 items or services included in a claim against the primary plan or the primary plan’s
7 insured” 42 U.S.C. § 1395y(b)(2)(B)(ii).

9 43. By virtue of the settlement, Defendant acknowledged that it was the primary
10 payer, and its policy became the primary plan under 42 U.S.C. § 1395y(b)(2). As such,
11 Defendant was required to make appropriate reimbursement for the conditional Medicare
12 benefits advanced by Humana on behalf of Enrollee.
13

14 44. Defendant disbursed the settlement payment to Enrollee in December 2015.
15 Although Enrollee was primarily responsible for reimbursing these funds within 60 days of
16 Defendant’s payment, 42 C.F.R. § 411.24(h), Defendant remained responsible to reimburse
17 Humana under applicable federal regulations, *e.g.*, 42 C.F.R. § 411.24(i)(1), and, by failing
18 to make advance arrangements to see that this occurred, assumed the risk of being
19 responsible to ensure that Humana was paid in the event Enrollee breached its obligations.
20

21 45. Enrollee did not comply with his repayment obligations, meaning Defendant
22 is responsible for reimbursing Humana, even though it has already paid Enrollee.
23

24 46. Humana has repeatedly sought information from Defendant related to its
25 right to recovery under the MSP Law, but Defendant has refused to provide any information
26 about the settlement.
27

1 47. On March 1, 2017, counsel for Humana sent Defendant a letter reminding
2 Defendant of its independent obligation to reimburse Humana under the Medicare
3 Secondary Payer law. That letter notified Defendant that Humana was willing to resolve the
4 matter without litigation if The Hartford was willing to pay Humana the amount set forth in
5 the relevant MSP regulation, 42 C.F.R. § 411.37. The letter also informed Defendant that, in
6 the absence of appropriate reimbursement, Humana reserved its rights to pursue an action
7 for double damages against Defendant under the MSP Law's private cause of action, 42
8 U.S.C. § 1395y(b)(3)(A).
9

10 48. Defendant never responded to Humana's reimbursement request.
11

12 49. Humana has not received any reimbursement to date for the conditional
13 payments it made on behalf of Enrollee.
14

15 COUNT I

16 **DECLARATORY JUDGMENT AS TO DEFENDANTS' OBLIGATION 17 TO REIMBURSE MEDICARE BENEFITS**

18 50. Plaintiff, Humana, incorporates by reference the allegations of paragraphs 1
19 through 49 of the Complaint as if set forth herein.

20 51. Pursuant to 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, Plaintiff, Humana, is
21 entitled to a Declaration as follows:

- 22 a. The PIP and UIM policies issued by Defendant are primary to
23 Medicare, including Medicare benefits advanced by MA
24 organizations such as Plaintiff, Humana.
25 b. When an MAO, such as Humana, has advanced conditional Medicare
26 benefits in circumstances in which its payments are made secondary
27 pursuant to 42 U.S.C. §§ 1395y(b)(2) and 1395w-22(a)(4), it is
28 entitled to pursue reimbursement from a primary plan or entity that

1 received payment from a primary plan under 42 U.S.C.
2 § 1395y(b)(3)(A).

3 c. Because Enrollee failed to reimburse Medicare payments advanced on
4 behalf of Enrollee by Humana, Defendant must reimburse Medicare
5 even though it has already paid Enrollee.

6 52. Declaratory relief is necessary and appropriate because Defendant has
7 refused to recognize its obligations under the MSP Law.

8 **COUNT II**

9 **PRIVATE CAUSE OF ACTION UNDER 42 U.S.C. § 1395y(b)(3)(A)**

10 53. Plaintiff, Humana, incorporates by reference the allegations of paragraphs 1
11 through 49 of the Complaint as if set forth herein.

12 54. Plaintiff, Humana, made payments of Medicare benefits for items and
13 services required by Enrollee as a result of the injuries Enrollee sustained in the collision.

14 55. Defendant was a primary payer, as defined in 42 U.S.C. § 1395y(b)(2) and
15 § 1395w-22(a)(4), with respect to medical expenses incurred by Enrollee but paid by
16 Humana.

17 56. At the time it made payment for Enrollee's medical treatment, Humana did
18 not know that primary coverage provided by Defendant existed or that any primary payer
19 could be expected to pay promptly for Enrollee's care. These payments were, therefore,
20 conditional. *See* 42 C.F.R. § 411.21.

21 57. Because Enrollee did not reimburse the Medicare payments advanced on
22 behalf of Enrollee by Humana, Defendant must reimburse Medicare even though it has
23 already paid Enrollee. *See* C.F.R. § 411.24(i)(1).
24
25
26
27
28

1 58. Defendant did not make appropriate reimbursements to Humana for the items
2 and services for which Humana advanced conditional payments.

3 59. Congress established a private cause of action under 42 U.S.C.
4 § 1395y(b)(3)(A), permitting the recovery of double damages for a failure to make
5 appropriate reimbursement in accordance with the MSP Law.
6

7 60. Under the private cause of action established by 42 U.S.C. § 1395y(b)(3)(A),
8 Plaintiff, Humana, is entitled to recover “an amount double the amount otherwise provided.”
9 Humana made payments of Medicare benefits of at least \$161,853.14 and is entitled to
10 recover double that amount, or at least \$323,706.28, from Defendant.
11

12 **PRAYER FOR RELIEF**

13 Based on the above claims, Plaintiff, Humana, seeks the following relief:

- 14 1. An order declaring:
- 15 a. The PIP and UIM policies issued by Defendant are primary to
16 Medicare, including Medicare benefits advanced by MA
17 organizations such as Plaintiff, Humana;
- 18 b. When an MA organization, such as Humana, has advanced
19 conditional Medicare benefits in circumstances in which its payments
20 are made secondary pursuant to 42 U.S.C. §§ 1395y(b)(2) and
21 1395w-22(a)(4), it is entitled to pursue reimbursement from a primary
22 plan or entity that received payment from a primary plan under 42
23 U.S.C. § 1395y(b)(3)(A); and
- 24 c. Because Enrollee failed to reimburse Medicare payments advanced on
25 behalf of Enrollee by Humana, Defendant must reimburse Medicare
26 even though it has already paid Enrollee.
- 27 2. Double damages under 42 U.S.C. § 1395y(b)(3)(A);
- 28 3. Pre- and post-judgment interest;
4. Attorneys’ fees and costs; and

1 5. Such other relief the Court deems proper.

2 **WHEREFORE**, Plaintiff, Humana, prays that the Court enter judgment on behalf of
3 Plaintiff, Humana, and against Defendant, Hartford Casualty Insurance Company, and
4 award Plaintiff, Humana, all requested relief.

5 DATED: September 18, 2017

Respectfully submitted,

6 By: /s/ Daniel J. Shih

7
8 Daniel J. Shih
9 Washington State Bar No. 37999
10 dshih@susmangodfrey.com
11 **SUSMAN GODFREY LLP**
12 1201 Third Avenue, Suite 3800
13 Seattle, Washington 98101
14 Telephone: (206) 373-7390

15 Michael P. Abate
16 (*pro hac vice* application pending)
17 Kentucky State Bar No. 95259
18 mabate@kplouisville.com
19 **KAPLAN & PARTNERS LLP**
20 710 West Main Street, 4th Floor
21 Louisville, Kentucky 40202
22 Telephone: (502) 540-8280