By Mary H. Rose

What the Medicare, Medicaid Anti-Assignment Provisions Really Mean

It is widely believed that the Medicare and Medicaid anti-assignment provisions prohibit the factoring of government health care receivables, but that is not true. What the anti-assignment provisions actually do — and the only thing they do — is prevent the government from making payments under the Medicare and Medicaid programs to anyone other than a provider. This rule is the same for factors[1] as it is for secured lenders, and the compliance methods are identical.

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The Anti-Assignment Provisions

The Social Security Act and its implementing regulations contain separate anti-assignment provisions for Medicare Part A,[2] Medicare Part B[3] and Medicaid.[4] For Medicare Part A, the statute simply states that a Medicare payment owing to a provider cannot be made "to any other person under an assignment or power of attorney":

> No payment which may be made to a provider of services under this subchapter for any services furnished to an individual shall be made to any other person under an assignment or power of attorney.[5]

There are exceptions for assignments (1) to a governmental agency or entity, (2) pursuant to the order of a court of competent jurisdiction, or (3) to a billing or collection agent under an agency agreement, provided that the compensation to the agent is unrelated to the amounts of the billings, collections or payments.[6] An assignment pursuant to a court order is effective only if a certified copy of the court order is filed with the Medicare intermediary or carrier responsible for processing the claim. Notably, a party that receives payment under a court-ordered assignment is jointly and severally responsible with the provider for any Medicare overpayments received by such party.[7]

The anti-assignment provisions for Medicare Part B[8] and Medicaid[9] are the same except that they also permit certain assignments that are specific to the services and billings under those programs, such as (1) by physicians to their employers; (2) under provider or supplier arrangements with a hospital, clinic or other facility; or (3) if an individual receiving care is entitled to direct payment, by the individual to the provider or the supplier.

Assignments for Security

The threshold issue for lenders is whether the grant of a security interest in Medicare or Medicaid accounts violates the anti-assignment provisions. This issue was definitively settled in favor of secured lenders by the Fifth Circuit's decision in *In re Missionary Baptist Foundation of America Inc.*[10] In *Missionary Baptist*, a group of nursing homes in Texas granted a security interest to their bank lender in all of their accounts, including Medicaid accounts. In the ensuing chapter 11 case, the trustee brought an adversary proceeding against the bank to invalidate the security interests on the grounds that the grant of the security interests violated the Medicaid anti-assignment provisions under both federal and state law. To resolve this issue, the Fifth Circuit looked to the legislative history regarding the purpose of the anti-assignment provisions and held that Congress enacted the provisions solely in order to prevent factoring of Medicare and Medicaid accounts:

> An examination of the legislative history of this provision reveals that its purpose was to prevent "factoring" agencies from purchasing [M]edicare and [M]edicaid accounts receivable at a discount and then serving as the collection agency for the accounts. Congress was concerned that direct payment of funds to these factoring agencies was resulting in "incorrect and inflated claims."[11]

The court further held that to the extent that the Texas Medicaid statute contained broader prohibitions on assignment of Medicaid accounts, the state statute must yield to the federal scheme. To hold

1 An accounts receivable factor purchases and owns the accounts. An accounts receivable lender lends against the accounts and is granted a security interest in the accounts, but the accounts continue to be owned by the debtor.
2 Medicare Part A covers inpatient hospital and critical access hospital care, skilled nursing facility care, some home health agency services and hospice care.
3 Medicare Part B covers physician services, hospital outpatient department services, ambulatory surgical centers, laboratory services, some home health care, physical and occupational therapy, and durable medical equipment, prosthetics, orthotics and supplies.
4 Medicaid is a federal- and state-funded program administered by participating states that finances health care for low-income individuals. States receive federal matching funds and are free to design their own programs provided that they cover certain federally mandated services and administer their programs within federal requirements.
5 42 U.S.C. § 1395g(c).
6 *Id.*; 42 C.F.R. § 424.73.
7 42 C.F.R. § 424.90.
8 42 U.S.C. § 1395u(b)(6); 42 C.F.R. §§ 424.73, 424.80 and 424.90.
9 42 U.S.C. § 1396a(a)(32); 42 C.F.R. § 447.10.
10 796 F.2d 752 (5th Cir. 1986).
11 *Id.* at 757 n.6 (citing *Danvers Pathology Assocs. Inc. v. Atkins*, 757 F.2d 427, 430 (1st Cir. 1979)).

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otherwise would "undercut a vital means of financing medical assistance for the needy."[12] Subsequent court decisions have uniformly held that based on the legislative history, Medicare and Medicaid accounts can serve as collateral for secured loans without violating the anti-assignment provisions under state or federal law.[13]

Factoring

There are only two reported decisions that directly consider whether factoring of Medicare and Medicaid accounts violates the anti-assignment provisions. Together, these cases clearly demonstrate what kind of factoring structure is prohibited, and what kind is not.

The first case, *Professional Factoring Service Assoc. v. Mathews*,[14] analyzed a factoring facility in which Medicaid claims were submitted by the factor in the provider's name, and payments were made by checks payable to the provider. However, the checks were not mailed to the provider but directly to the factor, which was able to cash them because of a power of attorney from the provider. The *Professional Factoring* court held that this kind of factoring arrangement was as subject to abuse as factoring arrangements in which providers assign their Medicaid claims to factors. Both types of factoring are equally subject to the same evil, namely "inflated and fabricated billings by factors."[15]

The Seventh Circuit's decision in *DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes Inc.*[16] analyzed a factoring facility that was structured very differently from the factoring facility in *Professional Factoring*. In *DFS*, the factor purchased "the right to receive the proceeds of collections of [Medicare and Medicaid accounts] when such collections were received by [the provider]." In exchange, the factor made immediate cash payments to the provider of 71.5 percent of the value of the accounts, and the provider was required to pay the factor 2.5 percent interest for each month that the accounts payable to the provider remained unpaid (a 30 percent annual interest rate).[17] The *DFS* court held that a purchase of the right to receive the proceeds of collections of Medicare and Medicaid accounts is not void for illegality, provided that the payments by the government are made in the first instance to and in the name of the provider:

> On its face, this statute stands only for the proposition that Medicare funds cannot be paid directly by the government to someone other than the provider, but it does not prohibit a third party from receiving funds if they first flow through the provider. Before this statute, health care providers assigned their right to Medicare receivables to third parties, which then submitted incorrect and inflated claims to be paid in their own names, creating administrative nightmares and overpayments.... Therefore, Congress passed this statute to remedy this problem by ensuring that payments would be made directly to healthcare providers. However, nothing suggests that Congress intended to prevent healthcare providers from assigning receivables to a non-provider.... [W]e remain unconvinced that this "factoring" agreement ... was illegal.[18]

Thus, the Seventh Circuit expressly held that factoring, if properly structured so that the payment first flows through the provider, does not violate the anti-assignment provisions. Since *DFS*, courts that have discussed the anti-assignment provisions (although not in the factoring context) have all followed *DFS* in emphasizing that the anti-assignment provisions only prevent Medicare and Medicaid funds from being paid to someone other than the provider. They do not prohibit a third party from receiving the funds under an assignment after the funds have flowed through the provider.[19]

Why the Misconceptions?

Notwithstanding *DFS* and the absence of any contrary authority in the case law, many in the health care financing industry continue to believe that factoring violates the anti-assignment provisions. One possible reason is that the stated legislative purpose of the anti-assignment provisions, as discussed in *Missionary Baptist*, was to prevent the factoring of Medicare and Medicaid accounts. However, as demonstrated in *DFS*, a factoring facility can be structured so that the perceived evils that factoring might cause — submission of incorrect and inflated claims, and administrative problems as to which entity the government should pay or from which it should collect overpayments — do not exist when the payments first flow through the provider.

Other possible reasons for the belief that factoring violates the anti-assignment provisions may arise from misinterpretations of the Medicaid anti-assignment regulations and the *Medicare Claims Processing (MCP) Manual*. The Medicaid anti-assignment regulations include an express prohibition on payment to factors:

> *Prohibition of payment to factors.* Payment for any service furnished to a beneficiary by a provider may not be made to or through a factor, either directly or by power of attorney.[20]

However, this language does not make factoring of Medicaid accounts illegal. It merely requires that payment by the government not be made to or through a factor. The *MCP Manual*, issued by the Centers for Medicare and Medicaid Services (CMS), contains what appears to be an express anti-factoring prohibition:

12 *Id.* at 758.
13 *See, e.g., Lock Realty Corp. IX v. U.S. Health LP*, No. 3:05-CV-715, 2007 U.S. Dist. LEXIS 14578, at *15 (N.D. Ind. 2007); *In re E. Boston Neighborhood Health Ctr. Corp.*, 242 B.R. 562, 573 (Bankr. D. Mass. 1999); *In re Am. Care Corp.*, 69 B.R. 66 (Bankr. N.D. Ill. 1986); *Qualix Care LP v. Everglades Reg'l Med. Ctr. Inc.*, 232 A.D.2d 323, 648 N.Y.S.2d 580 (N.Y. App. Div. 1996); *Snowden Inv. Co. v. Sci-Wentzville Care Ctr. Inc.*, 896 S.W.2d 732 (Mo. Ct. App. 1995); *Bank of Kan. v. Hutchinson Health Servs. Inc.*, 735 P.2d 256 (Kan. Ct. App. 1987); *see also Manalis Fin. Co. v. United States*, 611 F.2d 1270 (9th Cir. 1980) (interpreting Medi-Cal anti-assignment statute, Cal. Welf. & Inst. Code § 14115.5).
14 422 F. Supp. 250 (S.D.N.Y. 1976).
15 *Id.* at 256.
16 384 F.3d 338 (7th Cir. 2004).
17 *Id.* at 340-41.
18 *Id.* at 350.
19 *Lock Realty Corp. IX v. U.S. Health LP*, No. 3:05-CV-715, 2007 U.S. Dist. LEXIS 14578, at *6-*7 (N.D. Ind. 2007); *By Your Side Homemaker & Companion Servs. LLC v. Agency of Aging of So. Cent. Conn. Inc.*, No. NNHCV106013214S, 2013 Conn. Super. LEXIS 267, at *16-*19 (Conn. Super. Ct. 2013); *Fla. Corp. Funding Inc. v. Always There Home Care Inc.*, No. 0005691/2008, 2011 N.Y. Misc. LEXIS 1471, at *22-*25 (N.Y. Sup. Ct. 2011).
20 42 C.F.R. § 447.10(h).

> Irrespective of the language in any agreement a provider/supplier has with a third party that is providing financing, that third party cannot purchase the provider/supplier's Medicare receivables.[21]

The purpose of the *MCP Manual* is to serve as a statement of CMS policy with respect to the processing of Medicare claims, and provide instructions to providers and suppliers, as well as the carriers that process Medicare claims.[22] It does not have the force of law. Viewed in this context, the "anti-factoring" language in the *MCP Manual* only expresses CMS's policy that regardless of a provider or supplier's contractual financing arrangements, purchases of Medicare accounts will not be recognized for purposes of payment of Medicare claims.

This interpretation of the *MCP Manual* is consistent with the Seventh Circuit's interpretation of the anti-assignment provisions in *DFS*, as well as with CMS's actual practice. There are a number of factors that have peacefully purchased Medicare and Medicaid accounts without interference by CMS for many years.

Compliance

The standard method for complying with the anti-assignment provisions, which is equally applicable to secured lenders and factors, is the double lockbox.[23] Under the double lockbox arrangement, the lender establishes a government lockbox and lockbox account in the name of the provider (for payment of Medicare, Medicaid and other government accounts), and a non-government lockbox and lockbox account in either the name of the provider, the lender or both (for payment of all other accounts). The lender also typically requires that the provider execute standing instructions to the lockbox bank providing for a daily sweep of all funds received in the government lockbox account to either the non-government lockbox account or another deposit account subject to the control of the lender.

Both the government and non-government lockbox accounts are subject to deposit account control agreements (DACAs) among the provider, the lender and the lockbox bank. However, the DACA for the government lockbox account must contain a provision specifying that the provider retains the ultimate right to direct the disposition of funds in the government lockbox account. Thus, the provider has the right to rescind the sweep instructions and direct disposition of funds received in the government lockbox account (usually after 3-10 days' notice to both the lender and the lockbox bank) regardless of whether the rescission is a violation of the loan agreement between the provider and the lender. The DACA with respect to the non-government lockbox account is subject only to instructions by the lender.

This double lockbox arrangement satisfies the anti-assignment provisions because it ensures that Medicare and Medicaid payments are made to and in the name of the provider, or in the language of the *DFS* court, payments "first flow through the provider" before being transferred to the lender. Notably, the arrangement also satisfies the directives of the *MCP Manual*, which includes the additional requirement that a lender that is also the lockbox bank must waive its right of offset against Medicare payments.[24]

Conclusion

Compliance with the anti-assignment provisions is critical for both providers and lenders (and providers and factors) because CMS may terminate a Medicare provider agreement if the provider "executes or continues a power of attorney, or enters into or continues any other arrangement, that authorizes or permits payment contrary to [the anti-assignment provisions]."[25] Fortunately, the courts have interpreted the anti-assignment provisions in a manner that enables both secured lenders and factors to provide much-needed financing to health care providers. abi

21 *MCP Manual* § 30.2.5.
22 *MCP Manual* § 01.
23 *See* Kimberly Easter Zirkle, "Not So Perfect: The Disconnect Between Medicare and the Uniform Commercial Code Regarding Health-Care-Insurance Receivables," 9 *N.C. Banking Inst.* 373, 380-83 (2005).
24 *MCP Manual* § 30.2.5.
25 42 C.F.R. § 424.74.