



MAY 16, 2022 • NO. 3

Ninth Circuit Deals Significant Setback to Medicare Advantage Out-of-Network Providers

In a blow to out-of-network providers pursuing underpayments from Medicare Advantage plans, the U.S. Court of Appeals for the Ninth Circuit Court of Appeals recently held in *Global Rescue Jets, LLC v. Kaiser Foundation Health Plan, Inc.* that the Medicare Act requires such providers to exhaust the often cumbersome and protracted Medicare administrative claim appeal process before bringing suit in court. However, the court did observe in a footnote that “[w]e need not decide whether a different conclusion would be warranted in a case involving a contract provider.” It is far from clear if an in-network contracted provider would be similarly required to exhaust administrative remedies before filing suit.

The plaintiff in the case, Global Rescue Jets (“Jet Rescue”), is an international air ambulance provider. After Jet Rescue provided out-of-network air ambulance services to two patients who became seriously ill while in Mexico, their Medicare Advantage plan (“MA plan”) offered by defendant, Kaiser Foundation Health Plan, Inc. (“Kaiser”) denied Jet Rescue’s claims for reimbursement at its standard billed charges.

Relying upon the patients’ assignments of their benefits, Jet Rescue sued Kaiser to recover the alleged underpayment of the claims, pleading various contract theories and a cause of action under California’s Unfair

Competition Law. The district court dismissed the action in its entirety for lack of subject matter jurisdiction because Jet Rescue had failed to exhaust administrative remedies under the Medicare Act prior to suing Kaiser in court.

On appeal, the Ninth Circuit affirmed. Although enrollees in the traditional Medicare fee for service program (and by extension, their assignees), are required to exhaust administrative remedies under the Medicare Act, Jet Rescue argued that a different result should be obtained under the Medicare Advantage (Medicare Part C) program because the Medicare Act, on its face, only precludes actions against the “United States, the [Secretary of HHS], or any officer or employee thereof” without prior exhaustion of administration remedies. As Kaiser is not an officer or employee of the federal government, but a private actor, Jet Rescue contended that the statutory exhaustion requirement was inapplicable.

The Ninth Circuit rejected this argument for three reasons. First, the court recognized that although MA plans are private entities, their plan appeal processes serve as an integral part of the overall administrative review scheme overseen by the Secretary of Health and Human Services (“HHS”). Second, the court noted that circumvention of the administrative process would defeat

the primary rationales for creating the administrative review process in the first place: to allow the agency to use its experience and expertise in interpreting the complex set of regulations governing entitlement to benefits, and to permit the agency to compile an adequate administrative record to facilitate judicial review. Third, the court noted that Congress created the administrative review process to preserve judicial resources by “spar[ing] federal courts from having to resolve a deluge of small-dollar claims for benefits from the more than 26 million enrollees in Medicare Advantage plans.”

In the alternative, Jet Rescue argued that its claims did not arise under the Medicare Act because it sought reimbursement for supplemental benefits offered under Kaiser’s MA plan that were not available in the traditional Medicare fee for service program. The Ninth Circuit rejected this argument, concluding that payment of the benefits Jet Rescue sought to recover would constitute a payment of benefits under Part C of the Medicare Act. The court reasoned that each of Jet Rescue’s claims was “predicated on its status as an assignee of the enrollees’ claims for benefits under Kaiser’s plans, for without that status Jet Rescue would have no basis for demanding payment from Kaiser.” The Ninth Circuit looked at the plain language of the Medicare Act and noted that the statute provided for both basic and supplemental benefits as subject to Part C’s administrative review scheme. The court, therefore, concluded that neither the statute nor its regulations supported Jet Rescue’s view that claims for supplemental benefits do not “arise under” the Medicare Act.

Finally, the Ninth Circuit rejected Jet Rescue’s claim under California’s Unfair Competition Law (“UCL”). In its UCL claim, Jet Rescue alleged that, by advertising coverage for international air ambulance services as an optional supplemental benefit but failing to pay in full for such services, Kaiser misled enrollees into paying for extra benefits that it then failed to provide. The Ninth Circuit held that this claim also arose under the Medicare Act and was thus barred by the failure to exhaust administrative remedies, because it rested directly on the interpretation of benefits provided under Kaiser’s MA plans. The Ninth Circuit noted that Jet Rescue’s UCL claim amounted to a “creatively disguised” claim to recover benefits under Kaiser’s MA plans.

The Ninth Circuit’s opinion should give out-of-network providers pause before suing MA plans without first exhausting their administrative remedies. However, the Ninth Circuit’s reasoning relied heavily on the fact that Jet Rescue’s standing only derived from its status as an assignee of the benefits of Kaiser’s plan members and thus Jet Rescue only had whatever rights to relief those members possessed themselves.

For additional information or assistance, contact [Barak A. Bassman](#), [Triston Chase O’Savio](#), or a member of Blank Rome’s [Healthcare industry group](#).

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