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Court Rules That the MSP's "Private Cause of Action" Extends to Medicare Advantage Organizations

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In the case of ***In re Avandia Marketing, Sales and Products Liability,*** No. 11-2664, 2012 WL 2433508 (3rd Cir. June 28, 2012) the court ruled that the private cause of action provision under the Medicare Secondary Payer (MSP) statute (which allows for "double damages" against primary payers) extends to Medicare Advantage Organizations (MAOs).

In this case, the United States Court of Appeals (Third Circuit) *reversed* the district court's ruling[1] and found, in main part, that the "plain text" of the MSP's "private cause of action" statute applies to MAOs thereby giving such plans private cause of action rights to assert claims for "double damages" against primary payers thereunder.

In this article, the author dissects the court's detailed decision in the *Avandia* case. This is followed by a "Practical Considerations" section (p. 6) outlining various factors for evaluating this decision and dealing with Medicare Advantage plans as part of claims practice.

Medicare Advantage (MA) - Brief Background

In order to properly assess the court's decision in *Avandia* having a base understanding of how and where MA plans fit into the bigger picture of the Medicare program may be helpful. While a complete examination of the makeup of the Medicare program is outside the scope of this article, the following brief (and very general) overview is provided:

The Medicare program is comprised of four parts: Parts A, B, C, and D. Parts A and B are referred to as "original" or "traditional" Medicare which was enacted into law in 1965. The benefits under original or traditional Medicare are provided through the federal government.

In 1997, Part C was added to the Medicare program and was initially known as "Medicare+Choice." This name was eventually changed to "Medicare Advantage (MA)." Under Part C, beneficiaries receive Medicare benefits from *private insurers* (and not the federal government) through a variety of different options, including private fee for service plans (PFFs), HMOs, PPOs, and other arrangements.[2] Part D was enacted in 2006 and provides a limited outpatient prescription drug benefit.

As discussed by the court in *Avandia*, the Medicare Act contains certain secondary payer provisions related specifically to Medicare Advantage Organizations (MAOs) and Medicare Advantage HMOs as part of Part C.[3] The MA plan at issue in the *Avandia* case was a MAO.

In *Avandia*, the court was called upon to determine the extent of a MAO's secondary payer rights, most specifically, whether the private cause of action provision contained under the MSP extended to MAO plans.

With this backdrop, we can now dissect the *Avandia* decision as follows:

Facts

This case involved a class action suit filed against GlaxoSmithKline, L.L.C. and PLC ("Glaxo") for alleged injuries resulting from the use of the diabetes medication Avandia. The dispute in this case arose in relation to the settlement of this action.

In regard thereto, the MAO plan, Humana, filed suit against Glaxo seeking reimbursement of medical expense it allegedly provided its enrollees in relation to this claim, and sought "double damages" against Glaxo under the MSP's private cause of action. Glaxo filed a motion to dismiss Humana's action on grounds that Humana, as a MAO, did not have private cause of action rights.

The district court granted Glaxo's motion to dismiss finding that the

Medicare Act did *not* provide MAOs, such as Humana, with a private cause of action to seek the claimed reimbursement. Humana then appealed to the United States Court of Appeals (Third Circuit) which *reversed* the district court's ruling for the reasons discussed below.

Question Presented

Does the private cause of action for double damages under the MSP Act (42 U.S.C. § 1395y(b)(3)(A)) provide Humana, and other MAOs, with the right to bring suit against primary payers under that provision?

Court's Ruling

Yes, the United States Court of Appeals (Third Circuit) held that 42 U.S.C. § 1395y(b)(3)(A) does in fact extend to MAOs and provides such entities with a private cause of action against primary payers.

How Did the Court Reach Its Decision?

The court asserted the following **five (5) bases** in support of its ruling:

1. **The "plain text" of the MSP's private cause of action provision affords MAOs private cause of action rights.**

   The MSP's private cause of action provision is codified at 42 U.S.C. § 1395y(b)(3)(A) and states as follows:

   > There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

   The referenced paragraph (2)(A) was applicable to the issue before the court.[4] In relation to this paragraph, the parties' dispute centered on the phrase "payment under this subchapter" as contained therein.[5]

   Glaxo argued that this phrase referred to payments made only under traditional Medicare and *excluded* payments made by MA plans arguing that the payments in the latter instance are issued "pursuant to private contracts of insurance between the MAO and the participant."

   Humana argued that this phrase properly refered to the Medicare Act *as a whole* and not just to Parts A and B under the traditional Medicare program. In support, Humana highlighted other instances in the Medicare Act where Congress purportedly (and intentionally) limited applicability to specific parts (e.g. Part A or Part B). The court agreed with Humana finding that:

   > This language makes clear that 'subchapter' refers to the Medicare Act as a whole. Since the MSP Act and its private cause of action provision do not attach any narrowing language to 'payments made under this subchapter,' that phrase applies to payments made under Part C as well as those made under Parts A and B. Accordingly, that language cannot be read to exclude MAOs from the ambit of the private cause of action provision.[6]

   In addition, Humana argued that the text of this provision placed no limitations on which private parties may bring suit thereunder. The court also agreed with Humana on this point finding that:

   > [42 U.S.C. § 1395y(b)(3)(A)] establishes 'a private cause of action for damages' and places no additional limitations on which private parties may bring suit [.]
   >
   > Accordingly, we find that the [private cause of action] provision is broad and unambiguous, *placing no limitations upon which private (i.e., non-governmental) actors can bring suit for double damages* when a primary plan fails to appropriately reimburse any secondary payer.[7] (Emphasis Added).

   Further, the court noted that while the MSP Act was enacted before Part C was introduced in 1997, private Medicare risk plans had been in operation since 1972, prior to when the MSP Act was enacted in 1980. Accordingly, the court reasoned that at the time Congress enacted the MSP Act, *"Congress was aware that private Medicare providers existed .. [h]ad it intended to prevent them from suing under the private cause of action provision, Congress could have done so explicitly."*[8]

2. **Even if the language of the private cause of action provision is viewed as being ambiguous, application of 42 C.F.R. § 422.108**

affords MAO plans private cause of action rights. (The court reached this conclusion by utilizing *Chevron* deference).

Although the court found the text of 42 U.S.C. § 1395y(b)(3)(A) to be unambiguous, it clearly acknowledged that its conclusion may be "counterintuitive" to some given the general textual complexity of the Medicare Act, noting in particular that the Act was described by one court as among *"the most completely impenetrable texts within human experience."*[9]

Notwithstanding, the court ruled that even if the text of 42 U.S.C. § 1395y(b)(3)(A) was viewed as being ambiguous, MAOs would still enjoy private cause of action rights through 42 C.F.R. § 422.108 by applying *Chevron* deference principles. [10]

Under *Chevron*, if a statute is unclear, silent or ambiguous, then the "question for the court is whether the agency's answer is based on a permissible construction of the statute."[11] The court will defer to the agency's regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute."[12]

From this analytical base, the court found that CMS has the authority to "promulgate rules and regulations interpreting and implementing Medicare related statutes."[13] Accordingly, the court concluded that it *"must accord Chevron deference to regulations promulgated by CMS."*[14]

In doing so, the court focused on that part of 42 C.F.R. § 422.108(f) stating that an *"MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter."*[15]

Based on this provision, the court concluded that 42 C.F.R. § 422.108(f) extended private cause of action rights to MAO plans. The court stated:

> The plain language of [42 C.F.R. § 422.108(f)] suggests that the Medicare Act treats MAOs the same way it treats the Medicare Trust Fund for purposes of recovery from any primary payer. In this circumstance, we are bound to defer to the duly-promulgated regulation of CMS.[16]

In addition, the court referenced other factors as *"lend[ing] further support to this understanding of the rule."* Most notably, the court referenced a December 5, 2011 memorandum regarding MAO plans issued by CMS in response to recent federal court decisions limiting MAOs recovery rights and remedies to state court actions.[17] In pertinent part, this memo provides:

> CMS regulations at 42 CFR § 422.108 describes [sic] MSP procedures for MAOs to follow when billing for covered Medicare services for which Medicare is not the primary payer. These regulations also assign the right (and responsibility) to collect for these services to MAOs.
>
> *Specifically, 422.108(f) stipulates that MAOs will exercise the same rights of recovery that the Secretary exercises under Original Medicare MSP regulations in subparts B through D of part 411 of 42 CFR and that the rules established in this section supersede any State laws …*
>
> Notwithstanding these recent court decisions, CMS maintains that the existing MSP regulations are legally valid and an integral part of Medicare Part C and D programs.[18] (Emphasis Added).

From the court's view, CMS' memorandum *"clarified that CMS itself understood § 422.108 to assign MAOs 'the right (and responsibility) to collect' from primary payers using the same procedures available to traditional Medicare."*[19]

3. **The court found nothing in the legislative history or text of the MA secondary payer provisions evidencing Congressional intent to deny MAO plans access to the MSP's private cause of action provision.**

Glaxo argued that the secondary payer provisions of the MAO statute (42 U.S.C. § 1395w-22(a)(4)) precluded the extension of private cause of action rights to MAO plans.

42 U.S.C. § 1395w-22(a)(4) states as follows:

> **(4) Organization as secondary payer**
>
> Notwithstanding any other provision of law, a [MAO] may (in the case of the provision of

> items and services to an individual under a [MAO] plan under circumstances in which payment under this subchapter is made secondary pursuant to section 1395y(b)(2)) of this title charge or authorize the provider of such services to charge, in accordance with the charges allowed under a law, plan, or policy described in such section--
>
> **(A)** the insurance carrier, employer, or other entity which under such law, plan, or policy is to pay for the provision of such services, or
>
> **(B)** such individual to the extent that the individual has been paid under such law, plan, or policy for such services.[20]

Glaxo advanced **three (3) arguments** in relation to this statute (all of which were rejected by the court) as follows:

First, Glaxo argued that the plain text of the MAO secondary payer provision "makes clear" that MAOs do not have a federal cause of action under the Medicare Act and, as such, the MSP's private cause of action provision is inapplicable to MAOs. In essence, Glaxo argued that a MAO's reimbursement rights were *contractual* in nature subject to enforcement in state court.

However, the court observed that Humana was *not* contending that the MAO secondary payer provision provided it with private cause of action rights; but rather that it was "hangin[ing] [its] hat entirely on the MSP Act provision." Accordingly, the court noted that § 1395w–22(a)(4) was *"relevant only inasmuch as it assists us in interpreting the MSP private cause of action provision, and we are not persuaded that it undermines the meaning of the plain text of that provision."*[21]

Second, Glaxo argued that reference to §1395y(b)(2) within the MAO secondary payer provision only applied to the definition of a "primary payer" and did not incorporate the entire MSP Act into the MA statutory scheme. The court also rejected these arguments stating:

> In order to find these arguments persuasive, we would need to determine that, although private insurers providing [Medicare] services could have brought suit under the MSP private cause of action provision before the enactment of the MA secondary payer provision, once that text became law, the MSP private cause of action was closed to them. We will not reach this conclusion.[22]

Third, Glaxo argued that MAOs do not have private cause of action rights based on the fact that the MAO secondary payer provision is permissive in nature (i.e. an MAO "may" charge a primary payer) while the MSP uses mandatory language with respect to repayment obligations. In rejecting this argument, the court noted:

> Glaxo reads far too much into this distinction. No MAO, acting rationally, would decline to position itself as a secondary payer in order to charge primary payers where appropriate.
>
> Accordingly, the fact that Congress employs permissive language when establishing rules for private, market-driven entities and mandatory language when creating rules for the Secretary, a federal official over whom Congress exercises control, has no effect on the proper interpretation of MSP private cause of action.[23]

4. The District Court relied upon cases involving *different* issues related to MAO rights and which, accordingly, are inapplicable to the specific issue raised by Humana against Glaxo.

The court found that the district court's reliance on the cases of *Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir. 2003) and *Nott v. Aetna v. U.S. Healthcare Inc.*, 303 F.Supp.2d 565 (E.D. Pa. 2004) as authority to deny MAOs private cause of action rights was misplaced as *neither* of these cases "had plaintiffs who made an argument based on the MSP Act provision at issue here."[24]

Specifically, in *Care Choices* the court noted that the issue addressed by the 6th Circuit dealt with whether a Medicare-substitute HMO had an implied federal right of action allowing it

to recover its expendures. In this case, the 6th Circuit compared the private cause of action provision under the MSP with § 1395mm(e)(4), the applicable section providing secondary payer rights to Medicare HMO plans. In doing so, the 6th Circuit determined that §1395mm(e)(4) did not create any private right of action.

While noting the 6th Circuit's decision in *Care Choices*, the court found that the issue addressed by the court in that case was *not* the same as the cause of action being asserted by Humana against Glaxo. Specifically, the court noted that the issue of whether Care Choices could have brought suit as a private actor under the MSP Act *"was neither raised nor addressed and thus the decision of the United States Court of Appeals for the Sixth Circuit cannot guide us here."*[25]

Likewise, the court found that *Nott* addressed a different issue from the specific issue being raised by Humana in its action against Glaxo. According to the court, the issue in *Nott* involved whether the secondary payer provisions related to MAOs and Medicare-substitute HMOs created a federal scheme of enforcement capable of preempting conflicting state laws.

As such, it was referenced that the "*Nott* court noted explicitly that § 1395y(b)(2)(B)(ii), the government's cause of action for reimbursement, was not implicated in the case … and it nowhere mentioned the § 1395y(b)(3)(A) private cause of action."[26] Accordingly, the court found that since the Nott decision *"does not discuss whether a private insurer providing Medicare services can bring suit under the MSP private cause of action, it is of limited relevance here."*[27]

5. Legislative history and policy considerations support the conclusion that MAOs have, and should have, private cause of action rights.

The court also cited legislative history and policy considerations in further support of its decision.

In terms of legislative history, the court found that one of Congress' goals in creating the Medicare Advantage program "was to harness the power of private sector competition to stimulate experimentation and innovation that would ultimately create a more efficient and less expensive Medicare system."[28] It was further noted that Congress believed that the MA program would "continue to grow and eventually eclipse original fee-for-service Medicare as the predominant form of enrollment under the Medicare program."[29]

From this history, the court concluded that a main objective of the MA program, like the MSP Act with respect to original Medicare, was "designed to curb skyrocketing health costs and preserve the fiscal integrity of the Medicare system."[30]

Along these lines, the court reasoned that not permitting MAOs private cause of action rights would frustrate the underlying objectives upon which the MA program was premised. The court stated:

> If Medicare could threaten recalcitrant primary payers with double damages and MAOs could not, MAOs would be at a competitive disadvantage, unable to exert the same pressure and thus forced to expend more resources collecting from such payers. It is difficult to believe that it would have been the intent of Congress to hamstring MAOs in this manner.[31]

In addition to cost savings, the court noted that Congress also structured the MA program to allow MAOs to deliver efficient services to Medicare beneficiaries. Toward this goal, the court stated that when a MAO recovers from primary payers it realizes cost savings which can result in additional benefits to its enrollees. Accordingly, the court found that *"ensuring that MAOs can recover from primary payers efficiently with a private cause of action for double damages does indeed advance the goals of the MA program."*[32]

Taking these factors into consideration, the court concluded that *"[o]ur understanding of the policy goals of the MA program merely buttresses what we have already found in the text of the Medicare*

Act: MAOs are not excluded from bringing suit under the MSP private cause of action."[33]

Based on all the foregoing reasons, the court reversed the district court's order and remanded the case back to the district court for further proceedings.

Practical Considerations

The *Avandia* case brings to the forefront important questions concerning Medicare Advantage (MA) plans, in terms of the nature and extent of the rights afforded MA plans, as well as the compliance obligations primary payers (and others) have, or may have, in relation to such plans.

A complete examination into this emerging and complex area is beyond the scope of this article. Nevertheless, the court's decision in *Avandia* is significant and should be considered seriously by primary payers in their dealings with MA providers. Up until now, the bulk of the case law addressing MA plans has basically limited MA recovery rights to contractual claims to be addressed in state court. By now holding that the MSP's private cause of action extends to MA plans, the *Avandia* decision has the potential to dramatically change this landscape as it arguably places MAOs on equal footing with the federal government in certain respects.

It is unknown at this time if a request for an en banc hearing before the full third circuit panel will be submitted. To the extent any such request for a re-hearing is denied, it will then be necessary to monitor this case to see if Glaxo will appeal the matter to the United States Supreme Court and, if so, whether the Supreme Court would agree to hear the case.

While a point by point substantive critique of the court's decision was not the focus of this article, there may very well exist legitimate bases to question or challenge some of the court's conclusions on certain technical and interpretational points. Further, it remains to be seen how the *Avandia* decision will be viewed and assessed by future courts called upon to address similar MA issues.

In the meantime, primary payers are left to deal with the *Avandia* decision in the "here and now." In that regard, this decision seemingly expands MAO recovery rights. From a practical standpoint, the likely end result is that MAOs may now have the legal launching pad they have been seeking to strengthen their recovery efforts, including the ability to assert claims for double damages using the MSP's private cause of action provision. Thus, it is very likely that primary payers will find MA plans more aggressively pursuing their recovery claims.

Along those lines, primary payers should ensure that approaches are in place to address the MA issue. While an exhaustive review of all the applicable consideration points is beyond the scope of this article, at a base level the starting point would entail identifying when a MA plan is involved.

From there, primary payers need to arrive at a well reasoned understanding of what their compliance obligations are, or may be, with respect to MA plans. This involves a close examination of the relevant MSP and MA statutory provisions and regulations, case law, and all other possible authority. Review of the actual terms of the MA plan at issue may also be in order. Given the unsettled and emerging state of affairs regarding MA compliance, consultation with experienced counsel in devising these approaches and making these determinations should be seriously considered.

CPSC will continue to monitor any subsequent developments related to the *Avandia* case, as well as any other pertinent issues pertaining to MA plans, and will keep the industry apprised accordingly.

Note: This publication is provided for information purposes only and is not intended as legal advice. For legal advice, please consult your attorney.

About the Author

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Endnotes

[1] The district court's opinion is contained at *In re Avandia Marketing, Sales and Products Liability,* 2011 WL 2413488 (E.D. Pa. June 13, 2011).

[2] The information provided in this paragraph was obtained from The Henry J. Kaiser Foundation, Medicare Fact Sheet - Medicare Advantage, November 2011. www.kff.org.

[3] *See e.g.*, 42 U.S.C. §1395w-22(a)(4) and 42 C.F.R. § 422.108 regarding MAOs; and 42 U.S.C. §1395mm (e)(4) and 42 C.F.R. § 417.528(b) regarding Medicare Advantage HMOs.

[4] Codified as 42 U.S.C.A. § 1395y(b)(2)(A). By way of note, the referenced paragraph (1) relates to secondary payer issues related to group health plans and, as such, was inapplicable to the issues presented in *Avandia.*

[5] The court noted that the United States Code Service uses the word "title" instead of the term "subchapter" as used in the United States Code Annotated (USCA) version of the statute. In regard to same, the court noted that it elected to utilize the wording as used under the USCA. *In re Avandia Marketing, Sales and Products Liability,* No. 11-2664, 2012 WL 2433508 (3rd Cir. June 28, 2012), n. 10.

[6] *Id.* at *5.

[7] *Id.* at *5. Although the court ruled that the MSP private cause of action sweeps broadly to include MAOs, it noted that "it is not so broad that it can function as a *qui tam statute,* allowing a private party to bring suit as an agent of the government to collect moneys owed to the government." (citations omitted) *Id.* at n. 9.

[8] *Id.* at *6.

[9] *Citing, Cooper Univ. Hosp. v. Sebelius,* 636 F.3d 44 (3d Cir.2010) (quoting *Rehab. Ass'n of Va., Inc. v. Kozlowski,* 42 F .3d 1444, 1450 (4th Cir.1994)).

[10] The court's reference to Chevron relates to the case of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, and L.Ed2d 894 (1984).

[11] *Id*. at 843.

[12] *Id.* at 844.

[13] Citing, *Torretti v. Main Line Hosps., Inc.,* 580 F.3d 168, 174 (3d Cir.2009)*; see also* 42 U.S.C. § 1395hh(a)(1) *("The Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter.");* 42 U.S.C. § 1395w–26(b)(1) *("The Secretary shall establish by regulation [ ] standards ... for [MA] organizations and plans consistent with, and to carry out, this part.").* at *11

[14] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *11.

[15] The full text of 42 C.F.R. § 108 (f) reads as follows:

> (f) MSP rules and State laws. Consistent with § 422.402 concerning the Federal preemption of State law, the rules established under this section supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to MA plans. A State cannot take away an MA organization's right under Federal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer. The MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter.

[16] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *11.

[17] *Id.* at *11 citing CMS' Memorandum to Medicare Advantage Organizations and Prescription Drug Sponsors entitled *Medicare Secondary Payer Subrogation Rights* (December 5, 2011). While neither the court nor CMS cited any specific cases in regard to the reference of recent decisions limiting MAO's remedies to State court actions, the author references the following cases for the reader's consideration: *Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir. 2003); *Nott v. Aetna v. U.S. Healthcare Inc.*, 303 F.Supp.2d 565 (E.D. Pa. 2004); and *Parra v. PacificCare of Arizona, Inc.* No. CV 10-008-TUC-DCB, 2011 WL 1119736 (D.Ariz., March 28, 2011).

[18] *Id*.

[19] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *11.

[20] Although it was not referenced in the court's opinion, the author also notes that 42 C.F.R. § 422.108 (d) contains a similar provision as follows:

> (d) Collecting from other insurers or the enrollee. If a Medicare enrollee receives from an MA organization covered services that are also covered under State or Federal workers' compensation, any no-fault insurance, or any liability insurance policy or plan, including a self-insured plan, the MA organization may bill, or authorize a provider to bill any of the following--
>
> (1) The insurance carrier, the employer, or any other entity that is liable for payment for the services under section 1862(b) of the Act and part 411 of this chapter.
>
> (2) The Medicare enrollee, to the extent that he or she has been paid by the carrier, employer, or entity

for covered medical expenses.

[21] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *6.

[22] *Id.* at *7.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id*. at *8.

[27] *Id.* at *8 In contrast to the *Care Choices* and *Nott* cases, the court noted that the 6th Circuit in the case of *Bio–Medical Applications of Tenn., Inc. v. Central States Health and Welfare Fund,* 656 F.3d 277 (6th Cir.2011) did specifically consider the MSP private cause of action provision. However, the party bringing suit in that case was not a MAO plan or Medicare substitute HMO. As such, the court noted that *Bio-Medical* did not consider how a MAO plan or Medicare-substitute HMO could, or would, fit into the issues and analysis discussed by the court in that case.

[28] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at * 8, *citing*, H.R.Rep. No. 105–217, at 585 (1997) (Conf.Rep.) (stating that MA program was intended to "enable the Medicare program to utilize innovations that have helped the private market contain costs and expand health care delivery options").

[29] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *8, *citing*, H.R.Rep. No. 105–217, at 585 (1997) (Conf.Rep.) at 638.

[30] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at * 8, *citing Fanning v. United States,* 346 F.3d 386, 388 (3d Cir.2003).

[31] *In re Avandia Marketing,* No. 11-2664, 2012 WL 2433508, at *10.

[32] *Id.*

[33] *Id.*