

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN RE: AVANDIA MARKETING, SALES  
PRACTICES AND PRODUCTS LIABILITY  
LITIGATION

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: MDL No. 1871  
: 07-MD-01871-CMR  
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THIS DOCUMENT APPLIES TO:

ALL PLAINTIFFS REPRESENTED BY THE  
MILLER FIRM, LLC

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**OPPOSITION BY GLAXOSMITHKLINE TO MOTION TO ENFORCE THE  
SETTLEMENT AGREEMENT FILED BY THE MILLER FIRM**

GlaxoSmithKline LLC ("GSK") submits this Opposition to the Motion to Enforce the Settlement Agreement filed by The Miller Firm ("Miller"). The issue before the Court is whether GSK may continue to withhold its authorization to release funds that are being held in escrow under Miller's Master Settlement Agreement ("MSA") to assure resolution of liens by private healthcare insurance organizations that provided Medicare coverage to settling claimants under the Medicare Advantage program ("MAOs").<sup>1</sup>

This issue arises from the recent ruling by the Court of Appeals for the Third Circuit, reversing this Court's dismissal of the putative class action brought by Humana Medical Plan, as the representative of all MAOs. In *In Re: Avandia Marketing, Sales Practices and Products Liability Litigation, Humana Medical Plan, Inc., et al. v. GlaxoSmithKline LLC, et al.*,

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<sup>1</sup> Following Miller's filing, The Branch Law Firm ("Branch") filed a virtually identical motion, claiming that 620 of its settling claimants have funds being held in escrow for the same reason. The number of Branch claimants covered by MAOs is well below 620. Unlike Miller, which had discussed the issues with GSK before filing its motion, Branch did not, and consequently, GSK does not understand the basis for Branch's claim that the matter at issue impacts 620 claimants. Regardless, Branch's motion should be denied for the reasons described in this Opposition. To the extent a further response to Branch's motion may be required, GSK will respond within the time provided under the Court's rules, or earlier should the Court require an earlier response.

685 F.3d 353 (3d Cir. 2012) (the “Humana Action”), the 3<sup>rd</sup> Circuit ruled that MAOs possess a private right of action under the Medicare Secondary Payer Act (the “MSP Act”), 42 U.S.C. § 1395y(b)(3)(A), to hold a settling party such as GSK liable for double damages when a lien based on an MAO’s coverage for the medical condition at issue in the settlement is not satisfied.

The 239 Miller claimants who were covered by MAOs and who still have a portion of their settlement funds being held in escrow to assure satisfaction of healthcare liens have been cleared of claims by some MAOs, but not all MAOs.<sup>2</sup> The matter of the statutory rights of MAOs was recently placed back before this Court in the context of the 3<sup>rd</sup> Circuit’s remand of the Humana Action.

Miller’s MSA provides, under a section captioned Liens, Assignment Rights, and Other Third-Party Payor Claims, that the settling claimants it represents “shall identify all statutory lien holders” and, prior to distribution of any payment, Miller and the claimants shall represent and warrant that all lien claims have been or will be satisfied or otherwise resolved “in a manner acceptable to GSK.” Miller Mem. at 6-7 (emphasis added). On the basis of these provisions among others, GSK is fully entitled to protect itself from being liable for double damages to an MAO by withholding authorization to release funds being held in escrow, while the specific nature of an MAO’s rights under the MSP Act and applicable regulations of the Centers for Medicare and Medicaid Services (“CMS”) is determined by this Court.

## I. BACKGROUND

The Miller MSA provides in relation to liens and other third-party payer claims, such as those being made under the Humana Action:

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<sup>2</sup> For the most part, these claimants have received 75% or more of their settlement allocations. If desired by the Court, GSK can share additional information concerning payments to the remainder of Miller’s settling claimants.

Each settling Participating Claimant shall identify all statutory lien holders; any other holders of liens as to which the Participating Claimant or his or her respective Participating Law Firm(s) has received notice; parties to lawsuits or interventions, including by subrogation; and also, regardless of notice, government payors, including Medicare and Medicaid liens if they exist (collectively “lien holders”), through procedures and protocols to be established by the parties ...

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Prior to distribution of any payment, the settling Participating Claimant and his or her respective Participating Law Firm(s) shall represent and warrant that all claims by any of the foregoing lien holders have been or will be satisfied or otherwise resolved by the Participating Claimant in a manner acceptable to GSK, which acceptance shall not be unreasonably withheld.

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Upon request to a Participating Claimant’s Participating Law Firm(s), GSK shall be entitled to proof of lien or claim satisfaction and/or resolution of claims with respect to or by lien holders arising from or in connection with the use of Avandia.

MSA Paragraph IV.M. (emphasis added); Miller Mem. at 6-7.

In recognition of these obligations and GSK’s requirements as a result of the initiation of the Humana Action by Rawlings & Associates and Lowey Dannenberg Cohen & Hart (the “Rawlings Group”), and prior to the 3<sup>rd</sup> Circuit’s ruling, Miller and the Rawlings Group entered a lien resolution program that provided a mechanism for resolving healthcare lien claims by the MAOs that are represented by the Rawlings Group (the “MAO Lien Resolution Program”). Miller Mem. at 3.<sup>3</sup> The Rawlings Group has advised GSK that the MAOs they

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<sup>3</sup> The Miller Memorandum also makes reference to a separate Private Lien Resolution Program (the “Global Lien Resolution Program”) entered by Miller with the Rawlings Group. The Global Lien Resolution Program, which was negotiated between the Rawlings Group and a negotiating committee composed of leaders of the former Avandia PSC, with involvement by GSK and oversight by Special Master Merenstein, provides a mechanism for resolving lien claims by healthcare carriers represented by the Rawlings Group. All the Rawlings Group’s healthcare carrier clients have opted into the program, with the exception of Humana and UnitedHealth, which have opted out because they are no longer satisfied with the Program’s terms insofar as resolution of claims arising from their Medicare coverage, on account of 3<sup>rd</sup> Circuit ruling in the Humana Action. The opt-out from the Global Lien Resolution Program by Humana and UnitedHealth does not impact the Miller claimants covered by

represent account for approximately 50% of the healthcare coverage afforded by MAOs. The 239 Miller claimants whose settlement funds are at issue have been identified as having been covered by an MAO but determined by the Rawlings Group not to be covered by any of the MAOs they represent. The existence of a lien claim against them by another MAO has not been excluded, and the Rawlings Group has threatened GSK with double liability if settlement funds are released to a settling claimant whose healthcare coverage was provided by another MAO.

## II. ARGUMENT

The Miller MSA -- as does each of the other Avandia MSAs -- insulates GSK from the untenable circumstance of paying an agreed upon settlement amount to a settling claimant and then having to pay all or a portion of that amount again to the claimant's healthcare carrier because the claimant did not honor a reimbursement obligation owed to the carrier. In the Humana Action, and despite GSK's contention before this court and the 3<sup>rd</sup> Circuit that Congress did not grant MAOs a private right of action for double damages under the MSP Act, the unfortunate law of this case is that MAOs have been held to possess such rights. How those rights must be advanced by the MAOs under the MSP Act and applicable regulations such as 42 CFR 422.108, *see* Miller Mem. at 10, remains an open issue that is before this Court in the Humana Action based on the 3<sup>rd</sup> Circuit's remand.

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those carriers because the carriers entered the MAO Lien Resolution Program with Miller, but this action by such carriers will significantly impact other Avandia settlements.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, GSK respectfully requests that the Court deny the Motion to Enforce the Settlement Agreement filed by The Miller Firm.

Dated: September 14, 2012

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**ORDER**

AND NOW, this \_\_\_ day of \_\_\_\_\_, 2012, upon consideration of the Motion to Enforce the Settlement Agreement filed by The Miller Firm, and GlaxoSmithKline's Opposition thereto, it is hereby ORDERED and DECREED that the Motion is DENIED.

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Cynthia M. Rufe, J.

**CERTIFICATE OF SERVICE**

I certify that, on September 14, 2012, I caused the foregoing Opposition by GlaxoSmithKline to Motion to Enforce the Settlement Agreement filed by The Miller Firm to be served via Electronic Case Filing upon the following:

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