

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

ANNIE MAE BAUGHAN,	)	CIVIL ACTION NO. 3:02CV00111
	)	
Plaintiff,	)	
	)	
v.	)	<u>MEMORANDUM OPINION</u>
	)	
TOMMY G. THOMPSON, Secretary,	)	
U.S. Department of Health and	)	
Human Services	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

The plaintiff in this action seeks a declaration that the defendant has no claim against the proceeds of an insurance settlement for reimbursement of Medicare benefits paid for the plaintiff's treatment. The defendant has filed a motion to dismiss for lack of subject matter jurisdiction. The magistrate judge recommended that this court deny the defendant's motion. After a thorough examination of the defendant's objections to the magistrate judge's report and recommendation, the supporting memoranda, the applicable law, and the report and recommendation, this court adopts in part the analysis and findings of the magistrate judge but rejects his recommendation to deny the defendant's motion to dismiss.

**I. FACTS**

The facts most pertinent to this decision are summarized briefly here. On February 9, 2001, the plaintiff, Annie Mae Baughan, was injured when she was knocked over by a homeowner's dog. As a result of this altercation, she suffered a broken hip and required hospitalization. This treatment was covered initially by Medicare. Some time after the accident, the plaintiff filed a claim against the homeowner's liability carrier. After this claim was settled on March 1, 2002, the plaintiff's attorney notified Medicare of the settlement and placed a portion of the settlement proceeds in escrow pending a determination of the

amount owed (if any) to the Medicare system. In response, the defendant apprised the plaintiff of her reimbursement obligations in light of the Medicare secondary payer provisions.<sup>1</sup>

## **II. PROCEDURAL POSTURE**

On October 21, 2002, the plaintiff instituted this action seeking a declaration that the defendant is not entitled to the proceeds of the settlement agreement. It is undisputed that Ms. Baughan did not file a claim with the Department of Health and Human Services prior to the initiation of this suit. On December 23, 2002, the defendant filed a motion to dismiss for lack of subject matter jurisdiction. After oral argument and a stay pending resolution of a similar matter by another judge within this district, the magistrate judge filed a report and recommendation on August 15, 2003 (“Report and Recommendation”), recommending that the defendant’s motion to dismiss be denied. The defendant has filed timely objections to the Report and Recommendation. According to § 636(b)(1)(C), this court “shall make a de novo determination of those portions of the report . . . to which the objection is made.” 28 U.S.C. § 636(b)(1)(C) (2000).

## **III. DISCUSSION**

The defendant raises several objections to the Report and Recommendation. Taken together, these objections question the legal analysis of the magistrate judge in toto. Therefore, rather than parsing the remonstrations, the court will address the defendant’s assertions through a generalized discussion of the motion to dismiss.

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<sup>1</sup> In general, the Medicare secondary payer provisions, 42 U.S.C. § 1395y (2000), provide that when Medicare funds are used to compensate medical providers at the time of treatment, the benefits are paid upon the condition that the Medicare program will be reimbursed from the proceeds of subsequent insurance payments, should any subsequent payments arise. The purpose of the program was to control Medicare costs by relegating the Medicare program to secondary insurer status while simultaneously ensuring that individuals receive treatment in a timely manner.

In short, the court concludes that the plaintiff's case arises under federal law relating to the Medicare secondary payer provisions. As a result, this court has no subject matter jurisdiction over this case unless the plaintiff has engaged the administrative process, as required by statute. By failing to present her claim to the Department of Health and Human Services prior to bringing this action, the plaintiff has not complied with the exhaustion requirements of the Medicare statutory scheme. The court also finds that the exception to the exhaustion requirement, whereby plaintiffs are not required to pursue futile claims through the administrative process, is inapplicable. Therefore, the court will grant the defendant's motion to dismiss.

#### **A. Arising Under the Medicare Act**

The plaintiff's claim arises under the laws of the United States. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). The plaintiff has invoked the jurisdiction of this court under both the Declaratory Judgment Act, 28 U.S.C. § 2201 (2000), and the secondary payer provisions of Title XVIII of the Social Security Act (the "Medicare Act"), 42 U.S.C. § 1395 (2000). "A claim arises under the [Medicare] Act if it furnishes 'both the standing and the substantive basis for the presentation of the claim.'" *Buckner v. Heckler*, 804 F.2d 258, 259 (4th Cir. 1986) (citing *Heckler v. Ringer*, 466 U.S. 602, 615 (1984)). In *Buckner*, the plaintiff appealed a decision by the district court to dismiss her claim for lack of subject matter jurisdiction. *Id.* Similar to the plaintiff in this case, she had brought a declaratory judgment action against the Secretary of Health and Human Services to determine who was entitled to an overpayment held by the hospital where she received care for injuries sustained during an automobile accident. *Id.* The Court of Appeals for the Fourth Circuit held that the claim to the overpayment arose under the Medicare Act because the Secretary was the object of the suit, the express provisions of the Act

entitled the Secretary to reimbursement upon an overpayment, and the plaintiff's claim relied upon substantive regulations promulgated pursuant to the Act. *Id.*

In this case, the plaintiff also relies upon the statutory scheme to advance her entitlement to an overpayment. Fundamentally, the substantive issue presented to this court concerns whether the plaintiff should be required to reimburse Medicare for the conditional benefits that she received at the time of her hospitalization. *Cf. id.* (holding that “a claim that [a plaintiff] is entitled to the overpayment is, in essence, one for medicare benefits”). The plaintiff supports her position with an interpretation of the secondary payer provisions. Whether she is correct to argue that the government's apple is really her orange matters not: we are still talking about fruit. Indeed, were this court to proceed to the merits of the plaintiff's claim, it would have to interpret these provisions and the accompanying regulations to determine their applicability and effect. While the merits of this contention are beyond the scope of the present inquiry, the essence of the claim certainly invokes the substance of the Medicare Act.

### **B. Exhaustion**

Because this claim arises under the Medicare Act, the plaintiff is required to exhaust her administrative remedies before this court may consider her claim. *Id.* “The exhaustion requirement of 42 U.S.C. § 405(g) consists of a nonwaivable requirement that a claim for benefits shall have been presented to the Secretary, . . . and a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant.’ ” *Id.* (quoting *Heckler*, 466 U.S. at 617). There is no question that the plaintiff has not presented her claim to the Secretary. There is also no question that she has failed to engage the administrative process. However, it is unnecessary to reach the second question where, as here, the first, *nonwaivable* requirement has not been satisfied. *Id.*

### C. Futility Exception

The plaintiff's noncompliance with the nonwaivable presentment requirement also frustrates her argument that the futility exception to the exhaustion requirement saves her action from the motion to dismiss. In rare, exceptional cases, the plaintiff may be able to show that pursuit of administrative remedies would be futile. *See, e.g., Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Housing & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990) ("Absent a clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty, a litigant's prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion."). However, the court of appeals has held that this exception is applicable "only as to the waivable requirement of exhaustion and does not come into play until one has first presented a claim to the Secretary." *Buckner*, 804 F.2d at 260. Therefore, the court will not address the futility argument at this time.

The court's decision to deny a similar motion to dismiss in *Brown v. Thompson* is not binding, nor does it necessarily represent a resolution incompatible with this court's reasoning in this case. 252 F. Supp. 2d 312, 315 n.2 (E.D. Va. 2003) (citing an unpublished order). In *Brown*, Judge Ellis denied a motion to dismiss a declaratory judgment action. *Id.* The plaintiff had contended that it would be futile to exhaust her administrative remedies, and the court agreed. *Id.* However, it was unclear from the text of the published opinion whether the plaintiff had originally presented her claim to the Secretary. Notwithstanding this lack of clarity, one would assume that to be in concert with the court of appeals decision in *Buckner*, and the nonwaivable requirement of presentment, that the plaintiff in that case must have presented her claim. *Accord Nygren v. United States*, 268 F. Supp. 2d 1275, 1278, 1280-81 (W.D. Wash. 2003) (citing *Buckner* and holding that submission to administrative process and presentment required).

In contrast to *Brown*, the court finds the decision of *Bird v. Thompson* to be fully in accord with this opinion and regards the reasoning of that decision as persuasive. No. 02 Civ. 10269, 2003 WL 21537748, at \*1 (S.D.N.Y. July 8, 2003). In *Bird*, the plaintiff sought a declaration that the defendants did not have a claim to reimbursement for Medicare benefits from the proceeds of a subsequent personal injury settlement. *Id.* The district court, relying upon the opinion of the Fourth Circuit Court of Appeals in *Buckner*, found that the plaintiff's claim that the Medicare secondary payer provisions did not apply to her was a claim arising under the Medicare Act. *Id.* at \*3. The district court reasoned that the plaintiff did not dispute that she had received Medicare benefits conditioned on potential reimbursement and that the essence of the suit concerned her right to *keep* those benefits. *Id.* The court further reasoned that the claim required an interpretation of the substantive provisions of the Medicare Act. *Id.* Finally, it rejected the futility argument because the plaintiff had not complied with the nonwaivable presentment requirement. *Id.* at \*4-5.

In this matter, a prerequisite to the subject matter jurisdiction of this court is a final decision rendered by the Secretary of the Department of Health and Human Services. 42 U.S.C. § 405(g) (2000). While the exhaustion of administrative remedies may be waived in exceptional circumstances, the presentment requirement cannot be so waived. Absent presentment, therefore, no final decision has been rendered by the Secretary. This court is compelled to conclude that it lacks subject matter jurisdiction over the case and grants the defendant's motion to dismiss.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

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Date

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CHARLOTTESVILLE DIVISION

ANNIE MAY BAUGHAN,	)	CIVIL ACTION NO. 3:02CV00111
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Plaintiff,	)	
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v.	)	<u>ORDER</u>
	)	
TOMMY G. THOMPSON, Secretary	)	
U.S. Department of Health and	)	
Human Services,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's first and second objections to the Report and Recommendation, filed August 29, 2003, shall be, and they hereby are, SUSTAINED, rendering the defendant's remaining objections, also filed August 29, 2003, MOOT.
2. The magistrate judge's Report and Recommendation, filed August 15, 2003, shall be, and it hereby is, ADOPTED IN PART AND REJECTED IN PART.
3. The defendant's motion to dismiss for lack of subject matter jurisdiction, filed on December 23, 2002, shall be, and it hereby is, GRANTED.
4. The above-captioned civil action shall be STRICKEN from the active docket of the court.



The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

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Senior United States District Judge

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Date