

New front in Medicare Advantage battle: Law firm targeted

Mark Popolizio | June 2016

We continue to watch closely the expansion of Medicare Secondary Payer (MSP) recovery concepts to cases involving Medicare Advantage Plans (MAPs). Now, an important new MAP decision has been reached. In *Humana v. Paris Blank LLP*, 2016 WL 2745297 (E.D. Va., May 10, 2016), the United States District Court for the Eastern District of Virginia has ruled that Humana may pursue a private cause of action claim against a plaintiff lawyer and law firm under the MSP statute.

This new case and its larger implications are outlined as follows:

Case Facts

A Humana MAP enrollee settled her auto accident claim for \$475,000. The enrollee's lawyer disbursed the settlement funds after the Centers for Medicare and Medicaid Services (CMS) confirmed it was not asserting a conditional payment claim.

Several months later, Humana issued a lien demand for \$191,612.09. In response, the enrollee's lawyer requested a lien waiver, which Humana denied. Shortly before Humana issued its denial, the enrollee died. Humana requested more information from the enrollee's lawyer, which allegedly was not provided.

Humana then filed a private cause of action claim against the enrollee's lawyer and law firm under the MSP's private cause of action statute (42 U.S.C. 1395y(b)(3)A) for their failure to reimburse the alleged lien. This included a demand for "double damages." The plaintiff lawyer and law firm moved to dismiss, arguing the MSP's private cause of action section does not apply to MAPs.

Court Ruling

The court ruled in favor of Humana, finding the MSP's private cause of action statute applied to MAPs, thereby allowing Humana's claim to proceed.

In reaching this decision, the court found the Third Circuit Court of Appeals' ruling in the case *In Re Avandia*, 685 F.3d 353 (3d Cir. 2012) persuasive.

In *Avandia*, the Third Circuit ruled that MSP's private cause of action statute was "*broad and unambiguous, [and placed] 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.*" Further, the Third Circuit cited certain federal regulations and other considerations in support of its conclusion that MAPs enjoyed private cause of action rights.

Finding the *Avandia* decision "thorough" and "well-reasoned," the court in *Paris Blank* similarly concluded the "plain language" of the MSP's private cause of action statute "*establishes a private cause of action to recover double damages where a primary plan fails to pay*" and that it placed no restriction on who may use this provision.

The court also dismissed the plaintiff's argument that they, as a lawyer and law firm, were not "primary plans" subject to the private cause of action provision. In rejecting this position, the court concluded the private cause of action statute "*does not limit the parties against whom suit may be maintained*" and, as

such, “does not carve out exceptions for attorneys and law firms.” Further, the court noted that 42 C.F.R. 411.24(g) identifies attorneys as entities from which recovery may be pursued.

The Bigger Picture

Based on the court’s ruling, Humana’s suit will now proceed, and this case will need to be monitored closely to see if the court ultimately finds the plaintiff’s lawyer and law firm liable for double damages under the private cause of action statute.

The *Paris Blank* decision is significant on many fronts. First, this decision places the Eastern District of Virginia in line with a growing number of jurisdictions that have decided that MAPs enjoy private cause of action rights. This court’s ruling now joins prior United States District Court rulings from Florida, Louisiana, Texas, and Tennessee, which favorably viewed the Third Circuit’s *Avandia* decision in finding the MSP’s private cause of action statute applies to MAPs.

Second, this ruling charts new ground, as the court concluded that *plaintiff lawyers and law firms* are parties that can be sued by MAPs under the private cause of action provision. This interpretation will add yet another layer of complication to the ongoing legal debate regarding the nature, extent, and application of the private cause of action statute. On this point, it will be interesting to see if the plaintiff’s law firm appeals the court’s finding that they are primary plans and subject to a private cause of action claim.

Third, this case illustrates the practical challenges in identifying potential MAP lien claims. Along these lines, it’s important to remember conditional payment inquiries to CMS will *not* net MAP lien information, as CMS provides information related only to traditional Medicare. Further, there’s currently no centralized database, single point of contact, or the like to request MAP lien information. Thus, to obtain this information, parties need to resort to old-school discovery (for example, asking the plaintiff directly, interrogatories, production requests, and so forth).

As MAPs become more aggressive in asserting lien claims, claims payers and practitioners need to make sure the issue is on their radar and develop best practices to deal with this growing challenge.

About the Author



Mark Popolizio is vice president of MSP compliance and policy for ISO Claims Partners. Mark is a regularly featured presenter on MSP issues at national seminars and other industry events – and has authored numerous national articles addressing several topics related to MSP matters, including a yearly chapter in the California Bar CLE publication, *Special Needs Trusts: Planning, Drafting and Administration*. Mark is also active with several industry groups, including MARC, DRI and NAMSAP. Prior to dedicating his professional focus to MSP compliance in 2006, Mark practiced workers compensation and liability insurance defense for ten years, representing carriers, employers, third-party administrators and self-insureds. He is a member of the Florida and Connecticut bar. Mark is based out of Miami, Florida, and can be reached at Mark.Popolizio@verisk.com or 786-459-9117