

COURT FINDS MEDICARE ADVANTAGE ORGANIZATION MAY PROCEED WITH LAWSUIT AGAINST PLAINTIFF LAW FIRM UNDER THE MEDICARE SECONDARY PAYER STATUTE

In Humana Ins. Co. v. Paris Blank LLP, 2016 U.S. Dist. LEXIS 61814, the US District Court for the Eastern District of Virginia declined to dismiss a lawsuit against the plaintiff law firm of Paris Blank LLP ("Paris Blank"), holding that Humana could, as a Medicare Advantage Organization ("MAO"), sue and seek reimbursement for Medicare conditional payments directly from the Medicare beneficiary's attorneys.

Case Facts

Paris Blank represented a plaintiff (name withheld to protect privacy) who was injured in an auto accident on October 11, 2013, and who was also an enrollee ("Enrollee") in a Medicare Advantage Plan through Humana. Humana paid a total of \$191,612.09 in conditional payments on Enrollee's behalf to cover medical expenses. As a result of a lawsuit initiated after the accident, Enrollee received a total settlement of \$475,600 in April of 2014.

Humana communicated to Enrollee that Enrollee owed to Humana \$191,612.09 in reimbursements for the conditional payments Humana made for Enrollee's medical expenses and sought payment within 60 days. A letter from CMS showed Enrollee had no repayment obligations under Medicare Part A and Part B; however, the correspondence did not address any obligations to any MAO under Part C. Enrollee requested a waiver of the reimbursement, which Humana subsequently denied. Humana received no reimbursement for medical expenses from Enrollee and filed suit against Paris Blank for recovery, claiming the same reimbursement rights at Medicare. Paris Blank then filed a Motion to dismiss which was denied by the court, arguing that there is no binding precedent in the Fourth Circuit on this matter.

Case Holding

An eligible individual may elect to receive their Medicare benefits either from the Government under Medicare Parts A and B or from an MAO under Part C (also known as "Medicare Advantage"). If an individual elects to participate in Medicare Advantage, CMS pays to the MAO a fixed amount for each enrollee, and the MAO then administers benefits and assumes the risk associated with insuring that individual.

The court looked to prior cases in the Third Circuit on the question presented, starting with In re Avandia, 685 F.3d 353 (3d Cir.2012) where the Third Circuit held that the Medicare

Secondary Payer ("MSP") statute created a private right of action which an MAO could use to pursue recovery for conditional payments. Other district courts in the Third Circuit followed the reasoning in In re Avandia, including Humana Med. Plan, Inc. v. W Heritage Ins. Co., 94 F. Supp.3d 1285, 1290-91 (S.D. Fla. 2015); Collins v. Wellcare Healthcare Plans, Inc., 73 F. Supp. 3d 653, 664-65 (E.D. La. 2014); and Humana Ins. Co. v. Farmers Tex. County Mut. Ins. Co., 95 F. Supp. 3d 983, 986 (W.D. Tex. 2014).

Although not binding precedent, the Court found persuasive the Third Circuit's determination that an MAO may pursue recovery pursuant to the private right of action under the MSP and denied Paris Blank's motion to dismiss, ruling that Humana could proceed with their suit for recovery against the plaintiff attorneys.

Analyst's Comment

Humana continues its aggressive push for recoveries under the MSP, this time targeting plaintiff attorneys. Prior actions started (and won) by Humana focused on the insurance companies. Past decisions have shown the MSP is sufficiently broad to apply to both insurers and plaintiff, as well as their attorneys.

As the MSP also provides double damages in a private cause of action, Providio recommends that both defense and plaintiff have a vested interest in carefully considering how to handle liens asserted by MAOs. Issues such as jurisdiction and the asserting MAO will affect analysis of how to proceed. With decisions in favor of MAOs in both the Third and Fourth circuits, it remains to be seen if other circuits will follow suit, and whether other MAOs will take the same aggressive position that Humana has. Should you encounter an MAO, we are ready to assist in your analysis and also negotiate and resolve the lien if needed.

Providio also recommends that you check in with your clients on an ongoing basis to determine what health insurance policies they are enrolled in. Clients may elect to switch between standard Medicare (Parts A & B) and Part C plans. Therefore, the health insurance information that you gather at intake may change – perhaps even multiple times – between intake and settlement. Given the MAOs' growing appetite for aggressive subrogation, you don't want to risk discovering a "surprise" lien, especially if you've already disbursed your client's proceeds.