

Medicare Secondary Payer Update

Paris Blank LLP, a Richmond, Virginia, plaintiff's firm, is a defendant in a precedent-setting Medicare Secondary Payer ("MSP") compliance case potentially affecting your practice. Humana Health Care Systems is suing Paris Blank for double damages pursuant to 42 USC 1395y(b)(3) (A), "Private Cause of Action." *Humana v. Paris Blank LLP*, 2016 WL 2745297 (E.D. Va., May 10, 2016). Paris Blank LLP's client received \$109,612.09 from the client's Medicare Advantage Plan ("MAP") through Humana Medicare Advantage. The funds were paid as a result of the client's Medicare-covered injury-related claim. Humana was not paid a portion of the settlement proceeds. If Humana prevails, Paris Blank is liable to Humana for \$328,836.27. Your firm and any other entity/person receiving compensation from an injury settlement, judgment, or award could be exposed to joint and several liability for MSP Conditional Payment Recovery and double damages under the statute.

Paris Blank settled a motor vehicle accident case for \$475,000. Its client's Medicare coverage was not traditional Medicare combined with a Medicare Supplement plan. Instead, the Medicare coverage was under a Medicare Part C MAP. MAP plans are decoupled from Medicare and Centers for Medicare & Medicaid Services ("CMS") when it comes to recovery of presettlement

injury medicals. CMS has no idea of the MAP conditional payments made and has no role in recovery of the medical reimbursement. Case law clearly establishes a MAP's right of recovery. Some jurisdictions limit a MAP's recovery action to state court actions only, while other jurisdictions allow recovery in federal courts.

Paris Blank properly reported its case to the CMS Benefits Coordination and Recovery Center ("BCRC"). BCRC indicated that no conditional payments were made by traditional Medicare. BCRC has no information regarding a MAP's conditional payments. Paris Blank did not investigate to see if its client had ever been enrolled in a MAP. The proceeds were distributed. Months later, Humana sent a demand for \$109,612.09. Paris Blank requested a lien waiver. Humana denied the waiver, then filed a Private Cause of Action claim against Paris Blank with a demand for double damages on top of the \$109,612.09. Paris Blank moved to dismiss, arguing that 42 USC 1395y(b)(3) (A) did not apply to MAPs. The court ruled in favor of Humana, allowing its Private Cause of Action claim to proceed. Most likely the trial court's ultimate ruling will be appealed.

To protect all parties to any injury action, determine when a client first became Medicare-eligible. Submit a SSA-3288 (www.ssa.gov)

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[forms/ssa-3288.pdf](#)) to the nearest Social Security office after checking boxes 2, 3, 4, and 5. Have your client sign it. If your client is a minor or an incapacitated adult, a conservator in Oregon or guardian of the estate in Washington will be required to sign the form. When asked for dates, use the range of the actual date of the injury to the present.

Then determine whether your client was enrolled in traditional Medicare or a MAP from the date of the injury to the date of settlement. Sometimes during the course of an injury action, the client switches from traditional Medicare to a MAP and vice versa. This means you have to report the case to BCRC and then look for evidence of MAP enrollment. Ask your client or his or her family/significant others for all Medicare identification cards. If you see the term “Med Advantage” on a membership card issued by an insurance carrier, then a MAP is involved. Ask for all Explanation of Benefits (“EOB”) statements received from either Medicare or a MAP from the date of injury forward. Medicare EOBs have Medicare’s name on them. MAP EOBs have the insurance carrier’s name on them, and most often the term “Med Advantage” or “Medicare Advantage” will be near the top of the EOB.

Expect defense counsel and carriers to be asking for this information because conditional payment recovery and double damages may also be demanded of them as well as you and any party receiving remuneration from the injury settlement, judgment, or award. Don’t make Paris Blank’s mistake. If BCRC says it made no conditional payments in response to your submission of the “Final Settlement Detail Document” and you know your client received injury-related medical care, continue your due diligence to find out who paid for the care and negotiate repayment.

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