

# Medicare Advantage Organizations May Sue For Double Damages Under MSP Act

August 16, 2016

Humana Medical Plan, Inc. v. Western Heritage Ins. Co., No. 15-11436 (11th Cir. Aug. 8, 2016)



On August 8, the Eleventh Circuit Court of Appeals decided an issue of first impression in the circuit under the Medicare Secondary Payer (MSP) Act. In sum, the Eleventh Circuit held that a Medicare Advantage Organization (MAO) under Part C of the Medicare Act has the same right as the federal government under Part B to sue a primary plan for damages under the MSP if the primary plan funds a settlement but fails to reimburse the MAO for secondary expenses paid on behalf of the insured. Importantly, the Court held that MAOs are entitled to recover *double damages* under the MSP private right of action [42 U.S.C. §1395y(b)(3)(A)]. The Eleventh Circuit's opinion is part of a five-year medical lien reimbursement saga arising out of a personal injury lawsuit. In June 2009, Mrs. Reale and her husband sued a condominium association in state court for damages arising out of a slip-and-fall accident. The Reales had a Medicare Advantage plan with Humana, which paid \$19,155 in medical expenses related to Mrs. Reale's injuries in the accident. During the pendency of the lawsuit, Humana issued to Mrs. Reale an Organization Determination that it was entitled to reimbursement for the entire \$19,155. The Reales settled their case for \$135,000 and represented in the settlement agreement that no Medicare lien existed. Western, the liability insurer for the condominium, funded

the settlement to the Reales' personal injury attorney's trust account. The Reales did not file an administrative appeal of Humana's Organization Determination as provided under the Medicare Act and did not pay Humana. Humana then sued the Reales in federal court for reimbursement of the \$19,155 pursuant to the MSP. The Reales moved to dismiss for lack of subject matter jurisdiction on the theory that the Medicare Act did not provide Humana with an express or implied right of action for reimbursement. The district court granted the Reales' motion but later vacated the order after which Humana dismissed the case. *See Humana Med. Plan, Inc. v. Reale*, 2011 WL 335341 (S.D. Fla. 2011) *vacated* (Sept. 26, 2011). The Reales then filed a state court action against Humana seeking a declaration of the amount Humana was due pursuant to Fla. Stat. 768.76, the collateral source rule statute. Humana moved to dismiss the state court action for lack of subject matter jurisdiction. The trial judge denied Humana's motion and equitably adjusted Humana's lien down to \$3,000. On appeal, the 3rd DCA reversed and held that the state court did not have subject matter jurisdiction over the MAO lien. The appellate court held that the Medicare Act created an exclusive federal administrative process under which Medicare Advantage plan enrollees, like the Reales, could appeal a request for reimbursement by a MAO, like Humana. Upon exhaustion of this administrative process, the Medicare Act provided for federal judicial review and expressly preempted state law. *See Humana Med. Plan, Inc. v. Reale*, 180 So. 3d 195 (Fla. 3d DCA 2015). Finally, Humana filed suit against Western in federal court seeking double damages under the MSP private right of action for failing to reimburse Humana's secondary payments on behalf of the Reales. Humana moved for summary judgment, and in response Western argued that the MSP does not govern MAOs at all. The district court granted Humana's motion and awarded double damages against Western. *See Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 94 F. Supp. 3d 1285 (S.D. Fla. 2015). On appeal, the Eleventh Circuit affirmed and rejected all of Western's arguments. The court first analyzed numerous provisions of the Medicare Act and determined that Congress intended MAOs to have the same secondary payer status under Part C as the federal government has under Part B. Furthermore, the court reasoned that MAOs may avail themselves of the MSP private right of action for double damages if the primary plan fails to reimburse the MAO directly for its secondary payments. The court also rejected Western's argument that it provided for "appropriate reimbursement" of Humana's secondary payments pursuant to the private right of action section by placing \$19,155 into a trust account pending resolution of the dispute. The court observed that while the MSP does not define "appropriate reimbursement", the Medicare Act regulations state that if a beneficiary fails to reimburse Medicare within 60 days of receiving a primary payment, the primary plan "must reimburse Medicare even though it has already reimbursed the beneficiary..." 42 C.F.R. § 411.24(i)(1). Thus, because the Reales did not reimburse Humana within 60 days after Western funded the Reales' settlement, Western became obligated to directly reimburse Humana and its deposit in trust did not satisfy that mandate. Finally, the Eleventh Circuit rejected Western's arguments that it could dispute Humana's claim to \$19,155 and the appropriateness of double damages. As to the amount, the court noted that the Reales failed to pursue their right to an administrative appeal of Humana's claim thereby fixing the amount Humana may recover. The court also confirmed that double

damages are required under the private right of action section because it uses the mandatory language that damages “shall be in an amount double...” 42 U.S.C. §1395y(b)(3)(A).

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