District Court of Connecticut: Who May Sue, Who May be Sued, and When Suit is Proper Under the MSP Private Cause of Action

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Who May Sue under the MSP Private Cause of Action: The Court recognized that the Second Circuit had not yet taken up the issue as to whether the MSP private cause of action was intended to be utilized by MAPs. However, the Court looked to the two Circuits that had decided that MAPs may utilize the MSP private cause of action, the Third and Eleventh Circuits. Additionally, since the Third Circuit decision was published, a significant number of District Courts have followed the reasonings of the Third Circuit that MAPs may avail themselves of the MSP private cause of action decision. Further, even though the actual wording of the MSP private cause of action is vague as to who may bring the action, the Court would defer to CMS regulations interpreting the statute, which militate in favor of permitting MAPs to sue under the MSP private cause of action.

Who May Be Sued: The Court ultimately decided to dismiss the action as against the Medicare beneficiary and her attorneys, and allowed the action to only remain as against Big Y, the primary plan. In determining this, the Court found that the MSP and interpreting regulations do not give MAPs the right to sue beneficiaries or their attorneys, only primary plans.

The Court found that the plain language of the Private Cause of Action provision, while admittedly vague, suggests that Congress intended suit against only primary plans. The provision is triggered when "a primary plan . . . fails to provide for primary payment (or appropriate reimbursement)." 42 U.S.C. § 1395y(b)(3)(A). Had Congress intended to create a cause of action for double damages against beneficiaries who received payment from a primary plan, Congress could simply have created a cause of action when "any entity or person" failed to reimburse a MAP.

Interestingly here, Aetna cited to a decision from the Eastern District of Virginia, *Humana Insurance Company v. Paris Blank LLP* (for our prior blog on this decision click **here**), wherein the Court allowed an MSP private cause of action to proceed against plaintiff attorneys. However, the Court here disagreed with the *Paris Blank* decision, finding that the *Paris Blank* holding relied on section 422.108(f), which equates the rights of recovery for MAPs to the rights of recovery for the government, in combination with section 411.24, which permits recovery against beneficiaries and their attorneys.

Further, the Court disagreed with *Paris Blank* finding that section 411.24 does not provide for double damages recovery against beneficiaries and their attorneys, consistent with the text of the government's cause of action, subsection (2)(B)(iii). Essentially, to conclude that beneficiaries and their attorneys may be sued under the Private Cause of Action provision would mean that MAPs would not have rights equal to those of the government, but rather rights greater than those of the government, because the Private Cause of Action provision only provides for double damages.

With only Big Y remaining as a defendant, Big Y tried to argue it was not a “primary plan.” However, the Court found that Aetna's allegation that Big Y paid a settlement to Guerrera (or her attorneys) to resolve a personal injury claim is sufficient to bring Big Y within the definition of "primary plan." Aetna had therefore adequately pled facts that allow the plausible inference that Big Y is responsible for the misconduct alleged and thus is a “primary plan” within the meaning of the MSP.

When Suit is Proper: In its Complaint, Aetna alleged that Big Y was notified of Aetna's lien on Guerrera's medical expenses, but nevertheless paid Guerrera and/or her attorneys "the full amount of the Settlement Proceeds." Arguably, the fact that Big Y paid a settlement means that it did not "fail[ ] to provide for primary payment." 42 U.S.C. § 1395y(b)(3)(A). However, the court concluded that Big Y did not satisfy the obligation outlined by the Private Cause of Action provision, because the Private Cause of Action provision also includes the clause "or appropriate reimbursement."

Also looking to the Eleventh Circuit (*Humana v. Western Heritage*, for our prior blog on this case click **here**), the Court here agreed that the word "appropriate" signals that primary plans may not satisfy their obligations under the MSP simply by paying a settlement to a beneficiary, where they are on notice that a secondary payer has already paid the beneficiary's medical expenses.