

# Watch Out for Double Damages!

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**M**edical malpractice plaintiffs' attorneys have become interested in an oft-overlooked provision of the Medicare Secondary Payer Act ("MSPA"). Why?

Because it *seems* to offer them the opportunity to recover "double damages."

We represented a Maryland hospital in a wrongful death case that was tried in Circuit Court and resulted in a small verdict for Plaintiffs (medical bills only). The Plaintiffs' Decedent was a Medicare beneficiary and Medicare had asserted a lien to recover its conditional payments.

Prior to paying the judgment, the hospital filed a motion to reduce the verdict to "medical bills paid" pursuant to Maryland law; the motion was granted. The hospital also requested a tax identification number for the estate of the Decedent, which Plaintiffs refused to provide.

During the parties' disagreement regarding the tax identification number, Plaintiffs filed suit against the hospital in Federal Court pursuant to the MSPA. Plaintiffs' Federal complaint alleged the hospital "failed" to reimburse Medicare for the conditional payments made on behalf of the Decedent and, thus, was liable for double damages. They relied upon the following provision of the MSPA:

There is established a private cause of action for damages (*which shall be in an amount double the amount otherwise provided*) in the case of a primary plan which fails to provide for primary payment (or appropriate

reimbursement) ....

42 U.S.C. § 1395y(b)(3)(A) (emphasis added).

The hospital paid the revised Circuit Court judgment against it approximately two weeks after suit was filed in Federal Court (and 37 days after the revised — and "final" — Circuit Court judgment).

On behalf of the hospital, we filed a Motion to Dismiss/Motion for Summary Judgment in Federal Court arguing (a) Plaintiffs had no standing because they suffered no "injury in fact" and (b) the hospital did not "fail" to reimburse Medicare, because it had satisfied, in full, the pending judgment. Our Motion was granted by the District Court, which found that the hospital had paid Plaintiffs the entire judgment, including the portion due Medicare (and thus had not "failed" to reimburse Medicare).

Plaintiffs appealed to the Fourth Circuit Court of Appeals. Again, the hospital took the position that Plaintiffs had no standing and that the hospital had not "failed" to reimburse Medicare. Following oral argument in March 2018, the Fourth Circuit issued a published opinion in July 2018, affirming the District Court's grant of judgment in favor of the hospital. The Fourth Circuit held:

1) Plaintiffs did have standing because they suffered an injury-in-fact or, in the alternative, because Congress had effected a "partial assignment" of the government's right of action under the MSPA (Judge Traxler, who authored a dissent, agreed with the hospital that Plaintiffs had no standing because they had suffered no injury-in-fact. Thus, he believed neither the District Court nor the

Fourth Circuit should have reached the merits of Plaintiffs' case.); and

2) The hospital did not "fail to pay" or reimburse Medicare under the MSPA. The Fourth Circuit explained that the hospital had showed its intention to pay Plaintiffs the judgment owed them and did pay that judgment in a timely manner after a revised, final judgment was issued.

In sum, while this was an appellate victory for our client, it raises a complex set of issues for defense counsel and our clients. Because the MSPA "double damages" provision and case law across the country are unclear as to precisely when "double damages" are available and who is entitled to their recovery (these issues are disputed across the Circuits), **special care is warranted in the event of a judgment involving a Medicare lien.** You and your client may consider placing the full Medicare lien amount in escrow pending the resolution of any post-judgment motions, or even paying the Medicare lien amount directly to Plaintiffs and their counsel before the post-judgment motions are decided.

*Netro v. Greater Baltimore Med. Ctr., Inc.*, 891 F.3d 522, 524 (4th Cir. 2018)

*Christina Billiet is a trial attorney and Partner at Waranch & Brown, LLC. She has extensive experience defending medical malpractice cases, as well as representing physicians, nurses and other health care providers in a variety of Board of Physician, guardianship and hospital privileging matters. Ms. Billiet has successfully handled cases and appeals in the Circuit and appellate Courts of Maryland, as well as the United States District Court for the District of Maryland and the Fourth Circuit Court of Appeals. She has acted as lead counsel at trial, obtaining defense verdicts in multimillion-dollar cases.*

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