

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ELAINE L. CHAO,)
Secretary of Labor,)
U. S. Department of Labor,)
) FILE NO. 2:07-CV-00068-RL-PRC
Plaintiff,)
)
v.)
)
HARRIS N.A.,)
)
Defendant.)
)

INDEPENDENT FIDUCIARY'S SECOND REVISED PLAN OF DISTRIBUTION FOR
AND MOTION TO DISTRIBUTE ASSETS OF THE MY SMART BENEFITS UNPAID
CLAIMS TRUST

1. Pursuant to the March 8, 2007 Order of this Court, Jeanne Barnes Bryant was appointed as Independent Fiduciary (hereafter referred to as "Independent Fiduciary") for a trust established for the payment of outstanding medical claims of, or on behalf of, the employee participants in various employee welfare benefit plans established by employer clients of My Smart Benefits, Inc. (MSB), a third party administrator of employer sponsored dental and vision plans. Pursuant to that Order, the Independent Fiduciary submitted her Report and Plan of Distribution on August 13, 2007 (D.E. #9).

2. When the Independent Fiduciary received several inquiries and objections after the filing of her Report and Plan of Distribution, she determined based upon the inquiries and

objections, that there were participants, employers, and others who wanted to make claims on the Settlement Fund, but had not been included in the claims provided to the Independent Fiduciary by the U.S. Department of Labor. A Revised Plan of Distribution was submitted on February 13, 2008.

3. The Revised Plan was objected to by Mr. Jonathan Hogge (both in his individual capacity and as president/owner of My Smart Benefits Inc.), Direct Benefits, and Daniel Dixon. After hearing arguments and a review of the submissions in support of and in opposition to said objections, the Court issued its Opinion and Order of December 8, 2008. (D.E. # 81) This Order directed the Independent Fiduciary to submit her Second Revised Plan of Distribution at her earliest convenience and directed the Independent Fiduciary to utilize the information developed by Mr. Hogge to more accurately adjudicate submitted claims. In compliance with said Order, the Independent Fiduciary herewith submits her Second Revised Plan of Distribution.

Background

4. This action was commenced by the Secretary of Labor pursuant to her authority under the Employee Retirement Security Act of 1974. As a result of the Secretary's action, an order appointing the Independent Fiduciary was issued by this Court.

5. Upon the Independent Fiduciary's appointment, several boxes were shipped by the U.S. Department of Labor, Employee Benefits Security Administration (EBSA) to the Independent

Fiduciary containing 884 claims for unpaid medical services, the majority being unpaid dental services.

6. The funds transferred to the Independent Fiduciary were placed into an account established as a Qualified Settlement Fund and are maintained at Regions Bank, a large regional FDIC insured financial institution.

Status of the Plan

7. The Independent Fiduciary has completed the processing of the claims supplied by EBSA, claims submitted by other participants, and claims submitted by employers and others seeking reimbursement for monies they have paid on behalf of participants. These claims have been processed in accordance with available Plan Documents information provided either by EBSA or Mr. Hogge. The claim processing utilized prior claim information provided by Mr. Hogge.

8. Attached as **Exhibit A** is a listing of processed claims with approved amounts remaining in dispute between the Independent Fiduciary and Mr. Hogge. **Exhibit B** is a listing of processed claims with approved amounts adjusted pursuant to a Hogge objection. **Exhibit C** is a listing of processed claims with approved amounts adjusted due to the January 2010 Chicago DOL supplied Explanation of Benefits information. **Exhibit D** is a listing of processed claims with approved amounts not adjusted or affected by information supplied since the November 2009 processing.

9. Attached as **Exhibit E** to this Report is a statement of all assets of the Settlement Fund as of September 30, 2010.

10. Since the Court's December 8, 2008 Order, the Independent Fiduciary has reviewed all claims representing a total gross, unadjudicated amount of \$685,097.84. This adjudicated to \$375,088.27. After considering those claims where proof of payment by claimant had not been submitted as required, the total gross adjudicated total was reduced to \$273,502.36.¹

11. After additional review of information supplied since January 1, 2010, the gross adjudicated total was reduced to \$268,955.06² and the approved payment based on this additional information was reduced to \$239,525.17. The amounts reflected as "Approved Payment" are the amounts proposed to be distributed by the Independent Fiduciary. The proposed payments total \$239,525.17. If the Court adopted the Independent Fiduciary's recommendations regarding the disputed claims, the approved payable to claimants would total \$251,203.79.³ **See Exhibits A, B, C, and D.**

12. Twenty-seven (27) claimants filed proof of payment after the September 15, 2009 deadline. Because it has been over

¹ In August, 2009, all claimants were notified of the adjudicated total of their claim and given an opportunity to object. Also where proof of payment had not been previously supplied, claimants were given until September 15, 2009 to submit to the Independent Fiduciary proof satisfactory to satisfy this requirement as set forth under all MSB Plans. Late filed proof of payment amounts are not included in this figure.

² This figure includes \$11,723.52 gross adjudicated claims listed on Exhibit A as claims in dispute between Mr. Hogge and the Independent Fiduciary. The figure represents an eligible amount the plan would pay if a claimant provides the information necessary for reimbursement (proof that the claimant has paid the dentist or vision professional.)

³ This would be \$239,525.17 in approved payables plus \$11,678.62 in approved payables for claims Mr. Hogge currently disputes.

a year since the deadline the claimants were to meet, the Independent Fiduciary believes that equity would demand that these claimants be allowed to receive payment. This would add \$7,182.80 to the total approved payable amount.

13. In summary, the total approved payable amount to be paid to participants is \$239,525.17. If the Court upholds the Independent Fiduciary's recommendations of additional approved payables for disputed claims and late filed claims, \$11,678.62 and \$7,182.80 respectively, the total payable to participants would be \$258,386.59.

Claims Remaining In Dispute Between the Independent Fiduciary and
Jonathan Hogge

14. **Exhibit A** lists fourteen (14) claims that remain in dispute between the Independent Fiduciary and Mr. Hogge. The Independent Fiduciary recommends the Court resolve these disputed claims. On **Exhibit A** the position of the Independent Fiduciary and Mr. Hogge is reflected.

15. The majority of the disputed claims involve benefits that either required a waiting period or were subject to a lifetime maximum benefit. Under the MSB Plan, a waiting period existed as a condition of the benefit (i.e. orthodontic, periodontal, crowns) to be paid. Mr. Hogge believes this waiting period should be strictly applied. The Independent Fiduciary disagrees. Claimants, through no fault of their own, could not satisfy the waiting period since Mr. Hogge's plans went out of business before claimants could satisfy the waiting periods. In

an insurance receivership context, if the waiting periods were applied to deny claims, the calculated portion of a premium reserved for such benefits would be refunded to the claimant. That cannot be done here because MSB failed to create any premium or benefit reserves. Further, no calculations were made by MSB to identify the cost portion of waiting period benefits in the monthly fees paid by participants and their employers.

16. Similarly, certain benefits were held to both annual and lifetime maximum benefits. Again, due to no fault of their own, a claimant cannot receive a lifetime maximum because the MSB Plans ceased to operate. Mr. Hogge argues that his plans never paid a lifetime maximum in a single plan year. The Independent Fiduciary argues that since the Plans ceased to operate, the claimant was denied the opportunity to reach the lifetime benefit in multiple plan years. This ostensibly was a benefit paid for in the monthly charges and, as described above, should have been a part of a reserve created by MSB. Mr. Hogge has acknowledged to the Independent Fiduciary that his company did not account for such reserves and did not calculate the cost of the benefit as contained in the monthly charge. Therefore, the Independent Fiduciary has recommended on these particular charges the lifetime maximum be calculated as the approved amount.

Assets Available for Distribution and Reserve for Closing

Expenses

17. Current assets held by the Trust total \$155,743.10. The Independent Fiduciary would recommend a reserve of \$12,000.00

for closing expenses relating to submission of any final accounting, tax preparation, and related motions to request discharge. This reserve assumes no objection expense or travel expenses for appearances before the Court.

18. Assuming approval of the recommended reserve that would leave \$143,743.10 in assets as against potentially \$258,386.59 (\$239,525.17 + \$11,678.62 + \$7,182.80) in approved claims payments, representing a pro-rata distribution of 55.63%.

Proposed Distribution Plan

19. The Independent Fiduciary intends to issue notice to all claimants listed in **Exhibits A, B, C, and D** and direct them to the Receivership Management, Inc. website (www.receivermgmt.com) where they may view the Independent Fiduciary's Second Revised Plan of Distribution and more specifically, Exhibits A, B, C, and D listing their approved claim payable amount. The Notice will also instruct claimants on where to file objections with the Court.

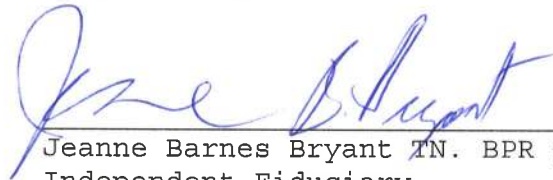
20. The Independent Fiduciary would allow these claimants thirty (30) days to submit any objections to the Court. Should objections be received, the Independent Fiduciary would recommend a procedure whereby the Court, acting either through his Honor or through the Magistrate, require the Independent Fiduciary to respond to the objection within fifteen days of receipt of the objection and that a determination be made without a hearing unless deemed necessary by the Court or the Magistrate.

21. Assuming that no objections are received from the parties or claimants, and the Court accepts the recommendations of this plan and grants the Motion to Distribute, the Independent Fiduciary will institute the Revised Plan of Distribution and begin distributions within thirty (30) days after the Court's Order of approval.

22. Upon completion of the task of distributions, the Independent Fiduciary will file a final accounting with the Court, advising as to the distribution and asking for discharge after performance of all responsibilities.

23. Therefore, the Independent Fiduciary moves for the approval of her Second Revised Plan of Distribution and respectfully asks the Court to grant her Motion to Distribute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Second Revised Plan of Distribution and Exhibits have been or will be mailed and/or faxed if number available by the 8 day of October, 2010 to all parties noted below:

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BY:



Jeanne Barnes Bryant
Independent Fiduciary