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### MEDICARE ADVANTAGE PLANS: THERE IS A NEW LIEN IN TOWN

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#### Medicare Advantage Plans: There is a New Lien in Town

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Attorneys defending clients in civil and workers' compensation cases understand that settlements involving Medicare beneficiaries must involve an arrangement to reimburse traditional Medicare for claim-related conditional payments made under Medicare Parts A and B. There is an established process (albeit a long and arduous one) to obtain a conditional payment demand from traditional Medicare when settling these types of claims. As the title of this article indicates, there is now yet another box to check when resolving claims with Medicare-eligible claimants: **Do any Medicare Advantage Plans have a lien against this settlement?**

Medicare Advantage Plans are not actually new; however, they are becoming increasingly popular with Medicare-eligible individuals, and recent litigation indicates they may have the same or similar recovery rights as traditional Medicare. Medicare Advantage Plans are insurance plans for Medicare-eligible individuals administered by private entities (for example: Medicare Blue, Humana, AARP) but funded in part by the federal government. See 42 U.S.C. §§ 1395w-21-28. It is Medicare's formal position that these plans should be given the same rights of recovery against third party claims as traditional Medicare. (See CMS Memorandum on December 5, 2011, re: Medicare Secondary Payment Subrogation Rights, Authored by Danielle R. Moon, J.D., M.P.A., and Cynthia Tudor, Ph.D.)<sup>1</sup> Several Courts throughout the country have recently allowed these plans to recover their payments from settlements through filing a private cause of action in federal court. In re *Avandia Mktg. Sales Practices and Products Liability Litigation*, 685 F.3d 353 (3d Cir. 2012); *Humana Ins. Co. v. Farmers Texas County Mutual Insurance Co.*, 95 F. Supp. 3d 983 (W.D. Tex. 2014); *Collins v. Wellcare Healthcare Plans, Inc.*, 73 F. Supp. 3d (E.D. Louis. 2014). Assuming this position continues to prevail, Medicare Advantage Plans will be able to bring private causes of action against insurers - even after a settlement - in the event they are not reimbursed out of the settlement proceeds. To add insult to injury, these plans may also be able to seek double damages against primary payers under the right set of circumstances. See 42 U.S.C. § 1395y(b)(3)(A).

Approximately one third of all Medicare-eligible individuals have enrolled in a Medicare Advantage Plan. See "Don't Settle for Less: Protecting Medicare Advantage Plans' Recovery Rights," Aaron P. Frederickson, 88 A.P.R. Wis. Law. 30 (April 2015). As such, it is likely that most workers' compensation and/or liability defense attorneys are currently handling at least one case involving a Medicare Advantage beneficiary (even if they do not know it). There are unique challenges presented when dealing with Medicare Advantage Plans, and although some questions remain unanswered, here is basic information for attorneys handling cases involving claimants with a date of birth of 1950 or earlier, or with a long-term SSA-approved disability.

- **How are defendants to know there is a Medicare Advantage Plan involved?** If a conditional payment letter or final demand letter received from traditional Medicare is \$0.00, and the claimant, a Medicare-eligible individual, has undergone claim-related medical treatment, there is likely a Medicare Advantage Plan involved. The typical reaction to a \$0.00 lien letter from traditional Medicare involves a call for a quick disbursement and file closure, but the reaction should be motivation to do more research before finalizing the settlement. Someone (or entity) paid for the medical treatment, and oftentimes, the payer is a Medicare Advantage Plan. Also, if the itemized billing statements reference AARP, Humana, Medicare Blue, etc., there will likely be payments by a Medicare Advantage Plan.
- **Do you notify the Medicare Advantage Plan of their rights?** It feels unnatural to place a lienholder on notice when they have not provided any indication of a lien. However, these plans will likely have notice of the third party claim through the manner in which they are funded by the federal government. Insurance companies now report settlement/judgment/award payments to the federal government through the Section 111 mandatory reporting requirements, and in turn, the federal government reduces the "capitation rate" they pay the Medicare Advantage Plans for the beneficiary. See "Is Medicare Advantage Entitled to Bring a Private Cause of Action Under the Medicare Secondary Payer Act?" by Jennifer Jordan, 41 Wm. Mitchell L. Rev. 1408, 1417 (2015)<sup>2</sup>. Assuming everything works as designed, in theory, the Medicare Advantage Plan will indirectly have notice of the third party claim. It goes without saying it is better to negotiate before settlement/disbursement, rather than after the funds have been disbursed and are unavailable to satisfy the lien.
- **How do you obtain a lien once the Medicare Advantage Plan is identified?** This is perhaps the good news. Medicare Advantage Plans are administered through private insurance companies and as such, the parties are able to call, email or fax to obtain a lien amount and itemized statement relatively promptly (particularly compared to the traditional Medicare process).
- **May there still be a conditional payment reimbursement request from Medicare for Medicare Parts A and B?** Yes. A beneficiary can switch back and forth from Medicare Advantage to traditional Medicare and therefore, although there was good news in bullet three above, a thorough lien search will involve both confirmation that there are no liens being asserted by traditional Medicare or any Medicare Advantage Plan.
- **Why is this my problem?** It does not have to be; however, if opposing counsel (or the unrepresented claimant) does not reimburse the Medicare Advantage Plan (or any claim by traditional Medicare), the lienholder, whether traditional Medicare or a Medicare Advantage Plan, may have a direct cause of action against the insurance carrier to be reimbursed for claim-related payments, and potentially double damages.

Awareness of the "new lien" in town is step number one to protecting clients from future liability related to Medicare-related liens. Good luck out there!

<sup>1</sup>Found at: [https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/downloads/21\\_MedicareSecondaryPayment.pdf](https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/downloads/21_MedicareSecondaryPayment.pdf)

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