

Medicare Advantage/Part C Plan Liens: Compliant Resolution

By Jason D. Lazarus, J.D., LL.M., MSCC, CSSC

The “Hidden” Lien

Now that you have gone through the resolution process for your client and gotten the conditional payment related issues dealt with you might think you are finished, but alas, you are not. Or you might not be. What lurks out there is that a Part C Advantage Plan (hereinafter MAO) may have paid for some or all of your client’s care. You may ask how that is possible when you were told that the client was a Medicare beneficiary and Part A/B was paid back for conditional payments. The reason is that MAOs aren’t Medicare and injury victim clients can elect to enroll in an MAO during relevant enrollment periods. Therefore, an MAO may have made payments after election of which you are completely unaware. Neither Medicare, BCRC nor CMS will alert you to this fact nor do they have any information as it relates to MAOs. Therefore, attorneys handling matters that involve a Medicare beneficiary must be vigilant and do their own due diligence to track down possible MAO liens or face the possibility of having to personally pay the lien times two. Although shocking, it is an area of the law that is rapidly developing in favor of MAO plans.

MAO plans use the Medicare Secondary Payer statute as the basis for their claims to reimbursement.¹ Accordingly, their repayment formulas are the same as Medicare under 411.37 (c) and (d) which only requires a procurement cost reduction. That being said, these plans are typically willing to negotiate and arguably must provide a mechanism for a compromise or waiver if they avail themselves of the MSP in terms of their recovery rights. All of that is well and good but what happens when you don’t know that an MAO has a lien? The answer is fairly ominous for all the parties to a personal injury settlement. A private cause of action can be brought as an enforcement action for double the amount of the lien. This right is provided for in the Medicare Secondary Payer Act itself. While parties have long been afraid of the government using this provision, it is on behalf of the MAOs that these actions are now being brought effectively to enforce their reimbursement rights times two.

According to the MSP, a private cause of action exists when a primary plan fails to reimburse a secondary plan for conditional payments it has made. “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) in accordance with paragraphs (1) and (2)(A).”² 42 C.F.R. §422.108(f) extends the private cause of action to Medicare Advantage Plans. “MAOs will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter.” According to 42 C.F.R. §411.24(g), “CMS has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment.” In that regard, a plaintiff personal injury law firm was sued last year by Humana for a \$191,000 lien that wasn’t repaid because the firm was unaware of the lien. The damages claimed were \$382,000 which is precisely double the lien that wasn’t paid. That case was resolved confidentially out of court.

The seminal case on this issue is, for now, *Humana v. Western Heritage Ins. Co.*,³ from late 2016. This was a slip and fall case wherein just before settlement the existence of a Humana Medicare Advantage plan was discovered.⁴ Western Heritage, the defendant insurer, initially put Humana on the settlement check but a state court judge ordered it removed.⁵ The plaintiff failed to repay Humana, so Humana initiated litigation directly against the defendant insurer.⁶ Western Heritage placed the amount of Humana's demand in trust during the litigation and disclosed the existence and location to Humana.⁷ The 11th Circuit Court of Appeals granted Humana's Motion for Summary Judgment and held that Humana's right to reimbursement for the conditional payments it made on behalf of the plan beneficiary under a Medicare Advantage Plan was enforceable.⁸ Western Heritage had an obligation to independently reimburse Humana. When they failed to do so, the Court ruled that as a matter of law, Humana was entitled to maintain a private cause of action for double damages pursuant to 42 U.S.C. § 1395y(b)(3)(A) and was therefore entitled to \$38,310.82 in damages.⁹ The Eleventh Circuit said that placing the \$19,155.41 in trust was not the same as paying the MAO and that the damages "SHALL" be double.¹⁰

In summary, when it comes to MAO liens there is a good chance you may be unaware that a lien exists without your own research. A good practice is to obtain copies of all government assistance program cards and any health insurance cards to see just what the injury victim is receiving in terms of benefits/insurance coverage. Make sure a thorough investigation is done if the client is a Medicare beneficiary for the existence of Part C/MAO liens. The investigation and inquiry should start upon intake and continue throughout representation with the final check occurring before disbursement of settlement proceeds. Failing to do so may expose you and your firm to personal liability for double damages to a Part C Plan or Medicare itself. Once a Part C/MAO lien is identified, you must aggressively pursue reduction methods either using traditional lien reduction arguments if the MAO doesn't insist upon adherence to the MSP or using the MSP's compromise or waiver process.

¹ An MAO "will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter." 42 C.F.R. § 422.108(f).

² 42 U.S.C. § 1395y(b)(3)(A).

³ *Humana Medical Plan, Inc. v. Western Heritage Insurance Company*, 832 F. 3d 1229 (11th Cir. 2016).

⁴ *Id.* at 1232

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1239

⁹ *Id.* at 1240

¹⁰ *Id.*