

MEDICARE ADVANTAGE PLANS PAYMENT RECOVERY RIGHTS

By: James E. Logan, CSSC

Medicare Advantage Plans (MAP) are private insurance plans that provide the same coverage as Medicare, plus expanded benefits. Premiums are charged and the policies remain valid for a specified term or period. In the past, some MAP administrators have claimed that their recovery rights for payments made are the same as Medicare's, which are allowed under the Medicare Secondary Payer Act (MSP) (42 U.S.C. 1395y(b)(2)). In the matter of Humana Medical Plan, Inc. vs. Mary Reale, et al. (Case No. 10-21 493-Civ-Cooke/Bandstra, U.S. District Court for the Southern District of Florida), the court came to a different conclusion.

Humana Medical Plan, Inc. (Humana) administers Medicare like benefits to Medicare beneficiaries who are enrolled in their Medicare Advantage Plans. Defendant Mary Reale was involved in a slip and fall incident and received medical treatment that cost Humana \$19,155.41. Reale filed a lawsuit against a condominium association and collected more than the cost of her treatment. On May 17, 2010, Humana amended their complaint against Reale and her attorney, alleging that the MSP entitled them to receive reimbursement in the same manner as Medicare. The defendants argued that the case should be dismissed because 42 U.S.C. 1395y(b)(2) does not grant Humana a private cause of action and, as a result, the Court lacked subject jurisdiction. (ECF No. 14)

Under 42 U.S.C. 1395y(b)(2)(B)(i), the Secretary of Health and Human Services authority is limited to making payments conditioned on reimbursement to the appropriate Medicare Trust Fund. Only the United States is vested with full authority to bring action for reimbursement, not the Secretary (42 U.S.C. 1395y(b)(2)(B)(iii)); therefore, because the Secretary cannot bring an action for reimbursement, Humana cannot claim such a right under 42 C.F.R. 422.108(f). Accordingly, Humana has failed to bring a claim arising under federal law and the case was dismissed¹.

This is an important decision because a MAP cannot stand in the same shoes as Medicare or the United States and likewise cannot assert the same demand for reimbursement or seek penalties in the form of double damages. These plans will be restricted to the terms and conditions contained in their policies and will be limited to asserting ordinary subrogation liens against the settlement and their MAP insured, not the employer, defendant or their insurer(s). If and when a MAP asserts its lien, it is advisable to ask for a copy of the policy language that enables the lien in order to validate against whom they can assert the lien and the extent to which they can assert their lien. Some MAP policies contain coordination of benefits provisions making them secondary to any other available insurance. Depending on the nature and amount of the settlement, most liens can be negotiated.

¹ Also see Parra v. PacifiCare of Arizona, Inc. 2011 U.S. Dist. LEXIS 33310 (D. Ariz., Feb. 4, 2011)

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This paper is not intended to provide legal advice and the reader should rely on their own counsel.