

# Medicare Conditional Payment Liens

North Carolina Association of Defense Attorneys

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## General Rule Courtesy of Medicare Secondary Payer Act

- Medicare is not supposed to pay for medical treatment if there is a primary payer responsible to pay for that treatment. If Medicare ultimately pays, such payment is conditioned upon reimbursement once primary payer responsibility is demonstrated. 42 U.S.C. § 1395y(b)(2).
- Responsibility is "demonstrated" via a settlement, judgement, award, or other payment. 42 U.S.C. § 1395y(b)(2)(B)(ii).
- This means, if a case is settled and "Medicare" paid for medical treatment related to the claim, Medicare must be reimbursed as a part of that settlement.



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## What is Medicare?

- "Traditional" Medicare (1965)
  - Part A: Provides Hospital Insurance
  - Part B: Provides Medical Insurance

*"When you receive a Medicare conditional payment letter from CMS, the conditional payments shown are only for payments made under Part A and Part B."*



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### Which Party is Responsible for Payment of Traditional Medicare Lien?

- Accepted claim and Medicare paid for related treatment?
  - Defendants are responsible, but technically should pay those bills per the NC fee schedule, and the provider will reimburse Medicare.
- In a denied claim the parties can negotiate responsibility for payment as a settlement term.
- What if the claimant agrees to repay Medicare and fails to do so?
  - If the party that received the primary payment fails to reimburse Medicare within sixty (60) days, the primary payer must reimburse Medicare even though it has reimbursed the beneficiary (or other party).
  - If CMS has to take legal action, Medicare may recover double the amount of the Medicare primary payment. 42 U.S.C. § 1395y(b)(2)(B)(iii) and (b)(3)(A); 42 C.F.R. § 411.24(c)(2).



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### When is Payment Due?

- Once the case has settled a final demand should be requested from Medicare.
- Payment is due within 60 days of the demand letter.
- Interest accrues from the date of the demand letter and will be assessed on the balance on day 61 if it is not paid.
- In accepted cases Medicare is also now sending out interim conditional payment letters seeking recovery prior to settlement.



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### Expanding the Definition of "Medicare"

Medicare Part C and Part D plans

- Medicare Part C was created in 1997
  - Part C provides coverage for services covered under Parts A, B and (sometimes) D through private insurers
  - Part C plans are also known as "Medicare Advantage Plans"
- Medicare Part D was added in 2003
  - Part D covers prescriptions for anyone eligible for Part A or B
- As of 2015, approximately 31% of beneficiaries were taking advantage of these options.



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### What are our obligations with regard to these MAPs?

42 C.F.R. § 411.24 addresses "Recovery of Conditional Payments," and:

- Gives Medicare a right of action to recover conditional payments from a beneficiary, attorney, provider, supplier, or physician who "has received a primary payment."
- Gives Medicare a direct right of action to recovery from any primary payer.
- Instructs that the beneficiary has 60 days to repay Medicare upon receipt of a primary payment.
- Provides Medicare can seek recovery from the primary payer if Medicare is not reimbursed (even if primary payer has already paid the beneficiary).



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### Do the Circuits Agree?

- MAPs take the position that they have the same recovery rights under federal law as traditional Medicare and therefore, all of these rights apply to MAPs as well.
- MAPs also contend that the MSP gives them a private cause of action. Do the federal courts agree?
  - 9<sup>th</sup> Circuit: **No.** (*Parra v. Pacificare of Arizona* (2013))
  - 3<sup>rd</sup> Circuit: **Yes** (*In re Avandia* (2012))
  - 2<sup>nd</sup> Circuit: **Yes** (*Potts v. The Rawlings Co.* (2012))
  - 6<sup>th</sup> Circuit: **Yes** (*Michigan Spine* (2014) *Cariten Health* (2015))
  - 5<sup>th</sup> Circuit: **Yes** (*Collins v. Wellcare Healthcare Plans* (2014))
  - 11<sup>th</sup> Circuit: **Yes** (*Humana v. Western Heritage* (2015))
  - 4<sup>th</sup> Circuit: **Hasn't chimed in yet**



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### Do the Circuits Agree?

- Up until 2011, the courts had established that MAPs could not sue for recovery under the MSP Act and were instead forced to state court to pursue recovery claims under traditional contract theory.
- US Supreme Court denied certiorari of *In Re Avandia* in 2013.
- The trend in the federal courts is to give MAPs the same rights of recovery as traditional Medicare, but there are two conflicting circuits so the law is unsettled.



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**Best Practices: How should we handle MAPs and their liens?**

- **First:** Know that Medicare Part C/D treatment does NOT show up on the conditional payment letters from traditional Medicare or on the portal.
- **Second:** Find out who is paying the medical treatment
  - Examine the medical bills – who is paying the treatment?
  - Send discovery/questionnaire and ask for Medicare Advantage Plan card or name; identification information; explanation of benefits print out, etc.
- **Third:** Once you have this information, send a certified letter to the MAP and request an accounting of what payments it alleges are owed.

\*Do not hide from the lien\*



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**Best Practices: How should we handle MAPs and their liens?**

- Once received, ensure the lien charges are related to the workers' compensation claim.
- Feel free to negotiate the lien and ultimate amount the MAP will agree to recover. Note, this is easier for Plaintiff's counsel to handle.
- Confirm the lien is final and the MAP will be satisfied once it is paid. Obtain this confirmation in writing.



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**Best Practices: How should we handle MAPs and their liens?**

- Make sure the mediated settlement agreement/clincher/release reflects the lien and who will be paying any Medicare lien.
- Make sure language is unambiguous, and any conditions are clearly spelled out.
- If any money is being held in trust pending the final lien, make sure the Order approving the clincher reflects that term.



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