



ATTORNEYS AT LAW

10/2/2019 | Articles

## Humana Ins. Co. v. Bi-Lo LLC

---

On September 24, 2019, the District Court of South Carolina dismissed Bi-Lo LLC's ("Defendant") motion to dismiss a claim brought by Humana, a Medicare Advantage Organization ("MAO"), under the Medicare Secondary Payer Act's private cause of action for Defendant's failure to reimburse it for Medicare conditional payments made in connection with an underlying liability claim.

### Background

On August 29, 2013, an individual enrolled in a Medicare Advantage Plan through Humana ("Enrollee"), an MAO, fell at Defendant's grocery store. MAOs are private health plans that provide Medicare benefits to qualifying Medicare beneficiaries under Medicare's Part C and Part D programs. Humana made more than \$25,000 in conditional payments for care of Enrollee related to the fall. In May 2016, Defendant entered into a settlement with Enrollee agreeing to pay \$80,000 in exchange for a release of all claims. After the Enrollee failed to reimburse Humana for the conditional payments alleged, Humana sent a demand letter for reimbursement to Defendant. Humana filed suit after no response or payment was received from Defendant, seeking reimbursement of the conditional payments as well as double damages pursuant to the private cause of action created by 42 U.S.C. § 1395y(b)(3)(A). Defendant filed a motion to dismiss alleging that no private right of action exists for Humana, Humana failed to join Enrollee as an indispensable party, the complaint was insufficiently pled, and Defendant had provided for payment.

### District Court Rationale

Preliminarily, the Court rejected Defendant's contention that the long-recognized practice in South Carolina is that the plaintiff remains responsible for satisfying any medical liens from the settlement proceeds. The Court noted that their analysis would look to the statutes, regulations, and case law regarding the issue, including whether the private cause of action was available to not only individual enrollees but also MAOs. Citing the overall goals of the Medicare Part C and Part D programs to efficiently provide Medicare benefits, the Court held, absent any binding authority from the Fourth Circuit, and consistent with a prior decision of another District Court within the Fourth Circuit, that MAOs can maintain a private cause of action and incorporated the Third Circuit's analysis in *In re Avandia Mktg.*, 685 F.3d 353, 2012 U.S. App. LEXIS 13230, 2012 WL 2433508.

The Court went on to reject the contention that Enrollee was a necessary party to the litigation. The Court acknowledged that the Enrollee had an obligation to reimburse Humana, but a private cause of action could be brought against Defendant with no obligation that Humana sue all joint tortfeasors. Additionally, the Court found that the complaint was sufficiently plead, opining that the information said to be missing from the Complaint could be obtained through discovery, and finally that payment to Enrollee with the intention of conditional liens being resolved from the settlement proceeds did not amount to payment to Humana.

### Analysis

Identifying whether any MAO conditional liens exist remains a unique challenge for primary payers. Unlike traditional Medicare liens, there is no central database to search for MAO liens, and MAO liens are not accessible through the

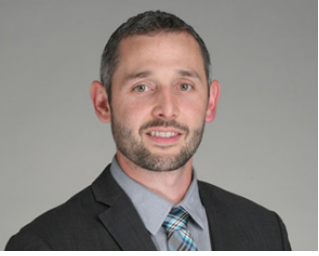
Medicare Secondary Payer Recovery Portal. Nevertheless, and as this case demonstrates, the burden can remain on the defendant/primary plan to identify any MAO conditional liens or face potential post-settlement liability. Because there is no centralized database, the fact that there are hundreds of MAO organizations that could potentially have a lien interest in a case, and because Enrollees may change MAO plans on a yearly basis leading to multiple MAO lien holders, each primary payer's investigation of MAO liens is based on their preferences and risk tolerance. This process can range anywhere from asking claimant/plaintiff under oath regarding enrollment in an MAO to contacting every MAO plan available to the beneficiary during the pendency of the claim.

In spite of the difficulty that primary plans experience identifying MAO liens, the Court did not find Defendant's lack of notice arguments availing. The Court pointed to the fact that Defendant should have experience dealing with Medicare/MAO liens, had the ability to seek indemnification from the Enrollee as a term of settlement, could have conditioned settlement on Enrollee providing the conditional payment amount during settlement negotiations and affording Bi-Lo an opportunity to satisfy the lien, or could have refused to issue a check directly to Plaintiff without ensuring the MAO conditional payments were satisfied. This decision should illustrate the importance of identifying and resolving MAO conditional liens prior to settlement, and the Court's suggestions regarding strategies to handle potential MAO liens should be considered by primary plans as part of their settlement process.

Although MAOs are always entitled to seek reimbursement for conditional payments, not all Circuit Courts agree that recovery may include the right to seek double damages. While the Court referenced sister decisions that have permitted MAOs to seek double damages, the Fourth Circuit has not ruled on this issue. Until that occurs, defendants/primary plans operating in the Third and Eleventh Circuits, which have found that the private cause of action is available to MAOs, and now possibly the Fourth Circuit, should take extra care in addressing conditional liens brought by MAOs or they may place themselves at risk of paying up to triple the conditional lien amount being asserted in cases where they have tendered payment to an Enrollee at settlement and are later forced to defend an MAO private cause of action seeking double damages. There will no doubt be additional litigation expenses incurred as well.

However, the difficulty of identifying MAO conditional lien debt may have a solution on the horizon. Presently, proposed legislation, the P.A.I.D. Act ("Provide Accurate Information Directly"), has been submitted to Congress and would require CMS to provide information directly to primary payers regarding a beneficiary's enrollment in a Medicare Part C or Part D plan. The objective here is to allow primary plans an opportunity to prospectively identify and settle Part C and Part D liens prior to settlement. The present system is universally regarded as poor, as primary payers are left with the task of chasing the debt directly with multiple potential MAOs or relying on the Enrollee to inform them which plans they are enrolled in or have been enrolled in. This new legislation offers a reasonable solution that could be to the benefit of all parties and should be monitored closely by interested parties.

The Dickie, McCamey & Chilcote Medicare Compliance Group is available to your organization with all aspects of MSP compliance, including the resolution of Medicare and MAO conditional payment issues. If you have any questions, please feel free to contact us.



Michael D. Bergonzi  
412-392-5451  
[mbergonzi@dmclaw.com](mailto:mbergonzi@dmclaw.com)



W. Brian Rambin