



# MEMORANDUM

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**Date:** November 20, 2010  
**To:** Hays Companies Clients  
**From:** Julia Uehling, Minneapolis Risk Services  
**Regarding:** **Non-Group Health Plan Medicare Secondary Payer (MSP) Statute – Private cause of action in federal Medicare lien recovery**

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Both Medicare and an injured claimant can bring a private cause of action if the primary payer of non-group health plan *liability settlements* fails to pay or properly reimburse Medicare for medical treatment or adequately protect Medicare's interests as to future Medicare covered expenses in a settlement, per Medicare Secondary Payer Statute; 42 U.S.C. 1395y(b)(2).

To-date, CMS has not yet specifically defined the Private Cause of Action Statute related to its intent or applicability regarding future Medicare covered expenses. The Medicare Secondary Payer (MSP) provisions have received considerable attention in the courts. Plaintiffs have contested the validity of the provisions and the regulations promulgated by CMS. The effects of the existing Statutes, the regulations promulgated by CMS and case law offer minimal guidance as to how CMS will exercise its authority in recovery efforts for third-party liability settlements. However, CMS has been actively pursuing legal recovery actions.

Medicare and the injured claimant have the ability to collect up to double damages, interest and expenses if litigation is required to pursue recovery. Medicare can exert their right of recovery against any party who benefits from the liability settlement (insurer, self-insured employer, attorneys). If there is a legal finding that there was a primary payer responsible, CMS can recover double damages from that party. The responsibility to pay is placed directly upon the primary payer. Please refer to the attached January 2009 report from Gould & Lamb, "Attorneys Beware!".

An admission of liability is never required to establish primary payer responsibilities. Any payment or settlement to or for the benefit of the injured claimant potentially opens the insurer or self-insured to primary payer responsibilities even though they are denying liability. The insurer or self-insured has this exposure under Title 3, Section 301 of the Prescription Drug Modernization and Improvement Act.

Anyone who received medical care for which Medicare paid and who later received payment from a "primary plan" (including a liability insurer, workers' compensation insurer or self-insured), must, by Statute and regulation, reimburse Medicare within 60 days from the beneficiary's receipt of payment from the primary payer. If the Medicare beneficiary does not repay Medicare within 60 days of a settlement or judgment, the primary payer must also reimburse Medicare, even though it has already reimbursed the beneficiary or another party. While Medicare's practice is to first pursue reimbursement from the beneficiary, it can also pursue recovery from the primary plan and anyone who receives payment from the plan.

Medicare can recover conditional payments (payments made by Medicare on behalf of the primary payer, or liens) made pre-settlement and post-settlement for up to the total amount of the liability settlement. Medicare requires recovery of payments. Until Medicare recovers the full amount to which it is entitled, it will impose severe consequences of denying Medicare coverage to the beneficiary. Medicare has six years to sue for recovery of secondary payments after the primary plan makes payment.

Medicare can claim recovery of the full cost of its past medical outlays regardless of how amounts may be designated in a liability award or settlement, e.g., loss of consortium, special damages, or pain and suffering. Medicare is entitled to be reimbursed for its payments from the proceeds of the award or settlement up to the total amount of the settlement.

An injured claimant can also bring a cause of action for a liability carrier's or self-insured employer's failure to pay or properly reimburse Medicare, despite having executed a complete release or settlement of all future claims. A scenario where a claimant could choose to pursue a private right of action is one where Medicare later denies the claimant coverage because the insurer or self-insured has disregarded Medicare's interests. The claimant's private right of action also provides for double damages.

The recommended course of action to avoid this exposure in liability settlements is to follow the workers' compensation settlement procedures; submitting a proposed settlement to Medicare for their approval, obtaining a Medicare Set Aside (MSA) and getting CMS's sign-off on the settlement.

This information is compiled from a legal opinion dated June 13, 2008 from the law firm of Buckingham, Doolittle & Burroughs as solicited by Gould & Lamb, and from Mr. Kip Daniels, Vice President of Strategic Services, Gould & Lamb, and is intended to be used for informational purposes only and not construed as legal advice or direction.

Please don't hesitate to contact your Hays Companies' representative if additional information or clarification may be helpful.