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A L E R T

SETTLING DEFENDANTS (AND THEIR INSURERS) BEWARE:
ELEVENTH CIRCUIT HOLDS SETTLING INSURER LIABLE
FOR FAILURE TO PROTECT MEDICARE PAYMENTS MADE
BY PRIVATE INSURER

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Congress created an uproar among personal injury tort defendants and their insurers when it passed the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) less than 10 years ago. The \$1,000 per day fine for failure to report to the Centers for Medicare and Medicaid Services (CMS) the resolution (or partial resolution) of a Medicare beneficiary's claim, and the potential for double damages if Medicare liens were not satisfied (a requirement derived from the Medicare Secondary Payer Act (MSP), which long predates the MMSEA), stoked great fear. After thousands of articles, seminars, and hours spent studying the MMSEA's requirements, Medicare no longer is the great concern it was.

A recent decision from the Eleventh Circuit, however, should serve as an important reminder that the MSP and MMSEA are still relevant and that their requirements can extend to payments by private insurers.

In *Humana Medical Plan, Inc. v. Western Heritage Ins. Co.*, No. 15-11436, 2016 U.S. App. LEXIS 14509 (11th Cir. Aug. 8, 2016), Humana sued Western Heritage to recover funds it had paid to Mary Reale, a Humana Medicare Advantage plan enrollee and personal injury plaintiff. Humana

operated as a Medicare Advantage Organization ("MAO"), a private company that provides Medicare coverage to beneficiaries in return for a per capita fee paid to the insurer by CMS, and paid nearly \$20,000 in medical costs incurred by Ms. Reale.

Western Heritage settled the personal injury lawsuit for \$115,000 without determining whether there was a Medicare lien. The release did, however, include a representation that there was no Medicare lien, or other lien or subrogation right, and provided for indemnification of Western Heritage against any such lien. Subsequent to the settlement between Western Heritage and the Reales, but prior to payment, Humana took action to recover the amount of its lien. Western Heritage then attempted to protect Humana's interests, with the Reales refusing to allow Humana to be added as a payee on the settlement check, but agreeing that their attorney would hold \$19,155.41 in trust pending resolution of litigation to determine the amount owed to Humana.

Humana's suit against Western Heritage asserted three causes of action: double damages under the MSP; declaratory relief under the Medicare statutory and regulatory scheme; and damages

under several state law theories. Humana won in the trial court and Western Heritage appealed the determination that the private cause of action provided by the MSP, which enables the Secretary of Health and Human Services, the United States, and the Medicare trust fund to seek reimbursement from a primary payer that fails to pay the government, also applies to a private insurer operating as a MAO.

The Eleventh Circuit upheld the district court, holding that “[t]he statutory text of the MSP Act clearly indicates that MAOs are included within the purview of parties who may bring a private cause of action.”¹ Important to this holding was that Congress considered MAOs on an equal footing with the Secretary, both in terms of being entitled to primary payment following an award to a beneficiary and of being responsible for making payments under the Medicare Advantage plan any time CMS would be responsible for such payments under traditional Medicare.

The Eleventh Circuit was not persuaded that Western had fulfilled its obligations by placing the lien amount into trust, and found that double damages were required by statute.

While concern over the requirements of the MSP and MMSEA has lessened over the years since the MMSEA’s passage, the lesson hard-learned by Western in the *Humana* case is that settling tortfeasors and insurers must remain vigilant in their compliance. The Eleventh Circuit’s opinion notes that, as of 2015, 31% of Medicare-eligible individuals were enrolled in a Medicare Advantage program. Thus, even if CMS has not been vigilant in enforcing its right to penalties from those who fail to report or properly ensure repayment to Medicare, we should anticipate that private entities will. Accordingly, Medicare and Medicare

Advantage should be considered and addressed when handling tort litigation. ♦

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¹ The Third Circuit reached a similar result in *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 367 (3d Cir. 2012).