



## Medicare Advantage lien claims: The other Medicare lien

A MEDICARE ADVANTAGE LIEN CLAIM IS AS POWERFUL AS A LIEN CLAIM BY MEDICARE

Medicare is a healthcare program for Social Security beneficiaries. It is administered by the Centers for Medicare and Medicaid Services (CMS).

Generally, Medicare coverage is for individuals who qualify for Social Security benefits. The Medicare program is controlled by the Medicare Act. (42 U.S.C. § 1395 et seq.) The Medicare Act provides an *option* that allows Medicare beneficiaries to have their Medicare healthcare coverage administered through private insurance companies, under a program called “Medicare Advantage.” (42 U.S.C. § 1395w -21 to -29) This article concerns lien rights under a Medicare Advantage program.

### The four basic parts of the Medicare Act

The Medicare Act has four primary parts that allow for Medicare healthcare.

(The other parts of the Medicare Act are not discussed in this compendium.) The four parts are:

#### **Medicare Part A and Part B**

Medicare Part A, for hospitalization, and Part B, for medical doctors and healthcare services, are known as *original (aka traditional)* Medicare. Original Medicare is a fee-for-service program. The Medicare beneficiary can choose any healthcare provider that honors original Medicare coverage.

Typically, original Medicare pays for a limited number of hospital days and other services under Part A. Under Part B, original Medicare pays a healthcare provider 80% of the provider’s fee, and the beneficiary is required to pay the 20% balance. Private insurance coverage, known as “supplemental” insurance, is available for purchase by the beneficiary. The supplemental insurance, inter alia,

pays the 20% Part B costs and some of the hospitalization expenses not covered by Part A.

#### **Medicare Part C, Medicare Advantage**

The Medicare Act allows a Medicare beneficiary to select a private insurance carrier to provide healthcare coverage instead of healthcare obtained through original Medicare. This elected healthcare plan is known as “Medicare Advantage.” Medicare Advantage is governed by the Medicare Act (42 U.S.C. § 1395w -21 to -29) and funded by CMS, usually on a capitated basis.

The Medicare Advantage private insurance carrier is known as a Medicare Advantage Organization (MAO). The MAO provides all original Medicare Part A and Part B healthcare. Most MAO plans provide additional benefits, such as prescription drugs. At this writing, nearly

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40% of Medicare beneficiaries have healthcare benefits under a Medicare Advantage plan.

#### **Medicare Part D, prescription drug benefit**

Under Part D, a Medicare beneficiary can annually sign-up for prescription drug benefits. It is known as a Part D plan. The prescription drugs are provided to the Medicare beneficiary by a private company. The private company administers the Part D plan. Most Medicare Advantage plans include Part D drug coverage.

The beneficiary pays a small monthly premium. There is a formulary for payment of the prescription drugs between the beneficiary and the Part D provider.

Under the Medicare Act, the Part D plan provider has the same lien claim reimbursement rights as an MAO has under a Medicare Advantage plan. (42 U.S.C. § 1395w-102(4), "Application of Secondary Payor Provisions".) Therefore, it is imperative for a tortiously injured beneficiary who received Part D prescription drugs to notify the Part D plan administrator of a claim against a third-party tortfeasor. Contact with CMS is also advisable.

The balance of this compendium concerns an MAO's right to reimbursement for benefits provided to a tortiously injured beneficiary.

#### **Issuance of identification cards**

All persons who qualify for Medicare receive a Medicare identification card that is red, white and blue. Healthcare that is provided under the red, white and blue card is known as "original" (or "traditional") Medicare.

Persons who opt for a Medicare Advantage healthcare plan will have two cards. The red, white and blue Medicare identification card *and* an identification card issued by the MAO. The MAO card may or may not say it is a Medicare Advantage healthcare provider, but it most likely will explain the basics of the MAO plan.

Unless there is an overlap in coverage periods, Medicare beneficiaries who

are enrolled in an MAO plan cannot use the red, white and blue card for their health care. They can only use the MAO identification card for the healthcare coverage provided by the MAO. A Part D provider may also issue an identification card for the beneficiary to obtain prescription drugs.

Both original Medicare and a Medicare Advantage plan have lien claim rights for medical services provided to a Medicare beneficiary for injuries sustained through the fault of a third party. Since a client has a yearly option to choose original Medicare or a Medicare Advantage plan, medical care for the injuries may have been provided through both programs.

**Caution:** Many clients who qualify for Medicare may mistakenly say they are on Medicare, when in fact they are receiving health care through an MAO plan. Not obtaining and resolving an MAO's lien claim can create substantial penalties assessed against the beneficiary and/or the beneficiary's attorney. Therefore, an attorney representing a Medicare-qualified client should snoop and ask to see the original Medicare red, white and blue card, as well as any identification cards issued by an MAO and Plan D prescription drug provider.

An attorney representing an injured beneficiary should periodically follow up with *both* Medicare and the MAO to determine if either or both provided medical care for the beneficiary's injuries.

#### **The various MAO plans**

Examples of MAO plans are: (1) health maintenance organization (HMO) plans, such as Kaiser, where the beneficiary is bound by Kaiser rules and requirements to use only Kaiser's staff and facilities; (2) Private Fee-for-Service (PFFS) plans that have a network of medical providers – the PFFS plan establishes the beneficiary's co-pay and the amount it will pay treating doctors in the network; and (3) Preferred Provider Organization (PPO) that have a network of doctors, but the PPO allows the beneficiary to seek out-of-network doctors at a higher co-pay cost.

MAO plans can be categorized as one-tier or two-tier. A one-tier MAO plan provides all medical services under its contract *with* the beneficiary. Kaiser is an example of a one-tier MAO. A two-tier MAO plan consists of a first-tier major insurance company (e.g., Humana) that usually contracts with small HMOs or clinics (second-tier) to provide medical care to the beneficiary. The beneficiary contracts not only with the large first-tier MAO insurance carrier but also likely with the small second-tier provider. In two-tier contracts, the first-tier MAO insurer is contractually responsible to pay for emergency services, and the second-tier is probably responsible for all other medical care. An MAO's reimbursement claim should be scrutinized to assure it contains both the MAO's claim for reimbursement and also any second-tier claim for reimbursement, if so allowed under the first-tier and/or second tier contract.

#### **Notice to an MAO of a beneficiary's third-party tort case**

Unlike original Medicare, the MAO has *no* specific statutory or regulatory right to receive notice of a beneficiary's third-party case. Many MAO plans, however, contractually require such notice. Even without a statutory or contractual requirement, it would be foolhardy to not notify an MAO early on, of a beneficiary's pending tort case for damages.

#### **Creation of a right of reimbursement**

Original Medicare's reimbursement rights are enforced by CMS. Medicare Advantage's reimbursement rights are enforced by the MAO that provided the beneficiary's medical care.

**(1) Original Medicare reimbursement rights:** Under certain conditions, original Medicare pays for a Medicare beneficiary's medical care related to a traumatic injury caused by a third-party tortfeasor. For those payments, Medicare calls itself a "secondary payer," and it claims the tortfeasor and its insurance carrier are the "primary payers." Medicare's right

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to recovery is established under the Medicare Secondary Payer Act (MSP). (42 U.S.C. § 1395y.)

Under the MSP, original Medicare claims have priority over other lien claims. (42 U.S.C. 1395y(b)(2)(B)(iii) and (iv).) Subsection (iii) provides Medicare with an independent cause of action to sue and assert a claim for its reimbursement rights against a primary payer. Subsection (iv) grants Medicare a right of subrogation, which allows assumption of the beneficiary's right of recovery against the primary payer.

Persons and entities receiving payment (settlement or bill payment) from a primary payer are also subject to the MSP. They are responsible for satisfying original Medicare's lien claim from the money received from the primary payer, if the primary payer failed to satisfy the lien. The Code of Federal Regulations states:

**Recovery from parties that receive primary payments.** CMS has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment. (42 C.F.R. § 411.24 (g); 42 C.F.R. § 422.108(f) – Medicare Secondary Payer (MSP) procedures; 42 U.S.C. § 1395w-22(g); Section 1395 mm(e)(4).)

Original Medicare reimbursement recovery applies to Medicare Part A and Part B. Sometimes original Medicare's claim is referred to as a "lien," but CMS advises the proper term is a Medicare or MSP "recovery claim." (CMS advisement on "Attorney Services," found on the CMS website, CMS.gov, dated December 9, 2014.)

Medicare's reimbursement rights, as enforced by CMS, are limited to benefits provided by original Medicare. CMS *does not* seek reimbursement for medical care provided by an MAO.

**(2) Medicare Advantage Organization's reimbursement rights:** Reimbursement enforcement under a Part C Medicare Advantage plan is the responsibility of the MAO. Payment of any MAO reimbursement claim is payable directly to the Medicare Advantage contractor and *not*

to Medicare. (See the next section for an explanation of an MAO's reimbursement rights.)

### **Does an MAO have the same private cause of action to recover benefits paid as does original Medicare?**

#### ***Original Medicare has a private cause of action***

Under original Medicare, CMS can seek a \$1,000 per day penalty against a third-party insurance carrier for not notifying CMS of a tort claim by a Medicare beneficiary. Additionally, CMS has a statutory right of a *private cause of action* for *double damages* against everyone, including the tortfeasor, his insurance carrier, the beneficiary, beneficiary's attorney and any other person or entity that is withholding the reimbursement owed to Medicare. (Medicare Secondary Payer Act (MSP), 42 U.S.C. § 1395y(b)(3)(A).) Under the MSP, if original Medicare is not reimbursed within 60 days after resolution of the beneficiary's tort claim, double damages are potentially recoverable by CMS.

Whether the MSP gives an MAO the same *private cause of action* rights with *double recovery* rights is the subject of many court decisions.

#### ***Cases holding an MAO has a private cause of action under the MSP***

A Third Circuit case, *Avandia Marketing etc. adv. Humana Medical Plan* (3rd Cir. 2012) 685 F.3d 353 (Cert. denied April 15, 2013), holds that under the MSP, an MAO has a *private cause of action* against primary payers. The MAO also has the same *double recovery* rights against primary payers, as original Medicare is allowed under the MSP. The MAO's recovery rights apply even when there is no contractual provision for enforcement.

*Avandia* was a drug maker that supplied certain drugs to Humana's beneficiaries. Humana, as an MAO, sued *Avandia* as a primary payer for reimbursement of the money Humana spent in treating its beneficiaries for the irreparable harm caused by *Avandia's* drug. *Avandia*, as a drug maker, was held to be a primary payer under the MSP and doubly liable to Humana for Humana's expenditures in treating its beneficiaries.

A Medicare regulation supports the *Avandia* decision. (42 C.F.R. § 422.108.) The regulation permits an MAO to "exercise the same right to recover from a primary plan, entity or individual that the Secretary [CMS] exercises under the MSP regulations . . ." (Brackets added.) (Also see *Collins v. Wellcare Healthcare Plans, Inc.* (2014) 73 F.Supp.3d 653, for an evaluation and following of *Avandia*.)

In *Collins*, the beneficiary (Collins) settled her injury case with the third-party tortfeasor. The settlement included payment for medical care that the MAO (Wellcare) previously provided for Collins' injuries. Instead of promptly reimbursing Wellcare, Collins, in good faith, placed the medical payment funds in a trust, pending court determination. The court held Wellcare could make a claim for double recovery under the MSP but found no double recovery against Collins, because of Collins's good faith handling of the funds.

In a Sixth Circuit case that followed *Avandia*, an MAO was successful in holding an automobile insurance carrier as a *primary payer* with an obligation to pay double, even though the primary payer insurance carrier claimed its insured was not liable for the injury to the MAO patient. (See *Michigan Spine and Brain Surgeons, PLLC, v. State Farm* (6th Cir. 2014) 758 F.3d 787. See also *Humana Medical Group, Inc. v. Western Heritage Insurance, Co* (11th Cir. 2016) 832 F.3d 1229, 1236, holding an MAO has a "private cause of action" against a primary payer, beneficiary and/or other entities for the costs of medical care provided to the beneficiary; 42 USC § 1395y(b)(3)(A).)

If the reimbursement rights of an MAO are not satisfied, the beneficiary's attorney may be held liable to the MAO for double the amount of the MAO's reimbursement rights. (See *Humana Insurance, Co. v. Paris Blank, LLC* (2016) 187 F.Supp.3d 676, where the beneficiary's attorney, Paris Blank, failed to honor the reimbursement rights of the MAO, Humana. The court found that under the MSP, Humana had a *private right of action* against attorney Paris Blank, and Humana could recover

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double the value of the medical services provided to Paris Blank's tortiously injured client.)

Although *Avandia* holds that an MAO has enforceable lien rights under the MSP, there are no regulations allowing an MAO beneficiary to dispute the lien claim. Certainly, if an MAO has reimbursement rights comparable to those provided to CMS, then the MAO beneficiary should be entitled to the same benefits available to an original Medicare beneficiary. Such original Medicare benefits include attorney fees, costs, waiver rights, appellate rights, etc. It is necessary for an MAO beneficiary to demand those same benefits.

According to a recent case, *Aetna Life Insurance Co. v. Guerrero, et al.* (2018) 300 F.Supp.3d 367, an MAO's rights to a *private cause of action* and *double recovery* under the MSP are only permitted against the "primary payer" insurance carrier. Note: The *Aetna* case is a must-read for anyone involved with an MAO's attempt to recover a lien claim against a beneficiary and/or his/her attorney.

#### **Before the Avandia decision**

Prior to the *Avandia* decision, there were two significant case holdings that required an MAO to have a *contractual* provision that permitted the MAO to seek reimbursement from a beneficiary. (See *Care Choices HMO v. Engstrom* (6th Cir. 2003) 330 F.3d 786 and *Nott v. Aetna* (E.D. Pa. 2004) 303 F.Supp.2d 565.)

#### **Does an MAO, under Avandia, have a private cause of action in California under the MSP?**

Whether an MAO's right of enforcement under *Avandia* has application in California is unclear. However, in *Parra v. PacificCare of Arizona, Inc.* (9th Cir. 2013) 715 F.3d 1146, 1149, the Ninth Circuit recognized an MAO's right to enforce a claim against a primary payer or beneficiary, only if *contractually* provided for in the MAO's agreement with the beneficiary. The *Parra* court observed: "We need not resolve whether *Avandia* was decided correctly because it does not aid PacificCare." (Italics added.) As of this writing, the Ninth Circuit has yet to resolve whether *Avandia* was correctly decided.

#### **Reading resources**

For a good summary of an MAO's direct action rights against primary payers and double recovery rights under the MSP, see *Humana Medical Group, Inc. v. Western Heritage Insurance, Co.* (11th Cir.2016) 832 F.3d 1229, 1236. Not agreeing with the court's holding, Western Heritage requested an en banc hearing. That request was denied, but in 2018 Circuit Judge Tjoflat filed a dissent to the en banc hearing denial. That lengthy dissent is worth reading, as it sets forth arguments against an MAO's direct action and double recovery rights under the MSP. (*Humana Medical Group, Inc. v. Western Heritage Insurance, Co.* (11th Cir. 2018) 880 F.3d 1284)

#### **Redetermination and appellate rights**

Under original Medicare, CMS will timely advise the beneficiary and primary payer of its required reimbursement amount. Included with CMS's monetary reimbursement advisement, CMS will provide forms to be used if the beneficiary desires a reimbursement *waiver*. Along with the waiver forms, CMS will send information on how the beneficiary can commence the five steps for redetermination, administrative law procedures and federal court determination of the amount owing, if waiver is denied. There is no specific statutory requirement for an MAO to advise the beneficiary of his/her waiver rights and the five steps of determination.

In a state of Florida appellate case, the court held a waiver request and the five-step determination process permitted for original Medicare also applied to a dispute with an MAO over the amount of reimbursement money requested by the MAO. (See *Humana Medical Plan, Inc. v. Reale* (2015) 180 So.3d 195, 204-205, where the court listed several jurisdictions that hold the appropriate remedy to dispute an MAO's claim for reimbursement is through a waiver request and the subsequent five steps set forth the Medicare Act; 42 USC § 1395w-22 (g)(5), cross-referencing to 42 U.S.C. § 405.) The *Reale* court, however, did not explain that, unlike original Medicare, there

currently is *no* statute or regulation allowing an MAO beneficiary to seek a waiver of an MAO's requested reimbursement or how to proceed through the five steps to contest an MAO's final lien claim. (Also see *Collins v. Wellcare Healthcare Plans, Inc.* (2014) 73 F.Supp.3d. 653, 662.)

After reading the lack of clarity in cases on this subject, this writer suggests that: 1) the MAO beneficiary obtain the waiver and five steps forms from CMS; 2) name both Medicare and the MAO in the waiver request; and 3) if waiver is denied, proceed through the five steps by naming both Medicare and the MAO. (See companion article on Medicare liens for procedures.)

The five statutory steps to follow are:

- Redetermination request;
- Reconsideration request;
- Hearing before administrative law judge;
- Medicare Appeals Council Review; and
- Federal district court trial.

#### **Penalties for not honoring an MAO lien claim**

Humana Health Care is a prominent provider of Medicare Advantage programs, and it has been a tenacious enforcer of its reimbursement rights. Case rulings on penalties for not honoring the MAO's lien or reimbursement claim are:

- Double recovery against tortfeasor drug maker (*Avandia Marketing etc. adv. Humana Medical Plan* (3rd Cir. 2012) 685 F.3d 353 (Cert. den. April 15, 2013)); Double recovery against beneficiary, if beneficiary malice is proven. (*Collins v. Wellcare Healthcare Plans, Inc.* (2014) 73 F.Supp.3d. 653);
- Double recovery available against a tortfeasor insurance carrier, even though the carrier alleged no liability to pay the claim. (*Michigan Spine and Brain Surgeons, PLLC, v. State Farm* (6th Cir. 2014) 758 F.3d 787);
- Double recovery against beneficiary's attorney for not paying the lien claim from settlement funds. (*Humana Ins. Co. v. Paris Blank, LLC.* (2016) 187 F.Supp.3d 676);

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- Double recovery against tortfeasor's carrier, even though carrier paid the beneficiary's claim. (*Humana Medical Group, Inc. v. Western Heritage Insurance, Co* (11th Cir. 2016) 832 F.3d 1229.)
- Double recovery against an MAO beneficiary, after settlement or judgment, depends on whether the beneficiary was a recipient of money that should have been paid to the MAO and any malicious conduct by the beneficiary after receipt of the money (e.g., dissipating or hiding the funds). Cases on this matter include *Collins v. Wellcare Healthcare Plans, Inc.* (2014) 73 F.Supp.3d. 653, where no malice was found, because the settlement money was put in trust; *Taransky v. USDHHS* (2014) 760 F.3d 307, where settlement agreement release of tortfeasor for medical expenses created an obligation for reimbursement to the MAO; and *Benson v. Sebelius* (2011) 771 F.Supp.2d 68, 75-76, where wrongful death claim included claim for medical bills.

### Recovery after death of the MAO beneficiary

An MAO's collection attempt against the heirs of a decedent who received medical care from an MAO was denied by the Ninth Circuit in *Parra v. PacifiCare of Arizona, Inc.* (9th Cir. 2013) 715 F.3d 1146. The court held the MAO did not have a private cause of action or reimbursement rights under the MSP for two reasons:

First, the *contract* between the MAO and decedent beneficiary did not provide for a private cause of action allowing the MAO to sue the heirs for recovery of the lien amount; and

Second, the heirs brought a survivorship action under Arizona probate law against the tortfeasor and *did not* seek monetary damages for the decedent's medical care related to injuries suffered by the tortious conduct of the third party tortfeasor.

In essence, *Parra* held PacifiCare's right as an MAO to bring a private cause of action was against the first-party payer; i.e., the tortfeasor's insurance carrier. A contrary finding was made in another Arizona probate case.

(See *Estate of Ethridge v. Recovery Management Systems, Inc.*, (2014) 326 P.3d 297.)

In an original Medicare case, negotiations for settlement and settlement by surviving heirs against the tortfeasor did not include recovery of the medical bills incurred and paid by Medicare. (See *Bradley v. Sebelius* (11th Cir. 2010) 621 F.3d 1330, holding the heirs' claim for wrongful death, without claiming payment for medical bills, avoided CMS's claim for reimbursement. Although *Bradley* does not concern an MAO's reimbursement claim, the ruling against original Medicare should also be applicable to a claim by an MAO.)

A legal journal article recommends that heirs of a deceased original Medicare (or MAO) beneficiary *should never* seek medical expenses from a tortfeasor who caused the heir's death. The article states the safest course of action for heirs "is to assert the claim for the full value of the life on behalf of the survivors and never make any claim on behalf of the estate, including the survival action for medical expenses." (See "Protecting Your Client's Wrongful Death Settlement Proceeds from Medicare," Allan Galis and Dennis Keene, *The Brief*, Vol. 43, Number 1, © 2013.) (*The Brief* is a publication of the ABA Tort and Insurance Practice Section.)

### Settlement negotiations with an MAO; attorney fees and costs deductions

For calculation of an original Medicare's final lean claim amount, use Code of Federal Regulation section 411.37, *Amount of Medicare recovery when a primary payment is made as a result of a judgment or settlement*. The same regulation can be employed when calculating the reimbursement amount owed to an MAO. The Code of Federal Regulation section 411.37 regulation is set out verbatim, as follows:

(a) Recovery against the party that received payment:

(1) General rule. Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section, if —

(i) Procurement costs are incurred because the claim is disputed; and

(ii) Those costs are borne by the party against which CMS seeks to recover.

(2) *Special rule*. If CMS must file suit because the party that received payment opposes CMS's recovery, the recovery amount is as set forth in paragraph (e) of this section.

(b) Recovery against the primary payer. If CMS seeks recovery from the primary payer, in accordance with § 411.24(i), the recovery amount will be no greater than the amount determined under paragraph (c) or (d) or (e) of this section.

(c) Medicare payments are less than the judgment or settlement amount. If Medicare payments are less than the judgment or settlement amount, the recovery is computed as follows:

(1) Determine the ratio of the procurement costs to the total judgment or settlement payment.

(2) Apply the ratio to the Medicare payment. The product is the Medicare share of procurement costs.

(3) Subtract the Medicare share of procurement costs from the Medicare payments. The remainder is the Medicare recovery amount.

(d) Medicare payments equal or exceed the judgment or settlement amount. If Medicare payments equal or exceed the judgment or settlement amount, the recovery amount is the total judgment or settlement payment minus the total procurement costs.

(e) CMS incurs procurement costs because of opposition to its recovery.

If CMS must bring suit against the party that received payment because that party opposes CMS's recovery, the recovery amount is the lower of the following:

(1) Medicare payment.

(2) The total judgment or settlement amount, minus the party's total procurement cost.

**Caution:** Before resolving any reimbursement claim with an MAO, ensure that the reimbursement amount includes only care related to the suffered injury, with proper deduction for co-pays.

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### **The settlement agreement with an MAO**

It is suggested the beneficiary's attorney prepares the settlement agreement and release, with consideration given to include any or all of the following provisions:

The MAO will provide future medical care for the injury, even though the underlying reimbursement claim has been resolved;

The MAO will not seek reimbursement from any other person or entity, including, but not limited to, the beneficiary's attorney; medical providers; the primary payer insurance carrier; its insured and attorneys;

The settlement agreement is a release by the MAO of any past and future claims for the medical care provided by the MAO or any of its subsidiaries, contractors and medical providers for the beneficiary's sustained injury.

Upon receipt of payment to resolve its lien claim, the MAO will close its file on its claim and not request any further lien reimbursement.

This release includes any and all reimbursement claims by second-tier providers.

Be creative and protective of future claims by the MAO!!

### **Conclusion**

Based on the *Parra* case set forth above, an MAO's reimbursement right in the Ninth Circuit's jurisdiction is dependent on whether it is contracted for in the MAO agreement. In several other jurisdictions, the MAO is allowed to bring a private cause of action against the primary payer and others under the Medicare Secondary Payer Act (MSP), even when there is no relevant contract provision.

It is highly unlikely current contracts between an MAO and an MAO beneficiary will not contain a private cause of action provision. Therefore, an MAO operating in California will most likely be entitled to all of the reimbursement rights provided by the MSP.

In January 2019, CMS published a *Medicare Learning Notebook*, entitled

"Medicare Secondary Payer." The publication contains important information about the MSP and its application. The publication can be downloaded through the CMS website. (CMS.gov., and go to the Medicare Learning Notebook section.)

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