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**RIGHTS OF RECOVERY OF MEDICARE PART C PLANS
PURSUANT TO THE MEDICARE SECONDARY PAYER ACT**
Executive Summary

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Warning! Medicare Part C plans are gaining traction in their quest to have the exact same rights as traditional Medicare insofar as the Medicare Secondary payer Act.

Under the MSP, 42 U.S.C. § 1395y(b)(2), Medicare is prohibited from paying for accident-related treatment caused by the fault of another person or entity, i.e., a “primary plan.” The only exception to this prohibition on payment concerns Conditional Payments, which are pre-settlement payments made by Medicare that must be reimbursed upon settlement. This reimbursement obligation extends to primary plans and entities that receive payment from primary plans (such as a plaintiff’s counsel).

The legal landscape is not as clear, however, in a third-party liability case where the claimant is a beneficiary of a Medicare Part C plan, or MAO. For instance, the Ninth Circuit (*Parra*) and the Sixth Circuit (*Care Choices*) have held that MAO plans do not have a federally-created cause of action against insureds under the MSP. Rather, those courts have instructed that MAOs must include subrogation clauses within their contracts, which the plans may later seek to enforce through state court action.

On the other hand, CMS, the Third Circuit (*In re Avandia*), and at least two district courts within the Fifth Circuit (*Collins; Humana*) have taken the

position that the MSP—more specifically, § 1395y(b)(3)(A)—provides MAOs a direct, private cause of action against a primary payer, as well as the right to seek double damages. The significance of these decisions is that MAOs do not have to pursue their reimbursement or subrogation rights in state courts, and the amount in controversy is irrelevant as federal question jurisdiction exists. Additionally, from a practical standpoint, CMS apparently has taken the position that MAOs have rights and duties that duplicate those of traditional Medicare. Consequently, MAOs would have a cause of action against a “primary plan” and “an entity that receives payment from a primary plan,” and MAOs could be expected to reduce their recovery to account for attorney’s fees and other legal expenses. Further, for parties to third-party liability claims, it follows that, like a traditional Medicare claim, they would be obligated to notify a MAO of a pending claim involving a MAO beneficiary, and the parties could face double-damages liability for a failure to provide payment to a MAO.