

No. 09-13765-BB

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

CARVONDELLA BRADLEY, et al.,

Plaintiffs-Appellants,

v.

**KATHLEEN SEBELIUS, Secretary of the U.S. Department of
Health and Human Services, UNITED STATES OF AMERICA,**

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFFS-APPELLANTS

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to 11th Cir. Rule 26.1, counsel for Appellants Carvondella Bradley, Joyce Elaine Nieves, Laronda Williams, Chris Crowley, Derrick Burke, Charles E. Burke, Jr., Greg Burke, Cynthia Burke, Beatrice Wells, and Karl Crowley certify that the following have an interest in the outcome of this appeal:

1. Agency for Healthcare Administration c/o Health Management Systems, Inc;
2. Bradley, Carvondella, Plaintiff, individually and as Personal Representative of the Estate of Charles E. Burke, deceased;
3. Burke, Jr., Charles E., Plaintiff;
4. Burke, Cynthia, Plaintiff;
5. Burke, Derrick, Plaintiff;
6. Burke, Greg, Plaintiff;
7. Center for Constitutional Litigation, P.C., Counsel for Appellant;
8. Childs, Randy, Counsel for Alachua County, Florida;
9. Crowley, Chris, Plaintiff;
10. Crowley, Karl, Plaintiff;
11. Davey, Catherine, Probate Counsel for Estate of Charles E. Burke, deceased;
12. Deacon Moulds & Smith, P.A., Counsel for The Manor at Gainesville, Inc.;

13. Faddis, Eric H., Counsel for Appellant;
14. Faddis & Warner, P.A., Counsel for Appellant;
15. Finklestein, Andrew, Counsel for Maximus, Inc. (MMS) d/b/a Maximus Federal Services;
16. First Coast Service Options, Inc., on behalf of Centers for Medicare & Medicaid Services (CMS), Debt Collectors;
17. Florida Regional Medical Center c/o HCA Healthcare;
18. Gallagher Warner, Deborah, Counsel for Appellant;
19. Hale, Eleanor, Counsel for the Department of Health & Human Services;
20. Herrmann, Thomas E., U.S. Administrative Appeals Judge, Department of Health & Human Services, Departmental Appeals Board;
21. Kelly, Gregory J., Magistrate Judge, U.S. District Court, Middle District of Florida;
22. MAF Collection Services, Debt Collector;
23. Nieves, Joyce Elaine, Plaintiff;
24. Office of Medicare Hearings and Appeals, Southern Division;
25. Peck, Robert S., Counsel for Appellant;
26. Presnell, Gregory A., U.S. District Judge, U.S. District Court, Middle District of Florida;
27. Robertson, Zaring P., U.S. Administrative Law Judge, Office of Medicare;

28. Roundtree, Robert, Circuit Judge, Alachua County, Florida;
29. Sebelius, Kathleen, Defendant, Secretary of U.S. Department of Health and Human Services;
30. Stern, Mark B., Counsel for Appellees
31. Tenny, Daniel, Counsel for Appellees
32. United States of America, Defendant;
33. Wells, Beatrice, Plaintiff; and
34. Williams, LaRonda, Plaintiff.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument because of the significance of the issues raised in this appeal.

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**TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT:**

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. Proc. 28, Carvondella Bradley, Joyce Elaine Nieves, LaRhonda Williams, Chris Crowley, Derrick Burke, Charles E. Burke, Jr., Greg Burke, Cynthia Burke, Beatrice Wells, and Karl Crowley (collectively “Appellants”) submit the following:

(A) The U.S. District Court for the Middle District of Florida determined jurisdiction in its Order of June 9, 2008, on the basis of 42 U.S.C. § 405(g). Appellants timely appealed a final decision of the Secretary of the Department of Health and Human Services (“Secretary”) denying their request that, out of an undifferentiated wrongful death settlement, Medicare recover only the proportional amount representing the medical expense recovery of the Estate so that the majority of the recovery belonging to the ten competing survivor claims would not be interfered with unlawfully when Medicare asserted its repayment rights under the Medicare Secondary Payment provision, 42 U.S.C. § 1395y(b).

(B) Appellants appeal as of right the final order and judgment of the United States District Court, issued on July 13, 2009, pursuant to Fed. R. App. Proc. 3. Appellants’ notice of appeal was filed on August 10, 2009.

(C) The U.S. District Court issued its final order on July 13, 2009. Appellants timely filed their notice of appeal on August 10, 2009. This brief is timely filed on September 4, 2009, 25 days after the notice of appeal was filed.

(D) This appeal is from a final order or judgment issued by the U.S. District Court on July 13, 2009. The order adopted and confirmed the report and recommendation of the Magistrate Judge, affirmed the decision of the Administrative Law Judge, denied as moot all pending motions, and directed the Clerk to close the case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellants appeal the final order and judgment of the U.S. District Court for the Middle District of Florida finding that Defendant Secretary of Health and Human Services (“Secretary” or “Medicare”) correctly construed and applied the Medicare Secondary Payer (“MSP”) provisions found at 42 U.S.C. § 1395y(b), which conditions medical expense payments by Medicare on a waivable right to reimbursement when payments for those expenses are received from a third-party source, such as an insurance payment made pursuant to tort liability. *See also* C.F.R. § 411.28 (permitting Medicare to waive or compromise its reimbursement). As a result, Appellants submit the following questions for review:

1. Has the Secretary claimed reimbursement from a wrongful-death settlement that goes substantially and improperly beyond any recovery for medical expenses obtained in settlement by the Estate and which inappropriately included claims of ten survivors unrelated to medical expenses that are not subject to Medicare’s right of reimbursement?

2. Does the Secretary’s willingness to recognize an allocation by a state court that is the result of a full trial on the merits but not an allocation by a state probate court where Medicare was invited to participate but declined to do so a violation of equal protection because the discriminatory treatment is not rationally related to a legitimate governmental objective?

3. Does the Secretary's conclusive presumption against according validity to the state probate court's order allocating damages and its deprivation of the survivors' property in the settlement before the appellate process was complete constitute a violation of due process?

STATEMENT OF THE FACTS

Wrongful Death Claims and Undifferentiated Settlement Recovery

Charles E. Burke ("Decedent," "Burke"), father of the ten Appellants here, died at Shands Hospital at the University of Florida on January 30, 2005. (AR-309). The discharge summary from Shands Hospital states that Charles Burke died as a result of "multi-organ failure secondary to sepsis and wound infection." (App 0001). Medicare paid \$38,875.08 for medical treatments while Burke was hospitalized. (Rep. & Rec. 2, Doc. 39). Prior to being admitted to Shands Hospital, Burke was a patient-resident of The Manor at Gainesville, a nursing home. Appellants, Burke's ten survivors, presented a wrongful death claim to the liability insurance carrier for The Manor at Gainesville, alleging, *inter alia*, nursing home neglect. Appellants' claims were settled by the insurance carrier: Appellants accepted \$52,500.00, all that remained of a declining \$60,000.00 policy, in exchange for a release of their claims. (AR 429-432).¹ At the time, Appellants did

¹ Appellants' rationale for accepting the remaining \$52,500.00 of the \$60,000.00 policy is in their Complaint at paragraph 4 (App 0004).

not differentiate the settlement amount of \$52,500.00 between the amounts that satisfied Appellants' wrongful death claims and the amounts that satisfied the Estate's claim, the claim from which Medicare could recoup medical expenses and costs.² (AR 350-353).

Notification and Medicare's Refusal to Differentiate

Appellants duly notified Medicare of the settlement agreement and that, in addition to the claims of the "survivors/beneficiaries under [Florida's] Wrongful Death Act, [Fla. Stat. § 768.21(6)(b), (7), Medicare is] also entitled to a portion of the settlement." (AR 431).

In its initial calculation of the amount that it claimed in reimbursement under the MSP, Medicare did not attempt to apportion the undifferentiated settlement between those amounts belonging to the ten survivors (AR 422-425) and the medical expenses and costs claimed by the Estate. Appellants, accordingly, reiterated to Medicare that the settlement of \$52,500.00 was "undifferentiated," and that ten wrongful-death survivors had separate claims along with the Estate's claim in the settlement proceeds. (AR 412-413).

Appellants encouraged Medicare to resolve the issue and consider the independent nature of Appellants' claims, but at the same time, notified Medicare

² Appellants did so to avoid any argument by Medicare that the parties engaged in collusion to avoid the Medicare reimbursement obligation owed under 42 U.S.C. §§ 1395y, *et. seq.*

that it would seek a state probate court's decision concerning how much of the settlement should be allotted to the survivors' claims versus the Estate's claim. (AR 414-419; AR 412-413; AR 403-407).

On June 13, 2006, Appellants filed a motion with the state probate court to allocate the settlement proceeds between the claims of the survivors and the Estate, because *under Florida law*, the decedent's personal representative can recover for the decedent's estate only "medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent." Fla. Stat. § 768.21(6)(b). A survivor may recover only "[m]edical or funeral expenses due to the decedent's injury or death that the survivor has paid." Fla. Stat. § 768.21(5). Because Appellants did not pay any of Decedent's medical expenses, only the Estate recovered medical expenses from which Medicare can recover. Medicare responded that "[t]he only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a court order on the merits of the case." (AR 401-402 (citing Center for Medicare & Medicaid Servs., MEDICARE INTERMEDIARY MANUAL, § 3418.7)).

Appellants responded in their July 26, 2006 letter:

[I]t has not been determined how much of the proposed settlement was a recovery of medical expenses in this case. Of course, any such amount for medical expenses would be a component of the estate claim, and

consequently, recoverable by Medicare. However, it is premature at this time to calculate the recoupment discount we are entitled to until the estate's damages are determined by the Court. We are seeking such a determination at the scheduled hearing on August 15, 2006.

(AR 400.)

Appellants provided Medicare adequate notice of the hearing. (AR 408-409; AR 413; AR 410-411.) Medicare declined to appear or participate. Instead, Medicare referred Appellants' debt to the Department of the Treasury. (CAR 397). Medicare determined that, after a reduction for attorneys' fees and costs, it was entitled to reimbursement of \$22,480.89 out of Appellants' \$52,500.00 settlement with the nursing home.

Although the Appellants first requested an appeal in their letter of June 30, 2006 (CAR 412-413), and again reminded Medicare of the request in their letter of August 29, 2006 (CAR 396), Medicare again refused an appeal on September 11, 2006 (CAR 394). When the Appellants were served with the state probate court's Order Determining Medical Expense Recovery and Survivors Recovery in Undifferentiated Wrongful Death Settlement, they immediately notified Medicare urging Medicare to recalculate Medicare's right of reimbursement, and again requested an appeal. (CAR 388-393). The state probate court ordered:

[T]he Court after having heard sworn testimony on the potential value of each child/survivors' independent claim, and after calling on its own experience in the

range of values each child's claim potentially carried, finds that the values asserted by the Personal Representative's counsel in his motion are reasonable, and the Court adopts and specifically finds that each of the respective ten (10) survivors' claims holds a value of at least \$250,000.00. The Court notes that Medicare has asserted a claim of lien based upon payments of \$38,875.08. Therefore, the Court finds that the total, full value of this case had the total, full value been collectible, was/is \$2,538,875.08. (d) Based on principles of equity, the Court determines the medical expense recovery in the instant cause is \$787.50. The Court has calculated such figure based on such component's contribution to the total full value, if such value were collectible. The Court has not prioritized the recovery of medical expenses over the recovery on each of the respective survivors' claims. Further, the Court determines the independent survivors' claims recovery in the instant cause is \$51,712.50. The Court has likewise calculated such figure based on all survivors' claims contributions to the total, full value. *The Court has likewise not prioritized the recovery on each of the respective survivors' claims over the recovery of medical expenses.*

(AR 222-224) (emphasis added).

Medicare responded on October 12, 2006 that “[Medicare] does not allocate the payments made in a settlement between the various claims raised in the case.” Moreover, “[t]he only situation Medicare recognizes allocations of liability payments to nonmedical losses is when payment is based on a court order on the merits of the case.” (AR 386-387; App 0011-0013 (citing MEDICARE INTERMEDIARY MANUAL, § 3418.7)). Despite repeated notifications that Appellants were seeking the state probate court's involvement on differentiating the

undifferentiated settlement, Medicare consistently maintained that it did not intend to engage in allocation or to recognize the state court's decision because it asserted that decision was only advisory or was superseded by federal law. (AR 386; AR 394; AR 401-402). In fact, Medicare rejected the state probate court's opinion, and continued to reject Appellants' request for an appeal. (AR 379).

Appellants next asserted their right of appeal. (AR 375-376). Simultaneously, Appellants paid the alleged debt to Medicare under protest, including an additional interest penalty, and perfected their administrative appeal. (AR 383-384; App 0014-0017).

On February 9, 2007, Medicare again denied Appellants' claims. (AR 361-365). On March 2, 2007, Appellants requested an appeal before the Administrative Law Judge, and a hearing was held on May 10, 2007 (AR 17-55). The ALJ affirmed Medicare's decision and stated in pertinent part:

The Medicare Secondary Payer manual indicates it would honor an agreed allocation, but only if the agreement was reflective of an actual trial and judgment on the merits. An unopposed hearing by a probate judge on a matter which had never been litigated is not equivalent. Although counsel has asserted that evidence was taken by the state court, none was ever placed in the record, and counsel does not suggest the hearing adversarial. The appellant argues that Medicare had notice of the hearings on the allocation motion but did not participate. The fact remains that Medicare was not a party to the probate proceeding. It is also quit[e] (sic) obvious that its interest in recovering medical expenditures was not otherwise represented in the probate hearing. Nominally, the

“estate” quantified a claim for medical expenses, but there is nothing to suggest it had separate counsel or opposed the 1.5% allocation foisted upon the probate court. While the appellant argues that the allocation was fair and reasonable, this does not negate the fact that the probate court did not truly adjudicate the issue on the merits.

(AR 66).

The Medicare Appeals Council affirmed the ALJ’s opinion on the same basis. (AR 01-04). On October 23, 2007, Appellants filed this action in the U.S. District Court for the Middle District of Florida. (App 0002). After fully briefing the merits of the case, the Magistrate Judge issued his report and recommendation on June 11, 2008, holding that the Secretary’s interpretation of the MSP and regulations promulgated in the Medicare manual was reasonable, and, accordingly, that Medicare was entitled to reimbursement for conditional medical expense payments paid on behalf of Decedent. The Magistrate Judge also held that the Secretary was not bound by the probate court’s order. After supplemental briefing, the U.S. District Court for the Middle District of Florida issued its Order adopting the Magistrate Judge’s Report and Recommendation on July 13, 2009, from which Appellants’ appeal here.

SUMMARY OF ARGUMENT

Medicare acknowledges that it has no right of reimbursement under the Medicare Secondary Payer (“MSP”) provisions, 42 U.S.C. § 1395y(b), to

survivors' recoveries for wrongful death claims, which do not include medical expenses or costs, where such recovery was made after a "full trial, on the merits of the case." (AR 386, AR 401-402). Here, however, Medicare asserts a superior right of reimbursement, based on an interpretation of the MSP provisions by the Secretary to Appellants' recoveries for wrongful-death claims where Appellants recovered in an undifferentiated settlement, rather than after a full trial.

This Court should decline to follow the Secretary's interpretation and application of the MSP provisions to Appellants' settlement because it is at odds with federal precedent and fundamental tenets of constitutional law. Appellants' recoveries for wrongful death survivor claims are not the types of claims from which Medicare can recover for conditional payments because by their terms they do not include medical expenses. Medicare, however, may properly recover its share of Decedent Charles Burke's medical expenses from Decedent Estate's recovery, which a state probate court has recognized in apportioning the settlement among Appellants and Decedent's Estate. Medicare, however, declines to recognize the state probate court's order because it was not "adversarial."

The Secretary's interpretation and application of the MSP provisions here leads to absurd and unconstitutional results. Wrongful death survivors, such as Appellants, who settle their claims short of a full trial on the merits are treated differently than are other wrongful death claimants whose judgments are the

product of a “full trial,” without justification or reason and are denied the equal protection of the laws. A defendant in such a trial has no “adversarial” interest in the allocation of the damages between plaintiffs. Thus, the Secretary’s rationale for treating these plaintiffs differently from those who seek recovery through a full trial can only be regarded as pretextual. Appellants also are denied due process of law because they were deprived of the proceeds of their wrongful-death settlement arbitrarily and without constitutionally-mandated process.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court’s examination of the ALJ’s decision *de novo*. *Wilson v. Barnhart*, 284 F.3d 1219, 1221 (11th Cir. 2002); *see* 42 U.S.C. § 1395ff(b)(1)(A) (incorporating into Medicare Act the standard of review set forth in 42 U.S.C. § 405(g)). This Court also may review *de novo* the court’s interpretation of the MSP statute, for it is a question of law over which this Court’s review is plenary. *See United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir. 2009); *see also New York Life Ins. Co. v. U.S.*, 190 F.3d 1372, 1377-78 (Fed. Cir. 1999) (citing *Ed A. Wilson, Inc. v. General Servs. Admin.*, 126 F.3d 1406, 1408 (Fed.Cir. 1997)) (stating standard of review of MSP statute). In reviewing the Secretary’s decision, both this Court and the district court may reverse the decision if it is “arbitrary, capricious, an abuse of discretion, not in accordance with law, or

unsupported by substantial evidence in the record taken as a whole.” *University Health Services, Inc. v. Health & Human Servs.*, 120 F.3d 1145, 1148 (11th Cir. 1997) (citations omitted).

II. THE SECRETARY’S INTERPRETATION OF THE MEDICARE SECONDARY PAYER PROVISIONS IS ARBITRARY AND UNREASONABLE

The Secretary’s interpretation of the MSP provisions with regards to Appellants’ settlement of wrongful death claims is arbitrary and unreasonable and should not be upheld by this Court. The MSP does “not address the issue of apportioned recovery of conditional Medicare payments, either by its language or its structure.” *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir. 1995). Both the Secretary and the court below relied on the **MEDICARE INTERMEDIARY MANUAL**~~ERROR! BOOKMARK NOT DEFINED.~~, § 3418.7, stating that Medicare may “recover[] payments from . . . settlements, whether the settlement arises from a personal injury action or a survivor action.” Centers for Medicare & Medicaid Servs., **MEDICARE INTERMEDIARY MANUAL**, § 3418.7. Under that section of the Manual, Medicare has taken the position that it will only seek reimbursement for damages awarded by judgment or arbitration for medical expenses and not for other losses. *Id.* In implementing that regulation, the Secretary arbitrarily and erroneously refused to credit the survivors with their proportionate share of the settlement.

Under the MSP,

A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

42 U.S.C. § 1395y(b)(2)(B)(ii). Because Medicare conditionally paid \$38,875.08 for Decedent's medical expenses, *see* 42 U.S.C. § 1395y(b)(2)(B)(i), Medicare contends that after reducing its claim to account for attorneys' fees and costs,³ it is entitled to reimbursement of \$22,480.89 out of Appellants' \$52,500.00 settlement with the nursing home.

Under the MSP provisions, Medicare has a right to recover the amount of medical expenses that were conditionally paid from the party responsible for making primary payment, in this case the nursing home – or its liability insurance carrier. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.24(e) (“CMS has a

³ The Secretary's recognition of the legitimacy of the unregulated attorneys' fees and costs as legitimate deductions from the settlement underscores the arbitrariness of her rejection of the determination of the neutral Florida probate court's apportionment of the settlement.

direct right of action to recover from any entity responsible for making primary payment. This includes . . . an insurance carrier . . .”). The Secretary, here, never sought recovery from the nursing home’s liability carrier, as it was empowered to do by statute and by regulation. *See* 42 C.F.R. § 411.24(e). Nor did the Secretary exercise her right under the Medical Care Recovery Act (“MCRA”), 42 U.S.C. § 2651, to obtain a recovery from the nursing home as a tortfeasor. *See United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 874 n.3 (11th Cir. 2003). MCRA provides that “where the Government is obliged to pay for the medical care of a person who is injured ‘under circumstances creating tort liability upon some third person . . . to pay damages therefor,’ the Government has the right to recover from the tortfeasor (or their insurers) the ‘reasonable value’ of the care it provides.” *Id.* (citing 42 U.S.C. § 2651(a); *United States v. Haynes*, 445 F.2d 907, 908-09 (5th Cir. 1971) (discussing history and purpose of MCRA statute)).

Instead, the Secretary maintains that Medicare has a right to recover the medical expenses from an undifferentiated settlement paid to Appellants, Decedents’ survivors, whose claims were not for medical expenses but instead were solely for wrongful death/loss of consortium. As the Fifth Circuit has noted, “The problem with the government’s position is that it is unsupported in the statutory language upon which the government relies.” *Waters v. Farmers Texas County Mut. Ins. Co.*, 9 F.3d 397, 400 (5th Cir. 1993). As survivors who did not

claim recovery of medical expenses, Appellants are not the proper party from whom Medicare should seek reimbursement. Instead, the “government stands exactly in [Medicare beneficiary’s] shoes when recovering from the available insurance funds” and may only claim against that recovery. *Id.* at 401. Thus, if the beneficiary’s “true maximum allotment under the policy is somewhat less than [the amount recovered], then the government can be reimbursed only that amount.” *Id.*

Appellants’ conduct conformed fully with the law. Under Florida law, all claims of survivors of a decedent must be brought by the Personal Representative of the Estate of the decedent. Fla. Stat. § 768.20. Because Appellants as survivors may not recover for “[m]edical or funeral expenses due to the decedent’s injury or death” that they have not paid themselves, Fla. Stat. § 768.21(5),⁴ the amounts awarded to each survivor and to the Estate for medical or funeral expenses “shall be stated separately in the verdict.” Fla. Stat. § 768.22.

The claim was sensibly settled for the full value of the available insurance policy, prior to filing an action. Proceeding to file a lawsuit upon an offer of settlement for the available policy limits would not have served any useful purpose, other than potentially diminishing the recovery further from the costs of

⁴ Florida’s Wrongful Death Act, Fla. Stat. §§ 768.16 *et. seq.*, provides for children of a decedent to bring wrongful death claims, the components of which include loss of parental companionship and mental pain and suffering. Fla. Stat. § 768.21(3).

proceeding. It is accepted judicial and public policy to promote settlement before trial. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1308 n.20 (11th Cir. 2003) (“Public policy favors settlement of disputes without litigation.”); *see* Fed. R. Civ. P. 16(c) (advisory committee note) (“settlement should be facilitated at as early a stage of the litigation as possible”); Fed. R. Evid. 408 (advisory committee note) (“public policy favors the compromise and settlement of disputes”); *see also Bland v. Green Acres Group, L.L.C.*, --- So.3d ----, 2009 WL 1456948 at *9 (Fla. Dist. Ct. App. May 27, 2009) (stating that settlement is so preferred that the “supreme court has forcefully articulated a strong public policy encouraging it”) (citing *Robbie v. City of Miami*, 469 So.2d 1384 (Fla. 1985) (holding “settlements are highly favored and will be enforced whenever possible”)). Moreover, under Florida law, a case may “not be treated any differently because the personal representative expeditiously settled the claim without filing suit.” *Hess v. Hess*, 758 So.2d 1203, 1205 (Fla. Dist. Ct. App. 2000).

Because the parties settled, Appellants do not have a court order or verdict stating the amounts awarded to Appellants, the survivors, and the Estate, respectively. Instead, Appellants sought the next best judicial order and invited Medicare’s participation: an apportionment of the settlement from a state probate court. Florida law establishes that, where a wrongful death claim is settled before a lawsuit is filed, the proper forum for resolving the allocation between survivors, as

well as between survivors and the estate, is the probate court. *Id.* Such an apportionment is determinative as long as the court “employed a reasonable and equitable method of distribution and, accordingly, complied with the requirements of both the Florida Wrongful Death Act and the Florida Probate Code.” *In re Estate of Wiggins*, 729 So.2d 523, 526 (Fla. Dist. Ct. App. 1999).

Medicare may not choose among Florida governmental institutions to credit with a binding decision when Florida itself has designated the probate court as the appropriate entity. A Florida probate court is a court of record, established under the authority of the Florida Constitution. Section 9, article 5 of the Constitution of 1845 “gave the Legislature power of providing for appointment of ‘officer to take probate of wills, to grant letters testamentary of administration and guardianship, to attend to the settlement of the estates of decedents and of minors, and to discharge the duties usually pertaining to Courts of Ordinary, subject to the direction and supervision of the Courts of Chancery, as may be provided by law.” *Simpson v. Gonzalez*, 15 Fla. 9, 1874 WL 2314 (Fla. 1874) (citing THOMP. DIG., 57). More importantly, “[i]n the same act the Legislature provided that the Judge of Probate should have all the powers and perform all the duties theretofore prescribed by law, as powers and duties of Judge of County Court when acting as Court of Ordinary.” *Id.* (citing THOMP. DIG., 58, § 3); *cf. Everett v. Everett*, 215 U.S. 203, 208 (1909) (“The probate court is a court of record, established by the general

court of Massachusetts under the authority of the Constitution of the commonwealth.”). Because the Florida probate court has jurisdiction of the parties and the subject-matter, its order “is as conclusive . . . as the judgments of other courts there.” *Everett*, 215 U.S. at 208 (citations omitted) . Perhaps even more importantly, just as “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions,” *New York v. United States*, 505 U.S. 144, 162 (1992), it has not been understood to confer such authority upon the Secretary whereby she might specify which state courts are sufficiently authoritative that their orders would be observed.

The probate court’s order confirmed that the settlement of Appellants’ wrongful death survivor claims does not contain any recovery for medical expenses. Their recovery for wrongful death claims is rooted in state tort law and does not implicate Medicare benefits. *See, e.g., Ardary v. Aetna Health Plans of Southern California*, 98 F.3d 496 (9th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (holding that state wrongful death claims do not “arise under” Medicare Act and thus are not preempted). The probate court’s order determined that of the \$52,500.00 settlement reached by Appellants, ten portions belong to the surviving children and one portion belongs to the Estate.

Here, the state probate court’s findings must be given full faith and credit under Article IV, section 1, of the Constitution of the United States. *See Cadorette v. United States*, 988 F.2d 215, 218 (1st Cir. 1993) (explaining that federal district court gave full, faith and credit to the decision of the Massachusetts probate court, treating it as “determinative”); *see also Cors v. State Mut. Life Assur. Co.*, 196 F.2d 625, 627 (6th Cir. 1952).⁵ The Secretary’s failure to give credit to the probate court’s order, when she would do so to a state circuit court’s order, raises significant federalism concerns as it overrides the state’s designation of the proper court to make such a determination. Under the canon of constitutional avoidance, the MSP should be construed to give effect to the probate court’s allocation of Appellants’ settlement. *See, e.g., United States v. Steed*, 548 F.3d 961, 968 (11th Cir. 2008) (declining to address constitutional question consistent with canon of constitutional avoidance).

Moreover, the Secretary’s insistence on a “full trial on the merits” would illogically require Appellants to litigate their underlying wrongful death claims until final judgment to obtain Medicare’s recognition that their respective recoveries were for loss of consortium and not for medical expenses within

⁵ *But cf. Voss v. Shalala*, 32 F.3d 1269 (8th Cir. 1994) (explaining that Secretary is not compelled to give full faith and credit to an ex parte judgment or bound by principles of res judicata because she was not a party to the probate court proceeding).

Medicare's reimbursement rights. This is an absurd result and erroneously ignores the general public policy to promote settlement of disputes at as early a stage of the litigation as possible. Extending this absurdity to its logical conclusion in this case, Medicare's right of reimbursement would be eviscerated because litigation costs would likely leave no money for the recovery under the liability insurer's declining policy. Likewise, it would not be far-fetched to conclude that claimants and their counsel would never bring wrongful death claims where a limited, declining policy of insurance existed, and where Medicare, rather than seek recovery from the insurer waited to assert their allegedly superior right of reimbursement against the aggrieved survivors for the bulk, if not all, of the recovery.

III. THE SECRETARY'S APPLICATION OF THE MEDICARE SECONDARY PAYER PROVISIONS VIOLATES APPELLANTS' RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

A. The Secretary's Interpretation of the Medicare Secondary Payer Provisions Violates Appellants' Rights to Equal Protection

The District Court erred by upholding the Secretary's interpretation and application of the Medicare Secondary Payer ("MSP") provisions, 42 U.S.C. § 1395y(b)(2), to Appellants' settlement because it cements in place unconstitutional discrimination between similarly situated individuals.

The Secretary's interpretation of the MSP provisions, as found in the MEDICARE SECONDARY PAYER MANUAL § 50.4.4, requires that Medicare recover payments from settlements, even if the settlement arises from a survivor action and

even if the settlement does not expressly include damages for medical expenses.

The Manual elaborates that

Medicare recognizes allocations of liability payments to nonmedical losses . . . *when payment is based on a court order on the merits of the case.* If the court or other adjudicator of the merits specifically designates amounts that are for payment of pain and suffering or other amounts not related to medical services, Medicare will accept the Court's designation. Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services.

Centers for Medicare & Medicaid Services, MEDICARE SECONDARY PAYER MANUAL, § 50.4.4, *Designations in Settlements*, available at <http://www.cms.hhs.gov/manuals/downloads/msp105c07.pdf> (emphasis added).

The Secretary's interpretation of the MSP to require recoveries from unallocated settlements but to preclude recoveries from post-verdict or post-trial settlements, from payments resulting from a court's judgment "on the merits," and from those recoveries expressly denominated for pain and suffering, violates Appellants' rights to equal protection under the Fourteenth Amendment to the United States Constitution. The Secretary's interpretation improperly draws "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lofton v. Sec'y of Dep't of Children and Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (quoting *Lehr v. Robertson*, 463 U.S. 248, 265 (1983)). Equal protection does not forbid legislative classifications;

however, it forbids those classifications not rationally related to a legitimate state interest. *Id.* at 818 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

The distinction the Secretary draws is between allocations blessed through certain adversary proceedings and those, still having the force of law that are not. (See Rep. & Rec. 17, Doc. 39); see also *Hadden v. United States*, No. 1:08-CV-10, 2009, WL 2423114 at *7 (W.D. Ky. Aug. 6, 2009) (“In other words, had Plaintiff wanted equitable allocation and subrogation principles to apply in this case, then he should have proceeded to trial on the merits of his tort claim in state court.”). Yet, once liability is established at trial, a defendant like the nursing home here has no interest in litigating the allocation between claimants because it does not change the amount it must pay. Thus, there is no adversariness in the determination of any allocation unless there is a dispute between claimants.

The Secretary’s asserted distinction was found patently insufficient by the United States Supreme Court in analogous circumstances involving reimbursement for medical expenses paid by Medicaid. *Arkansas Dep’t of Health & Human Servs. v. Alborn*, 547 U.S. 268 (2006). As in this case, the underlying tort action was settled out of court without an allocation of damages. Like Medicare here, the Arkansas Department of Health and Human Services (ADHS) attempted to justify its claim against the entirety of the settlement, rather than the amount allocated for medical expenses, because of “an inherent danger of manipulation in cases where

the parties to a tort case settle without judicial oversight or input from the State.” *Id.* at 287. The Court found the argument unpersuasive. *Id.* Instead, it found that any risk of collusion “can be avoided” by the agency’s decision to participate in the allocation or submission to a court for decision. *Id.* at 288. On the other hand, the Court said, “a rule of absolute priority [like the one that Medicare asserts here] might preclude settlement in a large number of cases, and be unfair to the recipient in others.” *Id.* In a footnote attached to that statement, the Court favorably cited a Washington Supreme Court decision that held that a state agency “could not ‘share in damages for which it has provided no compensation’ because such a result would be ‘absurd and fundamentally unjust.’” *Id.* at n.18 (citing *Flanigan v. Dep’t of Labor & Indus.*, 869 P.2d 14, 17 (Wash. 1994)). *See also Denekas v. Shalala*, 943 F. Supp. 1073, 1080 (S.D. Iowa 1996) (“avoidance of contrived apportionments do not allow the government to take settlement proceeds to which others are entitled”).

Appellants here gave Medicare ample opportunity to participate in the probate court allocation, but Medicare flatly refused and continued to state throughout the proceedings below that “[Medicare] does not allocate the payments made in a settlement between the various claims raised in the case.” (AR 387). While the MSP provisions do not contain explicit allocation provisions, *see Zinman*, 67 F.3d at 845, Fla. Stat. § 768.25 requires court approval of allocations

under Florida's Wrongful Death Act. In light of other provisions under § 3418.7 where Medicare acknowledges that "it does not seek recovery from portions of awards that are designated as payment for losses other than medical services," MEDICARE INTERMEDIARY MANUAL § 3418.7, it follows that there is no rational basis for the distinction between allocations resulting from adversary proceedings and those that result from a state probate court's order. *See Everett*, 215 U.S. at 208 (citations omitted).

Moreover, it is also irrational to require Appellants to seek a full trial on the merits when a pre-trial settlement would yield the maximum available recovery, a result that furthers the laudable public policy goal of conserving judicial resources and prevents a diminished reimbursement for Medicare as a result of the additional costs that going to trial would ultimately entail and that would be deducted from the corpus available for reimbursement. *See* 42 C.F.R. § 411.37(a)(1) (Medicare pays its share of attorney fees and costs of obtaining the funds). Thus, the Secretary's interpretation actually undermines the purpose of the MSP, which is to "preserve the fiscal integrity of the Medicare system." *Fanning v. United States*, 346 F.3d 386, 388 (3d Cir. 2003) (citing *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir. 1995); H.R. Rep. No. 96-1167, at 352 (1980)).

Because the Secretary's classifications between allocations resulting from adversary proceedings and non-adversary proceedings fails to relate rationally to

the stated purposes of the MSP, it should be invalidated. *See U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 535-38 (1973) (holding that challenged classification is wholly without a rational basis and invalidating the “unrelated person” provision of the food stamp law under the Due Process Clause of the Fifth Amendment, which like the equal protection clause, forbids discrimination). Accordingly, the Secretary’s interpretation of the MSP provisions as applied to Appellants’ settlement violates equal protection.

B. The Secretary’s Interpretation of the Medicare Secondary Payer Provisions Violates Appellants’ Rights to Due Process

The Secretary’s interpretation of the MSP provisions, pursuant to which Medicare required that Appellants pay the alleged debt to Medicare, which Appellants did under protest, including an additional interest penalty (AR 383-384; App 0014-0017), violates Appellants’ rights to due process. Due process safeguards are indisputably applicable to Medicare benefits. *Gray Panthers v. Schweiker*, 652 F.2d 146, 167-72 (D.C. Cir. 1980). Appellants have a property interest in the portions of the settlement that were allocated to the survivors’ claims and in the money that Appellants paid to Medicare as an additional interest penalty, of which they were deprived by government action without constitutionally adequate process. *See Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Wall v. Leavitt*, No. S-05-2553, 2008 WL 4737164 at *10 (E.D. Cal. Oct. 29, 2008)

(“[P]laintiff has a property interest . . . in the total amount of the settlement at the time the tortfeasor’s insurance company pays the settlement amount.”) (holding that plaintiff’s due process rights were not violated).

Medicare was not entitled to the settlement proceeds that it claimed here because, as the Secretary concedes, recoveries by survivors are not subject to reimbursement claims, and the probate court allocated ten portions of the settlement for survivors’ claims and only one portion for the Estate’s claims, from which the Secretary was entitled to seek reimbursal. Medicare also was not entitled to the money that it claimed as interest.

The Secretary’s interpretation of the MSP provisions, permitting it to ignore the probate court’s allocation of damages, constitutes a conclusive presumption that lacks any basis in the statute and fails to further the purposes of the statute rationally. The Supreme Court has long recognized that “[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause.” *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Due Process thus forbids the government from relying on an irrebuttable presumption “when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.” *Id.* at 452. Here, Appellants did all that could reasonably be asked of them to establish a fair allocation of damages, and Medicare had an adequate opportunity to participate in

that allocation. It may not conclusively presume that the allocation is unfair or improper, as it has, without offending the Fifth Amendment's due-process clause.

The Secretary's interpretation would require irrational efforts by Appellants to prove that their recoveries were not compensation for medical expenses conditionally paid for by Medicare. Here, Appellants, in good faith, undertook significant effort to do so, yet Medicare found those efforts insufficient because it did not adjudicate its claims where there was no adversary with whom to do so. Appellants nonetheless informed Medicare that Decedent's survivors' claims did not include claims for medical expenses paid by Medicare, but that those expenses were the exclusive province of the Estate's representative. Furthermore, Appellants notified and invited Medicare to appear at a state probate court proceeding in which the settlement would be apportioned. Medicare declined to appear and then, ultimately, failed to recognize the order from the state probate court apportioning the settlement among the survivors and the representative of the Estate, because it was not represented at that hearing.

The Secretary's position is thus tantamount to having one's cake and eating it, too. Medicare declined to participate in the allocation proceeding, but will not recognize the probate court's order as valid because Medicare didn't participate. The constitutional requirement of due process requires "fundamental fairness." *See, e.g., Florida Agency for Workforce Innovation v. U.S. Dep't of Labor*, 176

Fed.Appx. 85, 97 (11th Cir. 2006) (“The fundamental fairness inherent in administrative due process cannot permit [an administrative official] to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed.”). Medicare’s claim thus provides a classic example of a due-process failure. *Cf. Caperton v. A.T. Massey Coal Co.*, --- U.S. ---, 129 S.Ct. 2252, 2259 (2009) (discussing *Tumey v. Ohio*, 273 U.S. 510 (1927)) (stating that the Due Process Clause reflects the maxim that “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity”) (citations omitted).

Despite Appellants’ attempts to accommodate Medicare’s legitimate interests, Medicare failed to provide any meaningful, constitutionally adequate pre-deprivation process to Appellants.⁶ Medicare instead maintained that it was owed the settlement proceeds, and when Appellants declined to pay in protest, Medicare added interest penalties. When, as here, Medicare demands repayments pursuant to the MSP provisions, “the law permits referral of that demand to the Treasury

⁶ Appellants do not take issue with the post-deprivation procedures, as Appellants have availed themselves of those procedures. Appellants requested reconsideration of Medicare’s initial determination, after which Appellants requested a hearing before an ALJ, appealed to the Medicare Appeals Council, followed by the filing of the instant action in federal court. *See* 42 U.S.C. § 1395ff(b)(1); 42 C.F.R. § 405.904(a).

Department for collection and for reducing other federal benefits (including Social Security benefits), withholding income tax refunds, or for referring the so-called debt to private collectors.” *Merrifield v. United States*, No. 07-987, 2008 WL 906263 (D.N.J. Mar. 31, 2008) (citing 42 U.S.C. § 1395gg; 31 U.S.C. §§ 3716(c), 3720(A)). Appellants were left without any real option but to pay the money to Medicare and, accordingly, were deprived of their property without justification and without constitutionally acceptable process.

Appellants’ situation is not unlike the plaintiff’s in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, the plaintiff could not bring a discrimination action unless the agency made a determination on his claim within 180 days; the agency defeated his claim by simply refusing to act for 181 days. Here, by refusing first to appear at the probate court hearing and then, second, refusing to acknowledge the state probate court’s apportionment of the settlement, Medicare deprived Appellants of the opportunity to apportion the settlement in a way that Medicare would recognize, thereby rendering their portion of the settlement subject to Medicare’s claim. At a minimum, the due process clause requires that Appellants’ be provided a meaningful way to retain their constitutionally protected property interests prior to the government’s deprivation thereof. *Zinerman v. Burch*, 494 U.S. 113, 136 (1990) (holding that the deprivation of the plaintiff’s liberty was predictable and predeprivation process was feasible).

Here, Medicare had an opportunity to participate in a hearing that would have prevented the wrongful deprivation of Appellants' constitutionally protected property, the portion of the settlement that was allocated to the survivors' claims and the money that Appellants paid to Medicare as an additional interest penalty. Medicare's failure to do so, and its continued deprivation of Appellants' property, has violated Appellants' rights to due process.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court reverse the Order of the U.S. District Court for the Middle District of Florida, which affirmed the Secretary's decision, and instead require that the Secretary refund to Appellants the portions of the settlement that do not include medical expenses, the interest penalty assessed, and any other relief as appropriate.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,810 words.



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