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,
U.S. Department of Health and Human Services,

Defendant-Appellee.

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

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Medicare Secondary Payer Act Provides No Support for any Claim out of the Settlement of Appellants' Wrongful Death Case 2

A. There Exists No Statutory Authority for Reimbursement from Payments to Settle Wrongful-Death Claims 6

B. Medicare's Regulations Do Not Authorize Reimbursement of a Decedent's Medical Expenses from Wrongful-Death Settlements 9

II. Medicare Is Not Entitled to Seek Reimbursement from the Entire Settlement Without Allocation of the Portion Attributable to Medical Expenses 12

A. Post-settlement Allocation of Undifferentiated Payments from a Primary Plan Is "Workable" 12

B. The Government's Insistence on a Court Order on the Merits Is Not Workable 14

III. The Government's Insistence Upon a Court Order on the Merits Discourages Settlements and Undermines the Goal of Lowering Medicare Costs 16

IV. Conclusion 19

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213 (1945) 11

Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S.Ct. 1752 (2006) .... *passim*

Denekas v. Shalala, 943 F. Supp. 1073 (S.D. Iowa 1996) 18

Hartford Insurance Co. v. Goff, 4 So.3d 770 (Fla. 2d D.C.A. 2009)........... 14

In re Zyprexa Products Liability Litigation, 451 F. Supp. 2d 458 (E.D.N.Y. 2006) 8

Lee v. CSX Transportation, Inc., 958 So.2d 578 (Fla. 2d D.C.A. 2007).. 4, 11

Mathis v. Leavitt, 554 F.3d 731 (8th Cir. 2009) 10

Saia Motor Freight Line, Inc. v. Reid, 888 So.2d 102 (Fla. 3d D.C.A. 2004) 6

United States v. Baxter International, Inc., 345 F.3d 866 (11th Cir. 2003) 7, 8, 10, 11

Waters v. Farmers Texas County Mutual Insurance Co., 9 F.3d 397 (5th Cir. 1993) 15, 16

Zinman v. Shalala, 67 F.3d 841 (9th Cir. 1995) 3, 12

Statutes

28 U.S.C. § 1411 11

42 U.S.C. § 1395y(b)(2)(B)(ii) .... *passim*

42 U.S.C. § 1396a(a)(25)(H) 18

45 U.S.C. § 51 11

46 U.S.C. § 30104 11

8 U.S.C. § 2672 11

Fla. Stat. § 46.021 5

Fla. Stat. § 768.21 5

Mo. Rev. Stat. § 537.090 10

Regulations

42 C.F.R. § 411.24(i) 13

63 Fed. Reg. 14506 10

SUMMARY OF ARGUMENT

Despite the Government's repeated references to the Medicare Secondary Payer Act as authorizing its position, the plain language of the statute makes it clear that Medicare is entitled to reimbursement solely for third-party payments made "with respect to an item or service" that Medicare originally paid. The statute clearly does not authorize reimbursement from wrongful-death claimants whose settlement recoveries could not, by law, have included medical expenses paid by Medicare.

In *Arkansas Dep't of Health & Human Serv. v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 (2006), the Supreme Court rejected the full reimbursement approach in the Medicaid program that most courts had previously accepted and which the Government attempts to propound before this Court. *Ahlborn* also rejected the rationale that manipulative settlements could deprive the Government of its fair share of payments when the Government chooses not to participate in the allocation. That rationale has no greater gravitational pull as a rational explanation for the arbitrary and unworkable distinction that the Government asserts between allocations that are the result of a trial decision on the merits and those that result from settlement. Finally, the Government does not even attempt to answer Appellants' argument that their position that all funds from a settlement that

is not the result of a court order on the merits amounts to an unconstitutional conclusive presumption.

ARGUMENT

I. The Medicare Secondary Payer Act Provides No Support for any Claim out of the Settlement of Appellants' Wrongful Death Case

In response to Appellants' opening brief, the Government repeatedly asserts that the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. § 1395y(b)(2)(B)(i)-(ii), authorizes reimbursement of Medicare conditional payments it made for medical services when a primary plan makes payments that release it from claims for a Medicare beneficiary's medical expenses. Brief for Appellee 4, 5, 12, 13, 15, 16, 18 [hereinafter, "Br."]. It further states that its claim against the entirety of the settlement, including claims against payments to non-beneficiaries to settle their wrongful death action, was "confirmed by Congress in 2003 amendments to the MSP statute." Br. 13. Yet, the plain language of the statute does not support the Government's broad reading. The relevant MSP provision states:

> 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).[1]

The statute limits any right of reimbursement to payments made "with respect to an item or service" that Medicare funds originally paid. Nothing in the 2003 amendments changes that. The MSP did "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), before the 2003 amendments *or afterwards*. Appellants have asserted that the Secretary's construction of the MSP to include payments made for wrongful death, which, by state statute cannot include past medical expenses, is arbitrary and unreasonable. The Government's repeated reference to the statute does not respond to Appellants' contentions and its brief fails to address them otherwise.

[1] The Government argues that "where, as here, a settlement resolves medical-expense and pain-and-suffering claims, the entire amount is available to reimburse Medicare." Br. 4 (citing, *inter alia*, 42 U.S.C. § 1395y(b)(2)(B)(ii)). Obviously, nothing in the statutory language supports this conclusion. To the contrary, the language's emphasis on "items or services" supports the opposite construction.

Instead, the Government submits that "[f]or evident reasons" "when a claimant enters into a settlement that resolves claims for medical expenses along with other claims. . . . the entire settlement payment is available to reimburse Medicare." Br. 13. The reasons advanced in the Government's brief are neither evident nor persuasive. Nor does the Government's brief satisfactorily address Appellants' contentions that Medicare's interpretation of its statutory authority is arbitrary and unreasonable, that it denies equal protection to those who settle rather than try their tort actions, and that it creates a conclusive presumption in violation of the survivors' due process rights.

Whatever the validity of this view with respect to settlements for personal injury, it is arbitrary and unreasonable in this case, involving separate claims by multiple claimants in a settlement following the death of the Medicare beneficiary. In this context, the Government erroneously overlooks the fundamental distinction between survivor claims by decedent's estate and wrongful death claims by decedent's survivors. Florida makes a cause of action for wrongful death an entirely new and distinct cause of action that exists for enumerated survivors of the deceased. *Lee v. CSX Transp., Inc.*, 958 So.2d 578 (Fla. 2d D.C.A. 2007). The wrongful-death claimants, by law, cannot 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). Such claims may only be brought by the estate's personal representative. Fla. Stat. § 768.21(6) (b).

The government appears to merge the two distinct types of surviving claimants, referring to the "obligations of the estate and of the surviving children to make reimbursement to Medicare." Br. 18. The importance of this distinction is evident from the facts of this case.

Charles Burke, a resident at The Manor at Gainesville a nursing home, became ill and was hospitalized at Shands Hospital at the University of Florida, where he died. Plaintiff Carvondella Bradley, as personal representative, brought suit against the nursing home. That suit included the survivorship claims of the estate, for losses Burke could have recovered in an injury suit if he had survived, including medical expenses as set forth in Fla. Stat. § 46.021. The suit also included ten wrongful-death claims by Burke's ten children to recover for their own losses. By statute, those claims cannot include any of decedent's medical expenses paid by Medicare. *See* Fla. Stat. § 768.21. The survivor claims and wrongful-death claims were brought in a single civil action, as required by Florida law. *Id*. Only the personal representative may bring that action and does so on behalf of all claimants. *Saia Motor Freight Line, Inc. v. Reid*, 888 So.2d 102 (Fla. 3d

D.C.A. 2004). Because the defendant nursing home tendered the entire insurance limits in settlement, Ms. Bradley entered into an agreement with the nursing home's liability carrier and accepted $52,500 on behalf of all claimants in exchange for a release of *all claims*, including the undeniably significant wrongful-death claims, against the nursing home.

Medicare sought reimbursement for medical expenses it paid for Burke's care. The settlement gave no indication how much of the payment was in settlement of the estate's survivorship claim. Nor did it make an allocation between Burke's medical expenses and other losses, though Plaintiffs did not argue against applying all of *the estate's share* to reimbursement of Medicare. Plaintiffs did, however, dispute Medicare's right to any of the money paid to settle the ten wrongful-death claims and sought a designation of how much of the payment should be allocated to those claims, inviting Medicare's participation in that allocation.

A. There Exists No Statutory Authority for Reimbursement from Payments to Settle Wrongful-Death Claims

The language of the MSP does not support Medicare's position that when a settlement releases a claim for medical expenses paid by Medicare the entire settlement amount, including payments made to release other claims by other claimants, may be taken to reimburse Medicare. In fact, 42 U.S.C. § 1395y(b)(2)(B)(ii) expressly provides for reimbursement only for

an "item or service" provided by Medicare from a primary plan's "payment with respect to such item or service." Medicare implicitly acknowledges the validity of this reading of the statute by declining to seek reimbursement from funds paid to release other claims provided that an allocation has been made by a court order on the merits. *See* Br. 16. The government can point to no language in the statute that supports its position, which is, perhaps, why it does not quote any statutory language.

Instead, the Government relies on this Court's decision in *United States v. Baxter International, Inc.*, 345 F.3d 866 (11th Cir. 2003). Br. 13. In that case, the Government sought to intervene in a class action against the manufacturers of breast implants to assert its MSP right to reimbursement from the settlement fund, despite the fact that it could not identify any Medicare beneficiary, any conditional Medicare payment, or the amount of any reimbursement due. *Id.* at 884. The court observed that in the class of 400,000 potential claimants, it was "not only possible but in fact inevitable" that "given the benefit of discovery . . . the Government will turn up a number of claims eligible for reimbursement." *Id.* Thus, in this "unique setting," this Court reasoned it would defeat the purpose of the statute to require the Government to identify any particular claim "at the pleading stage without benefit of discovery." *Id.* at 885. The footnote in *Baxter* cited

by the Government in its brief states only that the settlement fund may be deemed to include claims for medical expenses although no amount was actually designated to be for medical expenses. *Id.* at 899 n.27.

In *Arkansas Dep't of Health & Human Serv. v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 (2006), the Supreme Court reviewed an Arkansas statute that operates as the Government's MSP Manual does, *see* Br. 13, and automatically imposed a lien in favor of Arkansas's equivalent agency on tort settlement proceeds. Arkansas argued, as the Government does here, that its position was authorized by federal Medicaid law. The Court rejected that argument, holding that the only reimbursement that the agency could claim was from the portion of the settlement meant to compensate the recipient for medical costs. As one federal court put it, the *Ahlborn* decision unanimously "rejected the full reimbursement approach in the Medicaid program," that "a majority of the states and the federal government" adopted and courts had previously confirmed, *In re Zyprexa Prod. Liab. Litig.*, 451 F. Supp. 2d 458, 470, 469 (E.D.N.Y. 2006), and which the Government again propounds before this Court.[2]

[2] In *Ahlborn*, the Government filed an amicus brief remarkably similar in its substance and structure. *See* Brief of the United States as Amicus Curiae Supporting Petitioners, *Arkansas Dep't of Health & Human Serv. v. Ahlborn*, No. 04-1506 (filed Nov. 2005), *available at* http://www.justice.gov/osg/briefs/2005/3mer/1ami/2004-1506.mer.ami.html.

The government further suggests that its position "was confirmed by Congress in 2003 amendments to the MSP statute." Br. 13. In particular, the government points to a "Clarifying Amendment" which makes clear that a primary plan's responsibility to pay for the Medicare beneficiary's medical expenses "may be demonstrated based on 'a payment conditioned on the recipient's . . . release (whether or not there is a determination or admission of liability) of payment.'" Br. 13, quoting 42 U.S.C. § 1395y(b)(2)(B)(ii).

The quoted text, however, plainly does not authorize Medicare to seek reimbursement from other claimants receiving payments for other, non-medical claims. Indeed, by explicitly placing a judgment and a settlement of claims on the same footing, Congress in this provision lends support, not to the Government, but to Appellants' contention that Medicare's discrimination against claimants who settle their tort actions rather than pursue them through trial has no sound basis.

B. Medicare's Regulations Do Not Authorize Reimbursement of a Decedent's Medical Expenses from Wrongful-Death Settlements

In the absence of express statutory authority, Medicare argues, "affirmance of Medicare's order is required in light of the deference owed to the agency's interpretation of its own policy and the statute that it implements." Br. 17.

However, the Government points to no policy or regulation supporting reimbursement from wrongful-death settlements. The Government repeatedly cites the Medicare Secondary Payor Manual (MSP Manual) at § 50.4.4 for that proposition. *See* Br. 5, 13, & 16. That section, however, does not purport to seek any reimbursements from awards or settlements for wrongful death. In fact, the provision is explicitly limited to recovery from an award or settlement "from a personal injury action or a survivor action," on the ground that such "liability payments are usually based on the injured or *deceased person's medical expenses*." (emphasis added).[3]

Any doubt on the matter is removed by the agency's own explanation of the then-proposed regulation, cited by this Court in *Baxter.* The agency there stated that its proposed regulations addressed settlements arising "from a personal injury action or a survivor action," which "are usually based on the injured or deceased person's medical expenses." Medicare Program; "Without Fault" and Waiver of Recovery from an Individual as it Applies to Medicare Overpayment Liability, 63 Fed. Reg. 14506, 14514 (proposed

[3] Without any description or much explanation, the Government cites *Mathis v. Leavitt*, 554 F.3d 731, 733 (8th Cir. 2009), as holding that "Medicare is entitled to reimbursement so long as 'the settlement, which settled all claims brought, necessarily resolved the claim for medical expenses.'" However, the Eighth Circuit's decision relied heavily on the fact that Missouri (unlike Florida) authorizes wrongful-death claimants to "recover medical expenses that a decedent suffered between the time of injury and death '[i]n addition' to damages 'for the death and loss.'" *Id*. (citing Mo. Rev. Stat. § 537.090).

March 25, 1998), *cited in Baxter*, 345 F.3d at 899 n.27. Nowhere in that explanation or in the Manual does Medicare make any assertion that it was entitled to reimbursement from wrongful-death settlements nor from liability payments to survivors in wrongful-death actions that do not have a medical expense component.[4]

Finally, the Government insists that its position furthers "the overarching statutory purpose of reducing Medicare Costs." Br. 14. The same argument was explicitly made by the Government in *Ahlborn*, U.S. Amicus Br. 11, and the argument carried no weight with the Supreme Court. Of course, any payment to Medicare would serve that goal; the issue presented here is whether such payment may be demanded from decedent's children, who were not Medicare beneficiaries and whose settled wrongful-death claims, by law, did not include decedent's medical expenses.

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[4] Under Florida law, "[a]ctions for wrongful death are as a matter of history and current practice considered separate and distinct from actions for personal injury." *Lee*, 958 So.2d at 582. It is a creature of statute, rather than the common law, and "is not intended 'to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived.,'" but constitutes "'an entirely new cause of action'" which is based on "'an entirely new right'" in enumerated survivors of the deceased. *Id*. (quoting *Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213, 221 (1945)). As the *Lee* Court noted, "various federal statutes [ ] make explicit reference to wrongful death claims as distinct from personal injury claims." *Id*. (citing 28 U.S.C. § 1411; 28 U.S.C. § 2672; 45 U.S.C. § 51; & 46 U.S.C. § 30104).

II. Medicare Is Not Entitled to Seek Reimbursement from the Entire Settlement Without Allocation of the Portion Attributable to Medical Expenses

A. Post-settlement Allocation of Undifferentiated Payments from a Primary Plan Is "Workable"

The Government contends that it should be entitled to seek reimbursement from the entire settlement amount because "a contrary rule would be unworkable" and would require "a factfinding process to determine actual damages" or "place Medicare at the mercy of a victim's or personal injury attorney's estimate of damages." Br. 14, quoting *Zinman v. Shalala*, 67 F.3d 841, 846 (9th Cir. 1995).[5]

The same argument was made and rejected by the Supreme Court: the "argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation is . . . unpersuasive." *Ahlborn*, 547 U.S. at 288. The Supreme Court blithely noted that, instead of fretting about manipulation, "the risk that parties to a tort suit will allocate away the

[5] In quoting *Zinman*, the Government inaccurately makes it appear that the Ninth Circuit recognized that Congress "sensibly" declined to require such a factfinding process. The reference to Congress, however, does not appear in the opinion but is the Government's own invention. The Ninth Circuit merely noted that apportionment would entail such a factfinding process or acceptance of the parties' estimate. The obvious distaste that the Ninth Circuit expressed for putting "Medicare at the mercy of a victim's or personal injury attorney's estimate of damages," 67 F.3d at 846, was subsequently found to be an insufficient justification for a government agency's taking of an entire settlement by the Supreme Court in *Ahlborn*, 547 U.S. at 288.

State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id*.

Moreover, Medicare would certainly not be placed "at the mercy" of the parties' manipulations. As the Government itself points out, "if Medicare is not reimbursed, the nursing home will still be liable to the federal government," citing 42 C.F.R. § 411.24(i) (a primary payer must reimburse Medicare even if it has already paid a beneficiary or other party). Br. 18-19. The Government further notes that it is not required to sue in order to protect its own interests. Br. 19. However, a course of action is not "unworkable" merely because the Government does not choose to take advantage of it.

In any event, a post-settlement factfinding process to ascertain the portions of the settlement attributable to medical expenses is eminently workable. The Supreme Court in *Ahlborn* noted with apparent approval that "some States have adopted special rules and procedures for allocating tort settlements" to determine subrogation rights to settlement payments. *Ahlborn* at 288 n.18 (citing Brief for Association of Trial Lawyers of America, at 20-21, setting forth examples).

Indeed, Florida courts routinely conduct such post-settlement proceedings. Recently, for example, the court in *Hartford Insurance Co. v.*

Goff, 4 So.3d 770 (Fla. 2d D.C.A. 2009), emphasized that claims by the survivors in a wrongful death action are distinct and separate from the recovery of damages by an estate, and an insurer was entitled to a post-settlement hearing to allocate payments for purposes determining the extent of its workers compensation lien.

B. The Government's Insistence on a Court Order on the Merits Is Not Workable

The Government disparages the probate court's order allocation of the settlement as "no substitute for an adversarial proceeding in which the merits of the claims were actually evaluated." Br. 17. Such an adversary proceeding, though, could hardly be expected to give greater protection of Medicare's interests. If the court found against plaintiffs on their negligence claims against the nursing home, Medicare would be entitled to nothing. If the court found the nursing home liable, Appellants' adversary would have had no greater incentive than it had in the probate court to allocate the payable damages to medical expenses, particularly where, as in this case, the defendant's ability to satisfy a judgment is limited. Moreover, the considerable cost of litigating the case on the merits would have wiped out Medicare's entire claim because the Government concedes that attorneys' fees and expenses should be deducted from the settlement before Medicare is paid.

The Government's argument rests on a claim that the probate court order "cannot alter the obligations of the estate and of the surviving children to make reimbursement to Medicare," citing 42 U.S.C. § 1395y(b)(2)(B)(ii). However, the statute, as previously noted, does not impose any repayment obligation on the surviving children, whose wrongful-death claims are for their own losses, not the decedent's medical expenses. The government ignores Congress's express limitation in the statute to reimbursement for payments for "*an item or service*" it advanced money for. *Id.* (emphasis added).

That is, Congress authorized Medicare to seek reimbursement from the decedent's estate, which received a settlement payment that covered medical expenses paid by Medicare. It does not authorize Medicare to seek repayment from payments to surviving children because those payments are not with respect to medical expenses.

The Government also attempts to distinguish *Waters v. Farmers Texas County Mutual Insurance Co*., 9 F.3d 397 (5th Cir. 1993), which concerned the allocation of funds among several victims of a car accident, only one of whom was a Medicare beneficiary. Br. 18. The court there held, as Appellants here contend, that Medicare was entitled to reimbursement only from the share of the liability insurance payment to the Medicare

beneficiary. It could not seek repayment out of the payment to the non-beneficiaries. The Government's attempt to distinguish the case on the basis that each of the several claimants there could execute a release separately is entirely speculative and without any support in the Fifth Circuit's opinion. *Waters* was an interpleader case; none of the claimants settled their claims. More importantly, the court's holding is directly applicable to this case: the statute authorizes Medicare to obtain reimbursement only from a liability insurance payment that was made "with respect to such item or service" rendered to the beneficiary. 9 F.3d at 400, quoting 42 U.S.C.A. § 1395y(b)(2)(B)(ii). Here, the wrongful death claimants who received payment for their own losses may not be required to repay Medicare for its payment of decedent's medical expenses.

III. The Government's Insistence Upon a Court Order on the Merits Discourages Settlements and Undermines the Goal of Lowering Medicare Costs

Although the Government repeatedly characterizes its distinction between payments based on settlements such as this and those "based on a court order on the merits of the case" as "rational," Br. 18, and attempts to distinguish *Ahlborn* as decided on statutory grounds and involving an uncontested allocation, there is nothing logical about it and the logic of *Ahlborn's* reasoning is inescapable. Moreover, the Government fails to

address Appellants' contention that it has adopted an irrebuttable presumption, in conflict with basic principles of Due Process.

The Government's position both discourages the settlement of tort cases and works against MSP's objective of reducing Medicare's cost. In this case, for example, the Government insists that the decedent's children had to pursue their wrongful-death claims to verdict and judgment, thereby increasing the legal costs that Medicare is required to share, reducing the insurance funds available to pay Medicare, and risking the possibility of a low verdict or a defense verdict, so that there would be no reimbursement at all.

Claiming that it is uncontroverted that the settlement released Appellants' claims for past medical expenses, Br. 16, advances the dispute no more than the fact that it is uncontroverted that the settlement released Appellants' wrongful-death claims. Logic suggests that of the two varieties of claims, the wrongful-death liability was likely the larger one. To suggest that the nursing home would not have settled but for the release of all claims based on medical treatment defies logic. Still, the issue is the allocation of the payment between that release and the releases of the non-medical claims of the ten children. Moreover, the nursing home hardly needed added incentive to settle substantial claims for its relatively low policy limits. It is

the claimants who must decide whether to settle for less than their demand. The disincentive in Medicare's position is obvious: plaintiffs will have no incentive to pursue claims against the tortfeasor if all funds available to pay those claims must go to Medicare. And, as the Supreme Court observed, a state's very similar insistence upon repayment of Medicaid medical expenses from payments on nonmedical claims "might preclude settlement in a large number of cases." *Ahlborn*, 547 U.S. at 288.

The Government brushes aside the relevance of *Ahlborn* and *Denekas v. Shalala*, 943 F. Supp. 1073 (S.D. Iowa 1996), because the parties there stipulated to the allocation of the portion of settlement attributable to medical expenses. Br. 20. In fact, the Supreme Court's decision in *Ahlborn* is directly relevant here. Arkansas asserted repayment of medical expenses paid by Medicaid from liability payments to compensate for other losses, even where the parties designate how much of the settlement is for medical expenses. *Ahlborn*, 547 U.S. at 278. The Court held that the state could look for repayment only to a liability "payment by any other party for such health care items or services" provided by Medicaid under § 1396a(a)(25)(H). The provision at issue is very similar to 42 U.S.C. § 1395y(b)(2)(B)(ii) (reimbursement authorized from "payment with respect to such item or service" provided by Medicare). As here, the State's Department of Health

and Human Services expressed concern that the parties might manipulate the allocation of settlement payment, even though the State had stipulated to the allocation in that case. The Court's discussion directly addresses the argument Medicare makes here:

> *Even in the absence of such a postsettlement agreement*, though, the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision.

Ahlborn, 547 at 288 (emphasis added).

IV. Conclusion

For the foregoing reasons, 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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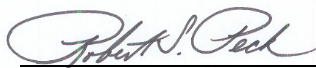
CERTIFICATE OF COMPLIANCE

I certify that the brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,264 words.



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I hereby certify that, on this 30th day of November, 2009, I electronically filed the foregoing Appellants' Reply Brief using the Court's EDF system and also caused a true and correct copy to be served via electronic mail and Federal Express 2nd day delivery on:

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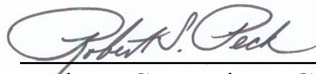

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