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Secondary Payer

Brief Says Supreme Court Review Needed On Limits to Settlement Recovery Authority

The federal government overstepped its Medicare Secondary Payer Act authority when it sought recovery of all of its costs of caring for a Medicare beneficiary from that beneficiary's third-party settlement, the beneficiary argued in a brief filed with the U.S. Supreme Court Aug. 7 (*Hadden v. United States*, U.S., No. 11-1197, *reply brief filed* 8/7/12).

A reply brief filed on behalf of Vernon Hadden said high court review of the issue—whether the government may recover all, as opposed to only an apportioned share, of a beneficiary's settlement with a responsible third party—is necessary because of a split in the federal appeals court circuits that have addressed the issue and because the approach adopted by the appeals court below is at odds with the approach used by courts addressing government settlement recoveries under Medicaid and other federal health care payment programs.

The brief disputed the government's claims, asserted in a brief in opposition filed July 26, that the case was not appropriate for high court review. The government claimed that there is no circuit split, that the U.S. Court of Appeals for the Sixth Circuit properly resolved the case, and that the issue is not of ''national importance,'' which otherwise might justify Supreme Court review.

The government said the Sixth Circuit properly determined that the United States may seek full repayment from a Medicare beneficiary of the amount Medicare provided when the beneficiary settles with a responsible tortfeasor for more than the amount Medicare paid. A petition challenging the Sixth Circuit's November 2011 decision—a 2-1 ruling—was filed March 30.

Petition Seeks Reversal. Hadden, in his petition, argued that the Sixth Circuit majority misinterpreted the MSPA and issued a decision that conflicts with a ruling by the U.S. Court of Appeals for the Eleventh Circuit in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010) and is inconsistent with the U.S. Supreme Court's decision in *Arkansas Dep't of Health & Human Services v. Ahlborn*, 547 U.S. 282 (2006). The high court, in *Ahlborn*, rejected a state's efforts to recover all of its Medicaid costs from a third-party settlement.

''The court's holding is unsupported by the text of the Act and interprets the law contrary to Congress's intent. Attempting to avoid the impact of this Court's *Ahlborn* decision, the court of appeals rewrote the statute to deny Mr. Hadden recovery,'' the petition said.

The Sixth Circuit, in its decision, rejected Hadden's argument that he should repay only one-tenth of Medicare's claim based on the fact that his settlement covered only 10 percent of his total damages. The court ruled that the Medicare statute clearly provides for full reimbursement when a settlement resolves a claim, even if the party believes the settlement only reflected a partial recovery.

A dissent filed in the case said that the majority was incorrect that the statute was clear regarding the amount of recovery. Rather, according to the dissent, the statute is ambiguous and the government's ''absolute priority'' theory of full reimbursement, similar to the Medicaid proposal rejected by the Supreme Court in *Ahlborn*, was not entitled to deference and raised a serious impediment to settlements in a large number of cases.

Accident Settlement. The case stems from an incident in which Hadden was hit in Kentucky by a vehicle owned by Pennyrile Rural Electric Cooperative Corp. The accident was allegedly precipitated by the negligent operation of a second vehicle, which led Hadden to settle with Pennyrile for $125,000.

Prior to the settlement, Hadden was treated for extensive injuries from the accident and his medical bills, totaling $82,036, were conditionally paid by Medicare. Under 42 U.S.C. § 1395y(b)(2)(B)(i), Medicare will pay a beneficiary's expenses if the responsible entity will not promptly pay. Under 42 U.S.C. §§ 1395y(b)(2)(B)(ii) and (iii), however, the federal program may seek reimbursement when the beneficiary receives a settlement.

When Medicare paid Hadden's entire $82,036 medical bill and sought full reimbursement from the $125,000 settlement, Hadden paid the amount under protest. He pursued an administrative appeal, arguing that Pennyrile's car only was 10 percent responsible for the injury, that an unidentified motorist was 90 percent responsible, and that only $8,000 of the $125,000 settlement was meant to compensate him for his medical expenses. The argument was rejected by the Medicare Appeals Council as well as a federal trial court.

Responsible for Full Amount. The Sixth Circuit, in upholding the lower court and MAC rulings, held that Section 1395y(b)(2)(B)(ii) was very clear in providing that ''an entity that receives payment''—Hadden—''shall reimburse'' Medicare ''if it is demonstrated that such primary plan''—Pennyrile—''has or had a responsibility to make payment.'' The issue was what was Pennyrile's ''responsibility'' to make payment to Hadden. The court said language added to the statute by Congress in 2003 made clear that Hadden's theory of 10 percent responsibility was not sound.

 ISSN 1049-7986

The additional language, added by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, said that a primary plan may be shown responsible through a judgment or a settlement that requires a waiver or release of claims even when there is no admission of liability.

''As used in § 1395y(b)(2)(B)(ii), 'responsibility' is no longer an undefined term into which courts might funnel their own notions (or Hadden's) of equitable apportionment,'' the appeals court said, concluding that ''the scope of the plan's 'responsibility' for the beneficiary's medical expenses . . . is ultimately defined by the scope of *his own claim against the third party*.''

Since Hadden requested that Pennyrile pay for all of his medical expenses, he is required to repay Medicare for all its payments. He ''cannot tell a third party that it is responsible for all of his medical expenses, on the one hand, and later tell Medicare that the same party was responsible for only 10% of them, on the other,'' the court said.

The court also rejected what it saw as Hadden's attempt to import irrelevant rules from the Medicaid statute and Medical Care Recovery Act, which he argued did not provide for full reimbursement if there is a discounted settlement.

''[O]ur task in this case is not to fashion a sort of judicial string theory, under which we develop universal principles that harmonize different statutes with different language. Our task instead is to apply the words of the statute at hand,'' the court concluded.

The petitioners are represented by David J. Farber, Kevin P. McCart, and Cordell A. Hull, with Patton Boggs, Washington. The reply brief was filed by Donald B. Verrilli Jr., Stuart F. Delery, Mark B. Stern, and Daniel Tenny, all with the Department of Justice in Washington.

The petition is at http://op.bna.com/hl.nsf/r?Open=psts-8x2nt4. The government's brief in opposition is at http://op.bna.com/hl.nsf/r?Open=psts-8x2nt6. The petitioner's reply brief is at http://op.bna.com/hl.nsf/r?Open=psts-8x2nt8. The Sixth Circuit's decision is at http://pub.bna.com/lw/096072.pdf.

MCR ISSN 1049-7986