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6th Cir: CMS Entitled to Large Portion of Settlement: *Top* [2011-11-23]

By John P. Kamin, Legal Editor

The U.S. Centers for Medicare and Medicaid Services is entitled to take most of an accident victim's settlement money for reimbursement of medical bills paid by Medicare, according to a published decision from the 6th Circuit Court of Appeals that some are calling inequitable.

The 6th Circuit Court of Appeals ruled that Vernon Hadden must pay the Centers for Medicare and Medicaid Services (CMS) $62,338 from his $125,000 settlement pursuant to the Medicare Secondary Payer Act. The case title of the published opinion is Hadden v. US, No. 09-6072, 11/21/11.

Hadden, a Kentucky resident, was injured in 2004 when a vehicle owned by the Pennyrile Rural Electric Cooperative Corp. drove into him. Medicare paid his $82,036 in medical bills because he is a Medicare beneficiary.

Hadden sued and settled his case against Pennyrile for $125,000, only to have CMS demand reimbursement of the $82,036 it paid in medical bills. After accounting for attorney fees, CMS determined that Hadden owed it $62,338.

Hadden attempted to argue that Pennyrile was only 10% liable for his damages, and therefore, the Pennyrile settlement could only be used to pay 10% of Medicare's damages. (He argued that the Pennyrile vehicle drove into him in an attempt to avoid a more negligent motorist.)

The U.S. District Court for the Western District of Kentucky at Bowling Green rejected these arguments, and concluded that the Medicare statute required Hadden to reimburse CMS. A three-judge panel at the 6th Circuit affirmed in a split decision, with Circuit Judge Helene N. White dissenting.

The majority's opinion hinged on the court's interpretation of a MSPA statute, and specifically focused upon the word "responsibility." In short, Congress' use of the word meant that a recovery from a primary payer (Pennyrile) must be used to reimburse Medicare for the full amount of Medicare's claim.

"But the compelling point is that Congress specifically defined the term 'responsibility' in the 2003 amendments to Section 1395y(b)(2)(B)(ii)," the court wrote. "It is that definition, and not the Supreme Court’s construction of a different term in a different statute in Arkansas DHHS v. Ahlborn, that we are bound to apply in this appeal. And under the 2003 definition of 'responsibility,' Hadden was obligated to reimburse Medicare the full amount that it demanded of him."

In her dissent, White wrote that the word "responsibility" merely indicates that the primary

payer is liable to Medicare, but that the statute gives no indication as to the amount that must be paid. She contended that the legislative history did not speak to the amount of reimbursement.

By requiring a large portion of Hadden's settlement, White warned, "The policy at issue here similarly discourages settlements and may ultimately hinder CMS's efforts to recover conditional Medicare payments."

David Farber, Hadden's attorney, told WorkCompCentral that he is still evaluating Hadden's legal options, and has not yet decided whether to file a petition for rehearing or an appeal. At the appellate and trial courts, Farber argued for a statutory interpretation that was similar to the views expressed in White's dissent.

"We had argued to the court that the statute was silent as to how much was owed to the agency in situations where a party reaches a proportional settlement," he said. "The facts in this case were undisputed as to what the proportion was."

When asked about whether the ruling could discourage settlements, Farber said that it was not so much the Hadden decision – but the MSPA policy – that discourages settlements as a whole.

Paul Caleo, an attorney who filed an amicus brief on behalf of the Medicare Rights Center, agreed that the policy discourages settlements. He explained that the Medicare Rights Center and others are lobbying to change the statute itself, in an effort to prevent CMS from taking inequitably large portions of injury victims' awards. While the amicus brief featured statutory interpretation arguments, the inequity of Hadden's situation was the primary theme of the brief.

"The issue that we tried to cover was the larger issue of the inequity that was faced by the Medicare beneficiary, Mr. Hadden himself," Caleo said. "In other words, notwithstanding that he was only paid a small portion of the damages that he actually suffered in the accident, Medicare itself was seeking to recover 100% of conditional payments that they made – which meant that the guy who got injured, the guy that was the Medicare beneficiary – literally got nothing from the settlement that he entered into with at least one of the tortfeasors who was involved in injuring him."

He noted that the 6th Circuit's Hadden decision does not change any prior case law, but rather reinforces how courts are interpreting the statute. He said the 6th Circuit's interpretation of the statute will discourage plaintiffs such as Hadden from settling cases for lower amounts because of concerns that CMS will attempt to claim a 100% reimbursement of medical bills paid.

Caleo believes that this is discouraging some personal injury settlements, which consequently slows payers' attempts to settle cases and reduce costs. The fact that a plaintiff is discouraged from settling also increases defendant's litigation costs, he said.

"We had hoped that over the passage of time, when the courts . . . begin to see how this was impacting the resolution of civil litigation that involves Medicare beneficiaries who for the most part, are over 65 years old," Caleo said. He had hoped that the impacts on beneficiaries

would influence how the courts interpreted the statute.

Although the majority was not persuaded, Caleo noted that it was significant that Circuit Judge White found it persuasive enough to author a well-reasoned dissent.

"I think the dissenting opinion found a way to interpret the statute and not be bound by the holding that Medicare is entitled to 100% recovery no matter what; no matter the other principles of law that may have affected the actual recovery," he said.

The statutory interpretation adopted by the majority has changed the way parties reach settlements, and Caleo warned that next time, CMS could decide to pursue any of the parties involved in an injury case for payment.

"I've talked about this issue with a lot of people, including some of the assistant U.S. attorneys setting up offices around the country to prosecute these cases, and it may not be the injured plaintiff the next time," he said. "It may be the tortfeasor, or the tortfeasor's insurer, the defendant, who is being sued for reimbursement. This is the risk that goes across the board, whether you are the injured plaintiff, the injured plaintiff's attorney, the defendant, the defendant's insurer – who are all the principle players in making the civil justice system work, especially for elderly plaintiffs who are Medicare beneficiaries. Every single one of them now knows, and the Hadden decision just reaffirms it, that it is not a business of how it was. You cannot settle these cases like we used to. You have to be aware that Medicare can seek 100% of what they paid, irrespective of fault, irrespective of other legal principles that affect the civil litigation."

Caleo's point may be best emphasized by the case of USA v. Stricker. In that case, a federal district judge dismissed the case after determining that two different statutes of limitations barred CMS's suit, because it filed its reimbursement suit more than six years after its cause of action accrued. In October, CMS appealed, and now the case is currently pending at the 11th Circuit Court of Appeals.

While Caleo believes that changing the MSPA is the real solution to the aforementioned problems, the current political climate has hampered lobbying efforts to change the MSPA. In the meantime, the lawyers and administrators who are "in the trenches" together must cooperate to design settlements equitably and fairly with the MSPA in mind, he said.

To read the Hadden decision, click on the case title in the sidebar.