

April 5, 2011

## **Medicare Successfully Recovers Conditional Payment in a Wrongful Death Action**

Benson v. Sebelius, 2011 U.S. Dist. LEXIS 30438, involves the issue of Medicare Secondary Payer (MSP) recovery (via summary judgment motions), within the context of a wrongful death claim. A prior case in the eleventh circuit, Bradley v. Sebelius, 621 F.3<sup>rd</sup> 1330 (11<sup>th</sup> Cir.2010) had also discussed this issue but with a very different result. Based upon this most recent case, it would seem the Plaintiff can't have his cake and eat it too.

The Plaintiff, in his capacity as a survivor and administrator of his mother's estate, pursued a wrongful death claim. The claim was predicated upon the decedent's fall within her home and subsequent death. The decedent had been hospitalized for 10 days prior to her death and the expenses were paid by Medicare. The total amount of the hospital expenses paid by Medicare was \$40,213.74. The Plaintiff sued the decedent's landlord and claimed all the medical expenses (Plaintiff had not paid any of the decedent's medical expenses). CMS notified the Plaintiff of the conditional payments made and their right to recovery from any potential settlement. Plaintiff and his attorney were also informed about the opportunity to contest the charges prior to payment. (It should be noted that under 42 U.S.C. 1395y (b) (2) (B) (iii)-(iv) of the Medicare Secondary Payer Act, CMS has both a right of subrogation and an independent cause of action to pursue their recovery).

The lawsuit settled for \$90,000 with 80% of the amount allocated to the wrongful death claim ("wrongful death settlement award") and 20% allocated to the survival claim ("survival settlement award"). The settlement did not allocate specifically for medicals, but did release the landlord from all liens against the proceeds of the settlement, including liens related to the decedent's medical expenses. In May 2007, the settlement was approved (full lien amount to be held in escrow) and in November, 2007, Plaintiff was advised by CMS that the amount of the conditional payments to be reimbursed was now \$25, 868.58 (after deduction for procurement costs and fees). To avoid the imposition of interest and penalties, the Plaintiff paid the amount and pursued his administrative appeals. The Medicare Appeals Council upheld CMS's recovery.



The Plaintiff sought judicial review of the decision. The primary argument advanced was that CMS could only recover from a settlement received by the decedent's estate and not the wrongful death claim. In analyzing this argument, the court noted that the Plaintiff had claimed all the medical expenses that were instrumental in achieving the amount of the settlement. The two cases relied upon by the Plaintiff to advance his argument were distinguishable in that the wrongful death claims in those cases did not claim any medicals. In *Bradley*, a probate court apportioned the settlement between the decedent's estate, which had claimed medicals and the wrongful death claim, which did not. CMS was allowed their recovery against the estate only. In the other case, state law prohibited the parties from claiming medical costs in a wrongful death suit.

The Plaintiff further argued the conditional payment recovery should be limited to the "fracture of the surgical neck of the humerus," which he contended was the only injury related to the accident. The court, in rejecting this argument, noted that the settlement documents in this matter released the landlord not only for the medical expenses but also for damages associated with the "post-fall complications." Of significance to the court was the fact that the Plaintiff provided no evidence that the wrongful death settlement did not include the medical expenses paid by Medicare. The court also rejected the plaintiff's Fifth Amendment due process argument after application of the factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court determined that the Medicare Appeals Board did not err in allowing CMS to recover in the wrongful death action.

The take aways from this case:

1. If medicals paid by Medicare are claimed in the wrongful death case, CMS has a basis for recovery against the settlement proceeds.
2. When drafting settlement documents, thought should be given to the handling of these issues, especially releases. One never knows what language the court may rely upon to make their determination.

For more information, please contact Rochelle Lefler, Executive Counsel, PMSI at [Rochelle.Lefler@pmsionline.com](mailto:Rochelle.Lefler@pmsionline.com) or 813.318.6751.

**Pharmacy | Medical Services and Equipment | Settlement Solutions**

#### **PMSI—Proven Solutions for Cost Containment**

Founded in 1976, PMSI is a leader in developing solutions to control the growth of medical costs in workers' compensation. As one of the nation's largest and most experienced companies focused solely on workers' compensation, we deliver proven solutions for cost containment across the claims lifecycle. PMSI's Pharmacy, Medical Services and Equipment, and Settlement Solutions products deliver quantifiable results and improve the quality of care for injured workers. We provide our customers with the innovation, focus, expertise, analytics and technology needed to successfully deliver workers' compensation benefits.

© 2011 PMSI, Inc. All rights reserved. Proprietary and confidential. Do not copy or distribute outside original intent.