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TOP STORY

October 7, 2010

Medicare not entitled to survivors' wrongful death benefits, Eleventh Circuit rules

Rejecting the Department of Health and Human Services' claim to a large share of a nursing home negligence settlement, the court found that compensation for the loss of a parent belongs to the decedent's children, "not the secretary of HHS." Robert Peck of the Center for Constitutional Litigation, who represented the plaintiffs in Bradley v. Sebelius, said the decision "clears the way to making these cases viable."

Photo: Chip Somodevilla/Getty Images



By Carmel Sileo

In a case of first impression, the Eleventh Circuit ruled last week that Medicare is not entitled to the proceeds of a wrongful death settlement paid to the surviving children of a Medicare recipient. Reversing a lower court decision, the appeals court found that "any claim of the estate is separate and distinct from the claim of a survivor" and that Medicare is entitled only to "the estate's allocated share of the proceeds." (*Bradley v. Sebelius*, 2010 WL 3769132 (11th Cir. Sept. 29, 2010).)

Robert Peck, president of the Center for Constitutional Litigation in Washington, D.C., who represented the plaintiffs, said the decision provides long-overdue clarity on a question that has confounded courts.

"Medicare's insistence that it is entitled to first and full reimbursement has been a problem in settlements, and also in bringing such cases to begin with," he said. "This ruling clears the way to making these cases viable and allowing lawyers to bring real benefit to their clients."

In 2005, Charles Burke died while under the care of a nursing home in Gainesville, Florida. His daughter, Carvondella Bradley, presented a wrongful death claim to the nursing home on behalf of Burke's estate and his 10 surviving children.

The case settled for the facility's insurance limits of \$52,500 before a lawsuit was filed, and Bradley notified the Department of Health and Human Services (HHS)—which administers Medicare—of the settlement. In response, HHS claimed that it was entitled to \$22,481.89 of the settlement proceeds as reimbursement for its share of Burke's nursing home medical expenses.

A Florida probate court hearing to adjudicate the matter was set. Bradley notified HHS of the hearing, but no agency representative attended. The probate court awarded \$787.50 to HHS. The rest was allocated to Burke's children for their nonmedical losses.

HHS disputed the probate court's decision, arguing that it was merely "advisory in nature or superseded by federal law." The agency argued that a clause in its *Medicare Secondary Payer Manual* should control in the case. The clause provides that HHS will accept an allocation of settlement proceeds to nonmedical losses only "when payment is based on a court order on the merits of the case."

HHS ordered Bradley to pay the \$22,480.89 within 60 days. Bradley paid the agency, exhausted her administrative remedies, and then appealed to the district court, which found for HHS.

Writing for the court of appeals, Judge James Hill noted that the facts of the case were not in dispute and that "the issue of first impression in this case is therefore: 'Whose property is the settlement?'"

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In answering that question, Hill found HHS's reliance on the *Medicare Secondary Payer Manual* "unpersuasive" and said it would "have a chilling effect on settlement" because it would force all plaintiffs to bring their claims to trial. Hill also cited Florida's wrongful death statute as the controlling statute in this case.

"Under Florida law, any claim of the estate is separate and distinct from the claim of a survivor," Hill wrote. "All loss of consortium or companionship recoveries are the property of the person who incurred the loss. Not the secretary of HHS. A child's loss of parental companionship claim is a property right belonging to the child. Not the secretary of HHS."

Hill also criticized HHS for "citing no statutory authority, no regulatory authority, and no case law authority, merely rely[ing] upon the language contained in one of its many field manuals," and for failing to attend the probate court hearing.

"Essentially, the court said, 'They had their chance, and they declined, and it's too late to cry now,'" said Peck.

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