

In The
Supreme Court of the United States

—◆—
VERNON HADDEN,

Petitioner,

v.

UNITED STATES,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—

**BRIEF OF *AMICUS CURIAE* OF THE
WORKERS' COMPENSATION SECTION
OF THE STATE BAR OF MICHIGAN
IN SUPPORT OF PETITIONER**

—◆—

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INTEREST OF AMICUS CURIAE¹

The Workers' Compensation Section of the State Bar of Michigan is comprised of 764 attorneys, representing both employers and injured workers, practicing in the field of workers' compensation law in the State of Michigan. The issue raised by the petitioner is of great interest to Michigan lawyers, and in particular, to lawyers practicing in the field of workers' compensation law. At the end of 2011, the State of Michigan Workers' Disability Compensation Agency had 14,386 cases pending administrative hearing resolution.

In Michigan, the vast majority of contested cases are settled by a redemption of liability, a form of settlement in which the worker gives up all claims for past, present, and future benefits. In 2011, 6,816 of 9,206 total dispositions were by way of redemption settlement, representing 74% of the total dispositions for that year. (http://www.michigan.gov/documents/wca/wca2011Annual_Report_380689_7.pdf)

A significant percentage of redemption settlements involve cases with Medicare involvement, either by way of a Medicare Set Aside account for future medical benefits or repayment of conditional payments to Center for Medicare and Medicaid Services. (CMS) In 2011, over \$15 million from workers'

¹ Counsel authored the whole brief and no one else made any monetary contribution to fund the preparation or submission of the brief. Written consent to file this brief has been given by both parties.

settlements were placed in Workers' Compensation Medicare Set-Aside accounts and \$651,714.96 was repaid to Medicare for conditional payments.

As our population ages, more and more retirement age persons are continuing to work well beyond age 65. In 1993, Congress passed amendments to the Social Security Act which allow social security retirement recipients to earn substantial wages without any penalty to their social security retirement benefits. In 2011, Social Security retirement beneficiaries less than full retirement age can earn up to \$14,640.00 without reduction of their old-age benefits, and up to \$33,880.00 if age 66 and older. This has resulted in an increase in older workers and a commensurate increase in Medicare issues in workers' compensation claims. In addition, injured workers may also qualify for Medicare as a result of their eligibility of Social Security disability benefits. In cases where employers are disputing claims made by injured workers who are either retirement or disability social security beneficiaries, conditional payments for medical expenses may be made by Medicare while their cases are pending resolution.

Problems and delays experienced by workers' compensation attorneys in Michigan in obtaining Medicare set aside approvals and determining Medicare conditional payments are substantial, and are a barrier to prompt resolution of claims involving Medicare. In our experience, it often takes up to 3 months to obtain an initial conditional payments letter with an itemized list of payments from the

Medicare Secondary Payment Recovery Contractor (MSPRC), the private contractor utilized by Medicare in recovering conditional payments. Furthermore, despite regulations authorizing compromise of Medicare's right to recovery under the Medicare Secondary Payer Act, the MSPRC routinely does not offer to compromise their demand for conditional payments in cases where the worker is entering into a compromise settlement.

Given the problems Michigan workers' compensation practitioners have encountered with conditional payments under the Medicare Secondary Payer Act, and our concern over the implications of the *Hadden* decision, the elected leadership of the section, comprised of both plaintiff and defense attorneys, voted unanimously to support the petition seeking certiorari in *Hadden v. United States*.



SUMMARY OF ARGUMENT

The Medicare Secondary Payer Act (MSPA), 42 U.S.C. § 1395(y)(b), provides the United States with the means of recovering conditional payments made on behalf of Medicare beneficiaries. A review of the statutory sections of the MSPA indicate a Congressional intent to allow compromise of Medicare's interests in contested legal claims. The regulations promulgated pursuant to the Act improperly preclude tort litigants from the regulations' process of compromising Medicare's interest in tort settlements. The decision of the Sixth Circuit in *Hadden* is legally

unsound, leads to absurd results, and is contrary to the courts' public policy of encouraging settlement of contested claims. This Court should grant the petition for certiorari to settle the conflict between the Sixth and Eleventh Circuits on this important issue.



ARGUMENT

INTRODUCTION

The Medicare Secondary Payer Act, (MSPA), 42 U.S.C. § 1395y(b), allows the federal government to recover conditional payments made for Medicare beneficiaries that may be the responsibility of some other entity, such as a private health insurer or a workers' compensation insurance carrier. Subsection (B)(ii) provides for repayment of the conditional payments made by Medicare where . . . 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). . . ." (emphasis added) The next subsection (iii) empowers the United States to file civil actions to recover conditional payment. It is important to note that the next subsection (iv), provides that the United States is subrogated to the rights of Medicare beneficiaries to the extent of any conditional payments.

In *Hadden v. United States*, 661 F.3d 298 (6th Cir. 2011), the Sixth Circuit held that Medicare had the statutory right to recover 100% of conditional payments made, despite the fact that the “responsible party” in the lawsuit was only responsible for 10% of the liability for plaintiff’s injuries. The interpretation of the MSPA by the Sixth Circuit is at odds with the statutory language evidencing a clear congressional intent giving the United States only a subrogation interest in the injured parties’ claims and the statutory language authorizing waiver and compromise of Medicare claims. If the injured party is limited in settling the claim for only 10% of the potential damages because the only party identified is only 10% at fault, how can the United States subrogation interest be 100% in the *Hadden* case? The Sixth Circuit’s decision defies logic, violates subrogation principles, creates absurd results, and would substantially harm courts’ policies of encouraging settlement of litigated claims. We urge this Honorable Court to grant the petition for writ of certiorari and reverse the Sixth Circuit decision.

I. THE SIXTH CIRCUIT’S DECISION IN *HADDEN* ERRONEOUSLY INTERPRETS THE MSPA.

A careful review of 42 U.S.C. § 1395y(b)(2)(B) evidences a clear congressional intent to provide subrogation rights to the United States in recovering conditional payments by Medicare. These statutory sections also evidence a congressional intent to limit

or entirely waive its rights to reimbursement of conditional payments under certain circumstances. Given these statutory sections, it was error for the Sixth Circuit to hold that the United States is entitled to 100% reimbursement of Medicare conditional payments, regardless of whether the defendant in the lawsuit was 100% liable or not.

Subsection (2)(B) of 42 U.S.C. § 1395y contains five subsections which define the rights of the United States to obtain reimbursement for conditional payments. Subsection (i) provides the authority for Medicare to make a conditional payment where the other party who may be responsible for making the payment cannot be expected to make the payment promptly. This provision is of great benefit to Medicare beneficiaries, since in disputed claims, Medicare will conditionally pay a medical bill while the underlying claim is being disputed or litigated. The fact that Congress did not flatly prohibit payment of medical bills on behalf of Medicare beneficiaries with cases in dispute evidences a congressional intent to assist Medicare beneficiaries, in contrast to the negative consequences of the Sixth Circuit decision below.

Subsection (ii) establishes Medicare's right to repayment from the "primary plan" or any entity that receives payment from a "primary plan." However, Medicare's right to repayment is predicated upon establishing that "such primary plan has or had a responsibility to make payment. . . ." If repayment is not made within 60 days, Medicare may charge interest on the repayment amount.

Subsection (iii) empowers the United States to file an action to recover repayment from any or all entities responsible to make payment under the primary plan, and recover double damages.

Subsection (iv) provides the United States with subrogation rights for payments made conditionally by Medicare:

The United States shall be subrogated (to the extent of payment made under this *title* [42 U.S.C. §§ 1395 *et seq.*] for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

Black's Law Dictionary, revised 4th edition, defines "subrogation" as: "the substitution of one person in the place of another with reference to a lawful claim, demand or right, . . ." Therefore, Congress intended the United States to be limited in its recovery of Medicare conditional payments to the subrogation rights of Medicare beneficiaries.

Subsection (v) gives Medicare the power to waive repayment, in whole *or in part*, where waiver would be in the best interests of the Medicare program:

The Secretary may waive (in whole or in part) the provisions of this subparagraph in the case of an individual claim if the Secretary determines that the waiver is in the best interests of the program established under this *title* [42 U.S.C. §§ 1395 *et seq.*].

In this subsection, Congress authorizes Medicare to compromise its interests in seeking conditional payment recovery from Medicare beneficiaries. Subsection (v)'s authorization of waiver in full *or in part*, combined with subsection (iv) indicating a subrogation interest of the United States, clearly demonstrates Congress did not intend the United States to have an absolute right to 100% recovery of conditional payments in every case.

This statutory framework, demonstrating Congressional intent to allow compromise of Medicare's right to repayment, was ignored by the Sixth Circuit below, which interpreted the word "responsibility" in subsection (ii) as indicating a congressional intent requiring injured plaintiffs to reimburse Medicare 100% of its conditional payments without regard to whether the injured plaintiff entered into a compromise settlement which did not fully compensate the Medicare beneficiary. This interpretation is at odds with subsection (v)'s clear intent that compromise or waiver of repayment should be allowed.

In the regulations promulgated by the Secretary, compromises of conditional payments in workers' compensation claims **are** allowed. At 42 C.F.R. 405.376(g), the factors for consideration of a compromise are set forth:

Factors considered. In determining whether a claim will be compromised, or collection action terminated or suspended, CMS will consider the following factors: (1) Age and health of the debtor, present and potential

income, inheritance prospects, possible concealment or fraudulent transfer of assets, and the availability of assets which may be reached by enforced collection proceedings, for compromise under paragraph (d)(1) of this section, termination under paragraph (e)(1) of this section, and suspension under paragraph (f)(2) of this section; (2) Applicable exemptions available to a debtor and uncertainty concerning the price of the property in a forced sale, for compromise under paragraph (d)(2) of this section and termination under paragraph (e)(1) of this section; and (3) *The probability of proving the claim in court, the probability of full or partial recovery, the availability of necessary evidence, and related pragmatic considerations*, for compromise under paragraph (d)(3) of this section (emphasis added).

The regulation quoted above, which only applies to workers' compensation claims, suggests that the Secretary recognized the need to compromise Medicare's interests in circumstances where the claim may not prevail or may not completely succeed. This regulation properly recognizes the need for the Secretary to compromise the claim in certain circumstances, but the Secretary improperly limited the compromise sections to workers' compensation claims only.

Other regulations promulgated by the Department of Health and Human Services implementing the MSPA also support petitioner's argument that the United States' interest in recovering conditional payments must be tempered by the extent to which

the injured plaintiff fully recovers in the underlying claim. The regulations at 42 C.F.R. 405.355 and following provide the details for waiver of recovery of overpayment. Please remember that Congress modified the term “waiver” in subsection (v) with the language “in whole or in part,” indicating an intent that Medicare compromise its claims in appropriate circumstances. The Sixth Circuit ignored this important factor by holding that Medicare was entitled to its entire amount of conditional payments.

In 42 C.F.R. 405.376(d), the regulations list five reasons that a claim for Medicare conditional payments can be compromised including: “(3) There is real doubt the United States can prove its case in court”; This section of the regulations recognize the reality of compromise settlements in litigated claims. Where liability is disputed and the outcome is uncertain, parties must often compromise their claims, recognizing that complete recovery of all damages is uncertain or may not be realized. In these cases, parties settle claims for a fraction of the potential damages recoverable. Lien holders in civil litigation routinely compromise their claims in civil litigation, because they recognize a stubborn insistence on full payment can force a trial, which can result in zero recovery if the plaintiff does not prevail. If the United States is subrogated to the injured parties’ rights and stands in their shoes, then the United States must also proportionately compromise its claims in a compromise settlement by the Medicare beneficiary. Curiously, without any statutory basis for doing so, the regulations allow Medicare to compromise its

conditional payment recovery in workers' compensation cases, but not other liability cases. See 42 C.F.R. 411.40-47. There is nothing in the MSPA to support excluding liability cases from application of subsection (v), which recognizes that there may be cases where compromise of Medicare's claim for recovery of conditional payments is appropriate.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE THE CURRENT SPLIT BETWEEN THE SIXTH AND ELEVENTH CIRCUITS ON THIS IMPORTANT QUESTION.

The Sixth Circuit's holding that Medicare is entitled to 100% reimbursement from Medicare beneficiaries' compromise settlements directly conflicts with the Eleventh Circuit's decision in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). In *Bradley*, the Eleventh Circuit found that the Medicare Manual was not entitled to deference, and upheld a state court decision giving Medicare a proportionate share of conditional payments. This Court denied certiorari in *Bradley v. Sebelius*, 2012 U.S. LEXIS 2266 (U.S., Mar. 19, 2012).

The lack of uniform enforcement of a federal statute is an important reason for this Court to grant certiorari. Given the increasing numbers of Medicare beneficiaries, both from the increase in social security disability recipients, as well as the demographic bulge of baby boomers reaching retirement age, this

issue is of critical importance to the recovery of Medicare conditional payments.



CONCLUSION

We acknowledge that Medicare has a right to recover conditional payments made for the benefit of Medicare beneficiaries. However, in contested litigation claims, where the plaintiff may be unable to obtain a total recovery of damages, Medicare's interests must be subject to the same proportionate compromise experienced by their subrogor, the injured party. In *Hadden*, the party with primary responsibility for causing the accident injuring the plaintiff could not be found. The only party able to be located and sued was only 10% responsible for the cause of the accident. Given these facts, interpreting the MSPA to entitle Medicare to recover 100% of its conditional payments is absurd and contrary to the public policy encouraging settlement of disputed claims. Congress clearly intended Medicare to stand in the shoes of Mr. Hadden in his litigation. If Mr. Hadden could only recover 10% of his damages in a compromise settlement, then the United States, standing in the shoes of Mr. Hadden, should also be limited to 10% of its recovery of the Medicare conditional payments. Furthermore, there is no statutory basis for Medicare to authorize compromise of Medicare conditional payments in workers' compensation cases, but not other civil litigation. We urge this Honorable

Court to grant the petition for Writ of Certiorari and reverse the Sixth Circuit.

Respectfully submitted,

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