



Legal Bulletin

March 9, 2011

TERMS OF SETTLEMENT-PARTIES BEWARE ArvinMeritor, Inc. v. Clifton Johnson

Enforcement of a settlement that includes a Medicare Set-Aside (“MSA”) has once again surfaced as a point of discussion in yet another workers’ compensation case. Previously the Kentucky Supreme Court held, in the case of Hudson v. Cave Hill Cemetery, 2010-SC-0023-WC, that the amount of the MSA was an “essential” term of the settlement and refused to enforce the settlement agreement. Now an Alabama appellate court in ArvinMeritor, Inc. v. Clifton Johnson, No. 2090822, Court of Civil Appeals of Alabama, has refused to enforce a workers’ compensation settlement involving an MSA under the scenario outlined below.

The Claimant sustained an industrial accident on July 19, 1999. Permanent total benefits were awarded on February 21, 2003 and these benefits, including medical, were provided by the employer, ArvinMeritor, Inc. A third party suit was filed by the Claimant and a confidential agreement/settlement was reached by the parties in November, 2008. The workers’ compensation case was also settled, at that time, under Alabama Code 1975, § 25-5-11.

The parties petitioned the court on January 27, 2009 for approval of the settlement. Relevant portions of the agreement included the following:

- a. [The employee] and [the employer] have agreed to settle all of [the employee's] claims for workers' compensation benefits, including all accrued benefits of any type and all future benefits which might be owed for permanent and total disability, and for the closing of all future medical expenses, in return for [the employer's] waiver of its right to credit or reimbursement under Ala. Code [1975], § 25-5-11(a), and contribution by [the employer] of up to \$65,000 for establishment of a Medicare set aside trust.

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"b. This agreement closes all of [the employee's] rights to workers' compensation benefits of any kind, including, without limitation, medical benefits. A Medicare set aside trust for the future compensable medical expenses of [the employee] will be established. The cost of such Medicare set aside trust is \$83,936.17. Upon entry by this Court of the order described in Paragraph a.

above, [the employer] will contribute up to \$65,000 to fund the Medicare set aside trust, with the balance of the amount necessary to fund such Medicare set aside trust to be paid by [the employee] . The Parties agree that the establishment of an approved Medicare set aside trust will relieve [the employer] of any future medical expense obligation concerning [the employee].

". . . .

As part of the agreement the employer agreed to waive its right to reimbursement upon the court issuing an order approving the settlement and relieving the employer of all responsibility for providing benefits. The issue, in this case, arose when five months later the MSA still had not been established. In the interim, the employer had stopped paying the Claimant's medical expenses and the Claimant filed a petition. The MSA had not been established as the Centers for Medicare & Medicaid Services ("CMS") returned a figure, which was substantially higher than originally anticipated. According to the terms of the agreement, the employer only had to pay a maximum of \$65,000 towards an MSA of \$83,936.17. Thus, the parties had entered into the agreement with the understanding the Claimant would fund the difference (\$18,936.17). It appears that neither of the parties anticipated CMS issuing a counter-high nor prepared for this contingency.

The Claimant argued that he should only have to pay \$18,936.17 and the employer should have to fund the difference above that amount, as it had been represented at settlement that the MSA was \$83,936.17. The employer argued that, according to the terms of the settlement (which had been approved by the court), they were only obligated to pay a maximum of \$65,000 and the Claimant was trying to repudiate the settlement. Further, the Claimant had received third party funds, which the employer argued should be available to fund the difference.

The court, applying principles of equity, found that the Claimant had been induced into settlement with the representation that the MSA was \$83,936.17 and therefore the employer should have to pay the difference above the \$18,936.17 paid by the claimant. The trial court also held that the employer had to pay all medical expenses that were incurred in the interim. Not surprisingly, the employer appealed.

The appellate court concluded that the trial court overstepped its bounds when, in essence, it re-wrote the settlement agreement. Both sides had valid arguments and, if the trial court found fraud in the inducement, the appropriate remedy would have been to set aside the judgment approving the settlement and not incorporate new terms. The appellate court upheld the payment of the medical expenses. The remedy for the employer under Alabama law (if the parties did not resolve this issue) was a hearing to determine the amount of recovery from the third party proceeds (the settlement amount was kept confidential by the trial court). Aside from these findings the appellate court did not provide the parties a resolution but simply an impasse or quite simply legal purgatory.



The lesson from this case is, if parties are going to include an MSA in their settlement and settle prior to CMS approval (assuming submission), contingencies should be considered in the event CMS provides a counter-high. Contingencies; however, are a double edge sword. While they allow the parties an “out” should it be necessary, enforcement issues could arise, especially within the context of whether all contingencies have been fulfilled. Thus, the parties will need to evaluate their cases very carefully when crafting settlement agreements.

For more information, please contact Rochelle Lefler, Executive Counsel, PMSI at Rochelle.Lefler@pmsionline.com or 813.318.6751.