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Medicare Conditional Payment Recovery Takes a Back Seat to Settlement Apportionment in State Court

There appears to be increased activity on Medicare conditional payment demands surrounding wrongful death actions as demonstrated in recent case law. This is probably due to the fact that when Medicare seeks to recover payments from a decedent's estate, recovery rights become blurry and can involve interpretations of both state and federal law. For example, in some cases a state's wrongful death laws will impact whether or not Medicare will be able to recover. The consensus among courts appears to be that if medicals are resolved as part of the wrongful death action, then Medicare has a right to recover conditional payments. If medicals are not claimed as part of the wrongful death action, but rather are just an action on the part of the decedent's heirs, Medicare does not have a right to recover conditional payments.

In *Wasson v. Sebelius*, 2011 U.S. Dist. LEXIS 77771, July 18, 2011, U.S. District Court, Eastern District of Missouri, Northern Division, the court encountered the complicated issues surrounding recovery of conditional payments in wrongful death actions, but also had the task of determining if the action belonged in State or Federal court. The Plaintiff, Martin T. Wasson ("Wasson"), who brought the wrongful death action individually and as the personal representative of the estate of Margaret Suzanne Wasson (the decedent) was served with a letter from the MSPRC alleging that Medicare was owed \$8,327.01 in conditional payments. Wasson initiated an action against the federal government and maintained that any claim of the estate was separate and distinct from the claims of a survivor and that Medicare was entitled only to the estate's allocated share of the proceeds of the settlement.

The St. Louis U.S. Attorney's Office, on behalf of the Department of Health and Human Services ("Defendant"), received the Complaint and removed the matter to Federal Court. Subsequently, Wasson filed a Motion to Remand the matter back to the State court in Marion County, Missouri, where they originally filed the lawsuit. In deciding the Motion to Remand, the Court had to determine if the action was a matter of state or federal law. Wasson alleged that the matter pertained to state law due to the fact that apportionment of the proceeds of a settlement would be dictated by Missouri law. The Defendant argued that Federal court was the proper venue pursuant to 28 U.S.C. § § 1441 and 1442 (a)(1).¹

¹ Section 1441 (a) and (b) provides for removal of actions of which district courts have original jurisdiction. Section 1442 provides for removal when federal officers or agencies are sued.



This court found in favor of the Plaintiff and remanded the matter back to State court to apportion the settlement pursuant to Missouri's wrongful death law. The court further found that Missouri has a combined death and survival statute under which damages may be recovered for the death and also for such damages as the deceased may have suffered between the time of injury and time of death.

This was an interesting case for several reasons. The most interesting factor was that the court was of the opinion that apportionment would apply to the amount Medicare's conditional payment recovery. The Wasson opinion is contrary to the position Medicare normally takes that its conditional payment recovery is superior and not subject to apportionment. In *U.S. v. Hadden*², the court agreed with Medicare's position. However, a recent case of *Bradley v. Sebelius*³ found just the opposite and that to not allow apportionment of conditional payments in settlements would have a "chilling effect." It appears that the Wasson court is in agreement with the Bradley court on the theory that apportionment should apply to Medicare's conditional payment recovery rights.

Wasson was also an interesting finding because the Defendant made what appeared to be a pretty legally sound argument to keep the matter in Federal court. It would seem that the MSP provides the Defendant with original jurisdiction in Federal court and further that the action involved an agency being sued, therefore keeping the action in Federal court would have been proper.

Between subjecting Medicare's recovery to apportionment and remanding the matter back to State court, Medicare certainly may be feeling that conditional payments are not being given the respect as the "super lien" that they once were.

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² *Hadden v. U.S.*, 2009 U.S. Dist. LEXIS 69383, U.S. District Court, Western District of Kentucky, Bowling Green Division.

³ *Bradley v. Sebelius*, 11th Circuit, U.S. Court of Appeals, Middle District, Fla.