

No. _____

**In The
Supreme Court of the United States**

CARVONDELLA BRADLEY, ET AL.,

Petitioners,

v.

U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the spirit and import of the Equal Access to Justice Act, 28 U.S.C. § 2412 (“EAJA”) (fees) violated when one appellate panel sidesteps the undisputed factual and legal findings of a predecessor panel?

PARTIES TO THE PROCEEDING

Petitioners

Carvondella Bradley
Charles E. Burke, Jr.
Cynthia Burke
Derrick Burke
Greg Burke
Chris Crowley
Karl Crowley
Joyce Elaine Nieves
Beatrice Wells
LaRhonda Williams

Respondent

Kathleen Sebelius
Secretary, US Department of Health
and Human Services

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REQUESTED RELIEF

The Petitioners, “The Burkes,” respectfully request this Court to issue a writ of certiorari to review the judgment of the Eleventh Circuit Court. **Appendix A.**



OPINIONS BELOW

There are two opinions at work here. The first is the underlying opinion from the Eleventh Circuit styled *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010), **Appendix C.** The second opinion is of immediate import. It is unreported but appears as a Lexis citation, specifically *Bradley v. HHS*, 2011 U.S. App. LEXIS 22015 (11th Cir. 2011), **Appendix A.**



STATEMENT OF JURISDICTION

This court’s jurisdiction is invoked because the opinion at issue specifically addresses a federal statute, the EAJA, 28 U.S.C. § 2412. See also, 28 U.S.C. § 1254(1).



STATUTORY PROVISION INVOLVED

28 U.S.C. § 2412

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys,

in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.



STATEMENT OF THE CASE

Charles Burke died from wound infection and resulting sepsis at Shands Teaching Hospital at the University of Florida in Gainesville, Florida, in 2005, caused by nursing home neglect resulting in the development of numerous bed sores while he was

rehabilitating in a Florida nursing home. Mr. Burke's ten children, as statutory survivors under Florida's Wrongful Death Act ("FWDA"), as well as the estate, served a notice of suit and demand letter to the nursing home. The "home" responded by tendering the limits of its insurance policy, \$52,500.00. See discussion in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). **Appendix C.**

At that point only one (significant) issue remained amongst the competing claims to the wrongful death settlement, "apportionment." The federal Department of Health and Human Services (hereinafter "HHS") was notified of the settlement and *demand*ed that the Burkes tender (to Medicare) over \$22,000.00 for Charles Burke's (their father's) hospitalization, despite the existence of the ten children's claims as FWDA survivors, competing with the estate's claim (HHS's claim). HHS brushed aside the Burke survivors' position that HHS had no legal right over their claims for wrongful death, and that requiring them to pay for their father's care violated Florida law and would constitute a "taking" of their property without due process of law.¹ In fact, HHS declared it did not allocate settlements, nor would it recognize an allocation short of a "*full trial on the merits.*"

¹ As discussed in more detail in the argument section below, *Florida law* has been static for decades that a family's proceeds from a settlement constitutes personal property – and cannot be taken absent due process of law.

The Florida circuit (trial) court was/is vested with the authority to determine apportionment under Article V of the Florida Constitution, *state statute*, and a myriad of state court opinions. Faced with the HHS dispute, the Burkes filed a petition and motion to differentiate (allocate) with the Florida court (probate division) in Alachua County (North Florida), notifying HHS and inviting them to share their view on the components of damages within the undifferentiated settlement before Judge Robert Roundtree, the circuit (Alachua County) judge. HHS refused, and in fact took the position that it would not honor any such opinion by the circuit court.

Judge Roundtree held an evidentiary hearing and was aware of HHS's demand for a significant percentage of the settlement proceeds. In a three-page order dated September 18, 2006, Judge Roundtree addressed HHS's claim and found that the Burkes, as survivors under the FWDA, as a matter of law were not financially responsible for their father's hospitalization (Medicare). The following quotes are taken verbatim from his 2006 order.

The Court notes that Medicare has asserted a claim of lien based upon payments of \$38,875.08.

* * *

Based on principles of equity the Court determines the medical expense recovery in the instant cause is \$787.50. The Court has calculated such figure based on such component's contribution to the total full value, if

such value were collectible. The Court has not prioritized the recovery of medical expenses over the recovery on each of the respective survivors' claims. Further, the Court determines the independent survivors' claims recovery in the instant cause is \$51,712.50. The Court has likewise calculated such figure based on all survivors' claims contributions to the total, full value. The Court has likewise not prioritized the recovery on each of the respective survivors' claims over the recovery of medical expenses.

The Personal Representative is hereby authorized to report this Court's decision to CMS and Medicare. The Personal Representative is hereby authorized to close on the settlement proceeds determined to be the survivors' collective recovery of \$51,712.50.

See **Appendix D.**

At that point, as a matter of law, comity, and principles of estoppel, this case should have been over. But HHS not only refused to participate in the proceedings or appeal Judge Roundtree's order – **it simply ignored it.** HHS contended that the state court's final order was merely advisory and superceded by its own interpretations, unilaterally promulgated and contained in a field (policy) manual. See *Bradley v. Sebelius*, 621 F.3d at 1334.

HHS's strategic hand was strengthened by the fact that it had turned the collection of the purported debt over to the U.S. Department of the Treasury even

before Judge Roundtree's order was executed, demanding interest from the Burkes as well, thereby forcing the Burkes to tender their property under protest to HHS. Therefore, even in light of Judge Roundtree's order, HHS demanded and unlawfully seized the Burkes' property, holding such property until the Eleventh Circuit Court ordered its return, **Appendix C**. As such, the Burkes had no option but to litigate internally (administratively) with HHS, followed by an "appeal" to the United States District Court in Orlando, Florida, and subsequently an appeal to the Circuit Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. This unnecessary litigation continued for many years because the Burkes, facing the Hobson's choice of three (3) repugnant options discussed *infra*, chose to challenge the unlawful conduct of HHS rather than capitulating to HHS's unlawful interpretations.

The United States District Court upheld HHS's position that its (internal) field manual addressing apportionment was controlling – in direct contravention to Florida law. This was similarly the case at every stop during the exhaustion of the Burkes' administrative appeals within the Medicare administrative arena. An appeal to the Eleventh Circuit Court followed. The question on appeal was whether the district court's decision was "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence in the record taken as a whole." *Bradley*, 621 F.3d at 1335. The *Bradley* court found that the lower court's decision

was unsupported. *Id.* at 1340. HHS was only entitled to assert its right of reimbursement in the Estate's portion of the recovery, or \$787.50 as ordered by Judge Roundtree in *September 2006* – approximately four years earlier.

In reversing, the Eleventh Circuit made a number of important observations. First, the Burkes' proceeds constituted personal property which could not be "taken" by HHS, and the procedure for determining apportionment had long been settled under Florida law. These findings vindicated the Burkes' and their counsel's efforts in defending against the unjustified actions of HHS, not only taken against them for over four years, but against every similarly situated victim for more than thirty years. The court was disturbed by HHS's refusal to respect the decision of the state court.

There is a particularly troubling sub-issue contained in this appeal.

* * *

The secretary declined to take any part in the litigation although at all times her position was adverse to the interest of the surviving children. The probate court made the allocation, finding that the secretary should recover the sum of \$787.50. **Yet, still, the secretary, citing no statutory authority, no regulatory authority, and no case law authority,** merely relied upon the language contained in one of its many field manuals

and declined to respect the decision of the probate court.

Bradley at 1337-1338 (Emphasis added).

* * *

The secretary declined to participate in the probate court's allocation proceeding but won't recognize the probate court's order as valid because she didn't participate. **This paradox has been compared to the oft-told story of the child defendant found guilty of murdering his parents, only to throw himself upon the mercy of the court because he is an orphan.**

Bradley at 1339, n. 19 (Emphasis added).

The Eleventh Circuit concluded that the HHS field manual was not controlling and if the language of the manual applied, it would lead to absurd results and have a chilling effect on settlements. The court repeated the refrain that HHS came to the court without any statutory, regulatory, or case law authority. The court agreed that the Burkes properly turned to the state court for proration. *Bradley* at 1338, **Appendix C.**

After the reversal, HHS returned the Burkes' property to them, and paid an interest penalty of \$10,000.00 to the Burkes for the unlawful seizure and

withholding of such property for over four (4) years.² But it refused to pay any fees to the Burkes, despite the Burkes and their counsel enduring over *four years* of unsubstantiated and obstructive litigation, requiring the commitment of resources including hundreds of hours of attorneys' time. Once again, the Burkes turned to the same district judge who had been reversed by the circuit court for relief under the EAJA.

Fees were sought under two provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and 28 U.S.C. § 2412(d). The latter provision was specifically noted in a fee affidavit filed with the court. **Appendix E.**

[2]8 U.S.C. 2412(d)(2)(A) routinely provides for fees based upon a \$125.00 per hour attorney's fee, which can be modified by the consumer price index (which would yield an hourly fee ranging from \$160.00 to \$175.00 per hour for the relevant time-frame in this case). The court could, it is believed, utilize that rate in connection with the extraordinary work and success of counsel in overturning the secretary's use of its field manual as the beginning and end of its analysis in this case. Clearly, under 28 U.S.C.

² HHS relinquished its right to both seek rehearing, seek rehearing en banc, and seek a writ of certiorari before this Court, a telling indicator of the febleness of its position under an EAJA analysis. See *Pierce v. Underwood*, 487 U.S. 552 (1988).

§2412(d)(2)(A), there were special factors favoring an upward adjustment for the benefit of counsel. See **Appendix E**, Blackwell Affidavit, App. 50-51, ¶ 11.

Despite the expenditure of over 1,000 collective hours by the Burkes' counsel in successfully challenging what the Burkes had consistently maintained was abusive governmental conduct in the taking of their constitutionally protected property without due process, the district court declined to award any fees – zero. The trial judge opined that because most of the judges who heard this dispute agreed with HHS, fees were foreclosed. “The secretary’s position in this particular case was also supported by most of the judges who heard this dispute.” See **Appendix B**.

To whom the district court was referring to by this comment is not entirely clear. Presumably, he was referring to the HHS administrative action, the recommendation of the Orlando magistrate judge, and he, himself. The district court also put great stock in the fact that the Eleventh Circuit’s opinion was a majority (2-1), with a dissent by Judge Martin. But of great moment is what the court overlooked. Specifically, the analysis and statements of the appellate court in its 2010 opinion (**Appendix C**), decades of Florida law, and Judge Roundtree’s 2006 apportionment order. **Appendix D**. A second appeal by the Burkes to the Eleventh Circuit followed.

A different panel was assigned to hear and decide the EAJA fee issue, with the inclusion of Judge

Martin on this panel. This second panel's opinion in upholding the district court's ruling that HHS's conduct was justified (**Appendix A**) contradicts, and is in direct conflict with, the findings of the first panel in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). **Appendix C**. It cannot be overstated that the court in 621 F.3d 1330 determined that the facts in the case were undisputed.



REASONS FOR GRANTING THE WRIT

The reasons for granting the writ can be explained in a nutshell. On the one hand, the first panel of the circuit court, in what can only be described as a caustic rebuke, found that the conduct of HHS was not only unjustified without any legal authority, but was also obstructive, petulant, and “*particularly troubling*.” **Appendix C**. On the other hand, the second panel of the same circuit court, consisting of the dissenting panelist who rejected the Burkes' unconstitutional taking claims previously, found that the conduct of HHS in unlawfully taking the Burkes' property was justified. The second panel's decision was/is mutually exclusive to the first panel's decision, and disregards the paramount public purpose of the EAJA, thereby provoking this petition and argument below on the fallacy of these circumstances.

More particularly, in the first panel's opinion, the court went so far as to compare the conduct of HHS to

a child who killed his parents and then pleaded for mercy for becoming an orphan. The words from the opinion jump from the pages. **Appendix C.**

The secretary's position is that the children are forced to "chip in" a substantial portion of their recovery to make Medicare's recovery 100%. She does not acknowledge that this would constitute a taking of their property with no process.

Bradley v. Sebelius, 621 F.3d 1330, 1333, n. 5 (11th Cir. 2010).

* * *

Counsel for the children and the estate gave adequate notice to Medicare of the probate court proceedings and invited the Secretary's participation. The Secretary declined to appear or to participate.

Id. at 1333.

* * *

The Secretary refused to accept the probate court's determination that she would only recover \$787.50.

Id. at 1334.

* * *

In reviewing the district court's analysis of the Secretary's decision, we may reverse the district court if its decision is "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by

substantial evidence in the record taken as a whole.”

Id. at 1335.

* * *

Florida courts have repeatedly held that proceeds from a wrongful death action are not for the benefit of the estate, rather, that they are the property of the survivors and compensation for their loss.

Id. at 1335.

* * *

The children never received anything from Medicare. They paid none of their father’s medical expenses, nor were they obligated to pay any.

Id. at 1337, n. 13.

* * *

A child’s loss of parental companionship claim is a property right belonging to the child. Not the Secretary of HHS.

Id. at 1337.

* * *

There is a particularly troubling sub-issue contained in this appeal. Here counsel for the estate and for the survivors, out of an abundance of caution, notified the Secretary of the \$52,500 in settlement proceeds

recovered, and invited her view as to the proper division of the funds in an adversarial probate court proceeding.

Id. at 1337.

* * *

Counsel properly turned to the Florida probate court for proration, filing an application with the probate court to adjudicate the rights of the estate and rights of the children vis-a-vis the rights of the Secretary to the compromised sum received in settlement of the claims.

Id. at 1338.

* * *

Counsel did this openly and in good conscience. He notified the Secretary of the pendency of the proceedings and invited the Secretary to participate.

Id. at 1338, n. 17.

* * *

The Secretary declined to take any part in the litigation although at all times her position was adverse to the interest of the surviving children. The probate court made the allocation, finding that the secretary should recover the sum of \$787.50. **Yet, still, the secretary, citing no statutory authority, no regulatory authority, and no case law authority, merely relied upon the language contained in one of its many field**

manuals and declined to respect the decision of the probate court.

Id. at 1337-1338 (Emphasis added).

* * *

Clearly, if the language of the field manual applied, in practice, it would lead to an absurd Catch-22 result. Forcing counsel to file a lawsuit would incur additional costs, further diminishing the already paltry sum available for settlement. This flies in the face of judicial and public policy.

Id. at 1338-1339.

* * *

The Secretary declined to participate in the probate court's allocation proceeding but won't recognize the probate court's order as valid because she didn't participate. This paradox has been compared to the oft-told story of the child defendant found guilty of murdering his parents, only to throw himself upon the mercy of the court because he is an orphan.

Bradley at 1339, n. 19.

* * *

The Secretary's position would have a chilling effect on settlement. The Secretary's position compels plaintiffs to force their tort claims to trial, burdening the court system. It is a financial disincentive to accept otherwise

reasonable settlement offers. It would allow tortfeasors to escape responsibility.

Id. at 1339.

* * *

The Secretary clearly anticipated that a court should determine the issue of allocation between payees. She advised Medicare's field agents that Medicare would recognize allocations of such payments between payees if the allocation is based on a court order. The court involved here was the probate court of the state of Florida. No other court was involved. All parties were notified and invited to participate.

Id. at 1339.

* * *

Without citing any statutory authority, regulatory authority, or case law authority, the Secretary and the district court's reliance upon language in a field manual is unpersuasive. [footnote omitted] The Secretary is not entitled to any share of the Burke surviving children's loss of parental companionship claims.

Id. at 1339-1340.

Considering these findings and the overall tone of the decision, and what one highly-respected lawyer felt was tantamount to an "indictment" of HHS in the case (**Appendix E**, Blackwell Affidavit, App. 52, ¶ 14), it should be no surprise that the Burkes sought fees

under the EAJA, for what they felt was vexatious, unjustified and obstructive conduct by HHS, thereby forcing them to endure what is now more than five years of litigation. 28 U.S.C. § 2412(b)'s vexatious standard and 28 U.S.C. § 2412(d)'s lesser included, "[not] substantially justified" standard. Common sense and common usage of the term "vexatious" supports the Burkes' conclusion. For example, when one looks up the definition of vexatious, it is defined in part as, "[i]nstituted without sufficient grounds. . . ." *The American Heritage Dictionary of the English Language*, American Heritage Publishing Co., Inc. (1970). Vexatious conduct has also been specifically characterized by the Eighth Circuit as conduct that compelled the plaintiff in response, to litigate over his well recognized legal rights. See *SEC v. Zehareas*, 374 F.3d 624, 626-627 (8th Cir. 2004).

Principles of due process and the protection of people's rights to enjoy their property without interference have been fixtures of the English common law since clause 39 was included within the Magna Carta in 1215. This concept in one form or another, was brought to the American shores at least by the time the first permanent English colony was established at Jamestown in 1607, and was ultimately lobbied to be included in the Constitution of the United States by this country's second president James Madison, who successfully obtained its inclusion as the Fifth Amendment to the U.S. Constitution in 1791. It cannot be contended by HHS herein, that due process principles under either the U.S. Constitution or Florida's state

constitution are not well known, not well established, and/or not well recognized legal rights, fundamental to the founding of this country.

From the inception of the proceedings below, the Burkes challenged the interpretations of HHS, repeatedly notifying HHS that its actions were not only violative of due process principles protecting FWDA survivors contrary to Florida law, but violative of pronounced judicial and public policy. Surely, the HHS legal team knew in April 2006, as every Florida lawyer knew, that for nearly forty years, Florida law proscribed apportionment of settlement proceeds between statutory wrongful death survivors and the decedent's estate in wrongful death cases by mandating the state circuit courts' involvement on this issue. See Ch. 72-35 codified as § 768.25 Florida Statutes, titled "Court Approval of Settlements." See also, § 768.21, Florida Statutes. These provisions and requirements can probably be traced to even earlier opinions from the Florida Supreme Court. For example, see *Ellis v. Brown*, 77 So. 2d 845 (Fla. 1955) and *Garner v. Ward*, 251 So. 2d 252 (Fla. 1971). And, surely the HHS legal team knew that Florida's statutory scheme on apportionment must have been based in part, on protecting the due process rights vesting in survivors resulting from the statutory creation of their rights to pursue claims for wrongful death.

Here, in compliance with Florida law, the Burkes turned to the state court for apportionment/proration, an action which this Court alluded to in *Arkansas Department of Health & Human Services v. Ahlborn*,

547 U.S. 268 (2006), would alleviate HHS's concern expressed therein as Amicus, that lawyers would collude and manipulate settlements if allowed to apportion settlements amongst competing claims.³ *Ahlborn*, while not involving a wrongful death survivor, and while not occurring in a state such as Florida with a forty-year mandated system governing allocations amongst claimants in wrongful death claims, gives support to the conclusion that HHS unjustifiably forced the Burkes to litigate over their known, well established, and long recognized legal rights.

Further, from the inception of the Medicare Secondary Payer Act ("MSPA") and promulgation of its field manual in 1980, HHS would not recognize a survivor's interest in a wrongful death settlement unless the claim was litigated to a full trial, *on the merits*. This forced an FWDA survivor, desirous of settling his or her claim(s), into the Hobson's choice of choosing between one of three repugnant options where a perceived, reasonable settlement offer was received – (1) rejecting the settlement offer and proceeding to trial in order to obtain HHS's recognition of their property rights – an endeavor recognized by *Bradley* as against judicial and public policy; (2) accepting the settlement offer and undertaking a Herculean effort and commitment of financial resources involving the expenditure of hundreds of hours of

³ Ironically, HHS's field manual recognized the validity of a Court order on allocations if made after a trial on the merits.

attorneys' time, in challenging HHS's conduct the value of which would greatly exceed the value of the property seized; or (3) accepting the settlement offer and capitulating to HHS's assertion of a non-existent reimbursement right in their constitutionally protected property based on expediency grounds. See **Appendix E**, Blackwell Affidavit, App. 47-48, ¶ 3-4, and Liggio Affidavit, App. 73-74, ¶ 11. Invariably, the *Bradley* court rejected HHS's unilateral interpretations and their resulting effects, declaring them contrary to judicial and public policy. **Appendix C**.

In reality, HHS was simply an unchecked bully for years, utilizing the coercive effects of its oppressive and unsubstantiated interpretations in its field manual which were found by the first panel to be contrary to law, leveraging its position by the use of threats of collection by the Department of the Treasury from not only the litigants, but their attorneys as well, and exploiting what it knew would ultimately control survivors' decisions on challenging HHS's position – expediency. It's not hard to deduct why survivors since 1980, had not challenged HHS's interpretations applying to settlements, since to do so, would require expenditure of resources well in excess of the value of the unlawfully taken property, as is evidenced in the instant cause.

The dispute herein involved approximately \$23,000.00. The Burkes have documented in their expert affidavits on attorneys' fees that their attorneys have collectively expended over 1,000 hours in successfully challenging the government's conduct.

According to these experts, the range of a reasonable attorneys' fee for the effort expended by the Burkes' attorneys would fall somewhere between approximately \$320,000.00 and \$1.1 million, dependent on the application of lodestar and multiplier, and dependent upon which provision of the EAJA were utilized in valuing the effort. It is crystal that expediency drove the decision making of survivors and their counsel since 1980, until the Burkes, armed with counsel who were committed to undertake the endeavor as the equivalent to private attorneys general, proceeded forward, ultimately bestowing a great public benefit on not only victims of wrongful death across the country, but on a wide variety of interests including industry, insurers and the defense bar. See **Appendix E**, Liggio Affidavit, App. 67-73, ¶ 8-10; and **Appendix F**.

On the other hand, when the reader reviews the opinion from Panel II denying the Burkes' petition for an award of fees under the EAJA, **Appendix A**, it is as if the circuit court addressed an entirely different case altogether. It defies the logic behind myriad principles, i.e., comity, law of the case, rule of law, collateral estoppel, res judicata, etc., that the second panel could simply ignore and sidestep the factual findings and legal conclusions made by the first panel, and reach a diametrically opposed conclusion contrary to the initial decision of the circuit court.

It has been long settled that the government is responsible for fees (under the EAJA) if it engages in vexatious, dilatory, or obstructive conduct.

The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F.D. Rich Co. v. United States, 417 U.S. 116, 129-130 (1974); *Scarborough v. Secretary of Veteran Affairs*, 541 U.S. 401, 406-407 (2004). This court has likewise made clear that vexatious conduct is not the functional equivalent of subjective bad faith.

[T]he term "vexatious" in no way implies that the [party's] *sic* subjective bad faith is a necessary prerequisite to a fee award against him.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). In fact, this Court has stated on several

occasions that vexatious and dilatory conduct is sanctionable under varied federal statutes and subject to discipline under the inherent power of the court. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Chambers v. Nasco*, 501 U.S. 32 (1991); *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067 (1985) (special concurrence). The second panel simply ignored and side-stepped the findings and conclusions of Panel I from the Eleventh Circuit (**Appendix C**), findings and conclusions inherently recognizing the vexatiousness of HHS's conduct.

But what cannot be forgotten in this litigation is how the Burkes arrived at this moment in time. Everyone knew what Florida law proscribed. But HHS refused, apparently for decades, to acknowledge the rule of law. They obviously ignored Judge Roundtree – to them his order was a meaningless piece of paper. This is how “governments” in third world countries behave – not true democracies founded under the rule of law. This court has, for lack of a better word, preached for decades about the principles of state sovereignty and comity.

What actually happened here is that HHS fed at its whim, whenever and wherever it chose, unchecked for decades, emboldened by the successful use of its flawed interpretations, intimidation and leverage, evidenced by its use of the Department of the Treasury to collect the purported debts it alone decided were owed, and evidenced by its insistence that any survivor, considering a challenge to its flawed, unilaterally adopted, policy interpretations, be forced into the

Medicare administrative arena and beyond where the deck would be stacked against them, forced to expend more in effort and resources than could ever be returned if the survivor were successful in challenging HHS. In the decades following enactment of the MSPA, each time a survivor capitulated on expediency grounds, and tendered monies to HHS rightfully belonging to them, HHS was further emboldened, earning its status amongst Florida practitioners as the 800-pound gorilla, arrogantly preying on innocent victims of wrongful death. It was this arrogance the *Bradley* panel reacted to so vehemently. No reasonable person could read the opinion of Panel I from the Eleventh Circuit (**Appendix C**) and not conclude that the conduct of HHS was vexatious and obstructive.

The Burkes and their counsel did exactly what this Court and Congress recognized private parties should do when encountering the unreasonable exercise of government authority, and did so in accordance with the purpose of the EAJA, committing to vindicate their efforts no matter what it cost to hold the government accountable.

[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.

* * *

The government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of government authority." (Internal Citation omitted).

INS v. Jean, 496 U.S. 154, 163-165 (1990); *HHS v. Hudson*, 490 U.S. 877, 883 (1989). See also, *City of Riverside v. Rivera*, 477 U.S. 561, 572 (1986). And, let's not forget what a third panel of the circuit court stated in citing this Court's precedent:

The primary purpose of the EAJA is "to insure that private parties will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." (Internal Citations omitted).

Maritime Management, Inc. v. U.S., 242 F.3d 1326, 1331 (11th Cir. 2001).

Finally, the successful effort made by the Burkes bestowed a great public benefit upon not only similarly situated wrongful death survivors across the country, but also on industry and the defense bar as settlements are now again encouraged and made manageable by the precedent of *Bradley*. **Appendix E, Appendix F.**



CONCLUSION

The Court's acceptance of certiorari in this matter would enable the Court to reconcile conflicting decisions by the same circuit court, and would allow the Court if it chose, to reaffirm the paramount public purpose of the EAJA – encouraging private parties to challenge the unreasonable exercise of government authority, especially where the expense in securing vindication is exorbitant. The conflicting decisions of the two panels, if allowed to stand, would undermine the very purpose of the EAJA, sending the wrong message to both governmental actors, and “would be” future private attorneys general and their clients. The Burkes, respectfully, request the granting of their petition for writ of certiorari.

Respectfully submitted this 17th day of January, 2012.

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Attorneys for Petitioners

App. 1

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12782
Non-Argument Calendar

D.C. Docket No. 6:07-cv-01690-GAP-GJK

CARVONDELLA BRADLEY,
JOYCE ELAINE NIEVES,
LARHONDA WILLIAMS,
CHRIS CROWLEY,
DERRICK BURKE,
CHARLES E. BURKE, JR.,
GREG BURKE,
CYNTHIA BURKE,
BEATRICE WELLS,
KARL CROWLEY,
individually, et. al.,

Plaintiffs-Appellants,

versus

SECRETARY, U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(October 28, 2011)

Before HULL, MARTIN, and FAY, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Carvondella Bradley, on behalf of Charles Burke's estate and the ten surviving Burke children, appeals the district court's denial of Bradley's request for attorney's fees, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(b). After review, we affirm.

I. BACKGROUND

Charles Burke resided in a Florida nursing home for approximately eighteen months. After becoming seriously ill, Burke was removed from the nursing home and died in a hospital. During Burke's hospital stay, the Secretary of the Department of Health and Human Services ("Secretary" or "DHHS"), on behalf of Medicare, paid \$38,875.08 for his medical care.

Subsequently, Plaintiff-Appellant Bradley, on behalf of Burke's estate, brought a wrongful death claim against the nursing home and its liability insurance carrier. Bradley settled the claim for \$52,500 and notified the Secretary of the settlement. The Secretary asserted that Burke's estate had to reimburse Medicare for Burke's net medical expenses of \$22,480.89.

Plaintiff-Appellant Bradley then filed in probate court an application for the court to adjudicate the rights of the estate and the children to the settlement funds. The Secretary declined to participate in the probate court proceeding. The probate court determined

that DHHS was entitled to only \$787.50 of the settlement funds.

The Secretary declined to recognize the probate court's determination, relying upon DHHS's Medicare Secondary Payer Manual ("Medicare Manual").¹ The Secretary continued to assert that Burke's estate owed Medicare \$22,480.89. Bradley paid that amount under protest. After exhausting her administrative remedies, Bradley appealed the Secretary's decision to the federal district court. The district court deferred to the Secretary's interpretation of the Medicare Manual, and held that Medicare was entitled to reimbursement in the amount of \$22,480.89.

Bradley then appealed to this Court. In *Bradley v. Sebelius*, we reversed the district court's decision, concluding that DHHS's Medicare Manual was not entitled to deference. 621 F.3d 1330, 1338 (11th Cir. 2010). Accordingly, we held the Secretary's decision was not supported by substantial evidence and found the Secretary was entitled to only \$787.50, as determined by the probate court. *Id.* at 1339.

On remand, the district court entered judgment in accordance with our appellate opinion.

¹ In pertinent part, the Medicare Manual states: "The only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a court order on the merits of the case." Medicare Secondary Payer Manual (CMS Pub. 100-05) Chapter 7, § 50.4.4 (currently under review).

Subsequently, Plaintiff-Appellant Bradley filed a motion for an award of attorney's fees and costs pursuant to § 2412(b) of the EAJA. The district court denied Bradley's motion, finding that DHHS had not acted in bad faith. The district court explained that our appellate decision involved an issue of first impression and that nothing suggested the Secretary had acted in bad faith, as follows:

The Secretary acted in conformity with [DHHS's] long-held legal position, one supported by decisions from other Courts of Appeal[s]. The Secretary's position in this particular case was also supported by most of the judges who heard this dispute. Ultimately, two of the three judges on the Eleventh Circuit Court of Appeals agreed with the Plaintiffs on a question of first impression. But neither of those judges suggested that the Secretary acted in bad faith in litigating this case, and the Plaintiffs have not provided any basis for such a conclusion in their motion.

This appeal followed.

II. DISCUSSION

We review a district court's decision denying a request for attorney's fees under § 2412(b)² of the EAJA

² In the district court, Bradley filed a motion entitled: "Plaintiffs' Verified Motion for Award of Attorneys' Fees and Costs as Prevailing Parties in These Proceedings Pursuant to
(Continued on following page)"

for abuse of discretion. *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1331 (11th Cir. 2001). We review a district court's finding regarding a party's lack of bad faith for clear error. *Id.*

Under 28 U.S.C. § 2412(b), a district court's award of attorney's fees is discretionary. The district court may appropriately exercise its discretion to award fees under § 2412(b) where the government acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Maritime Mgmt.*, 242 F.3d at 1331 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622 (1975)) (quotation marks omitted). "Bad faith," in turn, means "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999) (alteration in original) (quotation marks omitted).

Federal Common Law and Equal Access to Justice Act ("EAJA") 28 U.S.C. §2412(b)/Memorandum of Law in Support." The Memorandum of Law argues for attorney's fees exclusively under § 2412(b). Because Bradley argued before the district court only that she was entitled to attorney's fees under § 2412(b), we decline to address her argument on appeal as to 28 U.S.C. § 2412(d)(1)(A). *See Access Now, Inc. v. Sw. Airlines, Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (quotation marks omitted)).

Here, the district court's finding of no bad faith was not clearly erroneous and thus its denial of attorney's fees was not an abuse of discretion. In explaining its finding, the district court noted that the Secretary's actions followed "[DHHS's] long-held legal position," which other circuit court decisions supported. While our circuit (in a 2-1 opinion) reached a different conclusion than the Secretary on a matter of first impression in this circuit, that is not enough to compel a finding of bad faith. *See Gilbert*, 198 F.3d at 1299. Nothing in the record indicates DHHS pursued its position "because of dishonest purpose or moral obliquity." *See id.* Further, Plaintiff-Appellant Bradley has presented no evidence that DHHS acted vexatiously or wantonly, such as by pursuing dilatory tactics or abusive discovery practices. Accordingly, we must affirm the district court's denial of Bradley's § 2412(b) attorney's fee request.

AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**CARVONDELLA BRADLEY,
JOYCE ELAINE NIEVES,
LARONDA WILLIAMS, CHRIS
CROWLEY, DERRICK BURKE,
CHARLES E. BURKE, JR.,
GREG BURKE, CYNTHIA
BURKE, BEATRICE WELLS,
KARL CROWLEY,**

Plaintiffs,

**Case No. 6:07-cv-
1690-Orl-31GJK**

-vs-

**KATHLEEN SEBELIUS,
Secretary, U.S. Department of
Health and Human Services,**

Defendant.

ORDER

(Filed Jun. 7, 2011)

This matter comes before the Court without a hearing on the Plaintiffs' First Amended Motion for Award of Attorneys' Fees and Costs (Doc. 68) and the response in opposition (Doc. 78) filed by the Defendant, Kathleen Sebelius, in her capacity as Secretary of the United States Department of Health and Human Services (the "Secretary"). The Plaintiff seeks an award pursuant to 28 U.S.C. § 2412(b), which provides that

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

The Plaintiffs seek an award based on the Secretary's allegedly "vexatious, oppressive, and recalcitrant conduct," and further claim entitlement to an enhancement of that award by use of a multiplier. (Doc. 68 at 6). More particularly, the Plaintiffs argue that they seek an award "to counter the bad faith" of HHS. (Doc. 68 at 8). See also *Maritime Management, Inc. v. United States*, 242 F.3d 1326, 1331-32 (11th Cir. 2001) (award of fees under Section 2412(b) proper where government has conducted litigation in bad faith, vexatiously, wantonly, or for oppressive reasons). But there was no bad faith here. The Secretary acted in conformity with the department's long-held legal position, one supported by decisions from other Courts of Appeal. The Secretary's position in this particular case was also supported by most of the judges who heard this dispute.

Ultimately, two of the three judges on the Eleventh Circuit Court of Appeals agreed with the Plaintiffs on a question of first impression. But neither of those judges suggested that the Secretary acted in bad faith in litigating this case, and the Plaintiffs have not provided any basis for such a conclusion in their motion. Accordingly, it is hereby

ORDERED that the Plaintiffs' First Amended Motion for Award of Attorneys' Fees and Costs (Doc. 68) is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 7, 2011.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record

Unrepresented Party

APPENDIX C

**United States Court of Appeals
For the Eleventh Circuit**

No. 09-13765

District Court Docket No.
07-01690-CV-ORL-31GJK

CARVONDELLA BRADLEY,
JOYCE ELAINE NIEVES,
LARONDA WILLIAMS,
CHRIS CROWLEY,
DERRICK BURKE,
CHARLES E. BURKE, JR.,
GREG BURKE,
CYNTHIA BURKE,
BEATRICE WELLS,
KARL CROWLEY,
individually,

Plaintiffs-Appellants,

versus

KATHLEEN SEBELIUS,
Secretary, U.S. Department
of Health and Human Services,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

App. 11

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 29, 2010
For the Court: John Ley, Clerk
By: Clark, Djuanna

ISSUED AS MANDATE

DEC 13 2010

U.S. COURT OF APPEALS
ATLANTA GA

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13765

D.C. Docket No. 07-01690-CV-ORL-31GJK

CARVONDELLA BRADLEY,
JOYCE ELAINE NIEVES,
LARHONDA WILLIAMS,
CHRIS CROWLEY,
DERRICK BURKE,
CHARLES E. BURKE, JR.,
GREG BURKE,
CYNTHIA BURKE,
BEATRICE WELLS,
KARL CROWLEY, individually,

Plaintiffs-Appellants,

versus

KATHLEEN SEBELIUS,
Secretary, U.S. Department
of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 29, 2010)

Before DUBINA, Chief Judge, MARTIN and HILL, Circuit Judges.

HILL, Circuit Judge:

The facts of this claim against a Florida nursing home for neglect and abuse are simple and not in dispute. However, the question of law as to the interplay between the Florida Wrongful Death Act (FWDA) and the federal Medicare Secondary Payer statute (MSP) is an issue of first impression in this court.

I.

Charles Burke (Burke or Decedent) resided in a Gainesville nursing home for approximately eighteen (18) months. In November 2004, Burke was removed from the nursing home and admitted to a Gainesville medical hospital. On January 30, 2005, he died in the hospital as a result of multi-organ failure, secondary to sepsis and wound infection. During Burke's approximate three (3) month hospital stay, the Secretary of the Department of Health and Human Services (Secretary or HHS), on behalf of Medicare, paid \$38,875.08 for Burke's medical care.¹

¹ Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, commonly known as the Medicare Act, established the Medicare program. For convenience, we refer to the United States as the Secretary, HHS, Medicare or the government, as the context requires.

One of Burke's surviving children, Carvondella Bradley (Bradley), was named as personal representative of Burke's estate. Bradley, on behalf of the estate and the ten surviving Burke children, presented a wrongful death claim in a demand letter to Burke's nursing home and its liability insurance carrier, asserting nursing home abuse and neglect under Florida law.²

Bradley settled the wrongful death tort claims for \$52,500, the full amount of the nursing home's liability insurance policy limits.³ Settlement was made without filing suit. Burke's nursing home tendered the settlement amount and Bradley executed a release of all claims of the estate and the surviving

² Florida's Wrongful Death Act (FWDA) is codified at Fla. Stat. §§ 768.16 to 768.26 (2003). Under Florida law, "[t]he action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." Fla. Stat. § 768.20. Children of a decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. Fla. Stat. § 768.21(3).

³ The personal representative of an estate is merely a nominal party to a wrongful death action brought on behalf of a decedent; the estate and the decedent's survivors are the real parties in interest. See *DeVaughn v. DeVaughn*, 840 So.2d 1128 (Fla. Dist. Ct. App. 2003); *Fla. Emergency Physicians – Kang and Assocs., M.D., P.A. v. Parker*, 800 So.2d 631 (Fla. Dist. Ct. App. 2001).

children against the nursing home and its liability insurance carrier.⁴

Bradley notified the Secretary of the settlement proceeds and associated legal fees and costs. The Secretary refused to recognize that the medical expense claim had been settled for less than 100%. She asserted that under the MSP, 42 U.S.C. § 1395y(b)(2)(B)(ii), and its attendant regulations, 42 C.F.R. § 411.37(c), the Secretary had the authority to claim the total amount of medical expenses, \$38,875.08, less procurement costs, or a net amount of \$22,480.89. The Secretary gave the estate sixty (60) days to pay Medicare.⁵

⁴ At the time, no allocation was made in regard to the \$52,500 settlement lump sum as to the wrongful death claims of the ten surviving children, and the claim of the estate. In view of the limited insurance coverage, no evidence in the record of other nursing home assets, and the ever present hazards of trial, counsel for the estate and the children determined that the policy limit settlement was a practical and efficient alternative to filing suit. No party in this record has suggested that this settlement was not a reasonable disposition, though it obviously represented a considerably diminished compromise. There is speculation in the record that the potential value of the loss of companionship claims to the children was estimated to be over \$2,500,000, or \$250,000 per child.

⁵ The Secretary's position is that the children are forced to "chip in" a substantial portion of their recovery to make Medicare's recovery 100%. She does not acknowledge that this would constitute a taking of their property with no process.

Medicare had not paid for or provided medical care for any of the children. None of the children contributed funds to pay for their father's medical care and none were under any obligation

(Continued on following page)

Counsel for the children and the estate filed with the probate court an application for the court to adjudicate the rights of the estate and the rights of the children in regard to the compromised sum received in settlement of their claims.⁶ *See Thompson v. Hodson*, 825 So.2d 941, 950 (Fla. Dist. Ct. App. 2002) (where the personal representative receives a non-specific settlement offer in a wrongful death action, he or she is obligated to apportion the proceeds between the estate and the survivors in a reasonable and equitable manner or to seek court approval of an apportionment); *Hess v. Hess*, 758 So.2d 1203 (Fla. Dist. Ct. App. 2000).

Counsel for the children and the estate gave adequate notice to Medicare of the probate court proceedings and invited the Secretary's participation. The Secretary declined to appear or to participate.⁷

to do so. *See Scott v. Estate of Myers*, 871 So.2d 947, 949 (Fla. Dist. Ct. App. 2004) (where proceeds from a wrongful death action are not for the benefit of the estate, and are not subject to estate claims; rather, they are the property of the survivors and compensation for their loss).

⁶ The Florida Legislature designated the probate court as the appropriate entity in which to adjudicate the rights of the parties. Fla. Const. of 1845, art. V, § 5.

⁷ Under the FWDA, the decedent's personal representative can recover for the decedent's estate only "*medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of the decedent.*" Fla. Stat. § 768.21(6)(b). (Emphasis added). A survivor, on the other hand, may recover only "[m]edical or funeral expenses due to the decedent's injury or death *that the*

(Continued on following page)

The state probate court ordered:

(c) . . . The Court after having heard sworn testimony on the potential value of each child/survivors' independent claim, and after calling on its own experience in the range of values each child's claim potentially carried, finds that the values asserted by the Personal Representative's counsel in this motion are reasonable, and the Court adopts and specifically finds that each of the respective ten (10) survivors' claims holds a value of at least \$250,000.00. The Court notes that Medicare has asserted a claim of lien based upon payments of \$38,875.08. Therefore, the Court finds that the total, full value of this case had the total, full value been collectible, was/is \$2,538,875.08.

(d) *Based upon principles of equity, the Court determines the medical expense recovery in the instant cause is \$787.50. The Court has calculated such figure based on such component's contribution to the total full value, if such value were collectible. The Court has not prioritized the recovery of medical expenses over the recovery on each of the respective survivors' claims. Further, the Court determines the independent survivors'*

survivor has paid." Fla. Stat. § 768.21(5). (Emphasis added). There had been no wrongful death suit filed. The claim had been settled. There was an undifferentiated fund – \$52,500 paid for the release – in Bradley's possession for the benefit of the surviving children and any other claimant.

claims recovery in the instant cause is \$51,712.50. The Court has likewise calculated such figure based on all survivors' claims contributions to the total, full value. The Court has likewise not prioritized the recovery on each of the respective survivors' claims over the recovery of medical expenses.

(Emphasis added).

The Secretary refused to accept the probate court's determination that she would only recover \$787.50. Relying upon language contained in a document entitled 'Medicare Secondary Payer Manual', the Secretary responded that she would not recognize the probate court's allocation of liability payments to non-medical losses unless and until payment was based on a court order issued on the merits of the controversy. *See* MSP Manual (CMS Pub. 100-05) Chapter 7, § 50.4.4 (where "[t]he only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a court order on the merits of the case").⁸

⁸ Chapter 7, Section 50.4.4 of the MSP Manual states:

In general, Medicare policy requires recovering payments from liability awards or settlements, whether the settlement arises from a personal injury action or a survivor action, without regard to how the settlement agreement stipulates disbursement should be made. That includes situations in which the settlements do not expressly include damages for medical expenses. Since liability payments are usually based on the injured or deceased person's medical expenses,

(Continued on following page)

The Secretary contended that the probate court's decision was merely advisory in nature or superceded by federal law. The estate paid Medicare under protest, perfected its administrative appeal, and exhausted its administrative remedies.⁹

liability payments are considered to have been made "with respect to" medical services related to the injury even when the settlement does not expressly include an amount for medical expenses. To the extent that Medicare has paid for such services, the law obligates Medicare to seek recovery of its payments. *The only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a court order on the merits of the case.* If the court or other adjudicator of the merits specifically designates amounts that are for payment of pain and suffering or other amounts not related to medical services, Medicare will accept the Court's designation. Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services.

(Emphasis added).

⁹ Originally, in 2007, the ten surviving children, as surviving individuals, not as heirs to an estate, filed a complaint for a declaratory judgment in federal district court, asking the court to adjudicate and determine the rights and priorities of the respective parties' interests, including the Secretary's, in the wrongful death settlement funds procured under the FWDA. The estate was not a party to the declaratory judgment action.

The survivors sought a declaration that the Secretary, under federal law, had no priority over the survivors' rights in the settlement proceeds under state law. The survivors also claimed that the Secretary could not hide behind the advisory language of a Medicare field manual that indicated it would honor an agreed allocation, if and only if the agreement was reflective of an actual trial and judgment on the merits, when the Secretary

(Continued on following page)

II.

The case proceeded as an appeal to the district court from a final decision of the Secretary, wherein the surviving children filed their brief in opposition to the Secretary's decision, the Secretary filed her brief in support of her final decision, and the case became ripe for district court review.

The district court, adopting the report and recommendation of the magistrate judge, held that the Secretary's interpretation of the MSP, 42 U.S.C. § 1395y(b)(2)(B)(ii)(2006), and its attending regulations, 42 C.F.R. §§ 411.37(c)(1), (c)(2), (c)(3)(2004), was reasonable. The district court also relied heavily upon the language contained in the Medicare field manual. Accordingly, the district court held that Medicare was entitled to reimbursement in the amount of \$22,480.89, not \$787.50, for conditional medical expense payments paid on behalf of the Decedent. This appeal follows.

III.

We review *de novo* the district court's interpretation of the MSP federal statute in relation to the FWDA as a question of law over which this court's review is plenary. See *United States v. Endotec, Inc.*, 563 F.3d 1187, 1194 (11th Cir.2009). In reviewing the

refused to attend the probate hearing. In 2008, the district court dismissed the declaratory judgment complaint filed by the survivors on 28 U.S.C. § 1331 grounds.

district court's analysis of the Secretary's decision, we may reverse the district court if its decision is "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence in the record taken as a whole." *Univ. Health Servs., Inc. v. Health & Human Servs.*, 120 F.3d 1145, 1148 (11th Cir. 1997) (citations omitted).

IV.

The Burke surviving children contend that the FWDA controls. As previously stated, under Florida law, in a recovery for wrongful death action, children of the decedent may recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. Fla. Stat. § 768.21(3). The FWDA contemplates that damages allowed an estate are separate and distinct from damages recoverable by the deceased's survivors. *See Hartford Ins. Co. v. Goff*, 4 So.3d 770, 773 (Fla. Dist. Ct. App. 2009); *South Shore Hosp. v. Easton*, 441 So.2d 161, 163 (Fla. Dist. Ct. App. 1983). Florida courts have repeatedly held that proceeds from a wrongful death action are not for the benefit of the estate, rather, that they are the property of the survivors and compensation for their loss. *See Scott v. Estate of Myers*, 871 So.2d 947, 949 (Fla. Dist. Ct. App. 2004); *Continental Nat. Bank v. Brill*, 636 So.2d 782, 784 (Fla. Dist. Ct. App. 1994). Here the children's right of action under the FWDA is an

individual's property right, not derived from the estate.¹⁰

V.

The Secretary relies upon the MSP, enacted in 1980 to reduce federal health care costs by transforming Medicare from the primary payer to the secondary payer, with a right of reimbursement. *See United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 874 (11th Cir. 2003). The MSP "makes Medicare the secondary payer for medical services provided to Medicare beneficiaries whenever payment is available from another primary payer." *Cochran v. U.S. Health Care Financing Admin.*, 291 F.3d 775, 777 (11th Cir. 2002). "This means that if payment for covered services has been or is reasonably expected to be made by someone else, Medicare does not have to pay. . . ." *Id.*; *see* 42 U.S.C. § 1395y(b)(2)(A)(i) (2006).¹¹ Such

¹⁰ Under Fla. Stat. § 768.21(6)(b), the personal representative may recover for the decedent's estate medical expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent.

¹¹ The portions of the MSP statute relevant here are contained at 42 U.S.C. § 1395y(b)(2)(A)-(B)(iv) (2006), and read as follows:

(2) Medicare secondary payer

(A) In general

Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that –

(Continued on following page)

(i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or

(ii) payment has been made or can reasonably be expected to be made promptly (as determined in accordance with regulations) under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.

In this subsection, the term "primary plan" means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance, to the extent that clause (ii) applies. An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

(B) Conditional payment

(i) Authority to make conditional payment

The Secretary may make payment under this subchapter with respect to an item or service if a primary plan described in subparagraph (A)(ii) has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust fund in accordance with the succeeding provisions of this subsection.

(Continued on following page)

(ii) Repayment required

A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment under this subchapter with respect to an item or service if 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) of payment for items or service included in a claim against the primary plan or the primary plan's insured, or by other means. If reimbursement is not made to the appropriate Trust Fund before the expiration of the 60-day period that begins on the date notice of, or information related to, a primary plan's responsibility for such payment or other information is received, the Secretary may charge interest (beginning with the date on which the notice or other information is received) on the amount of the reimbursement until reimbursement is made (at a rate determined by the Secretary in accordance with regulations of the Secretary of the Treasury applicable to charges for late payments).

(iii) Action by United States

In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator,

(Continued on following page)

payment is conditioned on Medicare's right to reimbursement if a primary plan later pays or is found to be responsible for payment of the item or service. *Id.* Nowhere in the definition of primary plan are listed

as an employer that sponsors or contributes to a group health plan, or large group health plan, or large group health plan, or otherwise) (to make payment with respect to the same item or service or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity. The United States may not recover from a third-party administrator under this clause in cases where the third-party administrator would not be able to recover the amount at issue from the employer or group health plan at the time the action for recover [sic] is initiated by the United States or for whom it provides administrative services due to the insolvency or bankruptcy of the employer or plan.

(iv) Subrogation rights

The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or other entity to payment with respect to such item or service under a primary plan.

“surviving children with tort property beneficiary rights.”¹² *Id.*

VI.

In this case, Bradley, as personal representative, on behalf of the estate and the ten surviving Burke children, settled wrongful death claims for abuse and neglect brought under the FWDA with the nursing home and its liability insurance carrier. The total, undifferentiated amount of the settlement was \$52,500.00. The issue of first impression in this case is therefore: “Whose property is the settlement?” The settlement involved the medical expenses and costs recovered by the estate (and subject to the MSP statute), *along with* the non-medical, tort property claims of the surviving Burke children for lost parental companionship, etc., under state law, (*and not subject to the MSP statute*).¹³

¹² “In this subsection, the term ‘primary plan’ means a group health plan or large group health plan . . . and a workmen’s compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance. . . .” 42 U.S.C. § 1395y(b)(2)(A) (2006). *See also supra* note 11.

¹³ The Burke surviving children recovered damages for lost parental companionship, instruction, and guidance and for mental pain and suffering. The estate’s wrongful death claim included medical expenses and costs. The children’s claims did not. The children never received anything from Medicare. They paid none of their father’s medical expenses, nor were they obligated to pay any.

Under Florida law, any claim of the estate is separate and distinct from the claim of a survivor. 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. The Burke children's loss of parental companionship claims do not include the decedent's medical expenses, as a claim for medical expenses belongs only to the estate. Only the estate's allocated share of the proceeds is subject to the province of the Secretary.¹⁴

VII.

There is a particularly troubling sub-issue contained in this appeal. Here counsel for the estate and for the survivors, out of an abundance of caution, notified the Secretary of the \$52,500 in settlement proceeds recovered, and invited her view as to the proper division of the funds in an adversarial probate court proceeding. The Secretary asserted that she

¹⁴ This appeal involves the ten surviving Burke children, not as heirs or beneficiaries of their deceased father's estate, but as survivors entitled to compensation under the FWDA. Theirs is a cause of action under state law, sounding in tort against the nursing home and its insurance carrier for the loss of their father.

was entitled to the total amount of medical expenses, \$38,500, less procurement costs.¹⁵

At this point, the conflicting claims to the fund had never been made the subject of any court proceeding.¹⁶ Counsel properly turned to the Florida probate court for a proration, filing an application with the probate court to adjudicate the rights of the estate and rights of the children *vis-à-vis* the rights of the Secretary to the compromised sum received in settlement of the claims.¹⁷

The Secretary declined to take any part in the litigation although at all times her position was adverse to the interests of the surviving children. The probate court made the allocation, finding that the Secretary should recover the sum of \$787.50. Yet, still, the Secretary, citing no statutory authority, no regulatory authority, and no case law authority, merely relied upon the language contained in one of

¹⁵ It is obvious that under such an arrangement, the reasonable expectations of the children would be remarkably reduced. The Secretary would get 100% of her funds, and the estate and the surviving children would be left with the insufficient remainder.

¹⁶ Counsel for the estate and the surviving children refused to agree that their claims should be treated as inferior to the claims of the Secretary or that any of the property of the children should be taken from them to “beef up” the share of Medicare.

¹⁷ Counsel did this openly and in good conscience. He notified the Secretary of the pendency of the proceedings and invited the Secretary to participate.

its many field manuals and declined to respect the decision of the probate court.

In essence, the Secretary is asserting that its field manual is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court has stated that “agency interpretations contained in policy statements, manuals, and enforcement guidelines are not entitled to the force of law.” *United States v. R & F Properties of Lake County, Inc.*, 433 F.3d 1349, 1357 (11th Cir.2005) *citing Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (ordinarily “policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference”); *see Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995) (definition in HHS’s Medicare Provider Reimbursement Manual “is a prototypical example of an interpretive rule” that does not require notice and comment, and therefore “do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process”).¹⁸ We conclude that the

¹⁸ Medicare field manuals are not promulgated pursuant to the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*, as agency rules. Accordingly they are entitled to less deference than an interpretation arrived at after a formal adjudication or notice-and-comment rulemaking. *See, e.g., Guernsey Memorial Hosp.*, 514 U.S. at 99; *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) (a Medicare field manual “is merely an interpretive guide, and interpretive guides generally do not have the force of law.”).

deference given to the language in the field manual in this case by the Secretary and the district court is misplaced.

Counsel for the survivors and the estate acted sensibly, in a cost-effective manner. The nursing home neglect claim was settled for the full value of the available insurance. Clearly, if the language of the field manual applied, in practice, it would lead to an absurd Catch-22 result.¹⁹ Forcing counsel to file a lawsuit would incur additional costs, further diminishing the already paltry sum available for settlement. This flies in the face of judicial and public policy.

The Secretary's position is unsupported by the statutory language of the MSP and its attending regulations. The Secretary's *ipse dixit* contained in the field manual does not control the law. The district court also erred in relying upon the advisory language contained in a field manual as the rationale for its opinion upholding the actions of the Secretary.

¹⁹ The Secretary declined to participate in the probate court's allocation proceeding but won't recognize the probate court's order as valid because she didn't participate. This paradox has been compared to the oft-told story of the child defendant found guilty of murdering his parents, only to throw himself upon the mercy of the court because he is an orphan.

VIII.

There is a second reason that the Secretary's position, as adopted by the district court, is in error. Historically, there is a strong public interest in the expeditious resolution of lawsuits through settlement. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 574 (1976); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994). Throughout history, our law has encouraged settlements. See *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975); *Fla. Trailer & Equip. Co. v. Deal*, 284 F.2d 567 (5th Cir. 1960); *Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536 (11th Cir. 1991); *Johnson v. Occidental Fire and Cas. Co. of North Carolina*, 954 F.2d 1581 (11th Cir. 1992).²⁰

The Secretary's position would have a chilling effect on settlement. The Secretary's position compels plaintiffs to force their tort claims to trial, burdening the court system. It is a financial disincentive to

²⁰ Due to the inherent risk of litigation, the increased cost of taking a case to trial, problems of proof, a potential finding of contributory or comparative negligence, and limitations on the defendant's ability to pay full compensation, the vast majority of tort lawsuits are resolved by settlement. Settlement is often for less than the full value of the damages suffered by the plaintiffs. See Mark Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1272-74 (2005).

accept otherwise reasonable settlement offers. It would allow tortfeasors to escape responsibility.²¹

Without citing any statutory authority, regulatory authority, or case law authority, the Secretary and the district court's reliance upon language in a

²¹ Section 1395 is not a model of clarity. Yet it does clearly provide that, where there is some entity, other than Medicare, obligated to pay for an item or service, that entity shall pay first and Medicare shall pay the excess. *See* 42 U.S.C. § 1395y(b)(2)(A), (b)(2)(B)(ii). Here the liability insurance carrier of the nursing home became obligated to pay a compromise amount for services to Burke; the obligation was created as its consideration for the release by his estate. But no provision was made in the settlement to determine the amount of the compromise settlement fund paid to the estate and the amount paid to obtain the release of the separate claims of the children. [At this juncture, the liability insurance carrier was a "primary plan" under 42 U.S.C. § 1395y(b)(2)(A), and the estate was the "entity that receives payment from a primary plan" under 42 U.S.C. § 1395y(b)(2)(B)(ii).].

The Secretary clearly anticipated that a court should determine the issue of allocation between payees. She advised Medicare's field agents that Medicare would recognize allocations of such payments between payees if the allocation is based on a court order. The court involved here was the probate court of the state of Florida. No other court was involved. All parties were notified and invited to participate.

Lawyers routinely handling claims involving injury and medical expenses deal with settlements and judgments to resolve the participation in the settlement amounts by agreement or similar allocation litigation. At present, there is no vehicle or mechanism in the MSP statute or its regulations that specifically prescribes how a lump sum settlement will be pro-rated between multiple parties. Until better methods are prescribed and followed, the one pursued here is reasonable and, indeed, the only one available.

field manual is unpersuasive.²² The Secretary is not entitled to any share of the Burke surviving children's loss of parental companionship claims.²³

IX.

Under our *de novo* review, we conclude that the district court erred in upholding the decision of the Secretary because it was unsupported by substantial evidence in the record taken as a whole. *See Univ. Health Servs., Inc.*, 120 F.3d at 1148. We reverse,

²² Incidentally, we have not been advised by briefs or oral argument exactly how the parties could accomplish the Secretary's interpretation of the language in the field manual, even if we determined it was entitled to due deference, which we do not. In a settled case or claim, there is no "court order on the merits of the case" if "the case" refers to the claims against the alleged tortfeasor. Settlement replaces court proceedings. However, here, there was an "allocation based on a court order." The adverse parties interested in that proceeding were the estate and children on one hand, and the Secretary on the other. The "merits of the case" were the merits of the Secretary's position versus the merits of those of the estate and children. By this observation, however, we do not intend to indicate that compliance *vel non* with the field manual is a viable issue.

²³ Under both the statute and the regulations, the Secretary could have sought recovery from the liability carrier for the nursing home. 42 U.S.C. § 1395y(b)(2)(B)(ii). She could also have tried to obtain a recovery from the nursing home as tortfeasor. *Id.* The Secretary also has a right of subrogation which she chose not to exercise. 42 U.S.C. § 1395y(b)(2)(B)(iv). However, what course the Secretary must take in the absence of a right of recovery against the Burke children for loss of companionship is a matter that this court need not decide, and we offer no opinion as to the Secretary's business.

finding the Secretary entitled to the sum of \$787.50, as determined by the allocations of the probate court, and remand to the district court for further proceedings.

REVERSED AND REMANDED WITH INSTRUCTIONS.

MARTIN, Circuit Judge, dissenting:

I would affirm the decision of the District Court in this case, and therefore I write in dissent. Like the District Court, I recognize that when this court reviews the decisions of the Secretary of Health and Human Services, “we must abide by those decisions unless they are arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence in the record taken as a whole.” *Fla. Med. Ctr. of Clearwater, Inc. v. Sebelius*, No. 09-13922, ___ F.3d ___, 2010 WL 3258871, at *2 (11th Cir. Aug. 19, 2010) (quoting *Alacare Home Health Servs., Inc. v. Sullivan*, 891 F.2d 850, 854 (11th Cir. 1990) (alteration and internal quotation marks omitted)). Under this standard, I believe we are required to abide by the actions taken by Secretary Sebelius here.

As the majority notes, the facts of this case are straightforward: Mr. Burke developed severe bed sores while he was in the care of a nursing home facility. He was hospitalized, and eventually succumbed to multiple-organ failure secondary to sepsis

and wound infection. Medicare conditionally paid \$38,875.08 for his hospital treatment, subject to reimbursement from any payment made by the nursing home's liability insurance carrier. After the plaintiffs, through the personal representative of Mr. Burke's estate, received an undifferentiated settlement of \$52,500 from the nursing home's insurer, Medicare requested that it be reimbursed \$22,480.89 for Mr. Burke's medical expenses. Rather than administratively appeal the agency's initial determination, however, the plaintiffs proceeded to the Probate Court of Alachua County, Florida, which simply adopted the plaintiffs' proposed allocation of a mere \$787.50 to Medicare and the remaining \$51,712.50 to themselves. The Secretary was never made a party to that proceeding. The Probate Court received no evidence nor any adversarial presentation.

Applying the express provisions of the agency's Medicare Secondary Payer manual, the Secretary declined to recognize the Probate Court's allocation because it was not based on a determination of the merits of the case. The Medicare Secondary Payer manual is a lengthy and comprehensive agency manual governing the complex workings of the Medicare Secondary Payer program and reflects the longstanding policy of the agency. While the majority opinion is correct when it says that such policy statements and guidance interpretations are not entitled to the force of law, it ignores what is required of us in the way of deference to agency interpretations of the complex statutory and regulatory schemes they administer. Statements and guidance interpretations such as the

Medicare Secondary Payer manual “reflect ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’” *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399, 128 S. Ct. 1147, 1156 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S. Ct. 2196, 2207 (1998)), and they should not be lightly disregarded. In my view, the Secretary’s interpretation of the Medicare Secondary Payer statute and regulations embodied in the manual is entitled to some deference.²⁴ *Id.*; see also, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S. Ct. 2164, 2175 (2001) (explaining that agency interpretations “may merit some deference . . . given the ‘specialized experience and broader investigations and information’ available to the agency” and “the value of uniformity in its administrative and judicial understandings of what a national law requires” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 65 S. Ct. 161, 164 (1944))). Because I find the agency’s guidance sufficiently persuasive on the record before us, I would affirm the Secretary’s decision under the deferential standard of review applicable to our review of agency decisions.

²⁴ In sharp contrast to the way the majority dismisses the Secretary’s reliance on the Manual here, this court has held that the Handbook developed by the Secretary of the Interior and the Fish & Wildlife Service is in fact entitled to *Chevron* deference. *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1273 (11th Cir. 2009).

APPENDIX D

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND
FOR ALACHUA COUNTY, FLORIDA

IN RE: ESTATE OF CASE NO: 2005-CP-001483
CHARLES BURKE

Deceased

**ORDER DETERMINING MEDICAL
EXPENSE RECOVERY AND SURVIVORS'
RECOVERY IN UNDIFFERENTIATED
WRONGFUL DEATH SETTLEMENT**

CAME ON before the Court the Personal Representative's amended motion for equitable determination of medical expense recovery in third party settlement proceeds, and the Court finding it necessary to hold a trial/evidentiary hearing on the issues raised by the pleadings, and after having considered the sworn testimony presented at the trial on such motion, and otherwise being duly advised in the premises, and being of the opinion that the Court should exercise its inherent equitable powers in determining the medical expense recovery and survivors' recoveries in the settlement proceeds procured by the Personal Representative in her wrongful death action brought on behalf of ten (10) survivors and the Estate of Charles Edward Burke, it is therefore

ORDERED AND ADJUDGED as follows:

(a) The Personal Representative's wrongful death claims arise from the alleged neglect of Charles Edward Burke while residing at The Manor at Gainesville, Florida, a nursing home facility regulated by Chapter 400, Fla. Stat. It is noted that the decedent's cause of death according to the Certificate of Death was from Sepsis and Osteomyelitis, with the discharge summary from Shands Hospital at the University of Florida at the time of death indicating primary cause of death secondary to multi-organ failure secondary to Sepsis and wound infection. The Court has reviewed the Personal Representative's claims brought pursuant to §400.022 and §400.023, Fla. Stat., alleging nursing home negligence causing the development of severe decubitus ulcers, and finds that such claims are meritorious wrongful death claims brought on behalf of the decedent's ten (10) survivors and estate.

(b) The Court has been made aware of the details of the Personal Representative's settlement with the insurer of The Manor at Gainesville. Essentially, the Personal Representative was tendered the insurance company's policy limits of \$52,500.00, with no effort by the respective parties to differentiate the settlement proceeds amongst the eleven (11) competing claimants as follows:

1. Carvondella Bradley
2. Joyce Elaine Nieves
3. La Rhonda Williams
4. Chris Crowley

5. Derrick Burke
6. Charles E. Burke, Jr.
7. Greg Burke
8. Cynthia Burke
9. Beatrice Wells
10. Karl Crowley
11. The Estate of Charles E. Burke

(c) Because the Personal Representative was not able to procure a recovery for the full value of all claims based on limited insurance proceeds available on the claims, the Court finds it necessary to determine what amounts in the limited fund recovery represent both amounts recovered for medical expenses and amounts recovered for the collective survivors' claims. Consequently, the Court in exercising its inherent equitable powers finds it necessary to determine the total, full value if such value were collectible, estimating each damage component's contribution to the total, full value. In this way, the Court may subsequently apply the pro rata contribution each component has in the total, full value to any limited fund recovery in order to equitably pro rate such component's share in such limited fund recovery. The Court notes that the decedent was fifty-eight (58) years old at the time of his death, with his surviving children ranging in ages between twenty-four (24) and forty-one (41) years old. The Court after having heard sworn testimony on the potential value of each child/survivors' independent claim, and after calling on its

own experience in the range of values each child's claim potentially earned, finds that the values asserted by the Personal Representative's counsel in his motion are reasonable, and the Court adopts and specifically finds that each of the respective ten (10) survivors' claims holds a value of at least \$250,000.00. The Court notes that Medicare has asserted a claim of lien based upon payments of \$38,875.08. Therefore, the Court finds that the total, full value of this case had the total, full value been collectible, was/is \$2,538,875.08.

(d) Based on principles of equity, the Court determines the medical expense recovery in the instant cause is \$787.50. The Court has calculated such figure based on such component's contribution to the total full value, if such value were collectible. The Court has not prioritized the recovery of medical expenses over the recovery on each of the respective survivors' claims. Further, the Court determines the independent survivors' claims recovery in the instant cause is \$51,712.50. The Court has likewise calculated such figure based on all survivors' claims contributions to the total, full value. The Court has likewise not prioritized the recovery on each of the respective survivors' claims over the recovery of medical expenses.

(e) The Personal Representative is hereby authorized to report this Court's decision to CMS and Medicare. The Personal Representative is hereby authorized to close on the settlement proceeds determined to be the survivors' collective recovery of \$51,712.50.

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DONE AND ORDERED this 18 day of ~~August~~
[Sept.], 2006.

ORIGINAL SIGNED BY
ROBERT E. ROUNDTREE, JR.
Robert Roundtree, Circuit Judge

[Service List Omitted In Printing]

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 6:07-CV-1690-ORL-31GJK (CBH)

CARVONDELLA BRADLEY, indi-
vidually, JOYCE ELAINE NIEVES,
individually, LaRHONDA
WILLIAMS, individually, CHRIS
CROWLEY, individually, DERRICK
BURKE, individually, CHARLES E.
BURKE, JR., individually, GREG
BURKE, individually, CYNTHIA
BURKE, individually, BEATRICE
WELLS, individually, and KARL
CROWLEY, individually,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, Secretary
of the United States Department
of Health and Human Services,
UNITED STATES OF AMERICA,

Defendant.

**NOTICE OF FILING AFFIDAVITS OF BRUCE
B. BLACKWELL, ESQ., AND JEFFREY M.
LIGGIO, ESQ. IN SUPPORT OF PLAINTIFFS'
FIRST AMENDED VERIFIED MOTION FOR
AWARD OF ATTORNEYS' FEES AND COSTS
AS PREVAILING PARTIES IN THESE PRO-
CEEDINGS PURSUANT TO FEDERAL COM-
MON LAW AND EQUAL ACCESS TO JUSTICE
ACT ("EAJA") 28 U.S.C. 42412(b)**

COME NOW the plaintiffs, CARVONDELLA BRADLEY, individually, JOYCE ELAINE NIEVES, individually, LaRHONDA WILLIAMS, individually, CHRIS CROWLEY, individually, DERRICK BURKE, individually, CHARLES E. BURKE, JR., individually, GREG BURKE, individually, CYNTHIA BURKE, individually, BEATRICE WELLS, individually, and KARL CROWLEY, individually, by and through their undersigned counsel and hereby give notice that plaintiffs hereby file contemporaneously with this notice the affidavit of BRUCE B. BLACKWELL, ESQ., and the affidavit of JEFFREY M. LIGGIO, ESQ., in support of Plaintiffs' First Amended Verified Motion for Award of Attorneys' Fees and Costs as Prevailing Parties in these Proceedings Pursuant to Federal Common Law and Equal Access to Justice Act ("EAJA") 28 U.S.C. §2412(b).

[Certificate Of Service Omitted In Printing]

/s/ Eric H. Faddis
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Attorney for Plaintiffs-Appellants

**AFFIDAVIT OF BRUCE B.
BLACKWELL, ESQ.**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARVONDELLA BRADLEY, individually; JOYCE ELAINE NIEVES, individually; LARHONDA WILLIAMS, individually; CHRIS BROWLEY, individually; DERRICK BURKE, individually; CHARLES E. BRUKE, JR., individually; GREG BURKE, individually; CYNTHIA BURKE, individually; BEATRICE WELLS, individually; and KARL CROWLEY, individually,

PLAINTIFFS,

vs.

MICHAEL O. LEAVITT, Secretary of the United [sic] Department of Health and Human Services; UNITED STATES OF AMERICA,

DEFENDANTS.

CASE NO.: 6:07-CV-1690-ORL-31GJK

AFFIDAVIT OF BRUCE B. BLACKWELL IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR ATTORNEYS' FEES (DOC. 68)

I. OVERVIEW

I, Bruce B. Blackwell, being duly sworn and deposed, and based upon my personal knowledge do state as follows:

1. I am an attorney and member in good standing of the Florida bar and have been licensed to practice law in the State of Florida since May, 1975. I have also been licensed to practice law in the State of Georgia since 1977, but am presently inactive. I have been authorized to practice law in the State of New York since 1980. I practice law in both the state and federal courts. I have been qualified as an expert on attorneys fees in both state and federal courts. My practice involves complex civil litigation, including personal injury cases of significance. A copy of my resume is attached hereto as **Exhibit 1**.

2. In connection with my personal injury practice, I have, on a number of occasions, been required to deal with Medicare liens and the "Medicare Secondary Payer Manual." My personal experience with representatives or designees of the Secretary of what is now the U.S. Department of Health and Human Services (the "Secretary") has included cases involving survivorships under Florida's Wrongful Death Act, FLA. STAT. § 768.21.

3. Since the adoption of the Medicare Secondary Payer Manual in 1980, lawyers in the State of Florida handling cases involving Medicare have been faced with a Hobson's choice of taking every case to trial – regardless of the merits of settlement and whether the defendants had "wicking" insurance coverage depleted by defendant's attorneys' fees – in order to have a ruling on the merits before the Secretary would consider apportionment of the rights of the survivors and the estate.

4. It has been my uniform experience in cases involving the Secretary that common sense is often ignored. As in the case at bar, the Secretary routinely refuses to participate, and upon settlement demands one hundred percent (100%) of all payments made by Medicare on behalf of the estate. Should the survivors protest, the full power of the federal government is brought to bear, with litigation to claim all payments and to add interest; notwithstanding that in many of these cases, as in the instant matter, the survivors have independent property rights under state law. This practice has been endemic with the Secretary and, as the Eleventh Circuit Court of Appeals found, this case was the first to address and resolve the interplay between Florida's Wrongful Death Statute and the federal Medicare Secondary Payer statute. *See Bradley v. Sebelius*, 621 F.3d 1330, 1332 (11th Cir. 2010) (“[T]he question of law as to the interplay between the Florida Wrongful Death Act (FWDA) and the federal Medicare Secondary Payer Statute (MSP) is an issue of first impression in this court.”) [hereinafter, “*Bradley*”].

5. In this case, the total monies available for settlement were \$52,500.00 for all claimants because of a policy of insurance that was depleted by the nursing home's defense counsel. Settlement – not protracted litigation – made common sense. Because of the minimal funds available for the eleven survivors, probate litigation was initiated. The Secretary was duly noticed and given the opportunity to participate in the probate proceeding, but refused. The

Secretary refused to recognize the judgment of the probate court apportioning the \$52,500.00, and insisted, as was the government's uniform practice, to payment of its entire lien (which exceeded \$22,000.00). This purported lien was paid under protest.

6. Acting as a modern day Don Quixote, Plaintiffs' counsel, Mr. Faddis, began the laborious appeals process mandated by the Secretary. Not surprisingly, at each of the four (4) initial appellate levels, Plaintiffs were rebuffed, necessitating resort to the U.S. District Court for the Middle District of Florida.

7. Mr. Faddis's contract with his clients provided for a contingent fee. That contract was for the greater of a percent of the recovery or a court-awarded fee. It is clear that the claimants could not have engaged counsel on an hourly basis to climb the sheer cliffs of this case, and it is also clear that Mr. Faddis's efforts to right wrongs in place for more than 25 years by the Secretary's slavish adherence to its field manual were in the highest traditions of The Florida Bar. Mr. Faddis had experienced a similar issue in a case some years earlier that prompted tilting a windmill not only towards these ten survivors, but with the hope for genuine justice for survivors under Florida and federal law.

8. This case was akin to a case against the government that results in wide-ranging injunctive relief or a class action – a public benefits case – and its ultimate result will serve as a watershed decision going forward for Floridians when Medicare is at

issue in survivorship proceedings arising under Florida's Wrongful Death Act. The decision is long overdue. The Eleventh Circuit's opinion in *Bradley* forces the Secretary into the "real world" by requiring Medicare to actually analyze the facts of a case and to participate in the process.

9. No longer can the Secretary's field manual be used as a club against survivors, as it was in this case and has been since its inception approximately 30 years ago. No longer can courts simply rubber stamp Medicare lien recoveries when survivors are left without recompense for their injuries or losses under Florida law. No longer can claimants be forced into an "absurd Catch-22." *Bradley*, 621 F.3d 1330, 1338.

10. Instead, the Secretary must now recognize that a survivor's right of action under Florida's Wrongful Death Act is a property right belonging to the survivor – not the federal government (while the Secretary did not acknowledge that a 100% recovery to Medicare constituted a taking of property without due process, the net effect of the Secretary's posture was to supplant survivors' property rights in order to effect compliance with its interpretative field manual). *Id.* at 1337.

II. EQUAL ACCESS TO JUSTICE ACT (the "EAJA") – 28 U.S.C. § 2412(b)

11. Mr. Faddis has proceeded under 28 U.S.C. 2412(b) for a discretionary fee from this Court as authorized under his contingent fee arrangement

with the survivors. While my opinion is based upon that provision, 28 U.S.C. 2412(d)(2)(A) routinely provides for fees based upon a \$125.00 per hour attorney's fee, which can be modified by the Consumer Price Index (which would yield an hourly fee ranging from \$160.00 to \$175.00 per hour for the relevant time-frame in this case). The Court could, it is believed, utilize that rate in connection with the extraordinary work and success of counsel in overturning the Secretary's use of its field manual as the beginning and end of its analysis in this case. Clearly, under 28 U.S.C. § 2412(d)(2)(A), there were special factors favoring an upward adjustment for the benefit of counsel.

12. Mr. Faddis's affidavit confirms that he expended in excess of 1,000 hours of time in prosecuting (i) four (4) appeals from the agency; (ii) an action in the U.S. District Court before both the Magistrate Judge and the District Judge; and (iii) a subsequent appeal to the Eleventh Circuit. This effort consumed more than 4 1/2 years.

13. The tenor of the Eleventh Circuit's opinion in *Bradley* is clear. The Secretary was wrong and her unpromulgated field manual was entitled to little, if any, deference. *Id.* at at [sic] 1338. While this Court understandably followed existing precedent, (Doc. 45), the Eleventh Circuit decided to plow new ground and concluded that the Secretary's field manual was not entitled to *Chevron*-type deference. *Bradley* at 1338.

14. The Eleventh Circuit's opinion also recognized that Mr. Faddis acted sensibly and in a cost-effective manner, *Id.* at 1338, and that the Secretary's posture flew in the face of judicial and public policy. *Id.* at 1335. Indeed, read as a whole, *Bradley* is an indictment of the Secretary's posture in this case. What is chilling, however, is that it has taken 30 years – and Mr. Faddis's extraordinary tenacity, unwillingness to fold and efforts to right a wrong 30 years in the making – for this result to finally occur. Now it is up to the Court to use its sound discretion in determining whether Mr. Faddis should be entitled to an award of attorneys' fees under § 2412(b) of the EAJA.

III. A REASONABLE FEE FOR MR. FADDIS – THE LOADSTAR AND APPLICABILITY OF A MULTIPLIER

15. While Mr. Faddis did not keep contemporaneous time records, he painstakingly recreated his time. In my opinion, reduction to 870.9 hours is reasonable. Notwithstanding this reduction, however, it is my opinion that, by failing to keep contemporaneous time records, Mr. Faddis has substantially reduced the total hours that he actually devoted to this four-and-one-half-year-old project.

16. The first element in the loadstar calculation is, of course, the total number of hours expended. I believe that 870.9 hours is appropriate.

17. With respect to the second element in the loadstar calculation – the attorney’s reasonable hourly rate – it is my opinion that, given his stature in the community, his Board certifications, his AV rating at the highest level by Martindale, and his listing as a *Florida Super Lawyer*; it is appropriate for Mr. Faddis to claim a \$400.00 hourly rate. That rate, in my opinion, would have only placed him as a mid-level shareholder at a commercial litigation firm in Orlando during the relevant time-frame.

18. Based on the foregoing hours and hourly rate, it is my opinion that the loadstar as described routinely under both Florida and federal law is \$348,360.00.

19. Generally, under both Florida and federal law, the loadstar presumes a reasonable fee. A decision to apply a multiplier is clearly discretionary with the Court. Multipliers, however, are typically appropriate for extraordinary work that substantially benefits the public as a whole (as in a case with prospective injunctive relief or in a class action involving a benefit to the public as a whole). *See, e.g., Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) (Florida’s principal decision relating to the use of multipliers); *Gray Panthers Project Fund v. Thompson*, 304 F. Supp. 2d 36 (D.D.C. 2004) (applying a multiplier under § 2412(b) of the EAJA in a case involving egregious actions by the Secretary in a Medicare-related case).

20. In this case, Mr. Faddis went against 30 years of history involving routine court approvals of actions by the Secretary, and took this matter – in what the Eleventh Circuit recognized was a case of first impression – against unbelievably long odds. He prevailed. Clearly he was the first to vindicate survivors’ rights under Florida law, and to force the Secretary to modify the process Medicare has had utilized for 30 years. It was akin to fighting for civil rights before the passage of the Civil Rights Act and resulted in a watershed decision.

21. Based on *Quanstrom* and *Gray Panthers*, as well as similar cases (albeit in different contexts) under the EAJA cited by Mr. Faddis, it is my opinion that the Court can – and should – award a multiplier in this case. Given that success in this effort was unlikely from the start, both state and federal law would authorize a two (2.0) multiplier to the loadstar, which I believe is reasonable in these circumstances.

22. The fact that this case resulted in a genuine watershed decision is documented by the May, 2011 issue of the Florida Bar Journal, whose editors decided to accept and utilize a piece on this case as their lead article. Indeed, this lead article graces the cover of the journal.

23. In short, the work in this case was extraordinary. It was done to benefit all similarly situated citizens who have gone without such relief for 30 years because of the unsubstantiated and insupportable field manual utilized by the government to run roughshod over Floridian’s property rights.

24. In reaching my opinions as to a fee award in this case, I have reviewed all of the pleadings, the time sheets of Mr. Faddis, the time sheets of Mr. Beck and others, and what I believe to be appropriate case law that may be considered by the Court. My opinion is further based upon FLA. RULES OF PROF'L CONDUCT, R. 4-1.5.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: May 4, 2011.

/s/ Bruce B. Blackwell
Bruce B. Blackwell, Esquire

STATE OF FLORIDA
COUNTY OF ORANGE

Sworn and subscribed before me this 4th day of May, 2011. Affiant is personally known to me.

/s/ Angela Price
Notary Public – State of Florida

Printed Name: Angela Price

My commission Expires: 5/17/2010

[NOTARY SEAL] Notary Public State of Florida
Angela Price
My Commission DD764248
Expires 05/17/2012

EXHIBIT 1

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***Biography of Bruce B. Blackwell, Esquire
King, Blackwell, Downs & Zehnder, P.A.***

A fifth generation Floridian, Bruce B. Blackwell was raised in rural Marion County. He graduated from Florida State University with a B.A. in 1968, and received numerous leadership honors and awards including the Hall of Fame, Omicron Delta Kappa (ODK), Order of Omega, Gold Key, service as Senior Class President, Outstanding Senior of Lambda Chi Alpha Fraternity, and Founding Chair for the predecessor of the first Student Alumni Association.

After graduation he served as an officer in the United States Air Force with distinction, initiated the first Interracial Council on any USAF base in the United States and was named to *Outstanding Young Men of America*, 1972 edition. In his last two years of

active duty he served as the protocol aide to Vice Admiral Walter H. Baumberger, Commander, United States Taiwan Defense Command in Taipei, Taiwan.

He returned to Florida State in 1972 to pursue a law degree and worked as an administrative aide to the Comptroller of the State of Florida, a statewide elected Cabinet officer, during his first year, and later clerked for two prominent Tallahassee law firms during his second and third years of law school. While in law school he received a number of American Jurisprudence book awards signifying the highest academic average in several classes, and graduated with honors. In 1974, he received the Coyle E. Moore, Jr. Award from ODK signifying the most outstanding male student leader at Florida State University.

Before entering a private trial practice in 1981, he was an attorney for Southern Bell Telephone & Telegraph Co., and later an antitrust attorney with AT&T. He was the youngest lawyer asked to be a member of the trial team in the antitrust suit to break up the Bell System. He then spent almost a year with SunBanks of Florida, Inc., during a period of rapid expansion to a statewide banking system. He is now a partner with the seven-lawyer law firm of King, Blackwell, Downs & Zehnder, P.A., which specializes in complicated civil litigation. He has been admitted to practice in Florida, Georgia, and New York, formerly served as an Adjunct Professor of Law at the Woodrow Wilson College of Law in Atlanta, Georgia, and has been a frequent lecturer at seminars

on legal ethics and substantial trial related seminars within the profession.

He was for many years a Master in the George C. Young First Central Florida American Inn of Court, and from 2000 through 2007 was the Counselor to the Inn. The Inn is a legal society dedicated to promoting professionalism and civility in the practice of law. In March 2003, Mr. Blackwell was the second member of his firm to receive the annual Orange County Bar Association's William E. Trickel, Jr. Professionalism Award. Mr. Blackwell has been named to The Best Lawyers in America since 2006, and in 2009 and for 2010 in the categories of Commercial Litigation and Bet the Company Litigation. He has been listed by *The American Lawyer* as a Top Commercial Litigator for 2006-2010, the *Orlando Business Journal's* "Best of the Bar" for 2006, by *Florida Trend* magazine on all the first seven statewide lawyer peer reviews in 2004-2010 as one of Florida's "Legal Elite." In 2009 he was named as one of forty-eight lawyers statewide to the Legal Elite Hall of Fame and was the only Orlando area lawyer again named to the Hall of Fame in 2010. He has been similarly listed as a Florida Superlawyer since 2007.

Mr. Blackwell has previously served as the President of the Orange County Bar Association, Co-Chair of its first Gender Bias Committee, Chair of the Ninth Circuits Grievance Committee, Chair of the Ninth Circuit's Fee Arbitration Committee, and from 1998-2001 as the Co-Chair of the Orange County Bar Association Fair Judicial Campaign Practices

Committee. He and his firm received a 2009 OCBA President's Award for long-term service to the OCBA over the past twenty years.

He formerly served on the Board of Governors of The Florida Bar ("BOG") from 1994-1998. He previously chaired The Florida Bar's (TFB) 1986 Mid-Year Meeting, and The Florida Bar Annual Meeting for 1997. He was Co-Chair for the BOG Disciplinary Review Committee, and liaison for the Practice Management Section and The Equal Opportunities in the Profession Committee. During his BOG service, he also chaired The Solo and Small Firm Special Committee. He was previously appointed by the Florida Supreme Court to its Pro Bono Services Committee overseeing pro bono services statewide, and by the former Chief Justice in 1998 to serve on a select committee to study the need for additional District Courts of Appeal. In late 2006, he was appointed by the Chief Justice to serve on the Chief Justice's Advisory Committee for two years, and in June 2007 was named as a Trustee of The Florida Supreme Court Historical Society and commenced his term as President of that organization in June 2010. Most recently, he has been named to the United State's Eleventh Circuit Court Planning Committee for the 2011 meeting of the Eleventh Circuit in Orlando, and by the 2010-11 President of The Florida Bar to a small, Special Committee to secure adequate funding for the State's Judiciary from the Legislature.

On April 15, 2008, Mr. Blackwell was the recipient of the 2008 American Bar Association's (ABA) Grassroots Advocacy Award for his sustained and effective lobbying efforts to the United States Congress on behalf of the poor throughout the United States. He is the first Floridian to receive this national award. In June 2008, the Florida Council of Bar Association Presidents awarded him the statewide 2008 Outstanding Voluntary Bar President Award, their highest award. Also in June 2008, Mr. Blackwell was the recipient of the 2008 Judge James G. Glazebrook Memorial Outstanding Member Award by The George C. Young First Central Florida American Inn of Court. The award represents the Inn's highest award for service to the law profession and to the Inn. In 2009 he was the recipient of the Florida State University College of Law Alumni Service Award, its highest alumni award for service

He served from 1998 through 2009 as a member of The Florida Bar Foundation Board of Directors and helped oversee the disbursement of more than 25 million dollars in legal aid grants statewide each year on behalf of the lawyers of Florida. He concluded his term as President on June 30, 2008, and remains an Endowment Trustee through 2012. He previously chaired the Legal Assistance for the Poor/Law Student Assistance Grant Committee, the Budget and Finance Committee, and for several years was Chair of the Administration of Justice Committee recommending grants for systemic legal issues in Florida. In 2002, he received The Foundation's President's

Award for Excellence. In June 2011 he will receive the Foundations's 34th Medal of Honor, given annually to a Florida lawyer who has demonstrated dedication to the The Florida Bar's objectives, ". . . to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." It is considered the highest award bestowed by the legal profession in Florida.

He was honored with the 1996 Judge J. C. "Jake" Stone Legal Aid Society Distinguished Service Award which represents the annual outstanding pro bono service award for the Ninth Circuit, and received the President of the Florida Bar's 1997 pro bono service award for the Ninth Circuit. He was honored by The Florida Association for Women Lawyers (FAWL) with its annual 1998 Friend of FAWL Award. He has been profiled in *Who's Who in American Law* since 1996, and *Who's Who in America* for many years

He served for many years as a member of the Board of Directors and the Executive Committee for Lawyers Action, a statewide PAC for Florida lawyers to ensure fair and impartial courts and protect the core values of the legal profession and practice of law. He concluded that service in 2010.

Mr. Blackwell has previously served in 1985-86 as the National President (Chair) of the Florida State University Alumni Association, as President of The Florida State University College of Law Alumni Association for 2006-2007, was formerly Chair of the

Winter Park Civil Service Board, President of the Orlando Touchdown Club, a member of the Session for First Presbyterian Church of Orlando (FPCO), Chair of its Nominating Committee and Congregational Life Commission, and from 2007-08 served as the FPCO Dean of its College of Elders. He has previously served on numerous other civic and religious boards over the past thirty years in the greater Orlando area

Mr. Blackwell has been married for more than 41 years to Julie McMillan Blackwell, and together they have two daughters, Blair Allison Blackwell, a 1996 graduate of Princeton University, and Brooke Blackwell Castino, a 2000 graduate of Vanderbilt University. He has two granddaughters, Emma Kate Castino, born September 30, 2007, and Allison Marie Castino, born February 5, 2010.

**AFFIDAVIT OF
JEFFREY M. LIGGIO, ESQ.**

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**CASE NO.: 6:07-CV-1690-ORL-31GJK (CBH)
HIC#: 262-74-7126T
ALJ APPEAL #: 1-131269399**

CARVONDELLA BRADLEY, individually,
JOYCE ELAINE NIEVES, individually,
LaRHONDA WILLIAMS, individually,
CHRIS CROWLEY, individually, DERRICK
BURKE, individually, CHARLES E. BURKE,
JR., individually, GREG BURKE, individually,
CYNTHIA BURKE, individually,
BEATRICE WELLS, individually,
and KARL CROWLEY, individually,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, Secretary of the
United States Department of Health and
Human Services, UNITED STATES OF
AMERICA,

Defendant. /

**AFFIDAVIT OF EXPERT JEFFREY M.
LIGGIO, ESQUIRE SUPPORTING AWARD
OF REASONABLE FEES AND COSTS**

**STATE OF FLORIDA
COUNTY OF PALM BEACH**

BEFORE ME, the undersigned authority, person-
ally appeared Jeffery M. Liggio, Esquire, who upon

first being duly sworn on oath, deposes and says as follows:

1. I am an attorney at law and have been a member of the Florida Bar since 1982. I have been a member of the U.S. Southern District since 1984, the Eleventh Circuit Court of Appeals since 1990, and the U.S. Middle District since 1997.
2. I am a graduate of the University of Miami School of Law achieving my J.D. (Cum Laude) in 1982.
3. I am a graduate of the United States Naval Academy, achieving my B.S. in 1974, and was engaged as a Naval Aviator and an Air Force Command Pilot thereafter both active duty and reservist, retiring in 1995 (I have attached hereto a copy of my curriculum vitae as Exhibit ("A.")).
4. I have been actively engaged in the practice of law since 1982, primarily representing those individuals with no financial resources to obtain representation for themselves. My practice has been described in this regard, as a contingent fee practice since I primarily handle cases on the contingency of a recovery, agreeing to provide my services without payment by the clients until and unless my law firm is successful in achieving a recovery for the clients. However, my firm and myself have been routinely engaged in representing clients on an hourly fee basis, and I have personal knowledge of the hourly fee charges of my peers in this community who practice in the business, commercial, and defense bars, and consequently, have knowledge of the customary and

market rate for hourly fees charged in the community.

5. I have been active in my profession as a lawyer. I have been Chairman of the Florida Bar Grievance Committee "B", 15th Judicial Circuit, 1992-1993. I have served on the Board of Directors of the Florida Justice Association from 1990-present, and served as President of such organization in 1998-1999. I have authored numerous publications, received numerous awards, and participated in numerous presentations to my peers in my career. I have been involved in a number of significant cases involving the establishment of important precedents in the appellate courts of Florida.

6. I was asked by Eric H. Faddis, Esquire to comment on the work he performed in the **Bradley v. Sebelius** matter. More specifically, I was asked to review his firm's work including his purported time and costs expended in developing the case from inception, in responding to the Secretary's position both through the Medicare administrative appeals process, through the proceedings before the District Court and Eleventh Circuit Court of Appeals, and in asserting his right to attorneys' fees and costs in this matter.

7. I gladly agreed to accommodate Mr. Faddis' request for two reasons. First, we have been colleagues since at least 1998, when I met Mr. Faddis as he became active in the profession by joining me on the Board of Directors of the Florida Justice Association. I have known him since such time and I have personal knowledge of his

reputation, his ethics, and his commitment to his clients and his practice. He is respected amongst his peers in both the plaintiffs' and defense bars, and enjoys an excellent reputation for his competency, dedication and trustworthiness.

8. Second, the results of Mr. Faddis' work in ***Bradley v. Sebelius*** are exceptional and profound. I cannot think of a decision coming out in the last several years, that will have a greater, immediate, and financially significant impact to injury victims. In addition, the ***Bradley v. Sebelius*** decision has been hailed as a landmark by a broad range of interest groups to include insurers, industry and the defense bar, positively impacting their industry, let alone benefitting victims of wrongful death throughout the country. This is so because Medicare for years, imposed its interpretations contrary to plain and fundamental legal rights, upon the parties engaged in the litigation process, resulting in oppressive and vexatious process prejudicing every sector of the MSP regulated community. For example, Medicare's conduct stymied attempts at settlement in a large number of cases contrary to judicial and public policy, both costing industry millions in defense costs, depleting judicial resources, and lastly, denying the Medicare Trust Fund significant resources where potential settlements, which would have provided Medicare reimbursement, were abandoned by plaintiffs, only to thereafter result in adverse outcomes for plaintiffs in the pursuit of the claim "on the merits."

9. I have reviewed several communications either forwarded to me by email, or retrieved by

me as a Google search on the internet, which provide just a small sample of the acclaim that the ***Bradley v. Sebelius*** decision has received, and its impact on not only wrongful death cases, but in other settings as well. For example the following has been said by national organizations and industry representatives:

“CCL Wins Major Lien Court Victory: Affects All AAJ Members – The Center for Constitutional Litigation (CCL) recently won a landmark decision that affects the practices of nearly all AAJ members.”

– American Association of Justice

“Medicare Advocacy Recovery Coalition (MARC) Praises Two Recent Court Decisions on Medicare Secondary Payer (MSP) Issues – In two decisions, Bradley v. Sebelius. . . . noted Katie Fox, Vice President, Medicare Compliance for Franco Signor, LLC and former MARC Co-Chair. “The Medicare program has been slow to acknowledge settlement allocations between health care and other claims, and the Eleventh Circuit’s decision has now settled this important issue,” stated Roy Franco, MARC Co-Chair. . . . We welcome CMS responding to the decision, and changing it’s manual consistent with the Eleventh Circuit’s ruling”” (“MARC’s membership is comprised of entities representing virtually every sector of the MSP regulated community.)”

– Medicare Advocacy Recovery Coalition

“This is a very important case and a victory for the Property and Casualty industry because it will encourage settlements and be more equitable for injury victims”

las L. Shaw, CEO of Medivest
Allocation Services, Inc.

“Medicare’s Collection Power Under the Secondary Payer Act Curtailed – Maybe – A recent court ruling involving the Medicare Secondary Payer statute is generating a flood of comments and opinions about the potential impact on the workers’ comp system. While the decision may curtail Medicare’s collection power a bit, it is too soon to start celebrating. . . .”

– Risk & Insurance Online

“It was a pleasure talking with you this morning. . . . I think the United States has been taking rather extreme positions [in asserting reimbursement rights against innocent wrongful death survivors] in litigation and in regulatory matters related to [the]MSPA. . . . [I follow developments under the MSPA] because of their vast overreach . . . Presently I practice commercial litigation at Seyfarth Shaw. I’m familiar [with the MSPA because I represent insurers and the legislation that affects them both in litigation and in regulatory compliance. . . . It seems to me that victims, their counsel, tortfeasors,

and their insurers have some common interests when it comes to the [MSPA].”

– Esther Slater McDonald, Esq.
Seyfarth Shaw, Washington D.C.

10. Mr. Faddis shared with me numerous communications he and his firm have received from other lawyers around the state and the country. I have reviewed several of such emails evidencing the following comments:

“The decision in Bradley has been very helpful here in Indiana . . . Medicare conditional payment issue is an albatross around the necks of parties who wish to settle cases, but cannot out of fear that the Medicare amount will be greater than expected . . . The decision in Bradley addresses this huge public policy issue of resolving lawsuits . . . In my opinion, Bradley is one of the most important cases for those of us who practice personal injury litigation. Moreover, it not only benefits plaintiffs and their attorneys, but also benefits defendants because it helps facilitate a settlement, which reduced litigation costs.”

Jack A. Kramer Esq., TAUBER
WESTLAND & BENNETT PC,
Schererville, Indiana

“Excellent advice and work. I greatly appreciate your help on this. And Congratulations! That is an awesome opinion you obtained”

Joseph R. Neal, Esq., South Carolina;
Georgia

“Congratulations and thanks for your yeoman work in the Bradley case. What a great deal of professional satisfaction it must be for you to know that your labor not only made a difference in the lives of your clients but will allow so many other deserving families to benefit from the law you helped make. Congratulations!!”

Robert K. Finnel, Esq., Rome, Georgia

“Congratulations to your firm’s clearly exceptional efforts on this repeatedly vexatious issue to all Plaintiffs. I just recently mediated a nursing home matter in which these same WD/lien issues, including limited coverage, etc. caused settlement problems well beyond the lien. As you know, mediation negotiation is already difficult enough without having non-parties overshadowing the parties efforts. . . . [T]his well written opinion is worth having in everyone’s trial (and mediation) workbook. . . .”

Dan H. Honeywell, Esq., Orlando, Fl.

“Terrific result. You all are to be congratulated for maintaining the fight for

the rights of parties vs. the government's blatant abuse. Based on the amount involved, it is clear no one (including the lawyers) was compensated for anywhere near what they deserved. If there was an "Atticus Finch" Award, you all should be nominated."

Charles R. Steinberg, Esq., Rockledge, Fl.

"Outstanding lawyering. Congratulations and THANK you for the precedent!!! . . . We all WANTED to take them on. YOU did it!. . . GREAT work . . . You did a service to attorneys nationwide."

Melvin B. Wright, Esq., Orlando, Fl.

"Kudos is right! Congrats to Eric and Bob for a job well done. And a tremendous amount of perseverance when many lawyers would never have bothered. Great law for Florida plaintiffs but the precedent will undoubtedly carry nationwide. Make sure the FJA and AAJ are informed as well."

David Guiley, Esq., Orlando, Fl.

"Awesome job. Just read the opinion. This is a huge victory!!! Congrats Eric and Co. Has this been passed on to AAJ? They should know about it . . . This is a GREAT RESULT FOR US ALL!!! Kudos to you guys for a great effort."

Alexander Clem, Esq., Orlando, Fl.

“This is a huge victory for plaintiffs. This is a big victory for Plaintiffs (nation-wide)”

Floyd Faglie, Esq., Tallahassee, Fl.

“Amazing Result. Please send my congrats to Eric. That really is a cool decision.”

David A. Paul, Esq., Orlando, Fl.

“Congrats to Eric and Peck on an awesome result. This will be important in nursing home litigation.

Nathan P. Carter, Esq., Orlando, Fl.

“Eric, That was a great result. Thanks for sharing info.”

Bryan W. Crews, Esq., College Park, Fl.

“Absolutely! Awesome job. Way to persevere against the odds.”

– Riley Allen, Esq., Orlando, Fl.

11. I concur with Mr. Faddis’ sentiments that his and CCL’s work have literally turned Medicare’s long standing practice of taking property belonging to innocent victims of wrongful death without due process on its head. Mr. Faddis should be commended on taking a stand on the principle of an unconstitutional taking, sacrificing his time and committing his resources for years, with no guarantee of success or payment. I am not aware of any prior effort by any lawyer to engage the Medicare administrative appeals process in order to correct the oppressive interpretations

of the Secretary of DHHS since the MSP was enacted. I am aware that lawyers representing victims of wrongful death, who have faced the dilemma Mr. Faddis' clients faced in this case, have either relented to the Secretary's demands on expediency grounds, or continued to litigate contrary to judicial and public policy. It is my professional opinion that Mr. Faddis and his firm, along with Mr. Peck and his firm, have provided superior services to victims of wrongful death under the circumstances, have achieved exceptional results benefiting a large community of interests across the country, and have terminated an oppressive and vexatious process imposed upon the public by Medicare for years.

12. I was given access to Mr. Faddis' file including his electronic data and electronic case management system, which included emails, notes, memos, research, pleadings, correspondence, etc.. I was given access to his hard file, as well as the 26 pages of detailed time records he generated subsequent to the Eleventh Circuit's opinion in *Bradley v. Sebelius*. I was also provided with a copy of his EAJA motion for attorneys' fees along with the documents in support including affidavits and their attachments.

13. I am aware that Mr. Faddis did not keep contemporaneous time records as he undertook the effort against the Secretary. However, my review of Mr. Faddis' electronic case management system, along with his hard file, and especially considering the quality of his work contained in his pleadings, memorandums, briefs, and correspondence, were sufficient

to allow me to express the opinions I set forth below. Additionally, and in all fairness to Mr. Faddis and the type of practice he has, the routine in the industry of personal injury contingent fee lawyers similar to Mr. Faddis' practice, is not to keep contemporaneous time records since the substantial majority of these cases do not involve a prevailing party's right to the award of an attorneys' fee against the opponent. For example, I understand from Mr. Faddis' Affidavit that this case is only the second time in his 27 year career he has sought a court awarded attorneys' fee. This is typical in the type of practice Mr. Faddis maintains. Additionally, Mr. Faddis has expressed the reasons for his efforts in his affidavit, and it is abundantly clear that Mr. Faddis undertook his effort on the basis of the principle of an unconstitutional taking, and it was this reason alone he committed his time and resources towards his effort.

14. It is my professional opinion that the 870.9 hours attested to by attorney Faddis as the reduced, estimated hours he expended in this matter, is reasonable and within the range of the reasonable hours I would have expected to be expended on this effort. While Mr. Faddis attempts to be forthright in both reducing his hours from 1021.3 hours to 870.9 hours, withholding the inclusion of his former partners' time, and limiting conservatively his time blocks, all of which were meant to reconcile the non-existence of contemporaneous time records, I find from a review of both his electronic files, his hard files, and the substance and quality of his work that 1021.3 hours

would not be an unreasonable time expenditure in this matter. This case involved a novel and substantial undertaking: the challenge to the Secretary's interpretations on the basis that they were contrary to plain and fundamental legal rights under The Constitution, and the Secretary's recalcitrant conduct thereafter in rejecting these plain rights and in ignoring an allocation issue that unquestionably needed to be addressed where competing, independent claims existed in the corpus of an undifferentiated settlement. Moreover, the Secretary's recalcitrant conduct imposed upon the plaintiffs and their counsel oppressive and vexatious process, forcing them to undertake an herculean effort in the pursuit of the vindication of clear, plain, and fundamental legal rights. Frankly, I am as troubled as the Eleventh Circuit by the Secretary's rejection of plaintiffs invitation to allow her to address allocation unilaterally, and thereafter, her rejection of plaintiffs' invitation to have her position considered by the probate court. A lawyer, undertaking this effort without payment based on the principle of an unconstitutional taking, convicted to his belief, essentially providing his services *pro bono publico*, with no guarantee of success, would always be expected to expend significant levels of effort reflective of a superior effort.

15. It is further my professional opinion that the market rate recited to by plaintiffs in their motion are customary, reasonable and the prevailing market rate, and would have been charged and paid had this case been the proverbially [sic] case where the client

‘paid as he goes.’ It is my professional opinion that the market rate falls somewhere between \$350.00 and \$500.00 dollars an hour for Mr. Faddis’ time. It is further my professional opinion that the market rate for appellate specialists as recited to by Mr. Peck in his affidavit for “pay as you go clients,” is in the range of what is customary, reasonable and the market rate in this community. It is further my professional opinion that the costs incurred as attested to by Mr. Faddis in his affidavit, and as attested to by Mr. Peck in his affidavit, are customary and reasonable under the circumstances.

16. It is further my professional opinion that the chance of success in this matter at the outset was unlikely, and well below 50%. This is so because where survivors chose pre-**Bradley** to challenge the Secretary’s unlawful taking by exhausting their administrative and federal appeal challenges, the deck would be stacked against them since Medicare’s interpretations would be given deference at all levels of administrative appeals, and even before the district court, irrespective that her interpretations were fundamentally flawed, and violated plain legal rights contrary to law. It would have been easy for Mr. Faddis to have walked away many times after suffering defeat – he would never be blamed for joining all the other lawyers who would never have embarked on the effort in the first place, but who instead, would have accepted Medicare’s taking without due process on expediency grounds.

17. While I agree with Mr. Faddis' assessment in his amended motion for award of attorneys' fees that pre-**Bradley**, victims of wrongful death faced the conundrum of three (3) oppressive choices when dealing with Medicare's assertion of a right of reimbursement, I disagree with him that these choices were equally oppressive. The choice Mr. Faddis took personally, was the most oppressive of all. More particularly, survivors' decisions, usually driven by their lawyers' recommendations, which are in turn usually driven by an expediency analysis, would result in survivors electing either to accept Medicare's unlawful taking, or to pursue their claim to finality. Survivors' decisions were usually driven by the amount of the lien. The smaller the lien, the more palatable it was to accept Medicare's unlawful taking, ultimately dictating this choice. The larger the lien, the less palatable it was to accept Medicare's unlawful taking, ultimately dictating the rolling of the dice and the choice of trying the case on the merits. No lawyer, prior to Mr. Faddis, ever chose the most oppressive route as endured in the instant case. It is abundantly clear that Mr. Faddis was motivated by his conviction, and his commitment to preserve the fundamental rights of his clients.

18. It is finally my professional opinion that a maximum multiplier should be applied to the Lodestar established herein. Mr. Faddis and his firm, along with Mr. Peck and his firm, undertook this matter on the principle of an unconstitutional taking. Through the present time, they have not been paid. They will

only be paid should this Court exercise its discretion in awarding an attorneys' fee to the plaintiffs. Their efforts have vindicated the fundamental and important constitutional rights of their clients. They have established profound and binding precedent, serving important and well established judicial and public policy interests and the public at large. Their actions will help deter future oppressive, vexatious, and recalcitrant conduct by the Secretary and others in taking property belonging to innocent victims of wrongful death without due process. The award of attorneys' fees herein will serve as an inducement for lawyers to continue to act as private attorney generals in pursuing the principle of paramount, fundamental rights, and will benefit society as a whole.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Jeffrey M. Liggio
JEFFREY M. LIGGIO

STATE OF FLORIDA
COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me this 4th day of May, 2011, by **JEFFREY M. LIGGIO** who is personally known to me or has produced N/A as identification and who did/did not take an oath.

/s/ Jody Marie Hansel
NOTARY PUBLIC

Jody Marie Hansel
PRINT NAME

My Commission Expires: _____

SEAL

[SEAL]	JODY MARIE HANSEL Commission # DD 954423 Expires February 26, 2014 Bonded Thru Troy Fain Insurance 800-385-7019
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EXHIBIT A

JEFFREY M. LIGGIO

DATE OF BIRTH:

[Omitted In Printing]

PRIMARY OCCUPATION:

Trial Lawyer
LIGGIO BENRUBI, P.A.
The Barristers Building, Suite 3B
1615 Forum Place
West Palm Beach, Florida 33401

SECONDARY OCCUPATION:

Major U.S. Air Force, Reserve
Helicopter Pilot
301st RQS
Patrick Air Force Base
Retired, September, 1995

FAMILY:

Married, wife, Susan
Three children, Remy, age 25,
Stephen, age 20, Olivia, age 17

EDUCATION:

United States Naval Academy, B.S. 1974;
University of Miami School of Law,
J.D. (Cum Laude) 1982.

MILITARY:

1975-Designated Naval Aviator, NAS Whiting,
Fla.; 1975-1981, Active Duty as Naval Aviator;
1981-1982, Naval Reserve, Interservice Transfer
to Air Force Reserve as Air Force Pilot; 1982-
1995 Helicopter Pilot 301 RQS.

BAR MEMBERSHIPS:

The Florida Bar, 1982

ADMISSION TO COURTS:

All Florida State Courts, 1982

U.S. Southern District, 1984

U.S. 11th Circuit, 1990

U.S. Southern District (Trial Bar), 1992

U.S. Middle District, 1997

CERTIFICATION:

Board Certified Civil Trial Lawyer, Florida Bar,
1992.

National Board of Trial Advocacy, Civil Certification,
Jan. 2000

PROFESSIONAL AFFILIATIONS/SERVICE:

Chairman, Florida Bar Grievance Committee
"B", 15th Judicial Circuit, 1992-1993;

Academy of Florida Trial Lawyers President,
1998-1999, Member of Board of Directors, 1990-
Present, Elected to Executive Committee, 1992.
Chairperson and Previous Chair, Budget Review
Committee, 1990-1991. Insurance Strike Force,
1992-1995. Committee Memberships: Legislative
Committee, Membership Committee, and Budget
Preparation Committee

Association of Trial Lawyers of America,
Sustaining Member, "M" Club Member

Palm Beach County Bar Association

Palm Beach County Trial Lawyer Association

AWARDS AND ACHIEVEMENTS:

Military:

Air Force Commendation Medal, June 1992;

Air Force Commendation Medal, November 1992.

Legal:

Academy of Florida Trial Lawyers Eagle Talon Award, 1990; Academy of Florida Trial Lawyers Silver Eagle Award, 1991; Academy of Florida Trial Lawyers ABCD Award, 1991;

Academy of Florida Trial Lawyers Presidents Award, 1991 – awarded annually to the individual in Florida who made the most significant contributions to the system of justice.

PUBLICATIONS:

Author of “Choice of Law Florida and Elsewhere: Confusion at the Threshold”, Insurance Counsel Journal, January, 1982; Author of “Preparing the HMO case”, Trial Magazine, May, 1997; Co-Author of “Price of Piece [sic] of Mind, Recovery of Mental Distress Damages and Bad Faith Claims in Florida”, Florida Bar Journal, November 2001.

SPEAKING ENGAGEMENTS:

1992 Helmet; Discovery: Litigation From Signing The Case Through Trial; Legislative Update Seminar;

1993 Insurance Litigation Case Law Review; Attorney’s Fees In Insurance Cases Life, Health & Disability Claims; Trends In The 1900’s, Collateral Source issues;

- 1994 ERISA III;
How to Know When Insurance Adjusters
Are Doing It Wrong;
- 1995 PIP and No-Fault Insurance Concerns and
Problems; The Nine Commandments of
Handling & Litigating Direct Insurance
Cases; Life, Health & Disability Claims;
Domestic Violence Insurance Issues in
Florida; Obtaining Impeachment Data on
the Defense Medical Examiner; HMO
Liability;
- 1996 ERISA IV;
Keeping Them Honest: Deceptive and
Unfair Trade Practices Claims; HMO
Liability; Insurance Fraud;
- 1997 Discovery: Litigation from Signing the
Case Through Trial; ERISA V, You Need
to Know More Than Ever; ERISA VI, You
Need to Know More Than Ever; Statutory
Bad Faith;
- 1998 Legislative Overview and Q & A (Tampa
and Miami); PIP Bad Faith Case
- 1999 Statutory Bad Faith
- 2000 Effective Mediation & Settlement
Strategies; Basic, But Not Forgotten
Insurance Issues; Preparing and Presenting
the Effective Opening Statement;
- 2001 First Party Bad Faith and Insurance
Based Class Actions; First Party Bad Faith
Claims;
- 2002 Insurance Coverage;
Liggio's Rules for Trial Persuasion

2003 Class Actions Against Insurance Companies; Bad Faith in Medical Malpractices Cases; Beyond Bad Faith; Combating Mandatory Arbitration Clauses in Insurance Contracts.

2004 2004 Voting System Problems
Life, Health and Disability Claims;
Trial Persuasions

SIGNIFICANT APPEALS:

Springer v. Blue Cross & Blue Shield of Florida, Inc., 695 So.2d 944, (Fla.App. 4 Dist., 1997)

American Chambers Life Ins. Co. v. Hall, 695 So.2d 1264, (Fla.App. 4 Dist., 1997)

Eldridge v. Multi-Resources, Inc., 695 So.2d 1320, (Fla.App. 4 Dist., 1997)

Union Bankers Ins. Co. v. Hatin, 677 So.2d 374, (Fla.App. 3 Dist., 1996)

Lumbermens Mut. Cas. Co. v. Percefull, 653 So.2d 389, (Fla. 1995)

Old Holdings, Ltd. V. Taplin, Howard, Shaw & Miller, P.A., 584 So.2d 1128, (Fla.App. 4 Dist., 1991)

Allstate Ins. Co., Inc. V. Walker, 583 So.2d 356, (Fla.App. 4 Dist., 1991)

Roger Dean Chevrolet, Inc. v. Lashley, 580 So.2d 171, (Fla.App. 4 Dist., 1991)

Pierre-Louis v. Colonial Ins. Co. of California, 566 So.2d 320, (Fla.App. 4 Dist., 1990)

Millman v. Howard Johnson's Co., 533 So.2d 901,
(Fla.App. 3 Dist., 1988)

Antley v. Blue Cross, 515 So.2d 1314, (Fla.App. 4
Dist., 1987.)

APPENDIX F

THE FLORIDA VOLUME 85, NO. 5 MAY 2011
BAR JOURNAL

ADVANCING THE COMPETENCE AND PUBLIC
RESPONSIBILITY OF LAWYERS

[All Pictures Have Been Omitted In Printing]

Caging the
800-pound Gorilla:
MEDICARE'S RIGHT OF REIMBURSEMENT
AFTER *BRADLEY V. SEBELIUS*

Caging the 800-pound Gorilla:
Medicare's Right of Reimbursement
After *Bradley v. Sebelius*

by Eric H. Faddis and Floyd Faglie

On September 29, 2010, the 11th Circuit Court of Appeals in *Bradley v. Sebelius*, 621 F.3d 1330, 2010 WL 3769132 (11th Cir. 2010),¹ handed down a significant defeat to Medicare in the way it has been enforcing its reimbursement rights since the enactment of

¹ Co-author Eric H. Faddis initiated the challenge of the secretary of the Department of Health and Human Services' conduct in *Bradley*, representing the survivors through exhaustion of the administrative appeal process, through the proceedings before the district court, and through the proceedings before the 11th Circuit Court of Appeals. He was joined in the 11th Circuit by Robert S. Peck, president of the Center for Constitutional Litigation (CCL) in Washington, D.C. Mr. Peck and CCL authored the briefs and participated in oral argument before the panel. Co-author Floyd Faglie provided technical support to Faddis during the judicial appeal in the district court.

the Medicare Secondary Payer Act in 1980. Medicare can no longer act like an 800-pound gorilla by refusing to recognize a state probate court's allocation of a wrongful death settlement between the claims of the survivors and the claims of the estate and to indiscriminately take survivors' property without due process. The decision quashes Medicare's old policy of collecting reimbursement from the property of survivors who have no obligation or other connection to Medicare. The decision will have broad impact on not only wrongful death settlements when Medicare has claimed a right of reimbursement, but in circumstances involving other lien holders as well. This article outlines the breadth of the procedural and administrative hurdles faced by the attorneys representing the survivors, the contours of the decision, and some practical and potential effects moving forward.

Procedure and the Administrative Hurdles

Burke resided in a nursing home until November 2004, when he was admitted to a Gainesville hospital where he died on January 30, 2005, as a result of multi-organ failure secondary to sepsis and wound infection.² During his approximate three-month hospital stay, the secretary of the Department of Health and Human Services (secretary) paid \$38,875.08 in medical care through the Medicare program.³

² *Bradley*, 621 F.3d at 1332.

³ *Id.*

One of Burke's surviving children, Carvondella Bradley, was appointed personal representative of Burke's estate.⁴ Bradley, on behalf of both the estate and Burke's 10 surviving children, presented a wrongful death claim against Burke's nursing home and its liability insurer, which covered the nursing home under a \$60,000 declining policy.⁵

Bradley's wrongful death claim settled pre-suit for the available insurance policy limits, which had declined to \$52,500. The settlement was not initially allocated between the claims of the survivors and the claims of the estate,⁶ and the secretary asserted a claim for reimbursement of the \$38,875.08 in Medicare conditional payments that had been made as a result of the alleged negligence.⁷ Bradley properly notified the secretary of the settlement, provided information about the legal fees and costs incurred in

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* This was accomplished so as to avoid any subsequently made "collusion" argument that could potentially be raised by Medicare in defending its superiority position in seeking reimbursement from unallocated settlements.

⁷ Pursuant to the Medicare Secondary Payer statute (MSP) (42 U.S.C. §1395y(b)(2)(B)(ii)), Medicare is secondary when there is a primary plan responsible for paying for medical care. If the primary plan is not expected to make payment in a reasonable amount of time, Medicare will make payment conditioned on reimbursement when the primary plan is required to make payment through compromise, settlement, or judgment. These payments are often referred to as "Medicare conditional payments."

securing the settlement, and requested that the issue of allocating the undifferentiated settlement be addressed before the standard procurement cost discount was calculated.⁸ The secretary refused to recognize that the medical claim had settled for far less than its true value and that a majority of the settlement was compensation to the 10 surviving children for their individual losses, expressly asserting that it did not allocate settlements.⁹ The secretary further asserted that under the Medicare Secondary Payer statute (MSP) (42 U.S.C. §1395y(b)(2)(B)(ii)) and its associated regulations (42 C.F.R. §411.37(c)), its interpretations thereunder contained within its field manual empowered it to claim the total amount of medical expenses provided by Medicare (\$38,875.08), less a reduction for the cost of procurement, directly from the survivors.¹⁰ Consequently, the secretary

⁸ *Bradley*, 621 F.3d at 1332.

⁹ The secretary asserted this position prior to *Bradley*, seeking the probate court's involvement on the allocation issue, thereby forcing *Bradley* to pursue the only mechanism left to address allocating an undifferentiated settlement: Florida's probate court.

¹⁰ Pursuant to 42 C.F.R. §411.37, the secretary will reduce its Medicare conditional payment amount due by the same percentage of the settlement representing the attorneys' fees and costs incurred in securing the settlement – a cost of procurement reduction. For example, if the attorneys' fees and costs total 42 percent of the settlement, then the Medicare conditional payment amount will be reduced by 42 percent.

demanded payment of \$22,480.89, and that Bradley pay this amount within 60 days.¹¹

In response to the secretary's demand and refusal to allocate, Bradley filed a motion in the state probate court to allocate the settlement between the claims of the survivors and the claims of the estate. Bradley filed the motion in recognition that the Florida Wrongful Death Act (FWDA) provides that 1) a personal representative brings one consolidated claim for wrongful death on behalf of both the survivors and the estate; 2) the survivors may recover loss of parental companionship, instruction and guidance, and mental pain and suffering, if there is no surviving spouse; 3) the estate may only recover funeral and medical expenses related to the injury and death; 4) the personal representative may seek an allocation of a wrongful death settlement between the claims of the survivors and the claims of the estate at settlement; and, 5) the MSP does not grant the secretary the right to recover survivors' portions of settlement which are constitutionally protected property of the survivors.¹² In addition, Bradley gave adequate notice

¹¹ This reimbursement ultimatum by the secretary was made despite the pendency of the probate court hearing which had not yet occurred. Ultimately, after the secretary turned the "collection" matter over to the Department of the Treasury, Bradley paid the demanded amount plus an interest penalty "under protest."

¹² Again, this action was taken after the secretary rejected Bradley's overtures on the need to allocate *prior* to the calculation of the procurement cost discount.

of the motion and the hearing to the secretary, but the secretary declined to participate.

The probate court's analysis mirrored Bradley's assertions on how to divide or allocate the gross settlement. If the full value of the claim was measured by each damage component's relative contribution to the full value of all damages, then the estate claim subject to Medicare's reimbursement rights could easily be calculated according to such component's relative contribution to the full value of all damages. Consequently, the probate court adopted Bradley's view after hearing proffers on the value of the collective survivor claims, as well as on the value of the total estate claim.¹³ The court ultimately held that the estate's damage components contributed roughly 1.5 percent to the total full value of all damages, with the collective survivors' damage components contributing roughly 98.5 percent, and that the allocation in the diminished, compromised settlement should be calculated using the same pro rata percentages. This analysis resulted in the probate court entering an order determining that \$51,712.50, or 98.5 percent, of the \$52,500 gross settlement should be allocated to the surviving children for their claims and \$787.50, or 1.5 percent, should be allocated to the estate for its claims.¹⁴

¹³ *Bradley*, 621 F.3d at 1333-34.

¹⁴ *Id.* at 1334. This calculation was similar to the calculation used by parties in *Ark. Dept. of Health and Human Services*
(Continued on following page)

The probate court's order was provided to the secretary with the request that she recalculate the procurement cost discount out of the \$787.50 amount allocated to the estate's claim. The secretary refused to accept the probate court's allocation, and she continued to demand payment of \$22,480.89, plus interest. The secretary's refusal was based on her parallel views that the probate court's order was merely advisory in nature, or superseded by federal law, and that the secretary was not bound to allocate or honor an allocation unless it was procured after a "full trial, on the merits."¹⁵ She relied on language contained in the Medicare Secondary Payer Manual, Chapter 7, §50.4.4, which states:

In general, Medicare policy requires recovering payments from liability awards or settlements, whether the settlement arises from a personal injury action or a survivor action, without regard to how the settlement agreement stipulates disbursement should be made. That includes situations in which the settlements do not expressly include damages for medical expenses. Since liability payments are usually based on the injured or deceased person's medical

v. Ahlborn, 126 S. Ct. 1752 (U.S. 2006), to determine the portion of the settlement representing compensation for past medical expenses. While pertaining strictly to Medicaid, Bradley cited to *Ahlborn* in her briefs and originally utilized the logic of *Ahlborn* in support of her calculations submitted to, and subsequently adopted by, the probate court.

¹⁵ *Id.*

expenses, liability payments are considered to have been made “with respect to” medical services related to the injury even when the settlement does not expressly include an amount for medical expenses. To the extent that Medicare has paid for such services, the law obligates Medicare to seek recovery of its payments. The only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a *court order on the merits of the case*. If the court or other adjudicator of the merits, specifically designate amounts that are for payment of pain and suffering or other amounts not related to medical services, Medicare will accept the Court’s designation. Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services. (Emphasis added.)

Faced with the adverse position of the secretary, Bradley paid Medicare under protest to avoid further collection action and proceeded to exhaust her administrative appeal remedies with the secretary.

The exhaustion of the administrative appeals involved Bradley 1) filing a request for redetermination from the Medicare Secondary Payer Recovery Contractor (MSPRC); 2) filing a request for reconsideration of MSPRC’s unfavorable determination to MAXIMUS Federal Services; 3) filing an appeal of MAXIMUS’s unfavorable reconsideration by requesting a hearing before an administrative law judge (ALJ) at the Office of Medicare Hearings and Appeals, Southern Field Office and participating in a

hearing before the ALJ; and 4) appealing the unfavorable ALJ decision to the Medicare Appeals Council in Washington, D.C. Bradley, however, lost at every level of administrative appeal, ultimately receiving the Medicare Appeals Council's final decision rejecting her appeal on September 26, 2007.

On October 23, 2007, Bradley as a survivor, along with her nine brothers and sisters, also as survivors (hereinafter collectively referred to as "Bradley"), filed a federal district court complaint seeking a declaratory judgment on 28 U.S.C. §1331 grounds. The complaint sought declarations that the secretary had no priority over the collective survivors' property rights in the settlement, and further that she was bound by the probate court order allocating the settlement because she had refused to both allocate herself and participate in the allocation proceeding before the probate court. Bradley also perfected her right to directly appeal the secretary's final decision under 42 U.S.C. §405(g) grounds, filing such appeal as part of her complaint before the district court.

On June 9, 2008, the District Court for the Middle District of Florida adopted the magistrate's report and recommendations and dismissed the survivors' declaratory judgment action brought under 28 U.S.C. §1331. The case proceeded as a review of the secretary's final decision under 42 U.S.C. §405(g). Following a significant briefing period encompassing a multitude of issues including the magistrate's report and recommendations affirming the secretary's decision, the district court again adopted the magistrate's

report, directing that the clerk close the file on July 13, 2009. The district court held that the secretary need not recognize the probate court's order, and that the secretary could take the property belonging to the survivors without due process. The basis of this ruling was essentially that the court would give deference to the secretary's interpretations of the MSP, and because the survivors had not pursued their claims to judgment after a "full trial on the merits," they could not challenge the secretary's taking on due process grounds.

The district court's determination was subsequently appealed to the U.S. Court of Appeals for the 11th Circuit.

Contours of the Decision

On appeal, the 11th Circuit reversed the district court's determination. The issue before the court was the interplay between the MSP and the FWDA. The individual property rights of the survivors and the estate in the settlement were critical to the analysis. *Could the secretary ignore the probate court's allocations and seek to recover its Medicare claim from the property of the survivors, and more importantly, could the secretary take property belonging to survivors who had no connection to the payment of Medicare benefits without due process?*

The FWDA provides that a personal representative of an estate brings a consolidated wrongful death action.¹⁶ Unquestionably, this means that all claims for damages, whether held by the estate, or held by the survivors, are consolidated into one wrongful death action brought by the personal representative against the responsible third party(ies). The FWDA provides the specific damages recoverable by the surviving children in these circumstances as the value of lost support and services, parental companionship, instruction and guidance, and mental anguish.¹⁷ The damages recoverable by the estate include medical and funeral expenses due to the decedent's injury or death.¹⁸ The survivors are not allowed to recover damages for medical expenses unless they have actually paid the decedent's medical expenses.¹⁹ The only other claim for medical expenses related to the injury or death is recoverable as – damages by the estate.²⁰

Florida has a well-established procedure for allocating a wrongful death settlement between the claims of the survivors and the claims of the estate. The personal representative who settles the claim is authorized to allocate the settlement proceeds

¹⁶ FLA. STAT. §768.20 (2007).

¹⁷ FLA. STAT. §768.21(1) (2007).

¹⁸ FLA. STAT. §768.21(5) (2007).

¹⁹ FLA. STAT. §768.21(6)(b) (2007).

²⁰ *See id.* at 1332, fn. 2 (citing FLA. STAT §§768.20 and 768.21); *id.* at 1335, fn. 10

between the estate and the survivors in a “reasonable and equitable” manner or seek court approval of an apportionment. The decedent’s creditors may only recover from the portion of the settlement allocated to the estate and cannot seek recovery from the portion of the settlement allocated to the survivors.²¹

Bradley, throughout the proceedings below, maintained that the secretary could not seek recovery from the portion of the settlement belonging to the survivors because such portion constituted the collective survivors’ individual property, protected by principles of due process. Bradley further argued that the secretary’s reliance on its interpretations contained in its field manual were unreasonable.²²

²¹ See *Thompson v. Hodson*, 825 So. 2d 941, 950 (Fla. 1st D.C.A. 2002) (“[W]here the personal representative receives a nonspecific settlement offer in a wrongful death action, he or she is obligated to apportion the proceeds between the estate and the survivors in a reasonable and equitable manner or to seek court approval of an apportionment”); *Continental National Bank v. Brill*, 636 So. 2d 782 (Fla. 1994); *University Medical Center v. Zeiler*, 625 So. 2d 120 (Fla. 5th D.C.A. 1993); and *Orlando Regional Medical Center v. Heron*, 596 So. 2d 1078 (Fla. 5th D.C.A. 1992).

²² Consistent with this position was the belief by counsel throughout the proceedings below that Bradley and her siblings, as survivors, were not subject to the requirement that they exhaust Medicare’s administrative appeals remedies since the collective survivors had no obligation to, or other connection with, Medicare. However, since the secretary customarily raised the defense that the survivor(s) “failed to exhaust administrative remedies,” a matter sought by counsel to be judicially noticed herein, counsel elected to engage in the exhaustion of

(Continued on following page)

The secretary maintained that its decision to ignore the probate court's allocation was reasonable and in keeping with the MSP and the MSP Manual.²³ The secretary concluded that its interpretation of the MSP and the district court's deference given to it in upholding its decision was proper.²⁴

The court acknowledged that under the FWDA, the claim of the estate is separate from the claims of the survivors.²⁵ All loss of consortium or companionship recoveries are the property of the person who incurred the loss.²⁶ A child's loss of parental companionship claim is a property right belonging to the child. The surviving children's loss of parental companionship claims do not include the decedent's medical expenses, as a claim for medical expenses belongs only to the estate.²⁷ The court concluded that the secretary cannot claim the property of the survivors and can only claim a right of reimbursement against the claim of the estate which would constitute the recovery for medical expenses.²⁸

such administrative remedies so as to avoid dismissal of her paramount constitutional deprivation of property arguments.

²³ *Bradley*, 621 F.3d at 1335-37.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The court further pointed out that the MSP allows recovery of Medicare conditional payments from primary plans and that nowhere in the definition of primary plans is it listed that a primary plan is a surviving child with property rights in a tort settlement.²⁹ The court went on to emphasize that the secretary's reliance and the district court's deference given to the MSP Manual was misplaced. The MSP Manual is merely a policy statement that was not adopted by rule and notice and does not carry the force of law.³⁰

The court noted that counsel for the survivors and the estate acted sensibly and in a cost-effective manner. Once it was determined that the secretary was seeking more of the settlement than she was entitled to, counsel properly turned to the Florida probate court for a proration by filing an application for determination of the rights of the estate and the rights of the survivors to the wrongful death settlement.³¹ The secretary was served notice of the proceeding and could have participated, but chose not to participate.³² The secretary's refusal to accept the probate court's allocation, based on provisions of the

²⁹ *Id.*

³⁰ *Id.* at 1338.

³¹ *Id.*

³² *Id.*

MSP Manual, was unreasonable, because the MSP Manual does not control the law.³³

Finally, the court was seemingly perplexed at the way the secretary responded to counsel's efforts to address the constitutionally protected property rights belonging to the 10 survivors, describing Medicare's posturing as "a particularly, troubling sub-issue."³⁴ The court then found Medicare's position contrary to judicial and public policy,³⁵ since it would force victims to litigate their claims, contrary to the historically

³³ *Id.* at fn 25. The court pointed out that lawyers routinely resolve the interest of third parties in settlements by agreement or allocation litigation. In the instant case, Bradley, faced with the secretary's position, had no other option but to seek an allocation of the settlement through the probate court because the MSP and its regulations do not prescribe how a lump sum settlement will be prorated between multiple parties, and until better methods are prescribed, the steps taken by Bradley were reasonable and the only method available. This sentiment was likewise echoed by the U.S. Supreme Court in *Ahlborn*. In *Ahlborn*, the U.S. Supreme Court indicated that in the absence of an agreement as to the allocation of a settlement, the court is the proper venue for the allocation. *See Ahlborn*, 126 S. Ct. at 1765.

³⁴ *Id.* at 1337. As a result, counsel likened the secretary to the "800-pound gorilla," who, as the late comedian Henny Youngman would say in follow-up to his one liner on where an 800-pound gorilla sleeps, "Wherever it wants!"

³⁵ *Id.* at 1338-1339. Medicare's rejection of any allocation in a settlement and its position that it would only honor an allocation if it resulted after a "full trial on the merits," was deemed to "[fly] in the face of judicial and public policy." *Id.* at 1339.

strong public interest in the expeditious resolution of lawsuits through settlement.³⁶

At the end of the day, the court reversed the district court's affirmance of the secretary's decision and limited the secretary to recover from only the \$787.50 allocated to the estate by the probate court, remanding the case for consistent proceedings below.³⁷

The Effect of the Decision on Your Practice

The *Bradley* decision will have far-reaching implications on wrongful death actions in Florida. In

³⁶ Settlements are the compromise of legal rights based on the party's valuation of their legal rights and the likely outcome if the matter is brought before the court for decision. Like with any compromise, lienholders claiming a legal entitlement to a recovery must weigh their right based on the law and the possible outcome if the matter is submitted to a court for decision. Litigation over the entitlement to recover from a settlement will be tempered by the desire to mitigate risk of proceeding to hearing. In states where hearing procedures have been developed to allocate a settlement to determine the rights of lienholders, they are rarely used. Once all of the interested claimants understand the rules that govern the division of settlement proceeds, it is usually possible for them to agree to an allocation without the need for the time and expense of an allocation hearing. See Sharon L. Van Dyck & Wilbur W. Fluegel, *Determining "Full Recovery" Under the Minnesota Anti-Subrogation Statute*, MINN. TRIAL LAWYER MAG. 18 (Winter 1999). There is no reason compromise of Medicare conditional payments or other lien interest cannot occur outside the court now that it has been recognized that Medicare's recovery from the survivor's portion of the settlement is prohibited.

³⁷ *Bradley*, 621 F.3d at 1340.

the abstract, the decision rejected the secretary's wholesale reliance on the MSP Manual to justify collection from a settlement. This rejection of the secretary's reliance is a fundamental change in the playing field. Historically, the secretary has exercised broad power to interpret the MSP and adopt policy statements and manuals concerning its application. The *Bradley* court's refusal to give deference to the secretary's interpretations contained in the MSP Manual will provide future argument that other provisions of the MSP Manual that are contrary to law should not be used to justify unreasonable recoveries from settlements.

The more practical application of the decision will lead to a corrected approach to Medicare's collection from wrongful death settlements. Medicare will be forced to acknowledge the allocation of the settlement between the claims of the survivors and the claims of the estate, and the secretary will no longer be able to seek recovery from the entirety of a wrongful death settlement. It is too soon to determine if the secretary will begin to acknowledge allocations of the settlement prior to a court allocation, but it is definite now that they cannot ignore the allocation of a wrongful death settlement by a court. Since the *Bradley* court emphasized that the secretary could have participated in the probate court's allocation but refused, it is likely that the secretary's future position could be that she will continue to reject allocations of wrongful death settlements outside of the court. However, the recognition of the legal realities of the

secretary's recovery if the matter is submitted to the court for allocation should lead to the secretary adopting procedures to determine a recovery prior to a full-blown allocation hearing before the court.

Regardless of how the secretary proceeds administratively in accepting allocations of wrongful death settlements, it is certain that in the context of Florida wrongful death settlements, a probate court allocation of the settlement between the claims of the survivors and the claims of the estate must now be recognized. However, this recognition by the secretary could be tempered if the parties do not notice the secretary of the allocation proceeding and provide ample opportunity for the secretary to participate.

Moving forward after *Bradley*, a practical problem will arise as to how to challenge an unjustified legal action by Medicare if the secretary acts contrary to *Bradley* by not properly recognizing a court's allocation and demanding payment from portions of the settlement allocated toward claims other than medical expenses. There are, and will be, divergent views on how such action by the secretary should be challenged. One approach would be business as usual, which would require exhausting all administrative appeals before the matter can be brought back before a court.

As outlined above, however, the administrative appeals process involves four distinct steps that must be taken. These steps are labor intensive and time consuming, and it can take years to exhaust these

four levels of administrative appeals before reaching a disposition before a federal district court. Although this administrative headache is an aggravation, failure to exhaust administrative appeals could lead to the inability to bring the matter back to a court for determination. The good news for practitioners is that the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412, provides for a discretionary award of attorneys' fees under the federal common law for oppressive, vexatious, recalcitrant, or bad faith conduct,³⁸ or provides a mandatory award of attorneys' fees when the government's conduct is not "substantially justified."³⁹

On the other hand, there may be ways to sidestep the administrative appeals hurdles in some circumstances. For example, in a situation in which the secretary ignores an order allocating a settlement, persists in attempting to collect those portions deemed to be survivors' property, and subsequently refers the debt, plus interest, to the Department of Treasury for collection, a viable action could likely be filed relative to an inappropriate encumbrance or taking of property. This action would be akin to condemnation of private property and could be coupled with claims under the state or federal fair debt collections act if applicable. In addition, it may be that perhaps a viable declaratory judgment action on

³⁸ 28 U.S.C. §2412(b).

³⁹ 28 U.S.C. §2412(d)(1)(A).

28 U.S.C. §1331 grounds now exists *post-Bradley*. The court would then determine the rights of all competing claims to the settlement. This article is not intended to limit the arguments of any practitioner faced with the dilemma, but only to observe that creative thinking can now achieve much in holding Medicare accountable for refusing to honor the binding precedential value of *Bradley*. Since *Bradley* opens so many new possibilities, only time will prove the viability of worthy efforts consistent with logic and reason.

Application of *Bradley* to Other Jurisdictions

The *Bradley* decision concerned the interplay between the MSP and the FWDA. However, the logic and thrust of the *Bradley* decision would be applicable to any state wrongful death action where the claims of the survivors and the claims of the estate are consolidated into one action, and state law determines that these claims are independent. In these other states, the arguments made in *Bradley* that the secretary cannot recover from the settlement those portions belonging to the survivors should be compelling. As is always the case, however, dissimilarities may affect the degree of success. For example, a survivor's recovery may include components for medical expenses unlike the circumstance in Florida, necessitating further analysis. If a state's wrongful death statute does not provide that the two claims are independent, or the statute requires payment of the decedent's creditors before an allocation, all bets

are off concerning the application of *Bradley* to reduce a Medicare claim.

The Impact of *Bradley* on Other Lienholders

The *Bradley* decision addresses the secretary's claims to recover Medicare benefits under the MSP. Since the MSP explicitly states that the secretary makes conditional payments, these payments must be reimbursed to the appropriate trust fund, and the United States may pursue an action to recover unpaid conditional payments; the recovery rights under the MSP are reserved for the secretary. Accordingly, the *Bradley* decision directly affects only the secretary's recovery rights under the MSP.

Some Medicare beneficiaries receive their Medicare benefits from Medicare Part-C or Medicare Advantage plans (Medicare HMO). In this circumstance, the secretary pays a premium to private health insurance companies to provide benefits similar to Medicare benefits. If a Medicare HMO provides benefits, the secretary does not make conditional payments, so the secretary's reimbursement rights under the MSP would not be applicable. Medicare HMOs have the right to charge or bill enrollees for accident-related expenses, but this avenue to reimbursement is governed by 42 U.S.C. §§1395mm(e)(4) and 1395w-22(a)(4), and is much weaker than the reimbursement rights reserved for the secretary under the MSP. Medicare HMOs can include reimbursement rights in their contracts, but

these contractual reimbursement rights cannot be stronger than the secretary's rights under the MSP since the Medicare HMO is providing benefits in lieu of the secretary providing benefits.⁴⁰ Accordingly, Medicare HMOs' reimbursement from a wrongful death settlement should be limited to the recovery of medical expenses by the estate, and they should not be able to reach the survivor's property.

Medicaid agencies can assert a statutory right to recover accident-related medical expenses from a wrongful death settlement pursuant to 42 U.S.C. §1396 *et seq.* and corresponding state laws. However, according to the U.S. Supreme Court in *Ark. Dept. of Health & Human Services v. Ahlborn*, 126 S. Ct. 1752 (U.S. 2006), this right of recovery by Medicaid agencies is limited to the portion of the Medicaid recipient's settlement representing past medical expenses and cannot be extended to other portions of the settlement which represent a Medicaid recipient's unassigned private property. The analysis in *Ahlborn* prohibiting Medicaid agencies from asserting a lien against, and seeking recovery from, the portions of a Medicaid recipient's settlement not representing compensation for past medical expenses, coupled with

⁴⁰ See *Care Choice HMO v. Elizabeth Engstrom*, 330 F.3d 786 (6th Cir. 2003); *Arlene Nott v. Aetna U.S. Healthcare, Inc.*, 303 F. Supp. 2d 565 (E.D. Penn. 2004); and *Primax Recoveries, Inc. v. Catherine Yarmosh*, Case No. 3:03CV01931 (U.S. D. Ct. 2006) (Recommended Ruling on Parties' Dispositive Motions by U.S. Magistrate Donna F. Martinez, dated September 7, 2006, with stipulated dismissal dated September 25, 2006).

the analysis in *Bradley* is instructive on the separate nature of the property rights of various persons and governmental entities in settlements. The *Bradley* court's framing of the issue as a determination of "Whose property is the settlement?" speaks directly to the question that must be answered in regard to Medicaid liens. The *Bradley* case outlines the exact analysis necessary to limit Medicaid to recover from only the portion of the settlement belonging to the estate. Given the holding in *Bradley* and *Ahlborn*, Medicaid agencies should be limited to recover only from the estate's portion of any wrongful death recovery.⁴¹

⁴¹ In Florida, the Agency for Health Care Administration has been successful in asserting Medicaid lien rights against the entirety of wrongful death settlements regardless of whether the settlement is the property of the estate or the property of the survivors. See *Strafford v. Agency for Health Care Admin.*, 915 So. 2d 643 (Fla.2d D.C.A. 2005); *Englich v. Agency for Health Care Admin.*, 916 So. 2d 994 (Fla. 4th D.C.A. 2005); and *Ross v. Agency for Health Care Admin.*, 947 So. 2d 457 (Fla. 3d D.C.A. 2006). Although Florida Medicaid's entitlement to recover from the entirety of a wrongful death settlement pursuant to FLA. STAT. §409.910 has not been squarely before a Florida appellate court since the *Ahlborn* decision, the decision in *Ahlborn* limiting Medicaid to recover from only the portion of the settlement representing past medical expenses should restrict the use of these *pre-Ahlborn* wrongful death decisions. Furthering the logic and rationale of *Ahlborn*, the *Bradley* decision outlines the exact analysis necessary to limit Medicaid to only recover from the portion of the settlement belonging to the estate (past medical expenses). *Bradley*, coupled with *Ahlborn*, and if necessary, coupled with traditional attacks on the constitutionality of FLA. STAT. §409.910, as it relates to the taking of survivors' constitutionally protected property rights, should prevent Medicaid in

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While the recovery rights of other possible lien holders is subject to their statutory or contractual rights of recovery, the *Bradley* analysis will be problematic for these lienholders in their attempts to collect from the portion of the settlement allocated to the survivors. As the decision outlines, under the FWDA, the claims of the estate are separate from the claims of the survivors. The recovery for the claims of the survivors is the property of the survivors. Lienholders are left to recover medical expenses from the estate's compensation for its losses, not the recovery of the survivor's property. Accordingly, the analysis in *Bradley* will prevent lienholders from reaching into the pockets of survivors to satisfy their lien for medical expenses.

Conclusion

Although the aftermath of *Bradley* may be far reaching and not easily calculated at this time, it does give immediate traction to victims in Florida's tort system when a loved one's death is caused by the negligence of others. No longer can Medicare and other lienholders exploit true victims who have a constitutionally protected property right in their recovery. The 11th Circuit made a correct and well-reasoned decision in restraining the overreaches of

the future from asserting liens against, and seeking recovery from, the portion of a wrongful death settlement representing the survivor's property.

Medicare, which was born from its adopted status as an 800-pound gorilla. Hopefully moving forward, practitioners will find *Bradley* and its logic supportive in bringing disputed claims to a quick and timely resolution.

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