



November 30, 2011

## **Hadden Decision Affirmed by the Sixth Circuit Court of Appeals**

The long awaited Hadden decision has arrived. Those affected by the Medicare Secondary Payer Act (MSP) have been eagerly awaiting this decision since oral arguments were heard over a year ago in the United States Court of Appeals for the Sixth Circuit. It was hoped by those in support of the appeal that the Sixth Circuit would overturn the district court's decision, which held that the MSP requires full reimbursement of Medicare conditional payment demands regardless of apportionment or comparative fault principles. To the contrary, the Sixth Circuit affirmed the district court's decision in its opinion filed on November 21, 2011, holding that the MSP required Vernon Hadden to reimburse Medicare to the full extent that the government advocates. For a copy of the recent Hadden decision, please [click here](#).

The original events that formed the basis for this action were straightforward and undisputed. In August of 2004, Hadden was a pedestrian who was struck by a motor vehicle owned by Pennyrile Rural Electric Cooperative Corporation. The Electric Cooperative truck had swerved to miss an unidentified motorist who had run through a traffic signal and hit Hadden. A Medicare beneficiary, Hadden sustained serious personal injuries and Medicare paid his medical bills in full, which totaled \$82,036.17. When Hadden sued Pennyrile, he demanded compensation for all of his medical expenses as well as other damages. Pennyrile settled with Hadden for \$125,000 in exchange for a full release of claims against it. According to Hadden, the \$125,000 settlement with Pennyrile represented only 10% of his total damages. After taking reductions for a portion of the attorney's fees pursuant to 42 CFR §411.37, Medicare determined that Hadden owed it \$62,338.07. Medicare's determination did not take into consideration Hadden's claim of comparative fault and the conditional payment amount contained no reduction that reflected the 10% fault of the Electric Cooperative.

Hadden paid the amount due, plus some interest, but did so under protest. Hadden claimed that he should be required to reimburse Medicare for only 10% -- or about \$8,000 -- due to the fact that the unidentified motorist was 90% responsible for Hadden's damages. The essence of his comparative fault argument was that Pennyrile's payment of \$125,000 represented only 10% of his total damages, and therefore Medicare should only be entitled to 10%.

In their review, the Sixth Circuit took a *de novo* review of Hadden's petition, although the court pointed out that throughout the previous opinions, during both the administrative process and in federal district court, Hadden's arguments concerning comparative fault principles were consistently rejected. The opinion, the Sixth Circuit noted that the MSP was silent on the issue of whether CMS can obtain full reimbursement of conditional payments in situations like the



Hadden case. Therefore the Court applied the *Chevron* standard by giving deference to the agency's construction and interpretation of the MSP and its application to conditional payment recoveries. Here the Court noted that it was undisputed that Medicare made conditional payments and that Hadden had "received payment from a primary plan." The issue that was in dispute and the key term to be analyzed by the Court dealt with payment "responsibility." In other words, was it Hadden's "responsibility" to reimburse Medicare the full extent of what Medicare was owed, or, did Hadden only have a "responsibility" to make payment for 10% of what was owed?

Upon examination, the Sixth Circuit found a few items to be helpful in its analysis: 1) In *Zinman v. Shalala*<sup>1</sup>, the Ninth Circuit concluded that Medicare was "entitled to full reimbursement of conditional payments when a beneficiary receives a discounted settlement from a third party;" 2) Congress' amendment of the MSP in 2003 defined the term "responsibility"- if a beneficiary makes a claim against a primary plan, and then later receives a payment from that plan in return for a release of that claim, then the plan is deemed responsible for payment of the items or services included in that claim; 3) Because Hadden claimed that Pennyryle was responsible for all of his medical expenses, he should not be permitted later to argue that Medicare was now somehow only responsible for 10% of the damages.

Hadden sought to refute the Court's logic by citing the Medical Care Recovery Act<sup>2</sup> and the Medicaid Statute<sup>3</sup>, which under both statutes only allows the government to recover its proportionate share of a discounted settlement. Hadden also argued that there was "no principled reason" to the government's right to reimbursement under the Medicare statute. Additionally, Hadden asserted that the same principles applied in *Arkansas Department of Health and Human Services v. Ahlborn*<sup>4</sup> should also apply in this Court's decision. The Sixth Circuit disagreed and stated that "the Supreme Court did not divine principles of universal application in *Ahlborn*." Hadden additionally argued that Medicare could only enforce its rights by way of subrogation. The Sixth Circuit disagreed and found that its rights to recover against Hadden were "separate and distinct" from its rights to subrogation. Hadden's last shot argument was that the government's reimbursement obligation was "against good equity and conscience." The Court disagreed and found that Hadden had presented little or no evidence of hardship as a result of the reimbursement and that he still otherwise retained \$44,000 of the settlement money after reimbursing Medicare.

The dissenting opinion had a quite contrary view of this issue and felt that the majority opinion reached an absurd result and that *Chevron* deference was not the answer to the MSP's silence. Additionally, the dissent commented that the policy taken by the majority would discourage settlements and may ultimately hinder CMS's efforts to recover conditional Medicare payments.

---

<sup>1</sup> 67 F.3d 841, 845 (9<sup>th</sup> Cir. 1995)

<sup>2</sup> 42 U.S.C. §2651(a)

<sup>3</sup> *Id.* § 1396a(a)(25)

<sup>4</sup> 547 U.S. 282 (2006)



The Hadden case may ultimately be further appealed to the Supreme Court. In the meantime, it appears that tortfeasors can continue to expect that Medicare may obtain full recovery of their conditional payment demands, up to the amount of the settlement. Any change in this policy would need to be addressed by Congress, and not the Courts. The Hadden case ultimately demonstrates that the judicial system remains deferential to the plain language of the MSP, or in the alternative, *Chevron* deference being given to CMS' interpretation of the MSP.

For more information, please contact Heather Schwartz, Corporate Counsel, PMSI at [Heather.Schwartz@pmsisettlement.com](mailto:Heather.Schwartz@pmsisettlement.com) or 813.612.5504 or visit our blog at [www.MedicareInsights.com](http://www.MedicareInsights.com).

#### **Proven Solutions for Cost Containment**

Founded in 1976, PMSI is a leader in developing solutions to control the growth of medical costs in workers' compensation. As one of the nation's largest and most experienced companies focused solely on workers' compensation, we deliver proven solutions for cost containment across the claims lifecycle. PMSI's Pharmacy, Medical Services and Equipment, and Settlement Solutions products deliver quantifiable results and improve the quality of care for injured workers. We provide our customers with the innovation, focus, expertise, analytics and technology needed to successfully deliver workers' compensation benefits.