No. 11-1197

In The
Supreme Court of the United States

VERNON HADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE DRI[1]

Amicus curiae DRI – the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. To this end, DRI seeks to address issues important to defense attorneys, to promote the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as amicus curiae in cases raising issues of importance to its members, their clients, and the judicial system. This is just such a case because the Sixth Circuit's opinion will frustrate the ability of litigants to settle cases involving Medicare-covered injuries.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Pursuant to rule 37.2(a), amicus curiae states that it timely notified counsel of record for petitioner and respondent of its intention to file an amicus brief under rule 37. Counsel of record for petitioner and respondent have consented in writing to the filing of this amicus brief.

The Sixth Circuit's opinion creates a conflict among the circuits on the issue of whether, under the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b) (2011), the government is entitled to full reimbursement of its Medicare payments when a beneficiary compromises a tort claim and recovers a reduced amount for medical expenses, or whether the government (like its beneficiary) is entitled to only a proportionate recovery from the settlement. Without certainty on this issue, litigants cannot meaningfully evaluate settlement offers in cases brought by Medicare beneficiaries.

The Sixth Circuit's opinion also discourages Medicare beneficiaries from accepting reasonable settlement offers. Under the court of appeals' opinion, the government can obtain full reimbursement of its Medicare payments (less procurement costs) from a settlement even though the beneficiary has obtained only a discounted recovery of her damages. Yet the government does not seek full reimbursement of its Medicare payments if the beneficiary receives a comparably discounted recovery after a decision on the merits. As a result, Medicare beneficiaries within the Sixth Circuit will have no choice but to reject reasonable settlement offers and take their claims to trial to avoid overreaching government reimbursement claims.

SUMMARY OF THE ARGUMENT

The Sixth Circuit held that under the Medicare Secondary Payer Act the government can recover all of its Medicare payments from a discounted settlement even though the beneficiary is entitled under the settlement to only a partial, proportionate recovery of medical expenses. On this issue, the Sixth Circuit's opinion conflicts with the opinion of the Eleventh Circuit in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010). As petitioner has shown, the Sixth Circuit majority misconstrues the Act. DRI fully supports petitioner's arguments, and will not reiterate those arguments here. Instead, DRI submits this brief to emphasize the danger that the Sixth Circuit's opinion will frustrate settlements in cases involving Medicare beneficiaries even when both defendants and plaintiffs agree that settlement is appropriate. By doing so, the opinion will diminish the government's reimbursement of Medicare payments.

The conflict between the Sixth and Eleventh Circuits creates uncertainty impacting hundreds of thousands of settlements annually. Medicare covers about 15% of all Americans. Each year hundreds of thousands of new cases are filed involving claims for Medicare-covered injuries (413,000 new cases were reported to the Centers for Medicare & Medicaid Services in 2010 alone). Litigants attempting to settle any of these cases must now confront uncertainty regarding the government's reimbursement rights – uncertainty created by the conflict between the Sixth and Eleventh Circuit opinions.

Even putting this conflict aside, the Sixth Circuit's opinion discourages Medicare beneficiaries from accepting otherwise reasonable settlement offers. The opinion does so because it allows the government to seek full reimbursement of its Medicare payments from the beneficiary's discounted recovery following a settlement, although the government could not do so following a decision on the merits. Thus, after a settlement that realizes for the beneficiary only a partial, proportionate recovery of medical expenses incurred, the government can seize amounts expressly paid to the beneficiary for her lost earnings, pain and suffering, and other non-medical damages, and use them to make up the difference and reimburse the government for the full amount of its Medicare payments.

A beneficiary can protect against such overreaching reimbursement claims only by refusing to settle and instead proceeding to trial. Yet compelling beneficiaries to reject reasonable settlement offers will unnecessarily increase litigation costs and undermine the strong public interest favoring the expeditious and efficient resolution of appropriate cases through settlement. Thus, even when both defendants and plaintiffs prefer to compromise their disputes, the Sixth Circuit's opinion will deter settlement in cases involving Medicare-covered injuries. Further, the increased litigation costs from these unnecessary trials will reduce the amounts received by Medicare because the government's share of such

costs is deducted before reimbursement of its Medicare payments.

ARGUMENT

I. THE CONFLICT AMONG THE CIRCUITS REGARDING THE GOVERNMENT'S RIGHT TO FULL REIMBURSEMENT OF MEDICARE PAYMENTS FROM A DISCOUNTED SETTLEMENT WILL FRUSTRATE SETTLEMENT IN COUNTLESS ACTIONS.

A. The cases are in conflict.

The Medicare beneficiary in this case brought suit against one of two motorists whose actions allegedly caused his injuries (the other motorist could not be identified). The beneficiary alleged damages including medical expenses and pain and suffering. Pet. App. 2a, 3a. The beneficiary settled his claims against the identifiable motorist for only 10% of his claimed damages. Pet. App. 2a-3a. The Sixth Circuit nonetheless construed the Medicare Secondary Payer Act to allow the government to recover the full amount of its Medicare payments (less procurement costs) from the discounted settlement. Pet. App. 6a-7a.[2]

[2] The government generally "reduces its recovery to take account of the cost of procuring the judgment or settlement." 42 C.F.R. § 411.37(a)(1) (2011).

The Sixth Circuit's opinion conflicts with the Eleventh Circuit's opinion in *Bradley*, 621 F.3d 1330. In that case, a Medicare beneficiary died, allegedly as a result of a nursing home's neglect. The beneficiary's estate and survivors brought a wrongful death claim against the nursing home. *Id.* at 1332. The claim was settled for the amount of the nursing home's liability insurance policy limits, and a Florida probate court found the claim had been settled at a significant discount. *Id.* at 1332-34. But unlike the Sixth Circuit, the Eleventh Circuit held the government could not recover the full amount of its Medicare payments from the discounted settlement. *Id.* at 1339. Instead, the government could recover only the same fraction of its Medicare payments as the plaintiffs recovered of their total claimed damages. *Id.* at 1333-34, 1340.

In *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), this Court considered an analogous issue under the Medicaid statute. The Court held the Medicaid statute precluded a state from recovering all of its Medicaid payments from a discounted settlement. In doing so, this Court emphasized that "[t]he text of the federal third-party liability provisions . . . focuses on *recovery of payments for medical care*." *Id.* at 280 (emphasis added). As a result, the state could not "lay claim to more than the portion of [the Medicaid beneficiary]'s settlement that represents medical expenses." *Id.*

The Sixth Circuit distinguished *Ahlborn* on the ground it involved a different statute and "did not divine principles of universal application." Pet. App.

9a. But the Medicaid and Medicare statutes are not fundamentally different. As this Court explained in *Ahlborn*, the Medicaid statute provides that recipients must "'assign the State any rights . . . to payment for medical care from any third party,' 42 U.S.C. § 1396k(a)(1)(A), not rights to payment for, for example, lost wages." *Ahlborn*, 547 U.S. at 280. Likewise, the Medicare statute provides that a liability insurer or tortfeasor must reimburse the government "with respect to an item or service" provided by Medicare. 42 U.S.C. § 1395y(b)(2)(B)(ii) (2011). Reimbursement under Medicare – as under Medicaid – is thus limited to payment for medical care, not payment for lost wages or other claims.

Even before the Sixth Circuit's opinion, numerous commentators debated the application of *Ahlborn* to Medicare. *See, e.g.,* Nicole Miklos, *Giving an Inch, Then Taking A Mile: How the Government's Unrestricted Recovery of Conditional Medicare Payments Destroys Plaintiffs' Chances at Compensation Through the Tort System*, 84 St. John's L. Rev. 305, 315 (2010) ("It is unclear whether *Ahlborn* will also govern Medicare reimbursement rights."); William L. Winslow, *The Uncertain Future of Medicare Set-Asides*, 44 – Mar. Trial 56, 60 (2008) ("Because *Ahlborn* involved Medicaid, its application to Medicare expenditures is unclear."); Matthew L. Garretson, *What Does the Ahlborn Decision Really Mean?*, Cincinnati Law Library News, Feb. 2007 at 1, 4, *available at* http://www.hamilton-co.org/cinlawlib/newsletters/2007/07february.pdf ("Arguments both for and against *Ahlborn* controlling

similar cases involving Medicare reimbursement can be advanced."); Norma S. Schmidt, *The King Kong Contingent: Should the Medicare Secondary Payer Statute Reach to Future Medical Expenses in Personal Injury Settlements?*, 68 U. Pitt. L. Rev. 469, 484 (2006) ("While *Ahlborn* deals specifically with the state Medicaid liens, many of . . . [the] arguments [in that case] also apply to Medicare liens under the MSP statute."). The Sixth Circuit's narrow reading of *Ahlborn* only heightens this uncertainty.

B. The conflict is impeding settlement.

Until resolved, the uncertainty regarding the government's right to full reimbursement from a discounted settlement will impact settlements in hundreds of thousands of cases annually involving Medicare beneficiaries.

Parties ordinarily enter into settlements to achieve certainty and finally resolve their disputes. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) (Parties settle cases "to reduce uncertainty."); *D.R. by M.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997) ("A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs."). In this regard, litigants in cases involving Medicare-covered injuries are no different than other litigants. Predictability fosters settlement.

Medicare covers about 15% of all Americans. *See* 2011 Annual Report of the Boards of Trustees of the

Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds 4 (2011), *available at* http://www.cms.gov/reportsTrustFunds/downloads/tr2011.pdf ("In 2010, 47.5 million people were covered by Medicare."). It handles more than 1 billion claims per year. *See HHS: What We Do*, U.S. Department of Health & Human Services, http://www.hhs.gov/about/whatwedo.html (last visited Apr. 19, 2012).

Each year, Medicare beneficiaries bring hundreds of thousands of cases against tortfeasors for Medicare-covered injuries. In 2010, for example, the Centers for Medicare & Medicaid Services (CMS) received notice of 413,000 such cases. In that same year, CMS issued over 74,000 recovery demands. *See Protecting Medicare with Improvements to the Secondary Payment Regime Before the H. Comm. on Energy and Commerce, S. Comm. on Oversight & Inv.*, 112th Cong. 3 (2011) (statement of Deborah Taylor, Chief Financial Officer and Director, Office of Financial Management Centers for Medicare & Medicaid Services), *available at* http://republicans.energycommerce.house.gov/Media/file/hearings/oversight/062211/Taylor.pdf.

The number of reported cases is likely to increase. In January 2012, liability insurers were first required to begin reporting claims involving Medicare-covered injuries. *Id.* at 3-4. As a result, CMS expects the numbers of reported cases to increase in coming years. *Id.*

On average, about 97% of civil cases are resolved by settlement. *See* Bureau of Justice Statistics, Special Report: Civil Bench and Jury Trials in State Courts, 2005 1 (Revised 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf; *see also Bradley*, 621 F.3d at 1339, n.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."). Thus, of the 413,000 cases reported to CMS in 2010, more than 400,000 would ordinarily settle.

But to settle these cases, the parties need certainty on the issue of whether the government can recover its full Medicare payments from a discounted settlement. As shown by the facts of this case, the extent of the government's reimbursement right can significantly impact the value of settlement to a beneficiary. Under the government's construction of the Medicare Secondary Payer Act, the government was entitled to about $62,000. Pet. App. 2a-3a. But under the beneficiary's construction of the Act, the government was entitled to about $8,000 – 87% less. Pet. App. 3a. Until this issue is resolved, the conflict between the Sixth and Eleventh Circuits will frustrate settlement in countless cases involving Medicare-covered injuries.

II. THE SIXTH CIRCUIT'S CONSTRUCTION OF THE MEDICARE SECONDARY PAYER ACT UNDERMINES IMPORTANT POLICIES FAVORING SETTLEMENT.

A. The opinion will chill settlement in cases brought by Medicare beneficiaries.

Even without regard to the conflict it creates, the Sixth Circuit's majority opinion will deter settlement in cases involving Medicare-covered injuries.

Although jury trials play a fundamental role in our legal system,[3] the courts should facilitate settlement in cases where the parties choose to compromise their dispute. "Historically, there is a strong public interest in the expeditious resolution of lawsuits through settlement." *Bradley*, 621 F.3d at 1339; *see, e.g.*, *McDermott, Inc.*, 511 U.S. at 215 ("[P]ublic policy wisely encourages settlements."); *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005) (analyzing rule excluding evidence of settlement communications in light of policy that "the law favors out-of-court settlements"); *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (rejecting challenge to class action settlement based on the "strong judicial policy that favors settlements"). Settlement is

[3] *See* Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U. L. Rev. 67, 69 (2006) ("It is through this process, in which the jury applies rules formulated in light of common experience to the facts of each case, that we deliver the best justice our society knows how to provide.").

encouraged because it promotes, among other things, the efficient use of judicial resources. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("Settlement agreements are to be encouraged because they . . . lighten the increasing load of litigation faced by the federal courts."). Yet the Sixth Circuit's majority opinion undermines this public policy.

The opinion discourages settlement by according less respect to a settlement than it does to a decision on the merits. Thus, the opinion allows the government to seek full reimbursement of its Medicare payments from a settlement even if the Medicare beneficiary recovers only a fraction of her medical damages. *See* Pet. App. 6a-7a. By contrast, the government will *not* seek full reimbursement of its Medicare payments when a decision on the merits awards the beneficiary less than all of her medical damages. The government's position has been that:

> The only situation in which Medicare recognizes allocations of liability payments to nonmedical 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.

Centers for Medicare and Medicaid Servs., Medicare Secondary Payer Manual, CMS Pub. 110-5, ch. 7, § 50.4.4 (2008) (MSP Manual); Pet. App. 46a (emphasis added). This discordant treatment of settlements

and merits-based decisions will discourage settlement.

In lawsuits claiming damages for personal injuries, Medicare beneficiaries seek to recover more than just expenses covered by Medicare. They seek to recover damages for such items as lost earnings, lost earnings capacity, and pain and suffering. *See* Hon. Zerne P. Haning et al., California Practice Guide: Personal Injury ¶¶ 3:66 (Rutter 2011) ("[W]ages, commissions, bonuses and all other earnings and fringe benefits that claimant has lost, or probably will lose, are compensable damages elements."), 3:83 ("Gross amounts that plaintiff would have received in the future *but for the injury* are similarly recoverable."); Christopher C. Yearout, *Big Brother Is Not Just Watching, He's Suing: Medicare's Secondary Payer Statute Evolves in Aggressive Pursuit of Fiscal Integrity*, 41 Cumb. L. Rev. 117, 137 (2011) ("Settlement agreements . . . naturally reflect medical expenses, pain and suffering, lost wages, or any number of factors surrounding the alleged tortious conduct . . . .").[4]

Yet the Sixth Circuit's opinion allows the government to take all such settlement amounts so long as the claims arise from Medicare-covered injuries and the taking is necessary to reimburse the government for its Medicare payments. Thus, a beneficiary

[4] Indeed, "mental suffering frequently constitutes the principal element of tort damages." *Capelouto v. Kaiser Found. Hosps.*, 500 P.2d 880, 893 (Cal. 1972).

must reject even reasonable settlement offers and obtain a decision on the merits to prevent the government from seeking reimbursement of its Medicare payments from the beneficiary's recoveries for lost earnings, pain and suffering, and other non-medical damages.

This construction of the Medicare Secondary Payer Act is "a financial disincentive [for beneficiaries] to accept otherwise reasonable settlement offers." *Bradley*, 621 F.3d at 1339; *see also In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 470 (E.D.N.Y. 2006) ("Because it may deprive them of any compensation for their injuries, the full reimbursement approach gives many beneficiaries little incentive . . . to accept otherwise reasonable settlement offers . . . ."); Yearout, *supra*, at 155-56 ("[P]laintiffs are tempted to 'roll the dice' in a jury trial rather than settle for full damages, which Medicare would attach in full."); Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies From Medicare Beneficiaries*, 41 Akron L. Rev. 557, 588 (2008) ("It should be intuitively obvious that Medicare beneficiaries will have difficulty settling tort claims under the MSP.").

Under the Sixth Circuit's opinion, a plaintiff settling a claim for Medicare-covered injuries may keep *nothing* from the settlement even if the settlement includes payment for the plaintiff's pain and suffering and lost earnings. Assuming the settlement involves a significant discount, as is common in cases involving difficulties in proving liability or recovering from a penniless defendant, the amount of the

settlement might be less than the amount of the government's Medicare payments. The entire settlement (after procurement costs) might then be redirected to the government. *See* Miklos, *supra,* at 319 ("Because plaintiffs are the last entity to receive funds from a settlement, they can easily be left with little or no compensation."); Swedloff, *supra*, at 598 ("[A] Medicare beneficiary settling a tort claim could find herself without any compensation after Medicare has taken its due.").

By adopting a construction of the Act that allows the government to obtain full reimbursement of Medicare payments from a discounted settlement, even if the reimbursement exhausts the settlement, the panel majority's opinion chills settlement and undermines the efficient use of judicial resources.

B. The opinion will increase litigation costs and harm the government's efforts to obtain reimbursement of Medicare payments.

Congress passed the Medicare Secondary Payer Act to control skyrocketing Medicare costs. *Zinman v. Shalala*, 67 F.3d 841, 843 (9th Cir. 1995). If a primary payer does not pay promptly for medical expenses, Medicare can conditionally pay for the beneficiary's medical expenses. *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 874-75 (11th Cir. 2003). But Medicare does so with the right to seek reimbursement from the primary payer (*id.*), because under the Act, "if

payment for covered services has been or is reasonably expected to be made by someone else, Medicare does not have to pay." *Cochran v. U.S. Health Care Fin. Admin.*, 291 F.3d 775, 777 (11th Cir. 2002). This reimbursement right "reflects the overarching statutory purpose of *reducing Medicare costs*." *Id.* at 874 (quoting *Zinman*, at 845 (emphasis added)); *see Thompson v. Goetzmann*, 337 F.3d 489, 495 (5th Cir. 2003) ("Congress laudably sought to reduce Medicare costs by making the government a secondary provider of medical insurance coverage when a Medicare recipient has other sources of primary insurance coverage."). Yet the Sixth Circuit's construction of the Act needlessly increases litigation costs and paradoxically undermines Congress's goal of limiting Medicare costs.

By deterring settlement in cases where the parties prefer to compromise their dispute, the Sixth Circuit's opinion will force more cases to trial – with a corresponding increase in the cost of litigation (and the risk of zero recovery if the jury returns a defense verdict). *See* Miklos, *supra,* at 320 ("[T]here are higher costs associated with the representation because Medicare beneficiary cases are more likely to go to trial than to settle."); *see also Ehrheart*, 609 F.3d at 595 ("Settlement agreements are to be encouraged because . . . the parties . . . gain significantly from avoiding the costs and risks of a lengthy and complex trial."). Since the government generally reduces its

recovery to take into account the beneficiary's costs of procuring the judgment,[5] a beneficiary's increased litigation costs will diminish the government's recovery.

By encouraging Medicare beneficiaries to reject reasonable settlement offers and "roll the dice" in a jury trial, the Sixth Circuit's opinion puts the government's Medicare reimbursement at risk. "[T]he full reimbursement approach gives many beneficiaries little incentive to pursue valid claims or, if they do, to accept otherwise reasonable settlement offers, thereby tending to push them into uncertain litigation that burdens the courts and may result in little or no recovery for either the beneficiaries or for Medicare or Medicaid." *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d at 470.

The Sixth Circuit's opinion thus undermines the Medicare Secondary Payer Act. Although Congress intended the Act to reduce the government's Medicare costs, the court of appeals' construction of the Act accomplishes the opposite – it unnecessarily increases both the costs and risks of litigation and by doing so

[5] 42 C.F.R. § 411.37(a)(1); *see also Estate of Washington by Washington v. U.S. Secretary of Health & Human Servs.*, 53 F.3d 1173, 1175 (10th Cir. 1995) ("The regulation generally provides that [the government] will reduce its recovery to account for the procurement costs associated with the judgment or settlement over a disputed claim against a third party.").

reduces the government's reimbursement of Medicare payments.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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