

THE WESTERN DISTRICT OF LOUISIANA PROVIDES JUDICIAL SUPPORT FOR REQUIRING INCLUSION OF MEDICARE SET ASIDES IN LIABILITY CASE SETTLEMENTS

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For those attorneys and insurance carriers who have insisted to plaintiffs' counsel that certain funds be set aside for the payment of future medical bills following a liability case settlement – but have met strong opposition from plaintiffs' counsel, or more commonly from, third-party vendors such as the Garretson Firm Resolution Group – a January 5, 2011 decision by the U.S. District Court for the Western District of Louisiana has interpreted the requirements of the Medicare Secondary Payer Act (MSP Act), 42 U.S.C. § 1395y, as it relates to Medicare's future interests, a positive development in liability defense as a means to counter such resistance and ensure compliance with statutory requirements.

Big R Towing, Inc. v. Benoit, No. 10-538, 2011 U.S. Dist. LEXIS 1392, at *1 (W.D. La. Jan. 5, 2011),¹ involved a plaintiff, David Wayne Benoit, who allegedly injured his back and hip while performing deck work on a towboat. Benoit did not return to work and was paid maintenance and cure benefits. There was a dispute among his treating physicians, however, as to whether Benoit needed back surgery and a hip replacement. *Id.* at *1. Big R Towing, Inc. (Big R) filed suit for declaratory relief on the issue of whether maintenance and cure was owed for a medical procedure recommended by Benoit's treating orthopedic surgeon. Benoit counterclaimed, seeking damages under the Jones Act and general maritime law. *Id.* at *2.

At a settlement conference, Big R agreed to fund a settlement in the total amount of \$150,000.00 in exchange for a complete release of all claims by Benoit against Big R. Since Benoit was receiving Social Security disability benefits, part

of the consideration for the settlement was that Benoit would be responsible for protecting Medicare's interests under the MSP Act. The court was asked to determine whether Benoit should be required to set aside funding for future medical expenses to protect Medicare's interests as a secondary payer. *Big R Towing, Inc.*, 2011 U.S. Dist. LEXIS 1392, at *3.

Following a hearing with medical testimony regarding the future medical costs for the recommended back surgery and left hip replacement, U.S. Magistrate Judge Patrick J. Hanna concluded, in relevant part, that (1) the parties should have reasonably considered and protected Medicare's interests in the settlement; (2) Medicare is a secondary payer under the "Medicare secondary payer program;" (3) Benoit is obligated to reimburse Medicare for all conditional payments made prior to the time of the settlement, and for all medical expenses submitted to Medicare prior to the date of the order, even if those conditional payments are asserted by Medicare subsequent to the effective date of the order; and (4) it is reasonably expected that Benoit may become a Medicare beneficiary in the future, and that the sum of \$52,500 should be set aside to protect Medicare's interests as the secondary payer for future medical expenses arising out of the injuries alleged. *Id.* at *4.

U.S. Magistrate Judge Hanna therefore ordered that:

1. To the extent David Wayne Benoit receives confirmation from Medicare of any conditional payments made by Medicare for services provided prior to the date of this order, David Wayne Benoit shall promptly reimburse Medicare for such conditional payments;

¹ For the full text of *Big R Towing, Inc. v. Benoit*, No. 10-538, 2011 U.S. Dist. LEXIS 1392 (W.D. La. Jan. 5, 2011), [click here](#).

2. David Wayne Benoit will set aside \$52,500.00 of the settlement proceeds for payment of future medical benefits arising out of the injuries alleged in this lawsuit which would otherwise be paid or payable by Medicare.

Id. at *7.

Big R Towing, Inc. provides concrete support, via case law interpreting 42 U.S.C. § 1395y, clearly and unequivocally holding that Medicare's future interests **must** be protected by setting aside a portion of settlement funds for anticipated

future medical care arising from injuries allegedly caused by a tortfeasor in a liability lawsuit. *Big R Towing, Inc.* identifies no effective date for creating Medicare set asides and does not tie the creation of Medicare set asides to the new Centers for Medicare & Medicaid Services' settlement reporting date of January 1, 2012. Practitioners and carriers should cite *Big R Towing, Inc.* when they propose the creation of Medicare set asides to plaintiffs' counsel during settlement negotiations.