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WRONGFUL DEATH DAMAGES GO TO SURVIVORS, NOT MEDICARE

This is a summary of the 11th Circuit Court of Appeal's opinion in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010), which was a case involving a claim against a Florida nursing home for neglect and abuse.

In *Bradley*, the children of the estate of the deceased presented a wrongful death claim against a Florida nursing home for wrongful death. The claim was settled for \$52,500, which was the nursing home's policy limits. At settlement, Medicare's lien was \$38,875.08. The Centers for Medicaid and Medicare Services (CMS) demanded the full lien amount, minus the procurement costs. When the settlement proceeds were probated, the Secretary did not appear or participate.

A Florida probate court allocated \$787.50 of the settlement to medical expenses and the rest to the survivors. The Secretary rejected the probate court's decision and the case subsequently proceeded on appeal to the federal district court, which agreed with the Secretary's position. Relying on the Medicare Secondary Payer Act manual, the federal district court held that Medicare was entitled to reimbursement of its lien. The estate and its survivors appealed.

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The 11th Circuit Court of Appeals reversed the federal district court's decision on September 29, 2010. The 11th Circuit held that only the estate's allocated share of the proceeds is subject to the province of the Secretary. The 11th Circuit reasoned that Florida law distinguishes claims on behalf of an estate, which can include medical expenses, from tort claims based on loss of companionship. The 11th Circuit also held that the Secretary's reliance on the Medicare Secondary Payer Act's manual, without citing any binding authority was misplaced.

The 11th Circuit's decision in **Bradley** stands for the proposition that the Medicare Secondary Payer manual is not authoritative and does not control Florida law.

JLH/CVZ/smm/tsr

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