

February 21, 2023

Chiquita Brooks-LaSure
Administrator, Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, DC 20001

Brian M. Boynton
Principal Deputy Assistant Attorney General
Civil Division, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Seeking Urgent Assistance In Resolving Impasse Over Global Model Compromise Of Medicare Secondary Payer Liens on Roundup settlements

Dear Administrator Brooks-LaSure and Mr. Boynton:

We seek your urgent attention in quickly resolving a bureaucratic impasse that is harming vulnerable Medicare beneficiaries across the nation. For nearly six months now, the Administration has been reviewing a plan to permit global compromise of Medicare Secondary Payer (MSP) liens on mass-tort settlements stemming from injuries associated with exposure to the herbicide Roundup. Because the ongoing delay in resolving this issue is causing significant harm to cancer victims and other deserving Medicare beneficiaries nationwide, we urge you to resolve this impasse without further delay.

As you may know, my company, ARCHER Systems, LLC (“ARCHER”), is a settlement administrator that has distributed billions of dollars to tens of thousands of injured plaintiffs from mass torts and class actions. In recent years, ARCHER began working on behalf of injured plaintiffs who resolved their legal claims related to Roundup in exchange for cash payments from the settling defendant. ARCHER serves as the Lien Resolution Administrator for over 50,000 Medicare beneficiaries in the Roundup litigation, which is significantly more than any other administrator. Those individuals—many of whom are suffering from debilitating injuries relating to non-Hodgkin’s lymphoma—have been expecting payment for many months. Indeed, before the current impasse, ARCHER was administering, and preparing to administer, payment of hundreds of millions of dollars to over 30,000 Medicare beneficiaries by the end of 2022 alone. Those injured beneficiaries need their settlement money to help cover critical expenses, including lost wages, living expenses, and medical fees.

For the past 10 years, ARCHER has worked closely with CMS to resolve outstanding MSP liens against beneficiaries’ settlement proceeds on a global basis. CMS has long recognized that, as part of its global resolution process, compromise of MSP liens makes sense when the amount that Medicare is owed

in a mass-tort settlement exceeds the total amount of beneficiary proceeds. Absent compromise, many settlements would never occur, and CMS would recover nothing. Moreover, requiring tens of thousands of beneficiaries to seek individualized resolution via the Benefits Coordination & Recovery Center process would overwhelm the Medicare contractor and otherwise be untenable. That is presumably why CMS historically entered into arrangements with ARCHER, including in connection with the Roundup litigation, to ensure that mass tort settlements can be resolved in a fair and timely way that benefits both the settling parties and the U.S. Government.

In accordance with its historical practice, CMS initially (and sensibly) agreed to a process for resolving liens globally with ARCHER in December 2020. Unfortunately, in September 2022, CMS abruptly announced that it was rescinding the compromise feature, which would effectively terminate the global model. Although CMS subsequently clarified that DOJ was reviewing the agreement, neither agency has provided a clear timeline of when this review will be complete. CMS initially advised ARCHER that the review would take weeks, but five months have now passed since CMS reversed its position, and the uncertainty among the affected beneficiaries is deepening. ARCHER is unable to distribute settlement funds to beneficiaries receiving Roundup settlements or to pay their MSP liens, to the growing frustration of Medicare beneficiaries and their advocates. Although CMS issued “questions and answers” last month regarding the situation, that step has not alleviated the anxiety of those awaiting a response; instead, affected beneficiaries and other stakeholders are more frustrated than ever.

We understand that DOJ, working with CMS and HHS, continues to review CMS’s plan for global resolution of the MSP liens on Roundup settlements. However, time is of the essence, given beneficiaries’ urgent need for the cash payments to which they are entitled. We therefore request your assistance in assuring that the review is completed as expeditiously as possible, given the significant interests at stake for the impacted Medicare beneficiaries across the nation.

Thank you for your attention to this urgent matter. We would be happy to meet with CMS, HHS, and DOJ at your earliest convenience to provide whatever help is necessary to achieve a swift resolution. If you have any questions, please contact either me directly or ARCHER’s counsel at Akin Gump Strauss Hauer & Feld LLP: Rafi Prober (rprober@akingump.com / 202.887.4319) or James Tysse (jtysse@akingump.com / 202.887.4571).

Sincerely,



Robert A. Marcino, Esq.
Chief Project Officer

cc: Jonathan Blum, Principal Deputy Administrator & Chief Operating Officer, CMS
Kevin VanLandingham, Assistant Director, Commercial Litigation Branch, DOJ