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FEDERAL GOVERNMENT PURSUES DEFENDANTS FOR MEDICARE LIEN

A new case, *U.S. v. Stricker*, was filed on December 1, 2009, in the United States District Court for the Northern District of Alabama. In the suit, the United States seeks reimbursement of conditional payments made by Medicare on behalf of some 907 beneficiaries, all plaintiffs in a previously settled lawsuit. This Stricker case is significant in that it is the first case in which the United States has brought claims against **all** parties, in a single action, to seek reimbursement for the conditional payments made by the Medicare program for the medical care provided to personal injury plaintiffs. Reimbursement is sought not only from the plaintiffs and their counsel, but from the defendants and their insurers. Likewise, it appears the government is seeking reimbursement not only for conditional payments made prior to the settlement, but perhaps for conditional payments made post settlement as well. The underlying case was a consolidated action wherein multiple plaintiffs claimed injuries resulting from exposure to polychlorinated biphenyls (PCB) from a chemical plant in Alabama. It was settled for \$300 million in 2003.

According to the *Stricker Complaint*, the settlement provided for a lump sum amount to be paid to the plaintiffs at the time of settlement, as well as for supplemental annual amounts to be paid from 2004 through 2013. The United States alleges that it made, through CMS as the administrator of the Medicare program, conditional payments for medical services provided to these beneficiaries for the injuries and illnesses which were at the heart of the underlying suit and then released in the settlement agreement. Pursuant to the Medicare Secondary Payer (MSP) statute, 42 U.S.C. § 1395y(b) and its related regulations, the United States seeks recoupment of the payments, as well as double damages and interest.

In their claim against the plaintiffs' attorneys, the United States claims counsel received and continue to receive payments from the settlement, which entitles the United States to recover conditional Medicare payments on behalf of the beneficiaries participating in the settlement. It is alleged that counsel knew or should have known that one or more of the settlement claimants were Medicare eligible individuals on whose behalf the United States was entitled to recover the conditional Medicare payments made.

The defendant corporations' liability insurers made payments, which partially funded the settlement, and thus the U.S. seeks reimbursement from them for Medicare conditional payments made on behalf of Medicare beneficiaries participating in the settlement. It is claimed these insurers failed to comply with the MSP statute by failing to ascertain, prior to making the settlement payments, whether any of the settlement plaintiffs were Medicare beneficiaries. According to the allegations, they also failed to identify any amount owed the United States as reimbursement for the Medicare conditional payments when they knew or should have known that one or more of the plaintiffs were Medicare eligible.

The *Complaint* alleges the three defendant corporations paid into the settlement fund under a primary plan. Alternatively, it is alleged the corporations received some or all of their payments from their insurers and thus are entities that received payment under a primary plan from whom the U.S. may recover reimbursement for Medicare conditional payments. It is further claimed these defendant corporations failed to comply with the MSP statute by failing to ascertain whether any of the settlement plaintiffs were Medicare beneficiaries, and by failing to identify any amount owed the United States as reimbursement for the Medicare conditional payments. At the time of payment, the U. S. claims these defendants knew or should have known that one or more of the plaintiffs were Medicare eligible.

As a final count in the *Complaint*, the United States seeks declaratory relief to include: that the defendants are legally obligated to reimburse the U.S. for past Medicare payments made on behalf of the settlement claimants in accord with the terms of the MSP statute, that the defendants must give CMS notice of all future payments to Medicare beneficiaries, and that the defendants must ensure appropriate payment is made to the United States before any future settlement payment is made to any claimant.

On January 28, 2010, the United States filed a *Motion for Partial Summary Judgment on Liability*. The Motion for Partial Summary Judgment is only directed against certain plaintiffs' counsel named in the *Complaint*, and the three defendant corporations. In this Motion, it is alleged the defendants failed to comply with the MSP statute which requires the defendants to reimburse the Medicare Trust Fund for conditional payments made by Medicare. The U.S. urges it is entitled to judgment in its favor on liability, even if the damages remain in dispute. A *Memorandum in Support of the Motion for Partial Summary Judgment* was also filed on January 28, 2010. In the *Memorandum*, it is claimed that CMS essentially completed a search of its official records for all conditional payments made on behalf of the 907 Medicare beneficiaries identified by the underlying plaintiffs' counsel. That search captured conditional payments paid by Medicare on behalf of the beneficiaries from 1991 to November 30, 2009, and said conditional payments totaled \$67,156,770.01. In a footnote contained within the *Memorandum*, it is noted that the total amount of conditional payments reflected in CMS' data run is not asserted as proof of the amount of the conditional payments, but rather to show that Medicare made conditional payments. The amount of Medicare's conditional payments, which must be reimbursed, will be determined in the damages phase.

For more information, please contact your Lashly & Baer attorney or [Nancy R. Vidal](#) at (314) 621-2939.