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U.S. Department of Justice Seeks to Recover Conditional Medicare Payments From Liability Insurance Carriers Who Participated In Claims Settlement

A recent lawsuit filed by the U.S. Department of Justice on behalf of the Secretary of Health and Human Services, *United States v. James J. Stricker, et al.* in United States District Court for the Northern District of Alabama CV-09-PT-2423E, seeks to recover conditional payments under the Medicare Secondary Payer Statute (42 USC Section 1395y (b) (2), and the regulations promulgated thereunder, 42 C.F.R. § 411.20 *et seq.*) paid on behalf of certain individuals who also received compensation as part of a \$300 million PCB settlement entered into in 2003. The Medicare Secondary Payer (“MSP”) Statute states that Medicare may not make payments with respect to any item or service for which payment has been made or can reasonably be expected to be made under a liability policy or plan. 42 U.S.C. § 1395(b)(2)(A)(ii). The MSP further provides that the United States may recover reimbursement for conditional Medicare payments from entities that are required or responsible to make payment with respect to covered items or services under a liability insurance policy or plan (including a self-insured plan) and entities and persons receiving such payments.

The complaint seeks to recover damages from the plaintiffs’ attorneys, the defendant PCB manufacturers and two of their insurers for the conditional payments Medicare made on behalf of approximately 900 individuals. The complaint alleges that the MSP obligated the defendants to notify Medicare of any settlement, award, judgment or other payment that was made when the case was settled. The complaint further alleges that the defendants’ failure to notify Medicare of the settlement entitles Medicare to a double recovery for any payments that are owed pursuant to the MSP. This lawsuit appears to be the first one that includes the insurance carriers that contributed to the underlying settlement as defendants. The complaint also names the plaintiffs’ counsel whom Medicare alleges failed to notify, protect or reimburse Medicare’s liens. The Government additionally requests that the named defendants be required to give Medicare notice of all future payments to the plaintiff-beneficiaries and ensure that Medicare be reimbursed before any future payments are made.

Factual Background

In 2003, three of the named defendants settled several related suits in Alabama involving approximately 20,000 plaintiffs alleging injuries caused by the manufacture, release and disposal of PCBs. The \$300 million “Abernathy” portion of the settlement involved several consolidated lawsuits filed on behalf of approximately 3,500 Anniston, Alabama residents who claimed that PCBs released in the Anniston area lowered their property values and caused them personal injury.

The Abernathy settlement involved the creation of a \$300 million fund to process the settlement payments. The PCB manufacturers, along with two of the insurers of one of the PCB manufacturers, paid money into the Abernathy Settlement fund. In the Stricker complaint, Medicare alleges that no provision

was made in the settlement for reimbursement of the conditional Medicare payments made on behalf of the approximately 900 plaintiffs that also received Medicare benefits.

Potential Impact

The *Stricker* lawsuit provides valuable insight about how the government intends to enforce the provisions of the MSP and how aggressive such enforcement may be. Moreover, the government has now made it abundantly clear that it will seek double damages for recovery of any conditional payments where Medicare was allegedly not properly notified of a liability settlement. Pursuant to 28 U.S.C. § 2415, the statute of limitations for the government to bring such an action is six years. Therefore, to the extent the government's theories are correct, insurance carriers face potential double-damages liability for such settlements going back six years.

To date, the discussion that *Stricker* has prompted among insurers has focused on compliance with the alleged settlement and reporting requirements. Depending on how these issues are resolved, and whether insurers ultimately make additional payments under the theories asserted in *Stricker*, there may be reinsurance implications as well.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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