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## **New Enforcement of Medicare Secondary Payer May Be on the Horizon**

On December 1, 2009, the Department of Justice (DOJ), on behalf of the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS), brought an action against Monsanto, Solutia Inc., Pharmacia Corporation, Travelers Companies Inc., American International Group and their attorneys regarding the disbursement of funds for a \$300 million class action settlement. The DOJ alleged that these companies, their insurers, and attorneys failed to reimburse Medicare for conditional payments paid by Medicare to beneficiaries who participated in the settlement. *U.S. v. Stricker*, (E.D. N.D. Ala 2009) (No. CV-09-PT-2423-E) (December 1, 2009). The DOJ's recent actions represent an unprecedented enforcement of the Medicare Secondary Payer Statute (MSP).

In the early 1980s, rising Medicare costs prompted Congress to pass the MSP to make clear that the federal Medicare program is a secondary payer to other insurance or coverage. See 42 U.S.C. §1395y (2009). Under the MSP, Medicare issues conditional payments in situations where the primary payer has not made or cannot reasonably be expected to make payment promptly with the understanding that the primary payer will reimburse Medicare if there is a later determination that the primary payer is responsible for the cost.

To enforce MSP, the government is authorized to sue:

1. any primary payer who has failed to reimburse Medicare for such conditional payments (and to collect double damages in such a suit), or
2. anyone who received payment from the primary payer with respect to expenses covered under Medicare, including the beneficiary himself, should he collect the payment but fail to reimburse the government.

In practical terms, the MSP law provides that, although CMS may initially pay a provider for performing services for Medicare beneficiaries, if it is later discovered that the patient has another source of coverage for those healthcare services, Medicare will recoup funds from the other source.

To enforce MSP, CMS may "bring an action against any or all entities that are or were required or responsible [...] to make payment with respect to the same item or service [...] under a primary plan." Alternatively, CMS "may recover under this clause from *any entity that has received payment from a primary plan or*

from the proceeds of a primary plan's payment to any entity." *Id.* The federal regulations implementing the MSP specify that the government can recover primary payments from "a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment."

Accordingly, *any* entity who handles settlement proceeds and/or receives them as payment—attorneys, insurance carriers, third-party administrators—could have MSP liability to CMS. *See United States v. Harris*, No. 5:08CV102, 2009 WL 891931, at \*3 (N.D. W.Va. Mar. 26, 2009) (holding that plaintiff's counsel who prematurely disbursed settlement proceeds was individually liable for reimbursing Medicare because the government can recover "from *any* entity that has received payment from a primary plan, including an attorney.") (citing 42 C.F.R. § 411.24(g)). A waiver of recovery may be granted where:

1. a claimant is without fault; and
2. recovery would either defeat the purposes of Title II or would be against equity and good conscience. 42 U.S.C. § 404(b) (2009).

While the DOJ previously has pursued actions against plaintiffs and their counsel to recoup settlement proceeds paid to Medicare beneficiaries with unsatisfied Medicare liens, the *Stricker* case appears to be the first instance where the federal government is seeking MSP recovery from corporate defendants, their insurance carriers and their counsel involved in the settlement of a mass tort liability claim. The case exemplifies what could happen when settling parties fail to adequately address Medicare reimbursement interests prior to disbursing settlement funds.

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