

ALERTS AND UPDATES

In *Stricker* Case, District Court to Dismiss Medicare's Suit Seeking Reimbursement from Defendants, Insurers and Attorneys

September 22, 2010

In December 2009 in *United States v. Stricker*,¹ the U.S. government filed suit against chemical companies, insurers and several plaintiffs' attorneys who participated in the \$300 million *Abernathy v. Monsanto* class action settlement. *Abernathy's* chemical company defendants and their insurers entered into the settlement in 2003 to resolve claims related to alleged exposure to polychlorinated biphenyls (PCBs). The plaintiffs' attorneys in *Abernathy* received certain of the proceeds of the settlement in their escrow accounts, from which they ultimately distributed settlements to individual claimants and obtained their fees, allegedly without reimbursing Medicare for medical payments associated with the plaintiffs' claims.

In *Stricker*, Medicare sought reimbursement for payments that it had allegedly made for medical care provided to the settling class members. Medicare contended that the defendants and the insurers who participated in the *Abernathy* settlement were liable to Medicare for up to double the amount of medical expenses incurred by Medicare, under the Medicare Secondary Payer statute. *Stricker* was filed more than six years after the *Abernathy* settlement was approved by the court and after more than 90 percent of the settlement funds were deposited into escrow.

Defendants Sought Dismissal of the Case

Stricker has been litigated with gusto over the past year. The defendants have brought cross-claims, counterclaims and third-party claims, and have also filed motions to dismiss the case in its entirety—maintaining that the federal government's suit was barred by the statute of limitations. In the motions to dismiss and the government's opposition, two issues have been hotly contested: (1) when the statute of limitations began running on the government's Medicare reimbursement claims and (2) whether the government had three or six years to bring a claim under the Medicare Secondary Payer statute. The government filed various motions for partial summary judgment, as well as a motion seeking to impose double damages.

The government contended that it had at least six years to file suit, or that possibly no statute of limitations applied to its claims. The government also said that the statute of limitations did not begin to run until after the settlement was accepted by a certain percentage of class members, an event which occurred after court approval, when the *Abernathy* defendants could no longer withdraw from the court-approved agreement. The *Abernathy* defendants and the insurers maintained that the six-year statute of limitations was inapplicable since it applied only to actions brought in contract or quasi-contract, but rather a three-year statute of limitations for tort cases applied to suits filed under the Medicare Secondary Payer statute. The *Abernathy* defendants and insurers also contended that the statute of limitations began to run as soon as the settlement was approved by the court, at the latest, disputing Medicare's assertion that its cause of action accrued only when the defendants and insurers could no longer withdraw from the settlement.

The *Abernathy* plaintiffs' counsel who were named as defendants in the *Stricker* case also maintained that the government's claims were barred by either the three- or six-year statute of limitations, since they had received \$275 million of the settlement funds over six years before the government filed its suit. The plaintiffs' counsel were willing to concede that a six-year statute of limitations may apply to Medicare's claims for reimbursement against them, as opposed to the three-year

statute, and joined the *Abernathy* defendants and insurers in contending that the court did not need to reach this issue of which statute applied, as the government's claims would be barred under either limitations period.

Judge Will Dismiss Case Based on Statute of Limitations

On September 13, 2010, District Judge Karon O. Bowdre of the Northern District of Alabama held a hearing on the defendants' various motions to dismiss and stated that she would be dismissing all of the government's claims, because they were barred by the statute of limitations. Judge Bowdre held that the latest-possible date the statute of limitations began running on Medicare's cause of action against the *Abernathy* defendants and insurers was when the settlement was approved by the court—over six years and two months before the government filed suit. Judge Bowdre indicated that she believed a three-year statute of limitations applied to Medicare Secondary Payer claims against the *Abernathy* defendants and their insurers, but she did not need to decide this issue.

Judge Bowdre indicated that a six-year statute of limitations may apply to suits against the *Abernathy* plaintiffs' counsel, since the claims would be more analogous to a contractual or quasi-contractual recovery. Judge Bowdre also did not need to determine the length of the statute of limitations for suits against plaintiffs' counsel, instead holding that Medicare's cause of action accrued, at the latest, when the settlement funds were deposited into the attorneys' escrow accounts. In this case, \$275 million of the settlement was deposited into the escrow accounts of plaintiffs' counsel approximately six years and one month before the government filed the *Stricker* case. Based on these facts, Judge Bowdre also dismissed Medicare's claims against the *Abernathy* plaintiffs' counsel.

At the end of the hearing, Judge Bowdre stated that she would be issuing a written opinion, possibly by the end of September 2010. Judge Bowdre also indicated that she would be willing to consider the government's contention that continuing payments under the settlement agreement reset the statute of limitations for claims against the *Abernathy* plaintiffs' counsel, since they will continue to receive attorneys' fees until 2013. The government had not briefed this issue, and Judge Bowdre asked that it wait until after she issues her written opinion before filing a motion to reconsider.

Conclusion

During the hearing, the parties and the court recognized that no controlling authority exists on whether a three- or six-year statute of limitations applies to actions filed by the government under the Medicare Secondary Payer statute. Although Judge Bowdre did not need to determine whether a three- or six-year statute of limitations applies to decide the motions in *Stricker*, her forthcoming opinion is likely to provide much-needed guidance for others sued under the Medicare Secondary Payer statute. It possibly may deter the government from pursuing Medicare claims against older payments and settlements, although it is unlikely to influence their pursuit of more-recent payments.

Due to the significance of this issue, it is likely that the government will be filing a motion for reconsideration of this decision, given the ongoing payments since the statute of limitations began running, or will appeal it to the U.S. Court of Appeals for the Eleventh Circuit. Defendants, insurers and attorneys who are involved in personal-injury litigation or in settling claims with Medicare beneficiaries may want to monitor future developments in this case, including any opinions or appeals. *Stricker* is one of the first cases to provide insight into Medicare's recovery practices under the Secondary Payer statute, especially as applied to mass torts and class action settlements.

For Further Information

If you have any questions about this *Alert* or would like more information about recent developments affecting the Medicare Secondary Payer program or the MMSEA reporting requirements, please contact [Sharon L. Caffrey](#); [Philip R. Matthews](#); [Kenneth M. Argentieri](#); [Christopher L. Crosswhite](#); any of our [Products Liability and Toxic Torts attorneys](#), our [Insurance and Reinsurance attorneys](#) or our [Healthcare attorneys](#); or the attorney in the firm with whom you are regularly in contact.

Note

1. *United States of America v. Stricker, et al.*, No. 09-2423 (N.D. Ala. filed Dec. 1, 2009).