

U.S. v. STRICKER LAWSUIT UPDATE

COURT DISMISSES THE GOVERNMENT'S ACTION AGAINST CERTAIN DEFENDANTS

Analyzing the U.S. v. Stricker Lawsuit & the Court's Ruling

By:

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On September 30, 2010, the United States District Court for the Northern District of Alabama (The Honorable Karon Owen Bowdre) issued an Order dismissing the *U.S. v. Stricker* lawsuit (CV-09-PT-2423-E) against *certain* named defendants on statute of limitations grounds. The Court basically ruled that the Federal Government (hereinafter "Government") failed to file its lawsuit in a timely manner.

A copy of the *Court's Order* and its accompanying *Memorandum Opinion* (in which the Court outlines and explains its ruling) may be obtained at http://www.nuquestbridgepointe.com/news/uploads/stricker_-_court_order.pdf and http://www.nuquestbridgepointe.com/news/uploads/stricker_-_memorandum_of_opinion.pdf respectfully.

By way of background, in December, 2009, the Government sued numerous party defendants (including certain named plaintiff lawyers, plaintiff law firms, corporations and insurance carriers) for their alleged failure to reimburse Medicare for conditional payments in connection with a large toxic tort liability settlement reached in 2003.

Several (but not all) of the defendants filed separate *Motions to Dismiss* the Government's actions on various grounds, including that the Government had failed to file its action within the required legal time period under the law.¹ The

Government filed a *Motion for Partial Summary Judgment on Liability* arguing that, as a matter of law, the Court should rule in its favor.

On September 13, 2010, these motions were heard before the Court at which time the parties presented oral arguments in support of their respective positions. Upon hearing the parties' arguments, the Court dismissed the Government's action against those particular defendants that had filed motions to dismiss.² At the time this article was drafted, the Government had not filed an appeal, and the author is unaware at this time as to whether or not the Government plans to appeal this decision.

The Court's decision in *U.S. v. Stricker* is obviously an important legal victory, especially for the party defendants in whose favor the Court ruled. Notwithstanding, the significance of the *U.S. v. Stricker* action itself, and the technical grounds upon which the action was dismissed, must be assessed in the *larger* context of Medicare compliance and kept in proper perspective.

By deciding the issue on statute of limitations grounds, the court in *Stricker* indeed addressed an important and underdeveloped aspect of the Medicare Secondary Payer Statute (MSP). In this vein, the Court's decision certainly provides some welcomed substance to an otherwise peculiar legal and analytical terrain.

However, while the Government's action was dismissed, it is important to understand that the major substantive issues regarding primary payer and practitioner obligations to protect Medicare's interests for conditional payments under the MSP (which was at the core of the Government's action) remain.

Thus, notwithstanding the Government's defeat in this case, primary payers and practitioners must still ensure that they are properly addressing the issue of Medicare conditional payments as part of their claims handling and settlement practices to meet their MSP obligations, and to avoid a possible similar *Stricker* action from being filed against them.

Through this article, the author aims to place the *U.S. v. Stricker* lawsuit and the Court's ruling into proper perspective to assist the reader in his/her larger assessment of this case in the bigger picture of MSP compliance.

This analysis is broken down as follows:

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PART I

How It All Began (The *Abernathy* Settlement – Factual Background)

The *U.S. v. Stricker* lawsuit arises from the settlement of a large toxic-tort case in Alabama in which thousands of parties (referred to as "plaintiffs" under the law) filed lawsuits against certain chemical companies for injuries and other damages allegedly caused by PCB chemical contamination.³

These lawsuits began to be filed in 1996 in various state and federal courts. These suits were eventually consolidated given the scale of the filed actions. The consolidated action in the federal court was styled as *Tolbert v. Monsanto Co.* (CV-01-C-1407S (N.D. Ala.)). The consolidated action in the state court was styled as

Abernathy v. Monsanto (No. CV-01-832 (Circuit Court of Etowah County, Ala.)).⁴

In 2003, the parties reached a "global settlement" for \$300 million. This settlement became known as the *Abernathy Settlement*.

Understanding the terms of the *Abernathy* Settlement Agreement and its corresponding payout structure is important as the Court's ultimate determinations and ruling hinged on certain transaction dates related thereto.

The pertinent factual components of the *Abernathy* Settlement are as follows:

- August 20, 2003 — The global settlement was announced as part of a joint session of the applicable federal district and state circuit courts.
- August 26, 2003 — Defendants Monsanto, Pharmacia and Solutia wire transferred the initial \$75 million payment into a special settlement account set up in the Circuit Court.
- September 9, 2003 — Parties executed a formal written Settlement Agreement.
- September 10, 2003 — The Calhoun County Circuit Court entered an Order approving the Settlement Agreement.
- September 17, 2003 — An additional \$200 million was transferred to a court-established settlement account.
- As will be noted, by the middle of September, 2003, the sum of \$275 million had been deposited into the court registry. The Settlement Agreement contained specific terms governing the subsequent distribution of the funds to the individual plaintiffs.

In accordance therewith, on October 28, 2003 plaintiff counsel filed the required certification representing that 75% of the adult plaintiffs had signed the required releases and at that time requested transfer of the \$275 million to the court approved trust account held by one of the plaintiff law firms.

- December 2, 2003 — Plaintiff's counsel filed a certification that the last remaining condition for distribution had been met; specifically, that court approval had been obtained of the claims involving minors and that at least 97% of the total plaintiffs had signed releases.
- The remainder of the settlement proceeds was to be paid in annual \$2.5 million installments from 2004 to 2013.⁵

With a factual understanding of the *Abernathy* Settlement under our belts, we can now analyze the *U.S. v. Stricker* lawsuit.

PART II

The Government Files Suit - (*U.S. v. Stricker*)

A little over six years after the parties executed the *Abernathy* Settlement Agreement, the Government filed a lawsuit against certain parties to the *Abernathy* settlement seeking reimbursement of Medicare conditional payments. This lawsuit became known as *U.S. v. Stricker* (Stricker being the surname of the first named defendant in the action).

On December 1, 2009, the Government filed its initial **Complaint** commencing litigation. A copy of the Complaint can be obtained at http://www.npbp.com/news/uploads/stricker_-_complaint_12-2009.pdf.

On May 26, 2010, the Government filed its **First Amended Complaint** to add certain subsidiaries of the named insurance companies. A copy of the First Amended Complaint can be obtained at http://www.nuquestbridgepointe.com/news/uploads/stricker_-_first_amended_complaint_5-26-10.pdf.

Who Did the Government File Suit Against?

The Government filed suit against numerous parties in connection with the *Abernathy Settlement*, which can be categorized as follows:

- The chemical companies sued in *Abernathy* and their liability insurance carriers (and their subsidiaries) [Referred to by the *Stricker* Court as “Corporate Defendants”].⁶
- Certain named plaintiff attorneys and plaintiff attorney firms that represented the *Abernathy* plaintiffs [Referred to by the *Stricker* Court as “Attorney Defendants”].

It is interesting to note that the Government did *not* sue any of the alleged Medicare beneficiaries to the settlement, although under the MSP it would appear that it could have also filed suit against these individuals. See e.g., 42 C.F.R. § 411.24(g)

What Was the Basis of the Government’s Action?

The Government alleged that the *Abernathy* Settlement contained 907 Medicare beneficiaries⁷ and that the defendants failed to properly reimburse Medicare for conditional payments made by the Medicare program for medical treatment related to the claimed injuries and illnesses as required under the MSP.⁸

Against the **Attorney Defendants**, the Government alleged that they had “received” primary payments entitling Medicare to recover conditional payments under the MSP.⁹

In this respect, the Government alleged that the Attorney Defendants failed to properly comply with the MSP as follows:

- Attorney Defendants knew or should have known that one or more of the claimants were Medicare-eligible individuals on whose behalf Medicare was entitled to recover any conditional payments.¹⁰
- Failed to reimburse Medicare for conditional payments as required under the MSP.¹¹

Against the **Corporate Defendants**, the Government asserted that payment of the settlement represented “primary payment” under the MSP entitling Medicare to recover conditional payments.¹²

In this regard, the Government *alleged* that the Corporate Defendants failed to properly comply with the MSP as follows:

- Failed to determine if any of the settling plaintiffs were Medicare beneficiaries;¹³ and that they knew or should have known that one or more of the claimants were Medicare-eligible individuals on whose behalf Medicare was entitled to recover any conditional payments.¹⁴
- Failed to identify any amount(s) owed to Medicare for reimbursement of conditional payments.¹⁵
- Failed to reimburse Medicare for conditional payments as required under the MSP.¹⁶

In its Complaint, the Government listed several MSP statutes and regulations outlining the statutory bases for Medicare's right to pursue an action to recover conditional payments and the parties against which this right can be pursued, including the following:

- 42 U.S.C. § 1395y(b)(2)(A)(ii) –

Basis for Medicare's Secondary Payer Status & Conditional Payments

In pertinent part, this section provides that Medicare will not make payment for medical services if *“payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability policy or plan (including self-insurance) or under no-fault insurance.”*

However, Medicare may make “conditional payment” for medical treatment if a primary plan *“has not made or cannot reasonably be expected to make payment”* with any such payment *“conditioned on reimbursement to the appropriate Trust Fund...”* 42 U.S.C. §1395y(b)(2)(B)(i), 42 C.F.R. §§ 411.21 and 411.52.

- 42 U.S.C. § 1395y(b)(2)(B)(ii) –

Establishes Medicare's Right to Bring an Action to Recover Conditional Payments

In pertinent part, this statute states:

A primary plan, and an entity that receives payment from a primary plan, shall reimburse [Medicare] with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service.

A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

In addition to above factors, “responsibility” may also be demonstrated by a “settlement,” “award,” or “contractual obligation.” 42 C.F.R. § 411.22(b).

- 42 U.S.C. § 1395y(b)(2)(B)(iii) –

Medicare Has The Right to Pursue Parties Who “Make” or “Receive” Primary Payment

This section states that the government may bring an action to recover conditional payments against *“any and all entities that are or were required or responsible ... to make payments with respect to the same item or service (or any portion thereof) under a primary plan.”*

This section allows Medicare to seek ***double damages*** from any entity responsible to make payment under a primary plan which fails to reimburse Medicare conditional payments. See also, 42 C.F.R. § 411.24(c)(2)

In addition, this section also provides the government with a right of action against *“any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.”* See also, 42 C.F.R. § 411.24(g)

- 42 C.F.R. § 411.25(a) –

Notice to Medicare (Primary Payers)

This section provides that if a third party learns that CMS has made a Medicare primary payment for services for which the third party has made or should have made primary payment, it must give notice to that effect to Medicare.

- 42 C.F.R. § 411.24 (b) –

Medicare's Initiation of Recovery for Conditional Payments

This regulation provides that CMS may initiate recovery for payment of Medicare conditional payments as soon as it learns that payment “has been or could be made” under workers' compensation, any liability or no-fault insurance, or an employer group health plan.

- 42 C.F.R. § 411.24 (h) & 42 C.F.R. §§ 411.24(i)(1) and (2) -

Reimbursing Medicare

Under 42 C.F.R. § 411.24 (h), the beneficiary or other party who receives a third party payment must reimburse Medicare within 60 days.

Per 42 C.F.R. § 411.24 (i)(1), if the claimant does not reimburse CMS within 60 days, the third party payer must reimburse Medicare *even though it has already reimbursed the beneficiary or other party.*

From the author’s perspective, an understanding of these statutes and regulations is helpful in terms of not only understanding the bases of the Government’s action, but also in relation to the reader assessing their own potential obligations as part of claims handling and settlement practices.

What Legal Relief Did the Government Seek?

The Government claimed the following in terms of legal relief:

1. Reimbursement of the alleged Medicare conditional payments (the exact figure was not referenced in the Complaint) against *all* of the defendants, plus interest.
2. *Double damages* against the Corporate Defendants.
3. Declaratory relief against the Corporate Defendants requiring them to give notice to CMS of all future payments to Medicare beneficiaries per 42 C.F.R. § 411.25, and to ensure that they make appropriate payment to Medicare before any future settlement payments were made from the settlement.

PART III

The Court’s Ruling Why Did the Court Dismiss the Government’s Action?

By Order dated September 30, 2010, the Court dismissed the Government’s action on grounds of the statute of limitations as to those defendants that had filed motions to dismiss.¹⁷

As part of its analysis, the Court first briefly summarized the basic statutory tenets and conceptual underpinnings of the MSP noting that other courts had referred to the statute as “*convoluted and complex*” and a “*model of unclarity.*”¹⁸

However, at its core, the Court noted that the objective of the MSP was relatively straightforward observing that the MSP is essentially “*a statutory reimbursement mechanism for the Government to recover expenses conditionally paid by Medicare.*”¹⁹ (Many of the provisions referenced by the Court were contained in the Government’s Complaint as outlined by the author above in Part II of this article).

On this point, the Court referenced the following summary of the MSP from the Eleventh Circuit opinion in *United States v. Baxter Int’l, Inc.*, 345 F.3d 866 (11th Circ. 2003):

In a nutshell, the MSP declares that, under certain conditions, Medicare will be the secondary rather than primary payer for its insureds. Consequently, Medicare is empowered to recoup from the rightful primary payer (or from the recipient of such payment) if Medicare pays for a service that was, or should have been, covered by the primary insurer. Although the statute is structurally complex—a complexity that has produced considerable confusion among courts attempting to construe it—the MSP’s function is straightforward.²⁰

After establishing this framework, the Court then turned its attention to addressing the specific issues before it. Before dissecting the Court’s Order, a few preliminary points are in order.

First, the statute of limitations issue regarding the MSP is an unsettled area of the law. A full examination of the statute of limitations issue is beyond the scope of this article. Accordingly, the discussion herein will be limited to the Court’s analysis of the issue within the specific confines of the *U.S. v. Stricker* action.

Second, in reaching its ruling the Court expressly stated that its decision was premised upon the *assumptions* that the Corporate Defendants were “primary payers” (as that term is defined under the MSP) and that there was no issue concerning the applicability of certain retroactive amendments made to the MSP back in 2004.²¹ The Court also assumed that the Attorney Defendants were entities that “*received payment from a primary plan or from the proceeds of a primary plan’s payment to any entity*” under the MSP.²²

It is important to understand that the Court did *not* render factual or legal determinations on these assumptive points. Rather, these points served to establish applicability of the MSP thereby allowing the Court to proceed with analyzing (and ultimately deciding) the issue from the standpoint of the statute of limitations.

With these preliminary matters established, the focus can now shift to examining the Court’s ruling.

The Court framed the two issues to be determined as follows:

Issue #1

What is the applicable statute of limitations?

Court’s Ruling on Issue #1

- 1. The Court ruled that a *three year* statute of limitations applied to the Corporate Defendants.**
- 2. The Court ruled that a *six year* statute of limitations applied to the Attorney Defendants.**

Court’s Analysis

The Court started its analysis by noting that it found the MSP to be “silent” in regard to a deadline for filing a claim for recovery in relation to this action.²³ [By way of note, it is interesting that neither the parties nor the Court discussed, or even referenced, the possible relatedness (or non-relatedness) of the “Claims-Filing Period” section as specifically contained in the MSP. See, 28 U.S.C. § 1395y(b)(2)(B)(vi).]

As such, the Court referenced that the parties agreed that the “*relevant statute of limitation for the Government’s claims, if any, is governed by the Federal Claims Collection Act (FCAA) [codified at] 28 U.S.C. § 2415 (2008).*”²⁴

The FCCA establishes either a *six or three year* statute of limitations.

Subsection (a) of the FCCA sets forth a *six year* statute of limitations based on *contract* as follows:

[E]very action for money damages brought by the United States ... which is *founded upon any contract* express or implied in law or fact, shall be barred

unless the Complaint is filed within six years after the right first accrues.” 28 USC § 2415 (a). (Emphasis Added)

Subsection (b) of the FCCA sets forth a *three year* statute of limitations based on *tort* as follows:

[E]very action for money damages brought by the United States ... which is *founded upon a tort* shall be barred unless the Complaint is filed within three years after the right of action first accrues. 28 USC 2415 § (a). (Emphasis Added).

In applying the FCCA, the Court noted that “*because the nature and origin of the purported relationship between the Government and the two [defendant] categories differ*” it was necessary to perform a separate analysis for each defendant.²⁵

Accordingly, the Court broke down its analysis in the following manner:

Corporate Defendants (Three Year Statute Applies)

The Court ruled that the FCCA’s *three year of statute of limitations applied to the Corporate Defendants* finding that the Government’s claims arise from an underlying tort action between the plaintiffs and the Corporate Defendants.

On this point, the Court stated:

[T]he defendant’s reimbursement duties to the Government are based solely on the MSP statute because *no express contract exists* between the Defendants and the Government. The defendant’s relationship with the Government prompting liability for reimbursement under the MSPA arises only, if at all, from the defendant’s tortious relationship with any potential Medicare beneficiaries arising from the allegations of reckless and negligent behavior, which prompted the \$300 million settlement agreement.²⁶

The Court finds in this scenario that logic and reason compel the application of the three year statute of limitations founded upon tort, because the Government’s MSPA claims are founded upon allegations of the *Corporate Defendant’s tortious activity and the resulting tort settlement.*²⁷ (Emphasis by the Court).

The Government argued that the six year statute should apply based upon the “implied at law” contract theory (the Government conceded the point that no *express* contract existed). However, the Court rejected this argument

stating that “while creative, [that argument] stretches too far beyond the bounds of logic and reason to adopt as precedent.”²⁸ The Court also rejected the Government’s arguments for application of a six year statute based on the theory of restitution²⁹ and actions invoking cost-recovery statutes.³⁰

Attorney Defendants (Six Year Statute Applies)

The Attorney Defendants took the position that the *six year statute of limitations* controlled in regard to them, which was accepted by the Court.

The Court’s rationale on this point was as follows:

Logic suggests that the Attorney Defendants who represented the tort plaintiffs in the *Abernathy* case, the alleged Medicare beneficiaries in the instant case, essentially acted as agents pursuant to the contractual relationship between the Government and the Medicare beneficiaries. More specifically, the Attorney Defendants’ obligation to pay their clients any monies allegedly owed to the Government for Medicare reimbursement, unlike that of the Corporate Defendants, arose not from any tortious conduct on behalf of the Attorney Defendants themselves but from an express contractual relationship with the Medicare beneficiaries—namely, any fee agreement or attorney-client agreement between them. From that perspective, the Attorney Defendants’ MSPA obligation is essentially founded upon a contractual obligation.

For these reasons, the grounds for statute of limitations determination as applied to the Attorney Defendants is more reasonably founded upon contract rather than tort. The contractual nexus is clearer in this instance than as alleged against the Corporate Defendants, whose MSPA obligations ultimately arose from, and cannot be divorced from, allegations of tortious conduct.

The court, therefore, concurs that the six-year statute of limitations applies as to the Attorney Defendants.³¹

Issue #2

What is the appropriate time of accrual concerning the Government’s cause of action?

Court’s Rulings On Issue #2

1. Corporate Defendants

The Court ruled that the three-year statute of limitations began running

against the Corporate Defendants no later than September 10, 2003, which was the date the executed *Abernathy* Settlement Agreement was approved by the state court.

Therefore, the Court found that the statute of limitations expired no later than September 10, 2006, thereby making the Government’s claim filed against the Corporate Defendants on December 1, 2009 untimely.

Alternatively, the Court ruled that even under the six-year statute of limitations, the Government’s claims against the Corporate Defendants expired no later than September 10, 2009, thereby barring the Government’s claim as untimely.³²

2. Attorney Defendants

The Court ruled that the six-year statute of limitations began running against the Attorney Defendants no later than October 29, 2003, the date they received the \$275 million payment from the *Abernathy* settlement.

Therefore, the Court found that statute of limitations expired no later than October 17, 2009 thereby barring the Government’s claims against the Attorney Defendants which was filed on December 1, 2009.³³

3. Federal “Tolling” Statute Held Inapplicable

The Court ruled that the Federal tolling statute, which would extend the Government’s accrual period for determining the statute of limitations, was inapplicable.

Court’s Analysis

Once the Court established the applicable statute of limitations (three years for the Corporate Defendants, and six years for the Attorney Defendants), it had to decide whether or not the Government had filed its action timely.

Regarding this issue, the Court proceeded from the following analytical perspective:

“[I]mportant to accrual analysis of the statute of limitations ... the regulations define the Government’s right to initiate recovery beginning ‘as soon as it learns that payments has been made or could be made under workers’ compensation, any liability or no-fault insurance, or an employer group health plan (citing 42 C.F.R. § 411.24(b)).³⁴

To determine when the Government’s MSPA cause of action first accrued for purposes of the statute of limitations, the court considers the point of time when the Government could have brought an independent action for Medicare reimbursement related to the *Abernathy* settlement. See 42 C.F.R. § 411.24(b) (“[The Government] may initiate recovery as soon as it learns that payment has been made or could be made under [workers’ compensation], any liability or no-fault insurance, or an employer group health plan.”).³⁵

As the Government asserted a different basis of liability pertaining to each defendant category, the Court again rendered *separate* analyses for the Corporate and Attorney Defendants.

As to the Corporate Defendants

The Court stated that the key question involved at what point the Corporate Defendants could be viewed to have demonstrated a “*responsibility to pay*” under the MSP in relation to the *Abernathy Settlement*.

In making this very specific determination, the Court’s analysis centered on 42 U.S.C. § 1395y(b)(2)(B)(ii) which provides:

A primary plan, and an entity that receives payment from a primary plan, shall reimburse [Medicare] with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service.

A primary plan’s responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient’s compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan’s insured, or by other means. (Emphasis Added).

In addition, “responsibility” may also be demonstrated by a “settlement,” “award,” or “contractual obligation.” 42 C.F.R. § 411.22(b)(3).

According to the Court, once “responsibility to pay” is demonstrated, the statute “*unambiguously establishes the earliest point at which the Government could have asserted its claims for reimbursement [against the Corporate Defendants], as third party payers: as soon as it learned that ‘payment has been or could be made under ... any liability or no-fault insurance.’*” 42 C.F.R. § 411 24(b).³⁶

From this standpoint, the Court found as follows:

- The Corporate Defendants’ “responsibility to pay” arose “*no later than the point of execution and court approval of the Abernathy Settlement Agreement [which was September 9, 2003].*”³⁷
- The Court noted that the August 26, 2003 initial settlement payment, and the additional payment made on September 17, 2003, “*demonstrated responsibility to pay*” under the MSP.³⁸

In this regard, the Court stated that “[*d*]espite these dates reflecting accrual of its cause of action, the Government did not bring its MSPA claims until December 1, 2009,” which was well beyond the three year statute of limitations found to be applicable to the Corporate Defendants.³⁹

The Government argued that the accrual date in the context of the “responsibility to pay” requirement under the MSP did not actually arise until payment was *distributed* to the *Abernathy* plaintiffs in exchange for the signed releases which occurred on December 2, 2003.

However, the Court rejected the Government’s “distribution-accrual” interpretation of the statute stating this argument “*directly contradicted the plain reading of the language of [42 U.S.C. § 1395y(b)(2)(B)(ii)]*” and, accordingly, that it would “*not so expand the clear intent of Congress by adding language to the MSPA statute.*”⁴⁰

The Court explained:

Despite the Government’s attempt to twist the reading of this statute, its terms squarely contemplate that a payment conditioned upon release triggers a responsibility to reimburse Medicare under the MSPA, which is exactly the situation presented here.

Consequently, as to the Corporate Defendants, the court finds that the Government's cause of action accrued, *at the latest*, on September 10, 2003, when the state court approved the executed *Abernathy* Settlement Agreement and at which point Defendants' responsibility to pay was clearly established.

The Government reasonably could have intervened in the *Abernathy* litigation to initiate its MSPA-related claims against the Corporate Defendants at least by September 10, 2003, if not earlier. Applying either the three-or-six-year statute of limitations, the Government's right of action expired long before it filed suit on December 1, 2009. (Emphasis by the Court).⁴¹

With regard to the issue of when the Government knew or otherwise "learned" of the *Abernathy* Settlement Agreement, the Order indicates that the Government did not argue that it had not learned of this settlement until December 2, 2003.⁴² Rather, the Government argued that the accrual limitations period could not have accrued prior to December 2, 2003 under the MSP. However, as noted, the Court rejected the Government's interpretation of the MSP on this point.

Regarding the issue of the Government's knowledge of the underlying *Abernathy* action, the Court found it questionable how the Government could have not been aware of the underlying litigation given its magnitude and publicity. In a footnote, the Court stated:

Considering the widely publicized nature of the *Abernathy* Settlement Agreement – a comprehensive 20 page document detailing the logistics of the settlement payments, including dates, times and specific accounts – the court finds it hard to conceive a reasonable argument as to the Government's lack of knowledge about its MSPA claim at the time the settlement was executed.⁴³

On this point, the Court highlighted the wide national attention the underlying actions had generated — noting that articles about the cases were published in several major national news publications and journals, along with multiple reports aired on National Public Radio. In addition, the Court noted that the Alabama Supreme Court recognized the "media frenzy" in its 2001 ruling related to a request for a venue change in the state actions.⁴⁴

As to the Attorney Defendants

In deciding the issue of when the Government's action accrued as to the Attorney Defendants, the Court utilized a different standard under the theory that these

defendants were alleged "*recipients*" of payments under the MSP.

The Court's focus concentrated on that aspect of the MSP providing that any "*recipient*" of a payment that qualifies as reimbursable to Medicare must reimburse Medicare within 60 days per 42 C.F.R. §§ 411.22(a) and 411.24(h).

The Court also referenced 42 C.F.R. § 411.24(g) which provides that Medicare has a direct "*right of action against to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a third party payment.*" (Emphasis Added).

The Court found that the Government's cause of action accrued against the Attorney Defendants on October 29, 2003, at the latest, which was the date the court in the *Abernathy* litigation ordered the transfer of \$275 million from the court registry to the plaintiff attorney's escrow account.⁴⁵

The Government argued that the actual date the funds were released for *distribution* to the plaintiffs (which was December 2, 2003) was the more appropriate date to be utilized.

However, the Court rejected the Government's argument stating:

To the contrary, the most logical and appropriate time for the Government's right of reimbursement under the MSPA to be honored would have been at the time of initial transfer of the settlement funds into the attorneys' escrow account, if not earlier. At that time, a court could have determined proper distribution of those funds as allocated to the plaintiffs, to vendors, to attorneys for legal fees, and to any parties with subrogation claims, including the Government's claim here for Medicare reimbursement.

The Government most certainly could, and should, have intervened *before* the *Abernathy* settlement monies were actually distributed to the thousands of plaintiffs. The Government's MSPA claims were, therefore, ripe for accrual *no later than* October 29, 2003, the date the Attorney Defendants received payment of the \$275 million settlement monies in escrow.

The court notes that in practical terms, the Government likely could have intervened at any time during the pendency of the *Abernathy* litigation, and certainly at the time the Settlement Agreement was executed and judicially approved in September 2003.

To afford every possible benefit to the Government, however, the court reaches its generous conclusion that accrual of its MSPA claim occurred no later than October 29, 2003. (Emphasis by the Court).⁴⁶

Court Rejects Government's "Tolling" Argument

The Government also argued applicability of the Federal tolling statute (28 U.S.C. § 2146(c)), asserting that under this theory its action did not actually accrue until much later than December 2, 2003 and, therefore, was timely.

This statute basically stops the FCCA statute of limitations during periods where "*facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances.*" (Emphasis by the Court).⁴⁷

In analyzing this argument, the Court referenced the Eleventh Circuit case, *United States v. Kass*, 740 F.2d 1493 (11th Cir. 1984), noting that the court held that "*once the facts making up the 'very essence of the right of action' are reasonably knowable, the 2146 bar is dropped.*" *Kass* at p. 1497.⁴⁸

As part of its analysis, the court in *Kass* examined the history of this tolling statute noting that it was designed to promote "*diligence by the government in bringing claims to trial.*" *Id.* at p. 1497 (Citations Omitted). Furthermore, the court noted that a major underpinning of the statute "was the thought that the government should not be penalized if the *fraud* of an adverse party restricted its ability to discover a valid cause of action until long after its accrual." *Id.* at 1497 (Emphasis in Original).⁴⁹

However, the Court rejected the Government's tolling argument finding that there was no evidence of fraud and on a technical pleading point stating:

The facts of this case do not implicate any fraudulent concealment of any related MSPA claim. Moreover, the Government has not alleged that it did not or *reasonably could not have known* the facts giving rise to its MSPA causes of action prior to December 2, 2003. While the Eleventh Circuit has not designated which party bears the burden of proving the elements of this particular federal tolling statute, "federal courts have repeatedly held that plaintiffs seeking to toll the statute of limitations on various grounds must have included the allegation in their pleadings." *Wasco Prods. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006) (citing cases from the Ninth, Tenth, Eighth, and D.C. Circuit Courts of Appeals).

Indeed, the Government would be hard pressed to show that it reasonably could not have known of the widely reported *Abernathy* litigation, initiated in 1996, and the ensuing settlement reached in August 2003. Rather, the Government argues the "obvious fact" that it "could not have had knowledge of its claim before that claim arose, which. . . was on December 2, 2003." (citation omitted). Because the court ultimately disagrees with the Government as to the accrual date of its claim, it finds no merit in this particular argument.⁵⁰

Conclusion

As the dust settles from the Court's ruling, the interesting and more sobering question of "*so, exactly what does Stricker mean in the bigger picture of MSP compliance?*" emerges.

The author recognizes that this question will surely open the gates (and, in fact, should open the gates) to many different and divergent viewpoints and angles, observations and questions, conclusions, and even perhaps some predictions -- all of which are certainly part of a healthy post-game analysis of the *Stricker* decision.

In the spirit of this larger discourse, keeping the *Stricker* decision in proper perspective should be an integral part of any assessment from the author's standpoint. The court in *Stricker* certainly provided welcomed and keen analysis in interpreting important aspects of the MSP with respect to determining when and how, *from its viewpoint*, an action for recovery of conditional payments accrues, and the applicable statute of limitations controlling the government's rights related thereto.

However, it must be remembered that the Government's action was essentially dismissed on the sole ground that the Government simply failed to file its lawsuit timely. The Court did *not* reach the underlying substantive allegations -- namely, that the parties failed to properly protect Medicare's interests under the MSP. In this respect, caution is in order to avoid overstating whatever victory the *Stricker* decision may represent. The industry must not be drawn into a false sense of complacency by the narrow technical ruling of *Stricker* as the MSP arms Medicare with some pretty strong legal rights and broad enforcement powers regarding conditional payment recovery.

Accordingly, notwithstanding the dismissal of the *Stricker* case, the author believes it is vitally important for primary payers and practitioners to understand their

obligations under the MSP regarding conditional payments, the potential risk and exposure it could face for failing to protect Medicare's interests (including a possible *Stricker* lawsuit and the prospect of "double damages"), and to build the necessary practical compliance protocols to address the issue as part of claims handling and settlement.

With the implementation of MMSEA Section 111 reporting around the corner, the need to tackle this issue takes on even greater significance as more cases will now be squarely on Medicare's radar. A review of the MSP

statutes and regulations outlined by the author in Part II of this article, and the Court's general discussion of same in Part III, would seem to be a good starting point toward this end.

In the interim, it will be interesting to learn if the Government decides to appeal the *Stricker* decision, and, if so, how the issues will be addressed at the appellate level. It will also be interesting to see how the *Stricker* ruling may, or may not, be followed by other courts in the future as part of their examination and determination of MSP issues.

About the Author

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Mark is very active on the national MSA/Medicare educational and training circuit. He is a regularly featured speaker on MSA/Medicare issues before carriers/TPAs, state bar associations and industry specific organizations. Mark has also published several articles on MSA/ Medicare issues. Mark can be reached at 786-457-4393 or via e-mail at mpopolizio@nqbp.com.

Endnotes

¹ The Court's Order indicates that the following defendants filed Motions to Dismiss: Monsanto Company; Solutia, Inc.; Pharmacia Corporation; James J. Stricker, Daniel R. Benson, Donald W. Stewart and Kasowitz, Benson, Torres and Friedman, LLP; Don, Barrett, The Barrett Law Firm, P.A.; Charles E. Fell, Jr., Charles Cunningham, Jr., and Cunningham & Fell, PLLC; American International Group, Inc; and Travelers Companies, Inc. *Stricker* Memorandum Opinion at p. 1.

The Court noted that not *all* of the defendants the Government sued filed motions to dismiss. As to those defendants who did not file motions, the Court noted that it did not have the necessary information related to the claims against these defendants to determine whether or not the government's action could be similarly dismissed against them. As such, the Court stated that "*the decision set forth in this Memorandum Opinion and accompanying Order does not apply to these Defendants [meaning those Defendants that had not filed motions to dismiss].*" *Stricker* Memorandum Opinion at p. 2, fn. 1.

² See Endnote 1.

³ *Stricker* Memorandum Opinion at p. 2.

⁴ *Stricker* Memorandum Opinion at p. 3.

⁵ The settlement terms as outlined in the bullet points can be found in the *Stricker* Memorandum Opinion at p. 3-4.

- ⁶ The named Corporate Defendants included, Monsanto Company, Pharmacia Corporation, Solutia, Inc., Travelers Companies, American International Group, Inc., and certain named subsidiaries. *Government's First Amended Complaint* (May, 26, 2010) at p.3-4 (paragraphs 1-5).
- ⁷ *Stricker Memorandum Opinion* at p. 8; *Government's First Amended Complaint* (May 26, 2010) at. 7 (paragraph 21)
- ⁸ *Stricker Memorandum Opinion* at p. 5; *Government's First Amended Complaint* (May 26, 2010) at. 9 (paragraph 31). See, 42 U.S.C. § 42 U.S.C. 1395y(b)(2)(B)(iii) and 42 C.F.R. . § 411.24(g).
- ⁹ *Government's First Amended Complaint* (May 26, 2010) at. 12 (paragraph 38).
- ¹⁰ *Government's First Amended Complaint* (May 26, 2010) at. 12 (paragraph 39).
- ¹¹ *Government's First Amended Complaint* (May 26, 2010) at. 12 (paragraph 40).
- ¹² *Government's First Amended Complaint* (May 26, 2010) at. 13 (paragraph 41). See, 42 U.S.C. 1395(y)(b)(2)(B)(iii).
- ¹³ *Government's First Amended Complaint* (May 26, 2010) at. 14 (paragraph 43).
- ¹⁴ *Government's First Amended Complaint* (May 26, 2010) at. 14 (paragraph 44).
- ¹⁵ *Government's First Amended Complaint* (May 26, 2010) at. 14 (paragraph 43).
- ¹⁶ *Government's First Amended Complaint* (May 26, 2010) at. 15 (paragraph 45).
- ¹⁷ See Endnote 1.
- ¹⁸ *Stricker Memorandum Opinion* at p. 8, *citing, Estate of Urso v. Thompson*, 309 F. Supp. 2d 253, 259 (D. Conn. 2004).
- ¹⁹ *Stricker Memorandum Opinion* at p. 8, *citing* 42 U.S.C. §1395y.
- ²⁰ *Stricker Memorandum Opinion* at p. 8, *citing, Baxter*, at 345 F.3d at p. 888.
- ²¹ *Stricker Memorandum Opinion* at p. 10.
- ²² *Stricker Memorandum Opinion* at p. 10.
- ²³ *Stricker Memorandum Opinion* at p. 11.
- ²⁴ *Stricker Memorandum Opinion* at p. 11. The Court also cited the case of *In Re Dow Corning*, 250 B.R. 298, 350-51 (Bktrpcy). E.D. Mich. 2000) (stating the universal recognition of FCCA's applicability to MSP claims).
- ²⁵ *Stricker Memorandum Opinion* at p. 12.
- ²⁶ *Stricker Memorandum Opinion* at p. 12.
- ²⁷ *Stricker Memorandum Opinion* at p. 15.
- ²⁸ *Stricker Memorandum Opinion* at p. 15.
- ²⁹ *Stricker Memorandum Opinion* at p. 13.
- ³⁰ *Stricker Memorandum Opinion* at p. 14.
- ³¹ *Stricker Memorandum Opinion* at p. 16.
- ³² *Stricker Memorandum Opinion* at p. 24.

- ³³ *Stricker* Memorandum Opinion at p. 24-25. The author is unclear if the Court's reference to the "October 17, 2009" date is a scrivener's error. Specifically, the Court ruled that the applicable six year statute of limitations against the Attorney Defendants began running "no later than October 29, 2003." It then stated that, accordingly, the statute of limitations "expired October 17, 2009." However, from the author's understanding, basing the six year statute of limitations from October 29, 2003 would have barred the Government's action as of October 29, 2009, not October 17, 2009. Notwithstanding this technical point, any issue in this regard is really moot as the Government's action would be deemed as being filed untimely from either date per the Court's analysis and ruling.
- ³⁴ *Stricker* Memorandum Opinion at p. 10.
- ³⁵ *Stricker* Memorandum Opinion at p. 17.
- ³⁶ *Stricker* Memorandum Opinion at p. 19-20.
- ³⁷ *Stricker* Memorandum Opinion at p. 17-18.
- ³⁸ *Stricker* Memorandum Opinion at p. 18.
- ³⁹ *Stricker* Memorandum Opinion at p. 18.
- ⁴⁰ *Stricker* Memorandum Opinion at p. 19.
- ⁴¹ *Stricker* Memorandum Opinion at p. 20-21.
- ⁴² *Stricker* Memorandum Opinion at p. 20.
- ⁴³ *Stricker* Memorandum Opinion at p. 20, fn.14.
- ⁴⁴ *Stricker* Memorandum Opinion at 4-5.

Regarding the Government's "knowledge" of the *Abernathy* action, as noted the Court indicates that the Government did not argue that it "[had] not learn[ed]" of the *Abernathy* Settlement until December 2, 2003. *Stricker* Memorandum Opinion at p. 20. Furthermore, the Court noted that the Government did "not [allege] that it did not or reasonably could not have known the facts giving rise to its MSPA causes of action prior to December 2, 2003." *Stricker* Memorandum Opinion at p. 23.

The fact that the Government was not alleging "lack of notice" or "knowledge" appeared to eliminate the potential application of 42 C.F.R. § 411.25(a) which can be interpreted to place an obligation on third party payers to put Medicare on "notice" of an action involving a Medicare beneficiary. This regulation states that if a third party learns that CMS has made a Medicare primary payment for services for which the third party has made or should have made primary payment, it must give notice to that effect to Medicare.

While the Government in its First Amended Complaint (paragraph 36) references 42 C.F.R. § 411.25(a) as part of its general review of the MSP, the Government did not apparently assert this section against the defendants as part of its more specific allegations against them. Thus, for these reasons, it appears that the Court's analysis is essentially devoid of any discussion of this "notice" regulation in relation to its ultimate determination of the issues. In fact, as noted above, the Court actually focused on the Government's "knowledge" of the *Abernathy* action, and strongly suggested that the Government had ample opportunity to reasonably "learn" of the *Abernathy* action given its national publicity.

From the author's view, it is interesting to contemplate how, if at all, the Court's analysis in *Stricker* may have been altered if a "notice" issue per 42 C.F.R. § 411.25(a) was raised. That is, what would have been the affect on the Court's analysis and ultimate determinations if it was alleged that the Government did not in fact have knowledge of the action, or was not provided notice of the action by the third party payer? Again, in *Stricker* this was not at issue - the Government did not allege lack of notice or knowledge, and the Court essentially indicated that the Government had reasonable opportunity to have learned about the *Abernathy* action given its national notoriety.

However, the author does not believe it is unreasonable to suggest that there could very well be other cases in the litigation settlement stream in which this type of issue could arise. It would indeed be interesting to see how a court in *that* situation would analyze the limitations period if the issue of "notice" to Medicare, or lack of agency knowledge, was thrown into the equation. With the passage of time, this potentially concerning issue should recede with full implementation of the mandatory reporting requirements per the Medicare, Medicaid & SCHIP Extension Act (42 U.S.C. § 1395y(b)(7) and (8)).

⁴⁵ *Stricker* Memorandum Opinion at p. 21.

⁴⁶ *Stricker* Memorandum Opinion at p. 21-22. The Court also noted that at the close of the hearing on the motions to dismiss the Government for the first time raised a theory “of continuing accrual, vaguely proposing that a new MSPA cause of action accrues every year when the Corporate Defendants make additional payments to the Attorney Defendants.” However, as this was not raised in any of the briefs before the Court and not pled in the Amended Complaint, the Court determined that it was not properly before it for determination. See, *Stricker* Memorandum Opinion at p. 20, fn. 15.

⁴⁷ *Stricker* Memorandum Opinion at p. 23, citing 28 U.S.C. § 2146(c).

⁴⁸ *Stricker* Memorandum Opinion at p. 23.

⁴⁹ *Stricker* Memorandum Opinion at p. 23.

⁵⁰ *Stricker* Memorandum Opinion at p. 23-24.