



Legal Bulletin

October 5, 2010

Update: US v. Stricker

On September 30, 2010 the court in Stricker entered an order dismissing the Government's complaint against six Defendants. The order was the result of a hearing held on September 13, 2010 on the Government's Motion for Partial Summary Judgment. Six Motions to Dismiss were consolidated for this hearing arguing various grounds for dismissal including statute of limitations. The motions were filed by Monsanto Company, Solutia, Inc., Pharmacia Corporation, AIG, The Travelers Companies as well as various attorneys. For ease of reference, the court in their ruling refers to the two categories of Defendants above as "Corporate" Defendants (chemical companies and their liability carriers) and "Attorney" Defendants. Only the statute of limitations argument was addressed by the court as there was no further need to reach the decision "on other grounds." The following is a synopsis of the basis of that decision.

Background

By way of history, this case originated from a \$300 million dollar settlement which took place on August 20, 2003. The settlement stemmed from multiple environmental exposure (toxic tort) cases filed as a class action lawsuit against various corporate employers, collectively referred to as the "Abernathy Settlement." Some key dates noted by the court included the following:

1. **August 26, 2003** – Corporate Defendants transfer by wire \$75 million into a settlement account established by the Circuit Court of Calhoun County.
2. **September 9, 2003** – The parties formalize and execute a twenty (20) page settlement agreement.
3. **September 10, 2003** – The settlement is approved by the court and an order is entered.
4. **September 17, 2003** – \$200 million is transferred to a court established settlement account under the terms of the Settlement Agreement.
5. **October 29, 2003** – Abernathy plaintiffs' counsel file a certification that seventy-five percent of the adult plaintiffs have executed releases. Request is made for transfer of the \$275 million to the court approved trust account of the law firm of Kasowitz, Benson, Torres & Friedman, LLP.
6. **December 2, 2003** – The final certification (including minors) have now executed releases. The court refers to these certifications as the "75% Certificate" and the "97% Certificate."

The terms of the settlement provided for the remainder to be paid in annual installments between 2004 through 2013. Of significance to the court was the fact this settlement had been extremely publicized.



On December 1, 2009, the Government filed a lawsuit under 42 U.S.C. 1395-1395ggg (MSPA) seeking reimbursement from the corporate tortfeasors who participated in the “Abernathy Settlement,” their insurance companies, subsidiaries, and certain Plaintiff attorneys who allegedly received settlement funds. The lawsuit allegedly involved 907 unnamed Medicare beneficiaries who received settlement funds in a case where Medicare had made payments for related treatment and unidentified medical expenses. The Government did not pursue these Medicare beneficiaries.

Statute of Limitations Argument

This case is predicated upon a settlement which occurred in 2003. The order assumes the Corporate Defendants qualify as “primary plans” under the 2004 amended definition of “primary plan” under the Medicare Secondary Payer Act (“MSPA”) and no issue exists as to retroactive application.

The MSPA does not address the deadline for filing a claim for recovery. The parties therefore agreed the relevant statute of limitations for the Government’s recovery claims, (if any) is governed by the Federal Claims Collection Act (“FCCA”) (28 U.S.C. 2415). There are two applicable time periods depending on characterization of the underlying complaint. Under subsection (a) of the FCCA, if an action for money damages is brought founded upon any contract (express or implied), it is time barred unless the complaint is filed within six years after the right of action first accrues (28 U.S.C. 2415(a)). Under Subsection (b), an action for money damages which is founded upon a tort is barred unless the complaint is filed within three years after the right of action accrues (28 U.S.C. 2415(b)).

The court noted there was no precedent in the Eleventh Circuit as to which time period applied to this type of case and conducted a separate analysis as to these two categories of Defendants.

Corporate Defendants

The Corporate Defendants argued the lack of “express contractual privity” with the Government. Any claim for reimbursement by the government is based on the “tortious” relationship between the Defendants and potential Medicare beneficiaries and is therefore governed by the three year statute.

The Government argued an “implied in fact” contract in which the lawsuit is more akin to a restitution action and not tort, especially in light of the fact there was no requirement to prove the tort elements. The court noted the language of 28 U.S.C. 2415(b) applies to actions “founded” upon torts and does not require proof of tort elements.

In determining the accrual period the court reviewed 42 U.S.C. 1395y (b) (2) (B) (ii) which states that an entity’s liability for Medicare reimbursement arises upon demonstration of its “responsibility to pay” under a primary plan, including self insured plan. Under Alabama law, court approved settlements are fully enforceable. The court determined the “responsibility to pay” by the Corporate Defendants arose in this case no later than when the court approved the settlement. (September 10, 2003).

The court therefore held that the Government’s cause of action accrued, at the latest, on September 10, 2003 when approved by the court.

Attorney Defendants

The Attorney Defendants argued the applicability of the six year statute of limitations and did not address the three year provision. The court noted these Defendants act as “agents” pursuant to the contractual relationship



between the government and the Medicare beneficiaries. As such the obligation is contractual predicated upon the attorney-client or fee agreement and therefore characterization of the underlying complaint as contractual versus tort appeared reasonable. The court concurred with the application of the six year statute of limitations.

In determining the accrual date the court utilized a different standard as these Defendants were “recipients” of payments owed to the government. The court found the Defendants received payment on October 29, 2003 when the \$275 million dollars was transferred to the law firm escrow account. The court rejected the Government’s argument that the controlling date should be December 2, 2003 when the 97% Certificate was filed as the law firm could not have disbursed the funds from the escrow account on October 29, 2003. The court noted the Alabama court could have determined proper distribution at that time. Thus the claim was ripe for accrual no later than October 29, 2003.

The Government raised for the first time at the close of arguments the concept of “continuing accrual” dates based on payments made by the Corporate Defendants to the Attorney Defendants. However this argument was not considered since it was not raised previously.

Federal Tolling of Statute

The Government also argued tolling of the statute under the FCCA. Basically the time period can be tolled when “facts material to the right of action are not known and reasonably could not be known by an official ...to act in the circumstances” (28 U.S.C. 2146(c)). The court determined there was no fraudulent concealment of any MSPA related claim and in fact the “Abernathy Settlement” had been publicly reported.

Holding

The holding of the court was that as to the Corporate Defendants, the three year statute of limitations began running no later than September 10, 2003, the date court approved the settlement. Thus the Government’s claims are time barred. Alternatively, the same conclusion would be reached under the six year statute. As to the Attorney Defendants, the six year statute of limitations began running on October 29, 2003 when the \$275 million dollar settlement was transferred to the law firm’s escrow account. The Government’s claims are therefore time barred.

Summary

In the final analysis, choosing the accrual date of September 10, 2003 rendered moot the issue of which statute of limitations applied as to the Corporate Defendants (although the court strongly favored application of the three year provision) because the Government was time barred under either scenario. The same could not be said for the Attorney Defendants. Application of the six year statute of limitations could have yielded a different result if the court had agreed with the Government’s argument and used an accrual date of December 2, 2003. Additionally, the argument made at closing regarding “continuing accrual dates” provides a preview of arguments yet to come regarding this issue. Whether the Government will appeal remains to be seen. Further, the order is not applicable to those defendants who did not join in the motion.

For further information please contact Rochelle Lefler, Executive Counsel, PMSI Settlement Solutions at 813.318.6751 or Rochelle.lefler@pmsionline.com.

Pharmacy | Medical Services and Equipment | Settlement Solutions

PMSI—Proven Solutions for Cost Containment. Founded in 1976, PMSI is a leader in developing solutions to control the growth of medical costs in workers’ compensation. As one of the nation’s largest and most experienced companies focused solely on workers’ compensation, we deliver proven solutions for cost containment across the claims lifecycle. PMSI’s clinically integrated solutions for Pharmacy, Medical Services and Equipment, and Settlement Solutions deliver quantifiable results and improve the quality of care for injured workers. We provide our customers with the innovation, focus, expertise, analytics and technology needed to successfully deliver workers’ compensation benefits. For more information, visit www.pmsionline.com or call 877.ASK.PMSI.