

## COURT CASE HIGHLIGHTS IMPLICATIONS OF MSP ACT FOR HIGH FINES

By Joe Picone

**USA v. STRICKER: CMS (CENTERS FOR MEDICARE & MEDICAID SERVICES) ASSERTS RECOVERY RIGHTS IMPLYING AN INTERPRETATION OF THE MEDICARE SECONDARY PAYER ACT LIABILITY IN A LAWSUIT THAT MAY RESULT IN UP TO \$600 MILLION IN FINES!**

The applicability and effect of the Medicare Secondary Payer Statute (MSP) on liability settlements have engendered much confusion, controversy and debate over many years. However, with the passing of the MMSEA (Medicare, Medicaid and SCHIP Extension Act of 2007), many liability carriers and liability attorneys have been awakening to their obligations to protect Medicare's interests.

Willis, with our strategic partner, Gould & Lamb, has been advising our clients to protect Medicare's interests relative to both conditional payments and future Medicare-covered expenses. We have foreseen and warned that any vagueness or doubts about Medicare's rights would be defined or clarified in future, imminent litigation. That time is now and will unquestionably continue.

In a recently filed U.S. Court action (*The United States of America v. James J., Stricker, et. al., Northern District of Alabama, Eastern Division, Civil Action No. CV-09-PT-2423-E*), the government is exercising its right to seek recovery of conditional payments based upon the Medicare Secondary Payer Statute (MSP). This complaint seeks recovery from both the liability carriers and the plaintiffs' counsel.

The Stricker complaint involves a class action claim that was settled without reimbursing Medicare for conditional payments. The complaint has resolved an often-posed question: When a class action is settled with one lump sum and no specific amount is designated by the defendant/carrier for any plaintiff/claimant, must Medicare entitlement status and Medicare conditional payments be determined for each plaintiff to avoid future risks? The position of the government in the Stricker complaint indicates the aggressive position they will maintain, and it portends the absolute need for liability claim handling and settlement practices to be compliant with the MSP.

In addition to seeking the conditional payments, interests and penalty, the government is requesting that "the

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defendants must give CMS notice of all future payments to Medicare beneficiaries pursuant to 42 C.F.R. § 411.25; and, that all Defendants must ensure before any future settlement payment is made to any claimant that appropriate payment is made to the United States.”

Clearly, the government claim appears to seek to establish a right to proceed against the liability carriers for pre- and post-settlement Medicare expenses. This dramatic move from the traditional approach to the post-settlement exposure of liability carriers may be an omen of future actions. The final decision in this case may have far reaching effects on liability carriers and their settlements. We will keep you advised of future developments in this case and other legal actions in the MSP arena.

In conclusion, we advise our clients to seek advice of defense counsel or legal counsel before settling any liability cases that could possibly trigger Medicare/Medicaid obligations. Gould & Lamb, our strategic partner in this area, is available to ensure that protocols are in place so that your organization is compliant with these new regulations. Should you have any questions or need assistance, please do not hesitate to contact Tom Blackwell of Gould & Lamb, or Joe Picone or Manuel Homem of Willis.

## CONTACTS

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*The observations, comments and suggestions we have made in this report are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.*

## WEBINAR FEBRUARY 16 3:00 - 5:00 PM EST

### SCHIP Mandatory Insurer Critical Updates and Latest Case Law You Need to Know!

In December of 2007, the Medicare, Medicaid and State Children’s Health Insurance Program (SCHIP) Extension Act of 2007 was signed into law. Section 111 of SCHIP defines specific requirements for liability, no-fault auto and workers’ compensation carriers and self-insurers designed to ensure compliance with the Medicare Secondary Payer statute (MSP). Failure to comply with Section 111 carries stiff monetary penalties. Failure to report carries a \$1,000.00 per day, per claim penalty.

Willis and Gould & Lamb will be conducting a SCHIP update session for Willis clients via webinar on February 16. Attendees will receive:

- Updated overview of the Mandatory Insurer Reporting (MIR) process
- Updated overview of testing with G&L and CMS
- New Legal implications of MIR compliance
- New Legal implications of MSP compliance
- Discussion of upcoming changes in settlements

To pre-register, click on the link below and follow the instructions. Dial-in instructions and webinar access link will be sent to you in a separate email.

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