

# Medicare gets aggressive in drive to recoup medical costs

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The U.S. government's first-of-its-kind lawsuit against all parties that settled a pollution liability case signals Medicare's aggressive push to make sure it does not pay medical expenses when others are to be the primary sources of payment, observers say.

The suit filed Dec. 1, 2009, cites Medicare Secondary Payer provisions in federal law that allow Medicare to recover past and future medical expenses from all parties—insured and self-insured—involved in a liability claims award or settlement that includes Medicare-eligible individuals.

With the suit, “CMS basically let the insurance and self-insured world know, “This is an important issue for us (and) if you are resolving a case and you don't tell us and somehow we are not collecting this money, we are going to come after you,” said Roy Franco, director of risk management strategies for supermarket chain Safeway Inc. in Pleasanton, Calif.

Mr. Franco also is co-chairman of the steering committee for the Medicare Advocacy Recovery Coalition, a group formed in 2008 to advocate improvements in the Medicare Secondary Payer program.

The case breaks new ground because CMS simultaneously named insurers, settlement beneficiaries and plaintiffs attorneys all in one lawsuit, said John Williams, CEO and president of Bradenton, Fla.-based Gould & Lamb L.L.C., which specializes in complying with Medicare secondary payer and mandatory insurer reporting to CMS.

It serves notice that CMS will seek payments from defendants and plaintiffs in a liability settlement involving those eligible for Medicare, Mr. Williams said.

“What you can read into it is that Medicare is getting a lot more aggressive in their conditional payment rights of recovery and they are not going to pick one side vs. the other,” Mr. Williams said. “A lot of attorneys I talked to thought they were just going to go after the claimants or just go after the insurers. They are going to go after everybody.”

Mr. Franco said it is the first suit to his knowledge in which Medicare has sued insurers contributing to such a settlement.

The lawsuit brought in U.S. District Court for the Northern District of Alabama, caught many observers by surprise, because they assumed CMS would seek reimbursement only for future liability settlements, Mr. Franco said.

But the lawsuit seeks money from a \$300 million global settlement reached in 2003 in a case that alleged injuries from exposure to polychlorinated biphenyls manufactured in Alabama.

“What we are seeing is CMS going back quite a few years here,” Mr. Franco said. MARC is seeking federal legislation that would place a three-year statute of limitations on claims brought by the government to recover under the Medicare Secondary Payer law.

The government's lawsuit names St. Louis-based Monsanto Co.; New York-based Pharmacia Corp., St. Louis-based Solutia Inc., Hartford, Conn.-based Travelers Indemnity Co., New York-based American International Group Inc., individuals who received settlement payments, and several law firms and individual attorneys who represented thousands of plaintiffs in the case.

Monsanto, Pharmacia and Solutia were defendants in the consolidated Alabama case known as *Abernathy vs. Monsanto Co.* The government claims in its suit that approximately 907 Medicare beneficiaries were among those who received compensation for their medical expenses.

CMS has made conditional medical payments on behalf of those beneficiaries for illnesses and injuries tied to the PCB pollution case, the complaint states.

Travelers and AIG insured Solutia under a product liability policy and paid a portion of the \$300 million settlement, court documents show. Monsanto and Pharmacia also contributed a portion of the \$300 million.

The government's lawsuit seeks “payment of damages,” but does not specify an amount. It also seeks to force the defendants to pay Medicare before making any future payments to claimants in the underlying case.

The complaint alleges that AIG and Travelers did not determine whether any settling plaintiffs were Medicare beneficiaries and they did not pay Medicare on behalf of Medicare beneficiaries that received settlement money.

Similar allegations are made against Monsanto, Solutia and Pharmacia.

Reacting to the suit, a Solutia spokeswoman said the company denies the government's allegations. Solutia agreed to the settlement in the underlying case and fulfilled its obligation in that settlement, but was not involved in distributing the funds to individual plaintiffs, she said.

Monsanto believes that if Medicare is owed anything, it would be from plaintiffs attorneys and their clients who received money from a court-approved settlement trust account to which Monsanto contributed, a Monsanto spokesman said. Monsanto had no control over distribution of the funds and plaintiffs attorneys were empowered to distribute the funds, the spokesman said.

The suit also alleges that plaintiffs attorneys received \$129 million of the settlement funds and knew or should have known that the settlement claimants were Medicare-eligible. The law firms have not made any payments to the United States on behalf of those claimants, the suit states.

The government's action ultimately will raise liability insurance costs, said Douglas J. Holmes, president of UWC Strategic Services on Unemployment & Workers' Compensation, a Washington-based business group.

He said this is because underwriters now face greater uncertainty when insuring risks. The government's case is ambiguous about precisely how many plaintiffs in the Alabama case are Medicare-eligible, the medical services each used or will need, and the value of their care in the future.

Insurers will have to price for that uncertainty, Mr. Holmes said.

But another option may be to deduct Medicare's share from liability lawsuit settlements.

Insurers and self-insureds have limited options to avoid this exposure, Mr. Franco said in a newsletter he distributes to MARC supporters. One possibility is to work with Medicare to determine the amount it will demand and pay that out of the settlement fund, with the balance then paid to the Medicare beneficiary.

Because the government sued both sides in the Alabama settlement, the lawsuit serves as notice to the plaintiffs bar and the defense in future cases that they will have to cooperate to determine how they will comply with the Medicare Secondary Payer law, Mr. Williams added.