

Medicare's Recovery Rights and Statute of Limitations

By: James E. Logan, CSSC

For years, there have been ongoing questions concerning what recovery rights Medicare has where conditional payments are concerned and which statute of limitations applies. The answer can be found in the Medicare Secondary Payer statute (MSP) at 42 U.S.C. §1395y, Subsection (b)(2)(B)(ii). The MSP makes it clear that any payments Medicare makes as a secondary payer must be reimbursed by a primary payer at the time of settlement or at the time of notice or discovery of the reimbursement obligation. The MSP establishes that reimbursement of conditional payments made must take place within 60 days of receipt of notice from The Centers for Medicare & Medicaid Services (CMS). Interest will accrue after this period.

The next question relates to the time frame for CMS to file its claim. Subsection (b)(2)(B)(vi) provides the following:

(vi) Claims-filing period

... the United States may seek to recover conditional payments in accordance with this subparagraph where the request for payment is submitted to the entity required or responsible under this subsection to pay with respect to the item or service (or any portion thereof) under a primary plan within the 3-year period beginning on the date on which the item or service was furnished.

There are three key issues contained in this subsection that should be well understood. First, Medicare **DOES NOT** file a lien! Medicare has a statutory claim to recover conditional payments they have made. A statutory claim is much stronger than a lien because penalties can be assessed if the government is required to file a collection action. The Department of Justice may seek double damages if reimbursement is not made in a timely manner. The authority for enforcement can be found in 42 U.S.C. §1395y(b)(2)(C)(3)(A). It states:

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide primary payment (or appropriate reimbursement) in accordance with (1) and (2)(A).

Severe penalties can be avoided by reimbursing Medicare in a timely manner. Even if it takes longer than 60 days to resolve the amount owed, it is unlikely that anything more than interest will be assessed. However, if the United States has to initiate a collection action, they are allowed to seek double damages in addition to the actual amount owed. For this reason alone, it is important to work cooperatively with CMS, even when the primary payer disagrees about the amount owed.

The second point to recognize is that only the United States may take action to recover conditional payments under this Act. There are private insurers who sell Medicare Advantage plans and attempt to claim the same recovery rights as provided under the MSP. In reality, their right to recovery is no greater than the subrogation lien language they place in their health care policy. These insurers cannot seek the same penalties as can the United States. (*Humana Medical Plan, Inc. v. Cooke*, 2011 U.S. Dist. LEXIS 8909).

¹ Conditional Payments are payments made by Medicare for treatment and services which should have been paid by another primary payer.

The third and very important point to recognize is that the United States may only seek to recover conditional payments made during a 3-year period beginning on the date on which the item or service was furnished to the Medicare beneficiary. In many cases, liability, no-fault and workers' compensation claims can go on for years. In the liability arena, verdicts often take many years to find their way through the appeals process.

In late September 2010, the United States District Court for the Northern District of Alabama, Eastern Division, decided the case of *U.S. v. Stricker* (Case No. 1:09-cv-02423-KOB). The government sued the attorneys and insurance carriers involved in the settlement in an effort to collect substantial conditional payments. The United States asserted that the attorneys and insurers failed to take Medicare's interests into account at the time of a class action settlement and allowed the settlement funds to be improperly distributed. The Court ruled against the United States, finding that the government failed to file the action in a timely manner, regardless of which of two statutes of limitation periods was used.

Specifically, the Court ruled that under the "Federal Claims Collection Act" (FCCA) (28 U.S.C. 2415), the 3-year statute of limitations applied to corporate defendants. The Court further ruled that a 6-year statute of limitations applied to the attorneys involved in representing the plaintiffs in the case and that statute of limitations had also tolled. While the court's ultimate decision was correct, it was correct for the wrong reasons.

The court appears to have only looked at the FCCA and appears to have overlooked a critical provision that states...

*"Subject to the provisions of section 2416 of this title, and **except as otherwise provided by Congress**, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied shall be barred unless the complaint is filed within six years after the right of action accrues..."*
[Emphasis added]

The same language is found in §2415(b) except the action is "founded upon a tort" and the action is "barred unless the complaint is filed within three years after the right of action accrues..."

According to the MSP statute, 42 U.S.C. §1395y(b)(2)(B)(vi), **Congress provided** that the statute begins to toll when the service or treatment is provided [Emphasis added]. This section states in part...

"under the primary plan within the 3-year period beginning on the date on which the item or service was furnished."

The FCCA defers to time frames otherwise provided by congress. In the case of claims for conditional payment reimbursement, Congress made it clear in the MSP that the claim can only be asserted 3 years from the date the item or service was furnished. The time frames contained within the FCCA do not apply. When presented with conditional payment proofs by CMS, it is important to determine if any of the conditional payment claims are older than 3 years from the date the item or service was furnished.

JAMES E. LOGAN, CSSC, is the president and CEO of James E. Logan & Associates, Ltd., a national settlement consulting firm headquartered in Farmington Hills, Michigan. He specializes in the development of successful settlement strategies for complex personal injury disputes. His firm's services include compliance with the Medicare Secondary Payor statute, structured settlements and negotiation support. If you would like further information or discussion on this topic, contact Jim Logan at jlogan@jeloganltd.com or 248-865-3900.

This paper is not intended to provide legal advice and the reader should rely on their own counsel.