

Medicare Secondary Payer Update:

Mandatory Reporting and Other Significant Developments

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Overview of the MSP Program

Goal – Shift Primary Payment Responsibility from Medicare to Other Third Party Payers:

- Employer Group Health Plans
- Workers' Compensation
- Automobile, Liability, and No-Fault Insurance

Congress sought to use the MSP provisions to reduce the growth of Medicare by shifting primary payment responsibility to EGHPs "to place the burden where it could best be absorbed." See *Provident Life & Accident Ins. Co. v. United States*, 740 F. Supp. 492, 498 (E.D. Tenn. 1990).

Overview of the MSP Program

Three Interlocking Concepts:

- Make Medicare Secondary
- Prohibit Health Benefits “Discrimination” Against Medicare Beneficiaries
- Prohibit Incentives for Medicare Beneficiary to Reject Coverage that would be Primary to Medicare

Overview of the MSP Program

- Substance – Laws, Regulations, Sub-regulatory Documents, etc.
- Process – IEQ, Mandatory Reporting, Data Match, VDSA, COB Claims Processing, *etc.*
- Enforcement – CMPs, Tax Penalties, Collection Actions, etc.

Overview of the MSP Program

The MSP statute affects:

- Rules for coordination of benefits (“COB”) where Medicare is involved
- Rules for calculating Medicare’s secondary payment
- Claims filing
- Plan design
- Government enforcement authorities
- Government collection rights
- EGHP repayment obligations/limitation on EGHP defenses

Overview of the MSP Program

- Rules for COB where Medicare is involved
 - **Working aged**
 - **Disability**
 - **End-Stage Renal Disease (“ESRD”)**
- Rules for calculating Medicare secondary payments - 42 C.F.R. §411.33

Overview of the MSP Program

Claims Filing

- Affects liability and no-fault insurance and Workers' Compensation
- Dictates When Medicare:
 - **Can't be billed**
 - **May be billed**
 - **Must be billed**

Overview of the MSP Program

Plan Design

- Employer not required to offer health insurance
- Coverage and benefit requirements if health insurance is offered
- Discrimination/nondifferentiation/taking into account issues
- Bar on incentives to reject plan coverage
- Beware of special rules for small employers in multiemployer plans

Overview of the MSP Program

Statutory Repayment Obligation:

- Applies to a “primary plan, and an entity that receives payment from a primary plan” - 42 U.S.C. §1395y(b)(2)(B)(ii)
- Reimbursement is due within 60 days or interest accrues
- If Medicare is not properly reimbursed, and the primary payer paid another entity when it knew or should have known that Medicare had made a conditional primary payment, Medicare can seek payment from primary payer “even though it had already reimbursed the beneficiary or other party.” 42 C.F.R. §411.24(i).

Overview of the MSP Program

Medicare Set-Aside Trusts (“MSAs”)

- Where a settlement agreement allocates payments for future medical services, “Medicare does not pay for those services until medical expenses related to the injury or disease equal the amount” of the settlement so allocated. 42 C.F.R. §411.46(d)(2).
- In place for many years for workers’ compensation.
- Guidance concerning WC-MSAs can be found at:
http://www.cms.gov/WorkersCompAgencyServices/04_wcsetaside.asp#TopOfPage

Overview of the MSP Program

Liability MSAs

- CMS has stated that the statutory authority that authorizes CMS to require WC plans to “adequately consider” Medicare’s interest in payments for future injury-related medical claims, 42 U.S.C. §1395y(b)(2)(A), also provides authority for the agency to require the same of liability plans.
- Nevertheless, CMS has issued virtually no guidance specifically on liability MSAs.

Overview of the MSP Program

Liability MSAs

- During the October 22, 2009 Town Hall Teleconference on the Mandatory Reporting requirements for Non-Group Health Plans (“NGHPs”), CMS stated that the obligation for those involved with liability settlements to consider Medicare “has existed essentially since 1980.” See Transcript at 65
- “And if an entity has not been taking this into consideration and taking steps whether it’s to do a set aside or some how else take care of it. It’s something they now need to be documenting and taking care of.”
Id.

Overview of the MSP Program

Liability MSAs

- CMS has stated that liability MSAs can be reviewed by CMS Regional Offices (“ROs”), within the sole discretion of the RO.
- CMS has not issued criteria for the ROs to use to evaluate liability MSAs.
- CMS may use the WC-MSA criteria.
- What are current “best practices” regarding the use of liability-MSAs?

Overview of the MSP Program

Government Collection Rights

- Direct and Subrogated Causes of Action
- Federal Claims Collection Act
- Debt Collection Improvement Act of 1996
- Treasury Offset Program
- Administrative Offset

Overview of the MSP Program

- Effect of improper referrals of MSP recovery claims from the MSP Recovery Contractor (“MSPRC”) to the Department of Treasury (“DOT”) for offset and other MSPRC/DOT issues.

Overview of the MSP Program

Government Collection Rights

- If government must “take legal action to recover from primary payer, CMS may recover twice” the amount otherwise due.” 42 U.S.C. §1395y(b)(2)(B)(iii); 42 C.F.R. §411.24(c)(2).
- Joint and several liability – “United States may bring an action against any and all entities that are or were required or responsible” to make payment. 42 U.S.C. §1395y(b)(2)(B)(iii)
- FY 2010 HHS-OIG Work Plan – MSP – “evaluate procedures for identifying and resolving credit balance situations.” Work Plan at 6.

Class Action

Haro, et al. v. Sebelius, CV 09-134 TUC DCB (D. AZ 11/30/2009)

- Nationwide class action - motion to dismiss denied
- Allegation is that CMS's demand for recovery from beneficiary within 60 days of a liability settlement violates due process because not enough time to resolve appeal or waiver request.
- Could change how liability cases are handled

Recovery Mechanisms – Litigation by United States

United States v. Stricker et al., CA No. 09-PT-2423-E (N.D. AL
filed December 1, 2009)

- United States seeks to recover under the MSP provisions payments made by Medicare to approximately 907 beneficiaries who were allegedly injured by PCB exposure.
- \$300M settlement in 2003 but no payments to Medicare
- The amount Medicare paid for beneficiaries is not stated.
- Seeks reimbursement for past conditional Medicare payments and notice of future liability payments
- Double damages, plus interest

Recovery Mechanisms – Litigation by United States

United States v. Stricker et al., CA No. 09-PT-2423-E (N.D. AL filed December 1, 2009)

- Defendants in *Stricker* are (a) the defendants in the underlying tort suits, (b) their liability insurers, and (c) the attorneys and law firms that represented the plaintiffs in the underlying tort suits
- May be first case of this type seeking recovery from liability insurers
- Motions to dismiss pending

Overview of the MSP Program

Private Cause of Action

- If successful, private plaintiff can recover “double damages”
- Must first establish primary plan’s responsibility to pay *National Committee to Preserve Social Security and Medicare v. Philip Morris, NSA Inc.*, 2009 W L 590573 (E.D.N.Y. March 5, 2009).
- Recent private actions dismissed for lack of standing because private individuals do not have economic interest. *But see National Renal Alliance LLC v. Blue Cross Blue Shield of Georgia Inc.*, 2009 WL 426001. *9 (N.D. Ga. 2009).
- MSP statute is not a private False Claims Act

Overview of the MSP Program

Government Enforcement Authorities

- Excise Tax on Finding that EGHP is “non-conforming”
- Civil Monetary Penalties
- Imposition of Interest

Overview of the MSP Program

Government Enforcement Authorities

- False Claims Act - civil statute providing for damages and penalties for knowingly submitting false claims and knowingly and improperly avoiding an established duty to pay the government
- Standard and “Reverse” FCA violations

Overview of the MSP Program

“Reverse False Claim”

- 31 U.S.C. §3729(a)(1)(G), enacted on May 20, 2009, establishes liability for a person who: “**knowingly and improperly** avoids or decreases an **obligation** to pay or transmit money or property to the Government.” (emphases added).
- “Obligation” 31 U.S.C. §3729(b)(3), “an **established duty**, whether or not fixed, **arising from** an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any **overpayment...**” (emphases added).

Overview of the MSP Program

Government Enforcement Authorities

- FCA provides for treble damages and penalties of \$5,500 to \$11,000 (subject to adjustment) for each violation
- The FCA's *qui tam* provisions empower private persons (“whistle-blowers”) to sue, on behalf of the government, persons or entities, for possible FCA violations and to share in any proceeds recovered as a result of the suit.

Potential Liability -- Damages

United States ex rel. Brenda Sharp v. Eastern Oklahoma Orthopedics Center, No. 05-CV-572-rck-TLW (WL 499375) (N.D. Okla., Feb. 27, 2009)

- Case allowed to proceed based on allegations that provider (a) billed Medicare when it was aware of other primary payers and (b) improperly retained Medicare overpayments after Medicare and primary payer both paid claims for the same service.
- *Qui tam* action - U.S did not intervene

False Claims Act Litigation

U.S. ex rel. Mason v. State Farm Mutual Automobile Insurance Company, 2009 WL 2486339 (D. Idaho August 16, 2009)

- Plaintiff alleged that State Farm caused a hospital to submit a false claim to Medicare by not paying, as it was supposedly required to do under the MSP statute, and then not properly reimbursing Medicare for the payment it made to the hospital (a “reverse false claim”).
- Complaint dismissed for failure to state a claim because it did not show that defendant had acted improperly.
- *Qui tam* action – U.S. did not intervene

Overview of the MSP Program

Mandatory Reporting

- Mandatory Insurance Reporting requirements for EGHPs were enacted by Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (“MMSEA”).
- Section 111 also includes mandatory reporting requirements for liability insurance (including self-insurance), no-fault insurance, and workers’ compensation.

Overview of the MSP Program

Mandatory Reporting

- CMP for non-compliance is severe – “\$1,000 for each day of noncompliance for each individual for which the information” should have been submitted.”
- Requirements under this law are addressed at <http://www.cms.hhs.gov/MandatoryInsRep>

Proposed Legislation

H.R 4796 – Medicare Secondary Payer Enhancement Act of 2010

- Endorsed by the Medicare Advocacy Recovery Coalition (MARC) - <http://www.marccoalition.com>
- This bill would, *inter alia*, reduce civil monetary penalties for failure to report under the MMSEA by, for example, making it discretionary instead of mandatory
- Would create a \$5,000 settlement threshold for MSP recoveries and impose user fees

COB Issues Relating to the Implementation of Medicare Part D

- The Part D Benefit
- “TrOOP” and How it is Determined
- The Three Contractors Involved in Calculating TrOOP
 - **PDPs**
 - **TrOOP Facilitation Contractor**
 - **COB Contractor**

COB Issues Relating to the Implementation of Medicare Part D

FY 2010 HHS-OIG Work Plan

- Medicare Part D Selected Controls for Systems Tracking True Out-of-Pocket Costs - “We will review selected Medicare Part D general and application controls at the CMS contractor, known as the TrOOP facilitator, responsible for collecting information on TrOOP from payers secondary to Medicare Part D.” Work Plan at 63.

Important Questions on Medicare Parts C/D and MSP

- Will Medicare Advantage (“MA”) and Part D Plans be able to access the information provided to CMS under the Mandatory Reporting Statute, including information from NGHPs?

Important Questions on Medicare Part C and MSP

- 42 U.S.C. §1395w-22(a)(4) states that MA plans may "charge or authorize the provider to charge" the primary plan.
- Courts have interpreted this to mean that if MA plans want to enforce their right to "charge" the primary plan, they must put "subrogation" language in the "insurance policy" issued to the MA beneficiary. *Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir., May 30, 2003).
- What are the "best practices" in this area?

Medicare Parts C/D and OPL

Questions & Answers

111TH CONGRESS
2^D SESSION

H. R. 4796

To amend title XVIII of the Social Security Act with respect to the application of Medicare secondary payer rules for certain claims.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2010

Mr. PATRICK J. MURPHY of Pennsylvania (for himself and Mr. TIM MURPHY of Pennsylvania) introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title XVIII of the Social Security Act with respect to the application of Medicare secondary payer rules for certain claims.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Medicare Secondary
5 Payer Enhancement Act of 2010”.

1 **SEC. 2. CALCULATION AND DIRECT PAYMENT OF MSP**
2 **CLAIMS.**

3 (a) **CALCULATION AND DIRECT REIMBURSEMENT OF**
4 **CONDITIONAL PAYMENT FOR SETTLEMENT PURPOSES.—**

5 (1) Section 1862(b)(2)(B) of the Social Secu-
6 rity Act (42 U.S.C. 1395y(b)(2)(B)) is amended by
7 adding at the end the following new clause:

8 “(vii)(I) **VOLUNTARY CALCULATION**
9 **AND PAYMENT OF CONDITIONAL PAY-**
10 **MENT.—**In the case of a settlement, judg-
11 ment, award, or other payment between a
12 claimant and an applicable plan (as de-
13 fined in paragraph (8)(F)) involving a pay-
14 ment made by the Secretary pursuant to
15 clause (i) for items and services provided
16 to the claimant, for purposes of deter-
17 mining the amount of reimbursement re-
18 quired under clause (ii) to the appropriate
19 Trust Fund during the 90-day period pre-
20 ceding the reasonably expected date of
21 such settlement, judgment, award, or other
22 payment, the claimant and plan may—

23 “(aa) in good faith calculate the
24 amount of such reimbursement re-
25 quired based upon available billing

1 data for such items and services pro-
2 vided; and

3 “(bb) reimburse such amount to
4 the appropriate Trust Fund, in ac-
5 cordance with regulations promul-
6 gated by the Secretary.

7 With respect to a payment made
8 under clause (i) for items and services
9 provided to a claimant and subject to
10 subclause (II), any reimbursement
11 made in accordance with this sub-
12 clause shall satisfy any obligation of
13 the claimant and the applicable plan
14 under this subsection.

15 “(II) SECRETARY’S ABILITY TO CON-
16 TEST AMOUNT OF PAYMENT.—In the case
17 of a reimbursement made to the appro-
18 priate Trust Fund under subclause (I),
19 during the 75-day period beginning on the
20 date of such reimbursement, if the Sec-
21 retary determines such reimbursement
22 made is not the total amount owed under
23 this subparagraph the Secretary shall have
24 the right to contest the amount of such re-
25 imbursement made and to serve upon the

1 claimant and applicable plan a final de-
2 mand for the balance of the remaining
3 amount so owed. The claimant or applica-
4 ble plan may make a reimbursement to the
5 appropriate Trust Fund in the amount of
6 such balance determined by the Secretary
7 or may pursue appeal of the amount of the
8 reimbursement determined by the Sec-
9 retary pursuant to the appeals process
10 under clause (ix). In any such appeal, the
11 burden of proof shall be on the claimant or
12 applicable plan to demonstrate that the re-
13 imbursement made to the appropriate
14 Trust fund under subclause (I) was cor-
15 rect.

16 “(viii)(I) REQUEST FOR FINAL DE-
17 MAND FOR REIMBURSEMENT.—In the case
18 of a settlement, judgment, award, or other
19 payment between a claimant and an appli-
20 cable plan (as defined in paragraph
21 (8)(F)) involving a payment made by the
22 Secretary pursuant to clause (i) for items
23 and services provided to the claimant, the
24 claimant or applicable plan may at any
25 time beginning 120 days prior to the rea-

1 sonably expected date of such settlement,
2 judgment, award, or other payment, sub-
3 mit to the Secretary, in accordance with
4 regulations to be promulgated by the Sec-
5 retary, a request for a recovery demand
6 letter for reimbursement required under
7 clause (ii) of such payment. The Secretary
8 shall have 60 days to respond to such re-
9 quest with such final demand. Not later
10 than 60 days after the date of receipt of
11 such final demand, the claimant or applica-
12 ble plan may reimburse the appropriate
13 Trust Fund for such payment in the
14 amount identified in such final demand, in
15 accordance with regulations promulgated
16 by the Secretary. With respect to a pay-
17 ment made under clause (i) for items and
18 services provided to a claimant, any such
19 reimbursement made in accordance with
20 this subclause shall satisfy any obligations
21 of the claimant and the applicable plan
22 under this subsection.

23 “(II) FAILURE OF THE SECRETARY
24 TO PROVIDE FINAL DEMAND FOR CONDI-
25 TIONAL PAYMENT.—In the case that the

1 Secretary fails to provide a final demand
2 for any item or service subject to reim-
3 bursement required under clause (ii) in ac-
4 cordance with subclause (I), the claimant,
5 applicable plan, or an entity that receives
6 payment from an applicable plan shall not
7 be liable for and shall not be obligated to
8 make payment subject to this subsection
9 for any item or service related to the re-
10 quest for final demand for reimbursement.

11 “(ix) RIGHT OF APPEAL.—The Secretary
12 shall promulgate regulations establishing a
13 right of appeal and appeals process, with re-
14 spect to any requirement under clause (ii) for
15 a payment made under this title for an item or
16 service under a primary plan, under which the
17 applicable plan involved, or an attorney, agent,
18 or third party administrator on behalf of such
19 applicable plan may appeal such requirement.
20 Such right of review shall—

21 “(I) include review through an admin-
22 istrative law judge and administrative re-
23 view board, and access to judicial review in
24 the district court of the United States for
25 the judicial district in which the appellant

1 is located (or, in the case of an action
2 brought jointly by more than one appli-
3 cant, the judicial district in which the
4 greatest number of applicants are located)
5 or in the District Court for the District of
6 Columbia; and

7 “(II) be carried out in a manner simi-
8 lar to the appeals procedure used for pur-
9 poses of subsection (a).”.

10 (2) CONFORMING AMENDMENT.—Clause (ii) of
11 such section is amended by inserting after “60-day”
12 the following “(or in the case of an applicable plan
13 and reimbursement described in clause (vii) or (viii),
14 90-day)”.

15 **SEC. 3. THRESHOLD.**

16 (a) IN GENERAL.—Section 1862(b)(2)(B)(ii) of the
17 Social Security Act (42 U.S.C. 1395y(b)(2)(B)(ii)) is
18 amended—

19 (1) by striking “(ii) REPAYMENT REQUIRED.—
20 A primary plan” and inserting the following:

21 “(ii) REPAYMENT REQUIRED.—

22 “(I) IN GENERAL.—A primary
23 plan”; and

24 (2) by adding at the end the following new sub-
25 clause:

1 “(II) EXCEPTION.—Subclause (I)
2 shall not apply with respect to the fol-
3 lowing payments under this title:

4 “(aa) Any settlement, judg-
5 ment, award, or other payment
6 by an applicable plan constituting
7 a total payment obligation to a
8 claimant of not more than
9 \$5,000.

10 “(bb) Any settlement, judg-
11 ment, award, or other payment
12 by an applicable plan involving
13 the ongoing responsibility for
14 medical payments not otherwise
15 addressed in subclause (I), of not
16 more than \$5,000. For purposes
17 of this subclause and with re-
18 spect to a settlement, judgment,
19 award, or other payment pay-
20 ments not otherwise addressed in
21 subclause (I) involving the ongo-
22 ing responsibility for medical
23 payments, such payment shall in-
24 clude only the cumulative value
25 of the medical payments made

1 and the purchase price of any an-
2 nuity or similar instrument.

3 The amounts under this subclause
4 shall be adjusted each year based on
5 the percentage increase in the Con-
6 sumer Price Index (rounded to the
7 nearest multiple of \$100) for the year
8 involved.”.

9 (b) EFFECTIVE DATE.—The amendments made by
10 subsection (a) shall apply with respect to payments made
11 on or after 3 months after the date of the enactment of
12 this Act.

13 **SEC. 4. REPORTING REQUIREMENT SAFE HARBORS.**

14 Section 1862(b)(8) of the Social Security Act (42
15 U.S.C. 1395y(b)(8)) is amended—

16 (1) in the first sentence of subparagraph (E)(i),
17 by striking “shall be subject” and all that follows
18 through the end of the sentence and inserting the
19 following: “may be subject to a civil money penalty
20 of up to \$1,000 for each day of noncompliance. The
21 severity of each such penalty shall be based on the
22 intentional nature of the violation.”; and

23 (2) by adding at the end the following new sub-
24 paragraph:

1 “(I) SAFE HARBORS.—Not later than 60
2 days after the date of the enactment of this
3 subparagraph, the Secretary shall publish a no-
4 tice in the Federal Register soliciting proposals,
5 which will be accepted during a 60-day period,
6 for the creation of safe harbors from sanctions
7 imposed under subparagraph (E) under which
8 entities responsible for reporting information
9 under this paragraph will be deemed to have
10 complied with the reporting requirements under
11 this paragraph and will not be subject to such
12 sanctions. After considering the proposals sub-
13 mitted pursuant to the preceding sentence, the
14 Secretary, in consultation with the Attorney
15 General, shall publish in the Federal Register,
16 including a 60-day period for comment, pro-
17 posed safe harbors. After considering any public
18 comments received during such period, the Sec-
19 retary shall issue final rules establishing safe
20 harbors from penalties or other sanctions under
21 subparagraph (E).”.

22 **SEC. 5. USE OF SOCIAL SECURITY NUMBERS AND OTHER**
23 **IDENTIFYING INFORMATION IN REPORTING.**

24 Section 1862(b)(8)(B) of the Social Security Act (42
25 U.S.C. 1395y(b)(8)(B)) is amended by adding at the end

1 (after and below clause (ii)) the following sentence: “Not
2 later than one year after the date of enactment of the
3 Medicare Secondary Payer Enhancement Act of 2010, the
4 Secretary shall modify the reporting requirements under
5 this paragraph so that entities responsible for reporting
6 information under this paragraph are not required to ac-
7 cess or report to the Secretary beneficiary social security
8 numbers or health identification claim numbers.”.

9 **SEC. 6. STATUTE OF LIMITATIONS.**

10 (a) **IN GENERAL.**—Section 1862(b)(2)(B)(iii) of the
11 Social Security Act (42 U.S.C. 1395y(b)(2)(B)(iii)) is
12 amended by adding at the end the following sentence:
13 “Every action brought by the United States or an officer
14 or agency thereof under this clause shall be barred unless
15 the complaint is filed not later than three years after the
16 date of the receipt of notice of a settlement or other pay-
17 ment giving rise to recovery of a payment made pursuant
18 to paragraph (8).”.

19 (b) **EFFECTIVE DATE.**—The amendment made by
20 subsection (a) shall apply with respect to actions brought
21 on or after 6 months after the date of the enactment of
22 this Act.

1 **SEC. 7. USER FEE.**

2 Section 1862(b) of the Social Security Act (42 U.S.C.
3 1395y(b)) is amended by adding the following new para-
4 graph:

5 “(9) USER FEES.—

6 “(A) IN GENERAL.—Beginning 90 days
7 after the date of the enactment of the Medicare
8 Secondary Payer Enhancement Act of 2010,
9 and annually thereafter for the 10-year period
10 beginning on such date of enactment, the Sec-
11 retary shall assess and collect fees in accord-
12 ance with this paragraph as follows:

13 “(i) DIRECT CONDITIONAL PAYMENT
14 REIMBURSEMENT FEE.—Each person or
15 entity that submits a payment to fulfill the
16 reimbursement requirement pursuant to
17 paragraph (2)(B)(vii) shall be subject to a
18 fee of \$30 for each payment reimbursed to
19 the Secretary.

20 “(ii) REQUEST FOR FINAL DEMAND
21 OF CONDITIONAL PAYMENT FEE.—Each
22 person that submits a request for a recover
23 demand letter of conditional payment
24 under paragraph (2)(B)(viii) shall be sub-
25 ject to a fee of \$30 for each such request
26 submitted to the Secretary. In the case of

1 a person or entity that pays a fee under
2 this clause, such person or entity shall not
3 also be subject to the fee under clause (i).

4 “(B) INFLATION ADJUSTMENT.—For fiscal
5 year 2010 and subsequent fiscal years, the
6 amount of the fees specified in subparagraph
7 (A) shall be adjusted by the Secretary by no-
8 tice, published in the Federal Register, to re-
9 flect any percent changes in the Consumer
10 Price Index for all urban consumers (all items;
11 U.S. city average) for the 12 month period end-
12 ing June 30 of the preceding fiscal year.

13 “(C) COLLECTION OF UNPAID FEES.—In
14 any case where the Secretary does not receive
15 payment of a fee assessed under subparagraph
16 (A) by the date that is 30 days after the date
17 such fee is due, such fee shall be treated as a
18 claim of the United States Government subject
19 to subchapter II of chapter 37 of title 31,
20 United States Code.”.

○

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

FILED

2009 DEC -1 P 4: 03

THE UNITED STATES)
OF AMERICA,)
Plaintiff,)

U.S. DISTRICT COURT
N.D. OF ALABAMA

v.)

Civil Action No.

James J. Stricker;)
Daniel R. Benson;)
Kasowitz, Benson, Torres)
& Friedman, LLP; Donald)
W. Stewart d/b/a as)
Donald W. Stewart, PC;)
Don Barrett; The Barrett)
Law Firm, PA; Charles E.)
Fell, Jr.; Charles L.)
Cunningham, Jr.;)
Cunningham & Fell, PLLC;)
Johnston Druhan, LLP;)
Greg Cusimano; Cusimano,)
Keener, Roberts & Raley,)
PC; The Cody)
Law Firm, PC; Monsanto)
Company; Solutia, Inc.;)
Pharmacia Corporation;)
Travelers Companies,)
Inc., d/b/a The)
Travelers Indemnity)
Company; American)
International Group,)
Inc.,)

CV-09-PT-2423-E

Defendants,)

COMPLAINT

The United States of America files this civil

action to recover costs of medical care provided or paid for by the United States, based upon rights conferred under the Medicare Secondary Payer ("MSP") Statute, 42 U.S.C. § 1395y(b)(2), and regulations promulgated thereunder, 42 C.F.R. §411.20 et seq., pursuant to which the United States may recover reimbursement for conditional Medicare payments from entities that are required or responsible to make payment with respect to covered items or services under a liability insurance policy or plan (including a self-insured plan) and entities and persons receiving such payments. In support of its complaint, the United States makes the following allegations:

PARTIES

The United States files this action pursuant to the MSP Statute, on behalf of the Secretary of Health and Human Services ("HHS"). The Secretary of HHS is the federal official vested with primary responsibility for oversight of the Medicare program, which pays for health benefits to specified elderly and disabled individuals pursuant to 42 U.S.C. § 1395 et seq. The

Secretary has delegated responsibility for administration of the Medicare program to the Centers for Medicare & Medicaid Services ("CMS"). 42 U.S.C. §§ 1935hh and ii.

1. Upon information and belief, Monsanto Company ("Monsanto") is a Delaware corporation with its principal place of business in St. Louis, Missouri.

2. Upon information and belief, Pharmacia Corporation ("Pharmacia") is a Delaware corporation with its principal place of business in New York, New York.

3. Upon information and belief, Solutia, Inc. ("Solutia"), is a Delaware corporation with its principal place of business in St. Louis, Missouri.

4. Upon information and belief, Travelers Companies, Inc., d/b/a The Travelers Indemnity Company ("Travelers"), is a Connecticut corporation with its principal place of business in Hartford, Connecticut.

5. Upon information and belief, American International Group, Inc. ("AIG"), is a Delaware

corporation with its principal place of business in New York.

6. Upon information and belief, the individuals who received settlement payments in the matters styled Abernathy v. Monsanto Company, CV-01-832, Circuit Court of Etowah County, Alabama (which is a consolidated action composed of matters styled Abernathy v. Monsanto Company, CV-96-269, Abbott v. Monsanto Company, CV-97-967, Nelson v. Monsanto Company, CV-99-502, Long v. Monsanto Company, CV-96-268, Margie Suggs v. Monsanto Company, CV-01-0874, Circuit Court of Calhoun County, Alabama), and Brown v. Monsanto Company, CIV 97-ETC-1618-E, (N.D. Ala.) ("Abernathy Plaintiffs") were and/or continue to be represented by several attorneys and law firms as detailed in §§ 7 through 17 below (collectively "Abernathy Counsel").

7. Upon information and belief, Daniel R. Benson and James J. Stricker each represented and/or continues to represent the Abernathy Plaintiffs, and are partners at Kasowitz, Benson, Torres & Friedman, LLP, 1633 Broadway, New York, New York 10019.

8. Upon information and belief, the law firm of Kasowitz, Benson, Torres & Friedman, LLP, represented and/or continues to represent the Abernathy Plaintiffs. It is a domestic registered limited liability partnership registered in New York with its principal place of business at 1633 Broadway, New York, New York 10019.

9. Upon information and belief, Donald W. Stewart, d/b/a as Donald W. Stewart, PC, represented and/or continues to represent the Abernathy Plaintiffs. Upon information and belief, Donald W. Stewart's principal place of business is at 1000 Quintard Avenue, Anniston, Alabama 36202.

10. Upon information and belief, Don Barrett, represented and/or continues to represent some or all of the Abernathy Plaintiffs and is a partner at The Barrett Law Firm, 404 Court Square North, Lexington, Mississippi 39095.

11. Upon information and belief, the Barrett Law Firm, PA, represented some or all of the Abernathy Plaintiffs. The Barrett Law Firm is a professional

association incorporated in Mississippi, with its principal place of business at 404 Court Square North, Lexington, Mississippi 39095.

12. Upon information and belief, Charles E. Fell, Jr., and Charles L. Cunningham, Jr., each represented some or all of the Abernathy Plaintiffs and were partners at Cunningham & Fell, PLLC, 701 West Jefferson Street, Louisville, Kentucky 40202.

13. Upon information and belief, the law firm of Cunningham & Fell, PLLC, which is registered in Kentucky, with its principal place of business at 701 West Jefferson Street, Louisville, Kentucky 40202, represented some or all of the Abernathy Plaintiffs.

14. Upon information and belief, Johnston Druhan, LLP is a limited liability partnership registered in Mobile County, Alabama with its principal place of business at 5 Dauphine Street, Suite 201, Mobile, Alabama 36602. Johnston Druhan represented some or all of the Abernathy Plaintiffs.

15. Upon information and belief, Greg Cusimano represented some or all of the Abernathy Plaintiffs. Mr. Cusimano is a lawyer with Cusimano, Keener, Roberts & Raley, PC, at 153 South Ninth Street, Gadsden, Alabama 35901.

16. Upon information and belief, Cusimano, Keener, Roberts & Raley, PC, represented some or all of the Abernathy Plaintiffs. Cusimano, Keener, Roberts & Raley is a professional corporation incorporated in Etowah County, Alabama, with its principal place of business at 153 South Ninth Street, Gadsden, Alabama 35901.

17. Upon information and belief, The Cody Law Firm, P.C., represented some or all of the Abernathy Plaintiffs. The Cody Law Firm, PC, is a professional corporation incorporated in Jefferson County, Alabama, with its principal place of business at Lorna Oaks Professional Center, 3141 Lorna Road, Suite 202, Birmingham, Alabama.

JURISDICTION AND VENUE

18. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1345, 28 U.S.C. § 2201, and the MSP Statute, 42 U.S.C. § 1395y(b)(2).

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2).

BACKGROUND

20. This controversy arises from a \$300 million settlement ("Abernathy Settlement") by and among Abernathy Plaintiffs and defendants Monsanto, Pharmacia, and Solutia in the Abernathy action. Exh. 1.

21. Upon information and belief, persons receiving payment under the Abernathy Settlement include approximately 907 Medicare beneficiaries.

22. Distribution of the settlement monies was contingent on certification to the court that 97% of the Abernathy Plaintiffs had signed releases. Abernathy Counsel filed that certification with the court on December 2, 2003. Exh. 2.

23. Upon information and belief, the 907 Medicare beneficiaries sought compensation for, inter alia, medical expenses in their underlying complaints and released those claims in executed releases, as referenced in Exh. 2 hereto.

24. Upon information and belief, the Abernathy Settlement mandated that the settlement fund established thereunder ("Abernathy Settlement Fund") be an interest-bearing account. Exh. 1 at 8.

25. Upon information and belief, prior to and/or at the time of the Abernathy Settlement, Solutia, a party to the Abernathy Settlement, maintained product liability insurance policies with Travelers and AIG.

26. Upon information and belief, Travelers and AIG paid portions of the \$300 million Abernathy Settlement.

27. Monsanto, Solutia, and Pharmacia paid portions of the \$300 million Abernathy Settlement.

28. Solutia filed for Chapter 11 bankruptcy on December 17, 2003. HHS filed a proof of claim to recover Medicare conditional payments paid on behalf of Medicare beneficiaries who received payments in the

Abernathy Settlement. HHS's claim survived the bankruptcy and was not discharged.

29. The Abernathy Settlement provided for the distribution of \$171 million to the Abernathy Plaintiffs, with supplemental annual amounts of \$1.5 million to be paid from 2004 through 2013 by Monsanto to Abernathy Counsel to be allocated within their sole discretion, for the plaintiffs' benefit.

30. The Abernathy Settlement provided payment to Abernathy Counsel of \$129 million in attorney's fees and costs, including \$1 million annually from 2004 through 2013.

Medicare's Conditional Payments and Causes of Action

31. The United States, through CMS, as the administrator of the Medicare program, made conditional payments, on behalf of its Medicare beneficiaries, for illnesses and injuries released in the Abernathy Settlement.

32. A series of statutes known collectively as the MSP Statute, 42 U.S.C. §1395y(b)(2), requires available private insurance, including self insurance, to make

the primary payment for services provided to Medicare beneficiaries, leaving Medicare to pay only secondary benefits. The law provides, in pertinent part, that Medicare may not make payments with respect to any item or service for which payment has been made or can reasonably be expected to be made under a liability policy or plan. 42 U.S.C. § 1395y(b)(2)(A)(ii); 42 C.F.R. § 411.20(a)(ii).

33. The MSP Statute authorizes the Medicare program to pay conditionally for a beneficiary's medical care in instances where payment under a liability insurance policy or plan does not transpire "promptly," as that term is defined in regulations. 42 U.S.C. §1395y(b)(2)(B)(i); 42 C.F.R. §§ 411.21 and 411.52. However, such payments are subject to reimbursement to the appropriate Medicare Trust Fund once it is demonstrated that a primary plan has or had responsibility to pay with respect to such items or services. 42 U.S.C. §1395y(b)(2)(B)(ii); 42 C.F.R. § 411.24. Responsibility for such payments may be demonstrated by a judgment, a payment conditioned upon

the beneficiary's compromise, waiver, or release (irrespective of the existence of a determination or admission of liability) or payment for items and services included in a claim against a primary plan or the primary plan's insured. 42 U.S.C.

§1395y(b)(2)(B)(ii). The United States may initiate recovery of Medicare conditional payments when it learns that payment "has been or could be made" under a liability insurance policy or plan. 42 C.F.R. § 411.24(b).

34. The United States may bring an action to recover conditional Medicare payments with respect to an item or service, against "any or 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." 42 U.S.C. § 1395y(b)(2)(B)(iii). The MSP Statute also confers upon the United States 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. . . ." Id.

35. The MSP Statute defines the term "primary plan" to include a plan of self-insurance, specifying that "[a]n entity that is engaged in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise), in whole or in part." 42 U.S.C. § 1395y(b)(2)(B)(ii); see also 42 C.F.R. § 411.50(b). Applicable regulations define the term "plan" to refer to any arrangement, oral or written, to provide health benefits or assume legal liability for injury or illness. 42 C.F.R. § 411.21. "Liability insurance" is "insurance (including a self-insured plan) that provides for payment based upon legal liability for injury or illness or damage to property," including product liability insurance. 42 C.F.R. § 411.50(b). Under the regulations, a "liability insurance payment" includes an out-of-pocket payment (such as payment of a deductible under a liability insurance policy) by any individual or entity that carries liability insurance or is covered by a self-insured plan. Id.

36. If a third-party payer learns that Medicare has paid for services for which the third-party has made or should have made primary payment, it must notify the United States. 42 C.F.R. § 411.25(a). An entity that receives payment under a primary plan (including a beneficiary, physician, supplier, or attorney) must reimburse the United States within sixty (60) days after receiving conditional Medicare payments made on a beneficiary's behalf. 42 C.F.R. § 411.24(h); see also 42 U.S.C. § 1395y(b)(2)(B); 42 C.F.R. § 411.24(g) & (h). If the United States does not receive such reimbursement, the third-party payer is required to reimburse the United States even if it has already paid a beneficiary or other party. 42 C.F.R. § 411.24(i)(1). This same rule applies in instances where a third-party payer makes its payment to an entity other than the United States when it knows or should be aware that conditional Medicare payments have been made. 42 C.F.R. § 411.24(i)(2).

37. The United States may collect double damages from any entity responsible to make payment under a primary plan which fails to provide for primary payment or appropriate reimbursement of conditional Medicare payments. 42 U.S.C. §§ 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.24(c)(2).

Abernathy Counsel's Failure to Comply with the MSP

Statute

38. Upon information and belief, Abernathy Counsel have received and continue to receive payments from the Abernathy Settlement. These payments constitute payments under a primary plan that entitle the United States to recover conditional Medicare payments on behalf of beneficiaries participating in the Abernathy Settlement.

39. No later than the date that Abernathy Counsel caused payments to be made to settling claimants, Abernathy Counsel knew or should have known that one or more settlement claimants were Medicare-eligible individuals on whose behalf the United States was

entitled to recover to the extent of any conditional Medicare payments made.

40. Abernathy Counsel have made no payment to the United States on behalf of any claimant who received or will receive settlement payments and whose medical care was paid for by the Medicare program. Contrary to the MSP Statute, the United States has yet to be reimbursed for Medicare conditional payments made on behalf of these beneficiaries.

Defendants Travelers' and AIG's

Failure to Comply with the MSP Statute

41. Defendants Travelers and AIG each were required to and did make payments under a "primary plan," as that term is defined in the MSP Statute and regulations. Upon information and belief, defendant Solutia purchased various product liability insurance policies from Travelers and AIG to mitigate the financial risks arising from claims of injury or illness relating to Solutia's operations, including manufacturing PCBs, that was the subject of the claims

for which Medicare beneficiaries received compensation in the Abernathy Settlement.

42. The terms of the Abernathy Settlement rendered these defendants required or responsible to pay under a primary plan, and those payments into the Abernathy Settlement Fund constituted payments under a "primary plan" that entitled the United States to reimbursement for Medicare conditional payments made on behalf of Medicare beneficiaries participating in the Abernathy Settlement.

43. Upon information and belief, Defendants Travelers and AIG did not ascertain whether any settling plaintiffs were Medicare beneficiaries prior to making, or causing to be made, payment of those settlement amounts. Defendants Travelers and AIG also did not identify any amount(s) owed the United States as reimbursement for Medicare conditional payments made on behalf of Medicare beneficiaries prior to their payments to the Abernathy Settlement Fund.

44. At the time they paid into the Abernathy Settlement Fund, Travelers and AIG knew or should have known that one or more Abernathy Plaintiffs were Medicare beneficiaries on whose behalf the United States was entitled to recover to the extent of any Medicare conditional payments made.

45. Defendants Travelers and AIG have made no payment to the United States on behalf of any Medicare beneficiaries who received (or will receive) payments pursuant to the terms of the Abernathy Settlement. Contrary to the MSP Statute, Travelers and AIG have yet to reimburse the United States for its Medicare conditional payments made on behalf of its Medicare beneficiaries.

**Corporate Defendants Monsanto's, Solutia's, and
Pharmacia's
Failure to Comply with the MSP Statute**

46. Upon information and belief, Defendants Monsanto, Solutia, and Pharmacia were required to and did make payments under a "primary plan," as that term is defined in the MSP Statute and regulations.

47. The terms of the Abernathy Settlement rendered these defendants required or responsible to pay under a primary plan, and Monsanto's, Solutia's, and Pharmacia's payments into the settlement funds constitute payments under a primary plan that entitle the United States to reimbursement for Medicare conditional payments made on behalf of Medicare beneficiaries participating in the Abernathy Settlement.

48. Additionally, or in the alternative, upon information and belief, Defendants Monsanto, Solutia, and Pharmacia received some or all of their payments to the Abernathy Settlement from third-party payers, i.e., insurers or other primary plans. To the extent that any or all of these Defendants received payment from a third party prior to depositing those monies into the Abernathy Settlement Fund, Defendants Monsanto, Solutia, and Pharmacia are entities that received payment under a primary plan from whom the United States may recover reimbursement for Medicare conditional payments.

49. Upon information and belief, Defendants Monsanto, Solutia, and Pharmacia did not ascertain whether any Abernathy Plaintiffs were Medicare beneficiaries prior to making, or causing to be made, payment of those settlement amounts. Upon information and belief, Defendants Monsanto, Solutia, and Pharmacia also failed to identify any amount(s) owed the United States as reimbursement for Medicare conditional payments made on behalf of Medicare beneficiaries prior to their payments to the Abernathy Settlement Fund.

50. At the time they paid into the Abernathy Settlement Fund, Monsanto, Solutia, and Pharmacia knew or should have known that one or more settling plaintiffs were Medicare beneficiaries on whose behalf the United States was entitled to recover to the extent of any Medicare conditional payments made.

51. Defendants Monsanto, Solutia, and Pharmacia have made no payment to the United States on behalf of any Medicare beneficiaries who received (or will receive) payments pursuant to the terms of the Abernathy Settlement. Contrary to the MSP Statute, the

United States has yet to be reimbursed for Medicare conditional payments made on behalf of its Medicare beneficiaries.

Count I

Against Monsanto, Solutia, and Pharmacia

as Primary Payers

52. The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

53. Defendants Monsanto, Solutia, and Pharmacia are required to reimburse the United States for conditional Medicare payments made on behalf of settlement claimants for medical items and services related to the Abernathy Settlement.

54. The United States claims reimbursement from these Defendants as a third-party payers liable under the MSP Statute, and demands payment of its outstanding conditional Medicare payments, plus interest.

Count II

Double Damages Against Monsanto, Solutia, and

Pharmacia as Primary Plans

55. The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

56. Defendants Monsanto, Solutia, and Pharmacia are required to reimburse the United States for conditional Medicare payments made on behalf of settlement claimants for medical items and services related to the Abernathy Settlement.

57. The United States claims reimbursement from these Defendants as primary plans liable under the MSP Statute, and demands payment of double the amount of its outstanding conditional Medicare payments, plus interest, because it has been necessary to initiate this suit. 42 U.S.C. § 1395y(b)(2)(b), 42 C.F.R. § 411.24(c)(2).

Count III

Against Travelers and AIG As Primary Plans)

58. The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

59. Defendants Travelers and AIG are required to reimburse the United States for conditional Medicare payments made on behalf of settlement claimants for

medical items and services related to the Abernathy Settlement.

60. The United States claims reimbursement from these Defendants as a third-party payers liable under the MSP Statute, and demands payment of the amount of its outstanding conditional Medicare payments, plus interest.

Count IV

Double Damages Against Travelers and AIG

as Primary Plans

61. The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

62. Defendants Travelers and AIG are required to reimburse the United States for conditional Medicare payments made on behalf of settlement claimants for medical items and services related to the Abernathy Settlement.

63. The United States claims reimbursement from these Defendants as primary plans liable under the MSP Statute, and demands payment of double the amount of its outstanding conditional Medicare payments, plus

interest, because it has been necessary to initiate this suit. 42 U.S.C. § 1395y(b)(3), 42 C.F.R. § 411.24(c)(2).

Count V

Against Abernathy Counsel, Monsanto, and Pharmacia,
as Entities That Received Payment

64. The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

65. Defendants Monsanto, Pharmacia, and Abernathy Counsel are entities or persons that have received payment under a primary plan for purposes of the MSP Statute, and are required to reimburse the United States for outstanding conditional Medicare payments (plus interest) to the extent of any such payments received.

Count VI

Declaratory Relief

The United States repeats and incorporates the allegations in paragraphs 1 through 51, above.

66. Pursuant to 28 U.S.C. § 2201, and Fed. R. Civ. P. 57, the United States is entitled to a Declaration as

follows:

- a. that, to the extent the United States has not previously been reimbursed, Monsanto, Pharmacia, Travelers, AIG, and Abernathy Counsel are legally obligated to reimburse the United States for past Medicare payments made on behalf of Abernathy Settlement claimants in accord with the terms of the MSP Statute;
- b. that the Defendants must give CMS notice of all future payments to Medicare beneficiaries pursuant to 42 C.F.R. § 411.25; and
- c. that all Defendants must ensure before any future settlement payment is made to any claimant that appropriate payment is made to the United States.

Prayer For Relief

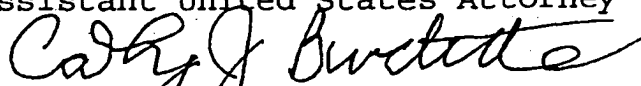
The United States respectfully demands (i) payment of damages by the Defendants as specified herein, together with interest; (ii) declaratory relief against all Defendants as specified herein; and (iii) any other relief this Court deems just and proper.

Dated: December 1, 2009

TONY WEST
Assistant Attorney General

JOYCE WHITE VANCE
United States Attorney

RICHARD E. O'NEAL
Assistant United States Attorney



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ATTORNEYS FOR THE UNITED STATES

This Settlement Agreement is being entered into concurrently with a Global Settlement Agreement among the parties to this Settlement Agreement and the parties to a Settlement Agreement in the matter styled Tolbert, et al. v. Monsanto Company, et al., Civil Action No. CV-01-C-1407-S, and other cases described in that Settlement Agreement for the Tolbert matter and its related actions and claims ("Tolbert Settlement Agreement"). The parties agree that the agreements and obligations set forth and described in this Settlement Agreement are conditional and contingent upon the parties to the Tolbert settlement signing the Tolbert Settlement Agreement and the entry of an Order and Judgment by the Honorable U. W. Clemon approving the Global Settlement Agreement and the Tolbert Settlement Agreement. The purpose of this Settlement Agreement is to effectuate the Global Settlement Agreement which is incorporated herein.

1. The Interested Parties, jointly and severally, agree to pay the total sum of Three Hundred Million Dollars (\$300,000,000.00) into the various settlement funds to be established as set forth below. All monies due under this Settlement Agreement shall be deposited by wire transfer pursuant to the following schedule:

- a. On or before 5:00 p.m. CDT on August 26, 2003, the sum of Seventy-Five Million Dollars (\$75,000,000.00) shall be wire transferred to SouthTrust Bank to an interest bearing account of the Circuit Court of Calhoun County (the Honorable R. Joel Laird) (the "Court") as follows: State of Alabama, Ted Hooks, Clerk, CV-2001-874, Account Number 69530631, Routing Number 062000080 (the "Settlement Account");

- b. On or before 5:00 p.m. CDT on the seventh day (or the next business day thereafter if the seventh day falls on a Saturday or Sunday) following the execution and filing of this Settlement Agreement with the Court, the sum of Two Hundred Million Dollars (\$200,000,000.00) shall be wire transferred to the Settlement Account;
- c. On or before 5:00 p.m. CDT on August 26, 2004, and on each August 26 of each year thereafter (or the next business day thereafter if August 26 falls on a Saturday or Sunday) up to and including August 26, 2013, the sum of Two Million, Five Hundred Thousand Dollars (\$2,500,000.00) shall be wire transferred in accordance with paragraph 3.h. of this Settlement Agreement.

2. The funds described in paragraph 1 above shall not be distributed from the Settlement Account in accordance with the provisions of this Settlement Agreement until all the following conditions have been met:

- a. the Court has entered an order approving this Settlement Agreement in substantially the form set forth in Exhibit A;
- b. the Court has approved the settlement of the claims of the plaintiffs who are minors as set forth below;
- c. Plaintiffs' counsel notifies the Court and counsel of record for the Interested Parties that the Relocation/Property Adjustment Fund account and the corporation, foundation, trust, or other entity described in

paragraph 3.d. have been established or selected.

3. The funds in the Settlement Account shall be distributed as follows once all conditions of paragraph 2 are satisfied:

- a. Each plaintiff who is an adult, a representative of the estate of a deceased plaintiff (including any administrator ad litem appointed by the Court), or is a church, business or other entity (hereinafter collectively referred to as the "adult plaintiffs"), as a condition of receiving any payment to or on behalf of such plaintiff from any of the separately available funds established under this paragraph 3, shall be required to sign a general release of all claims in the form of the release document attached hereto as Exhibit B (the "Release"). The term "Released Parties," as used in this Settlement Agreement, shall mean all persons and entities defined as "Released Parties" in the Release, including without limitation, the Interested Parties and their past, present and future affiliates, and their respective officers, directors, employers and agents.
- b. Within ninety days after the signing of this Settlement Agreement (which period will be extended for 30 days upon request of plaintiffs' counsel (and thereafter upon mutual agreement of the parties hereto)) (such 90-day period, together with any extensions, being hereinafter referred to as the "Release Period"), plaintiffs' counsel shall use diligent efforts to secure signed Releases from the adult plaintiffs, which Releases plaintiffs'

counsel shall hold in escrow. Plaintiffs' counsel shall also use diligent efforts during the Release Period to obtain Court approval of the settlement of the claims of the plaintiffs who are minors. Plaintiffs' counsel may, prior to the end of such 90-day period, together with any extensions, notify the Court and the Interested Parties that they have completed such diligent efforts. If such notice is given, the Release Period shall end on the date of such notice.

- c. When plaintiffs' counsel have obtained signed Releases from at least 75% of the adult plaintiffs, plaintiffs' counsel shall so certify to the Court and the Interested Parties. Immediately upon such certification, all funds in the Settlement Account, including any interest accrued during the time such money was on deposit in the Settlement Account, shall be wire transferred to an interest bearing plaintiffs' attorneys' escrow account ("Escrow Account") designated by plaintiffs' counsel and approved by the Court.

After plaintiffs' counsel have obtained court approval of the settlement of the claims of the plaintiffs who are minors and plaintiffs' counsel have obtained signed Releases from the adult plaintiffs and those minor and adult plaintiffs (counting each estate represented by any court-appointed administrator ad litem separately) total at least 97% of the plaintiffs on the Plaintiff List described in paragraph 7, plaintiffs' counsel shall so certify to the Court and the Interested Parties and shall release such signed

Releases from escrow and shall deliver such signed Releases to the Interested Parties. The Interested Parties shall have three business days from the receipt of the Releases to verify the number, content and execution of the Releases, to verify the number of minor plaintiffs whose claims have been settled through the Court approval process, and to raise any issues relating to the Releases or the minors' settlement with plaintiffs' counsel. Any dispute relating to the Releases or to the count of the Releases or the minors whose claims have been settled by Court approval shall be resolved by the Court.

At the end of this three-day verification period or following the resolution by the Court of any disputes brought to the Court under this subparagraph, if plaintiffs' counsel have obtained signed Releases from the adult plaintiffs and court approval of the claims of the minor plaintiffs that total at least 97% of the plaintiffs on the Plaintiff List, plaintiffs' counsel shall distribute the funds in the Escrow Account as set forth in paragraphs 3.d. through 3.h. The Releases and the Court approval of the settlement of the claims of minors shall not be enforceable until such distribution of funds commences.

- d. Seventy-Five Million Dollars (\$75,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid directly from the Escrow Account to plaintiffs' counsel and to plaintiffs as follows:

- i. Thirty Million Dollars (\$30,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid to plaintiffs' counsel for attorneys' fees.
 - ii. The remaining Forty-Five Million Dollars (\$45,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid from the Escrow Account to pay the claims of each settling plaintiff
- e. Fifteen Million Dollars (\$15,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid directly to plaintiffs' counsel, such amount being assessed as costs in the above referenced matter.
- f. One Hundred and Fifty Million Dollars (\$150,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid directly from the Escrow Account to plaintiffs' counsel and to a fund or funds established by plaintiffs' counsel for relocation/property adjustment payments to plaintiffs as follows:
 - i. Sixty Million Dollars (\$60,000,000.00), plus any interest accrued

on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid to plaintiffs' counsel for attorneys' fees;

- ii. The remaining Ninety Million Dollars (\$90,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid to a Relocation/ Property Adjustment Fund Account or Accounts designated by plaintiffs' counsel for payments for the benefit of the approximately 920 plaintiff property owners and other plaintiff residents for property relocation/adjustment. The Relocation/Property Adjustment Fund shall be used for the payment of monies for the benefit of plaintiff property owners and/or plaintiff residents in accordance with a matrix to be developed by plaintiffs' counsel in their sole discretion. Such matrix will consider such factors as, among other things, jury verdicts, proximity to the Anniston facility and drainage pathways or waterways, including Snow Creek and Choccolocco Creek, sampling results, fair market value of property, size of property, and use of property.

- g. Thirty-Five Million Dollars (\$35,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid directly from the Escrow

Account to plaintiffs' counsel and to a corporation, foundation, trust or other appropriate entity designated by plaintiffs' counsel as follows:

- i. Fourteen Million Dollars (\$14,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid to plaintiffs' counsel for attorneys' fees;
- ii. Twenty-One Million Dollars (\$21,000,000.00), plus any interest accrued on such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be used by the corporation, foundation, trust or other appropriate entity for the following general purposes, and the corporation, foundation, trust or other entity will have the authority to expend funds for such purposes, but will not be required to perform every such purpose:
 - (1) To provide primary health care and/or to assist in gaining access to primary health care and other health care services (including but not limited to lab, dental, outreach, prenatal care, radiology, case management, pharmacy, preventive medicine, holistic medicine and other health care programs) by making grants or payments for the actual benefit of persons meeting the criteria of the corporation, foundation,

trust or other entity;

- (2) To provide educational grants, scholarships or loans to persons meeting the criteria of the corporation, foundation, trust or other entity for purposes including but not limited to those described in subparagraph (5) below;
- (3) To provide health education and instruction to or on behalf of persons meeting the criteria of the corporation, foundation, trust or other entity;
- (4) To provide such other programs or payments relating to health, education and community welfare that would benefit such persons meeting the criteria of the corporation, foundation, trust or other entity; and
- (5) To create an educational trust fund to endow scholarships, grants or loans for purposes including but not limited to the evaluation of and development of personal education plans, pre-kindergarten program participation, after-school program participation, tutoring, participation in remedial programs or individual enrichment programs, computer training programs, SAT/ACT or other examination preparation programs, and participation in technical training, vocational, GED, college or adult educational

programs.

h. The annual payments of Two Million, Five Hundred Thousand Dollars (\$2,500,000.00) shall be paid directly from the Interested Parties to plaintiffs' counsel and to the corporation, foundation, trust or other appropriate entity designated by plaintiffs' counsel pursuant to paragraph 3.g. as follows:

- i. One Million Dollars (\$1,000,000.00) shall be paid to plaintiffs' counsel for attorneys' fees;
- ii. One Million Five Hundred Thousand Dollars (\$1,500,000.00) shall be paid to the corporation, foundation, trust or other appropriate entity established or selected in accordance with paragraph 3.g. hereof for the purposes outlined in paragraph 3.g. hereof.

4. Within seven (7) days of the signing of this Settlement Agreement, plaintiffs' counsel shall deliver to the Court and to the Interested Parties a list ("Plaintiff List") of the names of all plaintiffs, with a designation of which plaintiffs are minors, who are subject to the Release provisions or Court approval of the claims of minors under this Settlement Agreement. The Plaintiff List shall not include (a) plaintiffs who died more than two years prior to the date of this Settlement Agreement and for whom Suggestions of Death have been on file for at least six months and for whom there has been no substitution as plaintiff, or (b) plaintiffs who, prior to and including August 31, 2003, have moved to withdraw from the actions included within this Settlement Agreement. Within seven days of delivery of the Plaintiff List, the Interested Parties

shall deliver to plaintiffs' counsel a list of any additions or changes to the Plaintiff List they may propose based in good faith on their records. Any dispute as to the Plaintiff List shall be resolved by the Court.

5. At the end of the Release Period, plaintiffs' counsel shall deliver to the Court and the Interested Parties a list of all adult plaintiffs, if any, who have not signed their respective Releases ("Unsigned Plaintiffs") and all minor plaintiffs who have not had their claims included within and resolved through the Court approval process ("Unresolved Minor Plaintiffs"), and the following provisions shall apply:

- a. If fewer than all of the adult plaintiffs have signed Releases and/or fewer than all of the minor plaintiffs have had their claims included within and resolved through court approval of the settlement of the minors' claims, the amounts to be distributed pursuant to paragraph 3 hereof shall be reduced by:
 - i. any payments that would otherwise be made to the Unsigned Plaintiffs and the Unresolved Minor Plaintiffs, if any, representing the net settlement proceeds from the fund established in paragraph 3.d.;
 - ii. any payments or grants that would otherwise be made to or for the benefit of the Unsigned Plaintiffs, if any, from the Property Relocation/Adjustment Fund established under paragraph 3.f.;
 - iii. any payments or grants that would otherwise be made to or for the

benefit of the Unsigned Plaintiffs and the Unresolved Minor Plaintiffs, if any, from the funds described in paragraphs 3.g. and h.

- b. If the adult plaintiffs who have signed Releases and the minor plaintiffs covered by the court approval of the minors' settlement total fewer than 97% of the plaintiffs on the Plaintiff List, then the Interested Parties, at their sole discretion and election, may, during the period thirty-one (31) to sixty (60) days after the end of the Release Period except as provided in paragraph c.iii. below, give written notice to plaintiffs' counsel that this Settlement Agreement is null and void. If the Interested Parties give such written notice, plaintiffs' counsel shall have sixty (60) days to return any and all monies provided for hereunder to the Interested Parties. In that event, the plaintiffs reserve their right to file a motion with the Court requesting that the jury trial in the Abernathy case be resumed from the point at which it was stayed. If the Interested Parties do not give such written notice, plaintiffs' counsel shall distribute the funds in the Escrow Account as set forth in this Settlement Agreement.
- c. Notwithstanding paragraphs 5.a. and 5.b. hereof, if the Court dismisses the claims of the Unsigned Plaintiffs and the Unresolved Minor Plaintiffs, if any, with prejudice, no later than thirty (30) days after the end of the Release Period, then:

- i. if the claims of all Unsigned Plaintiffs and the Unresolved Minor Plaintiffs are dismissed with prejudice and no notice of appeal from such dismissal is filed within forty-two (42) days ("Appeal Period") of such dismissal, this Settlement Agreement shall remain in full force and effect and there shall be no reduction in the amounts provided for in paragraph 3 hereof;
- ii. with respect to Unsigned Plaintiffs or Unresolved Minor Plaintiffs, if any, who file such notices of appeal within their respective Appeal Periods and Unsigned Plaintiffs and Unresolved Minor Plaintiffs, if any, whose claims are not so dismissed, the reduction provided for in 5.a. shall remain in effect, with respect to the amounts payable to such Unsigned Plaintiffs or Unresolved Minor Plaintiffs.
- iii. if the number of Unsigned Plaintiffs or Unresolved Minor Plaintiffs, if any, who file such notices of appeal within their respective Appeal Periods plus the number of Unsigned Plaintiffs and Unresolved Minor Plaintiffs, if any, whose claims are not so dismissed amount to more than 3% of the plaintiffs on the Plaintiff List, then the Interested Parties shall retain their right to cancel this Settlement Agreement under paragraph 5.b. hereof by written notice during the period thirty (30) days after the end of the last respective Appeal Period.

6. No payments may be made to or for the benefit of any minor plaintiffs from any of the separately available funds established under paragraph 3 hereof until the Court approves the settlement of the minors' claims. No payments may be made to minors from the Property Relocation/Adjustment Fund.

7. Within sixty (60) days after the end of the Release Period (or, if claims of Unsigned Plaintiffs or Unresolved Minor Plaintiffs are dismissed under paragraph 5.c. hereof, within sixty (60) days of the end of the Appeal Period), plaintiffs' counsel shall return to the Interested Parties from the Escrow Account the amounts, if any, by which the amounts to be distributed pursuant to paragraph 3 are reduced under the terms hereof on account of Unsigned Plaintiffs and Unresolved Minor Plaintiffs. Within thirty (30) days after the end of the Release Period, plaintiffs' counsel shall also provide the following reports to the Interested Parties:

- a. a report for each such Unsigned Plaintiff or Unresolved Minor Plaintiff of the amounts calculated for payments and/or grants to or for the benefit of that Plaintiff for the purposes of paragraphs 5.a.i., ii. and iii; and
- b. with respect to each Unsigned Plaintiff or Unresolved Minor Plaintiff, if any, who, despite plaintiffs' counsel's good faith efforts, cannot be located, a report of the good faith efforts to locate such plaintiff.

8. Any dispute regarding the amount of the monies, if any, to be returned to the Interested Parties pursuant to paragraphs 5 and 7 above shall be referred to Resolutions LLC for resolution, and the decision of Resolutions LLC shall be binding upon the parties to this Settlement Agreement.

9. Plaintiffs acknowledge that the remediation obligations of the Interested Parties and the obligations, if any, of their affiliates and other persons or entities designated in Exhibit B as "Released Parties" are governed by the Revised Partial Consent Decree entered August 4, 2003. Upon delivery of the Releases from the adult plaintiffs pursuant to paragraph 3.c. hereof, plaintiffs agree to withdraw as amici curiae in the matter styled United States of America v. Pharmacia Corporation, et al., Civil Action No. 02-C-0749-E, and to forego any right to appeal any decision of the United States District Court regarding the Revised Partial Consent Decree.

10. It is specifically acknowledged and agreed that the agreements and obligations of the Interested Parties under this Settlement Agreement are conditioned upon the concurrent execution of the Global Settlement Agreement and the execution of the Tolbert Settlement Agreement and entry of the Order and Judgment in Tolbert.

11. Upon delivery of the Releases from the adult plaintiffs pursuant to paragraph 3.c. hereof, and the Court's approval of the minors' settlement, the plaintiffs and the Interested Parties shall jointly file motions for dismissal with prejudice, along with proposed orders, to effectuate the dismissal of all released claims in the cases referenced in the first paragraph of the preamble to this Settlement Agreement other than United States v. Pharmacia Corporation, et al. The orders in the state court cases shall provide that the Honorable R. Joel Laird, Jr., Calhoun County Circuit Court, retains continuing jurisdiction in those cases for the purpose of enforcing this Settlement Agreement.

12. The parties make no representations or warranties of any kind to each other except as specifically set out in the Global Settlement Agreement and this Settlement Agreement

and on the record before the Honorable U. W. Clemon and the Honorable R. Joel Laird, Jr. on August 20, 2003.

13. The Global Settlement Agreement and this Settlement Agreement and the attached Exhibits supersede all prior discussions, negotiations and agreements between the parties with respect to the settlement of the litigation. The Global Settlement Agreement, this Settlement Agreement and the attached Exhibits, and the representations made on the record on August 20, 2003, before the Honorable U. W. Clemon and the Honorable R. Joel Laird, Jr. contain the sole and entire agreement between the parties with respect to the settlement of the plaintiffs' claims.

14. This Settlement Agreement shall not be modified or amended except by an instrument in writing signed by or on behalf of the parties hereto and approved by the Court. No such modification or amendment shall modify or amend any Release without the written consent of the affected released party or parties.

15. It is understood and agreed by plaintiffs that the Global Settlement Agreement and this Settlement Agreement are a complete resolution, settlement and compromise of disputed claims, and neither the Global Settlement Agreement, this Settlement Agreement, the consideration, nor any discussions regarding the Global Settlement Agreement and this Settlement Agreement shall constitute an admission of liability or wrongdoing on the part of the Released Parties. It is expressly acknowledged by plaintiffs that the Released Parties deny any liability or wrongdoing whatsoever.

16. The parties agree that upon payment to or on behalf of the plaintiffs of the

amounts (as they may be adjusted) set forth in paragraph 3d. through g. hereof and the agreement to pay the amounts set forth in paragraph 3.h. hereof, any liability for punitive damages or penalties against Pharmacia Corporation, Solutia Inc., Monsanto Company, or any of the Released Parties relating to the manufacture, use, release or disposal of polychlorinated biphenyls at or from the Anniston plant or Anniston property owned or controlled by the Released Parties is extinguished and that an assessment of punitive damages or penalties against Pharmacia Corporation, Solutia Inc., Monsanto Company, or any of the Released Parties relating to the manufacture, use, release or disposal of polychlorinated biphenyls at or from the Anniston plant or Anniston property owned or controlled by the Released Parties would not be warranted.

17. The Global Settlement Agreement and this Settlement Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of Alabama.

18. Plaintiffs, by and through their counsel of record, represent and warrant that plaintiffs' counsel have express authority to enter into the Global Settlement Agreement and this Settlement Agreement. The Interested Parties, by and through their undersigned counsel, represent and warrant that their undersigned counsel have express authority, pursuant to their respective Articles of Incorporation, By-Laws, Board of Directors' resolutions, or other governing corporate policy or procedure, to enter into the Global Settlement Agreement and this Settlement Agreement on behalf of the Interested Parties.

19. The Global Settlement Agreement and this Settlement Agreement shall apply to, be binding upon, and inure to the benefit of all of the plaintiffs and the Released Parties as well

as their respective heirs, legal representatives, successors in interest and assigns. Nothing in this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity other than the plaintiffs and the Released Parties.

20. The parties to this Settlement Agreement and their counsel shall use best efforts to effectuate the terms and purposes of this Settlement Agreement.

21. All notices or other communications to any party to this Settlement Agreement shall be in writing (and shall include facsimile or similar writing) and shall be given to the respective parties hereto at the following addresses. Plaintiffs' counsel and the Interested Parties may change the name and address of the person(s) designated to receive notice on behalf of such party by notice given as provided in this paragraph.

Plaintiffs:

Donald W. Stewart, Esq.
1131 Leighton Avenue
P. O. Box 2274
Anniston, Alabama 36202
Facsimile: (256) 237-0713

Daniel R. Benson, Esq.
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, New York 10019
Facsimile: (212) 506-1800

Interested Parties:

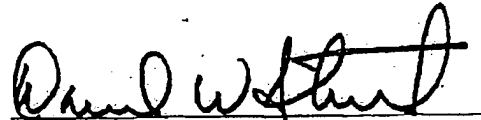
William S. Cox, III, Esq.
Lightfoot, Franklin & White, L.L.C.
The Clark Building
400 20th Street North
Birmingham, AL 35203-3200

22. All obligations of the Interested Parties pursuant to this Settlement Agreement (including, but not limited to, all payment obligations) are intended to be, and shall remain, joint and several.

23. Except as otherwise provided in the Global Settlement Agreement or this Settlement Agreement, all parties shall bear their own expenses of litigation and attorneys' fees which have arisen or will arise in connection with the litigation referenced in the preamble to this Settlement Agreement, the Global Settlement Agreement, this Settlement Agreement, or any other matters or documents related thereto.

24. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise a single instrument.

Dated: 9/9, 2003


Attorneys for Plaintiffs

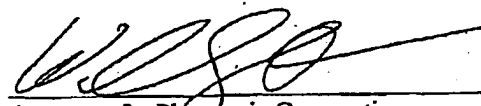
Dated: 9/9, 2003


Attorneys for Monsanto Company

Dated: 9/9, 2003


Attorneys for Solutia Inc.

Dated: 9/9, 2003


Attorneys for Pharmacia Corporation

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA
(Transferred from the Circuit Court of Calhoun County, Alabama)

SABRINA ABERNATHY, et al.,)
)
 Plaintiffs,)
)
v.)
)
)
)
MONSANTO COMPANY, et al.,)
)
)
 Defendants.)

CIVIL ACTION NO. CV-2001-832
(Consolidated)

**PLAINTIFFS' COUNSEL'S CERTIFICATION PURSUANT TO
PARAGRAPH 3.C.(2) OF THE SETTLEMENT AGREEMENT**

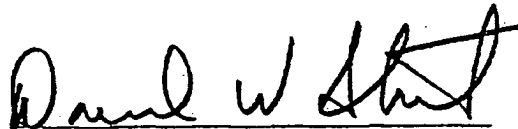
Pursuant to paragraph 3.c.(2) of the September 9, 2003 settlement agreement in this action (the "Settlement Agreement",¹ a copy of which is attached hereto as Exhibit A), plaintiffs' counsel hereby certifies to the Court and to the Interested Parties (Solutia Inc., Pharmacia Corporation, formerly known as Monsanto Company, and new Monsanto Company), that they have obtained Court approval of the settlement of the claims of the plaintiffs who are minors and plaintiffs' counsel have obtained signed Releases from the adult plaintiffs and those minor and adult plaintiffs total at least 97% of the plaintiffs whose names appear on the Plaintiff List. (A copy of the Court's September 10, 2003 Order Approving Settlement is attached hereto as Exhibit B. A copy of the Court's December 2, 2003 Order approving settlement of minors' claims is

¹ All terms herein have the same meaning as set forth in the Settlement Agreement.

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DEC 02 2003
JULY YATES
CLERK, CIRCUIT COURT

attached as Exhibit C. A copy of the list of adult and minor plaintiffs from whom plaintiffs' counsel have obtained signed Releases or on behalf of whom an Order has been entered is attached as Exhibit D.)

Dated: This 2nd day of December, 2003.



DONALD W. STEWART
Attorney for Plaintiffs
Donald W. Stewart, P.C.
P.O. Box 2274
Anniston, Alabama 36202
(256) 237-9311
(256) 237-0713 (Facsimile)

CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for all parties to this action with a copy of the within and foregoing document by hand delivery and/or by facsimile transmission and/or by depositing same in the United States mail in a properly addressed envelope with adequate postage affixed thereon and addressed as follows:

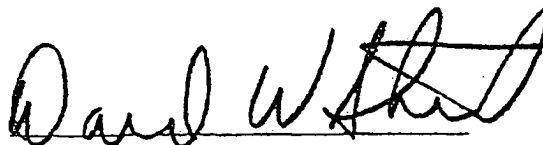
Warren B. Lightfoot, Esq.
Lightfoot, Franklin & White, LLC
The Clark Building
400 North 20th Street
Birmingham, Alabama 35203

This 2nd day of December, 2003.

FILED

DEC 02 2003

BILLY YATES
CLERK, CIRCUIT COURT



DONALD W. STEWART
Attorney for Plaintiffs