

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

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UNITED STATES OF AMERICA,)	
)	
PLAINTIFF,)	
)	
v.)	Case No. 1:09-cv-02423-KOB
)	
JAMES J. STRICKER, et al.,)	ORAL ARGUMENT REQUESTED
)	
DEFENDANTS.)	
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**REPLY BRIEF OF DEFENDANTS AMERICAN
INTERNATIONAL GROUP, INC. (“AIG”) AND THE
TRAVELERS COMPANIES, INC. (“TRAVELERS”) IN
SUPPORT OF MOTION TO DISMISS COUNTS III AND IV¹**

¹ Pursuant to the Court’s Order of June 9, 2010, this Reply Brief and the original Motion are also deemed filed on behalf of The Travelers Indemnity Company, Lexington Insurance Company, American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and The Insurance Company of the State of Pennsylvania (referred to collectively with AIG and Travelers as “Movants”).

I. THE GOVERNMENT’S COMPLAINT WAS FILED TOO LATE.

The Government dwells on its contention that the applicable statute of limitations under 28 U.S.C. § 2415 should be six, not three, years. Although the Movants and other corporate defendants have set forth why the three-year period is applicable in this case, the question of three or six years is actually academic: under *either* limitations period, the Government’s complaint is out of time.

The key triggering event here is when the *payment obligation* arose – the MSP reimbursement obligation kicks in when a “responsibility to make payment” can be demonstrated. 42 U.S.C. § 1395y(b)(2)(B)(ii); *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1309 (11th Cir. 2006). The Government is authorized to bring an action at that time against an entity “required or responsible . . . to make payment” (*i.e.*, a “primary payer”).² 42 U.S.C. § 1395y(b)(2)(B)(iii).

In this case, the *payment obligation* arose when the Settlement Agreement was executed on September 9, 2003. (Compl. ¶ 42.) For purposes relevant here, there were essentially two steps in the payment process outlined by the Agreement. Step one required the *Abernathy* defendants to make payments into the *Abernathy* Settlement Fund. A payment of \$75 million was made on August 26, 2003 – a week before the execution of the Agreement (Compl., Ex. 1 ¶ 1.a.), and another payment of \$200 million was made a week after the execution, on September 16,

² Movants do not concede that they are “primary payers” under the MSP Act.

2003. (*Id.* ¶ 1.b.) Step two provided for the disbursement of the monies already paid into the *Abernathy* Settlement Fund to the plaintiffs. This was to happen when a certain percentage of signed releases were obtained and certified to the court, which ultimately occurred on December 2, 2003. (*Id.* ¶ 3.c.)

In arguing that its claim did not accrue until December 2003, the Government mistakenly focuses on the second step – the timing of the *disbursement* of funds to plaintiffs who were allegedly Medicare beneficiaries. But claims under the MSP Act arose, if at all, at the first step – when the *Abernathy* defendants were obligated to make the payments into the Settlement Fund. The MSP Act says nothing about receipt of funds by the beneficiary. In fact, the Government does not even have to wait until the payment is made, much less disbursed, before filing suit. 42 C.F.R. § 411.24(b) (2010) (“CMS may initiate recovery as soon as it learns that payment has been made or *could be made . . .*”) (emphasis added); 54 Fed. Reg. 41719 (Oct. 11, 1989) (“[CMS] can seek recovery of conditional primary payments when it learns that another party is primary payer, *without waiting for the other party to actually pay.*” (emphasis added)). The premise of the statute is that a “primary payer” has an *obligation to pay*; whether a *beneficiary* actually receives a payment from the primary payer is irrelevant to the Government’s ability to sue for reimbursement. *See* CMS Medicare Secondary Payer Man., Pub. 100-05, Ch. 7 § 50.5 (indicating Medicare’s right to

reimbursement should be asserted *before* monies are disbursed and beneficiaries have the ability to dispose of them).³ Thus, the Government's claim accrued, if at all, when the *Abernathy* defendants committed themselves to paying on September 9, 2003, and, in fact, did pay on August 26 and September 16, 2003 – long before the December 1, 2003 date that might allow the Government's suit to be timely.

Because there was a valid settlement agreement in place, pursuant to which payments had already been made, the Government had the right to sue in September 2003. The law states that an MSP payment obligation can be demonstrated by a settlement agreement. *See Glover*, 459 F.3d at 1309-10 (Medicare is entitled to reimbursement “[a]fter the Medicare beneficiary obtains a . . . *settlement* of state tort claims;” the MSP Act authorizes a claim “against a primary plan that pays a . . . *settlement* to a Medicare beneficiary”) (emphasis added); 42 C.F.R. § 411.22(b)(3) (2010) (“A primary payer’s responsibility for payment may be demonstrated . . . [b]y other means, including but not limited to a *settlement . . . or contractual obligation.*”) (emphasis added). And the MSP Act itself expressly provides that “responsibility to make payment” may also be demonstrated by an actual payment, even where that payment is “conditioned upon the recipient’s compromise, waiver, or release.” 42 U.S.C. § 1395y(b)(2)(B)(ii).

³ Indeed, MSP regulations even allow the Government to intervene in an ongoing action before a settlement is reached so that it may protect its interests. 42 C.F.R. § 411.26(b) (2010).

The Government concedes that “a payment *conditioned* on a release of liability” is sufficient to demonstrate responsibility to pay. (Resp. at 9 (emphasis added).) In virtually the same breath, however, it opines that the Settlement Agreement was “contingent” upon the receipt of releases, and therefore could not demonstrate a responsibility to pay at the time of execution. *Id.* Twisting the semantics provides no relief here. Whether “conditioned” or “contingent,” it is undeniable that a payment *obligation* existed by no later than September 9, 2003. And the fact that one payment had already been made by September 9, 2003, demonstrates just how real that payment obligation was.

The Government argues that the Agreement was “unenforceable” as of September 9, 2003. This argument is belied by the provisions and implications of paragraph 5.b of the Agreement, which gave defendants the *option* of declaring the Agreement void if the contemplated releases were not obtained. (Compl., Ex. 1 ¶ 5.b.) That provision would have been superfluous if the Agreement were not enforceable from the outset. If the releases were not obtained, the monies already paid were not to be automatically returned. Rather, the defendants had to take action to void the Agreement and provide the requisite notice, and only then would there be an obligation to refund the payments. (Compl., Ex. 1 ¶ 5.b.) Notably, this never happened; the Agreement is still in place today.

Paragraph 3.c of the Settlement Agreement, to which the Government refers, merely provides that the *releases* and the *court approval* (*i.e.*, not the entire agreement) will not be enforceable until the funds are distributed. (Compl., Ex. 1 ¶ 3.c.) It in no way invalidates the payment obligation or the payments that had been made months earlier. Quite clearly, the Agreement was enforceable at the time the *Abernathy* defendants paid millions of dollars.

The Government further contends that the limitations period was tolled under 28 U.S.C. § 2416(c), which allows for tolling where a claim has accrued, but “facts material to the right of action are not known and reasonably could not be known” by the Government. However, “once the facts making up the ‘very essence of the right of action’ are reasonably knowable, the § 2416 bar is dropped.” *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984) (citations omitted). The burden is on the Government to plead facts in its Complaint showing tolling is warranted. *Wasco Prods. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006); *United States v. Carell*, 681 F. Supp. 2d 874, 888-89 (M.D. Tenn. 2009). Here, the required essence of the Government’s right of action is: (1) a settlement creating a payment obligation, where (2) the settlement payments will allegedly cover medical expenses of Medicare beneficiaries, and (3) those very same medical expenses have allegedly been conditionally paid for by

Medicare. The “essence” was thus knowable as of the September 9, 2003 Settlement, because all of these alleged facts were in place on that date.⁴

II. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM.

Contrary to the Government’s assertion, Movants do not contend that the Government must prove its case at the pleading stage. Movants do contend, however, that the Government is required to plead facts – not conclusions – that would, if proved, establish the essential elements of a claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (“labels and conclusions . . . will not do”).

The Government does not dispute that to prevail on its claim, it must establish that Movants were obligated to make payments for *the same item or service* for which Medicare has made conditional payment. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii). While the Government insists that it has pled sufficient facts from which the Court could plausibly infer this essential element, only two supportive paragraphs in the Complaint attempt to draw a connection between Medicare and the *Abernathy* Settlement – and both are vaguely asserted “upon information and belief,” as follows:

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

⁴ The Government has pled no facts to show that it could not have learned these essential facts through the exercise of reasonable diligence prior to December 1, 2003. The Government does not allege that it was unaware of the *Abernathy* case or of the Settlement Agreement or its terms, or that it was unaware of Movants’ provision of settlement funds. In the absence of such allegations, the Government has not met its burden, and no tolling of the limitations period is applicable.

...

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.

(Compl. ¶¶ 21, 23.) These paragraphs plainly do not supply sufficient facts to meet the pleading requirement, as they lack any specifics, such as the identity of beneficiaries, any physical injuries suffered, any medical treatments provided, or any dates of treatment.

Certainly, it can be inferred that the Government paid for some of the medical expenses of Medicare beneficiaries.⁵ But the Government alleges no facts to support its claim that the medical expenses paid by Medicare for these 907 individuals fall within the scope of the releases in the *Abernathy* Settlement. It may be “plausible” to infer from the allegations in the Complaint that the Government has paid for medical expenses for some – or even all – of these unnamed individuals, for broken bones, congestive heart failure, or any number of other ailments. There are no facts pled in the Complaint, however, from which a plausible inference can be drawn that any of those ailments arose from the plaintiffs’ alleged PCB exposure.

Further, the Government’s conclusory statement that claims for unidentified medical expenses were made in the *Abernathy* complaints and released in the

⁵ Medicare does not pay for *all* expenses of its beneficiaries. *See* 42 U.S.C. § 1395 *et seq.* (only categories specified in the Act are covered).

Settlement Agreement is wholly unsupported, as the Government does not even attach the *Abernathy* complaint to demonstrate it. And it is pled only “upon information and belief” – forming too hollow a base to allow a reasonable inference to be drawn. *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (criticizing allegations that “are ‘based on information and belief,’” and fail to provide any factual content that allows us ‘to draw the reasonable inference that the defendant is liable for the misconduct alleged.’”) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

In arguing to the contrary, the Government cites *United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 884 n.13 (11th Cir. 2003), where the Court declined to require Medicare to plead “the individualized medical and payment histories of each of its beneficiaries.”⁶ *Baxter*, however, pre-dated the more stringent pleading standard established by *Iqbal* and *Twombly*. And even then, *Baxter* expressly

⁶ The facts of this case differ significantly from those in *Baxter*, a class action with 400,000 unidentified claimants, in which there was no issue about whether the plaintiffs had medical expenses arising out of the tort that were being compensated by the settlement, and thus, no dispute about the nexus. *Abernathy* was brought by individual plaintiffs, identified by name and address, *without* any allegation or evidence of medical treatments. This case is more akin to *City of Birmingham v. American Tobacco Co.*, in which the court required the plaintiffs to plead details including the identity of each patient, the date of each injury, and the amounts, dates, and payees to whom the City made payments for which it sought reimbursement under a similar statutory scheme. 10 F. Supp. 2d 1257, 1262 (N.D. Ala. 1998). “In that non-class action . . . there was considerable doubt as to whether the plaintiffs could identify even a single person for whose care they were entitled to reimbursement, [even though] information as to the patients’ identities and medical history was within plaintiffs’ exclusive control.” *Baxter*, 345 F.3d at 884 n.14. Information as to the identities and medical histories of the 907 alleged Medicare beneficiaries is within the Government’s exclusive control, yet it has failed to allege facts concerning even a single beneficiary.

required that the Government's complaint allege that a defendant have at least constructive knowledge that Medicare paid for the same items or services for which the defendant paid. Here the Government has neither pled facts sufficient to connect the payments it made to the medical treatments allegedly covered by the *Abernathy* Settlement, nor alleged that Movants had knowledge that Medicare made conditional payments for medical expenses covered by the Settlement.

III. NEITHER AIG NOR TRAVELERS IS A PROPER PARTY.

Before filing their motion to dismiss, Movants AIG and Travelers gave the Government every opportunity to replace them with the proper subsidiaries, even providing the precise names of those companies. The Government failed to act, forcing Movants to file a formal motion. Only then did the Government amend its Complaint to add the proper parties. But it failed to remove parent companies AIG and Travelers, despite its lack of any colorable basis to proceed against them.

In its Response, the Government blithely asserts that it should be entitled to "explore" the relationships between the parents and their subsidiaries as they relate to the *Abernathy* Settlement. In so arguing, the Government ignores the fact that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks and citation omitted); *see also Nobles v. Rural Cmty. Ins. Servs.*,

303 F. Supp. 2d 1279, 1288 (M.D. Ala. 2004) (“a corporation is a legal entity existing separate and apart from other legal entities, such as its shareholders”).

The distinction between a highly-regulated insurance company and the unregulated holding company by which it may be owned is not inconsequential. Courts regularly dismiss holding companies from actions that are aimed at the insurance company subsidiaries. *See, e.g., Torvik v. The Ins. Co. of the State of Pa.*, No. 09-886RAJ, 2010 WL 148079 (W.D. Wash. Jan. 11, 2010) (dismissing AIG because it did not issue the insurance policy or adjust or handle the claim at issue); *see also Patterman v. Travelers, Inc.*, 11 F. Supp. 2d 1382, 1384 n.1 (S.D. Ga. 1997) (distinguishing Travelers, “a publicly owned financial holding company,” from its insurance company subsidiaries). The Government would sweep these distinctions aside based on nothing more than its desire to “explore.” But this is precisely what the heightened pleading standard established by *Twombly* and *Iqbal* is intended to foreclose – fishing expeditions based on nothing more than speculation. *See Iqbal*, 129 S. Ct. at 1949-50 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

CONCLUSION

For the above reasons and all of those discussed in Movants’ opening brief and the briefs filed by Monsanto, Solutia, and Pharmacia, Counts III and IV of the Complaint should be dismissed.

DATED: June 10, 2010

Respectfully submitted,

/s/ Augusta S. Dowd

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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