Legal Backgrounder

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WILL PROPOSED CHANGES TO MEDICARE LAW INSPIRE NEW WAVE OF HEALTH CARE-RELATED TORT SUITS?

by

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Credit card companies cannot charge late fees before their cardholders' bills are due. Banks cannot foreclose on homes where owners have not missed payments. Bounty hunters cannot snatch law-abiding citizens off the street. Similarly, Medicare's debt collectors should not be able to sue people or businesses who do not owe any debts to Medicare. Yet, that is precisely what a proposed amendment to the Medicare as Secondary Payer Act would do. This amendment would fundamentally change health care litigation in this country.

The Medicare as Secondary Payer Act ("MSP") is an important law that facilitates proper health care treatment of Medicare recipients. Under the Act, Medicare pays doctors, hospitals and other health care providers even though the patient's primary plan is responsible for covering certain costs. Medicare's payments are conditioned on being reimbursed by the primary plan. As the U.S. Court of Appeals for the Eleventh Circuit has explained, "Medicare does not have to pay" these bills; it does so "to accommodate its beneficiaries." *Cochran v. United States Health Care Fin. Admin*., 291 F.3d 775, 777 (11th Cir. 2002). The MSP also facilitates Medicare's subrogation rights. Should a Medicare beneficiary receive a litigation award that includes reimbursement for health-care costs originally paid by Medicare, that portion goes back to Medicare. If Medicare is not paid back the monies it is owed under either scenario, the MSP allows for a private right of action against the offending party for double the original debt; Medicare receives the amount of the debt and the private citizen bringing the suit receives an equal amount. *See* 42 U.S.C. § 1395y(b)(3)(A).

The proposed legislation, which has been circulated by Senator Charles Grassley (R-IA), would change the MSP's fundamental purpose away from debt-collection. Instead, the MSP would be used to put back in Medicare's coffers funds legitimately spent on people's health care. Defendants in these "Medicare recoupment suits" would be any individual or business accused of causing the injuries for which Medicare paid. So, if I got into a car accident with a Medicare beneficiary, I could face an MSP lawsuit for the

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monies Medicare spent on that person's health care as a result of the car accident.

The likely targets of these new MSP lawsuits are product manufacturers, particularly those who make pharmaceutical medicines and medical devices. Suppose, instead of getting into a car accident with a Medicare beneficiary, someone made a product that may have caused injury to that Medicare beneficiary. If this legislation were to be enacted, they would face two lawsuits. One would be from the plaintiff seeking products liability or tort damages. The other would be from an MSP lawyer seeking double the funds Medicare spent related to the plaintiff's injury – even before it has been decided that the producer did anything wrong. If the MSP lawyer alleged that my product hurt many people, the lawyer could file one mass MSP action seeking twice the amount Medicare spent on *all* their injuries. It would not matter if the actual customers never filed their own claims or believed I did not cause their harm. Liability would be based on statistical and generalized evidence.

Specifically, the Grassley amendment makes four fundamental changes to the MSP statute:

- The reason for the MSP suit would change from enforcing an existing, delinquent debt "to establish[ing]" for the first time that someone even owes Medicare a debt. Thus, MSP actions could be based on any speculative tort claim that Medicare beneficiaries *could* bring seeking reimbursement for funds spent by Medicare.

- The types of defendants in MSP actions would be expanded beyond just primary health plans and plaintiffs who have recovered Medicare costs to anyone accused of "owing" a debt to Medicare, including a defendant in a Medicare beneficiary's lawsuit. The MSP lawsuit would be filed separately for direct payment of the Medicare funds at issue in the beneficiary's claim.

- The scope of MSP actions would be widened from seeking the Medicare funds spent on a specific person's injury to quasi-class actions for "all items and services furnished to all individuals" related to the product or service at issue.

- The causation standard would be weakened; instead of requiring proof that a defendant specifically caused someone's injury, liability would be based solely on "statistical or epidemiological" evidence.

The result is that anyone, regardless of his or her connection with any injured Medicare recipient, could file a separate mass action against any company in federal court for double damages based on the collective tort claims that Medicare recipients could theoretically bring against that company.

This change would completely redefine health care litigation. Class action and mass action lawyers would not need clients to pursue a claim. Instead they could look through Medicare's health-related expense reports and sue anyone they can accuse of causing Medicare to spend those funds. Indeed, since 2000, several such lawsuits have been tried, mostly against tobacco, medical device, and pharmaceutical manufacturers. Not surprisingly, these cases have uniformly failed. As Judge Robert Holmes Bell has stated, they stand "the MSP statute on its head." *Graham v. Farm Bureau Ins. Co.*, No. 1:07-cv-241, slip op. at *5 (W.D. Mich. Mar. 21, 2007). If there is no debt to be collected, the MSP is not to apply. "Until Defendants' responsibility to pay for a Medicare beneficiary's expenses has been demonstrated (for example, by a judgment), Defendant's obligation to reimburse Medicare does not exist." *Glover v. Liggett Group, Inc*., 459 F.3d 1304, 1309 (11th Cir. 2006).

Even if the MSP were to apply in these situations, as the Grassley amendment would allow, federal

courts have explained that such claims would advance the wrong legal and public health care policies. *See, e.g., id.*; *Stalley v. Catholic Health Initiatives*, 458 F. Supp. 2d 958 (E.D. Ark. 2006). First, it would be a gross distortion of liability law for the double damages penalty to apply against a person or company for simply defending itself against unadjudicated state tort claims involving Medicare beneficiaries.[1] As a practical matter, the "alleged tortfeasor that is sued under the MSP (instead of under state tort law) could not contest liability without risking the penalty of double damages: defendants would have no opportunity to reimburse Medicare *after* responsibility was established but before the penalty attached." *Glover, supra*, at 1309. Thus, if these suits were allowed, the double recovery provision would simply double tort liability in Medicare-related cases.

Second, the lawsuits would not be premised on traditional American jurisprudence. The current legislation gives the MSP lawyers "super plaintiff" status because they would have greater standing and ability to prevail than the allegedly injured parties. No proof would be needed that the product or service specifically caused someone's harm or that the defendant was actually at fault. Affirmative defenses, such as assumption of the risk, would not be available. Liability would be unfairly retroactive to 1986. Also, while the actions would be akin to class action in character and scope, they would not come with the safeguards of class action rules, which require, among other things, a showing that a class action is the superior means for resolving the dispute and that common issues predominate over individual issues. *See Glover, supra*, at 1309.

Third, these claims would greatly expand federal jurisdiction over state tort suits. A federal claim would be authorized any time a personal injury claim was filed where the plaintiff happened to be a Medicare recipient seeking reimbursement for some health care costs that Medicare had covered. Diversity jurisdiction and other requirements would not need to be fulfilled. Federal Judge Jack Weinstein warned against this development, saying these suits would disrupt "the federal-state tort balance by creating a harsh shadow federal tort action in any case where Medicare payments were made on behalf of any person." *S.D.N.Y. Rejects "Bounty" Suit Against Tobacco Companies to Recover Medicare Funds,* Andrews Health Care Fraud Litig. Rptr (Sept. 2002) (reporting on *Mason v. Am. Tobacco Co.*).

Finally, there would be no check on abusive or agenda-driven claims. As seen with class actions and public nuisance suits brought on behalf of state attorneys general, the mere threat of massive liability is used as a tool to force defendants to capitulate to policy changes or concede to a financial settlement even when the claims have little or no merit. At least with the attorney general suits, the state attorney general has control over whether and how its office is used to pursue a civil liability claim. With MSP actions, Medicare has no say as to which claims are filed and how they are prosecuted, making it foreseeable that private "bounty hunting" lawyers could bring MSP actions on behalf of Medicare even where Medicare does not believe the company was wrong or that liability should be imposed. With courts only able to throw out claims unfounded in the law, there would be no check to make sure that liability in a particular suit would advance appropriate Medicare policy.

The net result is that if the proposed Grassley amendment is adopted,[2] the big money in health care

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[1]In 2003, Congress clarified that in order to stop private MSP actions from getting out-of-control, the private lawyer bringing the suit must demonstrate the defendant's "responsibility for such payment . . . by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." 42 U.S.C.A. § 1395u(2)(B)(ii).

[2]The amendment is misnamed a "technical clarifying amendment." Proposed Sec. 313(a). The *Glover* court properly called these kinds of changes to the MSP statute "radical innovations in jurisdiction, federal-state relations, and tort liability."

litigation would no longer be in representing injured individuals. Speculative, bet-the-company lawsuits could be filed against any company for any expense incurred by Medicare. If a Medicare recipient is injured in a car accident, gets food poisoning or is injured while using a lawful product, an MSP suit could be filed against the allegedly responsible parties *before* it is determined whether the defendant is liable to the injured person. It is entirely plausible that a defendant may be found liable for double damages under the MSP, but not liable for people's actual injuries.

When thousands of Medicare recipients are at issue, the injustice could be enormous. Adverse consequences would be most severe in the health care industry, as Medicare is a regular and significant consumer of health care products and services. Speculative MSP lawsuits, for example, could be filed against any pharmaceutical or medical device company, regardless of the importance of the medicine or device, for the inherent side effects and risks of their products. If these manufacturers had to build into the costs of their medicines and devices allowances for the liability risk of *twice* the amount of all the Medicare costs associated with those side effects, powerful and important health care products would be forced off the market or priced too high for average Americans to afford.

The better method is to continue the current case-by-case approach of subrogating Medicare's claims to the claims of those who are actually injured when liability has been imposed or a defendant in a case has settled. In fact, just last year as part of the Medicare, Medicaid, and SCHIP Extension Act of 2007, Congress created new MSP notification requirements for civil liability suits. Now, liability insurers, no fault insurers and workers' compensation plans must notify Medicare when a person filing a claim against it or one of its insureds has received benefits under Medicare. If the insurers fail to do so, there is a $1,000 per day per claimant fine. *See* 42 U.S.C. § 1395y(b)(8)(E).

We can all agree that Medicare funds should be safeguarded. The MSP is an important and powerful debt-collecting tool. It should not be re-engineered to open a new era in tort litigation that bypasses fundamental judicial principles and harms the health care of Medicare recipients.

Glover v. Liggett Group, Inc., 459 F.3d 1304, 1309 (11th Cir. 2006).

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