



# MEDICARE REPORT



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## **Kudos to Congress for Saying “No” to Renewed Attempts to Turn MSP Act Into New Vehicle for Litigation Abuse**

By PHIL GOLDBERG

**A**s a lifelong Democrat, I look for opportunities to praise my party's congressional leaders for doing the right thing on corporate liability measures. On July 16, the House Ways and Means Committee unveiled an 800-page amendment to its health care bill. Tucked into that amendment was a 10-page provision some business leaders properly call a “trial lawyer earmark” because it would have provided the basis for speculative mass Medicare Secondary Payer (“MSP”) actions. These claims would completely redefine health care litigation in this country by allowing freelance lawyers, without any checks and balances from Medicare, to sue anyone they could accuse of causing Medicare to spend money on its beneficiaries.

Before the overall amendment came up for a vote in the wee hours of the next morning, a bipartisan coalition of members from Ways and Means secured the removal of the problematic provisions.

During the day, business groups representing a wide swath of industries responded quickly and decisively, explaining that even though the provision was innocuously labeled an “enforcement” provision, it would

have created significant new liability exposure for all product manufacturers, from makers of medical devices to food and beverages.

The leaders of both parties on the Committee should be applauded for taking the time to fully understand what was at stake here even though the provision would have benefited one of the Democrats' most important supporters, my friends in the organized plaintiffs' bar.

One of the reasons the business community was able to respond so effectively is that a similar effort was tried and aborted in 2007 before the Senate Finance Committee. A draft bill included a four-page provision that had many of the same elements as the amendment before Ways and Means. That provision was also mislabeled to sound innocuous, called a “clarifying amendment.” It was abandoned before being officially introduced.

This article provides an analysis of these MSP reform measures, explaining why they do not seek to enforce or clarify existing law, but would instead open the door to massive liability that is neither in the public's interest nor in the interests of the American health care system.

### **I. The Purpose of the MSP Act is Debt Collection, Not Creation of Liability**

The MSP Act<sup>1</sup> is an important debt collection tool that penalizes people who owe Medicare money, but have failed to pay their debts. Once it has been determined that someone owes an outstanding debt to Medicare, the MSP Act authorizes a cause of action against the debtor for twice the original debt. If the suit is successful, the person bringing the action gives Medicare a

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<sup>1</sup> 42 U.S.C. § 1395y.

sum equal to the amount of the original debt and keeps the other half as a finder's fee.

The MSP Act is essential to the smooth delivery of health care service to Medicare beneficiaries. When a Medicare beneficiary goes to a doctor, hospital or other covered provider, Medicare might pay a beneficiary's entire medical bill even though a patient's primary insurance plan is responsible for some or all of those costs. Medicare makes these payments, which are conditioned on being reimbursed by the beneficiary's primary plan, to help its beneficiaries receive the health care treatments they need in a timely fashion.

Similarly, Medicare might pay the costs of care for someone hurt in an automobile accident even where another party was clearly at fault. In exchange, Medicare is to be reimbursed from any settlement or litigation award the beneficiary receives as a result of the accident. As Federal courts have recognized, Medicare is not obligated to pay these bills; it picks up the initial tabs "to accommodate its beneficiaries."<sup>2</sup> The penalty provisions in the MSP Act help assure that Medicare gets paid back.

Thus, the MSP Act does not create liability, it provides an enforcement mechanism for existing liability.

## II. The Proposed Amendments to the MSP Statute Would Create New Liability in the Form of Massive Medicare Recoupment Suits

The changes to the MSP Act sought on July 16 (and first floated in 2007) would fundamentally change this paradigm. These reforms are not about enforcing current MSP law or clarifying the intent of Congress in creating the MSP Act.

Rather, they try to transform the MSP Act from a debt collecting tool to a vehicle for suing any individual or business that can be accused of causing the injuries to Medicare beneficiaries for which Medicare has paid or will pay.

The creative idea of using the MSP Act for such mass Medicare recoupment suits appears to have been born during tobacco litigation, where some lawyers have tried invoking the MSP Act to seek double recovery for all the monies Medicare spent on smoking-related ailments.

Regardless of one's view about tobacco liability, it was proper for these claims to fail. As Federal Judge Robert Holmes Bell in the Western District of Michigan explained, the lawsuits stood "the MSP statute on its head."<sup>3</sup> Judge Gladys Kessler, Chief Judge of the D.C. Circuit, echoed that conclusion, stating that "Congress did not intend the MSP to be used as an across-the-board procedural vehicle for suing tortfeasors."<sup>4</sup>

Similar efforts also have failed against manufacturers of medicines and medical devices for the respective costs of treating unavoidable side effects and device failures, even where the side effects were warned against or the failures were within the predicted range.

If these claims had succeeded, similar suits would have undoubtedly been filed against gun makers for

costs of treating gun violence, food and beverage companies for costs of treating obesity, and many other manufacturers whose products could somehow be tied to Medicare expenditures.

To overcome the court failures, the language stricken from the House Ways & Means health care bill would have made the following changes to existing MSP law:

- **Claims Not for Debt Collecting:** A pre-existing determination that the defendant actually owes any money to Medicare would no longer be needed. The legislation combined under one Federal cause of action both the liability phase (generally determined under state law) and the enforcement phase. Thus, a federal MSP action could be brought against anyone that *might* be responsible for costs associated with treatment of a Medicare beneficiary.
- **Recovery for Future Costs + a 30 Percent Finder's Fee:** In addition to the availability of double damages, a defendant's liability under these speculative MSP actions would be heightened to include funds Medicare already spent on a beneficiary's injuries, funds that might be spent in the future, and a bounty equal to 30% of the total recovery.
- **De Facto Class Actions:** The legislation would have authorized a single freelance lawyer to file an action for damages based on all items and services furnished to all Medicare beneficiaries. Thus, anyone, regardless of whether they were injured or were a Medicare beneficiary, could bring this newly created class-type action without any of the class action safeguards that Congress and courts have created to keep these lawsuits in check.
- **No Actual Causation:** In mass MSP actions, the lawyers would not have to prove that the defendant actually caused any of the individual beneficiaries' injuries. Rather, causation could be based solely on statistical and epidemiological studies.

To understand how these provisions would have fundamentally changed the purpose of MSP actions, consider a typical automobile accident or products liability claim by a Medicare beneficiary. Under current law, the MSP claim is "subrogated" to the claim of the injured beneficiary, meaning that the MSP action must come *after* a judgment in favor of the beneficiary and the failure of the responsible party to reimburse Medicare. "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."<sup>5</sup>

Further, without the pre-existing determination requirement and with the unambiguous ability of any freelance lawyer to file an MSP action, he or she gets to jump to the front of the line—equal to or ahead of the claim of the injured beneficiary. In fact, the race to the courthouse would be fierce as no other freelance lawyers could oust the first-to-file lawyer. This MSP action would be on top of any claims between the Medicare beneficiary and that defendant, and could be pursued even if the defendant is absolved of wrongfully injuring that beneficiary.

The end result is an ingenuous creation: independent standing for plaintiffs' lawyers and activists who file policy-oriented lawsuits so that neither would need cli-

<sup>2</sup> Cochran v. United States Health Care Fin. Admin., 291 F.3d 775, 777 (11th Cir. 2002).

<sup>3</sup> Graham v. Farm Bureau Ins. Co., No. 1:07-cv-241, slip op. at \*5 (W.D. Mich. Mar. 21, 2007).

<sup>4</sup> United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000).

<sup>5</sup> Glover v. Liggett Group, Inc., 459 F.3d 1304, 1309 (11th Cir. 2006).

ents to pursue their high dollar or agenda-driven claims. All they would have to do is look through Medicare's health-related expense reports and file a separate mass action against any company for all the monies that Medicare has or will spend on its beneficiaries' care as a result of that company's conduct or products.

The big money in health care litigation would be in these speculative mass Medicare recoupment actions, not representing individuals with actual injuries. In fact, it would not matter if consumers never filed their own claims or believed the products did not cause their harms.

### III. The MSP Changes Would Create Unsound Health Care and Liability Policy

From both health care and legal public policy perspectives, allowing random people to speculatively sue companies for any costs incurred by Medicare would have significant and adverse unintended consequences.

As the bipartisan coalition of lawmakers who struck the provision last week apparently recognized, these negative impacts are magnified by using the MSP Act. Because the MSP Act is a debt collection statute encouraging private lawyers to collect Medicare's debts, it does not have the normal checks and balances the American civil justice system uses to restrain speculative litigation.

Consider the following three problems with the stricken proposal:

First, freelance MSP lawyers would have no clients; neither Medicare nor the allegedly harmed beneficiaries would have any control or say about the MSP claims. The recent imprisonment of well-known plaintiffs' lawyer William Lerach is a reminder that litigation abuse often is more rampant the farther lawsuits get away from seeking justice for actual plaintiffs. Mr. Lerach once famously said, "I have the greatest practice of law in the world, I have no clients."<sup>6</sup>

As we have seen with class actions, the mere threat of massive liability can be used to force defendants to concede to a financial settlement, even where the claims have little or no merit. These suits also could be used to get companies to capitulate to policy changes, even when those policy changes advance the lawyer's personal agenda but not the public's interest. With courts only able to throw out claims unfounded in law, there would be no check to make sure that these suits would advance the right public and health care policies.

For example, Medicare may willingly pay for side effects or complications related to prescription medicines and medical devices. These products have inherent risks, which are an accepted part of the health care system.

Even where Medicare believes a drug or device represents a breakthrough in medical care, a "bounty hunting" lawyer could bring an MSP action to force the company to pay Medicare's costs and the finder's fee. The additional costs could force these important health care products off the market or price them out of the range of all but the wealthiest Americans.

In addition, Medicare would be forced to cooperate with the lawyers who bring these claims, by turning over various documents, even where Medicare disap-

proved of the action or the documents contained private medical records of the beneficiary.

Second, freelance lawyers would have greater rights for recovery than the injured beneficiaries themselves. Individual plaintiffs would have to prove that the product actually caused their injuries, which would include, for example, showing that they did not assume the risk of using the product, contribute to the harms alleged, or were harmed by a superseding cause.

The MSP lawyers would have had no such burdens. For them, causation and damages would be based solely on generalizations, statistics and other such studies. Therefore, it could be common for companies to be liable to the freelance MSP lawyers, but not for people's actual injuries.

State supreme courts in Missouri, New Jersey and Rhode Island recently rejected such generalized causation standards tried in government public nuisance claims.<sup>7</sup> As prominent tort scholar Dan B. Dobbs in *The Law of Torts*, has explained, "proximate cause limitations are fundamental and can apply in any kind of case in which damages must be proven."<sup>8</sup>

Third, liability would be imprudently distorted as defendants would have to pay more than the damages they allegedly caused. The proposed 2007 reforms would have applied the MSP penalty of double recovery to these speculative MSP actions. The House bill's potential amendments could have required defendants to pay more than double the harms alleged, providing bounty hunting lawyers with a thirty percent bounty plus expenses on top of full Medicare reimbursement.

In rejecting one such lawsuit, a federal circuit court explained the inherent unfairness in this approach: defendants could not avoid paying the bounty because "defendants would have no opportunity to reimburse Medicare *after* responsibility was established but before the penalty attached."<sup>9</sup>

There are other shortcomings of this legislation, many pointed out by judges in rejecting these claims. For example, prominent Federal Judge Jack Weinstein with the U.S. District Court for the Eastern District of New York, who has always been sensitive to plaintiff's rights, expressed his concern that these suits greatly expand federal jurisdiction over state tort actions, saying they 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."<sup>10</sup> The Eleventh Circuit expressed similar fears.<sup>11</sup>

<sup>7</sup> See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass'n Inc.*, 951 A.2d 428 (R.I. 2008)

<sup>8</sup> Dobbs, *supra* note 180, at 443 n.2; see also Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986) ("Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability.")

<sup>9</sup> *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1309 (11th Cir. 2006).

<sup>10</sup> *S.D.N.Y. Reject "Bounty" Suit Against Tobacco Companies to Recover Medicare Funds*, Andrews Health Care Fraud Litig. Rptr (Sept. 2002) (reporting on *Mason v. Am. Tobacco Co.*).

<sup>11</sup> *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, at 1309 (11th Cir. 2006) (citing *National Committee To Preserve Social Security and Medicare v. Philip Morris USA Inc.*, No. 1L08-cv-02021, (E.D. New York, March 05, 2009) (stating that plaintiffs' interpretation of the MSP would "drastically expand fed-

<sup>6</sup> *I Have No Clients*, Forbes, Oct. 11, 1993, available at 1993 WLNR 5164245.

Also, both last week's and the 2007 language would have applied the new liability retroactively.

#### **IV. Conclusion: Maintain the Current System of Subrogation**

Safeguarding Medicare funds should be a priority for this Congress, but the stricken provisions erode that purpose. Under current law, Medicare, as with all health insurers, can recoup costs spent on beneficiaries' wrongfully-caused injuries through subrogation. To im-

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eral court jurisdiction by creating a federal forum to litigate any state tort claim in which a business entity allegedly injured a Medicare beneficiary, without regard to diversity of citizenship or amount in controversy . . . without complying with class action requirements."

prove this process, Congress recently created new MSP notification requirements.

Fortunately, when the expansive MSP reforms were sprung in the House, cooler heads prevailed on a bipartisan basis. Those Members should be applauded for recognizing that opening up nearly every sector of the economy to unreasonable threats of Medicare liability would have significant adverse consequences.

If Congress were to create such a cause of action, it should be done in the light of an honest and open debate and considered in the proper context. Sneaking in a provision that would completely re-engineer the MSP Act to achieve this goal bypasses fundamental judicial principles and would harm the health care of Medicare recipients.