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# DOUBLE DAMAGES OR NOTHING: WHETHER MEDICARE ADVANTAGE ORGANIZATIONS HAVE A PRIVATE CAUSE OF ACTION UNDER THE MEDICARE SECONDARY PAYER ACT

JENNIFER A. PREVETE<sup>†</sup>

## INTRODUCTION

Mrs. Aidan is a sixty-seven-year-old woman who suffers from Type 2 diabetes.<sup>1</sup> She took the drug Avandia, manufactured and distributed by the company GlaxoSmithKline, L.L.C. (“GSK”), for a year before suffering a stroke related to its consumption. She amassed substantial medical costs during her hospitalization and treatment. Under the Medicare Secondary Payer Act (“MSP Act”), GSK is responsible as a primary payer to cover the cost of Mrs. Aidan’s medical treatment.<sup>2</sup>

Assume Mrs. Aidan is a Medicare enrollee. Under the MSP Act, if GSK fails to make its required payments for Mrs. Aidan, the government may cover her medical expenses by making a conditional payment.<sup>3</sup> As the term “conditional” connotes, Medicare pays with the stipulation that GSK, the responsible primary payer, will reimburse Medicare.<sup>4</sup> If GSK does not repay the government within sixty days of Medicare’s final demand, the MSP Act empowers the government to bring an action in federal court and to recover not only the conditional payment, but twice

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<sup>1</sup> The facts from this hypothetical are adapted, in part, from *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 355 (3d Cir. 2012).

<sup>2</sup> See 42 U.S.C.A. § 1395y(b)(2)(B)(ii) (West 2014).

<sup>3</sup> See *id.* § 1395y(b)(2)(B)(i).

<sup>4</sup> See *id.* § 1395y(b)(2)(B)(ii).

that amount.<sup>5</sup> Thus, if Medicare makes a \$50,000 conditional payment, the government may potentially recover \$100,000 from GSK. The government has this right regardless of whether there is a judgment against GSK or a settlement between GSK and Mrs. Aidan.<sup>6</sup>

In an effort to stem the rising costs of health insurance, the MSP Act conditioned the government's payments for Medicare enrollees upon repayment from private insurers.<sup>7</sup> The government's right of recovery is extensive; the Act allows the government to recover double the amount of damages calculated for the beneficiary.<sup>8</sup> Amendments expanded the right even further, permitting the government to recover from alleged tortfeasors, such as GSK in the hypothetical.<sup>9</sup> Imagine if the government's rights, described in Mrs. Aidan's case, were also available to Medicare Advantage Organizations ("MAOs"). Established under the Medicare Act, MAOs are private insurers that cover an additional thirteen million beneficiaries in the United States.<sup>10</sup> For every one of these thirteen million beneficiaries who suffers an injury requiring medical costs, the MAO would have the ability to sue primary payers—including product-producing corporations—for double damages.<sup>11</sup> The costs would severely affect corporations' willingness to settle with injured beneficiaries.

This Note proposes that the United States Court of Appeals for the Third Circuit's interpretation of the MSP Act, extending a private cause of action to private insurers, will have negative effects on mass tort litigation. The Medicare statute's text and

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<sup>5</sup> See *id.* § 1395y(b)(2)(B)(iii).

<sup>6</sup> See *id.* § 1395y(b)(2)(B)(ii) ("A primary plan's responsibility for such payment may be demonstrated 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 . . . included in a claim against the primary plan . . .").

<sup>7</sup> See *id.* § 1395y(b)(2)(B)(i).

<sup>8</sup> See *id.* § 1395y(b)(2)(B)(iii).

<sup>9</sup> See *id.* § 1395y(b)(2)(A)(ii), 1395y(b)(2)(B)(iii); see also *infra* Part I.C.2.

<sup>10</sup> Marsha Gold et al., *Medicare Advantage 2012 Data Spotlight: Enrollment Market Update*, KAISER FAM. FOUND. 1 (2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8323.pdf>.

<sup>11</sup> See § 1395y(b)(2)(B)(iii); Amaris Elliott-Engel, *Cert Denial in Subrogation Case Could Complicate Mass Torts*, LEGAL INTELLIGENCER, Apr. 16, 2013, <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202596050820>, available at <http://www.advance.lexis.com> (search "Cert Denial in Subrogation Case"; then scroll down and select "Legal News" hyperlink).

legislative history do not definitively answer who should benefit from the private cause of action. However, since the liable parties may be held responsible for payment even after settling with the plaintiffs, the potential of having to pay double damages will discourage such parties from settling. Ultimately, the insured parties will have less compensation for their injuries.

Part I of this Note outlines the history and purpose of the Medicare statute, Medicare Advantage, and the MSP Act. The MSP Act dictates that insured individuals pursue coverage from “primary plans” while Medicare makes conditional payments with the agreement that the primary plans will reimburse the costs.<sup>12</sup> Part II provides the MSP Act’s spectrum of interpretations and why the United States Circuit Courts of Appeals have read the private cause of action with varying expansiveness. Part III concludes that the private cause of action should not be extended to MAOs, asserting that the extension ultimately results in harm to the injured insured and inefficiency in mass tort litigation and settlement. Despite the worthy goal of reducing the cost of healthcare coverage, providing private insurers with a new federal remedy and entitlement to double damages is an undesirable and inefficient solution.

## I. HISTORY AND PURPOSE

### A. *History and Purpose of the Medicare Statute*

Medicare is a federally conducted and federally funded health insurance program available to individuals age sixty-five and over, individuals who are permanently disabled under the Social Security Act, and individuals with end-stage renal disease.<sup>13</sup> While the push for a government solution to healthcare began decades earlier, Medicare was born from the ideal of social insurance during President Franklin Delano

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<sup>12</sup> § 1395y(b)(2)(A).

<sup>13</sup> Woody R. Clermont, *A Brief Introduction to Medicare and the Office of Medicare Hearings and Appeals*, 5 PITT. J. ENVTL. PUB. HEALTH L. 103, 103 (2011) (citing 42 U.S.C.A. § 1395rr (West 2014); 42 C.F.R. § 441.40 (2015)).

Roosevelt's New Deal.<sup>14</sup> In 1965, President Johnson signed the Social Security Amendments creating Medicare.<sup>15</sup> The program focused on providing benefits for the elderly.<sup>16</sup>

The Medicare Act consists of several parts. Part A refers to the hospital insurance program, covering "inpatient hospital care, skilled-nursing facility care, hospice care and home health care."<sup>17</sup> Part B is the supplementary medical insurance program, which includes physician services,<sup>18</sup> outpatient rehabilitation and hospital diagnostic services, outpatient physical therapy, occupational therapy, and speech pathology, among others.<sup>19</sup> Part C refers to a beneficiary's choice of Medicare benefits through Medicare Advantage ("MA") plans.<sup>20</sup> Part D provides a voluntary prescription drug benefit program for enrollees in Part A, Part B, and MA.<sup>21</sup> Over time, the Act has been amended to accommodate growing costs and the need for coverage for prescription drugs.<sup>22</sup> The statute's complicated nature continues to pose problems of statutory interpretation and efficiency.<sup>23</sup>

### B. *The Creation of Medicare Advantage Organizations*

In 1997, Part C allowed for the creation of health plans covered by private insurers, shifting costs away from the government.<sup>24</sup> Originally known as Medicare+Choice, the program was renamed Medicare Advantage in 2003.<sup>25</sup> Under Part C, private insurers may establish "MAOs" that provide

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<sup>14</sup> Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*, 41 AKRON L. REV. 557, 565–66 (2008).

<sup>15</sup> Clermont, *supra* note 13, at 104.

<sup>16</sup> Swedloff, *supra* note 14, at 570.

<sup>17</sup> Clermont, *supra* note 13, at 109 (citing 42 U.S.C. § 1395d (2012)). Part A also provides some coverage for other areas, such as up to ninety days of hospital care per illness occurrence, skilled nursing-facility care, home health care services, and hospice care. *Id.* at 109–10 (citations omitted).

<sup>18</sup> *Id.* at 112.

<sup>19</sup> *Id.* at 111–12.

<sup>20</sup> *Id.* at 113.

<sup>21</sup> *Id.* at 114.

<sup>22</sup> Swedloff, *supra* note 14, at 570–71.

<sup>23</sup> See *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 365 (3d Cir. 2012) ("[T]he Medicare Act has been described as among 'the most completely impenetrable texts within human experience.'" (quoting Cooper Univ. Hosp. v. Sebelius, 636 F.3d 44, 45 (3d Cir. 2010)).

<sup>24</sup> Clermont, *supra* note 13, at 105.

<sup>25</sup> *Id.* at 113.

Medicare beneficiaries with an alternative method of coverage.<sup>26</sup> Beneficiaries enrolling in one of these programs will receive the same benefits under Parts A and B, but the MA alternative avoids placing additional costs upon Medicare.<sup>27</sup>

MA plans exist under a contract or policy arrangement and must comply with both state and federal requirements.<sup>28</sup> Medicare pays the MA plan per registered individual, but if healthcare costs exceed the annual funds, the MA plan bears the loss.<sup>29</sup> If the MA plan's overall cost of providing coverage to its members is less than the annual funds Medicare provides, the MA plan may keep those profits.<sup>30</sup> Although there are various types of MA organizations, all MA plans must provide enrollees with coverage that encompasses the services guaranteed under the original Medicare program.<sup>31</sup> As of March 2012, thirteen million beneficiaries were enrolled in MA plans, comprising twenty-seven percent of the Medicare population.<sup>32</sup> These figures present a ten percent increase from the preceding year.<sup>33</sup>

For the purposes of this Note, the most crucial difference between Medicare and Medicare Advantage emerges from the Medicare Secondary Payer Act. While each plan option allows for certain benefits and payment schemes for its respective enrollees, the MSP Act affects recovery and reimbursement in lawsuits.<sup>34</sup> Damages from a potential lawsuit may not be a primary concern for beneficiaries at the time of selecting enrollment; however, the various circuit courts' interpretations of the MSP Act raises questions for an injured insured's settlement abilities.

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<sup>26</sup> *Two Federal Courts Say MA Plans Can't Use MSP Act To Recover Proceeds*, COORDINATION BENEFITS HANDBOOK NEWSL. (Thompson Publ'g Grp., Inc.), Oct. 2011 [hereinafter *MA Plans Can't Use MSP Act To Recover Proceeds*].

<sup>27</sup> *Id.*

<sup>28</sup> Clermont, *supra* note 13, at 113.

<sup>29</sup> *MA Plans Can't Use MSP Act To Recover Proceeds*, *supra* note 26.

<sup>30</sup> *Id.*

<sup>31</sup> Clermont, *supra* note 13, at 113–14. MA plans do not have to provide hospice services but must offer a type of prescription drug plan available under Part D and may offer supplemental benefits. *Id.* at 114.

<sup>32</sup> Gold et al., *supra* note 10.

<sup>33</sup> *Id.*

<sup>34</sup> See Swedloff, *supra* note 14, at 560–61.

### C. *The Medicare Secondary Payer Act*

#### 1. Medicare as a Secondary Payer

Congress created the MSP Act as one potential solution to reduce some of Medicare's growing costs.<sup>35</sup> In 1980, the creation of the MSP Act shifted Medicare's liability for providing primary coverage to enrollees.<sup>36</sup> Before, Medicare served as the primary payer, or the payer of first resort, for injured enrollees.<sup>37</sup> Now, under the MSP Act, private sources of primary coverage—such as workers' compensation, automobile insurers, liability insurers, and no-fault insurers—cover a Medicare beneficiary's claims.<sup>38</sup> Thus Medicare, as a secondary payer, makes payments for the beneficiary conditioned on reimbursement from the liable third party's insurance provider.<sup>39</sup> Congress intended to reduce its Medicare expenditures by shifting the cost of its enrollees from the publicly funded Medicare program to these private payers.<sup>40</sup>

To be successful, the MSP Act requires a governmental method of enforcement. Consequently, after Medicare makes conditional payments, the Act empowers the government to bring a direct action against the primary payer or any person or entity that has received payments from the primary insurer.<sup>41</sup> Medicare's right of reimbursement is both immediate and expansive. A case's resolution encompasses settlement, judgment, or award; thus, any of these conclusions to a claim automatically triggers Medicare's right to reimbursement.<sup>42</sup>

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<sup>35</sup> Matthew Garretson, *Medicare Liens—The Basics of the Medicare Secondary Provider (MSP) Statute*, in *HANDLING MOTOR VEHICLE ACCIDENT CASES 2D § 6B:2* (John W. Chandler ed., 2015). Rising costs are attributable to the "volume of services" provided to enrollees as the services steadily increased in complexity and intensity from 1965 and onwards. Swedloff, *supra* note 14, at 572–73 (internal quotation marks omitted).

<sup>36</sup> Swedloff, *supra* note 14, at 574.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also 42 C.F.R. § 411.24 (2015).

<sup>39</sup> Garretson, *supra* note 35.

<sup>40</sup> Swedloff, *supra* note 14, at 575.

<sup>41</sup> Garretson, *supra* note 35. If there is a settlement, the government can seek recovery from the settling beneficiary, the attorneys that receive contingency payments from the settlement, and the settling defendant. Swedloff, *supra* note 14, at 586.

<sup>42</sup> 42 U.S.C.A. § 1395y(b)(2)(B)(ii) (West 2014) ("A primary plan's responsibility . . . may be demonstrated 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) . . ."); see also Adam Stirrup,

Furthermore, the statute permits the government to recover double the amount of damages from the primary insurer that fails to reimburse Medicare.<sup>43</sup>

## 2. Expansion of Primary Payers

The 2003 amendment to the MSP Act expanded the government's potential sources for revenue in an unprecedented fashion.<sup>44</sup> From the outset of the Act, the government could recover from those entities that are clearly within the insurance industry.<sup>45</sup> However, an ambiguity arose concerning the statute's term "primary plan."<sup>46</sup> Prior to 2003, the government engaged in a series of lawsuits to recover from alleged tortfeasors, such as large corporations, that had settled with Medicare beneficiaries.<sup>47</sup> The government asserted its theory that the defendants were "self-insured entities" under the MSP Act.<sup>48</sup>

In one of these lawsuits, *Mason v. American Tobacco Co.*,<sup>49</sup> Medicare recipients asserted a right to recover from defendant companies that manufactured products causing tobacco-related illnesses.<sup>50</sup> The plaintiffs argued that under the statute, "defendants should have been the primary payers for the health care services needed to treat certain tobacco-related illnesses of Medicare beneficiaries."<sup>51</sup> As an issue of statutory interpretation, the Second Circuit Court of Appeals reviewed whether the tobacco companies could be considered "self-insured," "primary" plans under 42 U.S.C. § 1395y(b)(2)(A) because, in corporate form, these companies carried their own risk and shifted liability to the corporations themselves.<sup>52</sup> The court rejected this

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*Understanding the Medicare Secondary Payer Act*, MONDAQ, <http://www.mondaq.com/unitedstates/x/162988/Healthcare+Food+Drugs+Law/Understanding+The+Medicare+Secondary+Payer+Act> (last updated Feb. 1, 2012).

<sup>43</sup> See Swedloff, *supra* note 14, at 578; 42 U.S.C.A. § 1395y(b)(2)(A), 1395y(b)(2)(B)(iii).

<sup>44</sup> Swedloff, *supra* note 14, at 579–80.

<sup>45</sup> *Id.* at 578.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., *Mason v. Am. Tobacco Co.*, 346 F.3d 36, 43 (2d Cir. 2003); *United States v. Phillip Morris Inc.*, 116 F. Supp. 2d 131, 145–46 (D.D.C. 2000); *Thompson v. Goetzmann*, 337 F.3d 489, 492 (5th Cir. 2003) (per curiam).

<sup>48</sup> Swedloff, *supra* note 14, at 580.

<sup>49</sup> 346 F.3d 36.

<sup>50</sup> *Id.* at 37–38.

<sup>51</sup> *Id.* at 38 (internal quotation mark omitted).

<sup>52</sup> *Id.* at 39–40 (internal quotation marks omitted); 42 U.S.C.A. § 1395y(b)(2)(A) (West 2014).



argument, claiming, "The obvious problem with this approach is that it turns *every* corporation into an insurance company subject to suit under the MSP statute."<sup>53</sup> Thus, the government failed in its attempts to pursue corporate tortfeasors as primary payers.<sup>54</sup>

In direct response to the government's failed litigation, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.<sup>55</sup> The Medicare Reform Act within the amendment overturned the courts' decisions and allowed Medicare to recover from alleged tortfeasors.<sup>56</sup> The amendment provides:

[T]he term "primary plan" means . . . a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a *self-insured plan*) or no fault insurance, to the extent that clause (ii) applies. *An entity that engages 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.*<sup>57</sup>

Thus, large corporations became considered "self-insured plans" and subject to primary payer responsibilities under the statute.<sup>58</sup> In a settlement of a tort action, when a beneficiary agrees to compromise, waive, or release any claims against the defendant tortfeasor, the defendant assumes responsibility for any conditional payments.<sup>59</sup> In mass tort cases, especially those involving product liability, the expanded definition of "self-insured plan" creates a host of new primary payers who may also be subject to the government's right to recover double damages.<sup>60</sup>

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<sup>53</sup> *Mason*, 346 F.3d at 40. The District Court for the District of Columbia also firmly rejected the government's position: "[I]t is clear that Congress did not intend MSP to be used as an across-the-board procedural vehicle for suing tortfeasors, which is precisely how the Government attempts to use the statute in this case." *United States v. Phillip Morris Inc.*, 116 F. Supp. 2d 131, 135.

<sup>54</sup> *See, e.g., Mason*, 346 F.3d at 43.

<sup>55</sup> Garretson, *supra* note 35.

<sup>56</sup> 42 U.S.C.A. § 1395y(b)(2)(A)(ii); Garretson, *supra* note 35.

<sup>57</sup> § 1395y(b)(2)(A)(ii) (emphasis added).

<sup>58</sup> Garretson, *supra* note 35.

<sup>59</sup> Swedloff, *supra* note 14, at 584 ("It is hard to imagine a settlement agreement that would not include such a waiver and release of claims."). The government may recover double damages from these primary payers when they fail to reimburse Medicare within sixty days, regardless of whether the defendant has already reimbursed the beneficiary. *See id.* at 585; 42 C.F.R. § 411.24(h) (2015).

<sup>60</sup> *See* 42 U.S.C.A § 1395y(b)(2)(B)(iii).

### 3. The Private Cause of Action Under 42 U.S.C. § 1395y(b)(3)(A)

In 1986, Congress added a “private cause of action” to assist recovery from insurers under the MSP Act.<sup>61</sup> The text provides: “There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) . . . .”<sup>62</sup> Cognizant of Congress’s concern with Medicare costs, some courts suggest that the private right of action allows the beneficiaries—who may be more aware than the government as to what entity is responsible as a primary payer—to use the threat of double damages to motivate a “recalcitrant insurer” to reimburse Medicare expenses.<sup>63</sup> Furthermore, an award of double damages allows the beneficiary to not only pay back the government, but also to retain a personal “reward . . . for his efforts.”<sup>64</sup> Accordingly, a beneficiary may exercise the same recovery rights as the government if the insurer fails to pay.<sup>65</sup> Thus, the private parties help enforce Medicare’s rights to recover from conditional payments by pursuing the money owed from the primary payers themselves.<sup>66</sup>

Because of the 2003 amendment, beneficiaries may pursue a cause of action under the MSP Act in addition to any state law tort claims.<sup>67</sup> Therefore, entities face twice the exposure for liability.<sup>68</sup> Under the MSP Act, the right to recover exists when a claim is resolved through settlement, judgment, or award,<sup>69</sup> meaning that alleged tortfeasors may be liable for double damages without ever going to trial.<sup>70</sup> Although beneficiaries

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<sup>61</sup> Richard Neuwirth & Kevin I. Goldberg, *The MSP Act’s Hidden Remedy*, TRIAL, Aug. 2009, at 38, 38.

<sup>62</sup> 42 U.S.C.A. § 1395y(b)(3)(A); *see id.* §§ 1395y(b)(1), 1395y(b)(2)(A) (referring to the provisions establishing Medicare as a secondary payer).

<sup>63</sup> *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 524–25 (8th Cir. 2007).

<sup>64</sup> *Id.* at 525.

<sup>65</sup> *Id.* at 523–25. The beneficiary may exercise this right whether the government has paid or not. *Id.* at 525.

<sup>66</sup> Neuwirth & Goldberg, *supra* note 61 (citing *Stalley*, 509 F.3d at 524–25).

<sup>67</sup> *Id.* at 39.

<sup>68</sup> *Id.* at 39–40.

<sup>69</sup> *See supra* Part I.C.1.

<sup>70</sup> Neuwirth & Goldberg, *supra* note 61, at 39–40. “The MSP creates a disincentive to settle because a defendant is automatically liable if it settles—that is, it has no defense to the Secretary’s claim for reimbursement . . . .” Swedloff, *supra*

may ultimately succeed in recovering from tortfeasors, defendants “must be concerned about the outcome of each of the individual cases in a mass tort, both in terms of actual precedent and creating a norm for settlement.”<sup>71</sup> If defendants know that they will be facing multiple claims, regardless of whether or not they settle, then they will be less likely to settle in hopes of being able to limit liability at trial.<sup>72</sup>

Recovery of Medicare payments from private insurers has expanded drastically. Today, liability extends to almost any public and private entity that negligently causes injuries incurring medical expenses.<sup>73</sup> Courts have accepted this recovery method for Medicare payments as applied to the government and Medicare beneficiaries. However, before 2012, no circuit accepted a further application to private insurer MAOs. With the United States Court of Appeals for the Third Circuit's decision in *In re Avandia Marketing, Sales Practices & Products Liability Litigation*,<sup>74</sup> courts and alleged tortfeasors face extensive and additional claims for double damages from both MAOs and their enrollees.

## II. THE CONFLICTING INTERPRETATIONS OF THE PRIVATE RIGHT OF ACTION, 42 U.S.C. § 1395Y(B)(3)(A)

### A. *The Narrowest View: Only Medicare May Bring Suit Against Tortfeasors*

Looking at the MSP Act's private cause of action in conjunction with the 2003 amendment, the Court of Appeals for the Sixth Circuit has concluded that only Medicare has a federal cause of action against tortfeasors.<sup>75</sup> In two particular cases,

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note 14, at 606. Similarly, alleged tortfeasors would have no defense to any parties exercising the private right of action under 42 U.S.C.A. § 1395y(b)(3)(A) (West 2014).

<sup>71</sup> Swedloff, *supra* note 14, at 597–98.

<sup>72</sup> *Id.* at 598. Judge Weinstein observed: “Settlement of mass tort litigations for personal injuries have [sic] become extraordinarily complex and difficult as a result of the attempts by the United States to collect on Medicare liens . . .” *Id.* (quoting *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 461 (E.D.N.Y. 2006)) (internal quotation mark omitted).

<sup>73</sup> Neuworth & Goldberg, *supra* note 61, at 40.

<sup>74</sup> 685 F.3d 353 (3d Cir. 2012).

<sup>75</sup> See *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 294 (6th Cir. 2011), *cert. dismissed*, 132 S. Ct. 1087 (2012); *Care Choices HMO v. Engstrom*, 330 F.3d 786, 791 (6th Cir. 2003).

*Care Choices HMO v. Engstrom*<sup>76</sup> and *Bio-Medical Applications of Tennessee v. Central States Southeast & Southwest Areas Health & Welfare Fund*,<sup>77</sup> the court looked to the legislative history surrounding the various provisions in question. While these cases did not involve suits by MAOs, the Sixth Circuit rejected a private party's right to sue putative tortfeasors for double damages.<sup>78</sup>

Prior to MA's creation, in *Care Choices HMO*, the Sixth Circuit addressed some of the issues surrounding the private cause of action. The plaintiff, Care Choices HMO, sued to recover medical expenses it had paid under the relevant statutory provision.<sup>79</sup> Prior to Medicare Part C, Medicare "Health Maintenance Organizations" ("HMOs") contracted with the Center for Medicare & Medicaid Service ("CMS") to provide Medicare services on a "risk" or "cost" basis.<sup>80</sup> Licensed by the CMS to provide replacement Medicare coverage, Care Choices claimed that its authorizing statute provided an implied private right of action; therefore, Care Choices could sue and recover health care expenses after the defendant's liability carrier paid a settlement award for a slip-and-fall incident in the defendant's supermarket.<sup>81</sup>

Care Choices looked to the HMO "right to charge provision," 42 U.S.C. § 1395mm(e)(4), which by its plain language establishes an HMO's right to reimbursement where a beneficiary is eligible for coverage under another insurance policy.<sup>82</sup> However, the court had to determine if the statute created an affirmative statutory right, enforceable in federal court.<sup>83</sup> The statute provides: "Notwithstanding any other provision of law, the eligible organization may . . . charge or

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<sup>76</sup> 330 F.3d at 789.

<sup>77</sup> 656 F.3d at 289–90.

<sup>78</sup> *Bio-Medical*, 656 F.3d at 292–93; *Care Choices HMO*, 330 F.3d at 790.

<sup>79</sup> 42 U.S.C.A. § 1395mm(e)(4) (West 2014); *Care Choices HMO*, 330 F.3d at 787–88.

<sup>80</sup> D. Gary Reed, *Medicare Advantage Preempts New York Anti-Subrogation Law, Three New Decisions Hold*, HEALTH LAW., Aug. 2013, at 20, 21 (2013).

<sup>81</sup> *Care Choices HMO*, 330 F.3d at 787–88.

<sup>82</sup> *Id.* at 789; see also Eileen Kuo, *Medicare Advantage as Secondary Payer: Efforts by MAOs To Seek Reimbursement Under the Medicare Secondary Payer Law—Private Cause of Action—Confusion Between the Old and the New with Medicare and Managed Care*, in HEALTH L. HANDBOOK § 12:5 (Alice G. Gosfield ed., 2013).

<sup>83</sup> *Id.*

authorize the provider of such services to charge” either the “insurance carrier, employer, or other entity” legally obligated to pay for the services or its member, if the member had already been reimbursed for the services.<sup>84</sup> In its analysis, the court looked to legislative history as well as comparisons with the MSP Act.<sup>85</sup>

The court contrasted this HMO “right to charge” provision with the mandatory language of the MSP Act, which conditioned Medicare payments on reimbursement from a primary payer.<sup>86</sup> Upon comparing the MSP Act’s language—“‘shall’ be conditioned”—with the permissive word “may” found in the HMO provision, the court held that HMOs did not have as extensive rights as Medicare.<sup>87</sup> The court reasoned that the MSP provision applied strictly to Medicare while Congress intentionally failed to provide an express remedy for HMOs in § 1395mm.<sup>88</sup> The court emphasized that § 1395y(b) governs Medicare as a secondary payer, not any other insurer providing substitute Medicare coverage.<sup>89</sup>

The court went beyond the text to distinguish the two statutes based on the MSP Act’s legislative history and policy. Specifically, there is a traditional, alternative method of recovery for Medicare-substitutes: contractual remedies in state court.<sup>90</sup> According to this interpretation, private insurers have the ability to include specific provisions within their policy plans.<sup>91</sup> If private insurers, including HMOs and other MA plans, desire subrogation rights and the ability to pursue reimbursements in court, then they should include such a provision within their insurance policies.<sup>92</sup> The court claimed that this remedy, “based on a standard insurance contract claim and not on any federal statutory right,” was a “widely recognized alternative avenue for

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<sup>84</sup> 42 U.S.C.A. § 1395mm(e)(4).

<sup>85</sup> *Care Choices HMO*, 330 F.3d at 789–90.

<sup>86</sup> *Id.* at 790; *see also* Kuo, *supra* note 82.

<sup>87</sup> *Care Choices HMO*, 330 F.3d at 790 (internal quotation marks omitted); *see also* 42 U.S.C.A. § 1395y(b)(2)(B)(i); *id.* § 1395mm(e)(4).

<sup>88</sup> *Care Choices HMO*, 330 F.3d at 790.

<sup>89</sup> *Id.* at 789–90 (noting that § 1395mm(e)(4) did not provide Medicare-substitute HMOs with “affirmative rights to reimbursement” while “Congress subsequently amended § 1395y to include an express right of recovery”).

<sup>90</sup> *See id.* at 790; Kuo, *supra* note 82.

<sup>91</sup> *Care Choices HMO*, 330 F.3d at 789; Reed, *supra* note 80, at 22.

<sup>92</sup> *Care Choices HMO*, 330 F.3d at 790; Reed, *supra* note 80, at 22.

enforcement.”<sup>93</sup> With this reasonable alternative for insurers to recover, the court saw no reason to infer that private insurers possessed a federal right to sue.<sup>94</sup>

In a later decision, the Sixth Circuit examined whether the 2003 amendment classifying putative tortfeasors as primary payers would also allow a private party to recover double damages from defendant tortfeasors under the MSP Act’s private cause of action.<sup>95</sup> In *Bio-Medical*, the plaintiff Bio-Medical, a specialized treatment center, provided kidney dialysis treatment to a patient for about one year.<sup>96</sup> The patient assigned her rights under her insurance plan from Central States to Bio-Medical.<sup>97</sup> Central States initially covered the costs of the insured patient’s treatment; however, the coverage ceased after the patient was diagnosed with end-stage renal disease.<sup>98</sup> Bio-Medical sought reimbursement under the MSP Act’s private cause of action, alleging that Central States—as a primary plan—failed to make payments after the patient’s diagnosis of end-stage renal disease, which made her eligible for Medicare benefits.<sup>99</sup>

Central States attempted to avoid liability under the 2003 amendment involving suits against tortfeasors under the private cause of action.<sup>100</sup> With the 2003 amendment, Congress also added the “demonstrated responsibility” provision, which provides that a primary plan shall reimburse Medicare “if it is

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<sup>93</sup> *Care Choices HMO*, 330 F.3d at 790.

<sup>94</sup> *Id.* Other courts have applied this holding to contemporary MAOs. In a New York case, the court found that MAOs did not have a “statutory right of reimbursement” but only “statutory permission” to include recovery provisions in their contracts.” See *Kuo*, *supra* note 82 (citing *Ferlazzo v. 18th Ave. Hardware, Inc.*, 33 Misc. 3d 421, 426, 929 N.Y.S.2d 690, 693–94 (Sup. Ct. Kings Cnty. 2011)).

<sup>95</sup> *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 279 (6th Cir. 2011), *cert. dismissed*, 132 S. Ct. 1087 (2012).

<sup>96</sup> *Id.* at 280.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* End-stage renal disease is one of the conditions leading to Medicare coverage. See *Clermont*, *supra* note 13; 42 U.S.C. § 426-1(a)(2) (2012), 42 U.S.C.A. § 1395rr(a) (West 2014). The patient’s insurance plan with Central States explicitly provided that coverage would cease upon entitlement to Medicare. *Bio-Medical*, 656 F.3d at 280.

<sup>99</sup> *Id.* at 285. By the time the patient died, Bio-Medical had an outstanding balance of approximately \$210,000 and had received an undisclosed amount from Medicare. *Id.* at 280.

<sup>100</sup> *Id.* at 290.

demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service.”<sup>101</sup> It further provides:

A primary plan’s responsibility for such payment may be demonstrated 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.<sup>102</sup>

Although Central States attempted to avoid liability under this provision, the court noted several issues raised by prior case law: (1) The demonstrated responsibility provision, several paragraphs away from the private cause of action provision, had been read to limit the private cause of action despite the lack of any cross-reference, and (2) the provision only explicitly addresses Medicare, not private parties.<sup>103</sup>

Based on context and congressional intent, the court found that the demonstrated responsibility provision limited only tortfeasor liability, not primary plan liability generally.<sup>104</sup> Furthermore, the provision referred solely to Medicare; thus, the court found that the demonstrated responsibility provision applied only to suits brought by Medicare.<sup>105</sup> Consequently, the demonstrated responsibility provision did not apply to Bio-Medical, a private party, against Central States, an entity that provided insurance coverage but was not a self-insured tortfeasor.<sup>106</sup> The court “believe[d] that when Congress amended the Act in 2003 to permit lawsuits against tortfeasors and to add the ‘demonstrated responsibility’ provision, Congress intended to permit lawsuits against tortfeasors only by *Medicare*, and not lawsuits against tortfeasors by *private parties*.”<sup>107</sup> Thus, if a private party attempted to bring suit against a putative tortfeasor, the case would be dismissed.

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<sup>101</sup> 42 U.S.C.A. § 1395y(b)(2)(B)(ii) (West 2014); see *Bio-Medical*, 656 F.3d at 290.

<sup>102</sup> § 1395y(b)(2)(B)(ii).

<sup>103</sup> *Bio-Medical*, 656 F.3d at 288 (discussing *Glover v. Liggett Grp., Inc.*, 459 F.3d 1304, 1308–09 (11th Cir. 2006)).

<sup>104</sup> *Id.* at 290.

<sup>105</sup> *Id.* at 292.

<sup>106</sup> *Id.* at 293.

<sup>107</sup> *Id.* at 292–93.

In *Bio-Medical*, the court deferred to the Act's structure, noting that Congress placed the "demonstrated responsibility" provision within a subparagraph governing the relationship between Medicare and primary plans.<sup>108</sup> Consequently, the reimbursement rights relating to tortfeasor liability did not apply to private parties.<sup>109</sup> Furthermore, the legislative history surrounding the 2003 amendment did not suggest that the right of action against tortfeasors was available to private parties.<sup>110</sup> First, the MSP Act's private cause of action does not require private parties to obtain a judgment before seeking reimbursement for Medicare's conditionally made payments.<sup>111</sup> Second, Congress enacted the 2003 amendment in direct response to the cases that denied the government's recovery against putative tortfeasors.<sup>112</sup> These cases did not involve such a large extension of recovery rights to private parties.<sup>113</sup>

Although *Care Choices HMO* and *Bio-Medical* did not involve suits brought by MAOs, the Sixth Circuit's statements regarding the private cause of action and the demonstrated responsibility provision have implications upon how Congress intended the MSP Act to be applied to Medicare compared to other parties. While the Sixth Circuit strictly construed the statutory text, the court also relied on the legislative history surrounding the MSP Act and the 2003 amendment.<sup>114</sup> When the court examined the textual, legislative, and policy factors working against extending the right to sue tortfeasors, it ultimately concluded that only Medicare had the right to bring suit.

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<sup>108</sup> *Id.* at 292 (internal quotation marks omitted).

<sup>109</sup> *Id.* at 290–92.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 292; see also *supra* Part I.C.1.

<sup>112</sup> See *Mason v. Sebelius*, Civ. No. 11-2370 (JBS/KMW), 2012 WL 1019131, at \*7, \*9 (D.N.J. Mar. 23, 2012); see also *supra* Part I.C.2.

<sup>113</sup> *Bio-Medical*, 656 F.3d at 292 (“[T]he predominant legislative backdrop was Medicare’s (not private parties’) failed attempts to bring lawsuits against tortfeasors.”).

<sup>114</sup> See *Care Choices HMO v. Engstrom*, 330 F.3d 786, 790–91 (6th Cir. 2003); *Bio-Medical*, 656 F.3d at 288–89.



B. *The Middle View: Medicare Beneficiaries May Sue Tortfeasors Under the MSP Act*

Within the last several years, various circuits have interpreted the MSP Act to provide a private right of action exclusively to Medicare enrollees. In these cases, the plaintiffs were not injured beneficiaries but third-party advocates, which implicates arguments about standing and statutory interpretation.<sup>115</sup> Although the private cause of action does not explicitly establish who may bring suit, the circuits did not find that the statute conferred an unlimited right to sue.<sup>116</sup> In 2007, the Court of Appeals for the First and Eighth Circuits held that only Medicare beneficiaries were entitled to invoke the private right of action under the MSP Act.<sup>117</sup> Both courts dismissed on the same grounds: The MSP Act's private right of action did not bestow any plaintiff with the right to sue solely on behalf of the government.<sup>118</sup>

In *United Seniors Ass'n v. Philip Morris USA*,<sup>119</sup> a nonprofit taxpayer advocacy group sued to force five tobacco companies to reimburse the Medicare program expenditures on medical treatment for beneficiaries with smoke-related illnesses.<sup>120</sup> The group asserted the right to bring suit under the 42 U.S.C. § 1395y(b)(3)(a) private cause of action.<sup>121</sup> However, the plaintiff advocacy group did not allege whether it was suing on behalf of any of its members or whether any of its members were Medicare beneficiaries treated for smoking-related illnesses.<sup>122</sup> The court found that United Seniors "suing in its capacity as a nonprofit taxpayer advocacy group to vindicate the fiscal integrity of the Medicare program"—rather than representing any particular Medicare beneficiary—"utterly fails to meet [the] standard" for Article III standing.<sup>123</sup> The plaintiffs insisted that the MSP Act private right of action was a *qui tam* statute.<sup>124</sup> Qui

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<sup>115</sup> See *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 22 (1st Cir. 2007); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 519 (8th Cir. 2007).

<sup>116</sup> *United Seniors Ass'n*, 500 F.3d at 25; *Stalley*, 509 F.3d at 522.

<sup>117</sup> *United Seniors Ass'n*, 500 F.3d at 23; *Stalley*, 509 F.3d at 519.

<sup>118</sup> *United Seniors Ass'n*, 500 F.3d at 26; *Stalley*, 509 F.3d at 527.

<sup>119</sup> 500 F.3d 19.

<sup>120</sup> *Id.* at 22.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 23.

<sup>124</sup> *Id.*

tam statutes allow private individuals to sue on behalf of the federal government in an effort to encourage private aid in discovering fraud and abuse.<sup>125</sup> However, the court looked at the statutory language and rejected this interpretation.<sup>126</sup> Thus, the MSP Act private cause of action was limited to Medicare beneficiaries for the purpose of helping the government recover its conditional payments.

The court noted that although the legislative history is ambiguous, Congress added the private right of action to reduce government spending.<sup>127</sup> An examination of the text and public policy convinced the court that this right to recover was limited to Medicare beneficiaries.<sup>128</sup> The First Circuit contrasted 42 U.S.C. § 1395y(b)(3)(A) with true qui tam statutes, such as the False Claims Act (“FCA”), 31 U.S.C. § 3729.<sup>129</sup> As a qui tam statute, the FCA explicitly authorizes that a “person may bring a civil action . . . for the person and for the United States” as opposed to the language of § 1395y(b)(3)(A), which merely establishes that a private cause of action exists.<sup>130</sup> Also, Congress enacted the causes of action in the FCA and MSP Act within the same month; thus, Congress intentionally phrased these two provisions differently and intended to limit the MSP action.<sup>131</sup>

The Eighth Circuit, like the First Circuit, concluded that the MSP Act provided a private right only for Medicare beneficiaries in association with recovering conditional Medicare payments.<sup>132</sup> As in *United Seniors*, the plaintiff in *Stalley v. Catholic Health Initiatives*<sup>133</sup> had no personal injury but asserted he had standing to bring suit under the MSP Act’s private right of action as a qui

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<sup>125</sup> *Id.* at 24.

<sup>126</sup> *Id.* at 25 (“[A]ssuming (as we do) that only Medicare beneficiaries can prosecute a private § 1395y(b)(3)(A) cause of action . . . their very power to sue coincidentally serves a pro-government purpose: that of discouraging primary insurers from failing to reimburse Medicare and preventing depletion of the Medicare trust fund.”).

<sup>127</sup> *Id.* at 21.

<sup>128</sup> *See id.* at 25; *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 522 (8th Cir. 2007).

<sup>129</sup> *United Seniors Ass’n*, 500 F.3d at 24.

<sup>130</sup> *Compare United Seniors Ass’n*, 500 F.3d at 24 (alteration in original) (quoting 31 U.S.C. § 3730(b) (2012)), with 42 U.S.C.A. § 1395y(b)(3)(A) (West 2014) (“There is established a private cause of action for damages . . .”).

<sup>131</sup> *United Seniors Ass’n*, 500 F.3d at 24.

<sup>132</sup> *Stalley*, 509 F.3d at 527.

<sup>133</sup> 509 F.3d 517.

tam statute.<sup>134</sup> Stalley alleged that defendants Catholic Health Initiatives and Triad Hospitals, Inc., who were partly self-insured for malpractice, caused harm to Medicare patients at their hospitals.<sup>135</sup> Similar to *United Seniors*, the court noted that Stalley neither claimed to be a Medicare beneficiary nor did he allege any personal injury from defendants.<sup>136</sup>

Relying on the statute's plain language, the court noted that "[t]here is established a *private cause of action* for damages" as opposed to a public right, which may be vindicated in qui tam actions.<sup>137</sup> Although the court acknowledged that the private right of action may share characteristics of a qui tam statute, it would not confer a qui tam right to sue based on Congress's intentions.<sup>138</sup> Faced with scant legislative history referring to the private right, the court looked to case law and found general agreement that the statute's purpose is to aid the government's recovery of conditional payments.<sup>139</sup> Logically, if Congress contemplated that Medicare beneficiaries would sue to recover double damages from primary payers, then beneficiaries and Medicare would be adequately compensated. Consequently, the statute should not be read to allow plaintiffs to sue in order to assert "the public's rights."<sup>140</sup> Similar to the First Circuit, the Eighth Circuit in *Stalley* also referenced the FCA, which contained procedural safeguards for the government to control the qui tam provision.<sup>141</sup> In contrast, the MSP Act had no such governmental controls, providing strong textual support and "powerful evidence that Congress did not mean § 1395y(b)(3)(A)

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<sup>134</sup> *Id.* at 520.

<sup>135</sup> *Id.* at 519–20. Stalley pursued the medical care providers as self-insured primary payer tortfeasors and their insurers as primary payers. *Id.*

<sup>136</sup> *Id.* at 520.

<sup>137</sup> *Id.* at 522 (quoting 42 U.S.C.A. § 1395y(b)(3)(A) (West 2014)) (internal quotation mark omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 524 (citing *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 21–22 (1st Cir. 2007); *Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 396–97 & n.8 (2d Cir. 2001); *Harris Corp. v. Humana Health Ins. Co. of Fla.*, 253 F.3d 598, 606 (11th Cir. 2001); *Frazer v. CNA Ins. Co.*, 374 F. Supp. 2d 1067, 1077 (N.D. Ala. 2005)).

<sup>140</sup> *Id.* at 527.

<sup>141</sup> *Id.* at 522.

to function as a *qui tam* statute.”<sup>142</sup> Therefore, the MSP Act private cause of action required private parties to assert their own injury.<sup>143</sup>

In *Stalley*, the court also explored the practical implications of allowing beneficiaries to sue under the private cause of action: (1) The beneficiary may have greater awareness than the government of the entities responsible for payment; (2) the beneficiary has the incentive of recovering double damages from the primary payer and payment exceeding original expenses; and (3) the beneficiary obtains sufficient recovery to reimburse the government.<sup>144</sup> Thus, when Medicare makes conditional payments, the private cause of action allows Medicare beneficiaries to recover double damages for themselves with the ability to repay the government.<sup>145</sup> Both the statutes and case law support the limitation on the private cause of action to Medicare. The courts engaged in extensive interpretation because the statutory text does not explicitly identify Medicare beneficiaries as private actors; it only establishes that a private cause of action exists under the Act.<sup>146</sup> Legislative history also fails to clarify who the private actor may be. Nonetheless, Congress enacted the private cause of action several years prior to the creation of MA programs.<sup>147</sup> Based on these implicit textual cues as well as policy, the limitations upon the private right of action garner substantial support.

Based on the courts’ limitation of the action, the MSP Act allows Medicare beneficiaries to sue to enforce Medicare’s rights.<sup>148</sup> If plaintiffs meet the standing requirements, then they may sue their primary plan providers to recover Medicare’s conditional payments.<sup>149</sup> With the specific purpose of reducing

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 524–25.

<sup>145</sup> *Id.* at 527.

<sup>146</sup> See 42 U.S.C.A. § 1395y(b)(3)(A) (West 2014).

<sup>147</sup> Congress enacted the MSP Act in 1980 and added the private cause of action in 1986. See *id.* § 1395y(b)(3)(A). Congress created the Medicare Advantage program, then known as the Medicare+Choice program in 1997. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 275-76 (1997).

<sup>148</sup> See *Stalley*, 509 F.3d at 522–23; *United Seniors Ass’n v. Philip Morris USA*, 500 F.3d 19, 25 (1st Cir. 2007).

<sup>149</sup> Tamela J. White, *The Medicare Secondary Payer Act and Section 111 of the Medicare, Medicaid, Schip Extension Act of 2007: Implications for Claim*

government spending, MSP claims are individualized and do not exist in “mass-tort scenarios.”<sup>150</sup> In the hands of a beneficiary, the double damages recovery is a powerful tool, essentially “requir[ing] a payer to settle the same medical expense claim three times.”<sup>151</sup> Consequently, specific beneficiaries do not bring a generalized grievance suit on behalf of a class of commonly injured Medicare beneficiaries.<sup>152</sup> The express purpose of the private cause of action is to allow Medicare beneficiaries to help the government recover conditional Medicare payments.<sup>153</sup>

C. *The Broadest View: The MSP Act Private Cause of Action Extends to MAOs*

While the circuits have debated how expansive the MSP Act’s private cause of action is regarding Medicare beneficiaries and putative tortfeasors, the courts have consistently examined the right in the context of Medicare’s conditional payments. However, in 2012 the Third Circuit became the first circuit to hold that the Medicare Secondary Payer Act places no limits on the private actor that can bring suit to recover double damages.<sup>154</sup> Consequently, MAOs, as secondary payers, may sue primary payers who fail to reimburse MAOs for conditional payments.<sup>155</sup>

The Third Circuit employed the broadest interpretation of the MSP Act after it consulted both the statutory text and CMS regulations.<sup>156</sup> In *In re Avandia Marketing, Sales Practices & Products Liability Litigation*,<sup>157</sup> the plaintiff Humana was an insurance company that ran a MA plan.<sup>158</sup> As a private insurance company created under Medicare Part C, Humana sued the defendant GlaxoSmithKline (“GSK”) to recover expenses

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*Management and Resolution for Liability Insurance Plans*, 77 DEF. COUNS. J. 180, 186 (2010).

<sup>150</sup> *Id.* at 186–87.

<sup>151</sup> *Id.* at 186.

<sup>152</sup> *Id.* at 186–87. Article III standing requirements must be met: “injury in fact, causal connection, and injury redress.” *Id.*

<sup>153</sup> *Id.* at 186.

<sup>154</sup> *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 365 (3d Cir. 2012).

<sup>155</sup> *Id.* at 367.

<sup>156</sup> *Id.* at 355.

<sup>157</sup> 685 F.3d 353.

<sup>158</sup> *Id.* at 355.

incurred for Humana's treatment of its insureds' injuries.<sup>159</sup> GSK manufactured and distributed the drug Avandia, which was used to treat Type 2 diabetes and had been linked to "substantially increased risk of heart attack and stroke."<sup>160</sup> As a MAO, Humana insured those enrollees who were injured by taking Avandia.<sup>161</sup>

The Third Circuit agreed with Humana's assertion that "the private cause of action . . . created by the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(3)(A), provides it and other MAOs with the right to bring suit."<sup>162</sup> The court noted that the provision establishing MAOs as secondary payers cross-referenced § 1395y(b)(2), which provides the definitions for primary payers and secondary payers with regard to the original Medicare program.<sup>163</sup> Based on these definitions, GSK qualified as a "self-insured plan" because it paid "out of its own pocket to settle the Avandia-related claims."<sup>164</sup> Thus, GSK was a primary payer and Humana was a secondary payer.<sup>165</sup> The MSP Act only provides the United States with a cause of action.<sup>166</sup> However, the court then looked to the MSP Act private cause of action to determine that MAOs also have a cause of action against primary payers.<sup>167</sup>

Remarkably, the Third Circuit looked at the same statutory text as its sister circuits and came to the opposite conclusion regarding the absence of an established plaintiff in the private cause of action under § 1395y(b)(3)(A).<sup>168</sup> According to the court, if Congress wanted to limit the private cause of action and make it unavailable to MAOs then it would have expressly done so,<sup>169</sup> as in other provisions of the Medicare Act in which the section applied only to "part A or part B of this subchapter" and not part

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 357.

<sup>163</sup> *Id.* at 358.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See 42 U.S.C.A. § 1395y(b)(2)(B)(iii) (West 2014) ("[T]he United States may bring an action against any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service (or any portion thereof) under a primary plan.").

<sup>167</sup> *In re Avandia*, 685 F.3d at 358–59.

<sup>168</sup> *Id.* at 359.

<sup>169</sup> *Id.* at 359–60.

C.<sup>170</sup> A plain reading of the statutory text—“[t]here is established a private cause of action”<sup>171</sup>—placed no limitation upon which private parties may bring suit.<sup>172</sup> Thus, the court found any private party, including MAOs, had a right to sue for reimbursement from a primary plan.<sup>173</sup> Although MAOs did not exist when Congress created the MSP Act, the court believed that since Congress was aware of the existence of other private Medicare providers, such as HMOs, Congress would have explicitly prevented them from suing under the private cause of action provision.<sup>174</sup>

The court believed that the statutory text clearly conferred MAOs with the right to recover under the MSP Act.<sup>175</sup> However, it also came to the same conclusion under the deference analysis articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>176</sup> The *Chevron* two-part test allows a federal court to determine whether or not it will defer to statutory interpretation found within a federal agency’s regulation when that agency is charged with implementing the statute in question.<sup>177</sup> According to the test, (1) if congressional intent is clear, the court must abide by that intent regardless of any regulations, and (2) if the statute is unclear, “that is, silent or ambiguous with respect to the specific issue,” then the court will determine if the agency’s answer through regulations is a permissible interpretation.<sup>178</sup>

Specifically, the court referred to CMS’s guidance on Medicare secondary payer procedures provided in the Code of Federal Regulations.<sup>179</sup> Within 42 C.F.R. § 422.108, states are prohibited from depriving MA organizations of the rights

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<sup>170</sup> *Id.* at 360 (quoting 42 U.S.C.A. § 1395y(a)).

<sup>171</sup> § 1395y(b)(3)(A).

<sup>172</sup> *In re Avandia*, 685 F.3d at 359.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 360. The court was referring to private insurers such as the HMO seen in *Care Choices HMO v. Engstrom*, 330 F.3d 786 (6th Cir. 2003). *See supra*, Part II.A.

<sup>175</sup> *In re Avandia*, 685 F.3d at 360.

<sup>176</sup> *Id.* at 365–66.

<sup>177</sup> *Id.* at 366 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* (*Chevron*), 467 U.S. 837, 842–43 (1984)).

<sup>178</sup> *Id.* (internal quotation mark omitted) (citing *Chevron*, 467 U.S. at 842–44). The court defers to this permissible regulation as long as it is not “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* (internal quotation mark omitted).

<sup>179</sup> *See id.*; 42 C.F.R. § 422.108 (2015).

available to them under “[f]ederal law and the MSP regulations to bill, or to authorize providers and suppliers to bill, for services for which Medicare is not the primary payer.”<sup>180</sup> It further provides: “The MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations in subparts B through D of part 411 of this chapter.”<sup>181</sup> Thus, the court saw the regulation as a direct interpretation of the MSP Act and deferred to congressional intent to treat MAOs in the same manner as Medicare under the MSP Act.<sup>182</sup>

The court also found that legislative history and policy supported its expansive interpretation of the private cause of action.<sup>183</sup> The court referred to Congress’s expressed goal of curbing the rising costs of Medicare and how Congress intended to accomplish this goal through enacting the Medicare Advantage program and the MSP Act.<sup>184</sup> MAOs’ ability to use the private market for innovation and cost reduction would be inhibited if they could not recover with the same persuasive means that Medicare employs, including the threat of double damages.<sup>185</sup> The Third Circuit followed a somewhat attenuated line of reasoning; when MA plans spend less and efficiently provide coverage to enrollees, the Medicare Trust Fund retains twenty-five percent of the savings.<sup>186</sup> Consequently, when MAOs recover from primary payers, they spend less on their enrollees and that results in cost savings to the Medicare Trust Fund.<sup>187</sup> The court conceded that “the legislative history is nowhere explicit that MAOs may bring suit for double damages under the MSP private cause of action or using any other provision.”<sup>188</sup> Regardless,

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<sup>180</sup> § 422.108(f).

<sup>181</sup> *Id.*

<sup>182</sup> *In re Avandia*, 685 F.3d at 366–67.

<sup>183</sup> *Id.* at 363.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 363–64.

<sup>186</sup> *Id.* at 365.

<sup>187</sup> *Id.*; see also Eileen Kuo, *Medicare Advantage as a Secondary Payer: Efforts by MAOs To Seek Reimbursement Under the Medicare Secondary Payer Law—Private Cause of Action—The Third Circuit Finds That MAOs Do Have a Private Cause of Action Against Primary Payers*, in 2013 HEALTH L. HANDBOOK § 12:7 (Alice G. Gosfield ed., 2013) (“In other words, when MAOs are able to reduce costs by avoiding payment or collecting reimbursement when MAOs are secondary to a primary payer, the resulting savings do return to the Medicare Trust Fund and result in reduced costs for Medicare.”).

<sup>188</sup> *In re Avandia*, 685 F.3d at 364.



Congress intended to reduce the healthcare burden on the government through the creation of MAOs as a competitive alternative, and to place MAOs at a “competitive disadvantage” undermines that goal.<sup>189</sup>

Those supporting an extension of the private right of action to MAOs are also concerned with the alleged alternative means for MAOs to recover conditional payments. Because of the complexity of the Medicare Act, there is some debate as to how Medicare Part C plans interact with the federal government and enrollees.<sup>190</sup> MAOs contract with the federal government to serve as a substitute for benefits provided under Medicare Parts A and B.<sup>191</sup> Therefore, MAOs must comply with the statutory guidelines and do not issue their own policies or insurance contracts.<sup>192</sup> As a result, these supporters argue that MAOs do not have the suggested alternative of writing in “subrogation” rights into their “insurance contracts.”<sup>193</sup> Instead, MAOs’ rights to recovery as secondary payers are purely statutory.<sup>194</sup>

This interpretation of the private cause of action hinges on the view that MAOs enjoy the same rights and privileges as the federal government. It also employs a liberal approach to the methods that will ensure the ultimate goal of reducing the government’s costs for healthcare. An expansion of recovery rights to MAOs does not have the textual and legislative support as the other interpretations of the private cause of action. The lack of substantial support and the policy implications of expanding recovery rights counsel against this broad interpretation.

### III. THE PRIVATE CAUSE OF ACTION UNDER § 1395Y(B)(3)(A) SHOULD NOT BE CONSTRUED TO ALLOW MAOS TO SUE AND RECOVER DOUBLE DAMAGES

Based on both the plain language of the MSP Act’s private cause of action in 42 U.S.C.A. § 1395y(b)(3)(A) and policy implications, courts should not expand the right to sue and

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<sup>189</sup> *Id.* at 363–64.

<sup>190</sup> *MA Plans Can’t Use MSP Act To Recover Proceeds*, *supra* note 26.

<sup>191</sup> *Id.*; Kuo, *supra* note 82.

<sup>192</sup> *See MA Plans Can’t Use MSP Act To Recover Proceeds*, *supra* note 26; Kuo, *supra* note 82.

<sup>193</sup> Kuo, *supra* note 82 (internal quotation marks omitted).

<sup>194</sup> *Id.*

recover double damages from primary payers when Congress did not extend this right. The Third Circuit in *In re Avandia* created a new and extremely lucrative federal cause of action where none previously existed.<sup>195</sup> Without sufficient support from the statutory text and legislative history, courts should refrain from allowing MAOs to assert these reimbursement rights until Congress provides clarification.

A. *Support from Case Law and Statutes for a Limitation on the Private Cause of Action*

Prior to the Third Circuit's decision in *In re Avandia*, no circuit had expanded a federal right to pursue conditional payments to MAOs. In fact, other circuits limited the private cause of action as applied to Medicare beneficiaries.<sup>196</sup> The courts gave various reasons to limit recovery under the MSP Act. Although the statutory text can be ambiguous and confusing, Congress never explicitly expanded the MSP Act to MAOs.<sup>197</sup> Furthermore, when all relevant sections refer explicitly to the government, courts should not read in an application to MAOs when legislative history also does not suggest such an application.

First, the text of the MSP Act establishes Medicare as a secondary payer, emphasizing the statute's purpose at its most basic level: cost-savings and reimbursement for the federal government.<sup>198</sup> Likewise, each following subparagraph identifies the federal government: providing the Secretary of CMS with the power to make a "conditional payment" under § 1395y(b)(2)(B)(i),<sup>199</sup> ensuring repayment to the Medicare "Trust Fund," and providing a cause of action for the United States to recover these payments and collect double damages.<sup>200</sup> Similarly, nothing within the provision establishing a private cause of

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<sup>195</sup> See Elliott-Engel, *supra* note 11.

<sup>196</sup> Compare *In re Avandia Mktg.*, Sales Practices & Prods. Liab. Litig., 685 F.3d 353, 367 (3d Cir. 2012) (allowing MAOs to sue putative tortfeasors to recover conditional payments), with *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 294 (6th Cir. 2011), *cert. dismissed*, 132 S. Ct. 1087 (2012) (concluding that only Medicare, and not Medicare beneficiaries could bring suit against putative tortfeasors under the MSP Act).

<sup>197</sup> *In re Avandia*, 685 F.3d at 360.

<sup>198</sup> 42 U.S.C.A. § 1395y(b)(2)(B)(i) (West 2014).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* § 1395y(b)(2)(B)(ii), (iii).

action provides any reference to reimbursement outside of Medicare.<sup>201</sup> Based upon textual analysis, courts have found that the private cause of action provides Medicare beneficiaries with the ability to sue and recover conditional payments, enforcing a pro-government scheme.<sup>202</sup>

Reliance on regulations to confer a right to MAOs, which Congress itself has not provided, is inappropriate. The Third Circuit cited a federal regulation, which provides: "The MA organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary exercises under the MSP regulations . . ." <sup>203</sup> However, federal regulations provide administrative guidance, and they cannot create a cause of action where none exists.<sup>204</sup> As written, the statute leaves far too much doubt as to whether Congress intended to extend these powerful rights of recovery to private insurers that pursue their own money and not money paid from the Medicare Trust Fund.

Legislative history and case law also support limiting the private cause of action. Congress established the MSP Act's private cause of action in 1986, before MAOs existed as a substitute form of health coverage, indicating that, at the time, Congress could have contemplated only the government's recovery of conditional payments.<sup>205</sup> Also, the First and Eighth Circuits have ruled that the private cause of action is not a *qui tam* statute conferring a public right to sue on behalf of the federal government.<sup>206</sup> Instead, the courts limited the right to those with standing and an established injury from the nonforthcoming payments, rather than opening mass tort litigation to unrelated plaintiffs.<sup>207</sup> The Sixth Circuit suggested a

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<sup>201</sup> See *id.* § 1395y(b)(3)(A).

<sup>202</sup> See, e.g., *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 25 (1st Cir. 2007).

<sup>203</sup> 42 C.F.R. § 422.108(f) (2015).

<sup>204</sup> See *Petition for Writ of Certiorari, In re Avandia Mktg., Sales Practices & Prods Liab. Litig.*, 685 F.3d 353 (3d Cir. 2012) (No. 12-690), 2012 WL 6054794, at \*35 (citing *Alexander v. Sandoval*, 532 U.S. 257, 291 (2001) ("[A] regulation may not 'conjure up a private cause of action that has not been authorized by Congress . . . .'")).

<sup>205</sup> *Neuworth & Goldberg*, *supra* note 61, at 38; see also *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 524–25 (8th Cir. 2007). MAOs were created in 1997. See *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 111 Stat. 251, 275–76 (1997).

<sup>206</sup> See generally *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19 (1st Cir. 2007); *Stalley*, 509 F.3d at 517.

<sup>207</sup> See generally *United Seniors Ass'n*, 500 F.3d at 19; *Stalley*, 509 F.3d at 517.

further limitation based on primary payer liability, specifically for putative tortfeasors.<sup>208</sup> The Sixth Circuit implied that the 2003 amendment, expanding “primary payer” to include putative tortfeasors, came with two limitations: only Medicare could pursue tortfeasors under the MSP Act and only if it met the demonstrated responsibility provision.<sup>209</sup> Notably, although there is conflict among the circuits as to the precise limitations placed upon the MSP Act private cause of action, the Third Circuit stands alone in its assertion that it extends to suits by MAOs.

*B. Support from Policy for Limiting the Private Cause of Action*

Despite any ambiguities in text or case law, public policy justifies limiting the private cause of action. The costs within mass tort litigation discourage the broadest interpretation of the private cause of action. Putative tortfeasors, liable as primary payers, face the threat of double damages.<sup>210</sup> That threat directly bears on these defendants’ willingness to settle with an injured insured. With little congressional intent to support the change, MAOs should resort to their traditional remedies in state courts.

In the context of complex mass tort litigation, expanding the private right of action provides a right to sue for double damages to hundreds of MAOs insuring thousands of people.<sup>211</sup> Under the MSP Act, these new plaintiffs have a federal tort remedy for personal injury actions, an area traditionally left to state courts.<sup>212</sup> The expanded interpretation of the private cause of action allows private insurers to enter federal courts in an unprecedented manner. The cause of action provides a potential windfall for private insurance companies because once an insurance company makes a conditional payment, it may proceed to recover this payment from a settling tortfeasor.<sup>213</sup> There is a strong incentive to pursue double damages against corporate defendants that fail to timely reimburse MAOs. Thus, the

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<sup>208</sup> See generally *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277 (6th Cir. 2011), *cert. dismissed*, 132 S. Ct. 1087 (2012).

<sup>209</sup> *Id.* at 292–93.

<sup>210</sup> See 42 U.S.C.A. § 1395y(b)(2)(B)(iii) (West 2014).

<sup>211</sup> Elliott-Engel, *supra* note 11.

<sup>212</sup> *Id.*; see *Care Choices HMO v. Engstrom*, 330 F.3d 786, 791 n.7 (6th Cir. 2003).

<sup>213</sup> Elliott-Engel, *supra* note 11.

private cause of action no longer promotes efficiency and government cost reduction; instead, it provides a method for private insurers to recover. This interpretation does not serve the original purpose of the MSP Act.<sup>214</sup>

In mass tort litigation, defendants must consider how settlement will affect the outcome of later litigation, and the MSP Act leads to even greater consequences. Generally, settling a case for a large amount of money can create a norm for later plaintiffs who pursue the same defendant.<sup>215</sup> Under the MSP Act, any large settlements may become the basis for a MAO's right to recover in the future.<sup>216</sup> Under the MSP Act, defendants who settle with beneficiaries are automatically liable as primary plans.<sup>217</sup> Suddenly, defendants are facing the possibility of lawsuits from not only Medicare and Medicare beneficiaries but also MAOs and their beneficiaries. These defendants must focus on the future costs of settlement and the current exposure to both governmental and private insurance entities that may potentially pursue double damages.

Compounding the complications of expanded liability, settling tortfeasors face practical issues in their efforts to reimburse MAOs' conditional payments. In comparison to the data CMS provides on Medicare, the information pairing MAOs with their claimants is not readily available.<sup>218</sup> Under the MSP Act, there is a sixty-day period for a primary plan to reimburse the conditional payer before the government may pursue the primary plan.<sup>219</sup> Putative tortfeasors have no independent source matching MA enrollees with their private insurers.<sup>220</sup> Thus, the settling defendant has limited ability to ensure timely reimbursement for a potentially unrevealed lien and risks exposure to double damages with every settlement.<sup>221</sup>

Without Congress's clarification, extending the private cause of action to MAOs creates a host of issues in exchange for few benefits. Although the court in *In re Avandia* indicated the

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<sup>214</sup> See *supra* note 139 and accompanying text.

<sup>215</sup> Swedloff, *supra* note 14, at 597–98.

<sup>216</sup> See *id.* at 598 (discussing the problems of the MSP Act within the context of Medicare).

<sup>217</sup> *Id.* at 606.

<sup>218</sup> Petition for Writ of Certiorari, *supra* note 204, at \*28–29.

<sup>219</sup> 42 U.S.C.A. § 1395y(b)(2)(B)(ii) (West 2014).

<sup>220</sup> Petition for Writ of Certiorari, *supra* note 204, at \*28–29.

<sup>221</sup> *Id.* at \*28–29.

eventual savings to Medicare that occur when MAOs recover their conditional payments efficiently,<sup>222</sup> this minimal advantage does not outweigh the risks of expansion. If Congress seeks to provide MAOs with a private right of action, it would be beneficial to also provide limitations. Additionally, Congress should consider devising a method or database for defendants to match enrollees with their MAOs, preventing late reimbursement due to unknown liens. The double damages recovery is a powerful tool, perhaps best used by the government alone. Therefore, under the current state of the MSP Act, the private cause of action should not apply to MAOs.

### CONCLUSION

The MSP Act private cause of action should be construed narrowly to exclude MAOs' right to sue putative tortfeasors for recovery of conditional payments. Congress enacted the MSP Act and the private cause of action with one ultimate goal: help the government recover conditional payments made on behalf of Medicare enrollees. Allowing private insurer MAOs to assert the same rights as the government subverts the purpose of the statute, providing recovery to private insurers and not the government. By finding a cause of action where Congress did not explicitly provide one, the Third Circuit decision has left parties with a looming threat to settlements in mass tort litigation. As defendants face extensive and costly liability, the injured insured parties are ultimately left with less compensation while the government derives little of the statute's intended benefits. In the interest of preventing inefficiency in federal litigation, the private cause of action should not be extended to MAOs.

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<sup>222</sup> *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 685 F.3d 353, 365 (3d Cir. 2012).