No. 05-14219

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GENEVA GLOVER ET AL.,

Plaintiffs – Appellants,

v.

PHILIP MORRIS USA AND LIGGETT GROUP, INC.,

Defendants – Appellees.

ON APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANTS–APPELLEES AND URGING AFFIRMANCE

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No. 05-14219
Glover v. Philip Morris USA

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1-1, in addition to the parties and entities identified in the Certificates of Interested Persons and Corporate Disclosure Statements of the Plaintiffs-Appellants and Defendants-Appellees, which are hereby incorporated by reference into this Certificate, the Chamber of Commerce of the United States of America submits that the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae:

Chamber of Commerce of the United States of America

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Dated: November 9, 2005

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly files *amicus* briefs in federal and state courts throughout the country in cases raising issues of national concern.

This is such a case. Plaintiffs in this case are seeking to recover billions of dollars based on a far-reaching and countertextual interpretation of the Medicare as Secondary Payer statute (the "MSP"), 42 U.S.C. § 1395y(b), that no court has ever accepted. If this Court were to reverse the district court's well-reasoned decision dismissing the complaint, the impact would extend far beyond the tobacco industry to every business that is or might be the subject of a tort claim involving medical expenses. Indeed, if the plaintiffs' sweeping interpretation of the MSP were accepted, practically every business in the United States would be subject to unwarranted double liability in federal court in an enormous range of cases based purely on the fact that some alleged victim – and not necessarily even the MSP plaintiff herself – happened to be a Medicare beneficiary. Accordingly, the

Chamber's members have a very substantial interest in the proper resolution of the significant issue raised by this appeal.

All parties to this action have consented to the filing of this *amicus* brief.

STATEMENT OF THE ISSUE

The MSP, 42 U.S.C. § 1395y(b), authorizes a private cause of action to recover double damages when an insurance company or self-insured entity has failed to reimburse Medicare for health care costs for which that insurer or entity is legally responsible. The issue presented by this appeal is whether a private MSP action may be used to subject an entity that has *not* been shown to be legally responsible for the plaintiff's (or other Medicare beneficiaries') health care costs, but against whom the plaintiff (or other Medicare beneficiaries) has an unadjudicated tort claim, to a federal lawsuit for double damages.

STATEMENT OF FACTS

The plaintiffs in this lawsuit are two individuals who reside in Florida and are Medicare beneficiaries. They originally filed this action against all of the major American cigarette manufacturers, but later voluntarily dismissed their claims against all but two defendants: Philip Morris USA and Liggett Group, Inc. (*See* Defs.' Br. 15 n.5.) Plaintiffs also originally sought to advance claims as representatives of a putative statewide class of smokers, but they subsequently dropped their class action

allegations and proceeded exclusively as "private attorneys general" under the MSP. (*Id.*) In essence, plaintiffs claimed that the defendants committed a common law battery against Florida smokers by exposing them to nicotine while concealing its addictive properties, that the defendants were therefore obligated to pay for the smokers' health care costs, and that, because Medicare had paid some of these costs, the defendants were liable for twice the amount Medicare had paid. Relying on this theory, plaintiffs sought to recover double the total amount of Medicare's expenditures in Florida after May 26, 1998, for the treatment of diseases attributable to cigarette smoking – expenditures made on behalf of tens of thousands, perhaps millions, of Florida residents, and potentially totaling billions of dollars. On July 26, 2005, the U.S. District Court for the Middle District of Florida granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

In broad outline, the MSP provides that Medicare shall not pay for health care costs for which another payer – the "primary plan" – is responsible. 42 U.S.C. § 1395y(b)(2)(A). The exception to this rule is when a primary plan "has not made or cannot reasonably be expected to make payment . . . promptly," in which case Medicare may pay, subject to a right to reimbursement from the primary plan. *Id.* § 1395y(b)(2)(B).[1]

The statute establishes a private cause of action against "a primary plan which fails to provide for primary payment (or appropriate reimbursement)" in accordance with the substantive provisions of the statute. 42 U.S.C. § 1395y(b)(3)(A). Those provisions, in turn, state that a primary plan has a duty to reimburse Medicare "for any payment made by" Medicare "with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service." *Id.* § 1395y(b)(2)(B)(ii). The statute also provides that "[a] primary plan's responsibility for [primary] payment may be demonstrated by a *judgment*, a *payment conditioned upon the recipient's compromise, waiver, or*

[1] The statute is named "Medicare as Secondary Payer" not because Medicare pays second – indeed, the statute contemplates that it may well pay first – but because the statute makes Medicare's responsibility for coverage secondary to that of the "primary" plan. *See* 42 C.F.R. § 411.21 (2005).

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*." *Id*. (emphasis added).

As defendants persuasively demonstrate (Defs.' Br. 21-28), and as the district court correctly recognized (Order 18-24), the language of the statute provides no support for plaintiffs' novel interpretation. In particular, Section 1395y(b)(2)(B)(ii)'s delineation of the "means by which a primary plan's responsibility to pay may be demonstrated" – through a judgment, or through a payment conditioned on compromise, waiver, or release – targets situations where "the obligation of the primary plan to make the payment *has already been established*." (Order 23 (emphasis added).) Under the "the established interpretative canons of *noscitur a sociis* and *ejusdem generis*," *Wash. State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 1025 (2003), the residual phrase "by other means" *must* refer to the same class of objects referred to in the preceding examples – in other words, to *other instances* "where there is a previously established requirement or agreement to pay for medical services for which Medicare is entitled to be reimbursed." (Order 23.) *See Guardianship Estate of Keffeler*, 537 U.S. at 384, 123 S. Ct. at 1025 (2003) ("where general words follow specific words in a statutory enumeration, the general words are construed to embrace

only objects similar to those objects enumerated by the preceding specific words" (internal quotation marks and citation omitted)); *Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S. Ct. 740, 744 (2000) ("[W]ords . . . are known by their companions"). Otherwise, the phrase "by other means" would be so broad as to swallow up and render utterly superfluous the preceding examples that are specified.

Plaintiffs and their *amicus*, Senator Grassley, attack this rationale by suggesting that these canons of statutory construction are largely optional (Pls.' Br. 36), are essentially indeterminate because they "can yield various results" (*Amicus* Br. 10), and represent "outside help" that is somehow separate and distinct from the "text and structure of the statute itself" (*id*.). More generally, plaintiffs and Senator Grassley attack the district court's detailed and careful textual and structural analysis of the MSP as "warped," "cramped," and "radical," a "gross misreading of the statute" that "mangle[d] Congress's design and usurped the legislative function." (Pls.' Br. 17, 19; *Amicus* Br. 8, 15.) Once this rhetoric is set to one side, however, it is clear that plaintiffs and their *amicus* are wrong not only about the propriety of the district court's reliance on well-settled principles of statutory construction, but also about the balance of the district court's careful textual and structural analysis.

We do not intend here to repeat the persuasive analysis of the MSP's text and structure contained in the defendants' brief or in the lower court's well-reasoned

opinion. Instead, the Chamber submits this brief to supplement that analysis by making four points. First, the implementing agency regulations, when read together with the MSP's text, confirm the correctness of the district court's view that there can be no double damages liability for failing to make payment under the MSP if there has been no prior determination that the defendant is responsible for those payments.

Second, plaintiffs are wrong in suggesting that the implausible interpretation of the MSP they urge is supported by policy grounds. Although plaintiffs say that the result they favor furthers the policy underlying the MSP (because, they say, the more the federal government recovers, the better), they simply ignore the disjunction between their rendition of the statute and the usual policy grounds underlying the imposition of double damages by Congress. The usual rationale for double damages is to compensate the *government* for the full consequences of a wrong done to *it*. But a defendant that has not had any established legal responsibility for a plaintiff's injuries cannot possibly have wronged the government in not reimbursing it for covering those injuries.

Third, plaintiffs' unprecedented interpretation and use of the MSP statute would authorize federal litigation against an enormous number of new defendants by an equally large number of potential plaintiffs. If the plaintiffs are correct about the private cause of action under the MSP, then every time an injured party believes that

a commercial defendant is liable to it in tort, the injured party can use the fact of a Medicare payment to threaten that defendant with double damages despite the total absence of any prior dealings between the defendant and the plaintiff. With well over 41 million Medicare beneficiaries in the United States and practically every commercial entity arguably qualifying as a "primary plan" under the statute, there would no meaningful limits on the number and extent of such potential lawsuits. It is no exaggeration to say that the economic impact on American business would be enormous. Congress would not have brought about such a radical change in the law without making its intent clear in the statute's text, legislative history, or both.

Fourth, and relatedly, plaintiffs' sweeping interpretation would have far-reaching, negative implications for federal-state relations and the workload of the federal courts. The plaintiffs' regime would dramatically reshape the federal-state balance by encouraging a massive migration of tort claims from state into federal court. The effect on the federal docket would be tremendous – not just because of the sheer number of claims likely to be filed, but also because modern tort cases involving effects on health tend to be complicated and time-consuming. Had Congress intended such a result, it would have made a clear statement in the statute. This it did not do. For all of these reasons (and those set forth in the defendants' brief), this Court should uphold the dismissal of plaintiffs' MSP lawsuit.

ARGUMENT

I. The Implementing Regulations Confirm What The Statutory Text Says – A Private Lawsuit Under The MSP For Double Damages May Not Be Initiated Without A Prior Demonstration Of A Payment Obligation

As defendants persuasively show, plaintiffs' construction of the statute would make a key part of the statute utterly redundant. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574, 115 S. Ct. 1061, 1069 (1995) ("the Court will avoid a reading [of a statute] which renders some words altogether redundant."). The key sentence in Section 1395y(b)(2)(B)(ii) lists ways of demonstrating responsibility for payment. If "by other means" really can mean, as the plaintiffs would have it, "by a finding of liability *in* the lawsuit initiated to collect double damages for non-payment," as opposed to "by some kind of definitive demonstration *before* the initiation of that suit," then no purpose would be served by the language providing that responsibility for payment "may be demonstrated by a judgment [or] [settlement] payment . . . ."

By the same token, the district court's holding finds strong support in "the established interpretative canons of *noscitur a sociis* and *ejusdem generis*," *Wash. State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 1025 (2003). Echoing the criticism of a minority of legal academics, plaintiffs and Senator Grassley suggest that these principles of statutory

interpretation are either indeterminate or largely optional (Pls.' Br. 36; *Amicus* Br. 10), but in fact they are neither. As Justice Scalia has explained:

> Another frequently used canon is *noscitur a sociis*, which means, literally, "it is known by its companions." It stands for the principle that a word is given meaning by those around it. If you tell me, "I took the boat out on the bay," I understand "bay" to mean one thing; if you tell me, "I put the saddle on the bay," I understand it to mean something else. Another canon – perhaps representing only a more specific application of the last one – is *ejusdem generis*, which means "of the same sort." It stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using "tacks, staples, screws, nails, rivets, and other things," the general term "other things" surely refers to other fasteners.
>
> All of this is so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them.

ANTONIN SCALIA, A MATTER OF INTERPRETATION 25-26 (1997); *see also id*. at 26-27 (explaining why academic criticisms of use of canons are misplaced). Contrary to the plaintiffs' and Senator Grassley's suggestion, the Supreme Court takes these canons quite seriously and regularly applies them to the task of interpreting statutes. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2379 (2004) (per Scalia, J.); *Guardianship Estate of Keffeler*, 537 U.S. at 384, 123 S. Ct. at 1025 (per Souter, J.). Nor is Senator Grassley correct in suggesting (*see Amicus* Br. 10) that the canons of construction are entirely extrinsic to the statutory text and structure. On the contrary, they assist the courts in discerning the intended meaning

of statutory text precisely because they are based on the ordinary ways the English language is used by native speakers. See WILLIAM ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION 818, 822 (3d ed. 2001) (noting that *noscitur a sociis* and *ejusdem generis* are "textual canons" or "intrinsic aids" to interpretation, because "they assist the statutory interpreter in deriving probable meaning from the four corners of the statutory text"); *id.* at 823 (noting that the "purpose" of *ejusdem generis* "is to give effect to all the words" in the statute).

That plaintiffs' reading would render some of the words of the statute superfluous or inoperative is true not simply by virtue of the canons of construction that govern statutory interpretation. It is equally true as a matter of practical realities, at least under plaintiffs' own construction of the MSP. According to plaintiffs, the critical sentence in Section 1395y(b)(2)(B)(ii) allows an MSP plaintiff to demonstrate the defendant's responsibility for covering the plaintiff's injuries for the first time in the MSP lawsuit itself. But if that were true, why would Congress have bothered to specify several ways of demonstrating that responsibility? Surely, if the plaintiffs' position is accepted, they would have the opportunity during their MSP lawsuit to demonstrate the reimbursement obligation using *any* piece of admissible evidence and any legal theory they choose. And if that is so, then there was no need for Congress to specify that an MSP plaintiff could rely on a particular type of evidence – such as

a judgment or a settlement – as a basis for establishing the defendant's responsibility. Thus, the key sentence in the statute makes sense only if it is understood as providing that the obligation to reimburse or make primary payment – the failure to fulfill which gives rise to liability for double damages – is not complete until there has been a prior demonstration of responsibility along the lines of, although not limited to, a judgment or settlement.[2]

This interpretation is strongly confirmed by the agency regulations implementing the statute, which authorize the United States to sue for reimbursement and to collect double damages in the event of a failure to provide primary payment. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii). "[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 n.11 (11th Cir. 2001).

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[2] The plaintiffs wonder "what beyond the specific examples in the [statute] – a judgment or a voluntary agreement – could be another, *similar* means to have a previously established requirement to pay? There are none." Pls.' Br. 41. The plaintiffs are mistaken. For one thing, the statute demands only the prior demonstration of a "responsibility" to pay, not a "requirement." But more importantly, plaintiffs overlook the possibility that "by other means" could refer to determinations of responsibility by an arbitrator or administrative agency. *See* Defs.' Br. 28. Although there is no need for this Court to reach the issue, "by other means" might also include evidence that definitively establishes responsibility, including, for example, a sworn affidavit or statement of a tortfeasor recounting the underlying events giving rise to the injury, unequivocally acknowledging the tortfeasor's fault, and promising future compensation.

The relevant regulations establish a procedure that is highly instructive. The Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") "may *initiate recovery* as soon as it learns that payment has been made or could be made under workers' compensation, any liability or no-fault insurance, or an employer group health plan." 42 C.F.R. § 411.24(b) (2005) (emphasis added). Next, "[i]f it is not necessary . . . to *take legal action* to recover," then CMS collects simply the amount of the Medicare payment (or the full amount of the primary payer's obligation, if it is less). *Id*. § 411.24(c)(1) (emphasis added). On the other hand, "[i]f it *is* necessary for CMS to take legal action to recover from the primary payer," CMS is entitled to twice the amount of its payment, regardless of whether the primary payer's obligation is in fact less. *Id*. § 411.24(c)(2) (emphasis added).

The crucial feature of this procedure is the distinction between initiating recovery and taking legal action. Initiating recovery must mean taking some kind of meaningful measures *short of* filing suit – for example, sending an invoice or a written demand for reimbursement. The government may file a claim for double damages only *after* the initial recovery measures fail, thus making legal action "necessary." That is, in order for the government to collect double damages, there

must have been a demand or other notice by the government and a refusal to pay on the part of the "primary plan."

Moreover, the regime specifies when the government can make its initial, pre-litigation demand: after "it learns that payment has been made or could be made under . . . any liability or no-fault insurance, or an employer group health plan." This provision must be read against the statute, which of course tells us that "a primary plan's responsibility for such payment may be demonstrated by a judgment, a payment . . . , or by other means." 42 U.S.C. § 1395y(b)(2)(B)(ii). In other words, when the government receives information – whether through a judgment, a payment, or "other means" – that the insurance plan is responsible for payment, the government initiates recovery, and then, if that fails, initiates a double damages suit.

These agency regulations strongly confirm the correctness of the lower court's interpretation of the MSP. If the plaintiffs' reading of "by other means" were accepted, the result would be a logical absurdity, because the demonstration of responsibility would be only a potential outcome of the suit and therefore could not possibly serve, as the statute and regulations require, as a precondition to filing that suit. Put differently, the government cannot know that it is owed payment before a finding of liability in a suit brought to demonstrate that it is owed payment. To avoid this problem, the statute is properly understood to mean that the government cannot

claim double damages for non-payment before the liability determination has been made.[3] The agency's regulations and procedures reflect this understanding of the MSP.

And if all of this is true for government-initiated actions, then it must be true for the private cause of action as well. The private cause of action cannot be broader than the government-initiated suit for which it is effectively a substitute. Therefore, for a private MSP action just as for a government-initiated suit, the demonstration of responsibility that is a precondition to liability for double damages must occur prior to, not in, the very lawsuit in which those damages are sought.

II. As Interpreted By The Plaintiffs, The MSP Would Unfairly Penalize Businesses Because The Policy Reasons For Double Damages Awards Do Not Apply Where There Has Been No Prior Demonstration Of Responsibility For Payment Under The MSP

Unable to find support for its novel interpretation in the text and structure of the MSP, the plaintiffs fall back on the argument that reading the statute broadly furthers the "policies" underlying the law by bringing more money into the government's coffers. That argument proves too much, because it would support

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[3] Of course, it might be argued in response that "[CMS] learns that payment . . . could be made" means only "CMS becomes aware of information suggesting that a tortfeasor *might* be liable to a Medicare beneficiary for injuries that Medicare has paid for." That would mean, however, that the "demonstration of responsibility" could come during, rather than before, the lawsuit, which, for the various reasons discussed throughout this brief, does violence to the text of the statute and its remedial scheme.

reading *every* limitation out of the statute. Beyond that, the argument overlooks the fundamental policy reasons why the government usually elects to impose liability for multiple damages in the first place. Those reasons simply have no application to cases such as this, where an entity's underlying tort liability has never been adjudicated and its obligation to make payment has not been established – much less violated by the entity's failure to pay.

Amicus Senator Grassley and the plaintiffs make much of the similarities between the MSP and the False Claims Act (the "FCA") (*see Amicus* Br. 11-12, 17-18; Pls.' Br. 28-29, 34-35), which historically provided for double damages recovery[4] and, like the MSP, was enforceable either by the government or through *qui tam* procedures. *See United States v. Bornstein*, 423 U.S. 303, 305 & n.1, 315 n.11, 96 S. Ct. 523, 526 & n.1, 531 n.11 (1976); 31 U.S.C. §§ 3729, 3730. The analogy, however, demonstrates precisely what is wrong with the plaintiffs' position.

The primary rationale for double damages recovery in the FCA context (as in others) is that the party who has engaged in fraud has committed a wrong against the government and, accordingly, should be liable for the full amount of the injury caused by that wrong. As the Supreme Court has explained:

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[4] The statute was amended in 1986 to permit treble damage awards. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (codified at 31 U.S.C. § 3729).

> Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded. 'We think the chief purpose of the (Act's civil penalties) was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole.' . . . [D]ouble damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims.

Bornstein, 423 U.S. at 314-315, 96 S. Ct. at 530-31 (citation omitted).

The MSP's double damages provision was motivated by similar considerations. Like the FCA, the MSP was intended to preserve the government's financial integrity. *E.g.*, *Fanning v. United States*, 346 F.3d 386, 388 (3d Cir. 2003). As in the false claims context, double recovery under the MSP makes sense once the recovery is seen as making the government whole for the full consequences of a wrong against the government – namely, the failure to make a required payment to Medicare. *See United States v. Baxter Int'l, Inc*., 345 F.3d 866, 905-06 (11th Cir. 2003) (noting that the MSP should be read in light of the "common-law principle that an award of multiple damages usually requires a heightened showing of wrongful intent"). Full compensation requires not just making restitution for the initial health-care payment, but also remunerating the government for the entire impact of the failure to reimburse, which could include, among other things, the costs of investigation, delay, and recovery.

The trouble is that this eminently sensible rationale for awarding double damages falls apart in the very circumstances in which the plaintiffs are seeking them. The defendants in this case cannot possibly be said to have committed any wrong against the government for failing to make a payment that they dispute and for which they have never been shown to be responsible. To be sure, if the defendants *had* somehow been shown to be responsible, then the continued withholding of the payment would come within the reach of the statute, and a double recovery would be appropriate. But not even the plaintiffs argue that the mere allegation of liability under state tort law creates any obligation to pay.[5] The failure to make payment in these circumstances therefore cannot be a wrong against the government, and should not subject a defendant to double damages.

[5] The plaintiffs do argue that "'the rights and liabilities of the parties are fixed at the moment of the accident with respect to a cause of action sounding in tort.'" (Pls.' Br. 30 (quoting *In re Reading Co.*, 404 F. Supp. 1249, 1251 (E.D. Pa. 1975)).) This highly metaphysical point – assuming without conceding that it is even correct – is essentially irrelevant here. The issue is not when the underlying tort liability arises, but the conditions under which a failure to reimburse Medicare gives rise to liability for double damages under the MSP.

III. Under The Plaintiffs' Interpretation, The MSP Would Expose Every American Business to Double Liability In Every Tort Case In Which A Plaintiff Can Allege A Medicare Payment

Under the plaintiffs' view, the MSP permits a lawsuit against an alleged tortfeasor for double damages based on the failure to make a payment that would be required only if the defendant were ultimately held liable for the underlying tort. That unprecedented interpretation automatically converts every tort claim involving a health expense covered by Medicare into a potential federal lawsuit for double damages. According to plaintiffs, any aggrieved person who believes that his or her injuries (the costs of which were or might have been covered by Medicare) were caused by tortious conduct need only allege that, plus a failure to make primary payment; instantly, the plaintiff has initiated a viable federal lawsuit for double damages.

The pool of potential defendants in this brave new world of plaintiff's imagining is very large indeed. The MSP broadly defines a "primary plan" (*i.e.*, a potential defendant in an MSP action) as:

> a group health plan or large group health plan . . . [or] a workmen's compensation law or plan, an automobile or *liability insurance policy or plan (including a self-insured plan)* or no fault insurance . . . . *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*.

Id. § 1395y(b)(2)(A) (emphasis added).

This definition encompasses practically every potential commercial defendant. Some large organizations have a self-insurance program under which they pool the exposure of their component units and set aside reserves to cover potential losses. *See* EMMETT J. VAUGHAN AND THERESE M. VAUGHAN, FUNDAMENTALS OF RISK INSURANCE 42-43, 63, 65-67 (9th ed. 2003); MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 55-57 (7th ed. 2002). Such firms obviously come within the statutory definition of a "primary plan."

More importantly, even when a business purchases liability insurance, it bears part of its own risk and therefore becomes a primary plan for purposes of the MSP. Nearly all liability insurance policies include deductibles and policy limits. *See, e.g.*, SCOTT E. HARRINGTON AND GREGORY R. NIEHAUS, RISK MANAGEMENT AND INSURANCE 175 (1999) ("Policy limits always are used in liability insurance policies."); *id*. at 239 ("[P]olicies almost always require the policyholder to bear some risk" through "the use of policy provisions like deductibles and limits."). The insured carries its own risk to the extent of the deductible and to the extent that liability exceeds coverage under its policies. Indeed, the regulations implementing the statute spell this out; they define "liability insurance payment" as "payment by a liability insurer, *or an out-of-pocket payment, including a payment to cover a deductible*

required by a liability insurance policy, by any individual or other entity that carries liability insurance or is covered by a self-insured plan." 42 C.F.R. § 411.50(b) (2005) (emphasis added).

Even if some hypothetical business carried none of its own risk, however, it would still be subject to an MSP suit based on ordinary tort claims if the plaintiffs have their way. The statute does not specify who is to be named as a defendant in a private MSP suit. If the plaintiffs are right, any Medicare beneficiary who comes to believe that he or she has been injured by any business at all – whether a large manufacturer or a small family-owned store – could sue that business under the MSP on the theory that the business either has an insurance policy that will cover the relevant liability (in which case the underwriter of the policy would be the primary plan) or does not have such an insurance policy, in which case the business itself is a primary plan.

Either way, the plaintiff could allege that the relevant "primary plan" has failed to make payment and thereby instantly state a claim for double damages. If the primary plan were an outside insurer, it might be a necessary party in any such action, *see* FED. R. CIV. P. 19, but that would not necessarily prevent the MSP plaintiff – who initially has no way of knowing whether and by whom a particular defendant is insured – from suing the alleged tortfeasor under the MSP.

Finally, even if, on the plaintiffs' view, the MSP does not go so far as to permit a direct suit against a hypothetical fully insured business, it makes little economic difference. To accept the plaintiffs' view of the statute is to force businesses in the aggregate to bear the costs of the potential for routine double liability in the form of higher premiums under liability insurance policies.

Nor are the numbers of potential *plaintiffs* limited in any meaningful way. In 2003, over 41 million persons were enrolled in Medicare, and the number is only increasing. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, MEDICARE ENROLLMENT: NATIONAL TRENDS 1966-2003.[6] Any injury suffered by any one of these people could become the basis of a double damages suit. Indeed, under plaintiffs' sweeping interpretation, the MSP plaintiff need not even be an injured person or Medicare beneficiary herself; *anyone*, plaintiffs contended in the lower court, is authorized to bring suit as a private attorney general for double damages. (*See* Mot. Hr'g Tr. 62-63, Feb. 25, 2005.) In this particular case, although the two plaintiffs both claim to be injured Medicare beneficiaries, they are seeking double damages in the billions of dollars based on alleged torts committed against thousands or millions of Florida Medicare beneficiaries.

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[6] http://www.cms.hhs.gov/statistics/enrollment/natltrends/hi_smi.asp (last visited October 28, 2005).

Accordingly, whichever way the statute is sliced, every American business would be subject to vastly increased costs, in the form either of payments pursuant to settlements and judgments wrought in a double damages regime, or at the very least higher premiums for liability insurance policies. If Congress had intended such a vast expansion of the private cause of action under the MSP, it would have made its intentions clear. The complete absence of any evidence of such intentions in the text of the statute and its legislative history provides further confirmation that plaintiffs' reading is mistaken.

IV. The Plaintiffs' Novel Construction Of The MSP Would Flood The Federal Courts With Tort Claims Arising Under State Law, A Circumstance Not Intended By Congress

As if the foregoing were not enough, plaintiffs' position, if accepted, would impose vast new burdens on the federal courts and potentially federalize all manner of garden-variety tort litigation hitherto pursued in the state courts. To convert every underlying tort claim involving an injury suffered by a Medicare beneficiary into a potential federal suit is to radically alter the balance of work between the state and federal courts. Here again, if Congress had intended such a dramatic change, one would expect to see a clear indication in the statutory text or legislative history. But there is none. On the contrary, the available evidence of Congress's intent squarely refutes plaintiffs' interpretation.

In the modern era, federal courts of course adjudicate tort claims arising under state law only when there is the requisite diversity of citizenship between the parties and the amount in controversy is more than $75,000. 28 U.S.C. § 1332(a).[7] The plaintiffs, by contrast, would have federal courts routinely adjudicate underlying tort claims arising under state law regardless of the citizenship of the parties or the amount in controversy. So long as the plaintiff is one of the over 41 million Americans enrolled in Medicare (or is permitted to assert a claim on behalf of a Medicare beneficiary), he would be entitled to a federal forum for a health-related tort dispute – and would have every incentive to take advantage of this entitlement, because of the potential for double recovery. In fact, this point is not disputed by the plaintiffs or Senator Grassley, who goes so far as to say that a tectonic shift in the workload of the federal courts is "precisely what Congress intended." (*Amicus* Br. 15.)

As explained above and in the defendants' brief, however, *all* of the textual and structural evidence in the statute – to say nothing of common sense – points in exactly the opposite direction. Beyond that, as this Court is well aware, modern tort suits

[7] There is of course pendent jurisdiction, *see* 28 U.S.C. § 1367, but it is discretionary and used only to adjudicate state claims founded on the same case or controversy as a claim that comes within original federal jurisdiction. The plaintiffs' theory would not simply allow courts to hear state claims in addition to federal ones based on the same facts; rather, their theory would effectively *convert* all manner of garden-variety state claims into federal ones because an MSP claim based on alleged tort liability could not be resolved without first resolving the underlying tort claim.

involving health-related injuries can be exceedingly complicated and time-consuming to adjudicate. Asserting the same tort claims in the guise of an MSP action does not change that fact. Accordingly, every MSP suit based on unacknowledged tort liability would require federal courts to resolve a series of difficult, often fact-intensive, issues, before even reaching the issues germane to the MSP claim itself. Examples of the embedded issues a federal court entertaining an MSP lawsuit would be required to resolve under plaintiffs' view include the following:

- Choice of law, *see, e.g.*, *Giest v. Sequoia Ventures, Inc.*, 99 Cal. Rptr. 2d 476, 478 (Cal. Ct. App. 2000);
- Whether a product is defective, *see, e.g.*, DAVID G. OWEN, PRODUCTS LIABILITY LAW 432-560 (2005), which in turn may require consideration of conflicting expert testimony whose admissibility is disputed, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 585-95, 113 S. Ct. 2786, 2792-97 (1993);
- Whether a defendant's conduct was negligent under the applicable standard of care (which, again, may require expert testimony to establish the relevant standard of care);
- Whether the defendant's conduct or the product defect was a cause in fact and proximate cause of injury to the plaintiff, including in cases

where causation turns on complex scientific proof and requires expert testimony, *see, e.g.*, *Brooks* v. *Colonial Chevrolet-Buick, Inc.*, 579 So.2d 1328, 1332-33 (Ala. 1991);

- Whether, in failure-to-warn cases, the defendant's provision of the missing warning would have avoided the injury (so-called "warning causation"), *see* OWEN, *supra*, at 756-63; and
- The availability of a wide array of complicated affirmative defenses such as federal preemption, compliance with governmental regulations, product misuse, contributory negligence, statute of limitations, and "state of the art" defenses.

As this much-abbreviated list makes clear, individual MSP actions such as this one could potentially require very great expenditures of time on the part of district judges. (*See also* Defs.' Br. 15-16.) Plaintiffs in effect are asking for precious federal judicial resources to be expended on the resolution of embedded tort claims that do not arise under federal law, do not necessarily involve diverse parties, and do not necessarily have the requisite amount in controversy.[8]

[8] As the litigation history of this case makes clear, the important limitations on diversity jurisdiction are not the only restrictions that can be readily circumvented under plaintiffs' view. If plaintiffs are correct, then many of the essential requirements of FED. R. CIV. P. 23 for class actions can also be easily avoided through the simple expedient of repackaging the plaintiffs' tort claims as double damages claims under the MSP. If Congress had wished to permit such an end run around established legal protections, it surely would have said so clearly.

Senator Grassley responds that "potential court clog is a non-factor" because "the MSP private right of action has existed for years." (*Amicus* Br. 16; *accord id*. at 18; *see also* Pls.' Br. 37.) But the Senator ignores the fact that until the plaintiffs' counsel brought this and other novel lawsuits targeting cigarette manufacturers, private plaintiffs had *never* used the MSP to attempt to collect double damages based on nothing more than previously unadjudicated tort claims. (*See* Defs.' Br. 35-36.) Under these circumstances, past experience hardly shows that MSP actions would impose no serious new burdens on the federal courts.

Senator Grassley also argues that it is Congress's, not the courts', prerogative to control federal jurisdiction. (*Amicus* Br. 16.) He is of course correct, but the argument is beside the point. This appeal concerns the construction of a statute. The question is not whether the courts must do as Congress instructs – of course they must – but what in fact Congress has instructed. The Senator has pointed to no evidence that Congress intended anything like what the plaintiffs advance in this case.[9]

Because plaintiffs' novel interpretation of the MSP would convert every underlying tort claim involving an injury suffered by a Medicare beneficiary into a potential federal lawsuit, it would work a significant change in the balance of work

[9] The Senator's post-enactment litigation briefs do not, of course, constitute evidence of Congress's intent. (*See* Defs.' Br. 29.)

between the state and federal courts. Ordinarily, if Congress wishes to bring about such a significant alteration in the federal-state relationship, it must make its intentions "unmistakably clear." *Raygor v. Regents of the Univ. of Minn*., 534 U.S. 533, 543, 122 S. Ct. 999, 1006 (2002) (citations and quotation marks omitted); *accord Gregory v. Ashcroft*, 501 U.S. 452, 462, 111 S. Ct. 2395, 2401 (1991); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S. Ct. 1757, 1764 (1994). As explained above, nothing in the text or structure of the MSP or its legislative history comes close to satisfying that exacting standard.

* * *

The plaintiffs cast the defendants' and the lower court's construction of the statute as a "two-lawsuit rule," suggesting that there is something inherently questionable about two lawsuits even though a previous lawsuit may have resulted in the "judgment" or "payment" conditioned on "compromise, waiver, or release" that is specifically mentioned in 42 U.S.C. § 1395y(b)(2)(B)(ii). As that language suggests, Congress plainly envisioned circumstances in which the private MSP action would be the second of two lawsuits.

Ignoring that fact, plaintiffs ask: "How could two lawsuits be better than one to recover Medicare's conditional payments?" (Pls.' Br. 61.) The answer, they imply, is that two can never be better than one, as if that is the only choice this Court is

facing. But that is not the choice this Court is facing at all. Rather, it is facing the question whether Congress intended the mere fact of a Medicare payment made in good faith to transform any health-related tort claim into federal litigation for quasi-punitive double damages. The answer to *this* question is that Congress could not have intended through silence to clog the federal courts with claims that do not belong there and instantly double every business' potential liability for no other reason than that Medicare happened to pay for health care for the alleged tort victim.

CONCLUSION

For the foregoing reasons and those set forth in the defendants' brief, the district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(b) and 32(a)(7)(B). This brief uses a proportionally spaced font and contains 6937 words (including footnotes but excluding the cover page, the tables of contents and authorities, and the certificates of counsel), as reported by WordPerfect.

Dated: November 9, 2005

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CERTIFICATE OF SERVICE

I, Daniel Walfish, hereby certify pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure that on November 9, 2005, the original and six copies of this brief were sent via Federal Express overnight delivery to the clerk of this Court, and one copy of this brief was served, via First Class Mail, on each of the following counsel of record:

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