CASE NO. 05-14219-JJ

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GENEVA GLOVER, ET AL.,

Plaintiffs-Appellants,

v.

PHILIP MORRIS USA, ET AL.,

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE SEN. CHARLES E. GRASSLEY IN SUPPORT OF APPELLANTS

Richard B. Rosenthal
Florida Bar No. 0184853
RICHARD B. ROSENTHAL, P.A.
169 East Flagler Street, Suite 1422
Miami, Florida 33131
Telephone: (305) 779-6097
Facsimile: (305) 779-6095
E-mail: rbr@rosenthalappeals.com

Brian Stuart Koukoutchos
28 Eagle Trace
Mandeville, Louisiana 70471
Telephone: (985) 626-5052

Chadwicke L. Groover
Counsel
Sen. Charles E. Grassley
United States Senate
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510
Telephone: (202) 224-4200

Attorneys for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, the undersigned counsel certifies that the following is a list of persons or entities that have an interest in the outcome of this case:

Arnold & Porter, LLP

Dana G. Bradford, II

Derek S. Casey

Daniel M. Cohen

Cuneo, Gilbert & LaDuca, LLP

Jonathan W. Cuneo

Robert J. Cynkar

Joseph R. Egan

Egan, Fitzpatrick, Malsch & Cynkar , PLLC

Charles J. Fitzpatrick

Murray R. Garnick

James Gillins

Geneva Glover

Sen. Charles E. Grassley (Amicus Curiae)

Chadwicke L. Groover (Co-Counsel to Amicus Curiae, Sen. Grassley)

Stephanie J. Hartley

Charles C. Howell, III

Howell & O'Neal

Hutton & Hutton, LLC

Mark B. Hutton

Brian Stuart Koukoutchos (Co-counsel to Amicus Curiae, Sen. Grassley)

Liggett Group, Inc.

Martin G. Malsch

Robert A. McCarter

Deborah B. McIlhenny

Medicare

Philip Morris USA

Richard B. Rosenthal (Co-counsel to Amicus Curiae, Sen. Grassley)

Richardson, Stoops, Richardson & Ward, P.C.

Charles L. Richardson

Gary L. Richardson

Smith, Bambrell & Russell, LLP

Spohrer, Wilner, Maxwell & Mathews, P.A.

Fred Stoops

Chan P. Townsley

Keith Ward

Norwood S. Wilner

Richard B. Rosenthal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AND LEGISLATIVE MATERIALS

OTHER MATERIALS

INTEREST OF AMICUS CURIAE

Amicus curiae, the Honorable Charles E. Grassley, senior Senator from Iowa, is the Chairman of the Senate Finance Committee, which has exclusive Senate jurisdiction over Medicare. For over twenty years, Senator Grassley has been the strongest supporter in Congress of the role of citizens as "private attorneys general" in protecting the Treasury.[1] The purpose of the Medicare as Second Payer ("MSP") statute–to stem the flow of Medicare dollars when others should be paying Medicare beneficiary's medical bills–is of great importance to Senator Grassley, who has long advocated vigorous implementation of the MSP statute.[2]

Senator Grassley participated as an amicus throughout Mason v. The American Tobacco Co., 346 F.3d 36 (2d Cir. 2003), cert. denied, 541 U.S.1057 (2004). After

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1/ In 1986, Senator Grassley sponsored the amendments to the False Claims Act ("FCA"). The "most sweeping" reform involved the FCA's *qui tam* provision, which expanded the role of private citizens in enforcing the Act. See John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, 1-23 (Aspen Law & Business 1999). "The effect of the 1986 Amendments has been to transform the False Claims Act into an effective and widely used weapon against government-related fraud." Id. at 1-25.

2/ Senator Grassley introduced the "Medicare Funds Recovery Act of 1992" to increase funding for MSP enforcement: "Medicare contractors have MSP backlogs of claims mistakenly paid totalling over $1 billion" and "over $2 billion owed to the Government may never be collected." 138 CONG. REC. S3301, S3319 (Mar. 11, 1992).

announcing its restrictive reading of the MSP statute, the Second Circuit quoted Senator Grassley's amicus brief and invited Congress to address the issue if it disagreed with the court's interpretation. Id. at 43. In response, Senator Grassley introduced clarifying legislation that was enacted to correct erroneous readings of the MSP by the Second Circuit and other courts. See Medicare Prescription Drug, Improvement and Modernization Act of 2003 ("MMA"), § 301(b), Pub. L. No. 108-73, 117 Stat. 2066, 2221 (2003). The district court in this case was the first court to interpret those clarifying amendments, and in the proceedings below Senator Grassley participated as an amicus in support of Plaintiffs' reading of the statute.

Senator Grassley respectfully submits that the district court's reading of the statute works a fundamental distortion of the MSP regime as it has existed for nearly two decades. The Senator therefore has both an institutional and personal interest in ensuring that the MSP regime is faithfully applied as it was intended, and that Medicare dollars are promptly returned to the Treasury where appropriate. Senator Grassley cannot offer this Court any guidance on the merits of the underlying litigation against the tobacco company defendents. However, as chief architect of the legislation that has been misinterpreted below, the Senator is in a unique position to assist this Court in understanding these statutes in a manner consistent with Congressional intent and the national interest.

Senator Grassley represents that all parties to this appeal have been contacted, and each party has consented to the filing of this amicus brief. See Fed. R. App. P. 29(a) (permitting the participation of amicus curiae if all parties consent).

STATEMENT OF THE ISSUE

Whether the MSP regime requires the American taxpayers to pursue two separate lawsuits to recoup Medicare payments from an alleged tortfeasor, or alternatively whether such recovery may be had in a single, unified MSP action?

SUMMARY OF ARGUMENT

The district court's ruling works a fundamental distortion of the MSP regime. Unless corrected, the harmful impact of this misinterpretation would be immense. But even if the ruling did not represent a heavy blow to the Medicare reimbursement regime (it does), the gross distortion of Congressional legislation would itself be unacceptable as a matter of statutory interpretation. The ruling below should be reversed.

The MMA's clarifying amendments were enacted in direct response to some federal court rulings that, in Congress's view, effected an inaccurate and undesirably cramped view of the Medicare reimbursement regime. Clarifying legislation such as this, of course, is part of the ongoing "conversation" that occurs between Congress and the courts. But the ruling below suggests that the district court was simply

covering its ears to what Congress said.

Senator Grassley respectfully submits that the district court ruling cannot be squared with the text, structure, or legislative history of the Medicare statutes. Moreover, the ruling below significantly frustrates the very purpose of the MSP regime, which is to maintain the ongoing viability of the Medicare system by recovering taxpayer dollars that have been expended when a third party is primarily responsible in contract or in tort.

The district court appeared to view the prospect of a single, unified MSP action as some sort of boondoggle for certain litigants, or as a penalty against alleged tortfeasors. Any such view is baseless. Rather, the MSP statute provides the tools that Congress–over a span of twenty-five years–has decided are necessary and proper to help save the Medicare system in an era of tight budgets, an aging population, and soaring health care costs. These tools are not conceptually different than those Congress has provided in other "private attorney general" statutes. Against this backdrop and history, the district court's apparent concern for a massive "federalization" of tort law is profoundly misguided. In short, there is simply no support for the lower court's view that the MSP regime calls for two separate lawsuits before the taxpayers can recoup their expenses against an alleged tortfeasor. The district court's ruling is wrong, and it should be reversed.

ARGUMENT

For nearly eight years, legal skirmishing has delayed adjudication of a question of fundamental importance to the Medicare system: are various tobacco companies liable to reimburse Medicare for the health care costs required by Medicare beneficiaries' cigarette smoking? How this question is answered may impact whether Medicare can remain a financially viable American institution, as it has since its inception some forty years ago.[3]

The question was first presented in 1997 in Mason v. American Tobacco Co., No. 97CV-293 (N.D. Tex. filed Dec. 23, 1997). That litigation concluded when the Second Circuit held that the tobacco companies could avoid reach of the MSP enforcement regime because they were not a "self-insured plan" as the statute defined, Mason v. American Tobacco Co., 346 F.3d 36 (2d Cir. 2003), and the Supreme Court denied certiorari. 541 U.S. 1057 (2004).

Believing that the MSP had been misinterpreted by Mason and some other courts, in late 2003 Congress enacted certain clarifying amendments in the MMA.

3/ The trustees of Medicare now estimate that the system's Hospital Insurance Trust Fund will run out of money in only 14 years, in 2019. Social Security and Medicare Boards of Trustees, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2004 ANNUAL REPORTS, *A Message from the Public Trustees*, available at http://www.socialsecurity.gov/OACT/TRSUM/trsummary.html.

See Medicare Prescription Drug, Improvement and Modernization Act of 2003, § 301(b), Pub. L. No. 108-73, 117 Stat. 2066, 2221 (2003). The amendments made clear that self-insured and uninsured entities such as the defendant tobacco companies were indeed subject to an MSP enforcement action, whether brought directly by the Government or by private attorneys general.

This private attorney general action was filed soon thereafter. Apparently recognizing the clarifying effect of the MMA amendments, the tobacco companies have not disputed that they are "self-insured plans" as the statute defined. But they now argue that they cannot be haled into court in an MSP action unless and until their underlying tort liability has already been established by separate litigation. The district court accepted this "two lawsuit" argument, granting the defendants' motion to dismiss. Glover v. Phillip Morris USA et al., No. 3:04-CV-403-3-32-MMH, 2005 WL 1761655 (M.D. Fla. July 26, 2005) (hereinafter "Dist. Ct. Op.").

This Court should reverse. The district court's "two lawsuit" rule reflects either a gross misreading of the MSP statutes, or a fundamental unwillingness to apply the statutory regime that Congress has enacted. Either possibility is mistaken. Indeed, the district court's misreading of the statute undermines the very purpose of the MSP regime, a purpose that Congress has reiterated numerous times over the past quarter-century. Making matters worse, the district court attempted to justify its

decision by raising the specter of a flood of new federal tort litigation unless its "two lawsuit" rule were invoked. The reference to such a bogeyman is baseless. And even if the concern had any basis in fact, it is the prerogative of Congress–not the courts–to establish a federal cause of action. Court clog, whether real or imagined, is not a legitimate reason to ignore the explicit words of Congress's enacted statutes.

I. The District Court's Opinion Misreads the Text, Structure, and History of the MSP Statute, Thereby Frustrating the Purpose of the MSP Regime

The MSP, as amended by the MMA, requires a primary plan to reimburse Medicare "if it is demonstrated that such primary plan has or had a responsibility to make payment[.]" 42 U.S.C. § 1395y(b)(2)(B)(ii). In concluding that a yet-unlitigated tort claim could not be brought in an MSP enforcement action, the district court focused on the verb tense Congress used in this statutory provision. In the district court's view, "[I]t cannot be demonstrated that an alleged tortfeasor, which has neither been adjudicated as liable nor has agreed to settle a tort claim, 'has' an existing 'responsibility' to reimburse Medicare or 'had' a previous responsibility to do so." Dist Ct. Op. at *9.

As a matter of basic grammar, this reasoning does not withstand scrutiny. If Senator Grassley (as architect of the legislation) and Congress had intended the result the district court reached–that an MSP enforcement could be brought only after a

previous adjudication of third party responsibility–the legislation would have been written in the past perfect subjunctive tense–i.e., a primary plan would be required to reimburse Medicare only "if it *had been demonstrated* that such primary plan is responsible." Congress's decision to use the present subjunctive tense ("if it is demonstrated") conveys the idea that the demonstration of third-party liability need not have been accomplished before the MSP action can be pursued; it can occur during the MSP action itself.[4]

This construction also explains two other phrases in the statute, which are otherwise rendered nugatory by the district court's warped reading. First, Congress's use of present subjunctive tense explains why the statute includes the phrase "such primary plan *has or had* a responsibility[.]" If the district court's reading were correct, there would be no need to use both the present-tense term "has" and the past-tense term "had"; after all, under the district court's reading, the tortfeasors' liability

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4/ This grammatical construction is entirely familiar in legal contexts. For example, courts frequently state that a particular outcome is required "if it is demonstrated" that a certain showing is made, meaning that the showing must be made presently–not that it must have been made in some earlier proceeding. See, e.g., People v. Pomykala, 784 N.E. 2d 784, 791 (Ill. 2003) ("An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed."); Tuttle v. Eats and Treats Operations, Inc., 2005 U.S. Dist LEXIS 15302 at *1-*2 (D. Kan. May 23, 2005) ("Summary judgment is proper if it is demonstrated that the movant is entitled to judgment as a matter of law on the basis of facts to which there is no genuine dispute.").

would already be a foregone conclusion, either through (1) a previous adjudication or (2) a settlement. Why then bother with both terms? The district court never confronted this question. The answer, of course, is that Congress's decision to include both terms makes perfect sense if an alleged tortfeasor's responsibility can be demonstrated in a third, prospective way–i.e., in the context of the MSP enforcement litigation itself.

Second, the district court's cramped reading negates another statutory phrase: "responsibility may be demonstrated by a judgment, a payment . . . *or by other means*." If the district court were correct–that a tortfeasor must already have been found liable (or must have entered some sort of settlement) before an MSP action may be pursued–the "by other means" language would be rendered meaningless. The district court essentially punted on this question, opining merely that the "other means" must be "other instances of 'like kind' where there is a previously established requirement or agreement to pay for medical services for which Medicare is entitled to be reimbursed." Dist Ct. Op. at *10. But this reasoning is entirely circular. What other "previously established requirement or agreement to pay" could there possibly be, other than a court-order requiring payment or a voluntary contractual obligation,

both of which the statute already addresses explicitly?[5] In short, the structure of the statute makes sense only if it is read as permitting tort liability to be determined within the confines of an MSP enforcement action.

It was therefore unnecessary (and ultimately unhelpful) for the district court to seek refuge from a single canon of statutory construction, and to apply it in a way that guts the rest of the statute. Putting aside the obvious reality that applying various canons of construction can yield various results, cf. Shipes v. Trinity Indus., 31 F.3d 347, 348 (5th Cir. 1994) (confronting situation with "two, seemingly conflicting, canons of statutory construction"), there was simply no occasion to resort to outside help. The text and structure of the statute itself should have ended the inquiry.

But even if the district court somehow felt the need to look beyond the statutory language itself, the court's failure to consider in its analysis the history of

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5/ The district court's offhand attempt to answer this question only further demonstrates the weakness of its reasoning. The district court hypothesized that an MSP private action would still lie where "a private insurer denies a timely claim for benefits based solely on [a Medicare beneficiary's] eligibility for Medicare." Dist. Ct. Op. at 11 (quoting Harris Corp. v. Humana Health Ins. Co. of Florida, 253 F.3d 598, 605-06 (11th Cir. 2001)). This ignores the obvious reality that in such a case, the issue of a beneficiary's eligibility might well have to be litigated, and thus–just as in the case at bar–Medicare's entitlement to recovery would be undetermined at the time the MSP action is brought. The district court offered no principled justification why Medicare should be entitled to litigate that question *within* the confines of an MSP enforcement action, but should be required to litigate a primary payer's tort liability *in a separate action*. That is because there is no justification.

the MMA amendments and the broad purpose of the MSP regime was, at best, myopic. That history demonstrates unambiguously that Congress intended the Medicare reimbursement statutes in general, and the MMA in particular, to be used precisely as the plaintiffs sought to do in this case.

As this Court properly recognized in United States v. Baxter Int'l, 345 F.3d 866, 875-78 (11th Cir. 2003), the MSP regime has developed through a series of Congressional enactments over the past twenty-five years, each designed to protect further the financial viability of the Medicare system amid budgetary pressures, rising health care costs, and an aging population. "Since enacting the MSP statute, Congress has expanded its reach several times, making Medicare secondary to a greater array of primary coverage sources, and creating a larger spectrum of beneficiaries who no longer look to Medicare as their primary source of coverage." Id. at 877.

These MSP enforcement provisions are analogous to another piece of "private attorney general" legislation that Senator Grassley has championed, the *qui tam* provisions of the False Claims Act. It is impossible to ignore the tremendous success these actions have enjoyed, and the substantial benefit they have conferred upon the Treasury (and by extension, the American taxpayers). See *supra* n.1. And it is equally impossible to ignore the fact that smoking-related health care costs have

placed an extraordinary burden on the Medicare system, costs that may and should be recovered if the tobacco companies are indeed responsible as a primary payer. Xiulan Zhang et al., *Cost of Smoking to the Medicare Program, 1993*, 20 HEALTH CARE FIN. REV. 179 (1999) (noting that in 1993 alone, "smoking accounted for 9.4 percent of Medicare expenditures–$14.2 billion"). In both the FCA context and the MSP context, Congress has sought to provide incentives for private citizens to recoup public funds, an incentive system the Supreme Court aptly described a half-century ago:

> [The statute providing a qui tam right is] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) (citation omitted).

The district court's failure to understand the statutory history and purpose of the MMA is perhaps best exemplified by the court's assertion, "If Congress had meant to take the significant, additional step of allowing a plaintiff to try to prove a self-insured defendant's state law tort liability within an MSP private right of action, it would have explicitly said so." Dist. Ct. Op at *10. That statement is profoundly misguided. It ignores the plain fact that the clarifying amendments in MMA in fact

took no "additional step." They were enacted precisely to address unduly restrictive court interpretations of the MSP regime regarding what kind of entities could be defendants in private MSP actions.[6] They made no changes whatsoever to the elements of an MSP cause of action, nor to the procedure to be followed in prosecuting such an action. See 149 Cong. Rec. S15574, S15585 (daily ed. Nov. 22, 2003) (statement of Sen. Grassley) ("The provisions in title III do not change existing law in this area but, in fact, clarify the intent of Congress in protecting Medicare's resources. According to the Congressional Budget Office, these clarifications alone

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6/ The district court found it significant that the committee reports and DOJ statements that accompanied the MMA amendments did not mention the Phillip Morris or Mason decisions, both of which had expressed concern about expanding the tobacco companies' tort liability. From this, the district court inferred that Congress must not have intended tort liability to be determined in the context of a private MSP action. Dist Ct. Op. at 15. This argument finds no quarter. At the outset, it ignores the obvious reality that Senator Grassley had participated as an amicus throughout the Mason litigation, at all times urging the courts not to accept the unduly restrictive view they ultimately did. But if there were still any doubt, the very DOJ statement the district court examined here expressly stated that certain decisions, such as "Thompson v.Goetzman, 315 F.3d 457 (5th Cir. 2002) . . . make the statute's reimbursement mechanism inoperative in some jurisdictions." Waste, Fraud, and Abuse: Hearing Before the House Comm. On Ways and Means, 108th Cong. 88 (2003) (statement of William H. Jordan, Senior Counsel to the Asst. Atty. Gen.), available at 2003 WL 21667339. The Thompson decision, much like Phillip Morris and Mason, stated the MSP did not include "a right of action for reimbursement of medical expenditures against tortfeasors[.]" Thompson, 315 F.3d at 464. Thus, it is clear that it was *this erroneous view* that was being repudiated and corrected by Congress, even though the legislative history cited only some (and not all) cases that had expressed this erroneous view.

promise to restore Medicare over $9 billion out of that $31 billion.").[7]

It should therefore come as no surprise that the MMA and its legislative history do not speak at great length about the already-settled understanding regarding the ability of unliquidated claims to be brought in an MSP action. Faulting Congress for not re-hashing this point in the MMA would be a bit like faulting federal courts for failing to begin every judicial opinion with a statement that the judicial authority to decide cases derives from Article III of the Constitution.

In short, the district court's ruling misreads the statute, and guts the very MSP regime it was designed to protect. Congress has never required two separate lawsuits to recoup Medicare payments, and it certainly did not do so for the first time with the clarifying amendments of the MMA.

7/ Senator Grassley was the author and sponsor of the clarification, and the "remarks . . .of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982). The district court casually dismissed the Senator's arguments below, stating that his "post-passage" remarks were entitled to no weight because "neither the wording of the statute nor the legislative history supports the construction." Dist. Ct. Op. at *16. This Brief debunks those myths. The court also sidestepped Senator Grassley's *pre*-enactment statement that the clarifying amendments "do not change existing law in this area" by asserting that these comments did not "not address the cause of action plaintiffs attempt to bring in this case." Id. That is plainly incorrect. Because a private right of action against tortfeasors was already extant under the MSP, Senator Grassley's comments that the MMA did not change existing law were indeed most relevant, and should have been given effect, not brushed aside.

II. The District Court's Stated Concern that Interpreting the Medicare Statutes as Written Would Dramatically Expand Federal Tort Law is Baseless and Irrelevant

As if the district court's gross misreading of the statute were not enough, the court also stated that it was swayed by another factor–one that never should have entered the decision calculus. The court surmised that, if the plaintiffs' view were accepted, "virtually every state law tort claim involving a Medicare beneficiary would become a federal lawsuit for double damages under the MSP." Dist. Ct. Op. at 15. That would not be an unanticipated or unwelcome outcome–indeed, that is precisely what Congress intended. Whenever a tortfeasor injures a Medicare beneficiary, the tort also inflicts an injury upon the taxpayers in the form of outlays for health care under the Medicare program. As the statutorily designated "primary plan," that tortfeasor owes the U.S. Treasury reimbursement for the medical care costs of the beneficiary. And that is precisely why the MSP statutory cause of action was created: Congress wants an MSP claim prosecuted in every instance where a tortfeasor inflicts injury on a Medicare beneficiary (and by extension, on the Treasury). Only in that way will the costs of the tortfeasor's wrongs be borne by the wrongdoer, rather than by the American taxpayers. By treating this feature of the statute as a vice rather than a virtue, the district court mangled Congress's design and usurped the legislative function by displacing Congressional policy choices with its own.

It is unclear whether the court's concern was (1) perceived court clog; (2) federal court involvement in state law tort cases; and/or (3) the idea of "penalizing" certain tortfeasors. But ultimately it does not matter which of these concerns animated the district court because each of the three concerns is unfounded, and in any event, is beyond purview of the courts. First, potential court clog is a non-factor. As discussed, the MSP private right of action has existed for years. And to the extent that the MMA may spur additional litigation (by clarifying that uninsured entities may indeed be sued under the MSP), that is a policy choice left exclusively to Congress–not the courts. See Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) ("[N]o legislation purports its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). The abiding (and understandable) desire of courts to reduce avoidable docket burdens does not trump Congressional control of federal court jurisdiction and legislative prerogative to create federal causes of action.

Second, any possible federalism concerns are unfounded. The tobacco defendants have never challenged the constitutionality of the MSP regime on federalism grounds, nor could they. This regime has existed for twenty-five years, and it reflects the basic understanding that the federal government has a uniquely federal interest in protecting and preserving Medicare, one of its bedrock–and most

successful–social programs.[8] It is therefore meritless to suggest that the balance of federalism is any way altered by Congress's reiteration that tortfeasors are liable to the Treasury when their torts impose burdens on Medicare. Equally irrelevant is that fact that such liability may have to be proven according to state tort law principles. Federal courts, of course, routinely apply state law in a wide variety of instances (e.g., in diversity cases), and it is certainly not any cause for hand-wringing.

Third, the double damages provision of MSP does not impose any sort of penalty, nor would it be appropriate for a court to frustrate proper MSP enforcement even if it found the provision distasteful. As mentioned, Congress deemed the double damages provision to provide an important inducement for private attorneys general to vindicate Medicare's interest in recovering unnecessarily expended funds. That is the beginning and end of the matter.

Notably, this provision is less onerous than analogous provisions of the FCA, which calls for *treble* damages. 31 U.S.C. § 3729(a). As noted, the FCA's *qui tam* provision has proven to be a resounding success, see *supra* note 2, and Congress was

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8/ According to a recent report, "Medicare is the second-largest social insurance program in the United States, with 41 million beneficiaries and total expenditures of $280.8 billion in 2003." 2004 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, available at http://www.cms.hhs.gov/publications/trusteesreport/2004/tr.pdf.

perfectly at liberty to craft and refine the MSP regime in that mold. As the Supreme Court emphasized in the FCA context, Congress's choice of a remedy is not a matter for judicial second-guessing: it is "a problem for Congress." Hess, 317 U.S. at 552.

Finally, the district court expressed surprise that Congress would devise such a system "but failed to mention anything about it in the legislative history." Dist. Ct. Op. at 15. That statement perfectly encapsulates the district court's fundamental misapprehension in this case. The MSP regime has been with us for a quarter-century. The private right of action has existed for nearly as long. The only thing that is even remotely new is that now the tobacco companies finally seem to be getting Congress's message: if they have committed a tort, they must make their victims whole, and they must repay the American taxpayers, who have shared the heavy costs. No amount of legal wrangling, however phrased or packaged, can escape that reality.

CONCLUSION

The district court's dismissal of the case must be reversed, and the matter returned to the district court for further proceedings.

Respectfully submitted,

Richard B. Rosenthal

Florida Bar No. 0184853
The Law Offices of Richard B. Rosenthal, P.A.
169 East Flagler Street
Suite 1422
Miami, Florida 33131
Tel: (305) 779-6097
Fax: (305) 770-6095
rbr@rosenthalappeals.com

-and-

Chadwicke L. Groover
Counsel
Sen. Charles E. Grassley
United States Senate
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510
Tel: (202) 224-4200

-and-

Brian Stuart Koukoutchos
28 Eagle Trace
Mandeville, Louisiana 70471
Tel: (985) 626-5052

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the space limitations set forth in Fed. R. App. P. 29(d), and complies with all typeface and style requirements of Fed. R. App. P. 32.

Richard B. Rosenthal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 3rd day of October, 2005 upon:

Robert J. Cynkar
8300 Boone Blvd, Suite 340
Vienna, VA 22182

Norwood S. Wilner
701 W. Adams St.
Jacksonville, FL 32204

Jonathan W. Cuneo
507 E St., N.E.
Washington, DC 20002

Gary L. Richardson
6555 S. Lewis Ave.
Tulsa, OK 74136

Mark B. Hutton
8100 East 22nd St, North
Building 1200
Wichita, KS 67201-1166

Charles C. Howell, III
1 Independent Drive
Suite 2902
Jacksonville, FL 32202

Dana G. Bradford
Bank of America Tower
50 N. Laura St.
Suite 2600
Jacksonville, FL 32202

Murray R. Garnick
555 Twelfth St., N.W.
Washington, DC 20004