No. 12-690

IN THE
# Supreme Court of the United States

GLAXOSMITHKLINE LLC, ET AL.

*Petitioners,*

v.

HUMANA MEDICAL PLANS, INC., ET AL.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY TO BRIEF IN OPPOSITION


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## ARGUMENT

The brief in opposition does not—because it cannot—deny that the question presented in the petition is exceedingly important and will directly impact the rights and obligations of hundreds of private insurance companies, every business facing a tort action, and tens of millions of beneficiaries enrolled in private insurance plans under Parts C and D of the Medicare Act. Instead, respondent Humana focuses almost exclusively on the merits, trying to defend the decision below while downplaying the disagreements that have emerged in the Courts of Appeals over the scope of the private cause of action in the Medicare Secondary Payer (MSP) Act.

Neither effort is successful. The text of the MSP Act, through several statutory cross-references, creates a federal double-damages action to seek reimbursement for a payment "made by the Secretary." A private insurer operating a Medicare Advantage plan is not "the Secretary." By interpreting the Act to create a federal double-damages action for private insurers, the Third Circuit departed not only from the statutory text but also from the interpretation applied by other Courts of Appeals. And, as if that were not enough, the decision below needlessly extends federal law into an area long and comprehensively governed by state law—the subrogation rights of insurers—without any indication in the statute or legislative history that Congress intended that far-reaching result.

### A. The Petition Raises Important Questions That Merit This Court's Review.

The petition and *amicus* briefs explain in detail why the question presented in this case is, from both a legal and practical point of view, an important one that

warrants this Court's review. Humana responds in a single footnote on the last page of its brief, asserting without explanation that "the questions presented are not sufficiently important to require this Court's intervention," and that the Court should not "review every case involving Medicare Advantage." Opp. 36 n.7. But this is not just any plain-vanilla Medicare Advantage case. By authorizing Medicare Advantage Organizations (MAOs) to bring federal double-damages suits against tortfeasors, the Third Circuit has overridden traditional state-law remedies and created an unworkable legal regime that exposes businesses to harsh penalties for failing to fulfill reimbursement obligations they often did not know existed and could not readily have discovered. The inevitable result of that regime will be to substantially hamper settlement efforts in mass tort cases, which frequently involve large numbers of plaintiffs enrolled in private insurance plans authorized by Part C or D of the Medicare Act. A decision with such sweeping implications for the Nation's healthcare system and economy merits this Court's review.

Humana dismisses these concerns on the ground that "comprehensive disclosures" from settling plaintiffs will allow tortfeasors to "easily" comply with the decision below. Opp. 24-25. But as several *amici* explain, tort plaintiffs' disclosures are generally inadequate to determine potential reimbursement obligations to MAOs. *See* Br. of Alliance of Automobile Mfrs. (AAM) as *Amicus Curiae* at 7-9; Br. of MARC Coalition *et al*. as *Amici Curiae* at 7-8; Br. of Nat'l Ass'n of Mut. Ins. Cos. as *Amicus Curiae* at 14-16; Br. of Pharmaceutical Research & Mfrs. of Am. as *Amicus Curiae* at 18-20. By the time a tort action reaches judgment or settlement (which may be years after the

injury), a plaintiff often cannot locate his insurance policy or his medical billing records. And even if such records can be located, they frequently do not reveal whether an MAO provided coverage for the injury in question or how much the MAO paid to treat those injuries. These problems are particularly acute for plaintiffs who are now deceased and for plaintiffs who have switched insurance carriers since their injury. MAOs, moreover, have no incentive to help tortfeasors determine their reimbursement obligations. Better for them that they *not* be reimbursed; then, instead of receiving only the amounts they are owed, they can sue for double damages.

The inadequacy of existing discovery mechanisms is precisely why Congress recently amended the MSP Act to provide alternative mechanisms for settling parties to determine their reimbursement obligations *to Medicare*. *See* MARC Br. at 5-7; AAM Br. at 4-6. On January 10, 2013, the President signed the Strengthening Medicare and Repaying Taxpayers (SMART) Act, Pub. L. No. 112-242, 126 Stat. 2374, which amends the MSP Act to require the Government to create a website listing reimbursements owed to Medicare, establish a process allowing beneficiaries to dispute those reimbursement amounts, and annually publish minimum settlement thresholds below which Medicare will not seek reimbursement. Neither the SMART Act nor any other statute or regulation, however, imposes similar requirements on MAOs. Settling plaintiffs and tortfeasors are thus left in the dark as to what reimbursements an MAO might claim.

It is no answer to say, as does Humana, that settling tortfeasors simply can "withhold a portion of a settlement until its secondary payer liability to the

settling individual's MAO is resolved." Opp. 25. As explained, many settling tortfeasors might not even know that they have a "secondary payer liability" to an MAO. And even if they do, it is exceedingly difficult, if not impossible, for a tortfeasor to determine the amount of the reimbursement or the identity of the MAO to which the reimbursement is owed. Under the Third Circuit's regime, therefore, even the most diligent settling tortfeasors could be subjected to double-damages suits for failing to properly reimburse an MAO. That uncertainty will substantially delay settlement efforts in mass-tort cases, and could well frustrate the settlement process altogether. Thus, as the plaintiffs in the underlying Avandia litigation explain, the Third Circuit's ruling affects not only the businesses that are subject to tort suits, but also the "tens of thousands of injured Avandia claimants and millions of presently enrolled [Medicare Advantage] plan beneficiaries" who could well be plaintiffs in present or future mass-tort actions. Br. of Pls.' Advisory Comm. as *Amici Curiae* at 4.

### B. The Third Circuit's Decision Is Wrong On The Merits.

In stark contrast to the mere footnote it devotes to contesting the importance of the question presented here, Humana devotes the bulk of its opposition brief to defending the Third Circuit's ruling on the merits. *See* Opp. 11-26. Nowhere in its lengthy merits analysis, however, does Humana come to grips with the fundamental flaw in the Third Circuit's reasoning.

Humana begins (as did the Third Circuit) from the premise that the private cause of action in § 1395y(b)(3)(A) "contains 'no limitations on which private (i.e., non-governmental) actors can bring suit.'"

Opp. 11-12 (quoting Pet. App. 13a). That misses the point. Although § 1395y(b)(3)(A) does not purport to limit *who* can sue, it does purport to limit *what* they can sue for. Specifically, as relevant here, a private party can sue under § 1395y(b)(3)(A) only for a failure to pay "appropriate reimbursement[] in accordance with" § 1395y(b)(2)(A) of the MSP Act. Section 1395y(b)(2)(A), in turn, is phrased in the negative: it specifies that "[p]ayment under this subchapter may *not* be made, *except as provided in subparagraph (B)*."[1] To determine whether a reimbursement obligation arises under § 1395y(b)(2)**(A)**, therefore, it is necessary to turn to § 1395y(b)(2)**(B)**. And the only reimbursement obligation found in § 1395y(b)(2)(B) is a tortfeasor's obligation to "reimburse the appropriate *Trust Fund* for any payment *made by the Secretary*." The upshot is that a private party can sue under § 1395y(b)(3)(A) only to obtain reimbursement for a payment "made by the Secretary." That necessarily forecloses a suit such as this one, which seeks reimbursement for a payment made by a private insurer operating a Medicare Advantage plan.

Humana argues that it is error to look to § 1395(b)(2)(B) to determine when "appropriate reimbursement" is due, because the private cause of action in the MSP Act refers to "reimbursement 'in accordance with' Section 1395y(b)**(2)(A)**" and "does not refer to reimbursement under Section 1395y(b)(2)**(B)(ii)**." Opp. 16 (emphases in original). But that ignores the statutory text and structure. Section 1395y(b)(2)(A) generally prohibits Medicare

[1] All emphases added unless otherwise noted.

from making *any* payments at all when a primary plan provides coverage. Thus, if § 1395y(b)(2)(A) was all that mattered, *no* primary plan would *ever* be required to reimburse Medicare, and thus *no* primary plan could *ever* be subject to suit under § 1395y(b)(3)(A) for failing to make "appropriate reimbursement." Instead, a tortfeasor's obligation to make "appropriate reimbursement" arises only because § 1395y(b)(2)(A) sends the reader to § 1395y(b)(2)(B), where § 1395y(b)(2)(B)(i) allows "[t]he Secretary" to make a "conditional payment" and § 1395y(b)(2)(B)(ii) in turn requires a primary plan to "reimburse the appropriate Trust Fund" for any such conditional payment. In other words, the only way to give § 1395y(b)(3)**(A)** substantive effect is to look to the reimbursement obligations in § 1395y(b)(2)**(B)**.

Humana also errs to the extent it argues that § 1395y(b)(2)(B)(ii) obligates primary plans to reimburse MAOs. *See* Opp. 17. There is no plausible theory of statutory interpretation under which an obligation to reimburse the Medicare "Trust Fund for a[] payment made by the Secretary" could be construed as an obligation to reimburse a private insurance company operating a Medicare Advantage plan. Instead—and as Humana itself ultimately concedes—a tortfeasor's potential obligation to reimburse an MAO stems from an entirely *separate* provision of the Medicare Act, 42 U.S.C. § 1395w-22(a)(4), which states that an MAO "may … charge" a tortfeasor for certain healthcare costs incurred by the MAO. *See* Opp. 12 (stating that § 1395w-22(a)(4) "requires that Glaxo pay Humana the liability that arises from Glaxo's status as the primary plan"). The problem for Humana, of course, is that § 1395y(b)(3)(A) simply does not authorize a federal double-damages suit where a

tortfeasor is alleged to have failed to pay "appropriate reimbursement[] in accordance with" § 1395w-22(a)(4).

Contrary to Humana's assertion, to recognize that MAOs cannot invoke the double-damages cause of action in § 1395y(b)(3)(A) is not to "immunize[]" tortfeasors from suit or to allow them to "evade [their] duty" to reimburse MAOs. Opp. 19, 16. To the contrary, MAOs can enforce that duty in the way that insurance companies have always sought to enforce such a duty: through subrogation suits under state law. *See* Pet. 34; *see also Care Choices HMO v. Engstrom*, 330 F.3d 786, 790 (6th Cir. 2003). Nothing in the MSP Act or the Medicare Advantage statute suggests that Congress intended to displace that traditional state-law regime. *See* Pet. 34-35.

Humana responds by declaring that the Medicare Act "preempts" those traditional state-law remedies. Opp. 22. But the preemption clauses cited by Humana preempt only those state laws that would restrict an MAO's ability to "charge" a primary plan by including subrogation or secondary-payer rights in their insurance contracts, 42 U.S.C. § 1395w-22(a)(4), or that are otherwise inconsistent with certain "standards" established by Part C of the Medicare Act that are not relevant here, *id.* § 1395w-26(b)(3). They leave undisturbed the tort and contract remedies that private insurers typically use to enforce their rights.

There are also good reasons why Congress would have wanted to afford a federal double-damages remedy to the Government, while leaving MAOs to their traditional state-law remedies. In sharp contrast to double-damages recoveries by the Government under the MSP Act, double-damages recoveries by private MAOs do little (if anything) to lower the costs

of the Medicare program. As *amici* explain, "nothing in the MSP [Act] or any other federal regulation requires MAOs to use the excess funds generated from this new federal cause of action to reimburse the Medicare Trust Fund, supplement benefits, or lower premiums to beneficiaries." Br. of Pls.' Advisory Comm. as *Amici Curiae* at 16. Instead, those double-damages recoveries serve only to swell the profit margins of the private insurers that offer Medicare Advantage plans. There is no reason to think that Congress intended the private cause of action in the MSP Act to serve that purpose, particularly in light of recent news reports that the Government overpaid MAOs by at least *$3.2 billion* between 2010 and 2012.[2]

In the end, Humana resorts to pleas for agency deference. *See* Opp. 25-26. But the predicate for such deference is a statutory ambiguity, *see, e.g.*, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984), and there is no such ambiguity here. A complicated statute is not the same thing as an ambiguous statute. As noted above, under the plain terms of the statute, a private party can sue under § 1395y(b)(3)(A) only when a tortfeasor has failed to provide "appropriate reimbursement" for a "payment made by the Secretary." Thus, any regulations that purport to allow MAOs to sue under § 1395y(b)(3)(A) for failure to provide "appropriate reimbursement" for payments made by persons *other* than the Secretary (*e.g.*, MAOs)

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[2] *See, e.g.*, Government Accountability Office, *Medicare Advantage: Substantial Excess Payments Underscore Need for CMS To Improve Accuracy of Risk Score Adjustments* (January 2013), *available at* http://www.gao.gov/assets/660/651712.pdf.

are contrary to the statutory text and not entitled to deference. *See* Pet. 35-36; *see also* Br. of Wash. Legal Found. as *Amicus Curiae* at 13-16.

### C. The Circuit Courts Disagree Over The Scope Of The Private Cause of Action In The MSP Act.

Finally, Humana cannot obscure the confusion that has emerged in the Courts of Appeals concerning the scope of the private cause of action in § 1395y(b)(3)(A).

As Humana acknowledges, Opp. 29, the Sixth Circuit has concluded that the MSP Act "permit[s] lawsuits against tortfeasors only by *Medicare*, and not lawsuits against tortfeasors by *private parties*." *Bio-Medical Applications of Tenn., Inc. v. Central States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 292-93 (2011) (emphasis in original). That statement was hardly "dictum." Opp. 29. The Sixth Circuit in *Bio-Medical* itself described that reasoning as part of its "holding," which it was compelled to reach because of "widespread confusion in the district courts" about how the MSP Act applies to suits against tortfeasors. 656 F.3d at 292.

Nor is there any merit to Humana's suggestion that, when it used the word "Medicare" to specify who could sue tortfeasors under the Act, the Sixth Circuit intended to include MAOs. Opp. 20-31. MAOs are not merely Medicare by another name; they are *private* insurance companies that provide *private* insurance coverage under *private* insurance contracts. *See* Pet. 12-13. The Sixth Circuit, moreover, explicitly relied on § 1395y(b)(2)(B)(ii) in holding that only "Medicare" could sue tortfeasors under the Act, *see Bio-Medical*, 656 F.3d at 292, and thus was fully aware that the Act

authorized suits against tortfeasors only to recover reimbursements owed to "the Secretary."

There is also no basis for interpreting *Bio-Medical* to bar only "actual state-law 'tort' suit[s]" brought by private parties. Opp. 31. The *only* causes of action authorized anywhere in the MSP Act are those that seek *reimbursement* from primary plans. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii), § 1395y(b)(3)(A). And *Bio-Medical* held unequivocally that only Medicare—and not "private parties"—can invoke those remedies to sue tortfeasors. 656 F.3d at 292. That holding leaves no room for arguing that the Sixth Circuit merely barred "state-law 'tort' suits," which are simply not authorized by the Act.

If *Bio-Medical* left any doubt as to the law in the Sixth Circuit, *Engstrom* would dispel it. *Engstrom* squarely rejected the argument that private insurance companies operating Medicare-substitute plans have a federal cause of action against tortfeasors. *See* 330 F.3d at 790. True, *Engstrom* focused its analysis on whether to "imply a private right of action" on behalf of Medicare-substitute plans. Opp. 33 (emphasis omitted). But that only underscores the fallacy in the Third Circuit's reasoning: although the MSP Act's remedial mechanisms were specifically addressed in *Engstrom*, *see* 330 F.3d at 790-91, neither the parties nor the court believed that Medicare-substitute plans could invoke those remedies. Instead, a Medicare-substitute plan's remedies are "based on a standard

insurance contract claim and not on *any* federal statutory right." *Id*. at 790.[3]

Finally, Humana argues that the Third Circuit's ruling does not conflict with *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 524-25 (8th Cir. 2007) or *United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19 (1st Cir. 2007) because those decisions "did not hold that *only* a 'beneficiary' may sue." Opp. 35 (emphasis in original). That is wrong for two reasons. *First*, by holding that beneficiaries can sue tortfeasors under § 1395y(b)(3)(A), the First and Eighth Circuits have parted ways with the Sixth Circuit, which interprets the MSP Act to permit suits against tortfeasors "only by Medicare." *Bio-Medical*, 656 F.3d at 292. *Second*, the reasoning of *Stalley* and *United Seniors* will plainly foreclose MAOs from invoking the MSP Act's private cause of action in the First and Eighth Circuits. Both decisions recognized that a party can sue under § 1395y(b)(3)(A) *only* when a tortfeasor has failed to reimburse the Federal Government for a conditional payment made by Medicare. *See Stalley*, 509 F.3d at 522 (§ 1395y(b)(3)(A) "relies on private persons with superior knowledge to discover *the government's* claim"); *id*. at 524 (the purpose of § 1395y(b)(3)(A) is to

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[3] *Engstrom* cannot be distinguished on the basis that it involved a suit by a Medicare-substitute HMO rather than a Medicare Advantage plan. *See* Opp. 24. The secondary-payer statute that applies to Medicare-substitute HMOs is virtually identical to the secondary-payer statute that applies to MAOs, and both provisions are "logically subject to the same interpretation." Pet. App. 19a n.13; *compare* 42 U.S.C. § 1395mm *with id*. § 1395w-22(a)(4).

"help *the government* recover conditional payments"); *id*. at 527 (a portion of a private plaintiffs' recovery "would be paid to reimburse *Medicare*"); *United Seniors*, 500 F.3d at 22 (§ 1395y(b)(3)(A) was intended "to encourage private parties to bring actions to enforce *Medicare's* rights"); *Id*. at 25 (§ 1395y(b)(3)(A) "discourag[es] primary insurers from failing to reimburse *Medicare* and prevent[s] depletion of the *Medicare trust fund*").

## CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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Respectfully submitted,

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