

**FOR IMMEDIATE RELEASE****January 7, 2013**

COURT URGED TO REJECT EXPANSION OF PRIVATE CAUSE OF ACTION UNDER MEDICARE

(GlaxoSmithKline LLC v. Humana Medical Plans, Inc.)

U.S. Supreme Court

The Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court decision that drastically expands a private cause of action under the Medicare Secondary Payer Act (MSP Act) whereby certain private healthcare insurers around the country will be permitted to seek double damages from pharmaceutical companies and other alleged tortfeasors.

In a brief filed in *GlaxoSmithKline LLC v. Humana Medical Plans, Inc.*, WLF argued that, in enacting the MSP Act, Congress provided a unique remedy for the federal government to recover payments made by the Secretary of Health and Human Services from the Medicare Trust Fund, *not* a private cause of action for private health care insurers to recover their own costs. WLF charged that the extension of the MSP Act's private right of action to non-governmental plaintiffs is an attempted end-run around congressional intent.

“WLF is concerned that, if allowed to stand, the decision below will result in an explosion of unintended private litigation under Medicare Part C,” said WLF Senior Litigation Counsel Cory Andrews after filing WLF’s brief. “WLF recognizes that federal courts have a responsibility, in the absence of legislation, to fashion federal remedies in cases raising issues of uniquely federal concern. But where, as here, Congress has adopted legislation that speaks to the issue at hand (whether the Medicare Secondary Payer Act provides Medicare Advantage organizations with a private cause of action for double recovery), there is no legal basis for recognizing a remedy that Congress never intended,” Andrews said.

The MSP Act authorizes Medicare to sue tortfeasors to recover double the medical costs that Medicare had to pay as a result of a tortfeasor’s conduct. To accomplish that result, the MSP Act grants the government a private cause of action to sue for double damages any “primary plan” that fails to pay when it should. The Act further defines the term “primary plan” to include tortfeasors. But, as WLF argued in its brief, a necessary precondition of invoking the private cause of action in the MSP Act is that Medicare conditionally made a payment that a primary plan should have paid. That is never the case where, as here, a Medicare Advantage organization (MAO) files suit in an effort to recover *its own* payments, not the government’s. Significantly, the federal cause of action awards double damages to prevailing plaintiffs, thereby enabling MAOs to obtain

much more than they might otherwise be entitled to recover in a normal state-law action.

WLF also challenged the Third Circuit's conclusion that *Chevron*-type deference was owed to a 2005 amendment to the Center for Medicare and Medicaid Services' (CMS's) implementing regulations. In its brief, WLF demonstrated that while the statute unambiguously gives MAOs the right to "charge" primary payers, nowhere does it confer a private remedy on MAOs to enforce that right. Rather, MAOs are left to enforce their rights as secondary payers under the common law of contracts. And so where, as here, Congress has spoken directly to the rights of the federal government versus the rights of MAOs, CMS's implementing regulations are irrelevant. WLF emphasized that even if congressional intent was ambiguous, the CMS regulation was not a permissible construction of the statute, as the Secretary cannot invoke a right that Congress never created.

WLF is a public interest law and policy center with supporters in all 50 States. WLF routinely litigates in state and federal courts to promote free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.