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Federal Courts Reject Erin Brockovich's Latest Pitch

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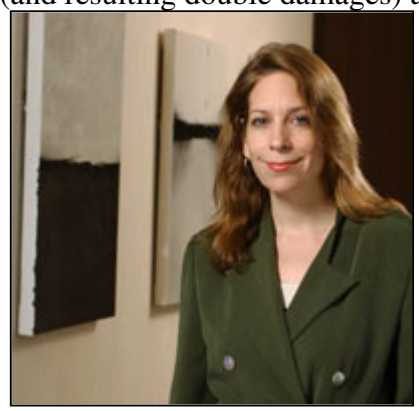
Erin Brockovich, of movie fame, is aggressively trying to stretch the limits of Medicare law by suing hospitals, nursing homes and other healthcare providers. So far, federal district courts in every one of the more than 30 California cases that Brockovich filed last summer have refused to "green light" this production. Rather, all courts have dismissed her claims, and they have done so upon initial motions to dismiss filed by the hospitals and other healthcare provider defendants.

In nearly identical, form-like, complaints that Brockovich filed across southern California, she urged that the Medicare Secondary Payer ("MSP") laws impose "primary payer" liability (and resulting double damages) against hospitals and skilled nursing facilities that allegedly commit professional negligence when treating Medicare patients. Brockovich also asserted that MSP suits may be prosecuted by uninjured, non-Medicare-insured plaintiffs, like herself, on the government's behalf. At the time she filed her lawsuits, Brockovich was 46 years old. She was neither Medicare-eligible nor a former patient of any healthcare provider she had named.



Federal district courts in California uniformly rejected Brockovich's theories. So have federal courts in Arkansas, Tennessee, and Pennsylvania in cases filed by Brockovich's lawyers on behalf of another, similarly situated plaintiff. In fact, no court anywhere has done anything other than dismiss these suits, upon the defendants' initial motions.

Brockovich is persistent, even if she is wrong on the law. She has appealed each California ruling in a pending (and consolidated) appeal before the Ninth Circuit. Brockovich's lawyers also have pursued a pending appeal to the Eighth Circuit in one of the identical cases filed in the other plaintiff's name.

In the California cases, the defendants argued that, as a matter of law, they could not be liable under the MSP absent established liability for payment, such as when a provider is determined in a judgment or settlement to be liable or finally responsible to pay on a patient's claim of negligent treatment. The defendants further argued that Brockovich could not manipulate the MSP private cause of action by attempting to make it, in effect, a *qui tam* statute that allows a private citizen to

sue in the name of the government. The courts agreed, dismissing these actions without leave to amend. [2]

The keys to Brockovich's legal misadventure lie within the language and purposes of the MSP law. The MSP statute was enacted to help reduce Medicare costs. [3] It makes Medicare the "secondary" payer whenever a Medicare beneficiary also has other primary medical insurance, or when another source is determined to be primarily responsible to pay for the care – such as worker's compensation or a third-party tortfeasor's liability insurance or its self-insurance.

The MSP statute also provides that the federal government, or a single Medicare beneficiary (through a private cause of action), may recoup double the amount of any sums Medicare paid, if a "primary payer" has a "demonstrated . . . responsibility" to pay, but has failed to do so. A 2003 amendment added that "[a] primary plan's responsibility for such payment may be demonstratedby a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." [4]

At least three fatal problems with Brockovich's theory of MSP liability were immediately apparent and decisive:

First, as the California and other courts ruled, Brockovich lacked Article III standing to pursue her claims. The MSP private right of action does not support a claim by the likes of Brockovich, an uninjured person who is not even a Medicare beneficiary. The private cause of action is available, in proper circumstances, to Medicare beneficiaries, but not to simply anyone who decides on his or her own to sue. [5]

The second major problem with Brockovich's claims is evident from the language of the MSP statute itself. Knowing that she had no case or controversy, Brockovich argued instead that the MSP statute is a *qui tam* statute, which would authorize private suits, by anyone, on the government's behalf. However, Congress must authorize *qui tam* actions expressly, if that is its intent – and in the MSP, it did not do so. [6] Unlike the quintessential *qui tam* statute, the False Claims Act [7] (a primary tool for policing suspected Medicare abuse), the MSP's private right of action speaks only to individual claims for damage, and the private right of action is distinct from a separate MSP right of action reserved specifically for claims directly by the federal government.

Unsurprisingly, the MSP private cause of action section lacks any procedural safeguards to protect the government, or any provisions for government ownership, supervision, or control of purely private MSP suits. Congress has been careful to insert such safeguards into the False Claims Act, specifically to prevent runaway litigation by private citizens, ostensibly in the name of the government. Courts repeatedly recognize the constitutional concerns raised by private suits on behalf of the government, and the False Claims Act has been carefully crafted to address them. [8] Brockovich's declaration that she sued on behalf of the government clashed with the Supreme Court's pronouncement that a tightly circumscribed assignment must exist for *qui tam* relators to proceed on behalf of the United States. The courts in the Brockovich cases refused Brockovich's request that they essentially rewrite the MSP private cause of action section to make it read as though it were a *qui tam* law. [9] As the district court in the Pennsylvania case brought by Brockovich's attorneys noted in its March 2007 order of dismissal, every one of the more than 35 decisions has rejected this "coordinated nationwide effort to persuade the federal courts to find an implied *qui tam* right of action in the MSP." [10]

The third major problem with Brockovich's claims also is fundamental, and it transcends the narrower problem of Brockovich's lack of standing to sue. Neither Brockovich nor anyone else – including an injured Medicare patient – can allege that a provider has a "demonstrated . . . responsibility" to pay, in any instance where the only wrong alleged is an undecided or unsettled allegation of medical negligence. Brockovich was unconcerned with any such real cases. Instead, each of her complaints contained verbatim boilerplate allegations of provider negligence, but none offered even a single allegation about any actual malpractice committed on an actual Medicare beneficiary resulting in care for which Medicare paid. The complaints, therefore, could not fall within the scope of the MSP statute. [11]

Brockovich's only response was to try bootstrapping the MSP's reference to "other means" by which responsibility to pay can be "demonstrated," to cover federal and state agency survey reports and mere allegations of deficiencies and claims of non-compliance with certification requirements unique to particular providers participating in the Medicare program. She also cited generally to healthcare providers' internal incident and investigation reports, and regulatory "plans of correction" and "statements of deficiencies." These reports contain findings, she argued, that can suffice to create "demonstrated . . . responsibility," without adjudication or other final finding of fault or a settlement agreement promising to pay.

Of course, none of these things is an acknowledgement that negligence occurred, nor is an investigation of an incident an admission of fault, and attaching MSP liability to such processes could discourage Medicare providers from undertaking internal review and improvement of the care they provide. Moreover, even a provider that renders deficient medical care may be entitled to Medicare reimbursement. Other legal avenues – not the MSP statute – ensure that the government enforces high standards for quality of care rendered to Medicare beneficiaries. [12]

Briefing in the Ninth Circuit consolidated California cases will take place in May and June. A similar case has already been briefed in the Eighth Circuit, so a decision from that court may soon establish additional precedent confirming that Brockovich's attempted expansion of the MSP private right of action exceeds the limits of the statute. [13]

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2 Twenty-nine of the cases were assigned to the Honorable David O. Carter in the Central District of California. Two others were assigned to the Hon. Thomas J. Whelan in the Southern District of California.

3 42 U.S.C. § 1395y.

4 42 U.S.C. § 1395y(b)(2) (B)(ii).

5 *See Manning v. Utilities Mut. Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001) (noting that "[t]he MSP creates a private right of action for individuals whose medical bills are improperly denied by insurers and instead paid by Medicare").

6 *See Burnette v. Carothers*, 192 F.3d 52, 57-58 (2d Cir. 1999) ("'there is no common law right to maintain a *qui tam* action; authority must always be found in legislation"), *cert. denied*, 531 U.S. 1052 (2000).

[7] 31 U.S.C. §§ 3729-30.

[8] 31 U.S.C. § 3730(b), (c). *see also Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*) (*qui tam* FCA actions only meet constitutional separation of powers requirements because the executive branch retains some degree of control over the litigation, such as the ability to intervene, the ability to dismiss, the ability to supervise).

[9] *See Vermont Agency of Natural Resources v. United States ex rel. Stevens* , 529 U.S. 765, 771-78 (2000)..

[10] *Stalley v. Genesis Healthcare Corp.*, Civ. 06-2492 (E.D. Pa. Mar. 12, 2007).

[11] Brockovich pursued her claims despite the fact that a spate of recent decisions, in the mass tort context, rejected the precise premise of her actions, observing that an *alleged* tortfeasor has no "demonstrated . . . responsibility" to pay absent an adjudication of liability, a settlement, or some other "like means" – which one court held "encompasses 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." *Glover v. Philip Morris USA*, 380 F. Supp. 2d 1279, 1291 (M.D. Fla. 2005) (footnote omitted), *aff'd, Glover v. Liggett Group, Inc.*, 459 F.3d 1304 (11th Cir. 2006) (*per curiam*); *see also, e.g., United Seniors Association, Inc. v. Philip Morris USA*, 2006 WL 2471977 (D. Mass., August 28, 2006).

[12] See, e.g., 42 U.S.C. §§ 1395i-3(g), (h); 42 C.F.R. § 488.450(c).

[13] *See Stalley v. Catholic Healthcare Initiatives*, 458 F.Supp. 2d 958 (E.D. Ark. 2006), *appeal pending*, No. 06-3884 (8th Cir.).

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