IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MSP RECOVERY CLAIMS SERIES 44, LLC, *Plaintiff,* v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *Defendant.*	Civil Action No. 1:22-cv-22500-RKA Judge Roy K. Altman Magistrate Judge Lisette M. Reid

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber, its members, and the business community have a significant interest in opposing unfair and abusive litigation tactics. A substantial number of meritless private lawsuits are filed under the Medicare Secondary Payer Act every year against insurance companies and other businesses. The Chamber has accordingly filed multiple amicus briefs to bring this abuse to light in cases where it is relevant to the underlying legal issues. *See, e.g.*, Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Appellees, *MSP Recovery Claims, Series LLC, et al. v. Metro. Gen. Ins. Co.*, 40 F.4th 1295 (11th Cir. 2022); Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Appellees, *MSP Recovery Claims, Series LLC, et al. v. Coloplast Corp.*, No. 3D22-191, 2023 WL 151324 (Fla. Dist. Ct. App. 2022).

INTRODUCTION

Defendant State Farm Mutual Automobile Insurance Company's motion to dismiss the amended complaint raises constitutional concerns about the Medicare Secondary Payer Act's ("the Act") private right of action. The litigation tactics of certain plaintiffs pursuing claims under the

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae, its members, and its counsel made such a monetary contribution.

Act, as well as those of plaintiffs in other, similar areas, underscore these concerns and the harms that result when unaccountable plaintiffs are permitted to bring meritless claims.

The private right of action under the Act is susceptible to abuse. The Act authorizes private parties to file civil enforcement actions that award double damages to a successful litigant. Because these double damages are only achievable through litigation and because there is often limited knowledge about the facts underlying these claims, plaintiffs may have little incentive to engage in pre-litigation negotiations. Some plaintiffs instead file suit without performing due diligence on their claims, plead claims without factual predicate, and use the litigation process itself to investigate whether any of their claims have merit. Indeed, courts across the country have admonished such plaintiffs for these and other abusive litigation tactics that run contrary to fundamental litigation practices and harm not only defendant businesses but our entire civil-justice system. *See, e.g.*, *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 878 (7th Cir. 2021) (collecting cases and noting these plaintiffs' "approach is not sitting well with many judges"); *see also Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008) ("Frivolous . . . lawsuits threaten the availability of a well-functioning judiciary to all litigants.").

As other contexts show, moreover, wherever private rights of action lacking necessary guardrails combine with a strong financial incentive to sue, litigation abuse follows. False Claims Act litigation, environmental citizen suits, and the growing trend of Americans with Disabilities Act "tester" litigation all illustrate the potential for abuse when private rights of action are unconstrained by public oversight and other crucial institutional checks.

ARGUMENT

I. Medicare Secondary Payer Act Claim-Aggregator Plaintiffs Often Litigate in Bulk Without Conducting Pre-Filing Diligence or Pleading Factual Support for Their Claims.

The Act's double-damages provision often encourages abusive litigation tactics, including inadequate pre-filing diligence, pleading without sufficient factual support, and fishing for possible support in discovery.

A. The Medicare Secondary Payer Act authorizes Medicare—and Medicare Advantage Organizations in some circuits—to sue primary payers for reimbursement plus double damages.

Congress created Medicare to provide federally funded health insurance to individuals with disabilities and those 65 years of age or older. Medicare beneficiaries often have more than one insurer, however, who may be liable for their expenses. Before 1980, Medicare generally paid for a beneficiary's medical services whether or not the beneficiary was also covered by another health plan. But this was quite costly to Medicare, and thus to the American people. To lower the costs to taxpayers and "counteract escalating healthcare costs," *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. and Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 281 (6th Cir. 2011), Congress enacted the Medicare Secondary Payer Act in 1980. The Act—which has been amended and expanded multiple times—designates private insurers covering medical care for Medicare beneficiaries as primary payers and designates Medicare as only a secondary payer. *See* 42 U.S.C. § 1395y(b)(2). These designations mean that if private insurance and Medicare both cover a beneficiary's medical procedure, then the private insurer as the primary payer is responsible for making the payment, while Medicare as the secondary payer is responsible only to the extent that the health care provider's bill exceeds the private insurer's coverage. If the primary payer "has not made or cannot reasonably be expected to make payment," however, Medicare is permitted to

make a "conditional payment." 42 U.S.C. § 1395y(b)(2)(B)(i). If such a conditional payment is made, the primary payer then reimburses Medicare. 42 U.S.C. § 1395y(b)(2)(B)(ii).

In the 1990s, Congress allowed Medicare beneficiaries to receive their benefits through private insurance companies that contract with Medicare to provide "Medicare Advantage" plans, rather than to receive their benefits directly from Medicare. *In re Avandia Mktg. Sales Pracs. & Prod. Liab. Litig.*, 685 F.3d 353, 355 (3d Cir. 2012). These private insurance companies are called "Medicare Advantage Organizations" ("MAOs"). Where there is overlapping coverage, MAOs, like Medicare, are authorized to charge primary payers for medical expenses they incur on behalf of a beneficiary when they are a secondary payer and an insurance carrier, employer, or other entity is the primary payer. 42 U.S.C. § 1395w-22(a)(4). MAOs, again like Medicare, sometimes make conditional payments, "with insufficient knowledge about the responsible primary payer." *State Farm*, 994 F.3d at 872. If an MAO later learns that a primary payer shouldered principal responsibility for a covered expense the MAO paid for a particular individual, the MAO may seek reimbursement from the primary payer. *Id.*

Where Medicare identifies the primary payer and the primary payer declines to provide reimbursement, the United States may sue for reimbursement as well as recovery of double damages—*i.e.*, reimbursement of the unpaid amount owed to Medicare plus that same amount as a penalty for failing to pay previously. 42 U.S.C. § 1395y(b)(2)(B)(iii). Whether an MAO can bring a private action under the Act seeking the same remedies is not settled nationwide, though the Eleventh Circuit has ruled that it can. *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 832 F.3d 1229, 1238 (11th Cir. 2016); *see also Avandia*, 685 F.3d at 367 (holding MAOs can bring a private action under the Act in the Third Circuit).

B. Claim-aggregator plaintiffs often sue potential primary payers for double damages without any attempt at pre-suit resolution or investigation.

Because attempting to collect unreimbursed payments "can be tedious, costly, and uncertain," MAOs are sometimes willing to "outsource this process—essentially to assign or sell [their] right to reimbursement to another party." *State Farm*, 994 F.3d at 872. The assignees or purchasers of these claims effectively serve as debt collectors for an MAO's reimbursement rights. They include claim-aggregator law firms such as the plaintiff in this case. These claim-aggregator plaintiffs "acquire[] claims" from MAOs via assignment and then use "data analytics services to identify" allegedly "improper payments for healthcare services." Lionheart Acquisition Corp. II, Registration Statement, p. xii (March 11, 2022), https://bit.ly/40p3KP6. As the Seventh Circuit explained:

> On the demand side, entities like the plaintiffs here see financial opportunity in effectively becoming debt collectors for MAOs. This arrangement *can be lucrative because of the Medicare Act's double damages provision*. If debt collectors—or more accurately assignees of the MAO—can identify unreimbursed conditional payments and successfully bring suit under the Act, they can collect twice as much on a particular assigned receivable.

State Farm, 994 F.3d at 872 (emphasis added).

This business model encourages claim-aggregator plaintiffs to file suit without performing due diligence on their claims. Again, the Seventh Circuit has explained these perverse financial incentives:

> Note the financial realities that exist for the debt collectors and MAOs alike. Both have financial incentives to expend as little as possible on the front end of these assignment arrangements. This is so because it is often unclear at the time of the initial assignment what, if any, value exists in the assigned receivables. . . . MAOs agree to assign their collection rights to large baskets of potential conditional payments in exchange for a percentage of anything recovered. For their part, the debt collectors agree to this fee sharing arrangement but do not pay much, if anything, up front for the assignation of collection rights. It is then on the assignee—effectively the debt collector—to do its best to collect and thereby realize value on the assignment. If the assignee is successful in recovering double damages through litigation, there is sufficient revenue to make the litigation and

> collection effort worth the collector's while, with proceeds remaining to share with the MAO. If nothing is recovered, the assignee loses only its litigation costs.

Id.

C. Claim aggregators' file-first, ask-questions-later litigation tactics have resulted in countless dismissals, have been sharply criticized as contrary to fundamental litigation practices, and are an abuse of the judicial system.

The claim-aggregator business model unsurprisingly results in a tremendous number of lawsuits and a tremendous number of dismissals. Many of the claim-aggregator lawsuits have been dismissed at the pleading stage for various reasons, most of which are attributable—at least in part—to the refusal to follow fundamental litigation practices, such as performing pre-suit diligence or filing pleadings with adequate factual support.

The Seventh Circuit *State Farm* case is illustrative. The complaint for reimbursement and double damages under the Act contained *no* specifics of any of the claims. As the Seventh Circuit noted, the claim-aggregator plaintiff was "unable in the district court to do more than show an assigned right to recover *potentially* unreimbursed payments." *State Farm*, 994 F.3d at 873. It "could identify baskets of possible receivables arising from payments MAOs made for healthcare provided to someone enrolled in Medicare but could go no further." *Id.* With no factual basis for its allegations, the plaintiff sought to use the litigation process itself as its "pathway to identifying any value in the assigned receivables and then pursuing any available collections." *Id.* But the district court rightfully demanded more specificity. Following repleading of an "illustrative" claim and discovery that turned up no evidence, the district court granted summary judgment for the defendant. *Id.* at 873-74. The Seventh Circuit affirmed, explaining, "[f]ederal courts do not possess infinite patience, nor are the discovery tools of litigation meant to substitute for some modicum of pre-suit diligence." *Id.* at 878. Claim-aggregator plaintiffs, the court noted, often "pull the litigation trigger before doing their homework"; "[t]hey sue to collect on receivables they paid little or

nothing for and then rely on the discovery process to show they acquired something of value and thus have an enforceable right to collect." *Id*. But "at the critical put up or shut up moment of summary judgment," they "once again failed to establish standing." *Id.* at 871, 878.

Such tactics have been heavily criticized by "multiple district courts" for bearing "all the earmarks of abusive litigation." *Id.* at 878. In *MSP Recovery Claims, Series LLC v. New York Central Mutual Fire Insurance*, the Northern District of New York said that claim-aggregator "tactics" of filing "deficient complaints, rely[ing] on courts to point out the problems, and then repeatedly amend[ing] their pleadings until they get it right" were "a flagrant abuse of the legal system." No. 19-CV-00211, 2019 WL 4222654, at *6 (N.D.N.Y. Sept. 5, 2019); *see also id.* (criticizing such tactics as "throw[ing] allegations into as many federal courts as possible [to] see what sticks"). Similarly, in *MSP Recovery Claims, Series LLC v. USAA General Indemnity*, the Southern District of Florida dismissed a claim aggregator's complaint with prejudice, stating: "In light of the ever-shifting allegations Plaintiff has presented in its four versions of its pleading, it is evident Plaintiff has played fast and loose with facts, corporate entities, and adverse judicial rulings." No. 18-21626, 2018 WL 5112998, at *13 (S.D. Fla. Oct. 19, 2018). The claim-aggregator plaintiff "sought to rewrite history with a convoluted story . . . that there was an MAO all along that properly assigned those rights," yet "that [was] not so." *Id.*

Likewise, in *MSP Recovery Claims, Series LLC v. AIG Property Casualty Co.*, the Southern District of New York rebuked the claim aggregator for having "done absolutely nothing to obtain relevant information from its assignors," saying that there was "no excuse" for not having gathered evidence on its claims. No. 20-CV-2102, 2021 WL 1164091, at *15 (S.D.N.Y. Mar. 26, 2021). This came after the plaintiff candidly admitted that it was "not in possession of claims information" specific to the claims it was alleging, attempted to "fill that factual gap" with

"exemplar claims," and even then, it was unable to produce any evidence that it was assigned the claims related to the exemplar patients or that those patients' medical care was for injuries covered by the at-issue insurance policies. *Id.* at *7-14.

And still other cases filed by claim aggregators reach similar ends. *See, e.g.*, *MSP Recovery Claims, Series LLC v. Travelers Cas. & Sur. Co.*, No. 17-23628, 2018 WL 3599360, at *4 n.4 (S.D. Fla. June 21, 2018), *aff'd as modified in relevant part*, *MSP Recovery Claims, Series, LLC v. ACE Am. Ins. Co.*, 974 F.3d 1305 (11th Cir. 2020) (reminding the plaintiff of its "duty of candor to the Court," which included a duty not to submit "knowingly inaccurate" information); *MAO-MSO Recovery II, LLC v. The Farmers Ins. Exchange*, No. 2:17-cv-02522, 2022 WL 1690151, *12 (C.D. Cal. May 25, 2022) (granting summary judgment to insurer on 118 claims, among other reasons, because "plaintiffs have not put forth any evidence . . . showing that plaintiffs' assignors made payments to compensate medical providers for treatment").

* * *

Abusive claim-aggregator litigation tactics, incentivized by the double damages available under the Act, underscore the harms of allowing unaccountable plaintiffs to use private rights of action to bring frivolous lawsuits.

II. Without Proper Institutional Checks, Private Rights of Action Encourage Unfair and Abusive Litigation Tactics in Many Other Contexts.

Beyond the Medicare Secondary Payer context, a similar lack of proper oversight encourages unfair abuse of private rights of action. As the United States Solicitor General recognized in a case about a private right of action for false advertising, a law that combines the "prospect of financial gain" with a lack of "institutional checks," "raises the prospect of vexatious and abusive litigation." Brief for the United States as Amicus Curiae, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 899100, at *23. And this "prospect" is by no means

hypothetical. Such abuse occurs in multiple areas where private plaintiffs seek to vindicate essentially public harms.

Take False Claims Act litigation. The FCA allows private citizens—called relators—to file suit on behalf of the United States against those who have allegedly defrauded the federal government. 31 U.S.C. § 3730(b). These relators lack any real federal supervision and, if successful, receive a significant monetary bounty. *Id.* § 3730(d) (relator shares in federal government's financial recovery). As a result, even though the FCA process was designed to encourage "insiders" aware of fraud to deliver that information to the United States by filing a lawsuit, *see United States v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995), financially motivated relators have distorted this design in search of ever bigger awards. Now, relators often target a whole industry or multiple defendants within an industry. *See, e.g.*, *ILR Briefly: Fixing the FCA Health Care Problem*, U.S. Chamber of Com. Inst. For Legal Reform, (Aug. 2022) https://bit.ly/3X2LGal (reviewing statistics and explaining that the FCA has been disproportionately enforced against the health care industry); *United States ex rel. Johnson v. Shell Oil Co.*, 33 F.Supp.2d 528 (E.D. Tex. 1999) (False Claims Act action against 18 major oil companies). The wider the net that relators cast, the greater the potential profits. *See, e.g.*, *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1294–95 (11th Cir. 2021) (relator brought suit for over 214 violations of FCA by hospital, and even though the actual damages sustained totaled less than $800, the ultimate recovery totaled over $1 million after treble damages and statutory penalties).

Moreover, like MSP claim aggregators, FCA relators often ignore pre-filing diligence and specific pleading in service of quick and cheap filing. *See, e.g.*, *Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006) (explaining that it often assumes relators bring an action "solely to use the

discovery process as a fishing expedition for false claims"); *United States v. Ortho-McNeil Pharm., Inc.*, No. 03 C 8239, 2007 WL 2091185, at *5 (N.D. Ill. July 20, 2007) ("[The Relator] has filed suit based upon his suspicion that Defendants engaged in unlawful conduct with the hope that discovery will unearth some specific FCA violation."); *U.S. ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 144 (N.D. Ill. 1993) (FCA complaint may not be "filed as a pretext to uncover unknown wrongs"); *U.S. ex rel. King v. Solvay S.A.*, No. H-06-2662, 2013 WL 820498 (S.D. Tex. Mar. 5, 2013) (noting qui tam relator's "generalized allegations" in its 267-page complaint containing more than 768 paragraphs does not justify the burden and expense associated with unfettered discovery).

Abusive litigation tactics also frequently occur where a statute empowers citizens to enforce federal law—often called "citizen suit" provisions. For example, the Clean Air Act and Clean Water Act authorize private plaintiffs through citizen suits to effectively act as bounty hunters by seeking "civil fines payable to the [federal] treasury" and by "profit[ing] from such litigation [targeting corporations] by obtaining attorneys' fees or settlements that can be used to finance subsequent litigation." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 47-50 (2001). As Justice Scalia noted, this has the potential to divert public remedies into private gain. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 210 (2000) (Scalia, J., dissenting).

The same is true for suits under the Americans with Disabilities Act, where self-proclaimed ADA "tester plaintiffs," appoint themselves as "private attorney general[s]" to enforce ADA provisions against businesses on behalf of disabled people. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J., concurring). These uninjured ADA testers and their counsel have a personal financial incentive to file as many cases as possible because of fee-shifting

provisions. It is no wonder, then, that the lawyers representing ADA testers are responsible for huge amounts of meritless lawsuits that prey on businesses. *See Shayler v. 1310 PCH, LLC,* 51 F.4th 1015, 1017 (9th Cir. 2022). As the Ninth Circuit has explained:

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through conciliation and voluntary compliance, a lawsuit is filed . . . . Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.

Id. at 1017-18 (citation omitted).

Tester plaintiffs have filed hundreds, sometimes thousands, of these harassing lawsuits. *See Arpan*, 29 F.4th at 1290 (recognizing plaintiff has filed over 600 suits since 2018); *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1226 (11th Cir. 2021) (over 250 lawsuits); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1326 (11th Cir. 2013) (over 270 lawsuits); *Cohan v. Lakhani Hosp., Inc.*, No. 21 CV 5812, 2022 WL 797037, at *3 (N.D. Ill. Mar. 16, 2022) (over 2,300 lawsuits). And there is no incentive for attorneys to stop this abuse because ADA plaintiffs may recover attorneys' fees (and costs), but only after filing suit. 42 U.S.C. § 2000a-3(b); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001). As these examples show, private rights of action unconstrained by the institutional checks of executive oversight are highly prone to abuse, harming both defendants and the entire civil-justice system.

CONCLUSION

The Court should grant the Defendant's motion to dismiss the amended complaint.

Dated: February 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have consented to electronic notification.

/s/ Jennifer Patricia Brooks
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