

Client Alert

A report
for clients
and friends
of the Firm

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Proskauer Defeats Medicare Secondary Payer Lawsuit Brought By Activist Erin Brockovich

Proskauer recently won the dismissal of a federal court lawsuit filed by well-known activist Erin Brockovich against Promise Healthcare, Inc. Brockovich filed lawsuits against Promise and a number of other health care companies under the Medicare Secondary Payer statute ("MSP"), 42 U.S.C. § 1395y(b). Brockovich originally filed her suit against Promise in California state court and Proskauer removed the case to federal court. Brockovich asserted that the MSP authorized suits by private attorneys general to recover alleged Medicare overpayments on behalf of the federal government. By suing major hospital and nursing home chains across the country, Brockovich hoped to recover hundreds of millions of dollars in alleged Medicare overpayments. The dismissal of the Brockovich lawsuit at an early stage of the case not only denied Brockovich a recovery, but also prevented her from conducting expensive and burdensome discovery as a wedge to force a settlement.

The MSP specifies that the Medicare program's obligation to pay for the cost of medical care is "secondary" when it is demonstrated that another entity has primary responsibility to pay for that care. Brockovich asserted that Medicare paid for medical care provided to program beneficiaries who were allegedly injured by health care providers. The suits claimed that the health care providers should be primarily responsible for the cost of that care. Brockovich, however, did not have any evidence that particular beneficiaries had been injured. Instead, she intended to conduct extensive discovery in the hope of finding evidence of injuries after she filed suit.

The MSP authorizes the federal government to bring a lawsuit against those who are responsible for making, but who fail to make, primary payment for medical care. The MSP also authorizes a Medicare beneficiary to sue a "primary plan" that fails to make payment and leaves the beneficiary without coverage for the cost of his or her medical care. Thus, the MSP creates two, and only two, causes of action. The MSP does not create a third "hybrid" cause of action that permits private parties such as Brockovich to file suit on behalf of the federal government.

Proskauer took the unique approach of challenging the core legal theory behind Brockovich's lawsuits. In its motion to dismiss, Proskauer demonstrated that the MSP does not create a private cause of action entitling private parties to recover Medicare funds on behalf of the federal government. Therefore, Brockovich cannot assert a private cause of action under the MSP based on an injury allegedly sustained by the federal government. Proskauer's motion to dismiss included a comprehensive analysis of the MSP and its legislative history, as well as a discussion of how Brockovich's interpretation of the MSP would violate the "Take Care" Clause of the United States Constitution by giving private parties the unfettered right to prosecute actions on behalf of the United States, without the government having any control over the litigation.

Ultimately, the Court concluded that Brockovich could not sue under the MSP on behalf of the United States and relied upon portions of Proskauer's briefs in its opinion dismissing the case with prejudice.

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