No. 05-263

In the Supreme Court of the United States

TELECARE CORP., PETITIONER

v.

MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner is a corporate employer that sponsored and contributed to an employee group health plan by purchasing third party health insurance for its employees. The question presented is whether petitioner is required under the Medicare Secondary Payer statute, 42 U.S.C. 1395y(b)(2)(B)(iii), to reimburse the United States when the United States makes payment under the Medicare program for items or services also covered by petitioner's employee group health plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 409 F.3d 1345. The order of the district court (Pet. App. 22a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2005. The petition for a writ of certiorari was filed on August 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the interpretation of amendments to the Medicare Secondary Payer statute that were en-

acted in 2003, while this case was pending in the district court.

1. For the first fifteen years of the Medicare program's existence, Medicare generally paid for services regardless of whether another insurance plan might also be responsible to pay for the beneficiary's care. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 1862(b), 79 Stat. 325. Beginning in 1980, however, Congress enacted a series of amendments designed to make Medicare the secondary rather than the primary payer for its beneficiaries when certain other insurance was available. The amendments have been codified at 42 U.S.C. 1395y(b) and are known as the Medicare Secondary Payer (or MSP) statute.

As the courts of appeals have explained, "[t]he transformation of Medicare from the primary payer to the secondary payer with a right of reimbursement reflects the overarching statutory purpose of reducing Medicare costs." *United States* v. *Baxter Int'l, Inc.*, 345 F.3d 866, 874-875 (11th Cir. 2003) (quoting *Zinman* v. *Shalala*, 67 F.3d 841, 845 (9th Cir. 1995)), cert. denied, 542 U.S. 946 (2004). The "obvious and express purpose" of the MSP statute is to "'reduc[e] federal health care costs' by making 'Medicare's payments . . . secondary and subject to recoupment in *all* situations where one of the statutorily enumerated sources of primary coverage could pay instead.'" *Brown* v. *Thompson*, 374 F.3d 253, 260 (4th Cir. 2004) (quoting *Baxter*, 345 F.3d at 888).

To effectuate that goal, the MSP statute broadly defines the circumstances under which Medicare is secondary to other insurance and the circumstances under which reimbursement of Medicare payments must be made. As the Eleventh Circuit explained, "[s]ince enacting the MSP statute, Congress has expanded its reach

several times, making Medicare secondary to a greater array of primary coverage sources, and creating a larger spectrum of beneficiaries who no longer may look to Medicare as their primary source of coverage." *Baxter*, 345 F.3d at 877. In addition, "Congress has repeatedly clarified and augmented the Government's powers to recoup conditional Medicare payments from primary sources." *Ibid.*

This case concerns the liability of an employer that sponsors or contributes to a group health plan to reimburse Medicare for mistaken payments for which the group health plan was primarily liable. Paragraph (1) of the MSP statute imposes substantive requirements on employers that choose to sponsor or contribute to group health plans. The statute's non-discrimination provision requires that an employer's group health plan (other than the plan of a small employer) provide the same benefits under the same conditions to employees (and spouses) age 65 or older as the plan provides to employees (and spouses) under 65. 42 U.S.C. 1395y(b)(1)(A)(i)(II) and (ii). Similarly, the statute's no-carve-out provision bars an employer's group health plan (other than the plan of a small employer) from taking into account the fact that an employee (or spouse) age 65 or older is entitled to Medicare benefits. 42 U.S.C. 1395y(b)(1)(A)(i)(I).

An employer that abides by the non-discrimination and no-carve-out mandates of the MSP statute is entitled to deduct the business expenses incurred in connection with the group health plan from its revenues in computing taxable income. If, however, the employer fails to meet those requirements, its group health plan may be deemed nonconforming, 26 U.S.C. 5000(c), and the employer may be assessed an excise tax equal to

25 percent of the expenses incurred by the employer in connection with any plan during the calendar year, 26 U.S.C. 5000(a).

Paragraph (2) of the MSP statute sets out directives to ensure that Medicare's coverage is secondary to the employer group health plan coverage required under paragraph (1) (as well as to the coverage of other forms of insurance not at issue in this case, such as liability and automobile insurance). Paragraph (2) directs the Medicare program not to pay for benefits when payment for the item or service has been made, or can reasonably be expected to be made, under an employer group health plan. 42 U.S.C. 1395y(b)(2)(A)(i).

Congress recognized that, in practice, the Medicare program often lacks the information needed to determine whether to make payment under the Medicare program. See, *e.g.*, *Baxter*, 345 F.3d at 901 n.30 ("HHS and Congress have repeatedly flagged Medicare's inability to ascertain the existence of alternative sources of coverage as a weakness in the secondary payer program."). Accordingly, Congress has authorized the United States to seek recovery from a wide range of entities with responsibility for making payment in connection with a primary insurance plan. The statute, in its present form, authorizes the United States to bring an action for reimbursement against:

> any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, *as an employer that sponsors or contributes to a group health plan*, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan.

42 U.S.C. 1395y(b)(2)(B)(iii) (emphasis added). Thus, "an employer that sponsors or contributes to a group health plan" may be required to reimburse Medicare, regardless of whether the employer had "direct[]" responsibility for making payment in the normal course for services provided to covered individuals under the plan.

The above underscored language was enacted (along with other amendments to the MSP statute) in 2003, while this case was pending in district court. Medicare Prescription Drug Act, Pub. L. No. 108-173, § 301, 117 Stat. 2221. As petitioner conceded below (Pet. C.A. Br. 18-19 & n.9), the amendments were intended to clarify rather than to change the law, and thus govern all of plaintiff's claims. Indeed, Congress formally declared that the amendments were "[c]larifying," 117 Stat. 2221, and provided that the amendments were effective as if included in the MSP statute as originally enacted in 1980, 117 Stat. 2222; see *Brown* v. *Thompson*, 374 F.3d 253, 259-260, 261-262 (4th Cir. 2004) (holding that the 2003 amendments clarified rather than changed the law).

2. a. Petitioner is a corporate employer that sponsored and contributed to a group health plan for its employees. According to the complaint, from 1996 to 2002, plaintiff maintained a group health plan within the meaning of the Medicare Secondary Payer statute by purchasing third-party health insurance for its employees from Kaiser Foundation Health Plan. C.A. App. 21 (Compl. ¶ 3).

The complaint alleged that petitioner could not be required to reimburse the Medicare program for Medicare payments made for items or services covered by petitioner's group health plan. C.A. App. 27 (Compl.

¶¶ 39-40). In petitioner's view, only employers that maintain self-insured group health plans may be required to reimburse the Medicare program. See *ibid.* Because petitioner's group health plan was underwritten by a third-party insurer (Kaiser) rather than self-insured, petitioner alleged that it could not be required to reimburse Medicare. *Ibid.* The complaint sought the return of $1342.40 that petitioner had paid the Medicare program under protest, C.A. App. 25 (Compl. ¶¶ 27-29), as well as declaratory and injunctive relief.

b. As stated, while this case was pending in district court, Congress amended the MSP statute to state expressly that "an employer that sponsors or contributes to a group health plan" may be required to reimburse Medicare, regardless of whether the employer's responsibility for the plan's payments was derived "directly" or "otherwise." 42 U.S.C. 1395y(b)(2)(B)(iii). The district court held that under the plain terms of those amendments, petitioner could be required to reimburse the Medicare program for items or services covered under petitioner's group health plan. Pet. App. 29a-30a. Accordingly, the district court granted the government's motion to dismiss the complaint. *Id.* at 30a.

c. A unanimous panel of the Federal Circuit affirmed. The court of appeals agreed with the district court that "the statute's plain language compels a finding that all employers who sponsor or contribute to a group health plan are liable." Pet. App. 13a. The court rejected petitioner's contention that only self-insured employers may be held liable, explaining that Congress had "separately provided for recovery from self-insurers in the same statutory provision," *ibid.*, and that petitioner's interpretation thus "would render parts of the statute inoperative," *id.* at 20a. The court also rejected

petitioner's related contention that employers that do not self-insure cannot be regarded as "required or responsible * * * to make payment" under a plan. *Id.* at 13a. The court explained that the statute expressly contemplates that an entity's responsibility for payment may be felt "directly" or "indirectly," *id.* at 16a, and observed that even an employer whose plan is underwritten by a third-party insurer retains a degree of accountability for the plan's payments, see *ibid.* Finally, the court rejected petitioner's various policy arguments, noting that petitioner's concerns could be addressed by contract with the insurance provider that underwrites the employee group health plan. *Id.* at 20a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Indeed, no other court of appeals has addressed the provision of the 2003 amendments at issue in this case. The petition for a writ of certiorari therefore should be denied.

1. Petitioner argues that the MSP statute creates a cause of action against only those entities that are directly and contractually obligated to pay for the costs of medical care also covered by Medicare. It accordingly argues that employers such as itself, *i.e.* those that sponsor a primary insurance plan, cannot be liable under the statute unless the employer is self-insured and thus obligated to pay for the cost of health care. Pet. 7-14. That contention is belied by the text of the 2003 amendments to the MSP statute, which applies to any entity that is "required *or responsible* (*directly*, as an insurer or self-insurer, [or] * * * *as an employer that sponsors or contributes to a group health plan*, * * * *or otherwise*)

to make payment" with respect to an item or service covered under Medicare. 42 U.S.C. 1395y(b)(2)(B)(iii) (emphasis added).

Congress thus expressly provided that "an employer that sponsors or contributes to a group health plan" may be required to reimburse Medicare, regardless of whether the employer's responsibility for the plan's payments is felt "directly" or "otherwise," and regardless of whether the employer was "required" itself to make the payment in the normal course of business. 42 U.S.C. 1395y(b)(2)(B)(iii). With those amendments, Congress ratified the agency's preexisting regulation that imposes liability on an employer that sponsors or contributes to an employee group health plan, without regard to whether the plan was self-insured or underwritten by a third-party insurer. 42 C.F.R. 411.24(e) (explaining that the United States has a direct right of action against, *inter alia*, "an employer," "an insurance carrier," and "a third party administrator," without regard to whether the entity was contractually or directly required to pay for the cost of medical care); see also C.A. App. 34.

There is no dispute that petitioner sponsored and contributed to an employee group health plan. And as discussed above (at 3), even where an employer such as petitioner has, by contract, shifted to an insurance company the responsibility for paying the claims for services to those individuals covered by a group health plan, the employer sponsoring or contributing to the plan remains responsible for payment being made in a manner that comports with the requirements of the MSP statute. See also Pet. App. 15a-16a. Accordingly, under the plain terms of 42 U.S.C. 1395y(b)(2)(B)(iii), petitioner is required to reimburse the Medicare program if Medicare

makes a payment for an item or service also covered under petitioner's employee group health plan.

As the court of appeals explained (Pet. App. 13a-14a), petitioner's contention (Pet. 12-13) that only self-insured employers may be required to reimburse Medicare would make the provision's separate reference to "self-insured" entities superfluous. In an attempt to give meaning to the phrase "an employer that sponsors or contributes to a group health plan," petitioner argues (Pet. 13) that Congress intended the phrase to refer to "self-insuring nonprofit or charitable" employers since self-insurers are limited to only for-profit business. The statute says nothing of the sort. The statute merely "deem[s]" an entity engaged in a business, trade, or profession (without specifying whether they operate for profit or not for profit) to be self-insured when it carries its own risk; the statute does not bar charitable organizations (or for that matter any other entity) from becoming a self-insurer, or otherwise provide a limiting definition for a self-insurer. 42 U.S.C. 1395y(b)(2)(A). In any event, had Congress wanted simply to impose liability on a separate category of "non-profit self-insurers," it could have easily done so and would not have used the quite different phrase "an employer that sponsors or contributes to a group health plan." 42 U.S.C. 1395y(b)(2)(B)(iii).

Petitioner and its amici advance a variety of policy objections to the 2003 amendments, suggesting that they impose new costs on employers that sponsor or contribute to employee group health plans. But the objections misunderstand the statutory scheme. Although petitioner and its amici focus on perceived harm to small employers, the plans of small employers are exempt from the statute's requirements. 42 U.S.C.

1395y(b)(1)(A)(ii). Moreover, even for employers that are covered, an employer is always free to arrange by contract to have its third-party insurer reimburse Medicare directly and thus satisfy the employer's obligation to Medicare. Likewise, an employer is free to negotiate with its third-party insurer for an indemnity for any MSP liability. What the employer may not do, as the 2003 amendments confirm, is relieve itself by contract with a third-party insurer of any responsibility to reimburse the Medicare program when Medicare makes payment for items or services also covered under the employer's group health plan.

2. The panel's decision does not conflict with a decision from any other court of appeals. Indeed, no other court of appeals has addressed the provision of the 2003 amendments at issue in this case. All of the court of appeals decisions that petitioner cites (Pet. 9-10) were decided before Congress enacted the 2003 amendments. Moreover, none of those cases addressed the question presented here: whether an employer that sponsors or contributes to an employee group health plan by purchasing third-party insurance may be required to reimburse Medicare. In *United States* v. *Baxter Int'l, Inc.*, 345 F.3d 866 (2003), cert. denied, 542 U.S. 946 (2004), the Eleventh Circuit sustained the government's right under the MSP statute to seek reimbursement from the manufacturers of breast implants that had settled mass tort litigation. In *Mason* v. *American Tobacco Co.*, 346 F.3d 36 (2003), cert. denied, 541 U.S. 1057 (2004), the Second Circuit rejected an attempt by private individuals to sue tobacco manufacturers under the MSP statute. In *Health Ins. Ass'n of America, Inc.* v. *Shalala*, 23 F.3d 412 (1994), cert. denied, 513 U.S. 1147 (1995), the D.C. Circuit held that the government could not recover from

an insurer acting solely as the third-party administrator of an employer group health plan. That decision, however, was overridden by Congress. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4633(a), 111 Stat. 487. And *Waters* v. *Farmers Texas County Mut. Ins. Co.*, 9 F.3d 397 (5th Cir. 1993), concerned the amount that the government was entitled to recover from the proceeds of an automobile insurance policy. The only decision that does support petitioner's position is an unpublished district court decision, *Manning* v. *Utilities Mut. Ins. Co.*, No. 98 Civ. 4790(RCC), 2004 WL 235256, at *6 (S.D.N.Y. Feb. 9, 2004). The government was, moreover, not a party in that case, and the court did not discuss the 2003 amendments to the MSP statute.

Petitioner's amici suggest (Br. 16) that it would be futile to await a conflict on the issue presented here because they believe that the issue inevitably will arise in the Federal Circuit. Petitioner similarly argues (Pet. 18) that any challenge to the government's imposition of MSP liability on employers must arise in the Federal Circuit because the government may impose liability by administrative offset against those employers who may be entitled to tax refunds under 31 U.S.C. 3720A. Those arguments lack merit, and MSP cases routinely arise outside the Federal Circuit, as the cases discussed above illustrate. This case arose in the Federal Circuit because petitioner chose to make payment to Medicare under protest and then sue for a refund, see Pet. App. 3a, 5a. Moreover, in any case where offset is unavailable (*i.e.*, because the employer is not entitled to receive money from the Treasury), the government would have to sue in the federal district court where the employer resides. 28 U.S.C. 1391(b).

Moreover, the issue of whether employers such as petitioner are liable may arise in cases where the government is not a party. The MSP statute creates a private cause of action against any primary plan (such as the group health plan sponsored by petitioner, see 42 U.S.C. 1395y(b)(2)(A), that refuses to make primary payment). 42 U.S.C. 1395y(b)(3)(A). The only other case to address the precise issue presented here arose in the Southern District of New York when a beneficiary argued that an employer such as petitioner was responsible for making payment under a primary plan. See *Manning*, 2004 WL 235256, at *6. There is therefore no reason to think that if the issue is important and recurring it will not arise in other courts of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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