

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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In re: ) Master File No. 05-MD-1708  
6 ) (DWF/AJB)

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GUIDANT CORPORATION ) DEFENDANT'S MOTION TO  
IMPLANTABLE DEFIBRILLATOR ) DISMISS THIRD-PARTY PAYER  
8 PRODUCTS LIABILITY ) AND SECONDARY PAYER ACT  
LITIGATION, ) CLAIMS

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This Document Relates To: )  
11 )  
Pennsylvania Local 1776; )  
12 City of Bethlehem, ) 9:00 o'clock, a.m.  
Pennsylvania; and ) March 6, 2007  
13 Tamela Ivens ) St. Paul, Minnesota

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THE HONORABLE JUDGE DONOVAN W. FRANK

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UNITED STATES DISTRICT COURT JUDGE

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STATUS CONFERENCE PROCEEDING

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1 (In open court.)

2 THE COURT: You may be seated. Thank you.  
3 Last week, I won't name the case, but we had sentencings  
4 in here, and there was literally not even standing room,  
5 and so we had to put the public in the jury box. And  
6 they were all here for the defendant during the  
7 sentencing in I guess what you would call lunging  
8 distance of the Court.

9 So, I just said, without mentioning the  
10 Judge's name in Florida, I said there, now, there won't  
11 be any breakdowns today, there won't be any crying in  
12 the courtroom. Everybody was very professional and  
13 there wasn't a problem. So, I do apologize to the  
14 extent we are probably sardined in here today.

15 Why don't we just note for the record who is  
16 here and in what capacity? And then we will agree -- we  
17 will either -- I will find out who is in agreement on  
18 how we are going to proceed with the oral argument this  
19 morning, and then we will -- or I will make the call on  
20 it. So, Mr. Zimmerman?

21 MR. ZIMMERMAN: Good morning, Your Honor, my  
22 name is Bucky Zimmerman. I am lead counsel for the  
23 Plaintiffs Steering Committee.

24 MR. LESSER: Good morning, Your Honor, Seth  
25 Lesser, also lead counsel for Plaintiffs.

1 MR. DRAKULICH: Nick Drakulich, Your Honor,  
2 for the Plaintiffs.

3 MR. GOLDSER: Good morning, Your Honor. Ron  
4 Goldser for the Plaintiffs.

5 MR. ARSENAULT: Good morning, Your Honor,  
6 Richard Arsenault for the Plaintiffs.

7 THE COURT: Did you go via the airport, this  
8 morning?

9 MR. ARSENAULT: No, we found a shorter way.

10 MR. SOBOL: Good morning, Your Honor, Tom  
11 Sobol, member of the PSC for the Third-Party Payor.

12 THE COURT: Mr. Pratt?

13 MR. PRATT: Tim Pratt for Guidant.

14 MR. CARPENTER: Andy Carpenter for Guidant.

15 MS. HOLLOWAY: Jean Holloway.

16 MR. PRICE: Joe Price for Guidant, Your  
17 Honor.

18 THE COURT: Whoever wants to indicate -- have  
19 the lawyers talked about -- do they have an agreement on  
20 how we are going to present the argument this morning or  
21 not?

22 MR. PRATT: No, we really haven't had any  
23 discussion, Your Honor, with the Plaintiffs Steering  
24 Committee. Perhaps we should have. Here is my proposal  
25 subject to your approval.

1           There are two aspects to the motions today,  
2 one is the Medicare Secondary Payer Act and the Motion  
3 to Dismiss those claims. The second is the Motion to  
4 Dismiss the Third-Party Payer claims.

5           Mr. Carpenter and I are going to divide that  
6 up. I will handle the MSP side of it, he will handle  
7 the Third-Party Payer side. I propose, subject to your  
8 approval, that we start with MSP, move through that  
9 argument with I hope some due speed, and then turn it  
10 over to the Third-Party Payer arguments. If that is  
11 acceptable to you and to the Plaintiffs Steering  
12 Committee, that is the way we would propose to do it,  
13 Your Honor.

14           MR. SOBOL: We are content with that, Your  
15 Honor.

16           THE COURT: Who will be making the arguments  
17 for the Plaintiffs? Obviously, there are a number of  
18 names on each of the briefs that were submitted, so --

19           MR. GOLDSER: Your Honor, I have the MSP  
20 argument, Ron Goldser.

21           THE COURT: All right.

22           MR. SOBOL: And I do for the Third-Party  
23 Payor, Your Honor, Tom Sobol.

24           THE COURT: Why don't we proceed, then? And  
25 what I am hopeful -- and I will represent to you,

1 myself, along with Ms. Gernon, and to -- well, first of  
2 all, I will stop there. She and I have had a chance to  
3 read all submissions on the motion, and to a lesser  
4 extent, Ms. Schutz and Ms. Mair have read some of the  
5 submissions, if not all.

6 I am hoping that at the end of each motion,  
7 or maybe at the end of each argument, each party can  
8 suggest to me what the procedural effect of granting or  
9 denying these, the motions, are on individual  
10 Plaintiffs, or as a group, on Third-Party Payers,  
11 Medicare.

12 In other words, if you have a view, with  
13 respect to what -- if I grant or deny the motion in sum  
14 or in part, would it solve, would it resolve, what it  
15 does and what the effect of it is depending on how I  
16 rule. Because in reading the briefs, I'm not so sure --  
17 maybe there is not an agreement on the effect, overall.  
18 But, at the end, if I have a question, I will ask, and  
19 we can go ahead with the arguments.

20 MR. PRATT: Thank you, Your Honor. We have  
21 another medical device MDL up here, the Medtronic MDL.  
22 And Judge Rosenbaum has weighed in on the motions to  
23 dismiss the Third-Party Payer and MSP claims in that  
24 litigation.

25 As you know, he granted the Motion to Dismiss

1 the MSP Claims in that litigation, but denied the  
2 Motions to Dismiss the Third-Party Payer Claims.  
3 According to our scorecard, that makes Judge Rosenbaum  
4 1-and-1, because I am here to urge you to not only grant  
5 the MSP motion, but also to grant the Third-Party Payer  
6 Motion to Dismiss.

7 THE COURT: Is it your view, and then if you  
8 have an opinion about -- well, it is my view, but I  
9 think on this limited issue, probably the Plaintiffs  
10 agree with me that -- can the two cases be distinguished  
11 factually or legally? Or are you saying, well, you  
12 know, we are not going to agree on if they were properly  
13 decided, but certainly we agree you can't distinguish  
14 one from the other, other than who the judge is  
15 presiding over the case. I mean, for purposes of these  
16 motions, is that your view on at least these particular  
17 motions today?

18 MR. PRATT: Well, clearly, the MSP claims are  
19 separate from the Third-Party Payer claims. In terms of  
20 what Judge Rosenbaum did with the MSP, well, he was  
21 obviously right on that. On the Third-Party Payer side,  
22 I think our hope is to show you how his ruling is not  
23 consistent with the great weight of authority. So, I  
24 mean, I guess I am not sure I understand --

25 THE COURT: Well, the question was whether

1 the two cases, factually and legally, that there would  
2 be no reason to rule one way in one case and one way in  
3 the other, except for how the Judge sees the case, as  
4 opposed to saying, well, you could decide it this way  
5 and Judge Rosenbaum decide it that way because they are  
6 factually and legally distinguishable, and so we would  
7 expect different rulings in these two MDL's.

8 I was going to think you were going to say  
9 quite to the contrary that, well, it would be very  
10 difficult for any lawyer to explain why one judge would  
11 call it this way on each of the motions and one would  
12 call it in a different way.

13 MR. PRATT: Yes, right. We are going to try  
14 to urge you to grant both of the Motions to Dismiss,  
15 because that would favor our side. But, in our view,  
16 that would make you 2-and-0 and put you a half game up  
17 on Judge Rosenbaum, the division standings. So, I don't  
18 know if you have handled an MSP motion in this context  
19 or not.

20 THE COURT: I have handled the motion, but  
21 not in an MDL context. I have handled such a motion,  
22 so --

23 MR. PRATT: So, you are familiar with it.  
24 But, I want to start with the MSP side, with the case --  
25 the only case in the MDL that raises the claim that

1 Guidant is responsible for double damages due to the  
2 claim failure to reimburse Medicare for certain  
3 expenses. That is the Tamela Ivens case.

4 Now, the Ivens case is not an 1861 case.  
5 Those are the bellwether cases that are coming up. Hers  
6 is an AVT case. We have different product lines  
7 involved in this. She had an AVT device. The AVT  
8 device was a device that was subject to a June 2005  
9 position letter.

10 The letter explained that there were three  
11 latching failures out of 21,000 AVT devices in that  
12 particular product line. It also said that these AVT  
13 patients could go to their doctor, wouldn't have to have  
14 the AVT device removed, but they could have it  
15 reprogrammed to reduce that already rare and minimal  
16 risk down to zero.

17 Within six weeks of the letter going out to  
18 the physicians, for reasons that we don't know, Ms.  
19 Ivens chose to have her AVT device removed. Not because  
20 anyone from Guidant or the FDA said that they needed it  
21 to be removed, but she chose to have it removed. The  
22 device, by all accounts, was fully functioning at the  
23 time. She suffered no injury as a result of that  
24 explantation and she suffered no economic loss because  
25 of that replacement, very typical of the cases we have

1 in this MDL involving all of the product lines: No  
2 failure, no injuries, no economic loss.

3           Within three weeks of having that AVT removed  
4 and replaced, she filed a lawsuit. In that lawsuit she  
5 wasn't just claiming that she suffered economic loss,  
6 because she couldn't claim that. She didn't suffer any  
7 economic loss. What she said is, I want to represent  
8 everybody who had any device that was subject to any of  
9 the recalls in the summer of 2005. Not just AVT device  
10 users, but the Prizm 2, the Renewal 1 and 2, Renewal 3  
11 and 4, and presumably all of the pacemakers. I want to  
12 represent all of them in this lawsuit. And what I want  
13 Guidant to pay me -- and you almost have to read it to  
14 understand it -- I want them to pay me, not the  
15 Government, Ms. Ivens, double the amount that was paid  
16 by Medicare to reimburse all health care providers for  
17 all health care services provided to Medicare  
18 beneficiaries resulting from all of the recalled  
19 implantable defibrillators, all of them. So I think we  
20 know why the case was filed, clearly a money motive to  
21 it.

22           THE COURT: What you are implying is lawyer  
23 driven, aren't you?

24           MR. PRATT: I am suggesting it is money  
25 driven.

1 THE COURT: All right, money driven.

2 MR. PRATT: Yes. So, I think that is why it  
3 was filed, and there is no fault that lies with that.  
4 The question is whether it can proceed or not. And  
5 whether it can proceed as a self-standing MSP claim. We  
6 are not talking about Ms. Ivens' own claims, here. You  
7 asked the question about what effect does it have on the  
8 individual claimant? The answer is really none. We are  
9 talking here about the MSP claim, which is one lawsuit,  
10 which is a self-standing argument.

11 She could proceed with her claims with all of  
12 the rest of them, even though her device didn't fail, if  
13 she wants to argue that I was somehow affected adversely  
14 by this, I am entitled to money for my own claimed  
15 injury, that can proceed. That is not the subject of  
16 this. What we are talking about is that part of her  
17 case in which she is saying, I want to receive all of  
18 the money paid to any health care provider by Medicare  
19 for any of these recalled defibrillators.

20 They can not proceed with this, Your Honor.  
21 They have no law to back it up. There is no public  
22 policy considerations to back it up. And there is no  
23 standing for Ms. Ivens to proceed with the case as she  
24 has filed it.

25 What the Plaintiffs are asking you to do on

1 the MSP side of things is to do something that no judge  
2 has ever done. They are asking you to hold an alleged  
3 tortfeasor, responsible for double damages, for failing  
4 to pay Medicare, even though there has been no  
5 determination that the alleged tortfeasor had a  
6 responsibility to pay. That is what they are asking you  
7 to do.

8           The law, all of the law from every judge who  
9 has decided that issue has said, no, you cannot recover.  
10 Just a quick sort of catch-up on what the MSP Act is all  
11 about, and I do this not to suggest you don't know it,  
12 but to distinguish some of the cases that the Plaintiffs  
13 are going to relying on. Clearly, the MSP statute is  
14 intended to sort of facilitate Medicare's recovery of  
15 money that has been paid by them. That was the point of  
16 it in 1980 when it was adopted.

17           There are two aspects to it. One is for  
18 Medicare to get back from people money it has paid, pure  
19 subrogation. That is not what we have here. A lot of  
20 the cases of the PSC side do not involve subrogation,  
21 not what this case is about. This case is about the  
22 double-damage aspect of the MSP Act. And that provision  
23 provides that if Mr. Carpenter here is the insurance  
24 company with the responsibility to pay money to an  
25 alleged victim, that is their primary insurance company,

1 whether it is Workman's Comp, whether there is  
2 automotive liability insurance, he has the  
3 responsibility to pay the alleged victim and refuses to  
4 do so. And Medicare is here and says, well, you should  
5 pay, but if you don't, we will make an additional  
6 payment to this alleged victim.

7 Under those circumstances, for this person's  
8 failure, the primary person's failure to make the  
9 payment that was due, and Medicare had to make it on its  
10 behalf, the law provides that Medicare, the United  
11 States Government could go against that primary insurer  
12 and say, you failed to pay us. And we are going to  
13 penalize you by making you pay double of what you should  
14 have paid. It is a double damages provision flowing  
15 from the failure of an entity to pay what it was  
16 responsible to pay. And that is a critical point in  
17 connection with our Motion to Dismiss.

18 The statute says it must be demonstrated that  
19 the primary plan, whether it is an insurance company,  
20 whether in this case, as they claim it to be, Guidant,  
21 that it's demonstrated that that primary plan had a  
22 responsibility to make the payment, and that Medicare  
23 made it conditionally on its behalf. It is a wrong  
24 against the government statute.

25 It is a failure to pay statute. It doesn't

1 fit here. Because as the cases establish, if the  
2 liability as of an alleged tortfeasor has not been  
3 adjudicated, as in this case, there is no responsibility  
4 to pay. The premise of the statute is not met.

5 In this case there is no question that  
6 Guidant is sitting there saying, we are not liable. We  
7 have no responsibility to pay. We are denying that we  
8 owe these individuals like Ms. Ivens money as a part of  
9 the tort case. So, the liability of Guidant to this  
10 alleged tortfeasor has not been adjudicated. The courts  
11 that have addressed this point recently and as far back  
12 as 2003 have consistently said you cannot proceed with  
13 an MSP claim under those circumstances.

14 Most recently on the Glover case in the  
15 Eleventh Circuit in 2006. An alleged tortfeasor is not  
16 a responsible party under the MSP statute. The statute,  
17 and this is the quote from the Glover case. The statute  
18 does not encompass the unresolved, unestablished tort  
19 claim that Plaintiff relies upon to determine  
20 Defendants' alleged responsibility to reimburse  
21 Medicare. They dismissed the MSP claim. And we are  
22 urging you to do so on the same grounds.

23 The Mason versus American Tobacco case is a  
24 Second Circuit case, 2002, same basis. An alleged  
25 tortfeasor is not a responsible party owing money under

1 the MSP Act. The United Seniors case out of the  
2 District of Massachusetts, very recently, 2006, same  
3 ruling. Alleged tortfeasor, like Guidant, is not a  
4 responsible party. And Judge Rosenbaum made that as one  
5 of the bases of his conclusion that the Medtronic MSP  
6 claims must be dismissed. He relied on the Glover case  
7 and the reasoning of the line of cases I just described  
8 for you in saying that the case must be dismissed  
9 because there was no determination and there has been no  
10 determination that Medtronic is a responsible party.  
11 With his phrase, what the Plaintiffs are trying to do is  
12 put the cart in front of the Court. You can not do that  
13 legally.

14           Despite the creative arguments, and I will  
15 give them an A plus on the Plaintiffs' side for  
16 creativity in their brief, they picked this out of the  
17 brochure, and this out of the statute, and this out of  
18 the case on subrogation and tried to put it together.  
19 But, at the end of the day, there has been no case,  
20 anywhere, to adopt the claim that the Plaintiffs are  
21 pursuing in this litigation.

22           So, the law is against them. Public policy  
23 is against them. I mean, it would be a terrible  
24 precedent if one were to declare that at the very  
25 beginning of a mass tort before any liability has been

1 resolved that a private citizen can jump ahead of the  
2 United States Government, file a lawsuit claiming double  
3 damages for all of the beneficiaries in this sort of  
4 ill-defined representative class, and say, I want the  
5 money for myself. There is no provision under the  
6 statute for how this money would be allocated.

7 Judge Rosenbaum made that point. I mean,  
8 that would create such a race to the courthouse, I mean,  
9 people would get trampled in this process. That is not  
10 what this statute is intended for. There has to be a  
11 determination, a demonstration of responsibility before  
12 there can be litigation. That hasn't been done.

13 So, public policy doesn't support it because  
14 it would just promote a lot more litigation than we  
15 have, number one.

16 Number two, arguably, it would deny the  
17 United States Government a chance to get in line to  
18 pursue Medicare recovery. The statute doesn't say that  
19 a private citizen, a step behind Medicare, in line to  
20 get reimbursement for these double damages. False  
21 Claims Act does, but this does not.

22 Plaintiffs' interpretation would dramatically  
23 expand Federal Court jurisdiction. You can file an MSP  
24 claim under the statute without regard to diversity,  
25 without regard to the amount in controversy. If they

1 are right, contrary to the law, that anybody can file an  
2 MSP claim at any point when there is simply an  
3 allegation of a tort, Federal Courts can be inundated,  
4 no matter what type of case you have, without regard to  
5 diversity, without regard to amount in controversy,  
6 someone could take that dog bite case or that car  
7 collision case and file it in Federal Court under the  
8 auspices of the jurisdiction provided by the MSP  
9 statute.

10 Glover, for example, pointed that that would  
11 be against public policy. Plaintiffs' interpretation,  
12 if they are right, is that a defendant sued under the  
13 MSP Act could really not contest liability without  
14 facing the risk of double damages.

15 You filed the lawsuit, and you say, you have  
16 to -- you have a responsibility to pay. You haven't.  
17 And even -- and if you don't, you are going to be facing  
18 double damages. So, a defendant like Guidant is facing,  
19 well, we have now been demanded to make Medicare  
20 payments that we believe we are not responsible for  
21 paying. We want to contest liability. The failure to  
22 do so, not pay, faces -- exposes the defendant, like  
23 Guidant, to double damages. So, as the Glover case  
24 said, you can't put a defendant like Guidant in that  
25 position, where they either have to pay or contest

1 liability and face double damages down the road.

2 It also would be against public policy, Your  
3 Honor, because by allowing Plaintiff to proceed under  
4 the allegations of this Complaint would permit a  
5 Plaintiff to essentially pursue a representative class  
6 action without satisfying the elements of Rule 23. That  
7 is what this Complaint does. It says, I want to  
8 represent everybody, but there is no protection within  
9 that of the type provided by Rule 23 class action,  
10 numerosity, typicality and all of that.

11 So, if there is no public policy argument to  
12 do what the Plaintiffs are urging you to do, no law, no  
13 public policy, plaintiff also has no standing, Your  
14 Honor. I mean, standing, simply stated under Article  
15 III, is that a person has to be injured in fact to have  
16 a case or controversy that is worthy of being considered  
17 by the Federal Judge.

18 That is not what Ms. Ivens has in this case.  
19 She has suffered no injury, in fact. All of her  
20 expenses have been paid by Medicare, as she alleges.  
21 The Vermont Agency case and Judge Rosenbaum talked about  
22 the Vermont Agency case, we talked about it in our  
23 brief. It says that an individual doesn't have standing  
24 just to sue on behalf of everybody in the United States  
25 out of some claimed injury. You just can't. You don't

1 have that basis. The Lujan case also says, just because  
2 you as an environmental plaintiff think that the  
3 environment has been hurt, that doesn't give you  
4 standing to sue. You have to have an oar in the water.  
5 You have to have some injury in fact that is a  
6 springboard to say to the federal judiciary, we need  
7 something to make us whole.

8           And Plaintiff has not claimed an injury to  
9 herself and cannot claim an injury to herself. Again,  
10 that was the basis for Judge Rosenbaum, one of the bases  
11 of his ruling denying the MSP claimant in the Medtronic  
12 litigation. There is also a different standing  
13 argument. It says, well, what about the claim that she  
14 has been sort of appointed by this statute, she, Ms.  
15 Ivens, to represent everybody in some representative  
16 capacity? Numerous problems with that. One is, the  
17 statute doesn't give her that right, number one. Number  
18 two, it would be unconstitutional. There clearly is a  
19 way in which Congress can create a mechanism where an  
20 individual private citizen can sue to recover on a  
21 broader basis beyond his or her own injuries. The False  
22 Claims Act is an example of that.

23           The False Claims Act has created a situation  
24 that has been an additional assignment of the  
25 government's claims to individuals subject to the

1 conditions in the False Claims Act. They don't take  
2 over the government's claim, they have to give notice to  
3 the government, there is a way to allocate the money,  
4 any money that is recovered. There are all kinds of  
5 protection built into that, conditional assignment  
6 within the False Claims Act.

7 In the MSP Act, there is nothing like that.  
8 And as Judge Rosenbaum said, the MSP statute does not  
9 provide an individual plaintiff in this case, like Ms.  
10 Ivens, with a conditional assignment of the government's  
11 claim. That is important in a lot of ways. It is  
12 important because if you interpret it the way the  
13 Plaintiffs want you to interpret it, that without these  
14 protection, without an express conditional assignment,  
15 Ms. Ivens can proceed on behalf of everybody, we have  
16 constitutional problems.

17 Article II of the Constitution says that it  
18 is the executive branch's responsibility to enforce laws  
19 affecting the public welfare. And it can be assigned  
20 expressly, as in the False Claims Act. It has not been  
21 assigned in connection with the MSP.

22 So, I will see what the Plaintiff had to say,  
23 Your Honor. I think this is a fairly straightforward  
24 argument with abundant precedent to back it up. You  
25 asked a question on what effect this really has in sort

1 of the course and scope of this MDL. I would say, none.  
2 There is one case involving an allegation that a  
3 Plaintiff can recover for everybody under the MSP Act.  
4 It doesn't affect any individual persons claims. They  
5 will be able to proceed, you know, weak or whatever they  
6 are, we will be able to defend each of those on the  
7 merits. It doesn't really affect that.

8 But, I urge you to follow what Judge  
9 Rosenbaum did, follow the precedent of the Second  
10 Circuit and the Eleventh Circuit, follow the precedent  
11 of other Federal District Courts that have addressed  
12 this issue and say that an unadjudicated tortfeasor  
13 like Guidant is not a responsible party. Guidant had no  
14 responsibility to pay Medicare anything at any time.  
15 That is not resolved. And under those circumstances,  
16 Ms. Ivens MSP claim ought to be dismissed. In addition  
17 to that, she has no standing to proceed with it.

18 There are some other arguments we make in our  
19 brief, Your Honor, about whether Guidant constitutes a  
20 primary plan under the MSP. Rather than get into all of  
21 that, I will just rely on the papers. If you have any  
22 questions, I would be glad to --

23 THE COURT: Timing of this motion, is there  
24 some significance to it, as opposed to the parties  
25 saying, these trials are around the corner and other

1 discussions are going on. Is there something  
2 particularly crucial about it?

3           For example, in another case I have with 40  
4 to 60 people, it is not an MDL, and it is not actually  
5 public. So, I can't -- like a lot of these qui tams,  
6 you can't go into some detail, but we sat in a room and  
7 the parties were trying to resolve some of the claims.  
8 And they said, we are going to go to the United States  
9 Government, because if we only have to pay back Medicare  
10 10 cents on a dollar versus 30 cents on a dollar, here  
11 is what our claim is -- here is what the global  
12 resolution is. And in that case, they dealt it out at  
13 10 cents on the dollar.

14           But, they asked me to wait, because what  
15 looked like, whether it was with a jury verdict or other  
16 resolution of the case, what looked like a fair amount  
17 in the eyes of individual Plaintiffs was, well, it is  
18 fair if I don't have to pay back all of the money to the  
19 feds, or over to the State Medicaid program. It is  
20 unfair if -- it is fair if I can pay 10 cents back on  
21 the dollar, so the two negotiated it. And I wasn't a  
22 part of that negotiation. I am just curious, the  
23 timeliness, whether -- is there some significance to it  
24 or is it just consistent with the scheduling orders in  
25 the case?

1           MR. PRATT: Two different questions, I will  
2 try to answer them both. One, does this affect the  
3 bellwether cases and trials? Not at all, it doesn't  
4 affect that whatsoever. Number two, does it affect any  
5 sort of negotiations that are going on with respect to  
6 the MSP? I think not. It is interesting that there  
7 really is only one MSP claim in this MDL. I think it is  
8 self-standing, it is not affecting, in my view any  
9 negotiations, so from that standpoint I think --

10           THE COURT: And at the end of all of the  
11 arguments today, just not on this motion, but the other,  
12 I will give a very time specific about when I would  
13 intend to file a decision and what, if anything, that  
14 does in terms of complicating any other issue. I will  
15 be very specific with the time frame. So, if there is  
16 an issue there, we will figure it out before we adjourn.  
17 Thank you.

18           MR. PRATT: Thank you, Your Honor.

19           MR. GOLDSER: Good morning, Your Honor. Just  
20 give me one moment, if you would, please?

21           THE COURT: I can return the zip drive and  
22 the copies to whoever. And then we can decide who gets  
23 what. There it is. So, did Judge Rosenbaum get it  
24 right, Mr. Goldser?

25           MR. GOLDSER: I don't think so, Your Honor.

1 Don't you know my laptop just decided it was going to  
2 reboot, itself, which thank goodness means we are going  
3 to work off paper. I had a PowerPoint which maybe we  
4 will get to, but we can work off these slides as a  
5 summary of my argument. And if I may approach?

6 THE COURT: All right. We can wait for the  
7 boot, I mean, if you're --

8 MR. GOLDSER: Oh, no, my computer takes a lot  
9 longer than that.

10 THE COURT: All right.

11 MR. GOLDSER: Besides, I was going to have to  
12 look down and I wouldn't be able to make eye contact.  
13 And that is not a good thing to do when you are giving  
14 oral argument.

15 Ron Goldser, of course, for Plaintiffs on the  
16 Medicare Secondary Payer Act. Mr. Pratt followed the  
17 case law and ignored the statute and regulations. The  
18 good news is that other than Judge Rosenbaum's decision,  
19 which may or may not be persuasive, and obviously I am  
20 going to say it is not, you have a clean slate to write  
21 on. We have no Eighth Circuit law on this. We have an  
22 Eleventh Circuit decision. We also have a Fourth  
23 Circuit and a Second Circuit decision that bear on this  
24 case. So, there are some competing Appellate Court  
25 decisions that matter.

1           THE COURT: And I can tell you, it's said,  
2 well not in entire seriousness, even though it is a  
3 serious matter. Obviously, judges in the same district  
4 will part company and see things differently. And Judge  
5 Rosenbaum and I have done that twice in the last two  
6 years. He does it more eloquently than I do. He will  
7 put in the footnote. I don't intend to gainsay my  
8 colleague over there in St. Paul -- I had to look up the  
9 word gainsay to -- and then when I just recently on a  
10 case with Danielle, when I said to her, I want to put a  
11 footnote in my opinion that I don't intend -- I  
12 reluctantly gainsay my colleague over in Minneapolis, so  
13 it does happen from time to time. So --

14           MR. GOLDSER: Well, I hope to give you reason  
15 to do so, and there will be lots of gain here for the  
16 United States Government and our health care system an  
17 the Medicare Trust Fund, which really is the purpose of  
18 the Medicare Secondary Payer Act.

19           As I take you through the slides, the place I  
20 want to start is with the economics of this case, what  
21 it means. What does this Medicare Secondary Payer Act  
22 really mean? I don't think there is any dispute that  
23 for the 1,400 individual lawsuits that are in this MDL  
24 right now, there are subrogation claims, be they health  
25 insurance or be it Medicare.

1                   And the figure I am going to use is that  
2 about 50 percent of the claims that have been paid were  
3 paid by Medicare, 50 percent were paid by health  
4 insurance. I have seen variations around that number,  
5 but that is a rough count. So, of those 1,400 cases,  
6 700 of those were explants -- in fact, not all of them  
7 were explants as you know, half of them were explants.  
8 Let's say 400 were explants made by Medicare.

9                   But, what we know after doing discovery, and  
10 what my first slide will tell you is that there are 23,  
11 almost 24,000 explants that Guidant knows about and has  
12 covered under their supplemental warranty program. And  
13 if you take half of those, 24,000 divided by two is  
14 12,000. There are 12,000 explant cases that Guidant  
15 knows about through their warranty program, but probably  
16 more, that Medicare has paid for.

17                   So, in this litigation that is before you, we  
18 have 400 cases that Medicare will be reimbursed for.  
19 And 11,600 Medicare payments that were made, individual  
20 patients for whom Medicare was paid, that Medicare will  
21 not be reimbursed for.

22                   And if you want to talk about public policy,  
23 let's talk about the Medicare system which is broke. I  
24 don't know if you saw 60 minutes on Sunday night, big  
25 expose about the Medicare system, but that is not news.

1 The Medicare system is broke. And this statute needs to  
2 be interpreted with that in mind. The Trust Fund needs  
3 to get reimbursed wherever it can.

4 How do we get before this Court 11,600 claims  
5 for Medicare reimbursement that are not presently before  
6 this Court? Because all you have got, according to the  
7 Defendant are 400 or so subrogation claims.

8 The arithmetic multiplies that out to be over  
9 \$300 million that Medicare should get back before you  
10 think about double damages. And let's talk about double  
11 damages for a second. Great fear Guidant has of double  
12 damages. And they make it sound like this is the only  
13 statute in the entire United States Code where double  
14 damages is at risk before liability is determined.  
15 Well, that is hardly the case. Antitrust law comes to  
16 mind immediately, where it is not double damages, but  
17 treble damages. And that is before liability is  
18 determined. So, I don't know where they are coming from  
19 that you have to have liability determined and an  
20 opportunity to make a payment before double damages  
21 applies. I don't think it does.

22 So, what Medicare is looking at is over \$600  
23 million, going back to the Medicare Trust Fund to help  
24 in some small way fix the Medicare system.

25 I am going to take the briefing that has been

1 done like a Rubik's cube, and turn it 90 degrees, and  
2 look into this window from another angle. I want to  
3 start from the notion of if the United States were  
4 standing here, if Medicare were standing here, what  
5 could they do to bring this litigation before this Court  
6 to recover for those 11,600 claims that they have paid?

7 Can Medicare sue Guidant for the illegal  
8 conduct concerning these devices at issue? I mean, it  
9 is unfathomable. The word I used in the slide was  
10 implausible. But, it is unfathomable that Guidant could  
11 walk away from Medicare and not have to pay the United  
12 States Government if the United States Government  
13 brought the lawsuit. So, I want to talk about the  
14 United States' rights, first. Because then you go into  
15 the question of, okay, if the United States isn't here,  
16 what exactly has Congress authorized a private citizen  
17 to do under these circumstances? Are the rights of a  
18 private citizen coextensive with the United States or is  
19 there some big canyon that you have got to leap over  
20 that prevents a private citizen from doing that which  
21 the United States can do?

22 THE COURT: Well, and then a question may be,  
23 and you may say, we will soon find out. Or, Mr. Pratt  
24 may say, well, that is a nice -- it is a rhetorical  
25 thing to ask, but it is not really relevant. And that

1 is, why aren't they here? And do they typically bring  
2 motions for intervention?

3 And I won't go into some of the cases where  
4 they fly in lawyers on matters involving maybe a few  
5 thousand dollars from Washington on a regular basis to  
6 our Federal Court and other Federal Courts -- not in  
7 this area, but that is a question that a judge or the  
8 public may have, as well.

9 Whether you should be here or not, or no  
10 matter what happened to the motion, where are they? Why  
11 aren't they here if the numbers are in the neighborhood  
12 of \$300 million just to get things started?

13 MR. GOLDSER: I wish they would tell me. I  
14 have asked. And they aren't. And that is all I know.  
15 And thank goodness, Congress has authorized private  
16 citizens to do that which the government has chosen for  
17 whatever reason not to do.

18 The fact of the matter is, and I think I am  
19 going to say this a few times, there is a statute out  
20 there that gives a private cause of action. Congress  
21 intended to do something. What exactly did they intend  
22 to do, under what circumstances, and how can you make  
23 that statute effective in any way other than what I am  
24 asking this Court to do?

25 I don't think you can. I don't think there

1 are any circumstances that any of the cases today have  
2 told you about that give a private citizen the ability  
3 to do something under this statute. So far the only  
4 answer is no. There have been a few cases, the Brown  
5 case out of the Fourth Circuit is one, the Dow Corning  
6 case out of the Bankruptcy Court in Michigan is another,  
7 where the claims have been recognized, but other things  
8 have prevented that case from getting to the end.

9 I think we have got everything here that  
10 would make this case get to the end. By end, I don't  
11 mean dismissal today.

12 THE COURT: I didn't think so.

13 MR. GOLDSER: Okay. So, what is the  
14 statutory framework? The United States Government has  
15 two rights. First under (b)(2)(B)(iii), the United  
16 States has a direct right of action. And under (B)(vi),  
17 they have subrogation rights.

18 Now, think about what those two are how they  
19 differ from one another. If you follow Mr. Pratt's  
20 argument, and you have to have liability determined  
21 first, or responsibility determined first before the  
22 United States Government can come in and make a claim,  
23 you really are only limiting the United States to a  
24 subrogation claim. There is no direct right of action.  
25 Because somebody has got to bring that lawsuit to have

1 responsibility determined.

2           If the United States can't do it because they  
3 can only bring a claim under the MSP after  
4 responsibility has been determined, somebody else has  
5 got to do that. Congress has given that authority to  
6 all of the individual plaintiffs' lawyers in the country  
7 to do that? I mean, can you imagine what Wall Street  
8 would say if that were the ruling, that it was up to us,  
9 plaintiffs' lawyers, the trial bar, to bring as many  
10 lawsuits as possible in order to vindicate Medicare? I  
11 don't think so. The United States has a direct cause of  
12 action, the statute says so. The regulations say so,  
13 the Medicare Manual says so. Everybody who matters in  
14 the regulatory and executive side says so.

15           Significantly placed right after those two  
16 United States rights in the statutory scheme, right next  
17 line after it is, there is created a private cause of  
18 action. And there are some regulations, there's some  
19 legislative history that talk about what that private  
20 cause of action means. And some of the things I will  
21 tell you are new today that were not in the briefs, and  
22 that is why the slides will be important to you because  
23 there are some citations that will be new that you  
24 haven't seen before. But, there is some logic to the  
25 placement of those statutes right next to each other.

1           The direct action, the United States may  
2 bring an action against any or all entities that are or  
3 were required or responsible to reimburse. What does  
4 that mean? The next statute, subrogation, the United  
5 States shall be subrogated to any right under this  
6 subsection. So, we have gone through that. Those are  
7 two very different things.

8           If the United States had to await a ruling on  
9 the question of responsibility, their right would be  
10 nothing more than subrogation. They have a direct  
11 right. So, what is that direct claim?

12           The regulations are at 42 CFR 411.24(e), and  
13 that says that CMS has a direct right of action to  
14 recover from any primary payer. We have already said  
15 that. When? Something I found yesterday that was not  
16 in the briefing, it is in that same regulation, 42 CFR  
17 Section 411.24(b) -- I don't know if you are following  
18 along with me, but I have got this one.

19           THE COURT: I am.

20           MR. GOLDSER: The second bullet point, CMS  
21 may initiate recovery as soon as it learns -- as soon as  
22 it learns what? That payment has been made or could be  
23 made under ... and then there is a whole string cite,  
24 Group Health Plans, Workers Comp, any liability  
25 insurance. So, this notion of primary plan and

1 liability insurance, that is really not an argument that  
2 Mr. Pratt wants to make very strongly, and he didn't.  
3 Because that issue has really gone away since the 2003  
4 Medicare Modernization Act amendments. Self insurance,  
5 liability insurance, tort liability is a primary plan  
6 under the statute. But, the point of this regulation  
7 is, when can Medicare act? They can act as soon as they  
8 learn that a payment could be made or has been made.

9           Now, has been made follows the argument that  
10 Mr. Pratt made that you have got to wait for a  
11 responsibility determination. But, or could be made, it  
12 says, CMS can jump in right at the beginning before that  
13 responsibility determination has been made. And they  
14 can start initiating the recovery action. They can file  
15 a lawsuit to initiate the recovery action.

16           And significantly, this regulation which was  
17 published at 71 Federal Register 9466 in February of '06  
18 supersedes an earlier Federal Register publication at 54  
19 Federal Register. And it is the 54 Federal Register  
20 cite that was used by the District of Massachusetts in  
21 the United Seniors case. In other words, the United  
22 Seniors case relied on old law. They didn't rely on the  
23 2003 amendments and the subsequent regulations to find  
24 that there is a two-lawsuit rule. The United Seniors  
25 case was not presented with this regulation,

1 unfortunately, by the Plaintiffs lawyer at the time.

2 THE COURT: So, implicit in that statement is  
3 that the decision is different under this than under the  
4 one-sided?

5 MR. GOLDSER: The decision that you should  
6 make is different under 42 CFR 411.24(b), as enacted in  
7 2006, because it supersedes the regulation that the  
8 United Seniors case relied on. The United Seniors court  
9 apparently did not have, or perhaps chose to ignore but  
10 I would prefer to think did not have, the current  
11 regulation that says recovery can be initiated as soon  
12 as Medicare learns about the possibility of that  
13 recovery.

14 The next slide is a portion of the Medicare  
15 Manual. It repeats the notion that Medicare has a  
16 statutory direct right of recovery. The Medicare folks  
17 believe it.

18 The next slide talks about their subrogation  
19 rights. And the important part of this provision in the  
20 Medicare Manual is near the bottom. And it says,  
21 Medicare can be a party to any claim by a beneficiary or  
22 other entity against an alleged tortfeasor, and or his  
23 liability insurance, and can participate in negotiations  
24 concerning the total liability insurance payment and the  
25 amount to be repaid by Medicare. Key word there,

1 alleged tortfeasor.

2           If they are a determined tortfeasor, they are  
3 no longer an alleged tortfeasor. In subrogation,  
4 Medicare can join the case. They can participate in the  
5 case, as liability was being determined. It is crazy to  
6 think that the United States has the right to join in a  
7 lawsuit that the plaintiffs brought, but can't do it  
8 themselves to have liability determined. That would  
9 make the two different statutes, the direct right of  
10 action under the subrogation claim vastly different than  
11 when the United States could participate. Why on earth  
12 would Congress do that? It makes no sense.

13           If the United States can get in during the  
14 pending lawsuit in subrogation, they can bring the  
15 claim, themselves. The Dow Corning case said that. The  
16 Dow Corning case, the government actually, I think,  
17 brought this case. And the problem with Dow Corning was  
18 that at the end of the day they failed to prove the  
19 underlying liability. The Dow Corning decision is a  
20 very long decision, but there are some very important  
21 parts of the Dow Corning decision. They talk about how  
22 the United States Government's direct right of action  
23 is, in a sense, derivative. The United States brings  
24 the lawsuit to recover Medicare when it is based on the  
25 individual court claims or underlying liability claims.

1 The United States steps into the shoes of what the Dow  
2 Corning Court said in order to prove the tort liability.  
3 The United States, can, must, has the ability to prove  
4 the underlying tort liability directly.

5 The Medicare Manual says so. The Dow Corning  
6 case says so. It just doesn't make sense that Medicare  
7 would have to wait for a liability determination in  
8 order to bring its own claim when they can jump in in  
9 subrogation as early as possible.

10 Now, the Complaint here sets up a scenario  
11 that is a little different -- well, actually it is a lot  
12 different from all of the other efforts to bring these  
13 kind of cases. Erin Brockovich, as you may know, tried  
14 to bring some cases. She didn't succeed because she  
15 doesn't have statutory standing. She didn't have any  
16 medical payments made on her behalf. There are a whole  
17 bunch of cases like that. Those can be dispensed with  
18 pretty easily. Tamela Ivens had a device. Her implant  
19 was paid for by Medicare. Her explant was paid for by  
20 Medicare. She has a personal injury lawsuit. She is  
21 seeking recovery of her medical bill damages in her  
22 personal injury lawsuit. She has statutory standing  
23 where Erin Brockovich and lots of others do not. That  
24 is on the tort cases.

25 Many of the cases, I think all of the cases

1 so far have sought to have the responsibility  
2 determination made as a tort liability determination,  
3 the judgment prong, and I will get to this in a minute.  
4 But, we also had a different approach, in addition,  
5 here, and that is that there is a direct contractual  
6 liability.

7           The contractual liability is very much like a  
8 first-party health insurance plan. I think Mr. Pratt  
9 alluded to it earlier when he said if the health  
10 insurance company fails to make the payment, Medicare  
11 will step in. And they try then to recover from the  
12 health insurance company that has got a contractual  
13 relationship with the patient. So, Medicare is trying  
14 to take the benefit of a contractual relationship  
15 between a health insurance company and the patient.

16           Here we have a very similar relationship  
17 between Guidant and the patients. We have a warrantied  
18 relationship. And when that supplemental warranty was  
19 issued, there was a direct letter to the patients. Dear  
20 patient: We will pay you extra money because of this  
21 recall.

22           Now, please put aside for the moment that  
23 there is a cap on that money, because us we think that  
24 cap is invalid. But, that is for another day. That is  
25 the liability determination. What is important here is

1 that there is a contractual warranty relationship which  
2 makes for a first-party, in addition to a third-party  
3 tort relationship. And we are arguing that both of  
4 those apply for the determination of responsibility.  
5 Those are both pled in the Complaint.

6 So, where does this determination of  
7 responsibility notion come from? It comes from Section  
8 (b)(2), which is right before the United States direct  
9 cause of action. And it says, "The primary plan shall  
10 reimburse Medicare if it is demonstrated that such  
11 primary plan has or had a responsibility to make a  
12 payment."

13 And that language has generated this whole  
14 notion of two lawsuits. You have to have the  
15 responsibility determined before the Medicare Secondary  
16 Payer Act claim can be brought. That is the two-lawsuit  
17 connection.

18 All the case law aside, I am sort of baffled,  
19 why can't you have one lawsuit that says, okay, we are  
20 going to have the responsibility determined for  
21 underlying liability, and then when you get to that  
22 determination, if there is responsibility determined,  
23 you determine the reimbursement amount.

24 It is not unlike a punitive damages claim  
25 which, of course, we have here. You determine whether

1 or not punitive damages are applicable and then you come  
2 back and you have another little trial on what are they?  
3 Why can't you do that in one lawsuit?

4 For some reason there are court decisions  
5 that suggest you have to have that responsibility  
6 determined first. Mr. Pratt said he was going to skip  
7 the subject of primary plan, so I will, as well. There  
8 is no question that liability insurance policy,  
9 including self insurance, is a primary plan.

10 And then I went on and talked about the Dow  
11 Corning case, where the notion of primary plan and  
12 responsibility often overlap. And in Dow Corning, that  
13 Court made clear that in order to prevail, the  
14 government must step into the shoes of the Medicare  
15 beneficiary and establish the tort.

16 So, let's go to the responsibility in the  
17 two-lawsuit issue. Also in Section (b)(2), a primary  
18 plan's responsibility for such payment may be  
19 demonstrated by a judgment, a settlement, and there's  
20 some other language, or by other means. So, there are  
21 two prongs that we are dealing with, here.

22 Is there a judgment that determines  
23 responsibility? And how do you get that judgment? And  
24 who gets to bring the case to determine that judgment?  
25 And then the question of other means. There is a

1 regulation that interprets this, 42 CFR 411.22. This  
2 regulation was also promulgated very recently. And it  
3 adds a significant piece to sub (B)(3) and that says, by  
4 other means, includes a contractual obligation.

5           And this warranty claim that I described  
6 moments ago is a contractual obligation that is now  
7 expressly mentioned in 42 CFR 411.22. Our claim is  
8 different from Glover. Our claim is different from the  
9 United Seniors. No court has addressed this contractual  
10 obligation theory ever, anywhere. This is completely  
11 new territory for Your Honor.

12           Well, we have got a variety of ways of  
13 determining responsibility. And the next one up, and I  
14 am sorry the people in the audience can't see this, is  
15 the first part of the recall letter. But, it is the  
16 recall letter where the Food and Drug Administration  
17 recalled the Prizm 2, and then it said clearly it is a  
18 Class I recall. Is that a determination of  
19 responsibility? I would venture to say the government  
20 would like to think it is.

21           The next item, and this is a document you may  
22 not have seen before, is a health risk assessment. And  
23 we think is a pretty important thing and a damning  
24 document. It is a document that was created -- this is  
25 as to the Prizm 2 -- in June of 2002. Guidant first

1 learned about the problems with the Prizm 2 in February  
2 of 2002. In June of 2002, they have come to a  
3 determination of the hazard, and they say the hazard  
4 description, "A breach in the polyimide tubing that  
5 insulates the DF- feedthru wire from other conductive  
6 surfaces results in a shorted condition to the backfill  
7 tube." That is the manufacturing defect that is claimed  
8 in the Prizm 2 litigation. And you are going to hear a  
9 lot about that as we go through the representative  
10 trials.

11 But, in June of 2002, four months after the  
12 first problem surfaced, and three years prior to  
13 Guidant's disclosing to the public, Guidant knew what  
14 the hazard was. And this hazard, they described, as  
15 "life-threatening if the patient requires tachy shock  
16 therapy after the short occurs."

17 Is this an admission of responsibility? I  
18 venture to say it is. For purposes of the MSP, I think  
19 it is an admission of responsibility.

20 The next document is the supplemental  
21 warranty document. This is the one that I was  
22 describing to you as the contractual relationship.  
23 Under this document, Guidant agrees to reimburse  
24 patients for their out of pocket expenses and in this  
25 they say, conveniently, "... after insurance

1 reimbursement, Guidant will provide up to \$2,500 for  
2 out-of-pocket medical expenses associated with device  
3 replacement." This is a contract. This is a warranty.

4           Mr. Koenig, the warranty representative for  
5 Guidant admitted that this supplemental warranty is the  
6 be all and end all of the warranty circumstances for the  
7 Prizm 2 device. It is a contract. If Medicare came in  
8 and simply used its subrogation rights for \$2,500 times  
9 12,000 devices, multiplied by double damages, you still  
10 get into a fairly large number, I think I calculated it  
11 out last night at about \$70 million. That is not  
12 anything to sneeze at to the Medicare Treasury if you  
13 are only limited to the \$2,500 in this supplemental  
14 warranty. Medicare has the right to all of that for  
15 every one of those 11,600 patients. How do they get it?  
16 Contractual obligation is right here on this piece of  
17 paper. Responsibility is demonstrated. It is admitted  
18 under the statute.

19           Now, speaking of footnotes, the next two  
20 slides are a bit of a footnote. But, the first one is  
21 the reimbursement guidelines. And this is Guidant  
22 posting on their website to doctors on how to get  
23 reimbursed for all of the explant surgeries. And under  
24 the paragraph headed, "Centers for Nursing and Medicaid  
25 Services, CMS," there is a citation in about the middle

1 of that first paragraph to the Medicare manual.

2 It says, when defective equipment or  
3 defective medical device is replaced under a warranty,  
4 hospital or other provider services rendered by parties  
5 over than the warrantor are covered despite the  
6 warrantor's liability. What Guidant is doing is trying  
7 to pass off its liability to Medicare. Guidant does not  
8 want to have to pay for the things that they did wrong.  
9 Guidant wants to pass off that liability to health  
10 insurers as the TPP will suggest to you moments from  
11 now.

12 The slide after this one, however, Your  
13 Honor, is the actual quote from the Medicare Manual.  
14 And conveniently, Guidant forgot to tell the doctors the  
15 part that matters to us here, and that is the last  
16 sentence on this slide. However, seeing the Medicare  
17 MSP manual, there are requirements for recovery under  
18 the liability insurance provisions. So, while Medicare  
19 may make conditional payments, Medicare is not the  
20 primary end payer. Those payments are conditional. And  
21 even under warranty provisions, as this section of the  
22 Medicare Manual suggests, there is recovery that is  
23 allowed under the Medicare Secondary Payer Act.

24 So, a primary payor's responsibility can be  
25 demonstrated by a judgment, that is one way of doing it,

1 by a contractual obligation, that is another way. But,  
2 suppose we go back to the judgment motion. Who gets to  
3 bring this lawsuit? We have already talked about the  
4 United States being able to bring a direct cause of  
5 action. The statute specifically allows that. How does  
6 one get a judgment against a primary payer? When do you  
7 bring this cause of action? The United States can bring  
8 the action. The United States can assert a subrogation  
9 claim.

10 Let's suppose we have the first lawsuit, the  
11 Duran case, and it results in a Plaintiffs' verdict. Is  
12 that a determination of responsibility as to Medicare  
13 for Mr. Duran? Or is that a determination of  
14 responsibility for all 1861 cases? Is that a  
15 determination of responsibility for all Guidant implant  
16 cases, including the AVT that Ms. Ivens had? How do you  
17 determine that responsibility? Where does that  
18 responsibility end? I know what Mr. Pratt would say.  
19 Mr. Pratt would say you get a judgment as to Mr. Duran,  
20 and that is it. One case, one Medicare reimbursement --  
21 what about the rest? How do you bring the rest of these  
22 cases in? Where -- how do you do that?

23 We then turn to the private cause of action  
24 which is when one would go about doing it. If the  
25 United States can do it, can a private citizen do it?

1           And let me footnote here something that is  
2 not in these slides, and that goes to the question I was  
3 just raising. And that is, what is the scope? How can  
4 we do this broadly? The Glover case in the Eleventh  
5 Circuit says, well, there is no mechanism in the statute  
6 for Rule 23. Well, last I knew, Rule 23 was in Rule 23  
7 in the Federal Rules of Civil Procedure and doesn't have  
8 to be repeated in the statute.

9           If Your Honor finds that it is necessary to  
10 have a class certified to do this, because the Complaint  
11 pleads a class, it alleges a class, so we are already  
12 there. This is a 12(b)(6) motion about the underlying  
13 liability, not whether or not there should be a class.  
14 And if you decide that this case can proceed, but can  
15 only proceed as a class, then you will tell us we have  
16 got to make a motion to certify a class. And we will  
17 decide whether Ms. Ivens or others are appropriate class  
18 representatives. And we will make sure we have proper  
19 class representatives before the Court. But, think  
20 about that for a second, because I don't think you have  
21 to go there.

22           If the United States brought the case, they  
23 wouldn't have to bring the case as to Mr. Duran or as to  
24 Ms. Ivens or as to Mr. Smith or Mrs. Jones. The United  
25 States would be bringing its direct cause of action for

1 all of the defects.

2 Now, there may be some scope questions of the  
3 United States lawsuit. And they have to bring separate  
4 cases for the 1861 and the Contak Renewal 1 and 2, and  
5 the AVT's, but the United States wouldn't have to bring  
6 it patient by patient by patient. And if that is true,  
7 if a private citizen steps into the shoes of the United  
8 States, then neither does the private citizen need to  
9 bring a Rule 23 motion to certify a class.

10 So, I don't think you have to go there. But,  
11 if you feel like you have to go there, we can go there.  
12 And we will just make a motion for class certification.  
13 Certainly if we are going to talk about class  
14 certification in the Third-Party Payer case somewhere  
15 down the road, there is no reason why we can't do the  
16 same thing in the Medicare Secondary Payer Act.

17 So, what is this private cause of action, the  
18 statute that appears right after the United States  
19 rights? It is pretty simple. It doesn't a heck of a  
20 lot. It says, there is established a private cause of  
21 action for damages. All right, what does that mean?  
22 Well, we know one thing, it doesn't mean nothing. It  
23 means something. What does it mean?

24 The Medicare manual unfortunately, my copy of  
25 the next slide has part of it blocked out. It is

1 supposed to be highlighted and would be on my laptop. I  
2 will modify this provision for you. But, as I remember  
3 it, this particular part of the manual, the first part  
4 that we can see describes a claimant, including a  
5 beneficiary, has the right to take legal action against  
6 and collect double damages from a GHP, that is a Group  
7 Health Plan. The part that is blacked out here goes on  
8 to say that a claimant can bring legal action against a  
9 self-insured, or an insured insurance policy, as well.  
10 That is part of this Manual, and I apologize, I thought  
11 I had traded out this slide, but I didn't.

12           The manual, though, recognizes that a  
13 claimant can bring a cause of action for double damages.  
14 Medicare says so.

15           So, how does a private citizen have standing?  
16 There are two aspects of standing. Most of the cases so  
17 far dealt with statutory standing, Erin Brockovich  
18 cases. We have got a plaintiff who has got the device,  
19 Medicare in, Medicare out, she has a personal injury  
20 case.

21           One thing I take umbrage with Mr. Pratt's  
22 comments, he says that she has suffered no economic  
23 loss. Every time I have brought a personal injury case,  
24 one of the things that always gets admitted into  
25 evidence are the medical specialists. A health

1 insurance payment is a collateral source. The jury  
2 returns a verdict on medical specialists. That is an  
3 economic loss in her underlying lawsuit.

4 It is an injury claim in her underlying  
5 lawsuit. She has a right to bring that claim for  
6 herself. Now, it so happens as we go to the next slide,  
7 that that is coextensive with Article III standing. She  
8 has Article III standing to bring her own claim for her  
9 own economic loss damages, which happens to be  
10 coextensive with the United States' damages for economic  
11 loss, that part of it, to say nothing of the personal  
12 injury and the extra surgery that she has had to go  
13 through, that's her claim.

14 The economic loss claim is hers. And under  
15 Vermont Agency, to have an injury in fact, the  
16 plaintiffs interest in the outcome of the lawsuit must  
17 consist of obtaining compensation for, but preventing  
18 the violation of a legally protected right.

19 It is her right. She has a right to recover  
20 that money as part of her personal injury lawsuit. That  
21 gives her standing to bring her personal injury claim.  
22 She could, under typical subrogation claims, she does  
23 bring action at the same time for the subrogation  
24 entity, Medicare or health insurance. She has got an  
25 injury in fact for Article III standing under those

1 circumstances. But, she also has standing to bring this  
2 claim as an assignment claim.

3 If you look at that language, the very simple  
4 language, it is either an assignment, or it isn't. You  
5 have got to decide if that language is an assignment by  
6 the Congress to a private party of that cause of action.

7 But, if you come to the conclusion that  
8 Tamela Ivens doesn't have personal injury, and in fact  
9 standing for her own claim, and then you decide that the  
10 statute is not an assignment, who can bring a claim?  
11 How does this statute have any effect whatsoever at that  
12 point in time if it is not an assignment?

13 And of course, the Supreme Court has told us,  
14 contrary to what Judge Rosenbaum said in his Medtronic  
15 ruling, that you have got to give Congress' statute's  
16 effect. And Judge Rosenbaum was saying that, well, my  
17 goodness, I don't understand how these damages have to  
18 be apportioned between the Plaintiff and Medicare.  
19 Congress didn't say that. You're right, they didn't.  
20 But, they did get a private cause of action. So, the  
21 simple fact that they didn't apportion the damages  
22 doesn't eliminate the fact that Congress spoke and said  
23 there is a private cause of action. What it is and what  
24 its contours are, are not particularly clear. But, that  
25 doesn't mean there is no private cause of action, there

1 is.

2 But, there is a little bit more to this than  
3 that, than the mere face of the statute, and that is the  
4 legislative history. And I am now to the slide that is  
5 entitled, MSP Legislative history, demonstrates  
6 assignment. There is not a lot, but there is some. The  
7 some, and this was a long document, and this is a small  
8 piece of it. The secondary payer provisions are  
9 enforceable through private action, action brought by  
10 the Federal Government.

11 Think about that for a second. Private  
12 citizen and Federal Government are on equal footing,  
13 according to the Senate, to enforce the MSP provisions.  
14 So, if I am right that the United States could come in  
15 and enforce the statute and bring this cause of action,  
16 so can a private action do it, because it is enforceable  
17 either through private action or by the Federal  
18 Government.

19 They are coextensive. They are equal. They  
20 are treated the same in this legislative history. And  
21 the conference committee said pretty much the same  
22 thing, the agreement includes additional modifications  
23 to, and a private right of action to enforce the  
24 provision variation.

25 What is Congress trying to do? They are

1 trying to make sure that Medicare gets paid back. If  
2 the government doesn't do it, Congress wanted private  
3 citizens to do it. And the Second Circuit agreed in the  
4 Manning case. This was before the 2003 amendments.

5           The MSP creates a private right of action for  
6 individuals whose medical bills are improperly denied by  
7 insurers, and instead paid by Medicare. The FCA, the  
8 first bullet point, that is the False Claims Act, the  
9 qui tam statute, is similar to the MSP. And both  
10 statutes allow individual citizens, as well as the  
11 government, to sue in order to right an economic wrong  
12 done to the government. Those statutes create a private  
13 attorney general by authorizing private citizens to  
14 receive part of the recovery. How much of a part? We  
15 will talk about that in a second.

16           But, the Second Circuit recognizes that the  
17 MSP is a bounty statute, just like the qui tam statute  
18 is a bounty statute for purposes of protecting the  
19 Federal Government. Interesting enough, the Vermont  
20 Agency case in footnote one highlights some of the other  
21 statutes that are qui tam actions.

22           This is my next slide. I pulled out those  
23 statutes, and I think I have got one or two others. And  
24 what we are seeing is kind of interesting. All of these  
25 statutes seem to have a provision where the government

1 gets half of the money and the private citizen gets half  
2 of the money.

3 Well, in our case, we did it a little  
4 different, they created a double damages provision. And  
5 it is not that far of a stretch to suggest that the  
6 government gets half of the money because they could  
7 bill them back. And the bounty should apply to the  
8 citizen who gets the other half of the money. Is it a  
9 lot of money? You bet you. Okay, so, big deal. There  
10 are a lot of qui tam cases where there are humongous  
11 amounts of money at stake.

12 I can think at the moment of the Neurontin  
13 case that Mr. Sobol was involved in, but it was  
14 originally a qui tam action, where the qui tam relator  
15 personally took home, I want to say, \$25 million.  
16 Nothing to sneeze at for being a whistleblower and for  
17 bringing the action. Is double damages required?  
18 Perhaps not. Is the bounty that should go to the  
19 private citizen half of the recovery? I think there is  
20 latitude in the statute that would allow the government  
21 to recoup part of the double damages and the citizen to  
22 recoup part of the double damages. But, just because it  
23 is silent doesn't mean it is non-existence. They are  
24 very different things. We have through history other  
25 statutes that talk about double damages.

1           In Manning it's clear that both the FCA, the  
2 qui tam action on MSP allow for a multiplier of damages  
3 to enable the government to recover its funds while also  
4 providing a financial incentive for private citizens to  
5 bring such suits.

6           So, Your Honor, I think we would like you to  
7 read 2-and-0, as well, only I think what we would like  
8 you to do is deny both motions to dismiss. And as to  
9 the MSP motion, I think you have got incredibly strong  
10 grounds to do so, grounds that are different here than  
11 any of the other cases before, because there is  
12 different law cited here. There are some regulations  
13 and Medicare Manual positions and legislative history  
14 that no other court has seen before. There is the  
15 contractual liability provision that no other court has  
16 ever addressed before. So, if the Glover decision  
17 doesn't take you where you need to go, doesn't take  
18 Guidant where it wants you to go, neither does the  
19 United Seniors. There is a statute. You need to give  
20 it effect.

21           If you deny the Motion to Dismiss, this case  
22 will continue on, just as the others will, just like the  
23 Third-Party Payer case will continue on. If you decide  
24 that we need to bring a Rule 23 motion before the class  
25 certification will get teed up, in due course we will

1 make sure that we have proper representatives.

2           If you grant the Motion to Dismiss, then the  
3 Medicare provisions will be out of this case. I agree  
4 with Mr. Pratt, for a change, that the personal injury  
5 claims will go unabated. The Medtronic ruling is on  
6 appeal to the Eighth Circuit at this point in time, so  
7 sooner or later the Eighth Circuit will weigh in on this  
8 subject.

9           I would like to have the Eighth Circuit have  
10 in front of it two decisions from this District: One  
11 that says, no you can't; and the other one that says,  
12 yes, you can. I would encourage you to find, yes you  
13 can, for lots of reasons.

14           THE COURT: Thank you. What I am thinking is  
15 we should hear from Mr. Pratt. And then Mr. Goldser may  
16 or may not get the last word. And then we will take a  
17 recess and go into the next aspect of the motion, if  
18 that is agreeable with everyone?

19           MR. PRATT: Yes, Your Honor.

20           THE COURT: All right.

21           MR. PRATT: I don't want to gainsay my  
22 colleague, Mr. Goldser, and I apologize for really not  
23 having loaded up on PowerPoint slides, Your Honor, but  
24 if I could just sort of adapt --

25           THE COURT: Sometimes it is a sign of age,

1 not just your age, maybe mine or others. You know, it  
2 is always fun to be in a big trial and it will be with  
3 some notable exceptions. It will be with the younger,  
4 newer attorneys that are kind of steering the way for  
5 the other lawyers in the case.

6 Now, I don't know what the age difference is  
7 between the two of you and I am not going to ask, but  
8 maybe that has nothing to do with --

9 MR. PRATT: There will probably be a time  
10 when I will be text messaging my argument to you, Your  
11 Honor.

12 THE COURT: Let's hope not. You forget, I  
13 have got five daughters and I get those text messages  
14 from around the world every blasted day.

15 MR. PRATT: Let me make a few points in  
16 response to Mr. Goldser's presentation. I have sort of  
17 adapted, and actually, I will present you with some  
18 slides.

19 The slides that Guidant relies on to support  
20 its position are Glover, Mason, United Seniors, Judge  
21 Rosenbaum. None of those were referenced in Mr.  
22 Goldser's slides or in his presentations. I understand  
23 he has wished that the law were otherwise, but the law  
24 is not.

25 He stands up here and says this is Mr.

1 Pratt's position. It is not just Mr. Pratt's position,  
2 it is the position of the Eleventh Circuit, it is the  
3 position of the Second Circuit, it is the position of  
4 Judge Rosenbaum, it is the position of the District  
5 Court in Massachusetts, it is the position of every  
6 judge to address the very points that Mr. Goldser just  
7 talked to you about. He has got no law to support his  
8 position.

9           There are a lot of legitimate reasons, Your  
10 Honor, why we need to look at the law. He was talking  
11 about the Manning case out of the Second Circuit. He  
12 had a slide on the Manning case out of the Second  
13 Circuit. He talked about it three or four times in his  
14 presentation. The Manning Second Circuit case was  
15 decided before the Mason Second Circuit case. The Mason  
16 Second Circuit case said that claims like this, these  
17 MSP claims against Guidant, cannot be proceeded with by  
18 a private citizen.

19           So, the circuit that he's -- the authority  
20 that he is relying on, actually contains a precedent  
21 that says that unadjudicated and alleged tortfeasors are  
22 not responsible parties under the MSP statute. He may  
23 wish it otherwise, but the argument that Manning somehow  
24 supports his position, in a Circuit that supports our  
25 position on all fours, is not very persuasive.

1           And he had slides that talked about illegal  
2 conduct. And it kind of goes to the point, clearly we  
3 deny illegal conduct. Guidant did nothing illegally in  
4 this case. But, it goes to the point that these sort of  
5 unadjudicated claims can not provide a basis for a party  
6 to be able to double damages for not making a required  
7 payment to the government as a responsible party.

8           There is a lot of talk about the warranty  
9 program that Guidant entered into, claimed to be a  
10 contract by Mr. Goldser. I want to make a point on  
11 this, Your Honor, that the supplemental warranty or the  
12 extended warranty program that Guidant entered into was  
13 a program that really wasn't a contractual program in  
14 that sense. After these recalls were -- the physician  
15 letters went out in December of 2005. Guidant said --  
16 it didn't have to, but Guidant said that for people who  
17 had the Renewal 1 and 2 and the Model 1861, we will help  
18 defray the out-of-pocket expenditures that you may  
19 encounter if you decide to have a switchout.

20           We will give you, in connection with those  
21 two products lines, a free device. The sort of slide  
22 that had a lot of fuzzy math on it, the \$300 million  
23 doesn't really reflect the reality of what is going on  
24 here, and I am not going to go through it and dissect  
25 it. The point is, though, the extended or supplemental

1 warranty program that Guidant entered into was an  
2 additional program that they provided, didn't have to,  
3 to its customers as a service. There was no  
4 consideration for that. What Guidant said is, if you  
5 choose to have this device replaced, 1861, Renewal 1 and  
6 2, we will provide you with a free device, free Guidant  
7 device.

8           Now, if the argument is that by extending  
9 that kind of a service to customers, that that somehow  
10 puts Guidant in a position of being a primary  
11 responsible insurer subject to double damages if it is  
12 not going to pay Medicare, that is ludicrous, let alone  
13 unsupported by the statute, unsupported by common sense.  
14 So, this warranty program that he talked about does not  
15 put Guidant in the position of having a primary plan,  
16 making it a responsible party for reimbursing Medicare.

17           And keep in mind, that is really a red  
18 herring. When you look at this complaint, they are not  
19 arguing that Guidant is not satisfying its obligation to  
20 patients under the extended warranty program. The  
21 extended warranty program for two product lines will  
22 give you a free device and pay \$2,500 in unreimbursed  
23 medical expenses.

24           For the other product lines, including the  
25 product line that Ms. Ivens had, AVT, we said we will

1 give you \$2,500 in unreimbursed medical expenses to go  
2 to the doctor and have this device reprogrammed. That  
3 is what we said.

4 Now, the idea that -- and keep in mind what  
5 they are alleging for recovery in this case. It is not  
6 that Guidant is not satisfying that so-called extended  
7 warranty. What they are seeking in this case under the  
8 MSP is a recovery of all damages paid by Medicare to any  
9 of these beneficiaries, Medicare beneficiaries as a  
10 result of all medical care they got arising out of these  
11 device, these recalled devices.

12 So, their claim for recovery of damages is  
13 not limited to this extended warranty. So, the extended  
14 warranty cannot become a springboard to make Guidant a  
15 responsible party for the recovery of expenses beyond  
16 that. So, they are talking about two quite different  
17 things here, Your Honor.

18 And I would hope that a company who does what  
19 Guidant does, which is to step up and to provide an  
20 extended warranty under these circumstances to patients  
21 who choose to go to the doctor or choose to have their  
22 device replaced, I think they ought to be applauded for  
23 that, not penalized with double damages, according to  
24 Mr. Goldser's argument.

25 That certainly doesn't establish any

1 concession of liability or any admission by Guidant that  
2 it is liable. In fact, we deny it and have every minute  
3 since this litigation began.

4 I want to talk about the argument that Mr.  
5 Goldser made about the MSP Manual, that somehow this  
6 Manual trumps all of this jurisprudence from the Second  
7 Circuit and Eleventh Circuit and other District Courts  
8 around the country.

9 THE COURT: And he singled out this February  
10 24th, '06 Reg, 9466.

11 MR. PRATT: That is one. The manual has been  
12 around a long time. The manual has been around a long  
13 time. Both Glover out of the Eleventh Circuit and the  
14 United Seniors case were decided in 2006. So, the  
15 argument that somehow these courts didn't have the  
16 benefit of this manual, didn't have the benefit of sort  
17 of knowing that these provisions were there is not  
18 supported, Your Honor.

19 You know, this manual doesn't change the law  
20 that now exists in the Second to the Eleventh Circuit.  
21 Does it affect what Judge Rosenbaum did? Judge  
22 Rosenbaum just ruled. The issue about the manual, the  
23 issue about the warranty program that Medtronic had,  
24 Your Honor, somewhat similar to the warranty program  
25 that Guidant had, was unpersuasive to Judge Rosenbaum.

1 That very argument about the warranty program being a  
2 springboard to cast the medical device manufacturers as  
3 a responsible party under the MSP statute, that was made  
4 to Judge Rosenbaum, and he rejected it in dismissing the  
5 MSP claims, just like it ought to be rejected here.

6 So, the manual doesn't trump anything. The  
7 reference to alleged tortfeasor in the manual, Your  
8 Honor, doesn't deal with the context of what we have  
9 here, which is a double damages recovery. It deals with  
10 a situation where there is a subrogation claim and a  
11 settlement has been made in which the alleged tortfeasor  
12 is not admitting responsibility. That is where they are  
13 trying to confuse you in terms of the Dow Corning case,  
14 they cite the Baxter case involving settlement of claims  
15 by alleged tortfeasors. We don't have that here.

16 If there is a settlement proceed, and that is  
17 one of the other means, one of the provisions in the  
18 statute that can make you a responsible party, a  
19 judgment, a settlement or by other means. And if an  
20 alleged tortfeasor settles, doesn't admit liability,  
21 there's a fund of money there that the Medicare can then  
22 go after, that is money that is being generated by an  
23 alleged tortfeasor. That is what the manual was talking  
24 about.

25 The manual in no place says that a warranty

1 along the lines of what Guidant did makes it a  
2 responsible party. And no place does it say you can do  
3 a two-lawsuit thing like they are trying to -- I mean,  
4 you can combine the MSP claims with the underlying tort  
5 claim.

6 No place does the manual say that. This is  
7 an extended manual that does not provide any support and  
8 it has never provided any support for the claims that  
9 these Plaintiffs and other similar plaintiffs have tried  
10 to make involving an alleged tortfeasor being a  
11 responsible party.

12 The standing argument continues to be  
13 unavailing. I mean, the Vermont Agency case supports  
14 our position, that unless you have some injury in fact,  
15 you cannot proceed with an MSP claim. The Vermont  
16 Agency case was in the context of the False Claims Act.  
17 It says that an individual who is not injured in fact  
18 does not have standing to proceed on his or her own  
19 behalf.

20 The only circumstances, according to Vermont  
21 Agency in which an individual can proceed to recover for  
22 a wider group of people, including himself, is when  
23 there has been an effective conditional assignment, as  
24 there was in the False Claims Act. The qui tam actions  
25 under the False Claims Act are completely different than

1 what we have in this case where a private party is  
2 saying, I want to recover on behalf of all of these  
3 beneficiaries under the MSP statute.

4 This is a point made by Judge Rosenbaum. The  
5 qui tam actions have very detailed circumstances under  
6 which the government's interests are protected. The  
7 government can intervene, the government gets notice of  
8 the lawsuit, the government can take control of the  
9 lawsuit.

10 That is a qui tam action under the False  
11 Claims Act. It was that provision that was upheld as  
12 constitutional by the United States Supreme Court in the  
13 Vermont Agency case. Here we had no provisions on the  
14 MSP side from notice to the government, the government  
15 having any rights, whatsoever, to take over this case,  
16 no provision for the allocation of funds. Mr. Goldser  
17 calls it a bounty statute. Congress didn't call it a  
18 big bounty statute. Congress didn't say, this is the  
19 way that this can be allocated among the government and  
20 private parties. Mr. Goldser, apparently, is offering  
21 to give some money back to the government, but the  
22 statute doesn't provide any compulsion for him to do so,  
23 or for Ms. Ivens to do so. So, there is a dramatic  
24 difference between a qui tam action under the false  
25 claims act, upheld as Constitutional, because they were

1 effective conditional assignments of claims by the  
2 government to private individuals with the MSP statute  
3 that contained no similar protections.

4           You know, the question was raised, maybe  
5 rightfully so, is why hasn't Medicare sort injected  
6 itself into this lawsuit? There may be a few reasons  
7 for that. One is, unlike the False Claims Act, there  
8 are really no clear set out provisions in the MSP  
9 statute for that to happen. It might be that Medicare  
10 agrees with me and all of these other cases, that it is  
11 too early to go after Guidant.

12           Guidant is simply an alleged tortfeasor. It  
13 has no established responsibility to make a payment to  
14 Medicare, so maybe Medicare is sitting there being  
15 persuaded by the kinds of arguments I am making that now  
16 is not the time to do these sorts of things. We have to  
17 have a judgment. We have to have a settlement, or we  
18 have to through some pre-existing responsibility have a  
19 means to go after Guidant for failing to make a payment  
20 to Medicare as a responsible party.

21           I don't want to get into a discussion of the  
22 June 2002, Model 1861 document that was shown to you  
23 which Mr. Goldser said shows that the company knew  
24 certain things in June of 2002 with respect to that  
25 product.

1                   You will hear a lot about that at the trial,  
2 Your Honor. We have a compelling story to tell, but I  
3 have this to say. I don't know why we are talking about  
4 a Model 1861 when his client Ms. Ivens never had an  
5 1861. I don't know why we are talking about failures of  
6 1861 when she didn't have a failure at all. And I don't  
7 know why we are continuing to talk about Model 1861's in  
8 this litigation when it is such a rare event to happen.  
9 The circumstances are so minutely in play, here, as  
10 evidenced by the fact that very few of the cases in this  
11 MDL out of the thousand or so Plaintiffs who have sued  
12 in the MDL, very, very few of them have the device of  
13 any type that failed. Very few of them had any kind of  
14 physical injury resulting from the use of these  
15 products. Ms. Ivens case is no different. If they want  
16 to proceed with her AVT case, we will assert our own  
17 individualized defenses to that.

18                   But, in terms of the MSP case, in terms of  
19 the core issues we have here, Your Honor, the not just  
20 overwhelming weight of authority, but the unanimous  
21 weight of authority here and elsewhere, is that despite  
22 the eloquence of Mr. Goldser, and the abundant slides he  
23 put forth is that there is no jurisprudential basis for  
24 this MSP claim to remain in this litigation. Ms. Ivens  
25 has no right to pursue it. Guidant is not a responsible

1 party who has failed to make a required payment to  
2 Medicare. Ms. Ivens has no standing on her own behalf,  
3 or in a representative capacity to proceed with this  
4 case. And as a result, we urge you to follow the law  
5 and dismiss the MSP claims in this matter.

6 THE COURT: One other question.

7 MR. PRATT: Yes, sir.

8 THE COURT: He raised the question, well, if  
9 she has no right to be here, what would be an example of  
10 a private action that would be valid under the provision  
11 in question? What would be an example of one if there  
12 is to be any meaning to the right to bring a private  
13 action, what would be an example of one?

14 MR. PRATT: Good question. I think it is  
15 extraordinarily narrow, Your Honor. I think it is  
16 narrow, and probably intentionally so. I mean, if you  
17 take a look at the False Claims Act, you know, I think  
18 there was probably an encouragement by Congress to allow  
19 private rights of action. That is why they built all of  
20 this sort of abundant, you know, provisions around the  
21 conditional assignment of the government to a private  
22 citizen.

23 I think the private right of action on the  
24 MSP side is very, very narrow. I think it involves a  
25 situation where a plaintiff has unreimbursed expenses,

1 out-of-pocket expenses, therefore satisfies the Article  
2 III requirement of the legally cognizable harm  
3 generating a case or controversy.

4 So, according to Judge Rosenbaum, according  
5 to the law of the Supreme Court, you have to have some  
6 injury. You have to have some out-of-pocket expense.  
7 You have to have suffered an injury in some respect or  
8 another, number one.

9 Number two, you have to have a claim that  
10 Guidant was a responsible party who failed to make the  
11 required payment to Medicare. You have to be in a  
12 position timewise to be able to make that argument.

13 Under those circumstances, I think Ms. Ivens  
14 could come in and say that I have been hurt personally  
15 by this, because I have out-of-pocket expenses that are  
16 -- is a legally cognizable injury because they have not  
17 been reimbursed.

18 Under those circumstances, I urge you to find  
19 not only that Guidant failed to make a payment, but that  
20 they owe double payments for that circumstance. I think  
21 it is a very specific situation in which one individual  
22 can sue after there has been a recognized injury to  
23 himself or herself to seek double damage for what should  
24 have been paid to that person.

25 Whether the argument could be made by

1 Plaintiffs' counsel that there is a broader scope to  
2 that, that you could satisfy the Rule 23 class action  
3 and do it on a basis beyond an individual, I am not sure  
4 you can.

5 I think Plaintiffs may argue that, but I  
6 think, Your Honor, one reason that Congress did not lay  
7 out all of the protections in the MSP that were provided  
8 under the False Claims Act is that it evinces a  
9 congressional intent that the private right of action  
10 under the MSP statute is an extraordinarily narrow right  
11 of action. And I think that has been recognized by the  
12 case law. And clearly, it is much narrower than what we  
13 have right here. In this case, it ought to be  
14 dismissed, Your Honor.

15 THE COURT: Thank you. Mr. Goldser, I will  
16 give you two or three minutes and then we will take a  
17 break. Some lawyers will say, well, I don't need the  
18 two or three, but not many, not many. Not very many.

19 MR. GOLDSER: If you heard the conversation  
20 at our table, that is what I was saying to my  
21 colleagues, but they were saying, no, you have got to go  
22 up there. It is all their fault. It is all their  
23 fault. I will take responsibility.

24 A couple of things, one is a 12(b)(6) motion.  
25 We allege there is a contractual liability, a

1 contractual obligation. That should be sufficient to  
2 that prong of the responsibility test, whether or not  
3 there is a contractual obligation as Mr. Pratt argued,  
4 that is for another day. We allege it, we win.

5 The Manning versus Mason case. Manning was  
6 before Mason. Manning said certain things about the  
7 meaning of the MSP Act and its comparison to the False  
8 Claims Act.

9 Mason that came after was a tobacco case. It  
10 was not this case. It was not a Class I recall device.  
11 It was not a supplemental warranty case. But, more  
12 importantly, Mason was a case that was decided on  
13 grounds that were subsequently amended out of existence  
14 by the 2003 MMA, and that was the self-insured provision  
15 of the liability insurance part of the statute. Mason  
16 was decided on wholly separate grounds and does not  
17 eviscerate the commanding holding and the reasons I  
18 cited Manning to you.

19 Next, money to the Government. Ms. Ivens if  
20 she recovers and wins double damages is still going to  
21 have to give money to the government, but I hope she  
22 walks away with the double damages. She is going to  
23 have to deal with the government, unless this Court  
24 allocates money between the government and here.

25 There is going to be a negotiation, or even

1 litigation about who gets what out of that, but that  
2 doesn't prevent the money from being recoverable. And  
3 clearly Medicare has a claim to that money, at least  
4 some of the damages.

5           And finally, I really appreciated your last  
6 question to Mr. Pratt, because his answer highlighted  
7 the problem. He said that only a person -- a claimant  
8 must show that Guidant is a responsible party and failed  
9 to make a payment. That is when this claim can arise.  
10 That is only the subrogation claim. That is the  
11 two-lawsuit rule only after somebody proves that Guidant  
12 is responsible.

13           But, under those circumstances, if you think  
14 that out, when can that happen? It's only a subrogation  
15 claim. And that is not what the statute provides for.  
16 Why on earth would Congress make this statute so narrow  
17 when Congress wants to Medicare to get money back? Why  
18 would they limit it so, as Mr. Pratt suggests?

19           When he talks about policy, think about that  
20 policy. That would not be good policy for Congress to  
21 limit the amount of money that Medicare could recover.  
22 Congress would want to expend and expand the amount of  
23 money that Medicare should recover. And I would  
24 encourage you to interpret the statute that way.

25           THE COURT: I can tell you are going to jump

1 up out of your chair, Mr. Pratt, so go right ahead.

2 MR. PRATT: 20 seconds.

3 THE COURT: All right.

4 MR. PRATT: And that would only leave then  
5 Mr. Goldser with five seconds in surrebuttal.

6 Mason wasn't legislated out of existence.  
7 There was a primary plan discussion in Mason that the  
8 2003 MMA amendments may have affected, maybe not, but  
9 Mason very clearly said, just as here, good law, that an  
10 alleged tortfeasor is not a responsible party under the  
11 MSP statute. So, that law continues to be consistent  
12 with Glover and all of the other cases.

13 And the issue about why Congress didn't do  
14 more with the MSP, maybe it was because they didn't want  
15 to have happen what they are trying to do here, which is  
16 essentially allow a private citizen without any  
17 allocation responsibilities to come in and say: I want  
18 to recover all of this money, double damages, for  
19 everybody who had one of these devices.

20 I think it is fair to say that Congress  
21 didn't want an individual like Ms. Ivens to do what they  
22 are trying to do in this courtroom. And that is a basis  
23 for Your Honor. That's all I have.

24 MR. GOLDSER: Nothing further, Your Honor.

25 THE COURT: All right. Let's take 15

1 minutes, and then we will move on to the second piece of  
2 this. Is that acceptable to everyone? All right. We  
3 will stand in recess for fifteen.

4 (Recess.)

5 THE COURT: You may be seated. Thank you.  
6 Whenever you are ready.

7 MR. CARPENTER: Yes, Your Honor.

8 THE COURT: Lowell, can you close the door  
9 right there? GSA wouldn't pay for the closers, so we  
10 have these doors that flop open. Whenever you are  
11 ready.

12 MR. CARPENTER: May it please the Court, Andy  
13 Carpenter for Guidant. I am here to address the  
14 Third-Party Payer aspects of the motions today.  
15 Although I am slightly younger than Mr. Pratt, I confess  
16 I do not have PowerPoint to offer the Court. We will  
17 have to rely on the actual speaking in this case.

18 Before I begin, I would like to point out  
19 that this Court is obviously hesitant to gainsay its  
20 Brethren in terms of Judge Rosenbaum's decision.

21 THE COURT: I don't know if hesitation was in  
22 my -- in the phrase -- but, no, I understand exactly  
23 what you're saying, look very closely at it, yes.

24 MR. CARPENTER: Absolutely. I think this  
25 Court, however, does have a free hand in ruling on these

1 issues.

2 THE COURT: No question, I agree.

3 MR. CARPENTER: But Judge Rosenbaum's  
4 analysis was in a different case, different defendant,  
5 different products, different plaintiff Third-Party  
6 Payer entities from different states, different  
7 jurisdictions, using different causes of action.

8 And frankly, although Judge Rosenbaum ruled  
9 against Medtronic's motion, there is no explanation of  
10 the analysis and the rationale for this Court to follow  
11 it if it were interested in doing so. So, therefore, I  
12 would submit that this Court has a blank slate in front  
13 of it. And obviously, it is free to rule as it sees fit  
14 on the --

15 THE COURT: Actually, since you brought it  
16 up, I will then ask. I mean, every judge has there  
17 their own policy and approach, and Judge Rosenbaum, more  
18 than any of the rest of us in our District. One, he  
19 will rule off the bench more frequently than the most of  
20 us. And secondly, on motions to deny, generally, and  
21 this -- I feel comfortable saying this because if he  
22 were here I think for the most part, he would say the  
23 same thing, with one, with maybe one question that  
24 doesn't need to be answered today. But, then when he  
25 denies a motion, it usually comes out in a one-page

1 denial, which this did, because I just looked at it over  
2 the break. But, when he grants, when he grants a  
3 motion, generally, whether it is a script -- I don't  
4 mean that in a derogatory sense -- a script or an  
5 explanation that he took into court with him, it is read  
6 into the record if not reduced to a memorandum, opinion  
7 and order. He is very consistent in that regard. So --  
8 because in the early argument, people were -- I think  
9 both lawyers were quoting some reasoning. And so, the  
10 -- because we have got the Order, it is a one-page  
11 order. So, I don't know if there is something in the  
12 transcript, because that is on line, that I will tell  
13 you, I have not reviewed.

14 MR. CARPENTER: Your Honor, we have looked at  
15 the transcript, obviously. And while Judge Rosenbaum  
16 laid out in excellent detail the rationale before  
17 granting the motion to dismiss the Medicare Secondary  
18 payer claims, there is no such explanation as to his  
19 denial of the Third-Party Payer claims.

20 THE COURT: That is consistent with, I think,  
21 how he rules on matters when he denies -- not unique to  
22 MDL's. You would see it in other cases. He is not  
23 alone. He may be in this District; but again, that  
24 answers that question.

25 MR. CARPENTER: Absolutely, Your Honor. We

1 began with the MSP argument because we believed that  
2 would be the shorter and simpler argument, and then we  
3 could spend more time on the Third-Party Payer argument.  
4 Much to everyone in this room's dismay, I am sure they  
5 are hearing that. However, Mr. Sobol and I agreed to  
6 expedite these as much as possible, while giving the  
7 Court as much information as it needs to make its  
8 decision. So, I am not going to belabor any points. I  
9 know the Court has read the briefing.

10 THE COURT: We have.

11 MR. CARPENTER: I am going to try to proceed.  
12 Feel free to interrupt me if the court has any issues or  
13 questions it might need to follow up on, or if it feels  
14 I move too quickly across.

15 Basically, Guidant's position is that the  
16 Third-Party Payer claims are the wrong claims by the  
17 wrong parties under the wrong procedure, attempting to  
18 apply the wrong state's law out of sequence.

19 Now, we are not saying that Third-Party Payer  
20 entities, Local 1776, Health and Welfare Benefit Fund  
21 and the city of Bethlehem, Pennsylvania, don't have a  
22 remedy. They do. It is traditional contractual  
23 subrogation to the rights of their insureds.

24 What they don't have a right to do is to file  
25 these direct actions, jump ahead of the cue and

1 immediately sue Guidant in substantive causes of action.  
2 Their remedy as health care payers lies in subrogation,  
3 after or during the resolution of the device recipients'  
4 claims.

5           The Plaintiffs seek three forms of relief in  
6 these cases. First, they seek class certification. We  
7 believe that is clearly improper, but that is not for us  
8 to resolve today. We will deal with that at the  
9 appropriate time if it ever arises. They seek  
10 injunctive relief in the form of disclosure of  
11 registration lists of patients in order to, quote, "help  
12 effectuate the recall," end quote.

13           THE COURT: Well, I mean, that is a question.  
14 I don't see a lawyer listed for the city of Bethlehem in  
15 the briefing today or 1776, so the implication to the  
16 second request is that they have no records of who they  
17 paid for what, and you have the record? Your client has  
18 the record?

19           MR. CARPENTER: I believe that is the  
20 implication. And two things jump out of that, Your  
21 Honor. First of all is what that tells you about how  
22 unworkable and unwieldy these lawsuits are, they don't  
23 even have a record of who their Plaintiffs are and they  
24 are relying on us to provide that. That gets into  
25 problems of apportionment, problems of proof that I will

1 demonstrate how remotely direct these injuries really  
2 are.

3           Second of all, without getting into too much  
4 detail on that, we will get to this later. That is an  
5 illusory, somewhat fictional request for injunctive  
6 relief. Nothing is required to effectuate the recalls.  
7 The recalls are over. They have been effectuated. The  
8 FDA oversaw the recalls, and there is no injunctive  
9 relief necessary to allow the city of Bethlehem,  
10 Pennsylvania to help to oversee the recalls. So, to the  
11 extent they request that injunctive relief, I would  
12 posit to say, that is a dead letter, somewhat of a legal  
13 fiction.

14           The third aspect of the relief they seek is  
15 monetary relief. And they are very clear in what they  
16 seek. They seek monetary relief for the, quote,  
17 "including payment for the wrongful economic burden  
18 placed on third-party payers for the cost of replacement  
19 and or corrective surgeries."

20           In other words, these are the payers of  
21 health care costs who seek to hold Guidant responsible  
22 for increased costs they had to pay out to their members  
23 due to Guidant's alleged wrongdoing, vis-a-vis their  
24 insureds and constituent members. These are classic,  
25 remote and derivative claims.

1           These are not new ground, Your Honor, there  
2 have been dozens, if not hundreds, of similar cases  
3 brought under various factual contexts over the years in  
4 Federal Courts. They have been brought by self-insured  
5 employers, they have been brought by HMO's, they have  
6 been brought by the insurers, they very been brought by  
7 municipalities, they have been brought by hospitals and  
8 direct health care providers. They have been brought  
9 against tobacco companies, they have been brought  
10 against firearm manufacturers, and all kinds of  
11 defendants under the same kind of a theory.

12           You did a wrong to my insureds that caused  
13 them to have injuries and increased medical costs. We  
14 had to pay them. We would like the money back directly  
15 from you, the alleged tortfeasor.

16           Luckily there is considerable case law this  
17 Court can rely on in dismissing those claims almost  
18 universally at the motion stage under the direct injury  
19 rule and the remoteness doctrine. Because the general  
20 rule is, Your Honor, that a party who claims damages  
21 merely flowing from injuries to a third person, stands  
22 at too remote and indirect a distance to recover, in  
23 general.

24           Speaking of the many jurisdictions in play,  
25 that brings us to a preliminary question, what choice of

1 law governs the claims of the Third-Party Payer  
2 Plaintiffs. The TPPs maintain that Minnesota law should  
3 apply to their claims. They say that Guidant is a  
4 Minnesota company and the device is manufactured by  
5 Guidant, emanated from the state of Minnesota. I think  
6 that vastly oversimplifies the analysis and overlooks,  
7 really, where the functional, meaningful contacts are in  
8 these cases. And it really overlooks who the Plaintiffs  
9 really are in this case.

10 The Plaintiffs are, and I don't mean to be  
11 flip about this, but one of the Plaintiffs is the city  
12 of Bethlehem, Pennsylvania. It is a city in  
13 Pennsylvania. Clearly, the default setting, the initial  
14 reaction is that Pennsylvania law should apply to claims  
15 asserted by the city of Bethlehem, Pennsylvania.

16 The other Plaintiff is a Health and Welfare  
17 Benefit Union centered again in Pennsylvania. Their  
18 constituents, their insureds, are all Pennsylvanians.

19 The devices, the ICD's their constituents  
20 received from Guidant were all received in Pennsylvania,  
21 not Minnesota. They were prescribed by doctors who were  
22 presumably doctors in Pennsylvania, not Minnesota. They  
23 were implanted. And if they were explanted, they were  
24 explanted in Pennsylvania, not Minnesota.

25 Any representations, omissions, any faults

1 that ostensibly would create liability that happened in  
2 the sales or selection process would have happened in  
3 Pennsylvania, not Minnesota. Any failure of a device,  
4 although as Mr. Pratt points out there have been  
5 extremely few failures of these devices. Any failure of  
6 the device would have happened in Pennsylvania. Any  
7 additional medical costs incurred would have happened in  
8 Pennsylvania. Any additional medical costs paid by  
9 these entities would have happened in Pennsylvania.

10 Basically, Your Honor, any acts upon which  
11 liability could ostensibly hinge, would have taken place  
12 in Pennsylvania, not Minnesota. And I also think it is  
13 important to point out that Plaintiffs' assertion that  
14 Minnesota law should apply because the ICD's were  
15 manufactured in Minnesota and sent out nationally is  
16 somewhat of a mistaken argument.

17 First of all, Guidant, although it obviously  
18 headquartered in Minnesota markets its products  
19 nationally, sends them to everywhere, and  
20 internationally, in fact. And recognizes that in doing  
21 so it may be exposed to laws of different jurisdictions.  
22 It doesn't expect Minnesota law necessarily to apply to  
23 a nationally and internationally marketed product.

24 Number two, though, it is just wrong to  
25 assume that all of the Guidant ICD's came from

1 Minnesota. For instance, Guidant manufactures some of  
2 its ICD's in Clonmel, Ireland. Should Ireland's law  
3 apply to these claims because of that? Clearly not.

4           If the Court looks at the balance of  
5 significant contacts with the different states,  
6 Pennsylvania vastly outweighs Minnesota. If you go back  
7 to Minnesota choice of law rules under the Leflar  
8 contacts analysis, those all indicate Pennsylvania law  
9 should apply. The first one is predictability of  
10 results. In other words, what did the parties think,  
11 which law did the parties think would apply when it  
12 entered into these transactions?

13           Well, clearly, the parties, the people who  
14 got the ICD's implanted had no idea they would be  
15 subjecting themselves to Minnesota law when an  
16 electrophysiologist in, say, Pittsburgh, Pennsylvania  
17 prescribes a device for a person who lives in  
18 Pennsylvania who has never been in Minnesota.

19           As a matter of fact, it is highly unlikely  
20 that any of the Plaintiffs are aware, even if they are  
21 aware that it is a Guidant device, that Guidant is a  
22 Minnesota corporation. So, therefore, the expectations  
23 as the predictability of results would absolutely  
24 dictate towards applying Pennsylvania law. That would  
25 make sense if you look at the Jepson case the Plaintiffs

1 cite as part of their choice of law analysis.

2 In the Jepson case, there were some contacts  
3 between Minnesota and North Dakota. And the Court  
4 looked at the predictability of results. And the Court  
5 noted that the parties knew they were issuing a policy  
6 for people with a North Dakota address. They knew the  
7 vehicles were registered and licensed in North Dakota,  
8 therefore the reasonable expectation of the parties  
9 should be, you'd think, that probably North Dakota law  
10 was going to apply. The same holds true in this case.

11 The second factor is the maintenance of an  
12 interstate order. That is concerned primarily with  
13 whether the exercise of Minnesota law over the claims of  
14 these Plaintiffs would evidence disrespect for  
15 Pennsylvania and its laws. Your Honor, frankly, I posit  
16 that it very well may. Pennsylvania, as we will talk  
17 about later has an extremely well developed, well  
18 thought out body of law under what circumstances a  
19 manufacturer of a prescription medical device may be  
20 held liable and when it cannot. Pennsylvania  
21 Legislature, Pennsylvania courts have made definite  
22 policy decisions limiting liability. They have got an  
23 interest in controlling and dictating to the extent  
24 manufacturers of prescription medical devices can be  
25 held liable. And I would posit that it would evidence

1 some degree of disrespect for that complex,  
2 well-developed body of Pennsylvania law were this Court  
3 to apply Minnesota law to these Pennsylvania entities.

4 The third Leflar factor is simplification of  
5 the judicial task. I will be real frank with the Court.  
6 Pennsylvania law is easier to apply. You still get to  
7 the same ultimate conclusion whether you apply Minnesota  
8 law or Pennsylvania law.

9 These claims have to be dismissed under  
10 either state's laws, frankly. But, you get there a lot  
11 faster under Pennsylvania law. It is an easier  
12 analysis.

13 THE COURT: You are saying the outcome -- you  
14 don't concede the outcome is different --

15 MR. CARPENTER: Absolutely not.

16 THE COURT: -- under one versus the other?

17 MR. CARPENTER: No. And I should make that  
18 point up front, that this Court frankly, I don't think,  
19 really has to resolve the choice of law issue.

20 THE COURT: I was going to ask that question,  
21 as well.

22 MR. CARPENTER: I think the Court would if  
23 the Court were to uphold any of the claims, but I think  
24 it is clear under Minnesota law or under Pennsylvania  
25 law, all of these claims have to be dismissed. And the

1 real remedy for the Third-Party Payer Plaintiffs is a  
2 properly pleaded subrogation claim, which is not what  
3 they pleaded currently.

4 THE COURT: Let me ask you the same question,  
5 -- and I don't mean to interrupt your argument -- that I  
6 asked Mr. Pratt and opposing counsel in the last piece  
7 of the case, that the timing of the motion, whether  
8 there would be an individual verdict in a case, unless  
9 you suggest that its MDL status affects the -- there is  
10 something unique about the outcome -- or a settlement.  
11 I mean, on a verdict form we would have the medical.  
12 And so, obviously, the city of Bethlehem and 1776 are a  
13 collateral source.

14 So, obviously, if there is money, that money  
15 is going to go to the city of Bethlehem, whether it is  
16 through a verdict or a settlement. So, I am wondering  
17 why the motion? Because one way or the other, if they  
18 paid it out, unless there is no recovery at all for,  
19 say, some of the plaintiffs, they are going to be paid.

20 MR. CARPENTER: The Court makes an excellent  
21 point. We can't say that they don't have subrogation  
22 rights and that if they paid money in that they are not  
23 entitled after the device recipients have had their  
24 claims pre-indicated to have their say and to recover  
25 that under the terms of their own subrogation

1 agreements.

2           What we say, the reason we bring this motion  
3 to dismiss, Your Honor, is legally they don't have the  
4 right to assert independent claims directly against us,  
5 especially not to jump the cue and sue us before the  
6 claims of the device recipients have even been paid.  
7 Logistically, I think, it would be a nightmare for this  
8 Court.

9           This Court -- I think the number of claims is  
10 approaching 2,000 in this MDL right now. This Court has  
11 a huge administrative challenge on its hand, just  
12 managing the device recipients. If the Court allows  
13 third-party payers to begin prosecuting their own  
14 independent claims against Guidant, adjudicating these,  
15 getting recovery, concurrent with over four device  
16 recipients, you are going to have problems with  
17 apportionment, problems with double recovery, collateral  
18 estoppel, res judicata issues. Frankly, it would be a  
19 nightmare. So, our position is that, functionally, yes,  
20 they will still have their rights protected by being  
21 able to subrogate individually to the claims of their  
22 insureds, but they can't bring these direct claims  
23 directly against Guidant for various legal and  
24 functional reasons that I think would make this MDL an  
25 absolute mess.

1           Did I answer your question, Your Honor?

2           THE COURT: Yes. Well, I guess it does  
3 substantially. It maybe begs the question that why  
4 there wasn't some agreement procedurally on -- well, you  
5 sit tight, and we'll sit tight and let's let these cases  
6 proceed on. I am trying to see the prejudice in that to  
7 either party.

8           I guess you mostly answered it, but I'm not  
9 sure what this does for Guidant. Let's say I grant the  
10 motion. It is not likely that any judge, whether this  
11 was an individual case or an MDL, would let the City of  
12 Bethlehem step in front of one of the individual  
13 Plaintiffs and say, well, before we decide whether you  
14 are going to get your out-of-pocket medicals, we have  
15 got this direct action going over here, that is going to  
16 speed ahead -- that piece, there is a little disconnect  
17 there for me.

18           MR. CARPENTER: I think one of our primary  
19 concerns is the danger of double recovery. What you  
20 have got is the Third-Party Plaintiffs and the device  
21 recipients all going for the same recovery and damages  
22 simultaneously. And although there is obviously the  
23 single recovery rule and apportionment issues, a big  
24 concern of ours is if you let the Third-Party Plaintiffs  
25 recover immediately and independently, we have got to

1 unspool that under a default setting, where likely  
2 unless we are very vigilant and very organized and able  
3 to discern which damages go where, Guidant, my client,  
4 is at a significant risk of paying two or three times  
5 for these different damages because the different  
6 entities are going after the same claims concurrently.  
7 It is much more orderly, much more my client's interest  
8 to have a proper organization, a proper sequence of  
9 these claims. So, I think double recovery is a real  
10 worry, not to mention the administrative problems that  
11 would ensue.

12           As to why there wasn't an agreement as to why  
13 the Third-Party Payers didn't hang back and let the  
14 device recipient payments and claims go forward first, I  
15 can't answer that. Mr. Sobol perhaps can, but  
16 apparently they have not seen fit to do that.

17           THE COURT: Because the other practical  
18 issue, and maybe there's some other management issues  
19 why -- I mean, if there is double recovery, it will be  
20 the first time in my 23 years of putting a robe on that  
21 I have seen that happen, at least to my knowledge. But,  
22 I don't claim to be a veteran of these MDL's, although I  
23 have had probably more than my fair share of class  
24 actions since I have been here -- no complaints,  
25 whatsoever. It is all random assignment.

1           But, another more practical issue is, another  
2 case I am involved in is, somewhere, somehow that will  
3 be beyond the reach of this Court, maybe appropriately  
4 so, when we start -- and I mentioned this on the  
5 Medicare issue, when people start talking about verdicts  
6 and settlement in the context of a verdict or  
7 pre-verdict or post-verdict, because the issues are the  
8 same. It is just who has got the leverage, is we will  
9 give you 20 cents on a dollar. And so, a \$50,000  
10 verdict or settlement may look very good if somebody is  
11 paying the City of Bethlehem, that individual Plaintiff,  
12 20 cents on a dollar, instead of a dollar on a dollar.  
13 And those settlements are made every day in every  
14 courtroom in every state in this country, apart from  
15 this MDL.

16           And so, somewhere down -- it doesn't affect  
17 the merits of this, I am the first to acknowledge that.  
18 But, that is going to be faced somewhere, and it just  
19 seems like a lot of lawyer time up front -- and of  
20 course, in a way that is not for me to say. You are  
21 going to get a ruling from me and you will hear when I  
22 am done here, unless I am asked not to by the parties, I  
23 will have an order out within 30 days or less on  
24 anything that is in front of me today, unless for some  
25 reason I am persuaded I should find a way to do it

1 differently. But, in any event, I have interrupted you.

2 But, that is the piece that is missing just  
3 ever so slightly for me on how these practically end at  
4 the end of the day, whether it is in the context of a  
5 verdict or it is in the context of a settlement.

6 MR. CARPENTER: That is a great observation,  
7 Your Honor. I can't -- I don't really have the  
8 information to answer that fully at this point.

9 THE COURT: All right.

10 MR. CARPENTER: As far as strictly legal  
11 analysis goes, I think these claims are legally infirm.  
12 And they should be dismissed as pleaded. And what the  
13 practical implications are remain to be seen in large  
14 respect.

15 THE COURT: All right.

16 MR. CARPENTER: I was going through the  
17 Leflar factors when we started talking about that. The  
18 next factor, number 4, is the advancement of the forum's  
19 interest. The question of, does Minnesota have an  
20 interest in applying its own law to these claims, or  
21 does Pennsylvania have more of an interest in applying  
22 its own law to these claims?

23 I submit, Your Honor, that it is not even a  
24 close question that these are Pennsylvania residents,  
25 Pennsylvania citizens, Pennsylvania entities suing us.

1 Pennsylvania has a much stronger interest in having its  
2 laws applied to the way its residents and entities are  
3 compensated or not compensated than Minnesota does in  
4 regulating how Pennsylvania residents and citizens are  
5 or are not compensated. Now, Plaintiffs make an  
6 argument that Guidant is a Minnesota corporation and  
7 Minnesota has an interest in policing Guidant's conduct.  
8 That is true, but only to a certain extent.

9           Number one, that clearly doesn't outweigh  
10 Pennsylvania's interest in determining how its residents  
11 get compensated in applying its own laws. Number two,  
12 Guidant is regulated and policed by an extensive Federal  
13 regulatory system under the FDA. The application of  
14 Minnesota Consumer Protection law to these particular  
15 claims is not necessary to police or reign in Guidant.  
16 That is already done by a strong regulatory framework.  
17 And that is also really not the point of private causes  
18 of action.

19           As we all know, private causes of action are  
20 for recovery of plaintiffs to adjudicate damages and  
21 make them whole or not. So, to that extent, the  
22 advancement of the forum's interest strongly weighs in  
23 favor of Pennsylvania.

24           The fifth Leflar factor is better rule of  
25 law. I am not going to say either state's laws are

1 better or worse. They are slightly different, but the  
2 end outcome under either is frankly the same.

3 This Court is no doubt aware of Judge  
4 Tunheim's decision in the St. Jude litigation. And  
5 that, Judge Tunheim found, that the laws of Minnesota  
6 should apply to the consumer protection claims in an  
7 MDL, rather than the laws of all 50 states, potentially.  
8 And I think that is a situation where this Court can  
9 chart a different course without gainsaying Judge  
10 Tunheim.

11 First of all, Judge Tunheim relied heavily on  
12 the simplification of the judicial task. In that case  
13 he was faced with the prospect of applying Minnesota law  
14 or applying the laws of a whole bunch of different  
15 states. In this case, it is either Pennsylvania or  
16 Minnesota. The Court doesn't have to make a decision of  
17 Minnesota versus the world. It is Minnesota versus  
18 Pennsylvania. So, that factor weighs much more in favor  
19 of applying Pennsylvania law than the simplification of  
20 the task factor weight in applying the law of all of the  
21 other states.

22 Second of all, I think Judge Tunheim  
23 respectfully didn't give his full credence to the  
24 governmental interests factor in his analysis, as he  
25 could have. Judge Tunheim basically ruled that the

1 other states would have no particular interest in not  
2 seeing their residents get compensation under more  
3 stringent consumer protection laws under those states.

4 I don't think that is quite the appropriate  
5 analysis. The appropriate analysis is whether  
6 Pennsylvania has more of an interest in having its laws  
7 with its limitations and its statements of when and how  
8 you can recover against a manufacturer of prescription  
9 medical devices applied to its citizens, than Minnesota  
10 does. So, I think in that context, that factor weighs  
11 more strongly in our favor.

12 Finally, Judge Tunheim emphasized that  
13 because they were just consumer protection claims in  
14 that case, the interests were a little different. He  
15 pointed out that in consumer protection claims, the  
16 focus is on the defendant, not so much the plaintiff, or  
17 the contacts of the plaintiffs' states of residence.

18 In this case, we do have some consumer  
19 protection statutes alleged. We have also got warranty  
20 tort contract claims where the focus should rightly be  
21 on not just on, not just the state or the defendant, but  
22 the state of residence where the plaintiffs are, or the  
23 plaintiffs' constituents in this case, which is  
24 Pennsylvania.

25 So, basically, I think this Court can and

1 should hold that Pennsylvania law applies, not  
2 withstanding Judge Tunheim's analysis in that case. And  
3 I think it makes more sense, also, when the Court looks  
4 at some of the strange results that would be engendered  
5 should this Court apply Minnesota law to these claims of  
6 Pennsylvania entities representing Pennsylvania  
7 constituents.

8           For instance, look at the Minnesota False  
9 Advertising law. That is a statute that applies to and  
10 prohibits the dissemination or the publication of  
11 misleading advertisements in the state of Minnesota.

12           It makes no sense, whatsoever, to apply the  
13 statute to a group of Pennsylvanians who very well have  
14 may never been to Minnesota and certainly can't say that  
15 they have seen advertisements in Minnesota. For reasons  
16 like that, it makes much more sense to apply  
17 Pennsylvania's laws to these claims.

18           Other courts looking at this issue have come  
19 to that same conclusion. If you look at the In Re:  
20 Vioxx case that Judge Fallon issued on November 22nd,  
21 2006, he was faced with a similar kind of issue, a  
22 national product sold by Merck, a New Jersey corporation  
23 in every jurisdiction. And Judge Fallon's question was:  
24 Do I follow the law in New Jersey, just because Merck is  
25 centered in New Jersey and the product comes from New

1 Jersey, or are the interests of the residence, states of  
2 residence of these people, where they lived, where they  
3 were prescribed it, where they were ingesting it, where  
4 they were allegedly injured by it, are those interests  
5 more important? And Judge Fallon clearly concluded that  
6 the contacts with the states of residence were much more  
7 important than contacts -- than the mere fact that the  
8 product emanated from the state of New Jersey.

9 He found that the interests of, hence, of the  
10 states of residence and seeing how their residents were  
11 compensated or not, having their laws applied, greatly  
12 outweighed the interests of New Jersey, in seeing New  
13 Jersey laws applied.

14 Judge Fallon agreed that the interests of the  
15 parties clearly favored applying the law of the states  
16 of residence. Judge Fallon also found that the  
17 competing interests of the states vastly favored  
18 applying the states of residence of the parties.

19 He found that the place where the injury  
20 occurred is really the state of residence, i.e., where  
21 the drug was ingested or sold. He found that the place  
22 where the relationship is centered, it is a state of  
23 residence, not New Jersey. He found that the place  
24 where the injury-causing conduct occurred, i.e., any  
25 omissions or failures to inform occurred were in the

1 states of residence where the drug was sold, not from  
2 New Jersey. So, to that extent, I think there is  
3 authority both ways on this. I frankly think the Vioxx  
4 decision is sound reasoning and would apply in a  
5 situation like this. And I would encourage this Court  
6 to apply Pennsylvania law rather than Minnesota law, but  
7 as I said before, I think this Court can grant our  
8 Motion to Dismiss under either court's laws.

9           That said, let me speak about Pennsylvania  
10 law and why it mandates dismissal of Plaintiffs' claims  
11 in this case. Both Pennsylvania law and Minnesota law  
12 recognize and follow the remoteness doctrine, or the  
13 indirect injury rule.

14           I won't backup too far and explain it. It  
15 has got its origins back in the Anthony -v- Slaid case,  
16 and the Supreme Court further explained it in Holmes -v-  
17 Security Investors Protection case. But, the bottom  
18 line is that Pennsylvania courts, the Third Circuit and  
19 the Western District of Pennsylvania, have all dealt  
20 with these precise types of claims before and dismissed  
21 them as remote and indirect.

22           If you apply Pennsylvania law, Your Honor,  
23 you need look no further than Williams & Drake Company,  
24 the Western District of Pennsylvania, Steamfitters Local  
25 Union from the Third Circuit, and Allegheny Hospital

1 from the Third Circuit. Those three cases all involved  
2 Third-Party Payers suing the Tobacco Industry under  
3 precisely the same theory that Mr. Sobol's clients are  
4 asserting here. You sold our clients a product. That  
5 product caused our clients to have injuries or  
6 additional medical expenses. We paid for those medical  
7 expenses. Now we are suing you for the increased  
8 medical expenses.

9           The plaintiffs in those cases varied from a  
10 self-insured employer, a Health and Welfare Benefit  
11 Union, Union Benefit Fund, and not-for-profit hospitals,  
12 who were direct providers of health care. They brought  
13 claims ranging from RICO to antitrust to tort claims, to  
14 unjust enrichment, to injunctive relief, to warranty  
15 claims. They were all dismissed by the Third Circuit in  
16 the Western District. Too remote, too indirect, they  
17 were based on injuries, stemming from and flowing from  
18 alleged injuries to their insureds, or the people they  
19 agreed to pay medical expenses for. They simply were  
20 not legally cognizable and couldn't stand.

21           I think, Your Honor, the exact same analysis  
22 applies to the cases in this case. Because if you look  
23 at what the Third-Party Plaintiffs' Complaint alleges,  
24 it very clearly alleges -- look at paragraph 27, 28, 29,  
25 look at the last paragraph in each one of their

1 substantive counts, where they list their causes of  
2 action. They make no bones about it. They seek to  
3 recover increased medical costs caused by surgeries, or  
4 additional medical procedures necessitated by their  
5 insureds, allegedly due to Guidant's misconduct. It is  
6 on all fours with those cases.

7 Plaintiffs in their opposition brief take  
8 great pains to try to distinguish the direct injury  
9 cases. Plaintiffs, in fact -- Plaintiffs cite about a  
10 dozen cases for the prospect that they do have standing  
11 to sue directly to recover health care costs paid.

12 None of the cases that they cite stand for  
13 the proposition that a third-party payer has standing or  
14 proximate causation to sue for injuries stemming out of  
15 health care benefits paid out due to injuries to its  
16 insured. What they do cite is a bunch of cases that  
17 deal with direct overpricing antitrust injury.

18 The cases they all cite involve a situation  
19 where the plaintiff -- or where the defendant allegedly  
20 overpriced, either through antitrust violations, some  
21 anti-competitive activities such as preventing a  
22 generic, cheaper equivalent from coming on to the  
23 market, or unfairly inflated the prices, and therefore  
24 directly injured the end payer.

25 They are not cases where the plaintiff

1 alleged, you injured my insureds. They incurred medical  
2 expenses. I had to pay those. In other words, they are  
3 direct financial injury cases. And the cases the  
4 Plaintiffs rely on, such as the Desiano case go to great  
5 lengths to distinguish the facts of direct financial  
6 injury cases from the cases like Holmes, from  
7 Steamfitters, from Allegheny Hospital.

8           For instance, if you would indulge me and let  
9 me quote the Desiano case upon which Plaintiffs rely, at  
10 page 349. The Court goes on to discuss the line of  
11 indirect injury cases, and then distinguishes them. In  
12 the instant case, instead, Plaintiffs allege an injury  
13 directly to themselves, an injury, moreover, that is  
14 unaffected by whether any given Plaintiff who ingested  
15 Rezulin became ill.

16           Plaintiffs' claim is that the defendants  
17 wrongful action was their misrepresentation of Rezulin's  
18 safety, and that this fraud directly caused economic  
19 loss to them as purchasers, since they would not have  
20 bought defendant's product rather than available,  
21 cheaper alternatives, had they not been misled by  
22 defendant's misrepresentations. Thus, the damages, the  
23 excess money plaintiffs paid defendants for the Rezulin  
24 they claim they would not have purchased, but for the  
25 defendants fraud were in no way derivative of damages to

1 a third-party. It is a very markedly different  
2 situation than what is being claimed in these cases.

3 Plaintiffs also rely on a series of decisions  
4 in which certain Blue Cross Blue Shield entities that  
5 directly buy health care services are considered, quote,  
6 "buyers" for purposes of being defendants in Sherman  
7 Antitrust Acts. However, those cases are very limited  
8 and don't really say anything about whether the  
9 third-party payer plaintiffs like this who pay, insure,  
10 who pay medical expenses have standing to sue an alleged  
11 tortfeasor directly. Plaintiffs rely on the Kartell -v-  
12 Blue Shield, Massachusetts case. If I can just quote  
13 briefly from page 927?

14 The relevant antitrust facts are that Blue  
15 Shield pays the bill and seeks to set the amount of the  
16 charge. Those facts led other courts in similar  
17 circumstances to treat insurers as if they were quote,  
18 "buyers." The same facts convince us that Blue  
19 Shield's activities here are like those of a buyer,  
20 whether for ethical, medical or related professional  
21 purposes, Blue Shield is or is not considered a buyer is  
22 beside the point. We here consider only one specific  
23 argued application of the antitrust laws, and we do not  
24 suggest how Blue Shield ought to be characterized in any  
25 other context.

1           So, my point is that is an extremely narrow  
2 ruling in a very particularized factual context, and  
3 none of those cases support Plaintiffs' position that  
4 they should be able to bring these claims directly.  
5 Aside from the direct injury rule, Pennsylvania law  
6 requires the dismissal of Plaintiffs' claims for other  
7 reasons.

8           All of Plaintiffs' claims, regardless of how  
9 they are denominated, whether it is negligent omission,  
10 whether it is a consumer product, CPL claim under  
11 Pennsylvania, are basically different ways of stating  
12 failure to warn claim. If you look at the substantive  
13 allegations, regardless of what particular type of claim  
14 it is, it is all premised on the fact that Guidant  
15 should have and could have warned of additional risks of  
16 its ICD's.

17           Under Pennsylvania law, Pennsylvania will not  
18 allow you to bring a cause of action against a  
19 manufacturer of a prescription medical device on  
20 anything but negligence; therefore, all Plaintiffs'  
21 claims should be dismissed.

22           Pennsylvania, under the long line of cases,  
23 culminating in the Colacicco versus Apotex case all  
24 follow Restatement of Torts 402A, Comment K. Now,  
25 Comment K deals with the unavoidably, unsafe medical

1 device exception. Pennsylvania recognizes as a matter  
2 of policy that certain prescription medical drugs and  
3 devices are going to be unavoidably unsafe.

4           You can't make them completely safe, because  
5 they are state of the art. They are cutting edge. But,  
6 they have such a powerful value to society that they  
7 shouldn't be held in strict liability. Pennsylvania has  
8 made a substantive decision that they will not hold the  
9 manufacturer of a prescription medical device or  
10 prescription drug liable under strict liability, under  
11 Consumer Protection Law, under warranty claims, under  
12 nothing except negligence, i.e., a failure to exercise  
13 reasonable care standard. They think that that is the  
14 proper balance.

15           And Pennsylvania cases such as the Luke case,  
16 the Albertson case, the Colacicco case, have dismissed  
17 cases brought under one level or another of an iteration  
18 of a failure to warn theory, whether they are warranty  
19 claims, whether they are Pennsylvania Consumer  
20 Protection Law claims, whether they are strict liability  
21 claims. It dismissed all of those against manufacturers  
22 of medical devices, because the only viable cause of  
23 action is a negligence one. Under those line of cases,  
24 Plaintiffs' claims clearly have to be dismissed under  
25 Minnesota law.

1           In addition, Plaintiffs' Consumer Protection  
2 Law claims under Pennsylvania also fail because these  
3 third-party payers are neither buyers of the products,  
4 nor are they buying the products for personal or home  
5 use.

6           As the Balderston line of cases clearly  
7 indicate, Pennsylvania law, Pennsylvania CPL law only  
8 applies to the actual buyers and buyers who buy for  
9 personal or home use. The city of Bethlehem didn't buy  
10 any of these products.

11           The Local 1776 didn't buy any of these  
12 products. Now, Plaintiffs try to argue that they should  
13 be considered buyers under the -- under the Commonwealth  
14 -v- TAP case. That case is inapplicable to Plaintiffs'  
15 claims. Commonwealth -v- TAP involved a case where the  
16 Commonwealth of Pennsylvania in its parens patriae  
17 capacity sued on behalf of all Pennsylvania residents  
18 who were enrolled and received benefits under  
19 Pennsylvania health programs sued the drug manufacturer.  
20 The drug manufacture came back and said, well, they are  
21 not the buyers, the actual customers are. The Court  
22 allowed the state of Pennsylvania in that case to  
23 proceed because they represented in parens patriae form  
24 the actual buyers, so it extrapolated their standing in  
25 the state of Pennsylvania. There is no such

1 extrapolation possible in these cases. The City of  
2 Bethlehem, Local 1776, do not bring these cases on  
3 behalf of or in a representative capacity of their  
4 members. To the contrary, paragraph 27 of the Master  
5 Complaint in which Local 1776 was expressly pleased that  
6 it has got the capacity to and is bringing this in its  
7 own name. It is not a *parens patriae* operation and  
8 there is no capacity to bring these on behalf of their  
9 insureds or their constituents. Therefore, they are not  
10 buyers and those claims have to be dismissed.

11 Finally, the unjust enrichment claim fails  
12 under Pennsylvania law, as well, as the Allegheny  
13 Hospital case demonstrates. The payment of the  
14 Third-Party Payer or insurer of medical expenses doesn't  
15 provide any benefit to the alleged tortfeasor. If it  
16 does, it is strictly incidental to discharging their  
17 duty to pay the healthcare expenses of their insured.  
18 Therefore, no unjust enrichment claim can stand.

19 I will deal with the subrogation claims  
20 separately. Basically, Pennsylvania law is fairly  
21 clear. These claims can't stand legally, Your Honor.  
22 Minnesota law results in the same exact result. It  
23 takes a little longer to get there due to some unique  
24 Minnesota Supreme Court decisions, but the same result  
25 happens.

1 Minnesota also recognizes the Remoteness and  
2 Indirect Injury Rule; however, the Group Health case and  
3 the Humphrey case both show that the direct injury rule  
4 isn't usually applied to -- there is a different  
5 causation standard, I will say. In that case, you had  
6 Blue Cross and Blue Shield entities of Minnesota  
7 representing Minnesota insureds and people who got  
8 health care in Minnesota suing the tobacco industry.  
9 The tobacco industry moved to dismiss those claims.

10 While the Supreme Court of Minnesota  
11 recognized that Minnesota law does follow the Direct  
12 Injury Rule, dating back to the Northern States  
13 Contracting case from 1936, they pointed out that that  
14 is an aspect of common law, proximate causation.

15 Therefore the Humphrey's Court said, no, you  
16 don't have direct injury to assert your tort claims;  
17 but, let's look at the consumer protection claims. And  
18 that court concluded that the causation element  
19 requirement in those consumer protection Minnesota  
20 claims were not common law proximate cause and limited  
21 by the direct injury rule, but were specific statutory  
22 grants of standing by the Minnesota Legislature. And  
23 then concluded it was broader than proximate cause, and  
24 therefore allowed the consumer protection claims to  
25 proceed.

1           Well, I think what is apparent from Humphrey  
2 is that the only things -- the only claims of the  
3 third-party payers under Minnesota law that could  
4 possibly survive the direct injury rule would be the  
5 great Minnesota Consumer Protection Statutes. The  
6 warranty claims, tort claims, those all require some  
7 kind of common law proximate causation that makes them  
8 susceptible to the Direct Injury Rule.

9           So, Humphrey will allow Plaintiffs' consumer  
10 protection claims to survive up to that point, but  
11 dismisses the rest of their claims. However, Humphrey  
12 and Group Health did not indicate that any third party  
13 payer has standing to bring these Minnesota Consumer  
14 Protection claims.

15           As I said before, the Plaintiffs in these  
16 cases were Minnesota Third-Party Payer entities,  
17 Minnesota HMO's representing health care provided to  
18 Minnesota residents -- not Pennsylvania residents. And  
19 if you look at the particular standing requirements of  
20 these three Minnesota statutes, you will see that under  
21 the Prevention of Consumer Fraud Act, under the  
22 Deceptive Trade Practices Act, under the false  
23 advertising Act, there is very limited standing that  
24 these particular Pennsylvania Plaintiffs can't satisfy,  
25 and therefore those consumer protection claims should be

1 dismissed, as well.

2 Start with the False Statements and  
3 Advertising Act, that one is fairly simple. By statute  
4 and by case law, it applies only to advertisements in  
5 Minnesota. These are Pennsylvanians. They didn't see  
6 these. There is no causal nexus. I think that claim  
7 has to be clearly dismissed as inappropriate for  
8 Pennsylvania entities.

9 If you look at the Minnesota Deceptive Trade  
10 Practices Act, that statute only provides standing for a  
11 private litigant to seek injunctive relief, no monetary  
12 relief. Therefore, they have got no standing to proceed  
13 with any of their monetary claims under the Minnesota  
14 Deceptive Trade Practices Act.

15 And as I said before and I will touch on  
16 later, the injunctive relief they seek is illusory  
17 non-relief they should not be granted for various other  
18 reasons. I will cover that shortly.

19 Then you get to the Minnesota Prevention of  
20 Consumer Fraud Act. That act is basically the private  
21 right of action corresponding to the powers of the  
22 Minnesota Attorney General. It allows citizens to  
23 proceed as private attorneys general to vindicate public  
24 rights.

25 What that means is that your standing to

1 bring a claim under the Minnesota Consumer Prevention of  
2 Fraud Act is no greater than the standing the Minnesota  
3 A.G. would have. And I think in this case, the extra  
4 territoriality of the third-party payer's claims makes  
5 it clear that the Minnesota Attorney General would not  
6 bring a case to vindicate the rights of the constituents  
7 of the City of Bethlehem, Pennsylvania, or Bethlehem,  
8 Pennsylvania, itself.

9 I would submit to the Court it is  
10 inappropriate, it's extraterritorial, and it is beyond  
11 the bounds of what is contemplated by the Consumer  
12 Protection Statute.

13 In addition, the Prevention of Consumer Fraud  
14 Act only applies to causes of action that are brought  
15 for the public's benefit. In the Lee case, the  
16 Minnesota Supreme Court dealt with a dispute over the  
17 sale of a Chinese restaurant. And while there may have  
18 been some nefarious dealing going on, they refused to  
19 exercise jurisdiction under the Prevention of Consumer  
20 Fraud Act, because it was a private dispute between  
21 private litigants. And all of the relief went to the  
22 private individual. There was no public benefit to  
23 that.

24 Since then, there has been a series of cases  
25 construing exactly what it means to have a public

1 benefit. And the Third-Party Payer entities in this  
2 case can't satisfy that element. The cases are pretty  
3 consistent that you need to look not just at the  
4 wrongdoing alleged, but you also need to look at what  
5 relief is requested. And the cases indicate that where  
6 the relief requested is exclusively to the benefit of  
7 the litigants and is not disbursed to the public in any  
8 sense, that it is not a public benefit. It is only for  
9 the private profit of the entity.

10 In addition, this case is particularly  
11 problematic. If you look at cases such as the Behrens  
12 case, because the alleged devices that they are suing  
13 over, Your Honor, have already been recalled and are no  
14 longer being marketed. The recall is done with. In  
15 Behrens, you had the owner of a mink farm suing the  
16 manufacturer of a mink distemper vaccine that allegedly  
17 did not work. Apparently, he bought this and all of the  
18 minks got distemper, anyway, and so he sued. The Court  
19 held --

20 THE COURT: That would not have been a  
21 pleasant place to be.

22 MR. CARPENTER: No. I imagine there may have  
23 been psychological damages imposed, as well.

24 THE COURT: To say the least.

25 MR. CARPENTER: He sued under the Minnesota

1 Consumer Protection Statutes. The Court found there was  
2 no public benefit. First of all, not just because all  
3 of the relief went to the private actor who was suing,  
4 but also because the vaccine in issue had already been  
5 recalled and was no longer being marketed.

6 Therefore, it benefited the public in no way  
7 to have adjudication of liability or any injunctive  
8 relief regarding a product that was already discontinued  
9 and off the market.

10 I would submit to the Court that that applies  
11 very strongly to this case, that the recalls had been  
12 initiated. The FDA has overseen the recalls. Guidant  
13 has done what is necessary to do. That is finished.

14 Plaintiffs, mindful of this, have pleaded  
15 they would like disclosure of patient registration lists  
16 to help effectuate the recalls. And as I said before,  
17 the recalls are already effectuated. They are too late.  
18 This alleged relief won't benefit the public.

19 Frankly, I think I see what they are trying  
20 to plead by this, but I don't think it works. It is an  
21 illusory relief and it has already taken place. So, I  
22 would say that under the Behrens case, Plaintiffs'  
23 Minnesota Consumer Protection Act claims fail because,  
24 number one, the extraterritorial application of that to  
25 Minnesota entities and Minnesota individuals makes no

1 sense within the scope of the Minnesota Attorney  
2 General's Office and powers. And number two, it is not  
3 brought for any public purpose, whatsoever.

4 Finally, I think Plaintiffs' consumer  
5 protection claims should be dismissed for an independent  
6 reason. If you look at the Humphrey case and the Group  
7 Health plan case, the Minnesota Supreme Court never said  
8 that you have unlimited standing under these statutes.  
9 They never said anybody can bring a claim under these  
10 statutes. All they held was that for these particular  
11 Minnesota Plaintiffs, their claims weren't too remote  
12 and indirect.

13 I would posit to this Court that the claims  
14 asserted by the Third-Party Payers in this litigation  
15 are even more remote and less direct than the claims  
16 upheld in Group Health and Humphrey.

17 For instance, in Group Health, the theory is,  
18 the tobacco industry sold cigarettes to our insureds.  
19 Our insureds smoked cigarettes and suffered injuries.  
20 They incurred additional medical expenses because of the  
21 injuries. We paid those medical expenses and are out  
22 additional money.

23 In this context, in this factual context as  
24 pleaded, Your Honor, you inject another level of  
25 uncertainty and remoteness by injecting the learned

1 intermediary prescription-prescribing physician angle  
2 into it. So, in this case, the allegations are Guidant  
3 manufactured these devices and sold them to physicians.  
4 Physicians prescribed them -- or they failed to warn  
5 physicians. Three physicians prescribed them to our  
6 insureds. Our insureds had these devices implanted  
7 which caused injuries or additional medical expenses.

8           And five, we had to pay these additional  
9 medical expenses and injuries. So, if the Court looks  
10 at it, it is actually an additional step more removed  
11 and remote. And that leads us back to the Rivera case  
12 from the Fifth Circuit in which the Court noted that  
13 when you bring in the independent element of the  
14 prescribing physician, that is a remote, attenuated  
15 indirect relationship that makes the claims even less  
16 concrete. So, I would propose that even -- I am  
17 certainly not asking this Court to go contrary to the  
18 Group Health or the Humphrey cases. I don't think you  
19 have to. I think Group Health and Humphrey only go so  
20 far. And what Plaintiffs in this case ask this Court to  
21 do, asks you to go too far. And that is demonstrated by  
22 the Borax case that we cite.

23           In Borax, a private individual brought an  
24 antitrust case claim against various chemical companies.  
25 She sued saying that they artificially raised the prices

1 of the chemicals sold to tire companies, which resulted  
2 in higher-priced tires, which she bought, and she was  
3 out out-of-pocket money for paying for tires that were  
4 too expensive. And she cited Humphrey for the  
5 proposition that there is this broad grant of statutory  
6 standing, under the Minnesota Consumer Protection Laws.  
7 And the Court said, hold on, wait a minute. We let that  
8 go in Humphrey. If we didn't say there was no limit to  
9 it and we didn't think the Legislature intended such  
10 broad and unreasonable results, dismissed. I think the  
11 same situation applies in this case, as well, Your  
12 Honor.

13           Additionally, Your Honor, even if the Direct  
14 Injury Rule didn't eliminate under Minnesota law  
15 Plaintiffs' unjust enrichment claim, this Court need  
16 look no farther than the Group Health Plan case at 68  
17 Fed. Supp. 2d 1064.

18           That Court dismissed the Third-Party Payers  
19 unjust enrichment claim on two bases. First of all, the  
20 Court noted that unjust enrichment is an equitable form  
21 of relief, and where there is an adequate remedy at law,  
22 you are not entitled to equitable injunctive relief,  
23 such as unjust enrichment.

24           There, as here, the Plaintiffs have good  
25 old-fashioned, traditional, subrogation claims and a

1 contract available to them. Therefore, under the  
2 analysis in Group Health, unjust enrichment is not  
3 available.

4           Second, the Court like the Court in Allegheny  
5 Hospital, Group Health noted that no real benefit is  
6 conferred upon the alleged defendant by just paying  
7 health care costs to your insured that you are obligated  
8 to pay. And any benefit that would be incurred or  
9 provided is just incidental to the pre-existing duties.  
10 On both of those grounds, the unjust enrichment claim  
11 fails.

12           Finally, subrogation. Plaintiffs do have  
13 subrogation claims. I don't believe they have them the  
14 way they have pleaded them, Your Honor. Under both  
15 Pennsylvania law and Minnesota law, the Court makes very  
16 clear how you can plead subrogation.

17           What you do is you, either interpreting the  
18 action, the ongoing action of the insured, or you  
19 exercise your subrogation rights and bring the action in  
20 the name of the insured. They have done neither. They  
21 haven't indicated who the insureds are. We have no  
22 names. They are certainly not standing in the shoes of  
23 their insured as they would have to do in a real  
24 subrogation action.

25           They haven't actually called it subrogation,

1 but procedurally and realistically, it is not  
2 subrogation. It is a mass action, without needing the  
3 particulars of any of their insureds.

4 As we all know in subrogation, you assume the  
5 rights of the subrogor, and you assume the limitations  
6 and defenses applicable to them, as well.

7 Our position is that the Third-Party  
8 Plaintiffs do have a right in subrogation, but it has  
9 got to be an individualized, case by case, properly  
10 pleaded, contractual subrogation claim and not be the  
11 large mass of indiscriminate action that they pleaded.

12 In conclusion, Your Honor, regardless of  
13 which state's laws applies -- I think it should be  
14 Pennsylvania's, but regardless of which way the Court  
15 goes on that issue, I think it is apparent that the  
16 claims asserted by the Third-Party Payers, and we deem  
17 them sound, make for bad policy, and make for  
18 administrative and judicial problems if allowed to  
19 proceed this way. And we would encourage this Court to  
20 grant our motion to dismiss these claims.

21 THE COURT: Thank you.

22 It has been a long wait for you.

23 MR. SOBOL: It really has.

24 THE COURT: You have been very patient.

25 MR. SOBOL: Holding up.

1           THE COURT: I didn't see you nod off like a  
2 few people in the back. No offense to anyone.

3           MR. SOBOL: Well, may it please the Court?

4           THE COURT: At least we don't have heating  
5 problems today. Even though there is a newer heating  
6 system in this building, some days it is very hot in  
7 here, some days it is very cold. And it seems it is in  
8 the neighborhood, at least, today. At least it is up  
9 here.

10          MR. SOBOL: It seems colder up here, has it?  
11 It is a little chilly, actually.

12          THE COURT: Yes. And actually, usually it  
13 has been the other way where it is unreasonably warm. I  
14 don't think I saw your name on the brief.

15          MR. SOBOL: Sure. My name is Tom Sobol,  
16 S-o-b-o-l. And I am from Boston. It's a pleasure to be  
17 out here. As I also told Judge Rosenbaum, I said it is  
18 a pleasure to be out here. And he said, well, you don't  
19 have to say that. And I said, so far it has been,  
20 before your questions.

21                 The parties obviously are pretty far apart in  
22 terms of their view of where the Third-Party Payer cases  
23 stay here. From our point of view, the Master  
24 Consolidated Complaint presents a relatively routine  
25 application of law accepted in many places, but

1 particularly here in Minnesota.

2           And the claims that are in this case, you  
3 asked the question earlier, the claims that are in this  
4 case are identical to the cases -- the claims that were  
5 pending in the Medtronic case in front of Judge  
6 Rosenbaum.

7           What do I mean by that? Well, the causes of  
8 action start out with the same Minnesota -- the same  
9 trio of Minnesota Statutes, and say to set forth those  
10 claims. They both involved medical devices, obviously,  
11 they both involved companies that are alleged to be  
12 based here in Minnesota.

13           The lawyers that are crafting both  
14 Master Consolidated Complaints use them both as the same  
15 template. So, if you compare even the Master  
16 Consolidated Complaint that is before the other Court  
17 here in Minnesota to this Master Consolidated Complaint,  
18 they are identical.

19           In fact, it is different -- it is difficult,  
20 excuse me -- other than the particular kind of devices,  
21 i.e., that are involved, to seek any legally relevant  
22 difference whatsoever for reasons I'll get into.

23           So, in this case, not only would you need to  
24 disagree markedly with the precise allegation pattern --  
25 not fact pattern, but allegations, but allegation

1 pattern as was put before Judge Rosenbaum, but I also  
2 would suggest, as I hope my argument makes clear, that  
3 you would also need to go directly opposite the way that  
4 the Minnesota Supreme Court ruled in State versus Philip  
5 Morris, you would have to go exactly the opposite, the  
6 way that the Minnesota Court ruled in Group Health, and  
7 you would have to go directly the opposite to where  
8 another member of the Minnesota Bench ruled in St. Jude  
9 case on issues of -- you would have to buck and gainsay,  
10 if you will, all of those jurists in order to go in any  
11 way in the direction that Guidant suggested.

12 THE COURT: Well, of course, Mr. Carpenter  
13 said that at least as it relates to the Philip Morris  
14 and Group Health case, that that is not necessarily the  
15 case, that a ruling here wouldn't be inconsistent  
16 with --

17 MR. SOBOL: No, it would be. And I will  
18 answer that question immediately and then come back to  
19 it.

20 THE COURT: If you are going to head there, I  
21 will sit tight --

22 MR. SOBOL: Yeah, I will head there. It is  
23 actually on all fours.

24 THE COURT: That's all right.

25 MR. SOBOL: Before I get into the legal

1 pieces of this, though, I have heard you ask a couple of  
2 times -- what I have heard, the question essentially is  
3 how would this case fit into what is going on in my  
4 court? And how would ruling on this help or not that  
5 process and where does this fit in? So I want to really  
6 address that more broad question before I deal with the  
7 legal issue.

8           And it is this, personally I feel the  
9 technicalities about where the Complaint is. There are  
10 two separate civil actions filed originally in  
11 Minnesota, one by the Taft-Hartley Fund, the other by  
12 the City of Bethlehem. And then there is one Master  
13 Consolidated Complaint, which ostensibly is not the  
14 action of either of those two entities, but it is a  
15 conduit for dealing with certain kinds of legal issues,  
16 if you will.

17           THE COURT: Agreed.

18           MR. SOBOL: Now, the ultimate purpose of the  
19 Master Consolidated Complaint is to seek class  
20 certification for all of the Third-Party Payers in the  
21 country. So, that is some large insurance companies,  
22 for-profit insurers, small for-profit insurers,  
23 not-for-profit insurers, for employers like the City of  
24 Bethlehem or other small employers that are self insured  
25 on their own account on dollars that are paid.

1           Also, for Blue Cross Blue Shield entities,  
2 all of the other Taft-Hartley Funds in the country. And  
3 unlike the remark that was made vis-a-vis the Medicare  
4 Secondary Payer Act, these claims are client-driven by  
5 the Third-Party Payers in the country who are outraged  
6 that a company like Guidant, and similarly a company  
7 like Medtronic, would effectuate a recall and cause  
8 completely unnecessary medical expenses measured in the  
9 many tens if not hundreds of millions of dollars to be  
10 incurred throughout the United States, knowingly,  
11 without any general remedy being given for that  
12 unnecessary economic burden that is being placed on all  
13 of them.

14           So, whether it is a small machine shop in  
15 Wisconsin, in the Medtronic case that was complaining  
16 about having to pay for the unnecessary surgery for one  
17 of its machinists, or it is a large organization like  
18 Aetna that has paid unnecessarily for thousands of  
19 people's, or at least many hundreds if not thousands, of  
20 unnecessary surgeries, there is an effort in the Master  
21 Consolidated Complaint here, as there is in Medtronic,  
22 to put the judicial arms around that issue and that  
23 problem and to resolve it once and for all in an  
24 efficient and meaningful manner. That is the intention.

25           Now, it is true that in each of those cases,

1 as here, some of the claimants, a small minority of the  
2 claimants have also brought their own personal injury  
3 case.

4 And so, we have a small minority in this  
5 situation where there would be the need to, as there is  
6 in any personal injury case, doing negotiation or work  
7 out -- rarely would there end up being litigation in  
8 terms of that subrogation claim, if there needed to be  
9 one, between the Third-Party Payer and insurer. But, in  
10 addition to that, in addition, in other words, to the  
11 health care costs that were born by either private  
12 insurers or by Medicare for the individual claimants'  
13 cases that are before you, there is also the larger  
14 number of non-litigating individuals, insured health  
15 care benefits for which this claim seeks to also recover  
16 for.

17 Now, there are innumerable reasons why an  
18 individual who has undergone an unnecessary replacement  
19 of a Guidant device would choose not to bring a claim.  
20 First, they might do it because they don't know.  
21 Second, they might do it because they have died. Third,  
22 they might do it because of a myriad of reasons, they  
23 don't want to go ahead with litigation. They don't want  
24 the time and the aggravation. It may be that there are  
25 individual cases out there where the surgery is

1 relatively non-invasive from their own point of view,  
2 their insurance company paid up the bill so they don't  
3 see what the real problem is from their point of view.  
4 There are all of these reasons, none of which of those  
5 reasons are relevant, but why it is that there are going  
6 to be situations where their uncovered medical insurance  
7 that the insurers here are trying to cover and get  
8 compensation for.

9           Now, why would it be, therefore, meaningful  
10 for us to go ahead. The Third-Party Payers in this case  
11 want this case to move. And from our point of view,  
12 with all due respect, we filed our cases in late 2005.  
13 We would like to get the ruling on 12(b)(6) so we can  
14 move our cases forward, to go forward with class  
15 certification proceedings, efficiently and effectively,  
16 because then you, with all respect, Your Honor, will  
17 have a judicial tool in front of you to manage the issue  
18 as to how it is that subrogation and unnecessary  
19 economic expenses are dealt with. And you can do that  
20 in an aggregate manner by looking at the class as a  
21 whole, rather than one insurer after another after  
22 another. And that is really the rough, because if this  
23 case can go forward, we can survive 12(b)(6) and we move  
24 forward to Rule 1203. You are then able to manage this  
25 litigation very effectively, efficiently, no

1 duplication of damages whatsoever because you have the  
2 judicial tool to deal with it. You won't have to deal  
3 with, literally, the claims of many hundreds, probably  
4 more than 1,000 different Third-Party payers in the  
5 country who have overpaid for these medical replacement  
6 exercises.

7           Now, why do I say that? Why do I give that  
8 estimate? In the country, there are, it is estimated  
9 from any other sources probably over 20,000 separate  
10 third party payers. They are, again, all of the  
11 different varieties, big and small. With respect to  
12 this device, given the number of recalls that have  
13 occurred, and the number of revisions that have had to  
14 occur, one can ballpark right now that the number of  
15 third-party payers who have unfairly incurred excess  
16 medical expenses is measured in over 1,000.

17           How are you going to be better off in terms  
18 of managing that problem than to have it done in a class  
19 context? That is the way we suggest it be done, rather  
20 than having one insurer after another, after another  
21 piped in here, there, whatever, as the case goes  
22 forward. So, that is the way that we would suggest it,  
23 that this case fits into things, they way we suggest it  
24 be done. And also, to be able to have a resolution, of  
25 course, the third-party payers ultimately don't go away

1 if it turns out that this -- you had asked the question  
2 about what is the consequence if I rule negatively or  
3 positively?

4 I will give a consequence negatively. It is  
5 actually hard to exactly understand how it is that  
6 Guidant's motion is geared toward -- is Guidant's motion  
7 geared towards just dismissing out Bethlehem, or is it  
8 just the UCFW, but still the Master Complaint would  
9 stand if some other Third-Party Payer could come in? Or  
10 is the whole Master Complaint supposed to go away?

11 But, if it is, there are claims they haven't  
12 moved on. There is also questions about their motion.  
13 But, the bottom line is, if we don't have the vehicle  
14 for Rule 23, then that forces the hand of large and  
15 small insurers to file their own individual actions and  
16 to pile on, you know, hundreds of separate actions in  
17 this Court to make sure that all of their medical  
18 expenses, if they are not being litigated by an  
19 individual, is done. And I have seen that in part  
20 happen where there have been literally scores of  
21 insurers who have had to file a claim on a drug case  
22 believing that they felt that they wouldn't be able to  
23 get their due.

24 So, it is judicially efficient for you to  
25 deny the 12(b)(6), go forward with the class

1 certification and manage the problem that way.

2 So, now I will turn to their argument.

3 Judge Rosenbaum did not issue a decision,  
4 reasoned, with the reasoning. He did not express from  
5 the Bench at the end as he did with respect to the MSPA  
6 his reasons. However, they are in the briefs. One of  
7 the things that is interesting about the briefing here  
8 and what my argument is about to go through is that when  
9 Guidant filed their memorandum, we filed a response.  
10 Their reply reminds me of when I was a kid. It was like  
11 a do-over brief. But, it is a do-over with all sorts of  
12 new arguments in it to which we have not filed a  
13 response. So, I am going to give you briefly our  
14 response right now.

15 But, in part, also, I would suggest that the  
16 reason the arguments in their reply brief and the  
17 citations weren't in their original brief to begin with,  
18 because they don't hold water and Guidant thought it  
19 made no sense to argue them, to begin with.

20 THE COURT: Or they were written by two  
21 separate groups of lawyers.

22 MR. SOBOL: It sounds like they may have been  
23 actually. It does, right.

24 Now, the first argument that is made in --  
25 and actually, it is made both in their original and

1 their reply brief, is generalized argument that the law  
2 does not permit such remote or indirect claims.

3 Now, it is true that under the common law,  
4 under the common law an insurer cannot recover increased  
5 medical expenses associated with a tort perpetrated on  
6 the insurers' insured; that is correct under the common  
7 law.

8 However, the Complaint, here, as in  
9 Medtronic, does not assert common law causes of action.  
10 We did that intentionally in this case. And we  
11 intentionally withdrew the common law counts of  
12 Medtronic. There are no common law counts of this type  
13 here.

14 As a result, what we do plead are exceptions  
15 to that common law rule. And it is statutory and  
16 contractual and equitable exceptions to the common law  
17 tort rule. The first are the three counts that we plead  
18 under the Minnesota Acts, the Deceptive Trade Practices  
19 Act, the Prevention of Consumer Fraud Act, and the False  
20 Statements Act.

21 All three of those statutes were expressly  
22 enacted in order to abrogate the common law and to make  
23 exceptions to the common law. Why? Because the common  
24 law did not afford the kinds of remedies that are being  
25 asserted here.

1           Now, in State versus Philips, a private  
2 health organization brought suit against tobacco  
3 companies under these laws. Seeking damages, and I  
4 quote, resulting from the fact that it has paid and will  
5 pay substantially higher amounts to its contracted  
6 health care providers, due to the increased costs of  
7 health care services for treating smoking-related  
8 illnesses.

9           What State versus Philips held was the claims  
10 that were being brought under the common law, no good.  
11 So, I agree with Mr. Carpenter on that. The State  
12 versus Philips, if they had a common law negligence  
13 action, it would not survive, but it is not the case.

14           But, what State versus Philips then said is,  
15 but wait a second, we have these statutes enacted to  
16 abrogate the common law, create new remedies. And guess  
17 what? If an insurance company sues because it is  
18 bearing an excess burden of the health care costs  
19 associated due to the remote activities of smoking  
20 activities, then we are going to allow recovery. So,  
21 that is an authoritative decision, statutory event,  
22 authoritative decision by the Minnesota Supreme Court  
23 upholding precisely the cause of action we allege here;  
24 and so, Mr. Carpenter is also right.

25           We make no bones about the fact that we are

1 suing for the increased burden associated with health  
2 care costs by reason of Guidant's wrongdoing. And the  
3 reason we do that is because I am pretty much a  
4 simpleton. If I read the Minnesota Statute and the  
5 Minnesota Supreme Court decision that says an insurance  
6 company can recover for that. I put it in the pleading,  
7 that is what we want. It should survive a 12(b)(6)  
8 motion.

9           Next the Minnesota Supreme Court then also  
10 held in the Group Health plan case, that -- once again  
11 this issue of whether private health benefit providers  
12 have a legally cognizable injury and standing to sue  
13 under the Minnesota Statutes -- again, Group Health  
14 expressly rejected the argument that a plaintiff must be  
15 a purchaser of a product in order to have standing.  
16 Neither the private remedy statute nor the substantive  
17 statutes contain any language restricting those who may  
18 sue purchasers or consumers. So, those two decisions in  
19 that statute uphold standing and abrogate remoteness.

20           Third reason why it is that this generalized  
21 argument about remoteness does not apply here is as the  
22 other authorities we cited in our brief. In recent  
23 years, the Federal Courts and the State Courts have  
24 increasingly in consumer protection cases and in  
25 antitrust cases granted standing and authority to sue to

1 third-party payers by reason of the wrongful activities  
2 of medical device companies and pharmaceutical  
3 companies, all for the reasons that I have cited for the  
4 cases that we have decided in our brief.

5           And the Desiano decision, itself, even  
6 indicates that if there are representations made that  
7 resulted in insurance companies doing something  
8 different than they otherwise would have, that they can  
9 recover under these circumstances. That is the third  
10 reason.

11           Now, the fourth reason why this generalized  
12 argument doesn't work is that in its reply brief for the  
13 first time, Guidant cites -- I didn't even count them --  
14 about 250,000 cases from the tobacco and firearms area,  
15 why it is that tobacco companies and firearms companies  
16 can't be sued under RICO, a Federal Statute, and  
17 sometimes under some State Statutes for increased health  
18 costs.

19           However, if you go through those cases, first  
20 of all, State versus Philip Morris and Group Health, the  
21 two Minnesota cases I just told you about don't follow  
22 that rule, nor do the Minnesota statutes. So, they are  
23 completely irrelevant to the Minnesota analysis, that  
24 litany of cases, number one.

25           Second, most of the cases that are cited by

1 Guidant talk about RICO. RICO incorporates the old  
2 proximate cause standard from the common law. That is a  
3 Supreme Court decision. I can't remember exactly which  
4 one. And that is why it is, that the tobacco cases, the  
5 RICO tobacco cases got shot down repeatedly across the  
6 country, is because they were trying -- because RICO,  
7 mostly through those cases, was interpreted to apply the  
8 common law proximate cause standard, and therefore you  
9 wouldn't have recovery there. That is not applicable  
10 here where we have a different statutory basis for the  
11 claims.

12 THE COURT: You could probably count on one  
13 hand, maybe two, the successful civil RICO cases across  
14 the -- there is not very many.

15 MR. SOBOL: No. The third point is that in  
16 the tobacco cases, there was also a remote feature to  
17 those cases that is not applicable here. In the tobacco  
18 cases, the wrongdoing wasn't immediately causing health  
19 expenses. The wrongdoing caused cigarette smoking,  
20 caused cigarette smoking for a decade, two decades,  
21 three decades. So, all of that wrongdoing there that  
22 was alleged, had it caused cigarette smoking for decades  
23 before there would be an illness, and then that illness  
24 had to in some way effectuate higher medical expenses  
25 that otherwise would be borne, which were then being a

1 cost of being insured.

2 Here, we have a recall of a medical device  
3 that requires somebody to go in and get a replacement  
4 surgery, completely direct and recoverable. So, this  
5 situation is far more compelling than even the one that  
6 was available in Group Health and State versus Philip  
7 Morris. So, for all of those reasons, this remoteness  
8 argument that they bring regarding Minnesota simply does  
9 not apply.

10 Now, there is then in Guidant's reply brief  
11 seven new arguments why Minnesota still shouldn't afford  
12 a remedy, here. And I'm just going to go through them  
13 and explain why they do not apply. This is in Guidant's  
14 reply, pages 10 to 20 that I am now addressing.

15 First they cite a 1934 case of northern  
16 states. That is the common law. It is decades before  
17 promulgation of the statutes, let alone, also, the two  
18 Minnesota decisions. So, northern States the only thing  
19 that is going to hold is if there is a common law claim,  
20 a common law tort claim, such as negligence, that it  
21 would have to be kicked out, but that is not applicable  
22 here.

23 Second is the cite, State versus Philip  
24 Morris for dismissal of common law tort claims. Again,  
25 here we don't have the negligence claim that was

1 dismissed in that case. We have the consumer protection  
2 statutes that were upheld in that case.

3 Third, they argue that the Minnesota  
4 Deceptive Trade Practices Act only provides for  
5 injunctive relief. And in its brief, Guidant argues, we  
6 don't even seek injunctive relief. It is not true.  
7 Even as counsel today has conceded, we do plead and seek  
8 injunctive relief in the case.

9 Now, the form of that relief that we seek may  
10 or may not be successful. I am going to describe that  
11 in a moment. But, that is not for here. We plead  
12 injunctive relief. We think that there are remedies  
13 that are available. So, a claim doesn't simply get  
14 dismissed because Guidant doesn't think it is good or  
15 helpful injunctive relief.

16 And what is the injunctive relief that we  
17 seek? The injunctive relief, we recognize first that  
18 the recall -- that there are some things, many things  
19 that Guidant has done to send out an announcement in  
20 order to effectuate a recall. But, there are many  
21 things in addition to this that Guidant can still do in  
22 order to cure the problem that it created and things it  
23 can do in real world terms.

24 What do I mean by that? I will take a step  
25 back so you can understand the part of the process of

1 how third-party payers pay claims. The when a  
2 third-party payer is presented with a medical claim  
3 benefit form, the procedure by which -- the medical  
4 procedure that was undertaken is coded in some way. Or  
5 if they are paying for a pharmaceutical, there is a code  
6 for the pharmaceutical product, that kind of thing.

7           With respect to these replacement activities,  
8 the unnecessary medical expenses that are being  
9 incurred, the coding systems that the claims  
10 administrators pay does not tell one whether or not what  
11 is being undertaken is a replacement for a recall  
12 Guidant device. It is more general than that. The  
13 coding is going to be blind as to whether or not what is  
14 actually happening, you can tell if it is a Guidant  
15 device or even, as a matter of fact, a Medtronic device  
16 for which somebody is paying.

17           The only way that third-party payers,  
18 virtually the only way that third-party payers can  
19 figure out if they are reimbursing for one of the recall  
20 Guidant devices is for them to first put their arms  
21 around the population of medical procedures that they  
22 are paying for, and then drill down into the separate  
23 medical records and paw through their insured's medical  
24 records on a claim by claim by claim basis, trying to  
25 figure out which one, you know, is in, which one is out,

1 which one belongs to Medtronic, which one belongs to  
2 Guidant, which one is outside of either of those two  
3 cases, that kind of thing.

4 THE COURT: Unless your client has said,  
5 contractually, we don't pay to replace recalled units.

6 MR. SOBOL: Well, that is right. They would  
7 also know that, too, at the outset. But, if they get  
8 into that threshold situation, the only practical way to  
9 find this out is to be pawing through -- you now,  
10 mindful, you, with all due respect, Your Honor, and  
11 Judge Rosenbaum are overseeing, administratively, this  
12 in the United States.

13 In order to find out the subset of recalled  
14 medical, of recalled Guidant devices in the United  
15 States which would be subject to these increased medical  
16 expenses, if we only went through the third-party  
17 payers, then all of the third-party payers in the  
18 country would need to paw through the records of every  
19 person in the United States during the class period who  
20 had a procedure coded in that manner, regardless of  
21 whether or not they got a Guidant or a Medtronic  
22 recalled devices or some other devices. That is what it  
23 would resolve. That is one way to do it.

24 Or, the way we seek to do it through our  
25 injunctive relief here is we say, well, wait a second.

1 There is no reason for anybody to do that. Guidant has  
2 a list of who got these device. In fact, they have  
3 already sent them, or ostensibly have sent them a  
4 letter. They know who they are. And they have other  
5 identifying information about it. So, if we can find  
6 out that information and put it in an appropriate  
7 privacy context, which is what our injunctive relief  
8 says, we have a far more efficient, non-duplicative way  
9 of being able to identify exactly the medical expenses  
10 that have been associated with this recall.

11 THE COURT: Now, and I say this respectfully.  
12 Calling it so doesn't make it so. They've characterized  
13 this as a discovery for the case.

14 MR. SOBOL: Right.

15 THE COURT: In other words, you can call it  
16 injunctive relief, but look close, Judge, calling it so  
17 doesn't make it so. It is pure and simple discovery.  
18 Because if their client can't look and see who they  
19 bought a -- who they paid for -- a unit for, why is it  
20 any less burdensome to their client to do that? I mean,  
21 that is how the argument goes.

22 MR. SOBOL: Sure, I understand that. I think  
23 the response to that is twofold. First, and we should  
24 note, the two Plaintiffs here, to make sure that they  
25 had standing have done the pawing through to be able to

1 make sure that they are just not, you know, whatever,  
2 just coming from nowhere. So, they have done it, that  
3 is not an issue.

4           The reason I go into this here -- oh, if the  
5 class -- I guess I would say this. The second answer to  
6 that is, if this case goes forward as a class, then it  
7 is really not discovery, it really is trying to  
8 undertake a benefit, injunctive relief to the class as a  
9 whole, to be able to have the wrongdoer provide his  
10 registering list to be able to undo the identification  
11 that is necessary, administratively.

12           THE COURT: So, relevant or not today, so you  
13 know whether the city of Bethlehem has paid for X number  
14 of recalled explants, or one versus 50, so you have all  
15 of that information as you --

16           MR. SOBOL: We know that each of the two  
17 Plaintiffs have identified at least one situation where  
18 they have paid medical expenses for -- that is what we  
19 know. So, we know their foot is in the door. Okay?

20           THE COURT: All right.

21           MR. SOBOL: In any event, and I didn't mean  
22 to belabor this too much, from our point of view, the  
23 Complaint, which the allegations control, seeks  
24 injunctive relief. It ought not just simply be tossed  
25 aside given these circumstances. There is good,

1 bonafide reason to seek the relief. And from our point  
2 of view, it is not as if everything that can be done has  
3 been done. It hasn't been.

4 Now, next, they argue, again, this is the new  
5 arguments in the reply, that the Minnesota False  
6 Statements Act shouldn't apply to false statements that  
7 end up going outside of Minnesota. There is no case  
8 they cite for that authority, whatsoever. No, no  
9 authoritative basis for it at all.

10 Instead, they have what you would consider to  
11 be a tortured reading of the statute. The statute is  
12 Section 325F.67. And there it talks about a variety of  
13 things that can happen here in Minnesota. And it  
14 includes the making for the -- the making, the  
15 publishing, disseminating, circulating, you know,  
16 placing -- so, even if the utterances begin here and end  
17 up going elsewhere, that they are here, they are  
18 actionable under the statute.

19 A plain reading of that statute, that causing  
20 a misrepresentation to be disseminated from Minnesota is  
21 within the scope of that section, if there are false  
22 statements at issue, in Minnesota, and were disseminated  
23 in Minnesota and outside, it is within that statutory  
24 language. This is the ruling, day facto in In Re: St.  
25 Jude, by your Brethren.

1           Why? Because there, after the Eighth Circuit  
2 suggested that a detailed conflicts choice of law  
3 analysis be undertaken, that was undertaken in order to  
4 apply Minnesota nationwide, the same statute now being  
5 applied, nationwide in that certified class.

6           The only way you can rule in favor, then, of  
7 Guidant on this issue, even though they have cited no  
8 case authority for it, whatsoever, would be to go  
9 against the reasoning in St. Jude Medical.

10           The next argument, this is my argument five  
11 of their new reasons why Minnesota law not apply, is  
12 that they argue that the Minnesota Attorney General,  
13 even the Minnesota Attorney General, they argue,  
14 wouldn't have the power to regulate a Minnesota company  
15 for things that they started in Minnesota if that has an  
16 effect outside of Minnesota.

17           No statute, no case authority for that,  
18 whatsoever. And the statutory citation is simply to the  
19 empowering statutes of the Minnesota Attorney General.  
20 We think it is a tortured reading here, again.  
21 Minnesota and its Attorney General, both, have a strong  
22 interest in policing the activities of its own  
23 corporations.

24           It must be the case that the Attorney General  
25 in Minnesota has the ability to police Guidant. If

1 Guidant's business were -- if the devices were only sold  
2 outside Minnesota, and there were no Minnesota residents  
3 that got this device, Guidant's position would be, the  
4 Attorney General can't touch us, even though we are  
5 located here in the state. The argument makes no sense,  
6 whatsoever.

7           The sixth new argument that Guidant raises  
8 regarding why Minnesota law doesn't apply is that they  
9 now say that there is no public benefit to this case.  
10 There is no public benefit, whatsoever, they said. Not  
11 an argument made before, but in Lee, and I think Mr.  
12 Carpenter is correct to point this out. In Lee, which  
13 is one of the authoritative Supreme Court decisions, it  
14 must be the case that there there was a single one on  
15 one transaction that was at hand, in order for there to  
16 be a ruling that there was no public benefit. But, in  
17 reality, what it is that all of the public cases stand  
18 for in Minnesota is that essentially, there can't be a  
19 situation where you have got a one on one, a one off  
20 relationship like the guy who had the mink farm and you  
21 know, they got distemper. It is a one off type  
22 situation and that wouldn't count.

23           Here, this isn't a one-off situation, this  
24 situation involves thousands and thousands of people.  
25 And it involves thousands of third-party payers, paying

1 hundreds of millions of dollars of excess health care,  
2 seeking financial recovery, as well as the injunctive  
3 relief that we seek provides a benefit that can't be  
4 denied. It was not wrong for Judge Rosenbaum to  
5 conclude that. It would not be wrong for you to  
6 conclude that, either.

7           It is also implicit, I think, in their public  
8 benefit argument that, well, if you only sue for money,  
9 then that can't be a public benefit. But, that is just  
10 wrong as a matter of law. Why? The Minnesota Consumer  
11 Protection Statutes, three statutes that I just  
12 mentioned before, affirmatively provide for a monetary  
13 remedy. It can't be the case that they give with one  
14 hand a monetary remedy, but then the public benefit rule  
15 immediately takes that away if that is what you want in  
16 the case if it is an irrational interpretation of the  
17 statutes in the cases. The rational interpretation of  
18 the cases in the statutes means that if you have  
19 something that is more than a one-off situation, if it  
20 is a serious issue like what we have here, and trying to  
21 recoup hundreds and millions of dollars is a public  
22 benefit that is achieved by the case.

23           I also suggest that this situation is  
24 different somewhat than a business-to-business  
25 transaction. Here this is a class action. And there

1 is an effort that is being made, not only to have the  
2 large insurers, but all of the small union funds across  
3 the country who can't afford on their own to hire a  
4 lawyer and sue for their one or their two claims where  
5 they pay for a machinists unnecessary medical expenses,  
6 let's say a secretary's unnecessary medical expenses.  
7 They can't afford to spring a lawsuit for 25 or \$50,000,  
8 given the kinds of things that would go on, here, they  
9 wouldn't.

10 If the public benefit here is met through the  
11 procedural vehicle of making sure that there can be a  
12 remedy for the small funds, or the mid-size funds, the  
13 small Blue Cross Blue Shield insurers throughout the  
14 United States.

15 Finally, then, in this effort in their reply  
16 to resurrect an argument somehow against Minnesota law,  
17 they circle back to the remoteness argument again,  
18 citing this case, the Lorix case, which I keep on  
19 thinking, actually, it's the Lorix case, which reminds  
20 me of the things with the kids, but it is the Lorix  
21 case.

22 The Lorix case did recognize that there might  
23 be some theoretical limit to the outskirts Pluto limits  
24 of where it is that Group Health and State versus Philip  
25 Morris might end. But, here is the hypothetical the

1 Court gave.

2 Applying Lorix's argument, even a garage sale  
3 purchaser of a secondhand desk would have standing to  
4 maintain an antitrust action against suppliers who sold  
5 raw materials to bolt manufacturers, who in turn sold  
6 the bolts to a hardware wholesaler, who in turn sold the  
7 hardware to the desk builder, who sold desks to the  
8 retailer, who sold a desk to Mr. Dudo, who finally  
9 unloaded it in a garage sale. That is the absurd  
10 hypothetical they gave, there.

11 That is not what we have here. There is no  
12 case that limits Group Health and State versus Philip  
13 Morris, which are cases expressly that give companies,  
14 like these third-party payers the right to recover  
15 excess health expenses by reason of a wrong. That is  
16 not what is going on, here.

17 It would be absurd to try to compare that  
18 situation to this. Then the other thing is that, then  
19 Guidant says, well, this case is different because there  
20 is the learned intermediary, so it is remote. What  
21 learned intermediaries are there? How many doctors did  
22 they tell them, by the way this device that you are  
23 putting in, it is defective. Three years from now it is  
24 going to be recalled. You are going to have to take it  
25 out.

1 I mean, this is the unlearned intermediary  
2 case, right? So, they argue that this is going to be  
3 remote by reason of learned intermediaries, and at yet  
4 by the same token, our allegations say you were lying to  
5 these doctors. So, you have to defy our allegations.

6 THE COURT: At what point in the process if I  
7 come your way do we find out from the doctors that they  
8 were due to have it replaced, regardless of what the  
9 circumstances were?

10 MR. SOBOL: Right. Sure. That is actually a  
11 very good question, Your Honor. It is also a question  
12 that Judge Rosenbaum asked me, as well, too.

13 In the individual circumstance, like one of  
14 the individual cases you have coming up, that will be  
15 resolved in terms of what it is, you know, on the  
16 individual facts that they would have at that time,  
17 where that person stood in terms of their age, how old  
18 the device was, the medical considerations -- I assume  
19 some of those things will come out.

20 On the class base approach that we will have  
21 for the third-party payers, where you are trying to  
22 figure out how much of the damages are the fault of the  
23 legal entity that you might create, a class, how we  
24 would deal with that is through economic modelling of  
25 what the average situation would be in terms of when the

1 device would end up having to be replaced, in any event  
2 and there are health care economists who are quite adept  
3 -- and in fact, this is the kind of thing that they and  
4 many others do quite often, can estimate whether or  
5 not -- you know, it is not, for instance, you are not  
6 getting all of the medical expenses for every  
7 replacement that occurred, you would have to reduce that  
8 by some amount appropriately to account for the fact  
9 that there would have been premature or replacements  
10 that would have occurred at some point in time in any  
11 event. So, it does need to be de addressed, and it gets  
12 addressed at the damages model in our case and at class  
13 certification, but not here.

14 I am now going to move away from Minnesota.  
15 Choice of law.

16 THE COURT: Do I have to make that decision.

17 MR. SOBOL: You do not need to make it and I  
18 would also suggest, Your Honor, it ought not be  
19 addressed right now, because the only facts you have are  
20 none. You don't any facts. You only have the  
21 allegations of the Master Complaint.

22 You don't have an affidavit from my clients  
23 or affidavits from Guidant about any of the myriad of  
24 things that my brother talked about or that you might  
25 deal with in your analysis, which is why we cited case

1 authority for the proposition that on a 12(b)(6) don't  
2 deal with the choice of law. You should deal with this,  
3 we would suggest, at class certification, after there  
4 has been some discovery, where there is a record of how  
5 you would be able to make a judgment.

6 But, even, for instance, the Taft-Hartley  
7 Fund that is in this case right now, you don't know, I  
8 don't know where all of their replacements were. We  
9 don't even know how many replacements they ever did or  
10 where the doctors were or where the representations  
11 were, if any of those things were really relevant. Or,  
12 we don't know any of the facts, because there are no  
13 facts before us right now.

14 I mean, there are literally none of what it  
15 is that Guidant did and where it did it and when it did  
16 it, how it did it, when it knew it. None of that. So,  
17 there should be no choice of law decision by this Court  
18 because you would have to make up, literally, make up  
19 facts.

20 I do address the Pennsylvania law arguments  
21 they make, because the Master Consolidated Complaint has  
22 as one of the states that it lists, Pennsylvania. But,  
23 that is the only reason I raise it, not because you  
24 would have to do any kind of choice of law issue at all.

25 With respect to Pennsylvania, we think that

1 really the TAP Pharmaceuticals and the Valley Forge  
2 cases that are in our brief are pretty much on all  
3 fours.

4           And TAP Pharmaceuticals, that is a case where  
5 I am very familiar with it because it involves drug  
6 pricing, average wholesale prices, that kind of thing.  
7 The question there was simply whether the state can  
8 recover from many different drug companies over  
9 expenditures that it had made for multiple drugs in the  
10 state, both on its own account and now on behalf of  
11 parens patriae. And in Valley Forge, the Court in  
12 Pennsylvania ruled that the only limitation that is  
13 given to the requirement that there be a -- that it be  
14 for household or personal use is that the item is for  
15 household and personal use, not that the claimants  
16 purchase, which in Valley Forge was a doctor, I believe,  
17 was for the doctor's personal or household use, but  
18 whether the item was used for personal or household use.  
19 Here as we articulated in our brief the documents are  
20 for the personal use of the people, obviously, of the  
21 people who get them. It satisfies that Pennsylvania  
22 requirement.

23           Now, I'm going to briefly touch on two other  
24 things, I think, and try to wrap up my remarks. There  
25 is a claim -- oh, just on this choice of law, thing. It

1 was brought up, the In Re: Vioxx case, the MDL down  
2 there. Those are personal injury claims, as I recall,  
3 they were not third-party payer claims. So, the choice  
4 of law there was whether or not an individual's personal  
5 injury claim should be governed by the law of New  
6 Jersey, even though the person was from Arkansas, and  
7 was litigating in New Orleans, or whether it should be  
8 in some other state.

9           The more apt analogy to Vioxx is to the Vioxx  
10 cases, the third-party payer cases that are pending in  
11 New Jersey, where a state court judge and the appellate  
12 division both ruled there would be a nationwide class on  
13 behalf of third-party payers under New Jersey law to  
14 address the issue of the unnecessary or the increased  
15 expenditure of pharmaceutical expenses relating to  
16 Vioxx.

17           So, the third-party payer claims on a New  
18 Jersey consumer fraud loss, similar analog statutes, the  
19 kind of statutes we have here in Minnesota. But,  
20 essentially what we have there is a New Jersey State  
21 Court doing there precisely what we are arguing that  
22 this Court should be doing here, applying state law  
23 nationwide to claims of third-party payers against a  
24 device or pharmaceutical maker. And that is the more  
25 appropriate analogy.

1           There are two other kinds of claims you have  
2 in the case, unjust enrichment and a type of a  
3 subrogation claim. The unjust enrichment claim is pled  
4 -- it is the kind of claim we think survives the State  
5 versus Philip Morris type of analysis, and it has been  
6 upheld under the cases we cited in our brief.

7           It is also, from our point of view, and as  
8 Judge Rosenbaum, we think implicitly agreed, efficient  
9 to keep it in the case. Because it can't be the  
10 situation where we don't know where the claims are  
11 ultimately going to succeed or not on summary judgment,  
12 what claims may or may not be certified at class  
13 certification, and so it performs no judicial function  
14 for you today to say, well, that claim will come out  
15 because I think you might have some other remedies  
16 elsewhere, even though you don't know, necessarily, what  
17 the contours or full scope of those other claims are  
18 going to end up being, you can't take out the unjust  
19 enrichment claim by reason of the existence of the  
20 possibility of some scope of a legal claim. It is more  
21 efficiently to simply leave the claim in the case and we  
22 deal with that when as and if you know the proper scope  
23 on a factual record at summary judgment on unjust  
24 enrichment.

25           THE COURT: So, you are saying, in essence,

1 at a minimum, it has been pled in the alternative?

2 MR. SOBOL: That is right. It is pled. It  
3 is in the alternative. It doesn't accomplish anything  
4 for us today to push it aside, none at all.

5 Finally, we get to the subrogation claim.  
6 Now, the subrogation claim that we plead in the  
7 case is a different, and I acknowledge, a novel approach  
8 to subrogation. Because we have not pled it as a one  
9 off, Jane Doe got a replacement, we want her share of  
10 the medical expenses. We have not done it that way.

11 We pled it, under Rule 23, the class action  
12 rule, under the portion of the rule that deals with just  
13 seeking a part of the liability determination, i.e.,  
14 that the devices are essentially defective, period, and  
15 that there was wrongdoing. That would otherwise be a  
16 cog in the subrogation analysis that an insurer would  
17 have to go through.

18 The reason we have done that is because it is  
19 another way that this Court can certify a class and  
20 reduce the issues that would have to be litigated by  
21 each of the other members if for some reason the other  
22 claims in the case don't survive.

23 You are not going to want to have a  
24 determination time and time and time again as to whether  
25 or not a certain kind of device was defective and

1 whether or not they lied to the public about it.

2 But, you can make that decision on the  
3 aggregate Rule 23 basis. Also, for the same reasons  
4 that the unjust enrichment claim is pled in the  
5 alternative and is here for the time being, and why  
6 Judge Rosenbaum kept the exact same subrogation claim in  
7 the case there, you should keep it here, because there  
8 is no need to dismiss that count.

9 Over time, there might be an identification  
10 of more people who are in the case. There might be a  
11 way that we officially tie this claim, amend this claim  
12 later on, depending upon what your proceedings are, but  
13 simply dismissing this as a possibility, now, without  
14 even knowing yet what its possibilities could me simply  
15 makes no judicial administrative sense.

16 So, I have gone on far longer than I  
17 expected, and I am sure other people did, too. But, the  
18 last remark I want to leave you with is this. The  
19 intention, and we think the effectuated purpose of this  
20 Master Consolidated Complaint, the third-party payers is  
21 really intended to be the tool for you to be able to use  
22 to effectively and efficiently manage this litigation.

23 The consequences of not having this tool is  
24 only to balkanize the litigation among many hundreds, if  
25 not more than 1,000 third-party payers in the country

1 who would file in state courts here and there, some of  
2 it may be removed, some of it may be sent back over  
3 here. People might have originally filed here. We  
4 don't think that is the appropriate way. When you get a  
5 chance, get a chance to go back with my remarks, you  
6 will be able to read it within that context, which is,  
7 that is the thrust that we try to accomplish with it.  
8 Thank you, Your Honor.

9 THE COURT: Now, what that implies is one of  
10 two things, perhaps. One is that if that in fact is the  
11 intent, and obviously I don't need to figure that out to  
12 rule on the merits, then there is as many benefits, as  
13 much benefit as detriment to Guidant, if that is the  
14 intent.

15 The, I guess the other side is more -- not  
16 really a cynical side, but the converse of that is, if  
17 it isn't handled this way, if it isn't such a tool --  
18 well, if it was such a tool, the only reason that  
19 Guidant wouldn't want to go this way is it is assumed  
20 that there is a number of these people. Rather than  
21 balkanize this, they just won't file a case, unless it  
22 can all be resolved in one place. I mean, that is kind  
23 of -- you are not really suggesting that, but that is  
24 the outcome of this if it really would be a tool to  
25 resolve these issues up or down.

1                   MR. SOBOL: Right. Well, I think that -- let  
2 me speak very practically about it. You hit the nail on  
3 the head in terms of you are both looking at the  
4 practical and the potentially cynical way of looking at  
5 it. The cynical results actually end up unfolding  
6 relatively cynically, because look what happens if this  
7 case can't go forward? Humana, Aetna, Cigna, WellPoint,  
8 Kaiser, the largest insurers in the country certainly  
9 aren't just going to sit down. They have lawyers. They  
10 can aggregate their case. They have done this in other  
11 cases that I am involved in all over the country. They  
12 can't do this.

13                   And for instance, in In Re: Lupron, there  
14 were 40 plans, 40 separate Blue Cross Blue Shield plans,  
15 along with a couple of others, that filed their own  
16 cases. So, they will and can go in and litigate on  
17 their own.

18                   And again, in the Lupron case, there were  
19 more than three dozen separate insurers that the Court  
20 had to manage there. But also look at how more cynical  
21 it is, look who can't file? It can't be the machine  
22 shop or the other small self-insured employers, or even  
23 the Health and Welfare Funds on their own. If it isn't  
24 going to do it on their own, they have got to do it with  
25 large groups of people, because even a small fund that

1 might have two or three, you know, at the most, people  
2 who have undertaken it, they are not going to get any  
3 recovery.

4           The practical truth for Guidant is if they  
5 are able to defeat this augmented complaint, or this  
6 Master Consolidated Complaint, or they are able to  
7 defeat class certification, the smallest third-party  
8 payers in the country, they are right, they probably  
9 won't sue all of them. And Guidant will probably get  
10 away without having to pay any money. That is the  
11 consequence of it. They won't get away with it with the  
12 biggest insurers, because the biggest insurers will be  
13 able to stand up for themselves. That is the real  
14 consequence, as I see it.

15           THE COURT: All right. Thank you. Mr.  
16 Carpenter?

17           MR. CARPENTER: We have gone way into the  
18 lunch hour --

19           THE COURT: The advantage to kind of rolling  
20 it altogether is you kind of wear people down after a  
21 while --

22           MR. CARPENTER: That is right. I am about to  
23 cry uncle at this point. No, but I am going to be brief  
24 because we are into the lunch hour and I appreciate  
25 everybody's indulgence.

1                   THE COURT:  And if there are -- and I don't  
2 say this lightly, if there are diabetics or other  
3 medical conditions where you have got snacks or fruit  
4 juices or something with you, I mean, roll them out.  I  
5 suppose everybody is now going to roll out whatever they  
6 have got and say, well, he is not going to ask me for  
7 medical cards, so how am I going to know.  But, go  
8 ahead.

9                   MR. CARPENTER:  I hear what Mr. Sobol is  
10 saying about purposes to wrap this all up into one large  
11 class action, to try to adjudicate the large issues in  
12 big hunks.

13                   If it is done for Guidant's benefit, thanks,  
14 but no thanks.  I don't think this will benefit anyone.  
15 Subrogation 1 and the rights of subrogation are very  
16 individualized.  You remember, Your Honor, the fighting  
17 and opposition about picking which cases were going to  
18 go first in this litigation as representative trial  
19 cases.  That didn't happen because all cases are  
20 identical.  These cases are very different, based on  
21 what the individual patients knew, how their devices  
22 performed, what their physicians told them, what kind of  
23 device they had, when they got it.  These are not one  
24 size fits all classes.  Class certification is an  
25 absolute impossibility.  Subrogation allows the

1 third-party payer to stand in the shoes of the subrogor,  
2 taking all of the defenses, all of the limitations and  
3 all of the advantages.

4 I submit to Your Honor that if the end  
5 purpose of this is a massive class action, even  
6 proposing to certify issues, which is improper unless  
7 common issues predominate all of the claims and not just  
8 one issue in this Eighth Circuit, it will be an absolute  
9 mess. We will oppose that class certification.

10 And practically, what allowed these legally  
11 infirmed claims to proceed would do is burden this Court  
12 with another full track of cases, discovery, rulings and  
13 class certification briefing. But, in reality, the long  
14 and the short of it is, what Mr. Sobol is saying is that  
15 the Third-Party Payer Plaintiffs just don't want to go  
16 to the trouble of asserting proper subrogation claims of  
17 individual Plaintiffs. There is nothing stopping them  
18 from doing that. And if they do that, we will be able  
19 to determine if these claims have merit.

20 He says maybe some of the smaller ones don't  
21 think it is worth the time, well, then they don't have  
22 to do that. If it is worth it, they have an absolute  
23 right to do that, and we will defend it on a  
24 case-by-case basis. Because, if you take out the device  
25 recipient, and the physician involved and you just have

1 the third-party payers bring the claims, there is really  
2 no way to adjudicate the factual issues, to know what  
3 was said and what was relied on, and it is going to be a  
4 substantive and procedural real problem. I appreciate  
5 Mr. Sobol's vision. I think it is counter class  
6 certification law. I think it is counter to due  
7 process. What he would like to do is have a large  
8 subrogation liability issue tried in the abstract that  
9 deprives my client of the right to defend against the  
10 particular facts in each individual case. I think that  
11 has gotten terrible due process ramifications.

12           Statistical modeling is no answer for trying  
13 to assert his en masse claims. If you look at the  
14 Steamfitters Local case out of the Third Circuit, that  
15 was the Plaintiffs in those cases answer, as well. That  
16 has been the answer of all of the third-party payers.  
17 We will statistically model it. We will have some kind  
18 of economics damages model.

19           But, if you look at what the Third Circuit  
20 said, they note at page -- oh, where am I? 929. We do  
21 not believe that aggregation and statistical modelling  
22 are sufficient to get the funds over the hurdle of the  
23 AGC factor focusing on whether the damages claim is  
24 highly speculative.

25           In some litigation contexts, there is a

1 meaningful distinction between damages that are  
2 completely incapable of determination, and those that  
3 are difficult to determine, but are nonetheless  
4 measurable. Basically, the way they would have these  
5 claims brought en masse, there is no way to determine  
6 liability. They can pretend to put up a statistical  
7 model if they want to, but that can't tell you whether  
8 Guidant was liable and caused an injury in a given case  
9 or not. The only way you can do that is the facts of a  
10 particular case.

11           On the direct injury issue, I don't think we  
12 are saying many different things. I recognize that  
13 Humphrey and Group Health say that the Direct Injury Law  
14 Rule doesn't necessarily apply to the Consumer  
15 Protection Statutes. But, it certainly eliminates  
16 misrepresentation, the warranty and the express warranty  
17 claim, because those all had proximate causation  
18 elements required by common law. We have cases that say  
19 that. We can cite those, if necessary. The Consumer  
20 Protection Statutes fail on their own reasons, which we  
21 talked about.

22           First one is the False Statements Act. I  
23 don't particularly understand Mr. Sobol's point. The  
24 statute is not particularly unclear. The statute says  
25 that it applies only to advertisements in this state.

1 The statute also, if you look at Group Health has a  
2 proximate causation nexus.

3 You have to claim the injury by virtue of the  
4 violation of the conduct prohibited in the statute,  
5 which is running the advertisements in this state.

6 It is not enough to just claim, well, I  
7 didn't see any advertisements in this state, but you ran  
8 them in this state. I may have seen something in  
9 Pennsylvania. There is no causal nexus between the  
10 prohibited activity of running false advertisements in  
11 Minnesota and the alleged injuries. Therefore, Mr.  
12 Sobol's argument doesn't make sense. There is no  
13 standing to bring false advertising claims under  
14 Minnesota law.

15 This Court rightly notes on the injunctive  
16 relief claim that what Mr. Sobol's clients are asking  
17 for is not so much injunctive relief as a discovery  
18 request. It doesn't benefit anyone but the third-party  
19 payers. All it does is help them identify who their  
20 potential plaintiffs might be. That is just another  
21 illustration of the problems of proof and unwieldiness  
22 of this cause of action.

23 It is not injunctive relief. It is just a  
24 discovery request and it doesn't benefit the public.  
25 Moving back to the public benefit argument, Mr. Sobol

1 makes a point that there is a difference between one off  
2 actions and of class actions such as this in terms of  
3 public benefit. He couldn't be less correct. That  
4 argument was advanced in several cases, one of which,  
5 for instance, was the Shaft -v- Residential Funding  
6 case, in which they made the precise argument. They  
7 said, Your Honor, this is a class action. Of course it  
8 has got public benefit.

9           And the Court said at page star 16, they  
10 confuse large numbers with public benefit. Evangelical  
11 is undisputedly a private organization any remedy sought  
12 in this case will inure solely to Evangelical.

13           So, the point is, look at where the relief  
14 goes. And let some relief go to the public. And it  
15 doesn't in this case. It goes to the TPP's. There is  
16 no public benefit. And it is not a question as Mr.  
17 Sobol phrased, whether it is monetary relief or not. It  
18 is a question of who gets the relief. In this case the  
19 public doesn't get any relief.

20           These products are already not being  
21 marketed, the recall is effectuated, and there can't be  
22 any public benefit for it. We do agree that this Court  
23 doesn't need to resolve all of the choice of law issues.  
24 We differ on the reason. I do disagree that this Court  
25 doesn't have enough facts to make a choice of law

1 determination.

2           This Court is not incapable of making clear,  
3 logical conclusions based on what is pleaded. And what  
4 is pleaded and what is not pleaded is that anyone in  
5 this case, any of the Plaintiffs are Minnesota residents  
6 or Minnesota entities.

7           What is pleaded is that Local 1776 and the  
8 City of Bethlehem are squarely in the middle of  
9 Pennsylvania, nowhere near Minnesota. So, this Court  
10 can clearly determine that there are no Minnesota  
11 residents at issue. And they are probably all, or  
12 significantly all, Pennsylvanians. I think that is  
13 really as far as this Court needs to go.

14           As far as Mr. Sobol's attempts to distinguish  
15 the Vioxx case, I think that is a difference without a  
16 distinction. Judge Fallon didn't rely on the fact that  
17 there were personal injury claims, not economic injury  
18 claims, but even if he had, and that is not important to  
19 his analysis, but even if he had, Mr. Sobol admits the  
20 fact that the third-party payers claims are premised off  
21 personal injury claims to the device recipients. It is  
22 the exact same scenario, but with an added layer of  
23 remoteness added on. I.e., these constituents of the  
24 funds and citizens of the City of Bethlehem were in fact  
25 injured and the injuries caused medical expenses.

1           Therefore, Judge Fallon's analysis is  
2 absolutely apropos. What this Court should be looking  
3 at is the contacts, and the significant contacts and the  
4 states of residence of these people, which the Court can  
5 logically infer is Minnesota -- or excuse me,  
6 Pennsylvania.

7           Finally, the subrogation claim, Mr. Sobol  
8 calls it a novel application. It is. I would submit  
9 that it is legally infirmed is what it is. It doesn't  
10 plead who they are subrogated to, what the rights are,  
11 the individuals. It is not proper contractual  
12 subrogation. And instead of waiting to see what happens  
13 with it, I would encourage this Court to take it as it  
14 finds it and dismiss it. They can always replead a  
15 proper subrogation claim in individual cases which at  
16 the end of the day is the remedy available to the  
17 third-party payers. It is a tried and true, time-tested  
18 remedy for insurers who want to recover their economic  
19 costs. And I think it is much less problematic in these  
20 direct types of causes of action they are attempting to  
21 assert. Thank you, Your Honor.

22           THE COURT: Thank you.

23           MR. SOBOL: I just want my glasses back.  
24 Thank you, Your Honor.

25           MS. HOLLOWAY: Does he get extra brownie

1 points for that?

2 THE COURT: Why don't you rest -- well, here,  
3 we will put this on the record. I will deem the matter  
4 submitted. I said right before the last break or  
5 before, unless I am asked to, and you will have a chance  
6 here to do something different, or I am asked, if not  
7 today, soon, to hold up, we had talked before I came in,  
8 I would have a decision in your hands within 30 days on  
9 the two motions.

10 So, unless there is -- for example I had a  
11 call today, not in this case, saying, you know, you said  
12 you would have a decision out by this day. Would you  
13 hold up for a week? We are trying to resolve this issue  
14 or that. But, unless I hear from anyone, I will  
15 automatically proceed and file a decision.

16 (Adjournment.)

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Certified by: \_\_\_\_\_

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Jeanne M. Anderson, RMR-RPR  
Official Court Reporter

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