

# **CATASTROPHIC HEALTH COVERAGE ACT**

## **Accountability Without Exploitation**

*Why Systematic Subrogation Reduces Litigation While Increasing Justice*

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## **Executive Summary**

The Catastrophic Health Coverage Act (CHCA) introduces systematic federal subrogation to recover medical costs from parties responsible for catastrophic injury and illness. This provision has been mischaracterized as transforming the federal government into a national litigation engine or as diminishing victims' rights. Both claims are incorrect.

The current U.S. tort-medical recovery system is not victim-centered. It is capital-dependent, delay-driven, and inefficient. Only 53 cents of every tort dollar reaches claimants—the remaining 47% is consumed by litigation costs and administrative overhead.<sup>1</sup> Victims bear the burden of financing litigation, absorbing delay, and accepting under-recovery, while responsible parties frequently escape meaningful accountability.

CHCA replaces this fragmented system with centralized, proportional, and economically disciplined recovery. By advancing medical care immediately and pursuing recovery independently of victim desperation, CHCA reduces litigation per dollar recovered, increases net victim retention, and restores deterrence against negligent conduct. This paper explains why systematic subrogation under CHCA is not an expansion of litigation, but a structural correction that shrinks exploitative legal volume while increasing justice.

### **I. The Reality of the Current System**

Public perception holds that when a person is catastrophically injured, they hire a lawyer, the responsible party is held accountable, and compensation follows. This narrative is incomplete.

#### **1.1 The Efficiency Problem**

Empirical research documents the inefficiency of current tort recovery. Analysis by the Institute for Legal Reform indicates that only approximately 53 cents of every tort dollar reaches claimants—47% is consumed by transaction costs including legal fees, administrative overhead, and litigation expenses.<sup>2</sup> This inefficiency persists despite decades of tort reform efforts because the fundamental structure—individual claimants pursuing separate actions against well-resourced defendants—guarantees high per-case transaction costs.

The Congressional Research Service has characterized current recovery as “haphazard”—some victims pursue claims successfully, many settle for inadequate amounts, and a substantial fraction never pursue claims at all.<sup>3</sup> This is not universal accountability; it is selective, capital-gated access to justice.

#### **1.2 The Disproportionate Burden on Moderate Claims**

The inefficiency falls disproportionately on victims with smaller claims. A victim with \$50,000 in medical expenses may find that \$20,000 in legal fees and costs makes recovery uneconomical, while a victim with \$500,000 in expenses can absorb proportionally similar costs. The current system effectively immunizes defendants whose negligence causes moderate harm while concentrating litigation on catastrophic cases.

This creates a perverse dynamic: the most serious harms are addressed (sometimes), while moderate harms—which affect far more people—often go uncompensated. Defendants learn that small-scale negligence carries little risk of accountability.

## **II. Why Victim-Driven Litigation Is Structurally Challenged**

The current system's failures are not primarily ethical; they are structural. Understanding these structural dynamics is essential to evaluating CHCA's alternative approach.

### **2.1 Capital Asymmetry**

Traditional contingency practice requires attorneys to advance all litigation costs—expert witnesses, depositions, court fees, medical records, document production—with recovery delayed until case resolution. A mid-size firm handling 120 cases annually may have \$6–8 million deployed in advanced costs at any time.<sup>4</sup> This capital carries costs of 10–15% annually, consuming approximately 10% of firm revenue before any case resolves.

The capital requirement creates structural barriers to entry. Over 75% of personal injury firms are solo or small practices with fewer than six attorneys, yet these firms lack the capital base to pursue the same cases as well-capitalized competitors.<sup>5</sup> Capital access—not legal skill—determines market participation. For victims, this means fewer attorneys willing to take moderate-value cases. For the legal system, it means inefficient allocation of legal talent.

### **2.2 Time and Risk Asymmetry**

Litigation takes months or years. Medical bills, lost income, and family disruption are immediate. This time gap creates leverage for defendants: delay becomes a weapon against injured parties who cannot afford to wait. Victims facing financial desperation accept settlements that undervalue their claims simply to resolve their immediate crises.

Additionally, victims bear the downside risk of losing. Attorneys price this risk into contingency fees—typically 33–40% of recovery—extracting returns from successful cases to subsidize losses on unsuccessful ones.<sup>6</sup> This risk premium is economically rational but reduces victim net recovery even in successful cases.

### **2.3 Selection Bias**

Only large, clean, high-value cases are attractive under the current model. Moderate or complex harms are routinely declined regardless of merit—not because attorneys are callous, but because the economics of contingency practice require case selection based on expected return rather than fault. An attorney who takes too many moderate-value cases cannot sustain a practice.

The result is triage driven by finance, not fault. The current system does not ask “Who is actually responsible?” It asks “Which cases justify the investment required to pursue them?” These are different questions with different answers.

### **III. Subrogation Is Insurance, Not Aggression**

Subrogation is not novel. It is a standard feature of insurance systems worldwide. When an insurer pays a claim caused by a third party, it steps into the claimant’s shoes to recover costs. This prevents double recovery, allocates costs to responsible actors, and stabilizes premiums.

#### **3.1 The Medicare Secondary Payer Precedent**

The Medicare Secondary Payer (MSP) program demonstrates this principle at federal scale. For over four decades, the federal government has systematically recovered healthcare costs from liable third parties. In FY2024 alone, the MSP program generated approximately \$9.04 billion in savings through subrogation and coordination of benefits; cumulative savings from FY2015–2021 exceeded \$63 billion.<sup>7</sup>

This is not a litigation free-for-all. It is systematic, proportional cost recovery that has operated successfully across multiple administrations. CHCA extends this proven model to the full scope of agency-decorrelated catastrophic conditions.

#### **3.2 What Subrogation Accomplishes**

Systematic subrogation serves multiple objectives simultaneously. It ensures that collective coverage of agency-decorrelated conditions does not mean collective absorption of costs properly attributable to negligent parties. It creates deterrence by ensuring that negligent actors face financial consequences. It improves fiscal sustainability by recovering costs that would otherwise fall on taxpayers. And it does all of this while providing victims with immediate care—care that is never delayed pending litigation or settlement.

### **IV. How CHCA Changes the Recovery Equation**

CHCA fundamentally alters incentives and processes for all parties involved in catastrophic injury recovery.

#### **4.1 Medical Care First, Litigation Second**

Victims receive care immediately, without waiting for liability resolution. This removes desperation from the negotiation dynamic. A victim no longer faces the choice between accepting an inadequate settlement or waiting years for fair compensation while medical bills accumulate. Care is provided; recovery proceeds separately.

## **4.2 A Worked Example: The Factory Worker**

Consider Maria, a factory worker injured when a defective industrial press malfunctions due to a manufacturing defect. Under the current system, Maria would need to find an attorney willing to take her case, wait months for case evaluation, advance expert witness costs (or find an attorney who can), and potentially accept a 33–40% contingency fee plus expenses. If her medical costs are \$150,000 and she eventually recovers \$250,000 after two years of litigation, she might net \$150,000 after fees and costs—barely covering her medical expenses, with nothing for lost wages or pain and suffering.

Under CHCA, Maria's medical costs are paid immediately through the Trust Fund. She receives care without delay. The government then pursues subrogation recovery from the press manufacturer, establishing the manufacturer's liability in the process. Maria retains the right to pursue non-medical damages—lost wages, pain and suffering, punitive damages—and can leverage the government's liability finding through collateral estoppel. Her subsequent action becomes a damages-only proceeding rather than a full liability trial, reducing costs and uncertainty.

## **4.3 Centralized Asset Screening**

Cases are pursued based on recoverability, not hope. The government can access tax records and financial databases—resources unavailable to individual litigants—to identify defendants with recoverable assets before committing litigation resources.<sup>8</sup> This eliminates pursuit of judgment-proof defendants, reducing dead-end litigation while focusing resources where recovery is achievable.

## **4.4 Tiered Recovery Mechanisms**

Not every claim justifies full adversarial litigation. CHCA employs tiered recovery mechanisms that match process intensity to claim value. Claims below 50% of annual per-capita allocation are resolved through administrative recovery mechanisms without litigation. Claims between the 50th and 80th percentile are resolved through small claims court or binding arbitration. Only claims above the 80th–90th percentile justify full government-initiated litigation.<sup>9</sup>

This tiered structure ensures that recovery costs are proportionate to recovery potential. Small claims are resolved through streamlined processes; large claims receive the full resources necessary to maximize recovery.

## **4.5 Fee-Shifting Structure**

CHCA applies a fee-shifting structure (sometimes called “loser-pays”) to subrogation actions: prevailing CHCA recovers litigation costs and fees from defendants.<sup>10</sup> This structure serves multiple purposes. It creates real consequences for responsible parties—defendants cannot simply outspend plaintiffs into abandonment. It encourages meritorious case pursuit while discouraging frivolous claims—CHCA has incentive to pursue only cases it can win. And it shifts costs to parties who caused harm rather than imposing them on victims or taxpayers.

This is not the “English Rule” applied to general litigation. It is a targeted cost allocation for government-initiated recovery of medical costs already paid. The government is not a vulnerable individual plaintiff who might be chilled by fee exposure; it is a sophisticated litigator pursuing recovery of its own expenditures.

## **V. Attorney Participation: From Capital Competition to Skill Competition**

Traditional contingency practice bundles multiple economic functions into a single percentage fee: legal labor, capital provision, risk absorption, case selection, and profit. This bundling creates the capital barriers described in Section II—attorneys must have access to capital to participate, regardless of legal skill.

### **5.1 Unbundling Through CPFF Contracting**

CHCA unbundles these functions through Cost-Plus-Fixed-Fee (CPFF) contracting, a model established under Federal Acquisition Regulation § 16.306 and proven in defense and government contracting over decades.<sup>11</sup> Under CPFF, attorneys are paid for work performed at approved billing rates. Litigation costs are reimbursed at audited actuals. An incentive fee tied to successful recovery provides outcome alignment.

This structure eliminates capital barriers. The over 75% of personal injury practitioners operating as solo or small-firm attorneys can compete based on legal skill rather than financing capacity. No minimum capital requirements apply to contractor qualification.<sup>12</sup>

### **5.2 Compensation Parity, Not Compensation Reduction**

CHCA’s compensation framework pursues a specific objective: equivalent net compensation for equivalent legal skill and effort. The framework does not seek to reduce attorney compensation; it restructures compensation to reflect the different economic conditions under which CHCA contractors operate.

Analysis demonstrates that a CHCA incentive fee in the 6–8% range achieves net profit margin parity with traditional 33% contingency practice after adjusting for eliminated capital costs and case-loss risk.<sup>13</sup> Under traditional contingency, the 33% fee must cover labor, capital costs, risk premium, overhead, and profit. Under CHCA, labor is reimbursed separately, capital costs are eliminated (the government advances costs), and case-loss risk is transferred to the government. The incentive fee need only cover

profit—which, adjusted for eliminated capital costs, falls to approximately 6–8% of recovery.

Attorneys contributing equivalent skill and effort receive equivalent net profit. The difference is that more attorneys can now participate, because capital access is no longer a prerequisite.

## **VI. Victim Outcomes Under CHCA**

Critics have suggested that CHCA diminishes victims' rights. The opposite is true. CHCA improves victim outcomes across multiple dimensions.

### **6.1 Immediate Care Without Litigation Dependency**

Under the current system, victims often experience delayed care as they attempt to find representation, pressured settlements driven by financial desperation, and net recoveries that barely cover medical debt. Under CHCA, medical costs are paid immediately through the Trust Fund. Care decisions are made on medical merit, not financial constraints. Recovery proceeds do not cannibalize care.

### **6.2 Retained Rights to Non-Medical Damages**

CHCA's subrogation authority extends only to medical costs paid by the Trust Fund. Victims retain independent rights to pursue non-medical compensatory damages (lost wages, economic losses not covered by CHCA), pain and suffering, punitive damages, and any other non-medical damages available under applicable law.<sup>14</sup>

The allocation structure ensures victims have priority over the Trust Fund for recovery of non-medical damages. CHCA recovers compensatory medical costs first; amounts above compensatory recovery flow to the victim.<sup>15</sup>

### **6.3 Collateral Estoppel Benefits**

When CHCA establishes defendant liability in a subrogation action, that liability finding benefits victims pursuing separate claims for non-medical damages. Under the doctrine of collateral estoppel, as established in *Parklane Hosiery Co. v. Shore* (1979), the defendant cannot relitigate liability after losing the government's case. The victim's subsequent action becomes a damages-only proceeding—reducing cost, complexity, and uncertainty.<sup>16</sup>

This creates informational leverage that victims could never achieve independently. The government's superior litigation resources—asset verification through tax records, systematic case screening, experienced contracted counsel—produce robust liability determinations that victims can leverage. Defendants cannot outspend the government into settlement or dismissal as they often can with individual plaintiffs.

### **6.4 Improved Net Recovery**

Analysis indicates that victims pursuing non-medical damages through coordinated prosecution with CHCA counsel retain approximately 65–80% of non-medical recovery, compared to approximately 55–67% under traditional 33–40% contingency arrangements.<sup>17</sup> This improvement occurs because CHCA has already established liability and borne litigation risk, enabling reduced fee percentages (15–25%) for the victim’s non-medical claims.

Even victims who choose sequential prosecution—engaging private counsel at traditional contingency rates after CHCA’s case concludes—benefit from collateral estoppel. The liability finding from CHCA’s case precludes the defendant from relitigating fault.

## **VII. Addressing Legitimate Concerns About Government Power**

Some critics raise legitimate questions about concentrating recovery authority in the federal government. These concerns deserve direct response.

### **7.1 “Will the Government Pursue Cases Too Aggressively?”**

The CPFF plus incentive structure creates natural discipline against over-litigation. Attorneys are reimbursed for hours worked, but their profit (the incentive fee) depends on successful recovery. Cases that consume resources without producing recovery reduce firm profitability—the incentive fee percentage applies to a smaller base. Additionally, fee-shifting means CHCA bears costs on unsuccessful cases, creating institutional incentive to pursue only meritorious claims.

### **7.2 “Will Litigation Priorities Be Politicized?”**

Case selection follows objective criteria: diagnostic codes indicating third-party causation, asset verification showing recoverability, and claim amounts exceeding established thresholds. These criteria are specified in statute and implemented through notice-and-comment rulemaking. Political manipulation would require changing published, auditable criteria—not informal discretion by political appointees.

Moreover, the tiered structure limits discretion. Claims above threshold are automatically referred for evaluation; recovery contractors (private law firms operating under federal contract) make case-level decisions within established frameworks. No political appointee decides which individual cases to pursue.

### **7.3 “What About Judgment-Proof Defendants?”**

When responsible parties lack assets to satisfy recovery, CHCA does not pursue dead-end litigation. Asset screening occurs before case referral, and cases without recovery potential are not assigned to contractors. This is still better than the current system, where victims often spend years pursuing unrecoverable defendants because they lack the government’s asset verification capabilities. Under CHCA, victims receive care

regardless of defendant collectability; the government simply does not pursue subrogation where recovery is impossible.

## **VIII. The Net Effect: Fewer Lawsuits, More Accountability**

CHCA does not increase litigation—it rationalizes it.

By removing victim desperation from the litigation calculus, centralizing recovery authority, enforcing proportional response through tiered mechanisms, and shifting costs to responsible parties through fee-shifting:

Fewer cases are filed (dead-end cases are screened out; small claims are resolved administratively)

Fewer dollars are wasted (transaction costs decline as a proportion of recovery)

More wrongdoing is deterred (systematic recovery makes negligence consistently costly)

The total annual recovery opportunity under CHCA is projected at \$23–33 billion—baseline recovery of approximately \$15 billion under current law plus \$8–18 billion in incremental recovery from new CHCA authority.<sup>18</sup> This represents both fiscal improvement for the Trust Fund and appropriate moral allocation of costs to parties whose conduct caused harm.

The system shifts from asking “Who can afford to sue?” to asking “Who is actually responsible?” That is not an expansion of government power. It is a correction of a long-standing accountability failure.

## **IX. Conclusion: Accountability Without Exploitation**

The current system exploits injury as a financing mechanism. It rewards delay, favors capital, and tolerates under-enforcement. Victims who lack resources to pursue claims receive nothing. Victims who do pursue claims sacrifice substantial portions of their recovery to transaction costs. Defendants whose negligence causes moderate harm often escape accountability entirely.

CHCA replaces this with a system that protects victims first (care is never delayed pending recovery), recovers costs systematically (from parties who caused harm, not from victims or taxpayers), enables broader attorney participation (based on skill rather than capital), and restores deterrence without excess litigation (through tiered, proportional response).

Accountability does not require exploitation. Justice does not require chaos. CHCA demonstrates that it is possible to have both less litigation and more accountability—at the same time.

## Endnotes

- <sup>1</sup> Institute for Legal Reform and Brattle Group, “Costs and Compensation of the U.S. Tort System” (2022).
- <sup>2</sup> Institute for Legal Reform and Brattle Group (2022). Total U.S. tort costs: \$443 billion annually.
- <sup>3</sup> Congressional Research Service, “Medicare Secondary Payer: Coordination of Benefits,” Report RL33587 (Washington, DC: CRS, August 2023).
- <sup>4</sup> CHCA Subrogation Compensation Framework v1.0, §2.2.
- <sup>5</sup> Embroker, “50 Solo Law Firm Statistics for 2025” (March 2025); Verified Market Reports, “Personal Injury Law Software Market Size” (June 2025).
- <sup>6</sup> Nora Freeman Engstrom, “Attorney Advertising and the Contingency Fee Cost Paradox,” *Stanford Law Review* 65 (2013): 636. Modal contingency rate of 33%, ranging to 40% or higher.
- <sup>7</sup> Centers for Medicare & Medicaid Services, “Medicare Secondary Payer,” MLN Fact Sheet MLN006903 (Baltimore, MD: CMS, July 2025). FY2024 savings: \$9.04 billion. Cumulative FY2015–2021 savings: \$63 billion per CRS RL33587.
- <sup>8</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 411(B).
- <sup>9</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 411(D).
- <sup>10</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 431.
- <sup>11</sup> Federal Acquisition Regulation § 16.306, “Cost-Plus-Fixed-Fee Contracts,” 48 C.F.R. § 16.306.
- <sup>12</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 412(C).
- <sup>13</sup> CHCA Subrogation White Paper v1.3, Appendix B.
- <sup>14</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 404(B).
- <sup>15</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 422.
- <sup>16</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); CHCA Legislative Draft Phase 4 v4.3, SEC. 432.
- <sup>17</sup> CHCA Legislative Draft Phase 4 v4.3, SEC. 422(D).
- <sup>18</sup> CHCA Quantitative Data Repository v1.22, Derived-Subrogation v2.0 sheet. Recovery framework separates baseline (~\$15B under current law) from CHCA incremental recovery (\$8–18B net after 20% administrative costs).

## Document Information

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