Class Action Watch

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Members of Congress Propose Amendment to Medicare Secondary Payer Statute

by Edwin Meese III & Hans A. von Spakovsky

The current Medicare statute simply ensures that Medicare is reimbursed for the medical benefits it pays when a third party is legally responsible for a Medicare beneficiary's injuries. However, critics argue that a new amendment to the health care reform bill in the U.S. House of Representatives would modify this system by:

- Allowing new types of lawsuits against the makers of consumer products for injuries to Medicare beneficiaries based on questionable statistical speculation;
- Flooding the federal courts with lawsuits that circumvent state tort law and federal requirements for class action lawsuits, diversity jurisdiction, or amount in controversy;
- Violating the privacy of Medicare beneficiaries by making their medical records available to tort lawyers without their permission (or that of the government);
- Interfering with the rights of beneficiaries against third parties responsible for their medical costs; and
- Turning the Medicare reimbursement provision into a *qui tam* statute that would allow plaintiffs' lawyers to pursue claims that Medicare does not think are valid, reducing the availability of medical treatment for Medicare beneficiaries.

The amendment—Section 1620—was removed before final passage of the health care bill in the House Ways and Means Committee on July 17, 2009, but it may be added in the Senate or in conference if the Senate and House pass different versions of the proposed government health care system.

Current Law

"Subrogation" is the legal doctrine under which one party assumes the rights of an injured party to seek compensation from the individual responsible for the injuries. In a typical example, a drunk driver might injure a victim, and the victim's automobile insurer might pay the victim's initial health bills. The automobile insurer can then assert a claim against the drunk driver for the benefits the automobile insurer has paid.

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Dukes v. Wal-Mart and Statistical Proof in Class Certification Proceedings

by Stephen J. Newman

It has now been more than seven months since *Dukes v. Wal-Mart* was argued en banc in the Ninth Circuit, five years since the district court entered its class certification order, and eight years since the underlying litigation was filed.[1] At issue in the appeal is whether the district court properly certified the largest employment class action in history, by approximately 1.5 million female workers at Wal-Mart stores nationwide. The Ninth Circuit issued two opinions at the panel level before the case was ordered for a hearing en banc. (The setting of an

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4 *Id.*

5 *Yokoyama I*, 243 F.R.D. at 411.

6 *Yokoyama II*, 2009 WL 2634770, at *5 (9th Cir. Aug. 28, 2009)

7 *Id.*

8 *Id.* at *4.

9 *Id.* at *5.

10 *Id.* at *6.

11 141 P.3d 427 (Haw. 2006).

12 *Yokoyama II*, 2009 WL 2634770, at *5.

13 919 P.2d 294 (1995).

14 *Id.* at 313.

15 *Id.* at 312.

16 Roberts Waikiki U-Drive, Inc. v. Budget Rent-a-Car Sys. Inc., 491 F.Supp. 1199, 1226 (D. Haw. 1980); Haw. Rev. Stat. 480-3.

17 *See* Norris v. Fairbanks Capital Corp., 178 Fed. Appx. 401, 2006 WL 11698498, at *1 (5th Cir. 2006); Naylor v. Case and McGrath, Inc., 585 F.2d 557, 561 (2d Cir. 1978); Perkins v. Washington Mutual, FSB, 2009 WL 2835781, at *4 (D. N.J. 2009).

18 *Yokoyama I*, 243 F.R.D. at 410 n.16.

19 *Id.*

20 *In re* Tobacco II, 207 P.3d 20, 30 (2009).

21 *Id.*

22 *Id.* at 39.

23 95 F.3d 791 (9th Cir. 1996).

24 *Id.* at 799.

25 Flores v. Rawlings Co., Inc., 177 P.3d 341, 350 (2008); *see also Roberts Waikiki*, 491 F. Supp. at 1226 ("Section 480-13 creates a private right of action for violations of 480-2").

26 *See* Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1433 (9th Cir. 1986) ("Haw. Rev. Stat. 480-13 provides a private right of action for violation of 480-2.")

27 *See Cunha*, 804 F.2d at 1433 ("[T]o maintain a cause of action under 480-13, a private plaintiff must demonstrate: (1) a violation of chapter 480... (2) that an injury to plaintiff's business or property has resulted; [and] (3) proof of damages."); Davis v. Wholesale Motors, Inc., 949 P.2d 1026, 1039 (Haw. Ct. App.1997) ("elements necessary to recover on an unfair or deceptive trade acts or practices claim under HRS s 480-13(b)(1) are (1) a violation of HRS 480-2; (2) injury to the consumer caused by such a violation, and (3) proof of the amount of damages.")

28 *Jenkins*, 95 F.3d at 799.

29 *Yokoyama I*, 243 F.R.D. at 411.

30 *Yokoyama I*, 243 F.R.D. at 410-11.

31 *See* Forsyth v. Humana, Inc., 114 F.3d 1467, 1481 (9th Cir.1997) ("To maintain a claim under RICO, a plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well.... [The] plaintiff must show a concrete financial loss."); Mazur v. eBay Inc., 257 F.R.D. 563, 570 (N.D. Cal. 2009) (denying certification where "plaintiffs allege financial harm and seek damages in all of their causes of actions. Such allegations will require evidence of injury and damages."); Deitz v. Comcast Corp., 2007 WL 2015440, *6-7 (N.D. Cal. 2007) (class certification not appropriate for claims for negligent misrepresentation, CLRA violations, and unjust enrichment where damages required individual inquiry); Stickrath v. Globalstar, 527 F. Supp. 2d 992, 996 (N.D. Cal. 2007) ("[B]oth the UCL and CLRA protect only plaintiffs who have suffered harm 'as a result of' defendants' unlawful or unfair practices.").

32 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

Members of Congress Propose Amendment to Medicare Secondary Payer Statute

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The Medicare Secondary Payer statute (MSP) implements such a subrogation right, preventing Medicare beneficiaries from potentially being paid twice for the same expenses and reducing federal health care costs. Medicare is entitled to reimbursement (as the "secondary payer") for medical services provided to Medicare patients whenever payment is available from another source: a primary payer such as "a group health plan" or "an automobile or liability insurance policy or plan (including a self-insured plan) or [] no fault insurance."[1] Payment by Medicare of benefits is "conditioned on reimbursement" from the primary plan. The requirement to reimburse Medicare is triggered by a judgment or payment by a primary plan to the Medicare beneficiary conditioned upon the Medicare beneficiary's compromise, waiver, or release of a claim (based on state law) against the primary plan.[2]

Beneficiaries are permitted to sue and collect double damages from a "primary plan that fails to provide for primary payment (or appropriate reimbursement)."[3] If successful, the beneficiary reimburses Medicare (which is subrogated to the extent of payment made) and keeps the other half of the double damages. However, no right to sue under the MSP arises against a party "whose responsibility to pay medical costs has not yet been established."[4] Thus, "it is necessary to establish tort liability by a [legal] judgment or settlement before a private right of action arises under the MSP statute."[5]

The attempts of plaintiffs' lawyers to pursue MSP suits against tobacco companies for injuries to Medicare recipients before any liability had been established were rebuffed in the courts, as were a series of cases filed against

hospitals.[6] The claims against the hospitals were dismissed as "utterly frivolous" because the MSP is not a *qui tam*[7] statute that allows a plaintiff to sue on behalf of the United States, and the plaintiffs did not have standing to sue.[8]

The Proposed Amendment

When the health care reform bill was brought before the Ways and Means Committee, it included a provision that would provide trial lawyers with this power to sue. Section 1620, "Enforcement of Medicare Secondary Payer Provisions," would rewrite the MSP to allow "[a]ny person" to bring an action under the MSP "to establish the responsibility of an entity to make payment for all items and services furnished to all individuals for which that entity is alleged to be the primary plan."[9]

Under this provision, any lawyer, without the permission of the government or the Medicare beneficiaries on whose behalf he is suing, could sue anyone who allegedly caused a Medicare beneficiary harm. This MSP action would be in addition to any claims between the beneficiary and that defendant, and could be pursued even if the defendant is absolved of wrongfully injuring that beneficiary."[10]

The proposed amendment further allows an MSP case to be based on "a judgment, opinion, or other adjudication finding facts that establish a primary plan's responsibility for any such payment… *by any relevant evidence, including but not limited to relevant statistical or epidemiological evidence or by other similarly reliable means*."[11] A lawyer thus could bring a single action to establish responsibility for all individuals for whom a company is alleged to be the "primary plan," thereby, critics say, circumventing class action requirements.[12] Accordingly, the factual finding could be established in a federal court under this statistical theory of liability without securing a prior judgment under a traditional theory of law. The amendment, some argue, would convert the MSP from a traditional reimbursement mechanism into a vehicle for bringing mass tort suits for health care injuries proven through statistical evidence.[13]

In a prior MSP case that trial lawyers brought (arguing for similar legal theories), the U.S. Eleventh Circuit Court of Appeals explained the potential scope of litigation:

> First, Plaintiffs' proposed interpretation of [the MSP] would drastically expand federal court jurisdiction by creating a federal forum to litigate any state tort claim in which a business entity allegedly injured a Medicare beneficiary, without regard to diversity of citizenship or amount in controversy. Second… an alleged tortfeasor that is sued under the MSP (instead of under state tort law) could not contest liability without risking the penalty of double damages: defendants would have no opportunity to reimburse Medicare *after* responsibility was established but before the penalty attached. Third… [it] would allow individuals acting as private attorneys general to litigate the state tort liability of a defendant towards thousands of Medicare beneficiaries—as a predicate to showing MSP liability—without complying with class action requirements.[14]

The intent of the proposed amendment is to override this ruling (and the rulings of the four other circuit courts that have heard similar claims) and to remove traditional tort law barriers to these claims.

Standing Issues

Article III of the Constitution authorizes the federal courts to hear only "cases" or "controversies." In determining whether a dispute is an actual case or controversy, a fundamental dividing line is *standing*—whether an individual has "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[15]

To demonstrate constitutional standing, a plaintiff must satisfy a three-prong test:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly… trace[able] to the challenged action of the defendant, and not… th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[16]

It is not enough that a statute gives prospective plaintiffs a right to sue: the Supreme Court has repeatedly said that "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[17] Indeed, the Court has made clear that "[a] plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted."[18]

While Congress's act of granting the litigants a bounty to bring these lawsuits might be enough to give the party a concrete private interest in the outcome of the

litigation, the Court has held that bounties, like statutory authorization of attorneys' fees, are not alone sufficient to confer standing because they are interests "unrelated to injury in fact."[19]

In the context of the False Claims Act (FCA), which protects the government against paying fraudulent claims, the Supreme Court previously found that plaintiffs in *qui tam* cases have standing to assert the injury in fact suffered by the government.[20] However, the *qui tam* provisions at issue here are significantly different from those in the FCA in ways that raise questions as to whether a plaintiff would likewise meet the standing threshold.

First and foremost, the court found that standing existed in the context of the FCA because the party bringing the suit—the *qui tam* relator—acted as an assignee of the government, who had a right to sue because of a genuine injury in fact.[21] But the MSP amendment is not a case of a company submitting an actual false claim to the government for payment which, in turn, creates an "actual" injury in fact. Here, statistical evidence may be used to establish liability without any evidence of actual harm.

Second, in declaring that FCA *qui tam* relators have standing, the Supreme Court found the history of *qui tam* suits "well nigh conclusive."[22] There was no history of common-law *qui tam* actions.[23] There were statutes permitting *qui tam* actions of two kinds: those that permitted informers who may not have suffered injury themselves to bring suit and those that permitted an injured party to sue for damages both on his own and on the United States' behalf.[24] In the MSP amendment, however, not only does the party not have an injury, but he also does not have any insider information of the kind ordinarily associated with informer statutes.

Policy Implications

Apart from the constitutional issues involved, opponents argue that the proposed amendment raises other legal and policy questions. For example, the federal government would be required to provide these plaintiffs with all medical records "containing encounter-level information with regard to diagnoses, treatments, and costs… and any other relevant information,"[25] even if the beneficiaries specifically objected.

Further, critics say, the statistical theory of liability would remove the traditional safeguards of state tort laws by allowing what amount to disparate impact claims against defendants "who might not be found liable in an individual case but are responsible in a 'statistical sense.'"[26] Some thus predict that, under the proposal, companies could end up paying settlements based on nonscientific studies and questionable statistical findings, even though they could not be found liable for the actual injuries under traditional legal theories.

Section 1620 also adds a provision (on top of the already existing double damages) that provides a 30 percent bonus plus "the actual costs that person incurred to prosecute the action."[27] Even if the government intervenes, the plaintiff will receive at least an additional 20 percent plus expenses.[28] The double damages provision is expanded to apply not just in the cases where a primary plan does not make a reimbursement as required, but in all cases where the primary payer engaged in "an intentional tort or other intentional wrongdoing."[29] Moreover, plaintiffs' lawyers could settle a case filed on behalf of the United States, "notwithstanding the objections of the United States," if the court approves the settlement.[30]

Finally, critics point out that this amendment would allow tort lawsuits to be filed on behalf of Medicare even if Medicare knowingly pays for prescription drugs or medical devices with "inherent risks [and side effects and complications] which are an accepted part of the health care system,"[31] which they say could have an adverse effect on the availability of treatments for Medicare beneficiaries.

Before Section 1620 could be approved by the Ways and Means Committee as part of the overall health care bill, it was removed,[32] but there is little doubt that this amendment will surface again in a later version of the bill.[33]

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Endnotes

1 42 U.S.C. § 1395y(b)(2)(A); *see also* Cochran v. United State Health Care Fin. Admin., 291 F.3d 775 (11th Cir. 2002).

2 42 U.S.C. § 1395y(b)(2)(B)(ii).

3 *Id.* § 1395y(b)(3).

4 Glover v. Liggett Group, Inc., 459 F.3d 1304, 1306 (11th Cir. 2006).

5 Graham v. Farm Bureau Insurance Co., 2007 WL 891895 (W.D.Mich 2007) (citations omitted).

6 *See, e.g.,* Stalley v. Methodist Healthcare, 517 F.3d 911 (6th Cir. 2008).

7 "*Qui tam*" is from a Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself." *See* Memorandum from the U.S. Department of Justice on False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, *available at* http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf; *see also* Hans A. von Spakovsky and Brian W. Walsh, *Correcting False Claims About the New False Claims Act Legislation,* Heritage Foundation Legal Memorandum No. 42, July 2, 2009, *available at* http://www.heritage.org/research/legalissues/lm0042.cfm.

8 *Stalley*, 517 F.3d at 919.

9 America's Affordable Health Choices Act of 2009, Chairman's Amendment in the Nature of a Substitute to H.R. 3200 § 1620(1)(E) July 16, 2009 (as offered by Mr. Rangel of New York), *available at* http://waysandmeans.house.gov/ legis.asp?formmode=item&number=687.

10 Phil Goldberg, *Kudos to Congress for Saying "No" to Renewed Attempts to Turn MSP Act Into New Vehicle for Litigation Abuse*, *in* BNA's Medicare Report (July 24, 2009).

11 America's Affordable Health Choices Act of 2009, Chairman's Amendment in the Nature of a Substitute to H.R. 3200 § 1620(1)(D) (emphasis added).

12 *Id*. § 1620(1)(E).

13 If such claims were brought by the beneficiaries under state law, they normally would be barred under traditional state law by defenses such as "contributory negligence" and "assumption of risk."

14 *Glover*, 459 F.3d at 1309.

15 Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (internal quotation omitted).

16 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotations omitted).

17 Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)).

18 *Gladstone Realtors*, 441 U.S. at 100 (1979) (internal quotation omitted).

19 Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 772 (2000).

20 *Id.* at 773.

21 *Id.*

22 *Id.* at 777.

23 *Id.*

24 *Id.* at 776–77.

25 America's Affordable Health Choices Act of 2009, Chairman's Amendment in the Nature of a Substitute to H.R. 3200 § 1620(3)(A)(iv).

26 Walter Olson, *Chronicling the High Cost of Our Legal System—Medicare Qui Tam: A Health Care Bill Surprise*, July 17, 2009, *available at* http://overlawyered.com/2009/07/medicare-qui-tam-a-health-care-bill-surprise.

27 America's Affordable Health Choices Act of 2009, Chairman's Amendment in the Nature of a Substitute to H.R. 3200 § 1620(3)(A)(iii).

28 *Id.* § 1620(3)(A)(v).

29 *Id.* § 1620(2).

30 *Id.* § 1620(3)(A)(v).

31 Phil Goldberg, *supra* note 10.

32 This was apparently due to the efforts of Reps. Dave Camp (R–MI) and Eric Cantor (R–VA). James K. Glassman, *Trial Lawyer Medicare Bonanza Averted—For Now*, The American, August 5, 2009, *available at* http://www.american.com/ archive/2009/august/trial-lawyer-medicare-bonanza-averted-2014-for-now.

33 A similar effort was tried in the Senate Finance Committee in 2007. *See* Phil Goldberg, *supra* note 10.