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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Ninth Circuit Reads Hawaii's Deceptive Practices Act to Allow Class Actions Seeking Damages Without Proof of Causation

by J. Russell Jackson & Spencer R. Short

Many states have tried to make it easier for plaintiffs to bring consumer fraud claims by passing consumer protection statutes that eliminate or otherwise weaken the reliance requirement inherent in common law fraud. Still, these statutes generally do not untether liability from actual causation, for to award money damages without causation would potentially make a statute overly punitive. Thus, for nearly all state consumer protection statutes that allow damages, even where reliance is not an element of the statutory claim per se, the plaintiff still must prove that she suffered a loss that was caused by the allegedly deceptive conduct. Some have called this "reliance lite."

Moreover, the further a state consumer protection statute moves from requiring actual causation, it often limits the type of relief available to injunctive relief. In this way, such statutes begin to resemble the Federal Trade Commission Act, which reserves enforcement to the Federal Trade Commission, but then does not require the FTC to prove that any injury was actually caused by deceptive conduct in order to enjoin such conduct to protect the public.

A recent decision by the U.S. Court of Appeals for the Ninth Circuit rejects the distinction between equitable relief and damages, reading Hawaii's Deceptive Practices Act to allow an entire class to sue for damages without anyone establishing that deceptive conduct actually caused any injury.[1] Left unreversed, some argue, the decision in *Yokoyama v. Midland National Life Insurance Company* (*Yokoyama II*) may wreak havoc in the field of consumer fraud class actions.

For critics, what is particularly nonplussing about *Yokoyama II* is the opinion below in *Yokoyama I*,[2] in which the district court judge came to the opposite conclusion. In *Yokoyama I*, three senior citizens sued on behalf of a putative class of Hawaii residents who bought indexed annuity products ("IAPs") from Midland National Life Insurance Company. The seniors alleged that Midland failed to adequately disclose in its brochures both the risks and the sales charges associated with the products. As a result, the plaintiffs alleged that the marketing and sale of the IAPs was in violation of Hawaii's Deceptive Practices Act, Hawaii Revised Statute § 480-2, and sued for damages pursuant to Hawaii Revised Statute § 480-13.

Hawaii Revised Statute § 480-2 states that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." This section is not self-enforcing, however. Rather, Hawaii Revised Statute § 480-13(b) creates a private right of action for "any consumer who is injured by an unfair or deceptive act or practice forbidden or declared unlawful by section 480-2." Under HRS § 480-13, any such injured consumer may sue for treble damages.

The district court denied class certification. First, the court determined that the suit was predominantly one for money damages, not injunctive relief, and thus applied Federal Rule of Civil Procedure 23(b)(3), not Federal Rule of Civil Procedure 23(b)(2). Then, the court determined that the individual issues attendant with plaintiffs' claims overwhelmed the common issues, and thus the predominance requirement of Rule 23 was not met.

District Judge Seabright noted that "under the explicit statutory language of HRS § 480-13(b), only 'injured' consumers have standing to bring suit."[3] As a result, "the elements necessary to recover on an unfair or deceptive trade acts or practices claim under HRS § 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."[4]

The court determined that the plaintiffs' putative class failed to meet Rule 23(b)(3)'s predominance requirement in four ways: (i) individual oral presentations by brokers would necessitate individualized inquiry; (ii) claims brought under HRS § 480-13 require an individualized showing of actual damages; (iii) HRS §§ 480-2 and 480-13 require a causal link between the allegations and injury; and (iv) whether the annuities were suitable for seniors required individual inquiry. In doing so, the court noted that "individual reliance—whether IAP purchasers actually relied on Midland's allegedly misleading or fraudulent publications or omissions—provides the crucial causal link between HRS § 480-2 and HRS § 480-13."[5]

The Ninth Circuit reversed and remanded in *Yokoyama II*, focusing solely on HRS § 480-2's definition of unlawful deceptive conduct and not addressing HRS § 480-13, the provision that deputizes private citizens to enforce HRS § 480-2 by obtaining damages for injuries caused by violations of HRS § 480-2. The Ninth Circuit noted that the district court "refused to certify a class in this case because it determined that Hawaii's consumer protection laws require individualized reliance showings."[6] This, the court held, "was contrary to the Hawaii Supreme Court's interpretation of state law, because the Hawaii Supreme Court has made clear that reliance is judged by an 'objective reasonable person standard.'"[7] Thus, the court held, "Hawaii's consumer protection laws look to a reasonable consumer, not the particular consumer."[8]

As a result, according to the Ninth Circuit, plaintiffs are not required to show reliance, causation, or even injury, at the class certification stage, but instead "only whether [defendant's] omissions were likely to deceive a reasonable person."[9] The court then found that, because there was no reliance requirement under Hawaii's consumer protection statute, the district court's finding that individualized damages inquiries would be necessary was also incorrect. Although "[d]amages calculations w[ould] doubtless have to be made under Hawaii's consumer protection laws," the "amount of damages is invariably an individual question and does not defeat class action treatment."[10]

The decision would constitute a major shift for a number of reasons. Apparently, *no class member*, not even the named plaintiffs, is required to establish that he or she

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Supreme Court to Clarify Rules for Multiplying Attorneys' Fees

by Gregory F. Jacob

More than twenty years ago, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ("*Delaware Valley I*"),[1] the Supreme Court opined that the federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys."[2] In *Kenny A. v. Perdue*,[3] the Court has the opportunity to revisit this earlier pronouncement by deciding when, if ever, a trial court is permitted to grant a successful plaintiff's attorney a discretionary multiplier of the standard attorney's fees award. Typically, a plaintiff's attorney who wins a case that is subject to a federal fee-shifting statute receives a "lodestar" fee award, which is calculated by multiplying the attorney's reasonable hourly rate by the number of hours the attorney reasonably expended on the case. The prevailing attorneys, of course, would like to receive more fees if they could, and every once in a while they succeed in talking a duly impressed or otherwise sympathetic court into increasing the fee award, usually by employing a "lodestar multiplier."

In the Eleventh Circuit's *Kenny A.* ruling, at least one judge (Judge Carnes) determined that governing Supreme Court precedent interpreting federal fee-shifting statutes does not permit a district court to award prevailing attorneys a lodestar multiplier based on the quality of their performance or the results they obtained. The panel unanimously ruled, however, that binding Eleventh Circuit precedent, handed down subsequent to the governing Supreme Court precedents, compelled the panel to allow precisely such an award. And so it did, affirming a 1.75 lodestar multiplier that cost Georgia taxpayers an additional $4.5 million in attorney's fees. Judge Carnes, however, argued in his separate opinion that the Eleventh Circuit should take the case en banc so that it could reverse its earlier precedents allowing such awards. When the court declined,[4] he issued what he described as his first dissent from a denial of rehearing en banc in his sixteen years on the bench, appealing to a yet higher authority to step in and set his circuit straight.[5] And it just may have worked. The Supreme Court granted certiorari, and argument was heard in the case on October 14, 2009.

1. What's in a Lodestar?

According to Black's Law Dictionary, the term "lodestar" originated in England sometime in the 14th Century.[6] King Edward I reigned in England then, and while anyone who has seen the movie "Braveheart" can attest that Edward may have committed a civil rights violation or two in his time, it is difficult to envision some enterprising medieval barrister suing the crown and then seeking fee reimbursement from the royal treasury for his troubles. No, times were simpler then: the Geneva Conventions had not yet been dreamed of; Longshanks had an official Castle Torturer on staff at the appropriately named Chillingham Castle; there was no organized plaintiff's bar around to fight the powers-that-be (or, more to the point, to find a way to get their fees *multiplied*); and "lodestar" was an innocent astronomical term that meant nothing more than a guiding light in the sky.

The term began to take on new meaning, though, when courts found themselves confronted with the difficult question of how to determine the reasonable value of a plaintiff's attorney's services when applicable law requires that the attorney's fees be shifted to a losing defendant. There is no immediately obvious answer. For example, plaintiff's attorneys often work on a contingency basis whereby they receive a percentage of the total damages awarded to their client. Cases that are subject to federal fee-shifting statutes, however, frequently seek primarily non-monetary relief, to which a contingency fee cannot readily be applied.

Eventually a majority of courts settled on the notion that plaintiff's attorneys who do work subject to fee-shifting statutes should get paid more or less like the rest of us: figure out how many hours they worked (or reasonably should have worked), and multiply that by the hourly rate they charged (or reasonably should have charged), and that's the presumptive fee award—the "lodestar." Without using the term "lodestar," the Supreme Court adopted this fee calculation methodology for all federal fee-shifting statutes in *Hensley v. Eckerhart*.[7]

Calculating the appropriate lodestar fee award sounds a lot simpler than it is in practice. The key complicating factor is the one found in the parentheticals: "reasonably should have." It must be remembered that what it is really going on here is that the prevailing attorneys are applying to the court *for their own fee award*. Judges, being intimately familiar with the stock from which they were drawn, decided early on that they couldn't just take the lawyers' word for it. So a twelve-factor test, originally judge-made but then endorsed by Congress in the legislative history of a key federal civil rights fee-shifting statute, is applied to determine the "reasonable" number of hours worked and the "reasonable" hourly rate. The twelve factors are:

(1) time and labor required;

(2) novelty and difficulty of the questions;

(3) skill requisite to perform the legal service properly;

(4) preclusion of other employment by the attorney due to acceptance of the case;

(5) customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) amount involved and the results obtained;

(9) experience, reputation and ability of the attorneys;

(10) "undesirability" of the case;

(11) nature and length of the professional relationship with the client; and

(12) awards in similar cases.[8]

2. Adjusting the Lodestar: Clash of the Governing Case Law

Even after the twelve factors have been applied and a final lodestar amount has been arrived at, a court's work is not necessarily done. As the Court explained in *Hensley*, "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'"[9] The question presented in *Kenny A.* is whether an upward adjustment can *ever* be made by a district court based on the quality of the prevailing attorneys' performance and the value of the results obtained. The answer to that question will depend on which strain of arguably conflicting prior pronouncements the Court elects to follow.

As a starting point, it is clear that the governing language from *Hensley* contemplates upward adjustments of the lodestar under some circumstances. Moreover, the *Hensley* court opined in dicta that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, *and indeed in some cases of exceptional success an enhanced award may be justified*."[10]

The next term, in *Blum v. Stenson*,[11] the Court had the opportunity to examine the enhancement factors that are at issue in *Kenny A.*. The Court opined that quality of representation "may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"[12] With respects to the results obtained, the Court stated that "it normally should not provide an independent basis for increasing the fee award."[13] Advocates of lodestar multipliers point to the fact that *Blum* suggested an upward adjustment for the quality of representation "may" be justified in exceptional cases, and further note that while *Blum* stated that an upward adjustment for the results obtained is not "normally" permissible, the Court's use of the term "normally" suggests that in exceptional cases, at least, it is permissible.

Opponents of lodestar multipliers discard these stray statements as dicta and focus instead on the Court's post-*Hensley* holdings concerning upward adjustments. *Blum* itself rejected a 1.5 lodestar multiplier that had been based on "the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit to the large class that was achieved."[14] In rejecting the use of the quality of representation and the results obtained as justification for an upward adjustment of the lodestar amount in the case before it, the Court noted that both factors were already expressly accounted for in the twelve-factor lodestar test, and thus should have been reflected in the number of hours and hourly rate deemed "reasonable" by the court. To apply those same factors a second time to justify an upward adjustment after the lodestar amount was already calculated, the Court suggested, would be impermissible double counting.

The Court followed this same line of reasoning in *Delaware Valley I* in rejecting a district court's upward adjustment of the lodestar amount that was based on, among other things, the quality of representation and the results obtained. The Court cautioned that district courts should apply a "strong presumption" that the initial lodestar calculation represents a reasonable fee,[15] and noted that the factors relied on by the district court to grant an upward adjustment in the case before it "are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award."[16] The Court's supporting reasoning is instructive:

> [W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensated the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.[17]

Finally, in *City of Burlington v. Dague*,[18] the Court ruled that district courts cannot "enhance the fee award above the 'lodestar' amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of no payment at all for their services."[19] The Court noted that "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits."[20] The Court stated that the legal and factual merits of the claim are irrelevant to the fee award, and noted that the difficulty of establishing the merits should be reflected "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[21]

Dague was the Supreme Court's last significant pronouncement on the subject. Thus, the above summary represents the slate on which the Supreme Court now prepares to write.

3. Competing Policy Concerns

When Congress used the term "reasonable" to describe the fee that should be awarded in fee-shifting cases, it necessarily left a great deal of discretion to the courts in fashioning how that term would be applied. The string of cases striking down upward adjustments of lodestar awards reflects the gut reaction of many Court members that it is fundamentally unfair to first count factors such as quality of performance and the result obtained in calculating the lodestar amount, and then to use those same factors again in deciding whether to apply a lodestar multiplier. It also reflects

the Court's awareness that the fees awarded in civil rights cases are paid by the government, and thus ultimately by the taxpayers. As Judge Carnes wryly noted in his *Kenny A.* panel opinion, while there was no question that the plaintiff's attorneys involved in that case had obtained significant and important relief for foster children in Georgia, the $4.5 million fee enhancement would actually leave less money in the state's coffers to provide the needed relief.

There is also clearly a sense among some of the Justices that because upward adjustments for performance and results in courts today are both exceptional and rare, they are also effectively standardless and random. In *Kenny A.*, the judge granting the 1.75 multiplier noted that "[q]uite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."[22] But as the Chief Justice inquired during oral argument, if that is the standard for granting a multiplier, how is a first-year judge supposed to know whether an upward adjustment is appropriate? If lodestar multipliers strike like lightning and ultimately significantly depend on the personality of the judge, that does not seem like a particularly fair or coherent system for transferring millions of dollars from taxpayers to plaintiff's attorneys.

On the other hand, there are significant policy arguments that counsel in favor of upward adjustments. The purpose of the federal fee shifting statutes is to induce private attorneys to take on cases that Congress has deemed worthy of representation because important interests and rights are at stake. Obviously, the higher the fees awarded in such cases, the more likely it is that competent counsel will agree to take them. While it is impossible to know whether the current system provides the optimal amount of representation, it can be said with some certainty that it systematically undercompensates plaintiff's attorneys for their fee-shifting work vis-à-vis the compensation they receive when their fees are paid by their clients. If they lose, they get nothing. If they obtain only partial relief for their clients, the courts frequently adjust the lodestar calculation *downward*, sometimes significantly.[23] And when they win big, while it is true that the base lodestar amount typically fully compensates them for the time and expense of litigating that particular case, it does not build in any margin (as contingency fees typically do) that accounts for the fact that other cases, some of them very expensive, will be lost.

A rational policy analysis will analyze what constitutes a "reasonable" fee based not only on a gut determination of fairness in a particular case, but also in the light of what is necessary to achieve an optimal level of fee-shifting representation across many cases. Is it "reasonable" to account for the quality of representation and the results obtained twice in setting a fee award—both when setting the lodestar amount and again when considering whether to grant an upward adjustment? That doesn't seem quite right. But is it "reasonable" to pay prevailing attorneys at a rate that does not adequately take into account the risks they bore in litigating the case? That doesn't seem right either. *Dague* definitively foreclosed consideration by the courts of the contingency risk borne by a prevailing attorney, thus forcing the *Kenny A.* respondents and their amici supporters to dance around the real underlying policy issue. Justice Sotomayor understood the game, and suggested at oral argument that *Dague* was wrongly decided and should be overruled.

Even if it were determined that the current system does not sufficiently incentivize plaintiff's attorney to take on cases that are both meritorious and important, however, is it really a rational solution to that problem to tack a jurisprudential "prevailing party" lottery ticket onto initial lodestar calculations, which when granted boosts fees tremendously, but which in fact is seldom granted and depends greatly on the personality of the trial judge? Will the prospect of such a lottery win truly attract substantially more competent counsel? The contours of the Supreme Court's past fee-shifting jurisprudence may have placed the Court in a box in which a coherent and rational approach to these problems is impossible without adjustment of the guiding parameters.

4. No Predictions Possible

The oral argument in *Kenny A.* made no definitive revelations about what the final disposition of the case is likely to be. Justices Stevens, Ginsburg, and Sotomayor seemed to favor the availability of fee multipliers, while the Chief Justice and Justices Alito and Scalia seemed opposed. Justices Kennedy and Breyer seemed to telegraph that they had not yet made up their minds, with Justice Kennedy perhaps leaning in favor of allowing fee multipliers and Justice Breyer perhaps leaning against. Justice Thomas asked no questions. Whichever way the Court goes, let us hope that the Court seizes the golden opportunity that *Kenny A.* provides to revisit its past jurisprudence and to tie up a more rational and internally consistent fee-shifting paradigm with a bow.

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Endnotes

1 478 U.S. 546 (1986).

2 *Id.* at 565.

3 532 F.3d 1209 (11th Cir. 2008).

4 *Id.* (reflecting a 9-3 vote against rehearing en banc).

5 Judge Carnes noted that the lodestar multiplier issue affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party," and that "[t]he record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can." *Id.* at 1337.

6 Black's Law Dictionary 1026 (Bryan A. Garner, ed., 9th ed. 2009).

7 461 U.S. 424 (1983).

8 *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 91-94 (1989); H.R. Rep. No. 94-1558, p. 8 (1976); S. Rep. No. 94-1011, p. 6 (1976).

9 *Hensley*, 461 U.S. at 434.

10 *Id.* at 435 (emphasis added).

11 465 U.S. 886 (1984).

12 *Id.* at 899.

13 *Id.* at 900.

14 *Id.* at 891.

15 Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

16 *Id.*

17 *Id.* at 565-566.

18 505 U.S. 557 (1992).

19 *Id.* at 559.

20 *Id.* at 562.

21 *Id.* at 563.

22 Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d at 1260, 1268-69 (N.D. Ga. 2006).

23 *See, e.g.,* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

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

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en banc hearing vacates prior appellate rulings.) That no opinion has yet issued suggests continuing debate within the appellate court. It remains to be seen what path the Ninth Circuit ultimately will take, and if the path will end there or continue to the U.S. Supreme Court.

One of the most significant issues the Ninth Circuit needs to resolve is the proper role for statistical or scientific evidence at the class certification stage.[2] The legal standard remains undefined; a district court must undertake a "rigorous analysis" to determine whether each element of class certification has been established.[3] Some federal appellate courts have rejected classes when an overall review of the statistical or scientific evidence shows that plaintiffs have not met their burden. In the Second Circuit, for example, district courts have been directed to resolve factual disputes relating to the elements of certification; they may not accept plaintiffs' experts without question if the defendant challenges them with its own expert testimony.[4] The Fourth and Fifth Circuits similarly hold that plaintiffs' experts may be rejected if they do not satisfy the usual strict standards (such as under *Daubert*[5]) for admissibility of scientific or technical opinions.[6] The Third Circuit recently joined these other appellate courts in requiring careful review of both the plaintiffs' and the defendants' statistical and scientific evidence at the class certification stage, and further requiring the district court to resolve any factual disputes between the parties that relate to the certification elements.[7]

Historically in the Ninth Circuit, however, the level of "rigor" in class certification analysis has not, as a practical matter, been substantial. A legal test stated by the *Dukes* panel is simply whether the plaintiffs have presented any "properly-analyzed, scientifically reliable evidence tending to show that a common question of fact… exists."[8] The panel's "tending to show" language suggests that so long as the plaintiffs' evidence tends to speak in favor of class certification, the defendants' countervailing evidence should be disregarded (or at least weighted much less heavily). This is a more pro-plaintiff standard than other appellate courts apply.

In *Dukes*, the plaintiffs offered sociological evidence that Wal-Mart had a pro-male culture which, when coupled with the overall policy of allowing promotion and pay decisions to be made based upon the discretion of store or regional managers, resulted in statistical disparities, regionally, in how women were treated. Based upon this information, the district court came to the conclusion that virtually all women, company-wide, were potentially subject to a "common" pattern of discriminatory conduct, and that the proposed class representatives, because they had been denied promotions or pay increases, had claims that were "typical" of the other 1.5 million class members. Evidence from the defendant suggesting that no systematic discrimination had occurred, based upon examination of store-by-store and department-by-department promotion and pay rates, was rejected out-of-hand.[9]

On appeal, the Ninth Circuit panel majority found, "It is well-established that commonality may be established by raising an inference of class-wide discrimination through the use of statistical analysis."[10] In evaluating each side's statistical evidence on appeal, however, the panel said that district courts are entitled to nearly complete discretion in rejecting the defendants' contrary evidence, and strongly suggested that (at the class certification stage) such a rejection usually will be beyond the scope of appellate review.[11]

Judge Andrew Kleinfeld wrote in his dissent from the second panel opinion that this approach is not "rigorous" and violates Supreme Court authority:

> Plaintiffs' only evidence of sex discrimination is that around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female. But… "[i]t is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." Not everybody wants to be a Wal-Mart manager. Those women who want to be managers may find better opportunities elsewhere. Plaintiffs' statistics do not purport to compare women who want to be managers at Wal-Mart with men who want to be managers at Wal-Mart, just female and male employees, whether they want management jobs or not.
>
> ….
>
> [Moreover, the class representatives' claims] are not even typical with respect to each other, let alone with respect to the class [defined by the district court] of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." Some of the seven named plaintiffs and members of the putative class work for Wal-Mart, some have quit, some have been fired. Some claim sex discrimination, some claim mixed motive race and sex discrimination, some appear to claim only race discrimination. Some claim retaliation, and some appear to claim unfairness but not discrimination. Some of the seven plead a prima facie case, some do not.[12]

The fundamental issue remains whether, given the potentially devastating consequences of litigating a super-sized class action,[13] the Ninth Circuit should (like other courts already have done) impose stricter scrutiny on the plaintiffs' evidentiary submissions in support of a class certification motion.

The allowed use of statistics by the *Dukes* panel opinion also seems to expand Ninth Circuit law beyond what the Ninth Circuit previously approved in *Hilao v. Estate of Ferdinand Marcos*, where a special master was allowed to examine certain class members' claims and then extrapolate the resulting figures to present a recommendation for class-wide damages awards.[14] In *Hilao*, however, liability had already been established as to each of the class members, since each had been proven to be a victim of human rights abuses at the hands of the Marcos regime in the Philippines. The statistical approach approved there was primarily designed to develop a fair approximation of damages, but only after each plaintiff had established that he or she had in fact been damaged by the defendant's wrongful conduct. The panel opinion in *Dukes* suggests taking a unique procedure developed for a unique case and expand its use to more run-of-the-mill class certification proceedings, *before there is any proof of damage to, or the violation of the rights of, each class member*. If the en banc Ninth Circuit ultimately rules in *Dukes* that the techniques employed in *Hilao* may be employed more broadly by class plaintiffs, the court would make the defense of every class case significantly more challenging, in a way that departs significantly from what is allowed in other appellate circuits.

Unfortunately, the en banc oral argument questioning focused very little on the evidentiary issues, even though, for practitioners mired in the details of litigating cases, such issues are of pressing concern. Much of the argument focused on the distinct purposes and goals of Rules 23(b)(2) and (b)(3). That issue is theoretically important but of less practical impact when briefing the typical

class certification motion.[15] If the panel opinion's analysis of statistical and sociological testimony survives the en banc decision, it will be significantly more difficult for defendants to challenge class certification orders on appeal, even when the contention is that indisputably-sound science or statistics shows the lack of "rigor" in plaintiffs' evidence.

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Endnotes

1 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), *op. withdrawn and re-issued*, 509 F.3d 1168 (9th Cir. 2007), *petition for reh'g en banc granted*, 556 F.3d 919 (2009). Oral argument occurred on March 24, 2009. *See also* J. Beisner, E. Becker & K. Thompson, Dukes, et al. v. Wal-Mart Stores, Inc., *Ninth Circuit Affirms Largest Employment Discrimination Class in History*, Class Action Watch (March 2008).

2 Other significant legal issues presented include whether a plaintiff may use Fed. R. Civ. P. 23(b)(2) (allowing certification of injunctive relief classes) as the primary legal driver to certification, even when there are potentially massive claims for punitive damages that would tag along to the certification order. Normally, damages claims must be certified under Rule 23(b)(3), where the standard for certification can be more difficult to meet. *See* Beisner et al., *supra* note 1. Another major issue is whether such a large class, encompassing business conduct at so many different physical store locations, is simply too unwieldy to justify class treatment. *See id.*

3 *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996).

4 *See In re* IPO Secs. Litig., 471 F.3d 24, 40 & n.1 (2d Cir. 2006) (rejecting principles that "some showing" by plaintiff will satisfy Rule 23 or that so long as an expert report is not "fatally flawed" the report is sufficient foundation for a certification order); Heerwagen v. Clear Channel Commc'ns, Inc., 435 F.3d 219, 232-33 (2d Cir. 2006) (district court may weigh competing expert testimony).

5 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

6 *See* Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 310-11 (5th Cir. 2005) (excluding a purported expert at class certification stage because his study was unreliable); Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 260-61 (4th Cir. 2005) (same).

7 *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008), *amended* (2009) ("The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands. "); *see also* I. Simmons & A. Okuliar, *The Third Circuit Joins the Majority with In re Hydrogen Peroxide*, Class Action Watch (May 2009); C. Mitchell & M. Scott, In re Hydrogen Peroxide Antitrust Litigation*: A Forecast of the Future of Class Certification in the Ninth Circuit*, Competition: The Journal of the Antitrust & Unfair Competition Law Section of the State Bar of California (Fall 2009) (suggesting that if *Dukes* ultimately upholds class certification by ruling in a manner inconsistent with *Hydrogen Peroxide*, the U.S. Supreme Court will grant certiorari, reverse the Ninth Circuit, and confirm that the Third Circuit's approach is the correct one).

8 *Dukes*, 509 F.3d at 1179.

9 *See* 222 F.R.D. at 154-165.

10 509 F.3d at 1180.

11 *Id.* at 1181-82.

12 *Id.* at 1194-96 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).

13 The U.S. Supreme Court has recognized that abuses of the class device are prone "to injure the entire U.S. economy," that "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years" and that "these abuses resulted in extortionate settlements." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, p. 31 (1995)).

14 103 F.3d 762 (9th Cir. 1996). In the Fifth Circuit, by contrast, statistical evidence is scrutinized very carefully, out of concern that to expose a defendant to potentially large liability simply on the basis of statistics and generalizations risks a deprivation of due process, and such evidence may not be used to extrapolate damages to the broader class. *See In re* Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990) (rejecting sampling in a class action because it would allow proof of causation to be made on a group rather than individual basis); Cimino v. Ray-Mark Indus., Inc., 151 F.3d 297, 319-320 (5th Cir. 1998) (holding that the use of statistical sampling violated the defendant's Seventh Amendment rights).

15 It is, of course, extremely important to the litigants in *Dukes* itself, particularly in regard to whether the punitive damage claim may proceed under Rule 23(b)(2). Under Rule 23(b)(2), the plaintiffs still must establish the elements of commonality and typicality, but to certify a class they need not establish key elements of Rule 23(b)(3): "that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy" (emphasis added).

Ninth Circuit Reads Hawaii's Deceptive Practices Act to Allow Class Actions Seeking Damages Without Proof of Causation

Continued from page 3

relied on the alleged misrepresentation, or even that the misrepresentation in any way caused her injury, in order to bring a claim for damages under Hawaii's Deceptive Practices Act. The ramifications of this holding are that the statutory scheme would allow for treble damages to each and every putative class member without any showing that the misrepresentations caused injury to any of them. In other words, under *Yokoyama II*, the consumer protection statutes assume both injury and causation.

This reasoning was founded on two Hawaii state court decisions, neither of which addressed the elements of private enforcement actions for damages under HRS § 480-13(b). The Ninth Circuit's determination that the district court committed legal error was based on its reading of the Hawaii Supreme Court's decision *Courbat v. Dahana Ranch, Inc.*,[11] which, the Ninth Circuit explained, "made it clear that [under Chapter 480] reliance is judged by an 'objective reasonable person standard."[12] *Courbat*, however, does not mention reliance and stands only for the proposition that "deception"—which constitutes a violation of Haw. Rev. Stat. § 480-2—is judged using a reasonable consumer standard. HRS § 480-2 itself does not contain any private right of action under which plaintiffs may bring suit for damages. Further, the plaintiffs in *Courbat* were not bringing a claim for damages under Chapter 480, but instead sought rescission of a contract pursuant to HRS § 480-2, which declares void any contract that violates HRS § 480-12.

The Ninth Circuit also cited *Hawaii v. Bronster*.[13] *Bronster*, however, does not address reliance but rather holds that, because a deceptive act under HRS § 480-2 is determined according to an objective, reasonable person standard, a jury instruction that articulated that objective requirement with an additional requirement that the act be "immoral, unethical, oppressive, or unscrupulous," was legally incorrect.[14] In fact, the jury instructions excerpted in the decision also required a finding by the jury that the alleged "acts or practices were the legal cause of harm or loss to plaintiff's property."[15] Thus, the case actually required causation as an essential element of a claim under the consumer protection law.

As noted above, HRS § 480-2 does not contain any private right of action. Rather, HRS § 480-2 is a virtual clone of section 5(a)(1) of the Federal Trade Commission Act, and therefore courts construing section 480-2 are "guided by the interpretations" given by the Federal Trade Commission and FTCA s 5(a)(1).[16] Thus, like FTCA 5(a)(1), which is enforced by the FTC and not private individuals, HRS 480-2 creates an objective test and does not create a private right of action.[17]

The district court noted in *Yokoyama I* that "the government does not have to wait for individual damages to be sustained prior to the filing of suit" under the FTCA, nor does the government have to wait for individual damages under HRS §§ 480-8, 480-15, 480-16, or 480-18, and proof of damages may not be required when private plaintiffs file suit seeking non-compensatory remedies under HRS § 480-2 (as in *Courbet*) or for injunctive relief under HRS § 480-7(b).[18] But, the court stated, "claims for damages brought under HRS § 480-13 are fundamentally different than claims for injunctive, declaratory, or other forms of non-compensatory relief brought under other sections of Chapter 480."[19] The district court thus found the possibility of treble damages to be intertwined with the requirement that plaintiffs prove causation as an element of their claims. At this intersection of burdens of proof and remedies under the Hawaii statutes, the district court and the Ninth Circuit parted ways. For the Ninth Circuit, the presence of treble damages played no part in determining whether both the elements of plaintiffs' claim and the requirements of Rule 23 could be met.

California's Unfair Competition Law ("UCL") serves as an interesting counterpoint to the Hawaii statutes. To state a claim under California's UCL, a plaintiff need only show that "members of the public are likely to be deceived."[20] As the California Supreme Court noted in *In re Tobacco II*, the California legislature "limited the scope of damages available under the UCL," eliminating damages, but allowing both injunctive relief and restitution.[21] Thus, any diminished evidentiary burden with regard to reliance or causation is paralleled by a limitation on the type of recovery. Further, the court in *In re Tobacco II* reiterated that—at least for the named class representative—the UCL "imposes an actual reliance requirement."[22] California's UCL is acknowledged as one

of America's most lenient consumer protection regimes. And yet, even under California law, the UCL imposes a higher evidentiary burden to initiate suit than the Ninth Circuit did in *Yokoyama II*, and California restricts the relief available in a way that the *Yokoyama II* decision does not.

The decision of the *Yokoyama II* court is all the more notable because the Ninth Circuit previously addressed the interaction of HRS § 480-2 and 480-13 in a decision that is never cited in *Yokoyama II*. In *Jenkins v. Commonwealth Land Title Ins. Co.*,[23] a different panel of the Ninth Circuit observed that:

> Section 480-13 of the Hawai'i Revised Statutes, the section that allows Jenkins to sue for a violation of § 480-2, requires that a plaintiff have sustained damages. "[T]he mere existence of a violation is not sufficient *ipso facto* to support the action; forbidden acts cannot be relevant unless they cause private damage." Jenkins' allegation that he has, as a "direct and proximate result" of Commonwealth's violation, "sustained special and general damages" suffices to withstand a motion to dismiss under Rule 12(b)(6).[24]

Under the Ninth Circuit's analysis in *Yokoyama II*, plaintiffs apparently no longer need to show either component of a claim.

By rejecting the injury and causation requirements of HRS 480 § 13, the *Yokoyama II* decision also departs from a long line of cases holding that HRS § 480-13 "governs lawsuits whose subject is anything forbidden or declared unlawful... by section 480-2."[25] In fact, the Ninth Circuit itself previously noted that very fact.[26]

Further, HRS § 480-13 requires that a plaintiff show *actual* injury *caused* by the alleged violation of Haw. Rev. Stat. 480-2.[27] Until *Yokoyama II*, "the mere existence of a violation [of HRS § 480-2] [was] not sufficient ipso facto to support the action."[28] Causation also was necessary.

While the *Yokoyama II* court held that the district court erred because Hawaii's consumer protection statutes do not "require" reliance, the district court never said Chapter 480 requires reliance. Rather, it found that, in a case based on allegations of deceptive marketing, "individual reliance... provides the crucial causal link between the alleged violation of HRS § 480-2 and the damages claimed under HRS § 480-13."[29] Thus, it was *causation* that was required by the statute, and reliance was likely to be at the root of any proof of causation.

Finally, the *Yokoyama II* opinion states that individual issues regarding damages do not defeat certification. Although that may be the case in a securities class action where the damages calculation involves proof of the number of shares held and the application of a mathematical formula, critics point out that this often is not true in consumer fraud cases. As the district court noted in *Yokoyama I*, Hawaii law would require any court determining damages in the context of a fraud claim involving fixed annuity sales to look to a variety of factors, including:

> financial circumstances and objectives of each class member; their ages; the IAP selected; any changes in fixed rate of interest for that particular IAP; the performance of the selected index; any changes in the index margin for that particular IAP; any cap on the indexed interest; the length of the surrender periods; whether the individual had undertaken or wanted to undertake an early withdrawal of the funds; any benefit the individual policy holder derived from the form of the annuity itself, including the tax-deferral of credited interest; and the actual rate of return of the IAP.[30]

Where, as in *Yokoyama*, the issues related to damages are inextricably intertwined with issues of causation and individual choice, courts everywhere, including the Ninth Circuit, routinely deny certification.[31]

By holding that a court deciding class certification under the Hawaiian consumer protection statutes may not consider the standing, injury, and causation elements of HRS § 480-13, the Ninth Circuit in *Yokoyama II* acted inconsistently with Rule 23's status as a procedural rule that "shall not abridge, enlarge or modify any substantive right."[32] The impact of this decision is significant, and plaintiffs' lawyers will no doubt rely on it for years to come when litigating cases under consumer fraud statutes.

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Endnotes

1 *See Yokoyama v. Midland National Life Insurance Co.*, No. 07-16825, 2009 WL 2634770, (9th Cir. Aug. 28, 2009) (*Yokoyama II*).

2 *See Yokoyama v. Midland National Life Insurance Co.*, 243 F.R.D. 400 (D. Haw. 2007).

3 *Yokoyama I*, 243 F.R.D. at 406.

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

Continued from cover

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.

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