Legal Memorandum
Published by The Heritage Foundation
No. 47
August 28, 2009

The Trial Lawyers' Earmark: Using Medicare to Finance the Lifestyles of the Rich and Infamous

Edwin Meese III and Hans A. von Spakovsky

In one of the starkest examples of how plaintiffs' lawyers want to use Congress to get rich at the expense of the American taxpayer, an amendment that would have generated abusive Medicare litigation on a massive scale—along with the usual huge attorneys' fees—was recently added to the health care reform bill in the U.S. House of Representatives.[1] 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 or medical costs. However, the tort lawyer amendment would:

- Allow new types of lawsuits against the makers of consumer products (including food) for supposed injuries to Medicare beneficiaries based on questionable statistical speculation;
- Flood the federal courts with lawsuits that circumvent state tort law and federal requirements for class action lawsuits, diversity jurisdiction, or amount in controversy;
- Violate the privacy of Medicare beneficiaries by making their medical records available to tort lawyers without their permission (or that of the government);
- Interfere with the rights of beneficiaries against third parties responsible for their medical costs; and
- Improperly and unwisely turn the Medicare reimbursement provision into a *qui tam* statute that would allow plaintiffs' lawyers to pursue claims that Medicare does not think are valid or proper,

Talking Points

- A proposed amendment to the U.S. House of Representatives' health care bill—America's Affordable Health Choices Act of 2009—would have generated abusive Medicare litigation on a massive scale to benefit plaintiffs' lawyers at the expense of the American taxpayer and Medicare beneficiaries.
- This amendment would have circumvented state law and flooded federal courts with frivolous lawsuits against the makers of consumer products and beneficial medical treatments and services.
- It would have endangered the health and safety of Medicare beneficiaries by interfering with their ability to obtain medical care and violating their right to privacy with regard to their medical records.
- The Senate should resist any attempt to introduce this amendment into the Senate version of the health care bill, or any other legislation proposed in Congress, because it is unconstitutional and will increase health care costs.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm0047.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

reducing the availability of medical treatment for Medicare beneficiaries.

Although the amendment would be unconstitutional, it might take years for the courts to make that determination. Fortunately, 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 there is nothing that precludes it from being added in the Senate or in conference if the Senate and House pass different versions of the proposed government health care system. Unconstitutional and counterproductive amendments designed to further the interest of plaintiffs' lawyers at taxpayers' expense need to be changed or removed from all bills considered by Congress.

Current Law

The proposed amendment would convert a relatively innocuous reimbursement requirement into a revolutionary new federal liability provision that could easily overshadow most state tort laws and vastly increase lawsuit abuse in America—already the most litigious nation on earth. To understand the radical and sweeping nature of the proposed takeover of tort law, it is necessary to explain the existing Medicare law and its roots in traditional legal principles.

"Subrogation" is the legal doctrine under which one party, such as an insurer, 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 victim's automobile insurer can then assert a claim against the drunk driver for the benefits the automobile insurer has paid (with other payments going to the victim for pain and suffering). Based on the theory of unjust enrichment, subrogation ensures that victims do not recover the same benefits twice from their insurance companies and the wrongdoers.

In 1980, Congress enacted the Medicare Secondary Payer statute (MSP) to implement such a subrogation right, thereby preventing Medicare beneficiaries from potentially being paid twice for the same expenses. In doing so, the MSP also helps to reduce federal health care costs. Pursuant to the MSP, 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."[2] Payment by Medicare of benefits is "conditioned on reimbursement" from the primary plan.

Congress also amended the MSP in 2003 to provide that the requirement to reimburse Medicare for payments it has made is triggered by a legal judgment or an actual payment by a primary plan to the Medicare beneficiary conditioned upon the Medicare beneficiary's compromise, waiver, or release of a claim against the primary plan.[3] It is important to note, however, that the beneficiary's right to receive payment from these other sources is dependent on underlying state law.

To encourage beneficiaries to help Medicare collect these reimbursements, beneficiaries are permitted to sue and collect double damages from a "primary plan which fails to provide for primary payment (or appropriate reimbursement)."[4] 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, the federal courts have correctly determined that no right to sue under the MSP arises against a party "whose responsibility to pay medical costs has not yet been established."[5]

1. America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009).
2. 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).
3. 42 U.S.C. § 1395y(b)(2)(B)(ii).
4. *Id.* § 1395y(b)(3).
5. Glover v. Liggett Group, Inc., 459 F.3d 1304, 1306 (11th Cir. 2006).

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."[6] This requirement makes perfect sense, because only the clarity and finality of such judgment or settlement makes it fair to subject a "primary payer" to damages, especially double damages, for not reimbursing Medicare.

Unscrupulous plaintiffs' lawyers have chafed under the requirement that actual responsibility be established before an MSP suit can be filed because they see the double damages provided by the statute as a potential hen that lays golden eggs. Their attempts to pursue such MSP suits against tobacco companies for supposed injuries to Medicare recipients before any liability had even been established were rebuffed in the courts, as were a series of frivolous cases filed against hospitals.

In the hospital cases, plaintiffs alleged that hospitals had violated the MSP statute by failing to reimburse Medicare for expenses to treat unspecified medical errors with regard to unspecified Medicare beneficiaries at unspecified health care facilities owned by the defendants.[7] The plaintiffs' lawyers wanted the court to recognize the MSP as a *qui tam*[8] statute granting them standing to sue as private attorneys general even though the plaintiffs were not Medicare beneficiaries who had been specifically injured. However, the MSP is not a *qui tam* statute that allows a plaintiff to sue on behalf of the United States, and the plaintiffs did not have standing to sue—they were acting as "self-appointed bounty hunter[s]" whose goal was to profit at the expense of the hospitals.[9] Consequently, their claims were dismissed as "utterly frivolous."

The Trial Lawyers' Get-Rich-Quick Amendment

When the health care reform bill was brought before the House Ways and Means Committee on July 16, it included a provision that would provide trial lawyers with everything they had been denied in the courts under the MSP, and more. 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."[10]

In other words, any lawyer, even without the permission of the government or the supposed Medicare beneficiaries on whose behalf he is suing, could sue anyone who allegedly caused a Medicare beneficiary harm. The race to the courthouse by self-appointed bounty hunters "would be fierce as no other freelance lawyers could oust the first-to-file lawyer. This MSP action would be on top of any claims between the Medicare beneficiary and that defendant, and could be pursued even if the defendant is absolved of wrongfully injuring that beneficiary."[11]

But it gets worse—much worse. Trial lawyers were frustrated by the fact that MSP liability is not triggered unless there is an actual judgment showing that a primary plan is liable or the primary

6. Graham v. Farm Bureau Insurance Co., 2007 WL 891895 (W.D.Mich 2007) (citations omitted).
7. *See e.g.,* Stalley v. Methodist Healthcare, 517 F.3d 911 (6th Cir. 2008).
8. *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; s*ee 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.
9. *Stalley*, 517 F.3d at 919.
10. 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.
11. 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).

plan makes a payment to a beneficiary and then fails to reimburse Medicare. The proposed amendment changes this requirement, allowing 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 (whether or not such finding has been appealed), *by any relevant evidence, including but not limited to relevant statistical or epidemiological evidence or by other similarly reliable means*."[12] The amendment also stated that a single action could be brought against a company to establish its responsibility for all individuals for whom the company is alleged to be the "primary plan," thereby circumventing class action requirements.[13]

Accordingly, the supposed factual finding could be established in a federal court under this novel statistical theory of liability—without securing a prior judgment under a traditional theory of law. The amendment would convert the MSP from a traditional reimbursement mechanism into a vehicle for bringing mass tort suits for "statistical" health care injuries, such as producing high-calorie foods, many of which the beneficiaries could avoid by modifying their behavior.[14] Lawyers and activists could sue virtually any company that provides a product that studies say is "bad for your health," regardless of whether any injuries *actually*—instead of statistically—occurred or, in cases where there are injuries, whether the patients or their doctors believe the product caused the particular harms. And all of this can be done by lawyers who do not even have a client, allowing a true rush-to-judgment bonanza.

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.[15]

The intent of the proposed amendment is to override this common-sense ruling (and the rulings of the four other circuit courts that have heard similar claims and rejected them), to expand federal jurisdiction, to remove traditional tort law barriers to these claims, and even to circumvent the class action restrictions that would otherwise be applicable.

Unconstitutional Standing Problems

The proposed amendment raises a host of serious legal concerns, the most severe of which is that allowing any random individual to sue for damages that he alleges the federal government suffered very likely violates constitutional standing requirements.

Article III of the Constitution defines the power of the federal courts and authorizes them to hear only "cases" or "controversies." In determining whether a dispute brought before the court is an actual case or controversy, a fundamental dividing

12. 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).
13. *Id.* § 1620(1)(E).
14. 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."
15. *Glover*, 459 F.3d at 1309.

line is *standing*—that is, 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."[16]

Under the Supreme Court's well-established jurisprudence, to demonstrate constitutional standing, the 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.[17]

While the MSP amendment purports to permit "any person" into court to establish the liability of any entity, it is extremely questionable whether "any person" would satisfy the constitutional requirements for standing. The amendment is designed to permit speculative, conjectural, or hypothetical suits—the very type of claims that the standing doctrine prohibits.

But it is not enough that Congress has granted these would-be bounty hunters 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."[18] Indeed, the Court has made clear that "[i]n no event…may Congress abrogate the Art. III minimum: 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."[19]

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, it is, on its own, insufficient to establish standing. Bounties, like statutory authorization of attorneys' fees, or even wagering on the outcome of a case, are not alone sufficient to confer standing because they are interests "unrelated to injury in fact[.]"[20]

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.[21] However, the putative *qui tam* provisions at issue here are significantly different from those in the FCA in ways that raise serious 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.[22] 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.

Indeed, the reason that the government has not pursued these injuries on its own is because they most likely do not constitute concrete, particularized injuries. The amendment would be an invitation

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

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

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

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

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

21. *Id.* at 773.

22. *Id.*

for avaricious trial lawyers to manufacture conjecture in the hopes of creating an injury. Such claims can hardly be considered injury in fact and would likely fail as being "conjectural or hypothetical."[23]

Second, in declaring that FCA *qui tam* relators have standing, the Supreme Court found the history of *qui tam* suits "well nigh conclusive."[24] That history demonstrates that there was no evidence in America of common-law *qui tam* actions.[25] 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.[26]

In the case of 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. While the absence of such insider information would not necessarily prohibit the federal government from assigning its rights arising from an actual injury (if such an injury exists), this break with the historical precedent of *qui tam*—which is itself seen as an exceptional case of standing—would likely make the courts skeptical at best regarding the constitutional standing of would-be bounty hunters to sue on the government's behalf.[27]

Given the lack of a concrete or particularized injury to assign and the break from historical precedent in the assignment of such claims, the MSP amendment raises grave questions as to whether those who would bring suit have the requisite standing to proceed. In the authors' opinion, the MSP's purported grant of standing to "any person" would be unconstitutional.

Other Policy Dangers

Apart from the proposed amendment's obvious constitutional problems,[28] other legal and policy implications are equally alarming. For example, the federal government would be forced to provide these "bounty hunters" with all medical records held by the administrator of the Centers for Medicare and Medicaid Services "containing encounter-level information with regard to diagnoses, treatments, and costs…and any other relevant information."[29] Thus, the private medical records of Medicare beneficiaries would be provided to such bounty hunters without the permission of the beneficiaries and even if the beneficiaries (or the federal government) specifically objected.

The statistical theory of liability would bring its own nightmares. Since it would be so much easier to prove theoretical injuries in federal court than it would be to prove real ones, the traditional safeguards of state tort laws (developed over hundreds of years) would be abandoned. This is because MSP lawsuits could be based on what essentially amounts to a disparate impact theory. As one commentator has said, this theory would allow claims against defendants "who might not be found liable in an individual case but are responsible in a 'statistical sense.'"[30]

Who are the defendants that trial lawyers want to target for "society-wide patterns of illness or injury?"[31] Every company that supplies "bad"

23. *See Lujan*, 504 U.S. at 560–61.
24. *Vermont Agency of Natural Resources,* 529 U.S. at 777.
25. *Id.*
26. *Id.* at 776–77.
27. In addition to these constitutionally relevant distinctions, there are policy distinctions suggesting that *qui tam* may be appropriate in whistleblower cases, which provide a remedy for individuals working for corrupt bosses or for being asked to participate in corrupt practices, but inappropriate here, where the lawyers bringing the actions have no such claim.
28. Beyond the Art. III standing problems, the MSP amendment raises substantial Art. II and constitutional federal concerns.
29. 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).
30. 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.
31. *Id.*

products ranging from fast food to alcohol to soda to guns would be the targets of lawsuits.

In other words, this is a legal recipe for mass class action lawsuits that will not require actual evidence of causation and that will virtually eliminate affirmative defenses such as assumption of risk or contribution to harm. Companies could end up paying huge settlements for MSP cases based purely on nonscientific studies produced by activist groups and questionable statistical findings even though they could not be found liable for the actual injuries of individual Medicare beneficiaries under traditional legal theories. This amendment changes the entire nature of the MSP statute from one that simply reimburses the government for existing liabilities to one that creates entirely new theories of liability.

And what good is a lawyer's earmark if it does not increase his bounty? Section 1620 adds a provision (on top of the already existing double damages) that provides the bounty hunter with a 30 percent bonus plus "the actual costs that person incurred to prosecute the action."[32] Even if the government intervenes, the bounty hunter will receive at least an additional 20 percent plus expenses.[33] 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 (under the almost nonexistent evidentiary standard implemented by the amendment) engaged in "an intentional tort or other intentional wrongdoing."[34] Bounty hunter lawyers could even settle a case supposedly filed on behalf of the United States "notwithstanding the objections of the United States" if the court approves the settlement.[35]

Finally, this provision would have the perverse effect of making health care in this country worse. There are many drugs and medical devices whose overall benefits to a large population of patients override the adverse reactions or side effects of a small number of users. 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." [36] This could have a devastating effect on the availability of a vast array of treatments for Medicare beneficiaries.

Conclusion

Fortunately, before Section 1620 could be approved by the Ways and Means Committee as part of the overall health care bill, it was removed,[37] but there is little doubt that this amendment will surface again, perhaps as soon as the Senate begins its deliberations on the health care bill.[38]

All of these proposed changes in the MSP would stand the "statute on its head."[39] In fact, the financial bonanza represented by such provisions is exactly the type of temptation that led to the imprisonment of leading members of the trial bar like William Lerach and Dickie Scruggs for paying bribes to plaintiffs and judges in lucrative mass litigation cases.[40] It seems unwise—and contrary to the purpose of the original statute—to base legisla-

32. 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).

33. *Id.* § 1620(3)(A)(v).

34. *Id.* § 1620(2).

35. *Id.* § 1620(3)(A)(v).

36. Phil Goldberg, supra note 11.

37. 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.

38. A similar effort was tried in the Senate Finance Committee in 2007. *See* Phil Goldberg, supra note 11.

39. *Graham,* 2007 WL 891895.

40. Quin Hillyer, *How the Mighty Lerach Has Fallen: Power Lawyer to Prisoner*, WASHINGTON EXAMINER, August 17, 2008; Jack Elliott, Jr., *Year in Review: Top Tort Lawyer Jailed for Bribery*, ASSOCIATED PRESS, Dec. 29, 2008.

tion on such provisions. Furthermore, faced with the potential of such damages, many companies would be forced to settle even frivolous cases to avoid the potential of huge damage awards whose costs would be passed on to consumers.

The proposed amendment—Section 1620—is bad public policy that would increase health care costs and endanger the health and privacy of Medicare beneficiaries. It should not be revived either in the U.S. Senate or in committee.

—Edwin Meese III is Ronald Reagan Distinguished Fellow in Public Policy in and Chairman of, and Hans A. von Spakovsky is a Senior Legal Fellow in, the Center for Legal and Judicial Studies at The Heritage Foundation.