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Lawsuit Doesn't Prevent Medicare Part D from Failing, but States Come to The Rescue

By Michelle Schnidler

Days after the U.S. District Court of Manhattan (“the District Court”) dismissed a suit on behalf of Medicare beneficiaries, Medicare’s new Part D prescription drug plan (“Part D”) went into effect causing many beneficiaries to have difficulties filling their prescriptions.¹

Predicting problems in implementing the new Medicare Part D prescription drug program in November 2005, a group of eight advocacy groups sued the Secretary of the U.S. Department of Health and Human Services (“HHS”), Michael Leavitt, to compel HHS to take action to ensure that beneficiaries were not denied coverage.² However, on December 30, 2005, two days before the implementation of Part D, the District Court denied the advocacy groups their Motion for a Preliminary Injunction and dismissed the case, finding the claim was not ripe and that the court lacked jurisdiction to hear the case.³

The lawsuit alleged that Leavitt had not met his statutory obligation to ensure continued and uninterrupted drug coverage for people enrolled in both Medicaid and Medicare, known as “dual eligibles.”⁴ Before January 1, 2006, Medicare did not have a prescription drug benefit program, so many qualifying low-income seniors obtained prescription drug coverage from Medicaid.⁵ In implementing Part D, Medicare’s new prescription drug program, HHS created an automatic enrollment program in which all eligible Medicare recipients would be enrolled in the new program.⁶ However, the suit alleged that HHS had not taken enough precautionary measures to ensure that the transition would run smoothly and dual eligible beneficiaries would not lose coverage.⁷

The District Court dismissed the suit and stated that the senior citizen advocacy groups could not bring suit on behalf of an unnamed class member and that the action was not ripe as it was commenced before Part D was implemented.⁸

While the injunction failed to compel HHS to

(CIA Kidnapping, *continued from page 9*)

² *Id.* at 1-2.

³ *Id.* at 4.

⁴ *Id.* at 4.

⁵ 28 U.S.C. § 1350 (2005).

⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

⁷ *Id.* at 725.

⁸ *Id.* at 713.

⁹ Complaint *supra* note 1, at 7.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ *Id.* at 13.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 17.

¹⁶ David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N. Y. TIMES, April 23, 2005, at A3.

¹⁷ Complaint *supra* note 1, at 7.

¹⁸ *Id.* at 7.

¹⁹ Press Release, American Civil Liberties Union, *Extraordinary Rendition-Khaled El-Masri-Statement* (Dec. 6, 2005), available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>.

²⁰ *Id.*

²¹ *Id.*

²² Complaint *supra* note 1, at 3.

²³ *Id.* at 12.

²⁴ *Id.* at 12.

²⁵ Johnston *supra* note 16, at A3.

²⁶ Complaint *supra* note 1, at 3.

²⁷ *Id.* at 3.

²⁸ *Id.* at 17.

²⁹ *Id.* at 17.

³⁰ Michael Hirsh, Mark Hosenball & John Barry, *Aboard Air Cia*, NEWSWEEK (Feb. 28, 2005), at 32; *see also*, Christopher Dickey, *Plane Spotting: How aviation hobbyists put vital evidence about secret CIA flights on the Web—and provided evidence for lawsuits about detainee abuse*, NEWSWEEK (Dec. 14, 2005) World, at 0.

³¹ Complaint *supra* note 1, at 5.

³² *Id.* at 5.

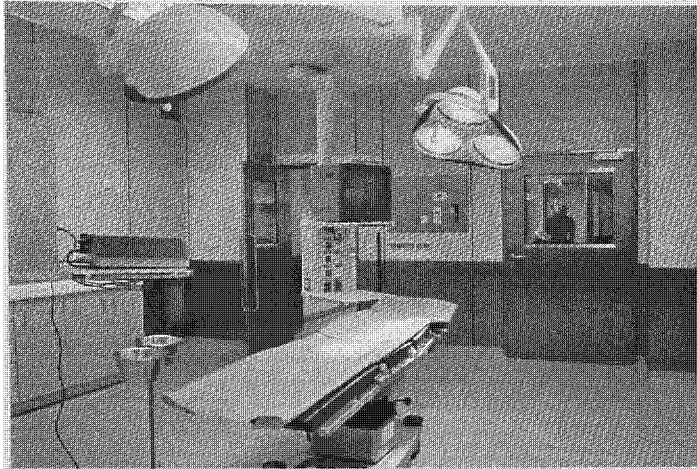
³³ *Id.* at 6.

³⁴ *Id.* at 6.

(Medicare Part D, *continued on page 11*)

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(Medicare Part D, continued from page 10)



Confusion over the new Medicare Part D may leave many seniors behind.

continue Medicaid drug coverage during the preliminary stages of Part D, most states, individually, have stepped in to ensure that any dual eligible beneficiaries continued to be covered.⁹ Problems arising from confusion in the automatic enrollment program have left many seniors without immediate coverage or erroneous high co-payments.¹⁰ Over 30 states have been using their own funds to pay for prescriptions for residents who could not get their medications through Part D.¹¹

HHS recently unveiled a reimbursement plan stating that Medicare will help states recoup funds from drug plans and further ensure that any differences in state expenditures and plan repayments would be covered by Medicare.¹² However, concerned that repayment requirements will prevent states from receiving full reimbursement, senior advocates, lawmakers and state officials are continuing to advocate for legislation requiring full reimbursement of state costs.¹³

Edo Banach, Medicare Rights Center's general counsel, stated that this *ad hoc* policy of state reimbursement is not working.¹⁴ Approximately 20 states have not yet offered dual eligibles back up assistance and the other 30 states are uncertain about being reimbursed by the federal government.¹⁵

"It's frustrating because a group of public interest attorneys and advocates alerted HHS to potential glitches in the switch over system, and now we are seeing the exact problems that were predicted," stated Banach.¹⁶ To combat some of these issues, Medicare Rights Center seeks the creation of an easily accessible appeals process for seniors when they have

been denied coverage or are charged incorrect cost sharing fees.¹⁷ As for the long term, Banach sees "institutional problems" with Part D and predicts that it will create a class of seniors, most likely those with mental disabilities or without caretakers, that are left out and denied coverage due to a misunderstanding of requirements, such as prior authorization or the use of alternative drugs.¹⁸

Addressing these concerns, on April 26, 2006, two beneficiary groups filed a class action suit against HHS in the U.S. District Court for the Northern District of California.¹⁹ The class action Complaint demands that HHS immediately design and implement a system that carries out Congress' mandate to enroll all dual eligibles into the Part D prescription drug plans and provide them with a subsidy to defray Part D cost-sharing expenses.²⁰

¹ States provide interim Rx drug coverage amid Part D problems, 9 INSIDE CMS 1, Jan. 12, 2006.

² Robert Pear, *Lawsuit Seeks to Guarantee Coverage In Drug Shift*, N.Y. TIMES, Nov. 14, 2005 at 18.

³ *New York Statewide Senior Action Council, et al. v. Leavitt*, 409 F. Supp. 2d 325,329 (S.D. N.Y. 2005).

⁴ Pear, *supra* note 2; Complaint, *New York Statewide Senior Action Council, et al. v. Leavitt*, available at: <http://www.medicarerights.org/complaint.pdf>.

⁵ Pear, *supra* note 2.

⁶ *Judge Denies Preliminary Injunction, Says Medicare System Set To Address Issue*, LEXISONE HEADLINE LEGAL NEWS, available at: <http://www.lexisone.com/news/nlibrary/m010406a.html>.

⁷ Complaint, *supra* note 4, at 10-11.

⁸ *Leavitt*, 2005 U.S. Dist. LEXIS at 13.

⁹ Inside CMS, *supra* note 1.

¹⁰ *Drug Industry Experts say swath of Part D Plans Hinders Competition*, 9 INSIDE CMS 1, Jan. 26, 2006, at 1.

¹¹ *HHS Plan to pay states for interim drug coverage shortfalls raises questions*, 9 INSIDE CMS 1, Jan. 26, 2006, at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ Interview with Edo Banach, General Counsel, Medicare Rights Center, in Chicago, Ill. (Feb. 6, 2006).

¹⁵ Inside CMS, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Class Action Filed Against CMS Over Part D Implementation for Duals*, 9 INSIDE CMS 9, May 4, 2006, at 1.

²⁰ *Id.*