B a c k g r o u n d
on

Brian Hall, et al. v. Michael Leavitt, et al.

Filed: United States District Court, District of Columbia
Original Complaint: October 9, 2008
Verified Amended Complaint: December 15, 2008

The Issue: Does the federal government have the right to deny otherwise eligible retirees their Social Security benefits if those retirees choose not to enroll in Medicare even though participation in Medicare, under law (Social Security Amendments of 1965, more commonly known as the Medicare Act, Title 42 of the United States Code, beginning at Section 1395 signed into law by President Lyndon B. Johnson on July 30, 1965), is voluntary (open to any U.S. citizen who meets the eligibility criteria and "files an application" to enroll)?

How We Got Here: In 1993 and 2002, the Social Security Administration (SSA) issued new rules, unchallenged until now, stating, in effect, that any retiree who elects to opt out of Medicare Part A (the Medicare hospital insurance program) will automatically lose his or her Social Security retirement benefits. The rules were promulgated without being published beforehand in the *Federal Register* and without benefit of public comment.

The five plaintiffs in this case believe that the Clinton administration (in 1993) and the Bush administration (in 2002) acted unlawfully – both, substantively, by violating the Social Security Act and the Medicare Act of 1965, and, procedurally, by violating the federal government's Administrative Procedure Act of 1946 (Title 5 of the United States Code, beginning at Section 500).

Why The Rules Are Illegal:

The plaintiffs claim that the rules are illegal because:

- The Social Security Act and Medicare Act state clearly that applying for Social Security monthly benefits and enrolling in Medicare are *voluntary* and that the applications for each of these programs are not dependent on the application for the other. For the new SSA rules to make enrolling in Medicare mandatory violates the Social Security Act and Medicare Act as well as Article I, Section 1 of the Constitution.
- Forced participation in Medicare infringes on a citizen's right to privacy and to make necessary choices about his or her own health care, and, accordingly, violates the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution.
- The new SSA rules were put into place **without** undergoing the required "notice" and "comment" rule-making requirements. The policies should have been published in the *Federal Register* and open to comment by the general public prior to implementation. Not doing so violates the Administrative Procedure Act.

The Remedy the Plaintiffs Seek: The plaintiffs' lawsuit, originally filed with three plaintiffs in the U.S. District Court for the District of Columbia on Oct. 9, 2008 and amended to add two new plaintiffs – Richard Armey and John Kraus – on December 15, 2008, asks the Court for a restraining order and a temporary and permanent injunction prohibiting SSA and HHS from enforcing the coercive policies and rules that effectively deny citizens the right to voluntarily opt out of Medicare by improperly penalizing them [denying them their rightful Social Security retirement benefits] if they do so. This would enable the plaintiffs to freely exercise their rights not to enroll in, or to "dis-enroll" from Medicare, without such penalty as suffering loss of retirement benefits, being forced to stop making contributions to Health Savings Accounts (HSAs), risking an interruption of medical services, or being denied medical services from chosen medical practitioners because of rules prohibiting practitioners from entering into "private contracts" with Medicare beneficiaries.

Why the Plaintiffs Are Bringing This Lawsuit: Plaintiffs Brian Hall, Richard Armey, John Kraus, Lewis Randall, and Norman Rogers are able to provide for their own health care needs and do not want to apply for or participate in Medicare. In their opinion, the health care services provided under Medicare are:

- inferior to those they currently obtain privately;
- effectively rationed because of government budget constraints; and,
- provided without concern for patients' privacy.

The plaintiffs additionally believe the rules undermine their individual freedoms and constitutional liberties.

Furthermore, HHS has provided no means and no applicable administrative procedures by which an individual can request to opt out of Medicare, Part A, leaving the plaintiffs with no other option than pursuing legal action.

Rules and Procedures At Issue:

On August 30, 1993, the Social Security Administration added two substantive rules to its "Program Operations Manual" to address the fact that "[S]ome individuals entitled to monthly benefits have asked to waive Hospital Insurance (HI) entitlement because of religious or philosophical reasons, or because they prefer other health insurance." (These rules, while promulgated by SSA, are enforced by both SSA and HHS.)

The first rule reads:

> **Policy**
> "Individuals entitled to monthly benefits which confer eligibility for HI many not waive HI entitlement. The only way to avoid HI Entitlement is through withdrawal of the monthly benefit application. Withdrawal requires repayment of all Retirement, Survivors, Disability Insurance (RSDI) and HI benefit payments."

The second rule reads:

Policy
"To withdraw from the HI program, an individual must submit a written request for withdrawal and must refund any HI benefits paid on his/her behalf … An individual who filed an application for both monthly benefits and HI may:

- Withdraw the claim for monthly benefits without jeopardizing HI entitlement; or

- Withdraw the claim for both monthly benefits and HI.

The individual may **not** elect to withdraw only the HI claim."

Nearly a decade later, on May 23, 2002, SSA tightened the noose still further, adding the following substantive rule to its Program Operations Manual:

Policy
"The claimant can withdraw an application for:

- RSI [Retirement or Survivors Insurance, i.e., Social Security] cash benefits only

- RSI cash benefits and HI insurance coverage …, or

- Medicare [Part B] only

However, a claimant who is entitled to monthly RSI benefits **cannot** [emphasis added] withdraw HI [Medicare, Part A] coverage only since entitlement to HI [Medicare, Part A] is based on entitlement to monthly RSI benefits…"

About The Plaintiffs and Legal Counsel:

Lead Plaintiff Brian Hall, a resident of Catlett, Va., retired from the U.S. Department of Housing and Urban Development in 1995 and has since worked in information technology management for several private sector companies, both full time and on a consulting basis. He is a graduate of the University of Maryland.

Plaintiff Richard K. Armey served as U.S. Representative for Texas' 26th Congressional District – near Dallas/Fort Worth – from 1985 to 2003 and served as House Majority Leader from 1995-2003. Armey received degrees from Jamestown College, the University of North Dakota and the University of Oklahoma. He is Chairman of FreedomWorks and resides in Bartonville, TX with his wife Susan.

Plaintiff John J. Kraus**,** a resident of Plymouth Meeting, PA, near Philadelphia, had a long career as an aerospace and defense industry engineer, retiring in 2007 from the U.S. Naval Air Systems Command. He received his bachelor's degree from the Massachusetts Institute of Technology (MIT) and a master's degree in engineering from the Pennsylvania State University.

Plaintiff Lewis Randall is a private investor who has served on the board of directors of E*Trade since its initial round of external financing in 1982. He is a graduate of Harvard College and resides with his wife, Martha, in Freeland, a town on Whidbey Island near Seattle.

Plaintiff Norman Rogers was founder and CEO of Rabbit Semiconductor from 1980 until 2005, when he sold the company and retired. He received his BS from UC-Berkeley

and his MS from the University of Hawaii. He and his wife, Roberta, reside in Miami, Fla.

Legal counsel Kent Masterson Brown is an attorney in private practice in Washington, DC and Kentucky who specializes in health, Medicare, Medicaid, and administrative and constitutional law. He has testified before Congress and state legislatures and has authored numerous articles on health care law for both scholarly journals and the mainstream press.

Why Should You Care:

The plaintiffs believe the coercive rules deny individuals their civil liberties, violate their right to privacy, and deny them the right to make choices about their own health care.

In addition to the legal, due process, constitutional and discrimination issues raised by the Social Security Administration's actions, which should concern all Americans, the plaintiffs also believe the rules are self-defeating from a financial perspective. Why? Because if even a small percentage of Medicare-eligible retirees were to opt out of the program it could save taxpayers about $1.5 billion per year now and **$3.4** billion or more per year by 2017, relieving some of the financial pressure on the fiscally insolvent Medicare program.

According to the *2008 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and the Federal Supplementary Medical Insurance Trust Funds*, Medicare expenditures reached almost $432 billion in 2007, or approximately 3.2 percent of U.S. Gross Domestic Product (GDP). With the retirement of the Baby Boomers, the first of whom (those born in 1946) will become eligible for Medicare after 2010, these expenditures will increase significantly in coming decades.

Indeed, using intermediate economic and demographic assumptions, the Medicare Trustees estimated that the Federal Hospital Insurance Trust Fund will be **insolvent** by 2019.

If just 1 percent of current retirees chose not to participate in Medicare, Medicare expenditures would decrease by about $1.5 billion per year immediately and by approximately $3.4 billion per year by 2017. Program cost savings would continue to increase by greater amounts for several decades as the "Baby Boomers" retire.

For More Information, visit http://www.medicarelawsuit.org or contact:

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