Want to Pay for Something Medicare Doesn't Cover? Forget It.

Rule of Law

By Kent Masterson Brown

The year is 2015. Hillary Rodham Clinton is over the age of 65 and wants a medical service that Medicare doesn't cover. What does she do? Thanks to her husband's pension, she can afford to do pay a physician privately for the service she needs.

But wait a minute. She can't find a doctor willing to take her money. For this, Mrs. Clinton can thank Congress and her husband's administration, which in 1997 made it unlawful for a doctor to take a private payment from a Medicare-eligible patient if during the previous two years he has billed Medicare for any service rendered to a patient over the age of 65. It is a good thing Mrs. Clinton can afford the airline ticket to London. There, a doctor would be delighted to see her, because it is perfectly lawful in England for her to pay privately for medical services.

This limitation on the rights of seniors is a little-noticed amendment to the Medicare Act that was enacted in August as part of the balanced budget deal. The reality is that few or no physicians are going to be able to make ends meet if they can't accept Medicare patients for two years. This means that few or no physicians are going to limit their practices to non-Medicare patients, which in turn means that, for all practical purposes, it is now unlawful for a senior to contract privately for medical services. In other words, unlike the rest of us, seniors have no option but to receive only the services that their insurance carrier, Medicare, will recognize and pay for.

The focal point of the current controversy is a 1992 opinion by federal district Judge Nicholas Politan in the case of *Stewart v. Sullivan* in New Jersey. The Medicare beneficiaries in *Stewart*, whom I represented, wanted to pay personally for their physician to visit them more than once a month at their residences, some of which were nursing homes. (One visit a month was all that Medicare permitted.) Yet the federal Health Care Financing Administration, in bulletins issued through the insurance companies administering Medicare, repeatedly threatened physicians with stiff sanctions, including exclusion from the Medicare program altogether, if they entered into private arrangements with a Medicare beneficiary.

What statutory authority did HCFA then possess to make such threats? I could find nothing. In fact, the Medicare Act contemplated just such a situation in which a Medicare beneficiary might receive medical services and not file a claim. Under the Medicare Act, payment for medical services by the Medicare program—and the resulting physician obligations—were triggered only if a claim was filed. The Medicare beneficiaries in *Stewart* did not want to file claims with Medicare.

In *Stewart v. Sullivan*, HCFA argued that a claim must be filed each and every time a medical service was rendered by a physician for a Medicare beneficiary—even if the beneficiary wanted to pay for it himself and not file a claim. But HCFA could never point the court to any provision that said as much.

The result of the case was a clear victory for private contracting. Judge Politan found nothing in the Medicare Act that prohibited a Medicare beneficiary from personally paying a physician for a medical service. In addition, he found that HCFA had promulgated no "clearly articulated" policy prohibiting such activity. Consequently, he found that there was nothing for a court to decide; the plaintiffs went ahead and paid the doctor.

Since that decision HCFA has not promulgated any "clearly articulated" regulation or policy prohibiting private contracting. It knows it has absolutely no authority to do that. Yet it continues to threaten physicians with sanctions if they and their Medicare patients try to contract privately.

The Medicare Carriers Manual, a document written by HCFA, warns insurance companies that administer Medicare that some physicians and beneficiaries are trying to enter into agreements so that beneficiaries will not have to use their Medicare coverage for certain claims.

> *If you are over 65, you have just lost the right to pay privately for any medical service not covered by Medicare.*

"Congress enacted these requirements," the manual reads, "for the protection of all Medicare Part B beneficiaries and their application cannot be negotiated between a physician and his/her patient."

Why would a federal agency administering a program so close to bankruptcy threaten physicians when their Medicare patients seek to relieve the financial burden on the program by shouldering it themselves whenever they can? Right now, the population of Americans over 65 is the wealthiest, healthiest, most well-educated elderly population the world has ever known. From what do these people need protection?

HCFA is a classic example of a federal agency out of control. It doesn't care what the law says. It seeks only to protect its control over the provision of health care. It wants to control who renders it, how it is delivered and, most important, what service is or is not delivered. And it wants to expand that control. Private contracting is HCFA's greatest threat. Unfortunately, Congress—which is supposed to oversee the agencies it creates—doesn't seem to care. Rather, it lets HCFA tell it what its own statutes mean. And that is the problem now.

Convinced by HCFA that private contracting is not permitted, Congress eliminated private contracting as an option for any Medicare beneficiary. Instead of overseeing HCFA, Congress just succumbed to it. Mr. Clinton threatened to veto the entire budget agreement if Congress passed the act without the Medicare amendment intact.

And so, if you are over 65, you have just lost the right to pay privately for any medical service not covered by your government insurance. In this regard, age is the only difference between you and any other patient. Those under 65 with private insurance can still go to a physician who is not in their plan and pay that physician's fee for the medical service. Similarly, younger patients can obtain a service not covered by their plan simply by paying privately.

Hoping to undo what was done in August, Sen. John Kyl (R., Ariz.) and Rep. Bill Archer (R., Texas) have introduced bills entitled the Medicare Beneficiary Freedom to Contract Act. The legislation would clearly state the right of Americans over 65 to contract privately with the physician of their choice. Seniors—all of us, for that matter—can only hope that that the legislation passes and survives an almost-certain presidential veto. Today, Americans over 65 have less freedom than do patients in Britain's notoriously inadequate National Health Service.

Mr. Brown practices law in Kentucky and Washington, D.C. He was counsel for the plaintiffs in the case that forced the White House to open the meetings and the records of Hillary Clinton's Health Care Task Force.

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nes K. Glassman

Medicare Without Choice

The courts long ago ruled that a pregnant 14-year-old girl has the constitutional right to medical services for an abortion. Then, why shouldn't a 75-year-old woman have the right to choose her own doctors—and pay them—to treat her heart condition?

That's the question being raised in a suit that I've learned will be filed in federal court Dec. 30. It's an attempt to overturn a new law that prohibits nearly all doctors from taking money from elderly patients for the vast majority of treatments.

The law, called Section 4507, was embedded—like a lot of other mischief that Congress didn't want you to know about—in this year's Balanced Budget Act.

ays that a doctor who takes reim- nent from the government for ating Medicare patients can't take money from anyone else on Medicare—even if that person wants to pay.

only doctors who will be allowed money from seniors (except for pecial treatments that aren't covered by Medicare, such as cosmetic surgery) are those who agree to "opt out" of the program for two years. For financial easons, very few doctors—an estimated percent—can do that.

As a result, nearly all seniors face an outrageous denial of their liberty and heir privacy. As the elderly get more and more frustrated with a Medicare system that faces serious constraints, it's only natural that some would want to use their own savings for the best possible use: keeping them healthy. But, thanks to this new law, they're handcuffed.

The suit tries to free them. What's ironic is that even though it's being filed by conservatives, it uses many of the same arguments used by liberals in abortion cases.

The suit is timely because the Health Care Financing Administration (HCFA) has just sent out thousands of "Dear Doctor" letters, setting out the new Medicare rules and asking physicians to decide whether to sign an affidavit to opt out.

Where did these oppressive rules come from? For years, HCFA, one of the most powerful federal bureaucracies, has been threatening doctors whose patients offered to pay them. But in a 1992 case, *Stewart v. Sullivan*, a court ruled that HCFA couldn't stop a group of nursing-home patients from paying physicians for extra visits not covered by Medicare.

Still, the threats continued, so Sen. John Kyl (R-Ariz.) introduced legislation that explicitly gave seniors the right to pay their doctors. (The issue, in Washington jargon, became known as "private contracting.") But Kyl's effort failed when Republicans, fearing a veto of the budget bill, agreed to a "compromise"—Section 4507. In fact, they made matters *worse* by, for the first time, codifying into law the prohibition on private contracting.

Kyl has filed another bill, with 46 cosponsors, but the lawsuit takes a route that may prove more effective. "We're saying that people have a liberty interest over their life, self, and health," says Kent Masterson Brown, the Kentucky lawyer who is filing the suit on behalf of four Medicare patients and the United Seniors Association.

"It's the same liberty that Justice [William O.] Douglas talks about in *Doe v. Bolton*," the companion case to *Roe v. Wade* in the famous 1973 abortion decision. Douglas said that the 9th and 14th amendments protect liberties that are not spelled out in the U.S. Constitution, including "the freedom to care for one's health and person." Also, he said, "The right of privacy has no more conspicuous place than in the physician-patient relationship."

So this interpretation of the Bill of Rights, which is supported by legions of liberals, should protect the freedom of seniors who want to care for their own health by paying their doctors for reasons they deem necessary: additional service, extra tests, more timely attention, secrecy from federal snoopers.

Brown is not demanding that Medicare cover every treatment his plaintiffs now must pay for, including, he says, screening for prostate cancer and diabetes if they have no symptoms. "We're saying that Medicare can get as restrictive as it wants. In fact, this is a way for Medicare to save itself from bankruptcy."

Brown will be formidable. He won *Stewart v. Sullivan*, and just last week, in a scathing decision on a suit he filed in 1993, a judge ruled that Hillary Rodham Clinton had no authority to hold closed meetings of her health care task force and ordered the government to pay $286,000.

BY JOHN OVERMYER

The big question in the private contracting issue is why politicians want to deny seniors the freedom to pick and pay. The answer goes back to the first lady's health plan: The true goal is a leveling, collectivized system, one, it would seem, most Americans reject. (Even the British are allowed to pay for their own doctors.)

The restrictions "assume that people shouldn't make their own choices because there would be unequal results," says health policy analyst John Hoff, a critic of Section 4507. Indeed, Rep. Pete Stark, a top Democratic health maven, has blasted private contracting because it would encourage "boutique health care centers for the privileged few" and allow them to "avoid the inconveniences" of Medicare.

But forget the class-warfare rhetoric. Shouldn't all Americans have a right to the health care they choose, as long as they pay for it? Of course. Just don't expect a cowardly Congress to stand up for that right. Instead, we'll have to rely on the courts.

The writer is a fellow at the American Enterprise Institute.

REVIEW & OUTLOOK

Welcome to Section 4507

Confusion will reign today in doctors' offices throughout the land, with the implementation of Section 4507 of the Medicare law, forbidding doctors from accepting payment from anyone over 65 without permission from Washington. Some seniors, championed by highly successful attorney Kent Masterson Brown, have already filed suit to overturn the new law.

The right of seniors to buy the medical service they want has never been a settled issue. In Mr. Brown's 1992 case *Stewart v. Sullivan*, federal Judge Nicholas Politan found there was no law or even a clearly articulated policy against private contracts between seniors and doctors. But that didn't prevent both the Bush and Clinton Administrations from using coercion to discourage it. The Health Care Financing Administration threatened fines of up to $2,000 a claim against doctors who didn't submit bills for all their elderly patients to Medicare.

The regulations worked, persuading the medial profession it was against the law to take money from patients over 65. For example, after Mary Ann Howard of Prescott, Ariz., turned 65 last year, she contacted a Prescott physician for specialized diabetic care, but was told he wasn't taking any new Medicare patients. She offered to pay cash, but was told the doctor would be charged with Medicare fraud if he accepted any money outside of federal Medicare reimbursement.

Mrs. Howard was forced for a time to travel more than two hours each way to Phoenix to get treatment. Her husband, Bill, wrote an outraged letter to GOP Senator Jon Kyl. "If a person is willing to pay their own bill, why in the world, how in the world could they accuse that doctor of Medicare fraud?" Senator Kyl agreed, sponsored legislation explicitly allowing Medicare patients to contract with doctors at rates above the program's mandated fees and won overwhelming Senate approval.

Enter the Clinton Administration, which threatened to veto the entire balanced budget deal if the Kyl language was included. The Administration professed to fear a "two-tiered" health care system; in fact, it saw that giving patients a right to choose threatened the piece-by-piece effort to revive the "Clinton-care" plan so resoundingly defeated during the President's first term. But to preserve their budget deal, Republicans caved in and agreed to compromise language in Section 4507.

The section requires that any doctors who treat a senior citizen privately must file an affidavit swearing they will see no Medicare patients for two years. GOP Rep. Bill Thomas, chairman of the Ways and Means health subcommittee, argues that "we had to compromise on provisions like these in order to make progress in other areas." But in fact, the Congressional Budget office, noting that only 4% of physicians get by without any Medicare patients, expects that under the new law "direct contracting will almost never be used."

Under the law just taking effect, indeed, America's seniors will be coerced into joining Part B of Medicare—a supposedly optional plan that pays for doctor visits. The new rules will effectively prevent beneficiaries from contracting with the doctors to purchase any of those 7,000 procedures for which Part B establishes fixed rates. If you feel you need a test—a CAT brain scan, for example—you will not be able to have it at your own expense, only if you have symptoms that qualify for Medicare reimbursement.

"On the day before your 65th birthday you can choose your own health care, on your 65th birthday and after, Section '507 means the government chooses it for you," says GOP Senate aide Jade West. Senator Kyl is mortified by how Congress mangled his idea. Along with House Ways and Means Chairman Bill Archer he has a repeal bill that uses the same language that allows British patients full freedom to pay for private treatment from any National Health Service doctor. The bill has 47 co-sponsors in the Senate and 170 in the House.

Mr. Brown, who also tore open the secrecy surrounding Hillary Clinton's health care task force with the 1993 suit in which Judge Royce Lamberth ordered the government to pay $286,000 for misconduct, is not waiting for legislative relief. On behalf of four Medicare patients, he filed suit last week asserting that the Constitution, the 9th and 14th Amendments for example, gives citizens "a liberty interest in their life, self and health," and that the federal government has no right to prevent seniors from using their own money to pay for services they and their doctors consider prudent and necessary, whether that be additional service, extra tests, more timely attention or privacy protections.

Section 4507 makes clear that seniors are being locked into a government-run system of one price and one choice for anything Medicare covers, even if they want to use their own money to buy privacy, convenience or more expert care. This is what the nation decided against in the battle over Clinton Care, and the current confusion serves a purpose in pointing to the need for judicial or legislative clarification.

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KENT BROWN

First, do no harm on Medicare

The U.S. Constitution resembles the Hippocratic Oath in one important way: It provides that the first priority of government is to "do no harm."

To secure "the Blessings of Liberty to ourselves and our Posterity" (using the language of the Declaration of Independence), the Constitution guarantees, among other things, the right of the people to be secure in their persons, the right of the people to physically protect themselves through the force of arms, and the right of the people not to be denied "life, liberty, or property without due process of law."

Apparently, however, what the founders giveth, today's lawmakers believe they can take away. That is the thrust of a federal lawsuit we filed on Tuesday challenging, on constitutional grounds, a bit of statutory legerdemain contained in the 1997 Balanced Budget Act.

The provision, scheduled to take effect yesterday, makes it all but impossible for one single group of Americans — Medicare beneficiaries — to act in a prudent manner to protect their own lives and well-being.

Known as Section 4507, this provision, which we have asked the court to enjoin as a violation of the "liberty interests" of the plaintiffs, effectively prohibits people enrolled in Medicare from paying out of their own pockets for medical services and diagnostic tests —such as a common screening test for prostate cancer — that are not approved by the Medicare bureaucracy.

The issue is not the cost of such services, because nobody is asking the government to pay for any of them. The issue is whether the federal bureaucracy has the right to prevent senior citizens from using their own money to pay for medical services they and their physicians consider prudent and necessary.

Prior to the passage of the Balanced Budget Act, senior citizens had the legal right — as they certainly should — to enter into private contractual relationships with physicians or other health-care "providers" for whatever services they wished, provided that they did not bill Medicare for the services — though the Health Care Financing Administration (which administers program) has repeatedly threatened physicians who entered into such private contracts with sanctions, which are spelled out in HCFA's "Medicare Carriers Manual." A 1992 court case, Stewart vs. Sullivan, upheld this right of patients and doctors to contract for services outside of Medicare.

Under Section 4507, however, this right has been stripped away for all practical purposes, though it still exists on paper. This sleight-of-hand is accomplished by requiring any doctor or other health-care practitioner who wishes to enter into such a private contract with even a single patient enrolled in Medicare to sign and submit an affidavit to the government agreeing not to see any Medicare patients or bill the program for anything for two years. Since more than 96 percent of all physicians treat Medicare patients, very few of them would be willing to give up this important part of their practices in order to see the one or two patients who want to pay out-of-pocket for some service.

While a legislative remedy is being sought in both the House and Senate, with 46 Senate and 169 House co-sponsors, what might be in the future is small consolation to senior citizens who want medical help now and can't wait for the wheels of government to explicitly sanction private contracts several months or several years from now.

Like all other American citizens, seniors have the absolute right to act in their own best interests, and the federal bureaucracy has no right to prevent them from doing so when it in no way interferes with the conduct of government or violates or impinges on the rights of any other American. That is the basis of our lawsuit: United Seniors Association vs. Shalala.

On behalf of Toni Parsons and Peggy Sanborn of Florida, and Ray and Margaret Perry of Washington State, the United Seniors Association will ask the federal district court for the District of Columbia to enjoin the Department of Health and Human Services from enforcing Section 4507 or in any way preventing the plaintiffs from paying for health-care services, as needed, from their own pockets.

Congress and the White House in 1997 crossed that line between sound policy-making and harmful meddling in the constitutionally protected private affairs of the American people. The courts must now act to see that no harm befalls America's seniors as a result of this unwise — and unconstitutional — legislative decision.

Kent Masterson Brown, who practices law in Kentucky and Washington, D.C., is representing the United Seniors Association and several USA members in their lawsuit challenging the constitutionality of Medicare "private contracting" restrictions. He was counsel for the plaintiffs in the case that forced the White House to open the meetings and records of the administration's health care task force.

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REVIEW & OUTLOOK

A Victory for Private Medicine

For two decades the federal government has tried to restrict the right of Medicare patients to make private contracts for medical services. This month, in an important but largely unreported decision, the U.S. Court of Appeals for the District of Columbia sent the federal health-care bureaucrats an unambiguous message: Lay off!

The court got involved after the GOP-controlled Congress tried in 1997 to stop the threatening letters the Health Care Finance Administration, Medicare's overseer agency, had been sending doctors. Arizona Senator Jon Kyl said he wanted to make it explicit that Medicare patients had the right to contract privately with a doctor of their choice for medical services "for which no claim for payment is submitted" to Medicare.

He told the story of a rural constituent who had turned 65 and was told by her longtime doctor that he wasn't taking new Medicare patients and that if he took cash from her, he could be charged with Medicare fraud. Other patients told Senator Kyl they wanted private contracts for privacy reasons or because they wanted additional services or tests not covered by Medicare.

After the Clinton Administration threatened a veto if any such provision survived, a poison pill was dropped into the Kyl bill mandating that any doctor who treated a senior citizen privately had to file an affidavit, swearing that the doctor wouldn't see *any* Medicare patients for two years. This meant that what came to be known as Section 4507 effectively restricted the right of anyone over 65 in the U.S. to contract privately for a doctor's services.

Indeed the Administration that year also fought off attempts by the Republicans to restore balanced billing for physicians. This practice allowed doctors to charge willing patients above Medicare's reimbursement rate; balanced billing expanded choices for these patients, reintroduced market incentives and helped doctors provide uncompensated care to the poor. But all this is forbidden under the Clinton Administration's medical ethic.

A bill to repeal the 4507 prohibitions on private contracting attracted more than 200 Congressional cosponsors, but never got anywhere. Then Kent Masterson Brown, the attorney who won a famous case opening the records of Hillary Clinton's health-care task force, filed suit on behalf of four Medicare patients, asserting that they were being prevented from spending their own money to maintain good health.

Immediately, the Clinton Administration began to backpedal. Health and Human Services Secretary Donna Shalala told the court that the restrictions applied only to persons paying privately for services *covered* by Medicare and only to deter price-gougers. She suddenly suggested that doctors could send Washington an Advance Beneficiary Notice if they believed Medicare would refuse any reimbursement. In such cases, the patient would and could agree to pay privately.

After reviewing many such "clarifications" by the government, the D.C. Court of Appeals found that there is no current prohibition against contracting privately. But it agreed with Mr. Brown's plaintiffs that their fears were "not unjustified," because the "meaning of section 4507 is hardly plain on its face." The court made clear that private contracts would be valid for patients willing to pay for procedures deemed by the government to be "unreasonable." They would also be permissible for non-reimbursed services (such as plastic surgery), or for what the government regarded as experimental procedures (heart-rate monitors worn on belts).

In a perfect world, patients would also be able to contract privately for those covered Medicare services. But Mr. Brown says the court has made clear that "the power of contract is back where it should be, in the hands of Medicare patients." He says the decision has already spurred manufacturers of new medical devices to start marketing directly to patients who might want to purchase them before they are approved by Medicare.

All this adds up to a largely happy ending. Bear in mind, though, that the Clinton Administration now has proposed that prescription-drug reimbursement be brought under HCFA's purview. It promises not to threaten the industry with price setting for its drugs.

But this Administration fought Senator Kyl's efforts to let people voluntary opt out of Medicare, it fought the reintroduction of balanced billing and it fought both medical savings accounts and the Breaux Commission's recommendations for greater choice in health plans. So long as this socializing mind-set prevails, the American medical system's inevitable inefficiencies will continue to frustrate a public that has become ever more sophisticated about the leading edge of medical care. For certain, the pressure to contract privately for medical care will grow.

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