

## States Sue Federal Government over Medicare Clawback Payments

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The Attorneys General of Kentucky, Maine, Missouri, New Jersey and Texas in early March 2006 joined in a lawsuit<sup>1</sup> charging that the federal government has overstepped its boundaries and violated the U.S. Constitution with the so-called “clawback” payment required under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”).<sup>2</sup> The MMA transferred responsibility for prescription drugs for individuals eligible for both Medicaid and Medicare (commonly known as the “dual eligibles”) from state Medicaid programs to the new Medicare Part D prescription drug program effective January 1, 2006.<sup>3</sup> For states, prescription drug coverage for the dual eligibles had been a significant Medicaid cost, and shifting the burden to the federal government initially seemed to offer the promise of relief for struggling state Medicaid budgets. For example, after passage of the MMA, the Centers for Medicare & Medicaid Services (“CMS”) estimated that that federal assistance would save Texas about \$1.7 billion in prescription drug costs over an eight-year period.<sup>4</sup> The MMA, however, linked the shift with a requirement that states pay the federal government a decreasing percentage (from 90% in 2006 down to 75% after 2014) of the costs for such coverage that the states would otherwise have assumed.<sup>5</sup>

The required state payment – widely known as the “clawback” – is calculated roughly as a state’s share of per capita Medicaid prescription drug costs for dual eligibles during 2003, multiplied by the number of dual eligibles enrolled in Medicare Part D plans for the specified time period, multiplied by the applicable percentage. If a state fails to make the required clawback payment to the federal government, the federal government has warned that it will offset the unpaid amount against the federal Medicaid payments otherwise payable by the federal government to the state.<sup>6</sup>

As the actual amount of the clawback began to be realized by the states, many states have argued against the clawback. Texas Governor Rick Perry led the charge beginning in the summer of 2005 when he used his line-item veto power to reject the appropriation for the

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<sup>1</sup> Texas Attorney General Gregg Abbott, *News Release: Attorney General Abbott Files United States Supreme Court Complaint over Medicare Drug Program Payments*, Mar. 3, 2006, available at <http://www.oag.state.tx.us/oagnews/release.php?id=1483> (last visited May 8, 2006).

<sup>2</sup> Pub. L. No. 108-173, 117 Stat. 2006 (2003).

<sup>3</sup> 42 U.S.C. § 1396u-5(d) (2006). See also Henry J. Kaiser Fam. Found., *Medicare Part D: Issues for Dual Eligibles on the Eve of Implementation* (Nov. 8, 2005), available at <http://www.kff.org/medicare/upload/Medicare-Part-D-Issues-for-Dual-Eligibles-on-the-Eve-of-Implementation-Issue-Brief.pdf> (last visited May 8, 2006).

<sup>4</sup> Centers for Medicare & Medicaid Services (“CMS”), *What MMA Means for Texas* (Oct. 2004).

<sup>5</sup> 42 U.S.C. § 1396u-5(c) (2006).

<sup>6</sup> *Id.* § 1396u-5(c)(1)(C).

clawback.<sup>7</sup> In announcing the veto, Governor Perry expressed concern about CMS' "interpretation of the state payment formula (i.e., clawback) and believe it penalizes states like Texas that have taken innovative steps to provide Medicaid drug benefits, control drug cost increases, and manage overall program costs trends." By 2006, Texas estimated that, instead of saving money by transferring the dual eligibles to Part D, the clawback would cause Texas to suffer net losses of approximately \$100 million from 2006 through 2009.

In their motion for leave to file suit against the Secretary of the U.S. Department of Health and Human Services, which oversees the Medicaid and Medicare programs through CMS, Texas and the other states raised three key questions: (1) whether the clawback constitutes "an unconstitutional tax against the States in their sovereign capacities," (2) whether the clawback "impermissibly commandeers state legislatures to fund the federal Medicare program," and (3) whether the clawback "violates the Constitution's Guarantee Clause by improperly usurping control of essential functions of state government."<sup>8</sup> Announcing the lawsuit on his state's behalf, Kentucky Attorney General Greg Stumbo said, "The Clawback violates our system of dual sovereignty and is an unconstitutional tax on the Commonwealth of Kentucky."<sup>9</sup> Texas Attorney General Greg Abbott echoed similar sentiments in his announcement: "Texas and other states have been forced to relinquish control over how we plan and budget taxpayer dollars to support Medicare's federal drug benefit program for seniors. The federal government has placed what amounts to a direct tax upon Texas and other states in violation of the U.S. Constitution, which prohibits Washington from interfering with essential functions of state government."<sup>10</sup>

Beyond the constitutional attack waged by the five lead states in the March complaint, many states have begun to argue that they can provide prescription drug coverage to the dual eligibles more efficiently through state Medicaid programs and at a lower cost than what they are being charged through the clawback.<sup>11</sup> Not surprisingly then, in addition to the five lead states participating directly in the lawsuit, 10 other states – Arizona, Alaska,

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<sup>7</sup> Texas Governor Rick Perry, *Proclamation* (June 18, 2005), available at <http://www.governor.state.tx.us/divisions/press/proclamations/proclamation.2005-06-18> (last visited May 8, 2006).

<sup>8</sup> States of Texas, Kentucky, Maine, Missouri, and New Jersey v. Michael O. Leavitt, Secretary, U.S. Dept. of Health and Human Services, Mot. for Leave to File Bill of Compl., Supp. Brief, and Bill of Compl., Mar. 3, 2006, available at [http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare\\_complaint.pdf](http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare_complaint.pdf) (last visited May 8, 2006).

<sup>9</sup> Kentucky Attorney General Greg Stumbo, *News Release: Attorney General Greg Stumbo Announces Medicare Part D Clawback Suit Filed in U.S. Supreme Court*, Mar. 3, 2006, available at [http://ag.ky.gov/NR/rdonlyres/528E47AF-1FBB-4FA2-8F30-E116C06F5320/0/clawback\\_suit.htm](http://ag.ky.gov/NR/rdonlyres/528E47AF-1FBB-4FA2-8F30-E116C06F5320/0/clawback_suit.htm) (last visited May 8, 2006).

<sup>10</sup> *Attorney General Abbott Files United States Supreme Court Complaint over Medicare Drug Program Payments*, *supra* note 1.

<sup>11</sup> See, e.g., Robert Pear, *States Protest Contributions to Drug Plan*, N.Y. TIMES, Oct. 18, 2005, at A24, and Robert Pear, *Cost-Cutting Medicare Law Is a Money Loser for States*, N.Y. TIMES, Mar. 25, 2005, at A12.

Connecticut, Kansas, Mississippi, New Hampshire, Ohio, Oklahoma, South Carolina and Vermont – filed a friend-of-the-court brief supporting the lead states.<sup>12</sup>

In the ongoing chorus of criticism and complaints about the new Medicare Part D prescription drug program,<sup>13</sup> the clawback has drawn relatively little news attention. Most ordinary taxpayers almost undoubtedly have no idea how Medicaid prescription drug coverage for dual eligibles was funded before the advent of Medicare Part D, nor do they understand the details of the transfer of responsibility to the federal government. The actual calculation of the clawback on a state-by-state basis causes even knowledgeable individuals to scratch their heads in confusion. Against this background, the significance of the states' lawsuit might easily be missed: If the clawback is ruled unconstitutional, a significant financial underpinning of the Medicare Part D benefit will be undone. For individual states, eliminating the clawback – but leaving the dual eligibles with the federal government – can only be positive in times when state Medicaid budgets are always struggling. For the nation as a whole, however, the financial stability of Medicare Part D itself remains uncertain. If states succeed in removing their obligation to pay the clawback, Medicare Part D's financial woes will only grow.

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<sup>12</sup> *Attorney General Abbott Files United States Supreme Court Complaint over Medicare Drug Program Payments*, *supra* note 1. A copy of the brief is available at [http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare\\_sweeney.pdf](http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare_sweeney.pdf) (last visited May 8, 2006).

<sup>13</sup> *See, e.g.*, Tom Baxter & Bob Kemper, *Medicare drug plan draws yelps*, ATLANTA JOURNAL-CONSTITUTION, Jan. 30, 2006, at 1A; Robert Pear, *Rolls Growing For Drug Plan As Problems Continue*, N.Y. TIMES, Jan. 18, 2006, at A17.