

PRESS RELEASE

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JUDGE CLEARS WAY TO VOID RULES MANDATING ENROLLMENT IN MEDICARE, PART A, AS A CONDITION OF RECEIVING SOCIAL SECURITY RETIREMENT BENEFITS

Motion to Dismiss Denied; Summary Judgment Pending

WASHINGTON, DC—In an opinion handed down on September 29, Judge Rosemary Collyer of the U.S. District Court in Washington, DC denied a Motion to Dismiss filed by Kathleen Sebelius, U.S. Secretary of Health and Human Services, and Michael Astrue, Commissioner of the Social Security Administration, clearing the way for the Court to void five rules created by the Clinton Administration that made receipt of an individual's Social Security retirement benefits contingent upon enrollment in Medicare, Part A.

Originally filed in October, 2008 as *Brian Hall et al v. Michael Leavitt et al*, the lawsuit, now known as *Hall v. Sebelius*, involves five plaintiffs: Brian Hall of Virginia, Norman Rogers of Florida, Lew Randall of Washington, John Kraus of Pennsylvania and former U.S. House of Representatives Majority Leader Richard Armey of Texas.

The lawsuit challenges the validity of five rules in the Social Security Program Operations Manual, known as the POMS, that require enrollment in Medicare, Part A, as a condition of receiving Social Security retirement benefits and that mandate the surrender of all Social Security retirement benefits received if an individual seeks to disenroll from Medicare, Part A.

The plaintiffs claim that the POMS violate the Social Security statute enacted by Congress in that the statute makes the two federal programs completely voluntary and no federal agency has the authority -- statutorily or constitutionally -- to "legislate" requirements interfering with an individual's entitlement to Social Security retirement benefits not enacted by Congress.

None of the plaintiffs want to enroll, or remain enrolled, in Medicare as they believe it is an inferior system that restricts seniors' access to health care because of its administration and looming bankruptcy. Three of the plaintiffs, Hall, Kraus and Armey, had superior private health care benefits, including health savings accounts, under the Federal Employee Health Benefits Program, which they had been denied due to the enforcement of the POMS. The other two plaintiffs had private health insurance and health savings arrangements that would have been disrupted by the POMS had they applied for their Social Security retirement benefits.

"The government attempted to get the case dismissed, arguing that the POMS were mere expressions of the statutes and regulations and that none of the plaintiffs had exhausted administrative remedies available to them to challenge the POMS before they filed suit in

Federal Court,” said Kent Masterson Brown, lead attorney for the plaintiffs in *Hall v. Sebelius*. “Judge Collyer denied their Motion.”

Rejecting the Government’s contention that the POMS were merely expressions of the statute and regulations creating and governing Social Security and Medicare, the Court ruled that “neither the statute nor the regulation specifies that Plaintiffs must withdraw from [Social Security] and repay retirement benefits in order to withdraw from Medicare, Part A.” “In contrast,” the Court asserted, “the POMS explicitly states that condition.”

Thus, according to the Court, “the POMS determines Plaintiffs’ rights or obligations in this instance and is an action from which legal consequences flow.” Concluding, the Court asserted: “the POMS is subject to judicial review.”

“With respect to the government’s argument that plaintiffs’ case must be dismissed because they failed to exhaust administrative remedies, the Court also asserted that exhaustion must be excused in this case; it would be futile,” said Masterson Brown.

Specifically, plaintiff Hall attempted to exhaust administrative remedies, but was informed by the Social Security general counsel that there was no way he could get out of Medicare, Part A, and still keep his Social Security. Plaintiff Kraus, through his Congresswoman, asked for an administrative law judge after he was “forced” to enroll in Medicare, but was stalled for more than three years.

“Importantly, the position taken by the government in this case clearly revealed its intent not to change the POMS,” said Masterson Brown.

The Court held, however, that “Where an agency has demonstrated an unwillingness to reconsider its position and there is certainty of an adverse decision – and where the challenge is to the agency’s policy and practice or systematic failure to comply with Federal law – exhaustion will be excused.”

Because the plaintiffs in this case challenge a policy “not found in the Social Security Act or federal regulations as Defendants allege, but was apparently created by the Social Security Administration and expressed in the POMS” - and exhaustion would be “futile” - the Court denied the Government’s motion.

“The Court further directed the government to respond within thirty days to the plaintiffs’ previously filed Motion for Summary Judgment asking the Court to void the POMS and permanently enjoin the government’s enforcement of the POMS,” said Masterson Brown.

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