

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DOUGLAS B. STALLEY,

Plaintiff,

vs.

GENESIS HEALTHCARE CORP., et al.,

Defendants.

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CIVIL NO. 06-2492

RUFE, J.

March 12, 2007

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants’ Motions to Dismiss, filed under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiff Douglas Stalley has brought this action on behalf of the United States under the Medicare as Secondary Payer Statute (“MSP”),¹ seeking to recover money allegedly owed to the Medicare Trust Fund by the Defendants. Defendants respond that Stalley does not have Article III standing to sue in this Court, or, in the alternative, that Stalley has not stated a valid claim under the MSP. The Motions are now ripe for disposition.

BACKGROUND

A. Medicare as Secondary Payer Statute

Medicare is a U.S. government-sponsored entitlement program that provides medical-insurance coverage for the elderly, the disabled, and for those with end-stage renal

¹ 42 U.S.C. § 1395y(b) (2000).

disease.² Many people covered by Medicare, however, are also covered under other insurance policies. In 1980, Congress passed the MSP as a cost-cutting measure, to prevent Medicare from paying claims for which other insurance was already responsible, thus making Medicare the “secondary” payer if a “primary plan” is also responsible.³

In general, under the MSP, Medicare will not pay for any item or service for which “payment has been made, or can reasonably be expected to be made” by a primary plan.⁴ But even if a primary plan is responsible for covering an item or service, Medicare may still cover the item conditionally “if a primary plan . . . has not made or cannot reasonably be expected to make payment with respect to such item or service promptly.”⁵ In such cases, the primary plan has a duty to reimburse Medicare for such conditional payments.⁶

In order for Medicare to recover its conditional payments, Congress included two remedial avenues. First, “the United States may bring an action against any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service . . . under a primary plan.”⁷ Alternatively, a private party may sue, who then is liable to the

² 42 U.S.C. § 1395c (2000).

³ See Health Ins. Ass’n of Am., Inc. v. Shalala, 23 F.3d 412, 413 (D.C. Cir. 1994).

⁴ 42 U.S.C. § 1395y(b)(2) (2000). The MSP defines “primary plan” as “a group health plan or large group health plan, . . . a workmen’s compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance.” Id. § 1395y(b)(2)(A).

⁵ 42 U.S.C. § 1395y(b)(2)(B)(i) (2000).

⁶ Id. § 1395y(b)(2)(B)(ii).

⁷ Id. § 1395y(b)(2)(B)(iii).

government in subrogation.⁸

B. Stalley's Complaint

Stalley brings this action under the MSP's private cause of action against several health-care companies, seeking recovery on behalf of the United States. Stalley is a resident of Tampa, Florida,⁹ suing the Defendants,¹⁰ who allegedly "owned, operated, and/or managed Medicare-participating nursing homes in the Commonwealth of Pennsylvania, as well as other states."¹¹ Stalley alleges that Defendants "caused harm to Medicare recipients who were patients in Genesis' nursing homes and assisted living centers."¹² He further alleges that "Genesis provided medical services, treatment and medication to such Medicare recipients . . . and thereafter received reimbursement from Medicare for treating [them]." Because Medicare made these payments conditionally, under the MSP, Stalley asserts that "Defendants had the duty . . . to reimburse Medicare for such expenditures as primary payers under the MSP."¹³ Stalley alleges

⁸ See 42 U.S.C. § 1395y(b)(3)(A) (2000) (private cause of action); 42 U.S.C. § 1395y(b)(2)(B)(iv) ("The United States shall be subrogated . . . to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.").

⁹ Compl. at 1.

¹⁰ The four Defendants are Genesis Healthcare Corporation, Genesis Health Ventures, Inc., Genesis Healthcare Holding Company I, Inc., and Omnicare, Inc. Compl. ¶¶ 4–5. The Complaint alleges that the three Genesis entities owned and operated the nursing homes at issue, and that Omnicare later purchased one of the Genesis entities, rendering it liable as a successor-in-interest. Because all four Defendants have an identity of interests, the Court will refer to them collectively as "Defendants."

¹¹ Compl. ¶ 4.

¹² Id. ¶ 8.

¹³ Id. ¶ 9.

that “[a]lthough Medicare advanced millions of dollars in payments, the Defendants did not reimburse Medicare as required under the MSP and did not inform or reimburse Medicare for the costs Medicare incurred as a result of Genesis’ conduct.”¹⁴

Defendants now move to dismiss the case under Rule 12(b). Defendants first argue that because Stalley has not alleged an injury to himself, he does not have Article III standing. Defendants’ second argument is that recovery under the MSP is available only after a Medicare beneficiary has already obtained a favorable settlement or judgment against a primary plan, and that therefore Stalley has not stated a claim upon which relief can be granted. The Court first turns to the issue of Stalley’s standing.

DISCUSSION

A. Standard of Review

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the Court “review[s] only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court.”¹⁵ The Defendants here mount their jurisdictional challenge based on standing. Indeed, “[a]bsent Article III standing, a federal court does not have subject-matter jurisdiction to address a plaintiff’s claims, and they must be dismissed.”¹⁶

Although “[s]tanding has constitutional and prudential components, both of

¹⁴ Id. ¶ 18.

¹⁵ Licata v. U.S. Postal Serv., 33 F.3d 259, 260 (3d Cir. 1994).

¹⁶ Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006).

which must be satisfied before a litigant may seek redress in the federal courts,”¹⁷ “satisfying the Article III ‘case or controversy’ requirement is the ‘irreducible constitutional minimum’ of standing.”¹⁸ The elements of Article III constitutional standing are as follows:

(1) the plaintiff must have suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁹

The Court now turns to Stalley’s Complaint, analyzing whether the allegations satisfy this three-part test.

B. Constitutional Article III Standing

As stated above, the plaintiff must allege “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Moreover, because “[federal] judicial power exists only to redress or otherwise to protect against injury *to the complaining party*, . . . [federal jurisdiction] can be invoked only when the plaintiff *himself* has suffered some threatened or actual injury resulting from the putatively illegal action.”²⁰

¹⁷ Id.

¹⁸ Trump Hotels & Casino Resorts v. Mirage Resorts, 140 F.3d 478, 484 (3d Cir. 1998) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

¹⁹ Lujan, 504 U.S. at 560–61.

²⁰ Newark Branch, NAACP v. Harrison, 907 F.2d 1408, 1412 (3d Cir. 1990) (internal quotation omitted) (emphasis supplied).

In his Complaint, however, Stalley has not alleged any injury to himself—only to unspecified “injured Medicare recipients” in Defendants’ facilities,²¹ and to the Medicare Trust Fund itself, i.e., to the United States.²² Therefore, it appears that Stalley has failed to satisfy the *sine qua non* of constitutional standing—an allegation that he himself has been injured.

Stalley argues, however, that he is suing as a *qui tam* plaintiff, on behalf of the United States, and that therefore by alleging injury to the United States, and by suing as a *qui tam* relator on behalf of the United States, he has Article III standing. Stalley points to the Supreme Court’s decision in Vermont Agency of Natural Resources v. United States ex rel. Stevens²³ for support. In that case, the Court decided whether a *qui tam* plaintiff, suing under the False Claims Act (“FCA”) to recover public funds on behalf of the government, satisfied the Article III injury-in-fact requirement. The Court held that the FCA’s right of action, which states, “[a] person may bring a civil action for a violation of [the FCA] for the person and for the United States Government,”²⁴ does allow a private plaintiff to sue for an injury to the United States. The Court held that this language effectuated a “partial assignment of the Government’s damages claim,”²⁵ and that therefore “the United States’ injury in fact suffices to confer standing on [the relator].”²⁶ Stalley now argues that Congress intended that this same partial assignment obtain under the

²¹ Compl. ¶ 8.

²² Id. ¶¶ 9–10.

²³ 529 U.S. 765 (2000).

²⁴ 31 U.S.C. § 3730(b)(1) (2000).

²⁵ Stevens, 529 U.S. at 773.

²⁶ Id. at 774.

MSP.

But unlike the FCA, the MSP's private right of action does not expressly state that a private plaintiff may sue on behalf of the United States. Rather, the MSP provides that "[t]here is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with [this statute]."²⁷ Thus, under the plain meaning of this provision, there is no express *qui tam* right of action.²⁸

Stalley also argues that because the purpose of the MSP is to protect the fiscal integrity of the Medicare Trust Fund, that Congress implied a *qui tam* right of action to allow private plaintiffs such as himself to serve as a "private attorney general" to enforce the will of Congress. There are strong indications, however, that Congress did not intend to imply such a right of action.

First, the legislative history reveals that in 1986, Congress amended both the FCA and the MSP within days of one another. On October 21, 1986, the Omnibus Budget Reconciliation Act of 1986 went into effect, which added to the MSP the private cause of action under which Stalley has sued.²⁹ Just days later, on October 27, 1986, the False Claims Amendments Act of 1986 was enacted, which added the express *qui tam* right of action to the

²⁷ 42 U.S.C. § 1395y(b)(3)(A) (2000).

²⁸ See Lowenschuss v. Resorts, Int'l, Inc., 181 F.3d 505, 515 (3d Cir. 1999) ("We begin every statutory interpretation by looking to the plain language of the statute.").

²⁹ See Pub. L. No. 99-509, § 9319, 100 Stat. 1874, 2011 (1986).

FCA.³⁰ Because Congress drafted an explicit *qui tam* right of action in the FCA, the Court finds it highly unlikely that just days before, the same Congress would have intended to include such a right of action in the MSP, and yet not stated so expressly.³¹

Second, unlike the MSP, the FCA contains critical procedural safeguards that allow the Executive Branch to retain control over suits brought on behalf of the United States. For example, an FCA *qui tam* plaintiff must serve on the government “[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses.”³² “The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.”³³ During that 60-day period, the government can elect to intervene and participate in the case, “in which case the action shall be conducted by the Government,”³⁴ or else “notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.”³⁵ When Congress vests a private plaintiff with authority to sue on behalf of the United States, such executive control is necessary to allow the President to perform his constitutional

³⁰ See Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3154 (1986).

³¹ See Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979) (finding that an implied cause of action for damages in the Securities Exchange Act of 1934 did not exist, because “when Congress wished to provide a private damages remedy [in other parts of the 1934 Act], it knew how to do so and did so expressly”).

³² 31 U.S.C. § 3730(b)(2) (2000).

³³ Id.

³⁴ Id. § 3730(b)(4)(A).

³⁵ Id. § 3730(b)(4)(B).

duty to “take Care that the Laws be faithfully executed.”³⁶ There is a strong suggestion that without such executive control, a *qui tam* right of action would violate the separation of powers.³⁷ Hence, because the MSP allows a private plaintiff to sue without any executive intervention,³⁸ allowing an uninjured *qui tam* plaintiff the right to sue would raise a legitimate doubt about whether such a right of action is constitutional.

As a final point, the Court notes that Stalley brings this action as part of what appears to be a coordinated nationwide effort to persuade the federal courts to find an implied *qui tam* right of action in the MSP. Thus far, of the more than 35 individual decisions issued by district judges in these cases, none accepts the theory that the MSP contains an implied *qui tam* right of action.³⁹ The Court has reviewed these decisions, and finds the cumulative weight of such a unanimous group of decisions to be yet further persuasive authority that its decision today is correct.

³⁶ U.S. Const. art. II, § 3.

³⁷ See, e.g., United States ex rel. Kelly v. The Boeing Co., 9 F.3d 743 (9th Cir. 1993) (relying on Morrison v. Olson, 487 U.S. 654 (1988), and upholding the *qui tam* provisions of the FCA against a Constitutional challenge based on separation of powers, finding that although Congress grants a measure of prosecutorial power to the *qui tam* plaintiff, that power is circumscribed by the executive’s ability to maintain control over the action).

³⁸ The MSP does not provide for executive intervention. If a private party sues under the MSP, the government’s only recourse is to sue the private party to vindicate its subrogation rights. See supra, note 8.

³⁹ See Mem. of Law in Support of Defendant Omnicare, Inc.’s Mot. to Dismiss [Doc. # 17], App. A (listing 33 district-court opinions issued in 2006, all of which dismiss similar *qui tam* suits brought under the MSP); see also Stalley v. Catholic Health East, 2007 U.S. Dist. LEXIS 6370 (E.D. Pa. Jan. 30, 2007) (Kelly, J.) (dismissing Stalley’s identical complaint against other health-care defendants on Article III-standing grounds).

C. Failure to State a Claim For Which Relief Can Be Granted

The settled rule in the Third Circuit, as in all the federal courts, is that “[d]ismissal for failure to state a claim is appropriate only if it ‘appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’”⁴⁰ The Court need not reach this inquiry, however. When a plaintiff lacks standing, the Court has no power to hear the case. Therefore the Court need not review any other alternative bases for dismissal.

CONCLUSION

Because the Court finds that the MSP does not contain a *qui tam* right of action, Stalley is not permitted to sue for injuries to the United States. Therefore, because Stalley has not alleged a personal injury to himself, he has no standing to sue in a federal court. Hence, the Court will dismiss his Complaint with prejudice. An appropriate Order follows.

⁴⁰ Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

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CIVIL NO. 06-2492

ORDER

AND NOW, this 12th day of March 2007, upon consideration of Defendants' Motions to Dismiss [Doc. ## 17, 18] it is hereby

ORDERED, that the Motions are **GRANTED**; and it is further

ORDERED, that Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

The Clerk shall **CLOSE** this case.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.