53,827

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	James B. Zagel	Sitting Judge if Other Than Assigned Judge	
Case Number	92 C 1982	Date	OCTOBER 20, 1992
Case Title	MEMISOVSKI V. BRADLEY		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

(1) Filed motion of [use listing in "MOTION" box above]

(2) Brief in support of motion due

(3) Answer brief to motion due ______ Reply to answer brief due ______

(4) Ruling / Hearing on ______ set for ______ at ______

(5) X Status hearing [ ] held [X] continued to [ ] re-set for 04 NOV 92 at 10:00 A.M.

(6) Pretrial conf. [ ] held [ ] continued to [ ] re-set for ______ at ______

(7) Trial [ ] Set for [ ] re-set for ______

(8) [ ] Bench Trial [ ] Jury Trial [ ] Hearing held and continued to ______ at ______

(9) This case is dismissed [ ] without [ ] with prejudice and without costs [ ] pursuant to [ ] FRCP 4(j) (failure to serve) [ ] General Rule 21 (want of prosecution) [ ] FRCP 41(a)(1) [ ] FRCP 41(a)(2)

(10) [X] [Other docket entry] DEFENDANT'S ORIGINAL AND FIRST AMENDED MOTIONS TO DISMISS ARE DENIED FOR THE REASONS STATED IN OPEN COURT. MOTION TO STRIKE IS DENIED. THE STAY OF DISCOVERY IS LIFTED. ANSWER TO THE COMPLAINT DUE WITHIN 20 DAYS.

(11) [ ] [For further detail see [ ] order on the reverse of [ ] order attached to the original minute order form.]

[ ]	No notices required, advised in open court	number of notices
[K]	No notices required.	
[ ]	Notices mailed by judge's staff	date docketed: OCT 23 1992
[ ]	Notified counsel by telephone	
[ ]	Docketing to mail notices	docketing dpty initials
[ ]	Mail AO 450 form.	
[ ]	Copy to judge/magistrate judge.	date mailed notice
DW	courtroom deputy's initials	mailing dpty initials

Date/time received in central Clerk's Office

Document # 51

1 IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
2 EASTERN DIVISION

3 THERESA MEMISOVSKI, et al.,)
Individually and on behalf of all)
4 others similarly situated,)
)
5 Plaintiffs,)
)
6 v.) No. 92 C 1982
)
7 PHIL BRADLEY, Director, Illinois) Chicago, Illinois
Department of Public Aid,)
8 ') October 20, 1992
) 10:15 a.m.
9 Defendant.) Ruling

10 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

11

APPEARANCES:

12

For the Plaintiffs: MR. NELSON A. SOLTMAN
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Chicago, Illinois 60604
22 312 435-5568

23

24

25

1 THE CLERK: 92 C 1982, Memisovski v. Bradley.
2 MR. SOLTMAN: Nelson Soltman for plaintiffs.
3 MR. HUSTON: John Huston, Special Assistant Attorney
4 General on behalf of defendant Bradley.
5 MS. CONESSI: Good morning again, Your Honor. Karen
6 Conessi, Special Assistant Attorney General on behalf of the
7 defendant Bradley.
8 THE COURT: You may want to sit down.
9 I have before me a motion to dismiss. Subsequent to the
10 filing of this case the Health & Human -- Secretary of Health &
11 Human Services or an officer under his authority has approved
12 the State plan, so to the extent that the claim depends on the
13 lack of such approval, the claim is moot. I actually did not
14 think the claim as originally drafted made a difference one way
15 or the other whether the Plan was approved, but it has been and
16 the record should reflect that.
17 In this class action certain women eligible for Medicaid
18 and requiring obstetrical services and certain children
19 eligible for Medicaid challenged the Illinois Medicaid Plan.
20 The exact definition of the classes, one of women and the other
21 of children, are really not particularly material to this
22 motion.
23 They say the Plan, one, does not enlist enough
24 professionals to provide the same obstetric and pediatric
25 services as are available to the general population; and, two,

1 the Plan does not establish an Early and Periodic Screening,
2 Diagnostic and Treatment program for children; and, three,: does
3 not provide that medical assistance in the form of obstetrical
4 and pediatric services are not less in amount, duration or
5 scope than the medical assistance made available to any other
6 similarly situated individual receiving Medicaid.
7 The Director of Public Aid of Illinois adopted the Plan,
8 and he is the defendant.
9 Each of the three elements that the classes say are missing
10 are mentioned as requirements by federal law and its
11 implementing regulations - the Medicaid Act, in particular 42
12 U.S.C. Sections 1396 and following.
13 I rely on the citations in the brief with respect to the
14 equal access claim, which appears in 1396a(30)(A); the
15 screening and correction, which appears in 1396a)(a)(43)(B);
16 and the amount, duration and scope requirement, which appears
17 in 1396a(a)(10)(B).
18 The language amount, scope and duration, equal access, and
19 the fairly complex citation system that's involved in this case
20 is a kind of melange of lawyers language. Underlying this
21 melange of lawyers language and legal numbering systems is an
22 easily understood problem. The women and children are suing
23 because they cannot, according to their claim, find an
24 obstetrician or pediatrician who will accept Medicaid. This is
25 so, they say, basically because Medicaid pays too little money

1 for medical work.

2 Theresa Memisovski's pediatrician refused to treat her'
3 children when the family shifted from private insurance to
4 Medicaid. Olivette Bennet had difficulty finding a
5 pediatrician who took Medicaid, and the one who did offered a
6 six-month wait for an appointment. Loretta Steurdivant,
7 pregnant and at high risk, sought an obstetrician, was unable
8 to find one until her seventh month. She was more fortunate
9 than two other pregnant women. Lynette Paulansky was unable tc
10 obtain regular obstetric care in her first four months of
11 pregnancy. Some doctors refused her and others offered
12 appointments some weeks in the future. Gwendolyn Williams
13 never found a regular obstetrician, and since the birth of her
14 daughter has found no pediatrician either for her daughter or
15 her nine-year-old son.

16 The Plan, the plaintiffs say, damages class members because
17 it fails to provide them with the opportunity to secure medical
18 services and because class members are not actually receiving
19 services (or are paying for them despite their right to have
20 Medicaid pay).

21 The Director of Public Aid seeks dismissal. I considered
22 the arguments seriatim.

23 Do class members have standing, personal standing to
24 enforce equal access in amount, scope and duration claims?

25 The Director says these plaintiffs lack standing to sue

1 under the appropriate sections in part because they allege no
2 injury that can be redressed here. No injury to be redressed,'
3 no case or controversy.
4 The problem for these plaintiffs is the failure of an
5 allegation to show that reimbursement rates are the cause of
6 their travail. The rates may be adequate, for example, about
7 what private insurers pay, but the delay or hassle in getting
8 them, for which the defendant may not be responsible, may deter
9 doctors.
10 The complaint, incidentally, does say that the Plan must :
11 provide methods and procedures for payment and ensure equal
12 access and that the defendant has failed to do this as well.
13 Or doctors' attitudes towards Medicaid recipients may be a
14 factor. Or, most significantly, there is not much of an
15 allegation that members of the general population fare better
16 with doctors than do the plaintiffs, although one can infer
17 from Memisovski's experience that this is the case.
18 The Director's argument is that there is no causation here.
19 The Director does not challenge, as I read the Director's
20 challenge, the standing of Medicaid recipients in general to
21 sue on the grounds that they have been denied services because
22 of a plan. And there are opinions that indicate they have such
23 standing. Persons denied benefits under government programs
24 usually get past the courtroom door. I think that is clearly
25 the proper reading of Lujan v. Defenders of wildlife, 112

Supreme Court 2130.

Not receiving necessary medical treatment is a legally cognizable injury, although that precise injury may be one that must be pursued by remedies under the Plan. So, too, I think is the lost opportunity to secure medical services. I think lost opportunity is a cognizable injury.

In this case causation is adequately pled. Part of it is based on the detail of specific allegations, and part of it, I think, is based more on the historical context in which this case is pled. You really do not need to say a lot to sustain (at a pleading stage) the inferences that services are lacking because there is not enough money offered promptly enough-to pay for them.

This basic premise of economic organization is implicit in much law. I don't know that plaintiffs in these cases are often great enthusiasts of the law in economics movement, but the truth of the matter is that the recognition that benefit is what -- monetary benefit is what drives much human action, and that this is implicit in the law is what I think sustains this complaint.

That there may be other contributing causes does not destroy the validity of the claim as pled, nor does it render the claim nonredressable. It is true that more reimbursement or faster reimbursement may not ensure to all class members the receipt of all appropriate medical treatment, but it is highly

1 likely to ensure its receipt by some who now have none and it
2 is difficult to see how it would fail to improve the class
3 members' opportunity for such services.
4 I also address the question of whether class members have
5 personal standing to sue over screening and correction
6 programs. It is true that physical harm has not been alleged,
7 but it has been alleged that there is no opportunity to
8 participate in an early screening program and this is an injury
9 that can be the basis of a suit as it was in Stanton v. Bond.
10 I recognize that there is subsequent law that casts some.'
11 doubt upon the precise holding of Stanton v. Bond, but it does
12 not erode it completely; and if it is not eroded completely, I
13 am obliged to follow it. And even if this were not enough, it
14 has been alleged that two children, one a newborn and one nine
15 years of age, have not received screening, and the screening is
16 specifically alleged in the case of the newborn to be medical11
17 necessary. An order requiring the establishment of a screening
18 and correction program would redress these injuries.
19 Having reached the question of standing, I have to address,
20 I think, several other issues.
21 The first question is given the statute and what it says,
22 are these class members intended beneficiaries'of the statute?
23 If they are not, whatever their personal injury and personal
24 loss is, the lawsuit dies. The Director looks to the history
25 to reach its conclusion that the class members are not intended

1 beneficiaries of the particular section (a)(30)(A) of the
2 statute.
3 In 1968 the Director says Congress allowed Medicaid
4 recipients freedom to choose their own medical professionals
5 and allowed States to pay the recipient directly. To ensure
6 against unnecessary use of medical services and unreasonable
7 charges, Congress directed the States to provide methods and
8 procedures to prevent such abuses. It turned out, as it was,
9 that the freedom of choice increased costs so that Congress in
10 1981 increased the power of States to decide themselves what
11 were reasonable charges. In 1968 and 1981 the States' power to
12 control costs was imbeded in (a)(30). It was not until 1981
13 that the equal access language was added. The States were "to
14 assure that payments are consistent with efficiency, economy
15 and quality of care." That language appeared previously and
16 that was the language it gave the State to decide what were
17 reasonable charges.
18 Congress added in 1989 the following language with respect
19 to the payments: "and are sufficient to enlist enough
20 providers so that care and services are available at least to
21 the extent that such care and services are available to the
22 general population in the geographic area."
23 From this the Director concludes the section has just two
24 intended beneficiaries: the States and medical service
25 providers. Recipients may be the intended direct beneficiaries

1 of the Medicaid Act as a whole, but were not direct
2 beneficiaries under 1396a(30)(A).
3 The force of this argument largely escapes me. It is true
4 that the courts have held that medical providers are intended
5 beneficiaries and can sue to enforce (a)(30). I express no
6 view on the correctness of that decision, and I think whatever
7 views I have are insignificant in the context of the litigation
8 regarding this case. But it seems to me that Medicaid
9 recipients have a much-stronger case than Medicaid providers.
10 The language of the statute clearly speaks in terms of benefits
11 to the recipient. Why the statute would speak in terms of
12 service being available, why that language would have been used
13 by Congress if it did not have its eye on the recipient is
14 beyond me. It is they who need the services.
15 The Director concedes that recipients are indirect
16 beneficiaries, but I think in this area the direct and indirec
17 distinction is of no consequence when it is clear, as I think
18 it is here, that the recipients are the intended beneficiaries
19 of the language enacted by Congress. Nothing in the
20 legislative history casts doubt on this reading of the statute
21 I conclude that if there is a right to enforce these
22 requirements of the Medicaid Act, the plaintiffs have the
23 standing to assert it.
24 The next question to be dealt with is the question of
25 whether the law does impose mandatory duties upon the Director

1 Since I found that there is personal standing by these
2 particular plaintiffs and the classes they represent -- members
3 of the classes they represent, and -1 found that the class
4 members are the intended beneficiaries, the next question is
5 whether Congress imposed mandatory duties upon the Director.
6 There is, incidentally, related to this issue the question
7 if the duties are mandatory, are they sufficiently specific to
8 be judicially enforceable. I do not read the Director as
9 challenging sufficient specificity, and I do not on the face of
10 it see that any of these duties, if they are mandatory, are too
11 vague to lead to some reasonably definable remedy.
12 Congress generally must speak clearly when it imposes
13 binding substantive obligations on the States as a condition of
14 the acceptance of federal money. That is what Pennhurst v.
15 Holderman said. I think Congress has done so here. The
16 language tells the State that they must do two things:.
17 safeguard against unnecessary utilization and assure that the
18 payments are sufficient to enlist enough providers so that
19 services are available under the Plan, at least to the extent
20 that they are available to the general population.
21 I leave aside the question that could be raised after the
22 pleadings stage as to whether those two things are in fact
23 consistent. Congress said you could do both, and absent being
24 shown that it is a futile'exercise, I think the plaintiffs can
25 plead this claim.

1 The Supreme Court has found that provisions of this sort in
2 this very law are mandatory. They did so in Wilder v. Virginia
3 Hospital Association.
4 The Director, as I noted, has not argued that the duties
5 are insufficiently specific. The standards are measurable,
6 although there is room to argue over what is to be included in
7 arriving at a benchmark against which access is to be compared
8 and amount, scope and'duration are to be compared. The
9 standard of compliance here is more definite than it was in
10 Wilder. It is true that Wilder is not now the case it was when
11 it was decided, but a narrow reading of Wilder does survive
12 Suter v. Artist M. and the plaintiffs' theory falls well within
13 that narrow reading.
14 Having found there are mandatory duties, the next question
15 is whether Congress has foreclosed the use of the typical form
16 of enforcement, Section 1983, has foreclosed the use of 1983
17 for enforcement of Section 1396a.
18 The Director says that Congress intended the States to
19 propose a plan for the review and approval by the Secretary of
20 Health, Education & Welfare when the department was so named.
21 It is now Health & Human Services. In this case the State has
22 done so and the Secretary has approved it. If there is
23 something wrong with the Plan, it is the job of the Secretary
24 to say so, not the job of the Court. Approval by the
25 Secretary, says the Director, is the final word.

1 except the plaintiffs' arguments are stronger with respect to
2 the mandatory nature of the duties to provide early screening,
3 and they are also more specific with respect to the benchmark
4 to be used in ascertaining amount, scope and duration.
5 I note that I reject the challenge of the complaint on the
6 grounds of failure to allege venue and I deny the motion to
7 strike. The prudential limits upon standing are
8 inappropriately applied in a case where the plaintiffs are
9 entitled to sue under 1983.
10 In giving my opinion, I give my opinion clearly based on
11 the fact that we are at the pleading stage. On a fuller record
12 some of the defendant's arguments may yet prevail. The truth
13 is that this claim ought not to be precluded at the pleading
14 stage. The allegations are sufficient, and it is quite clear
15 that there are some allegations at least, I suppose, that even
16 the Director in a case where the Director I think has some
17 quarrels with the factual allegations, where even the Director
18 would concede enforceability of these laws. I very much doubt,
19 for example, if a Director had decided that the reimbursement
20 rate for obstetric and pediatric services was a dollar an hour,
21 we would be dealing under these circumstances in motions to
22 dismiss.
23 I'm also aware, as I've indicated, that it may be that the
24 wilder case, which is very important to my conclusion here, has
25 in fact not survived Suter v. Artist M., but the truth is that

1 while the two dissenters in Suter v. Artist M. said it did not
2 the seven in the majority indicated that the case was to be
3 distinguished and not overruled, and in my position I have to
4 follow the seven and not the two.
5 The minutes order will read that for the reasons stated in
6 open court the motion to dismiss the complaint is denied.
7 Counsel.
8 MR. SOLTMAN:, Your Honor, as a procedural matter, we
9 are currently operating under a stay of discovery which Your
10 Honor entered pending resolution of the motion to dismiss.
11 THE COURT: Right, which I am now going to lift.
12 MR. SOLTMAN: Thank you, Judge. Would the minute
13 order reflect that as well?
14 THE COURT : The minute order will reflect the stay of
15 discovery is now ended.
16 MR. HUSTON: May we have 20 days to answer the
17 complaint, Your Honor?
18 THE COURT : Sure.
19 What kind of discovery are you going to be involved in?
20 MR. SOLTMAN: Judge, substantial discovery. My
21 recollection from your remarks at the time of the request for
22 the stay was that they were along the lines of if the motion to
23 dismiss was denied, discovery would be expedited in Some
24 fashion.
25 THE COURT: Right.

1 HR. SOLTMAN: I don't know -- this discovery has been
2 pending, I believe, about five months now, and I don't know
3 what the defendant's intentions are, but I think expedited
4 discovery is crucial here.
5 THE COURT: My one concern is that it is quite
6 possible in this case, indeed, as I view this complaint, that
7 you will not be able to make a case solely from what you get
8 from the defendant, because as I understand your theory of thi
9 case, with one exception -- and that's early screening --
10 you're going -- all of these complaints -- both of the other
11 causes of action depend on comparative standards, that is to
12 say you have to look at what's happening under the Plan and yo
13 have to establish that it does not meet certain standards, in
14 one case the general population and in the other case other
15 Medicaid recipients.
16 Now, maybe you can prove amount, scope and duration of
17 other -- care received by other Medicaid recipients from the
18 records of the Department of Public Aid, but on the other side
19 I think you might possibly have some difficulties. Maybe they
20 have done some studies, but --
21 MR. SOLTMAN: Judge, we have asked for those, if they
22 have them. I would also point out that with respect to the
23 amount, duration and scope claims, there are parts of those
24 which are not dependent on other Medicaid recipients, but
25 rather amount, duration and scope reasonably sufficient to

1 achieve the purpose of the service provided.

2 In any event, I think we do need a discovery schedule here

3 I have no idea what the defendant's timing is, but we do need

4 it expedited.

5 HR. HUSTON: At this point, Your Honor, we have to

6 take a look at the complaint. I have to confer with my

7 clients. If we want to set a status -- set a further discovery

8 schedule, that would be fine.

9 THE COURT: What you're going to do is you're going t

10 come back in two weeks and tell me. My assumption is the

11 Director is going to have to surrender whatever documents there

12 were which underlay the drafting of the Plan except those, of

13 course, I guess that involve internal debate within the agency

14 And, frankly, I think your opponent has to look at that first.

15 He's got to understand why you adopted the Plan you adopted.and

16 what your justification for it is.

17 MR. HUSTON: I don't know if he's asked for that in

18 his discovery.

19 THE COURT: Have you?

20 HR. SOLTMAN: The discovery is voluminous, Your Honor.

21 I mean we have asked for everything related to both

22 provision -- to all the claims.

23 THE COURT: All right. Confer with each other and

24 come back to see me in two weeks.

25 THE CLERK: November 3rd.

1 MR. HUSTON: Your Honor, we're going to be on election
2 duty.
3 THE COURT: The 4th.
4 MR. HUSTON: Thank you, Your Honor.
5 HR. SOLTMAN: Thank you, Judge.
6 * * * * * * * * * * *
7 CERTIFICATE
8 I hereby certify Chat the foregoing is a true and correct
9 transcript of the above-entitled matter.
10
11
12 [signature] 10/22/92
13 Official Court Reporter Date
14
15
16
17
18
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20
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22
23
24
25

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on January 19, **2001, she** caused a copy of the attached Notice of Filing and Plaintiffs' Memorandum of Law in Response to Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint by hand delivery upon the following:

John Huston
Karen Konieczny
Senior Assistant Attorneys General
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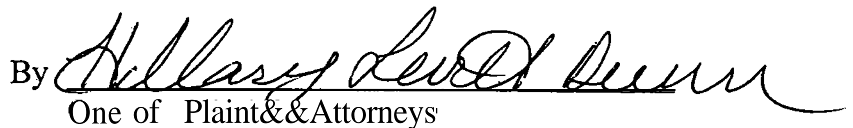
MEMISOVSKI, et al.

By 
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