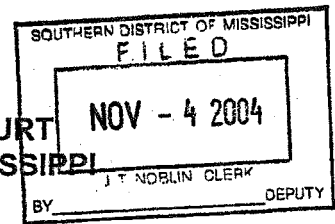


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



ALDORA VINSON, ON BEHALF OF
HERSELF AND OTHERS SIMILARLY
SITUATED, ET AL.

PLAINTIFFS

V.

CIVIL ACTION NO. 3:04-cv-784 WS

HALEY BARBOUR, IN HIS CAPACITY AS
GOVERNOR OF THE STATE OF
MISSISSIPPI, ET AL.

DEFENDANTS

ORDER

Before this court is the plaintiffs' motion for a Temporary Restraining Order ("TRO") filed pursuant to Rule 65(b)¹ of the Federal Rules of Civil Procedure. Plaintiffs herein are nine individuals who have received Medicaid benefits under Mississippi's Poverty Level Aged or Disabled ("PLAD") category. Recently, the plaintiffs putatively have been notified that their Medicaid benefits are subject to termination as of October 1, 2004. As of this date, 50,884 Medicaid beneficiaries are scheduled to lose eligibility for their benefits as a result of certain budgetary and funding changes announced by the Governor of Mississippi. In their complaint, the plaintiffs seek declaratory relief

¹Rule 65(b) of the Federal Rules of Civil Procedure authorizes the court to issue a temporary restraining order ... if: (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

pursuant to Title 28 U.S.C. §§ 2201² and 2202³, contending that the Governor's action has violated certain of the plaintiffs' constitutional guarantees as protected by Title 42 U.S.C. § 1983⁴, and certain mandated requirements of the Medicaid Act, see Pub.L. No. 89-97, 79 Stat. 286 (1965), codified as amended at 42 U.S.C. §§ 1396-1396u⁵. This court has jurisdiction over this matter under the authority of Titles 28 U.S.C.

²Title 28 U.S.C. § 2201(a) provides, in pertinent part, "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought... ."

³Title 28 U.S.C. § 2202 provides that, "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

⁴Title 42 U.S.C. § 1983 provides in part that, "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Those rights may be created by the Constitution or federal statute, and hence in a section 1983 action a person may challenge federal statutory violations by state agents. *Maine v. Thiboutot*, 448 U.S. 1, 4-5, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

⁵Title 42 U.S.C. § 1396 provides that, "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance."

§ 1331⁶, 28 U.S.C. § 1343⁷, 29 U.S.C. § 794a⁸, and 42 U.S.C. § 12133⁹.

In the Social Security Amendments of 1965, Congress established Title XIX, commonly referred to as the "Medicaid Act." The Medicaid Act establishes a program that supplies federal funds to states that agree to maintain a medical assistance program for the benefit of poor, aged, blind, or permanently disabled individuals and for the benefit of families with dependent children. See Title 42 U.S.C. § 1396 (footnote 2) (1992); *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908,

⁶Title 28 U.S.C. § 1331 provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

⁷Title 28 U.S.C. § 1343 provides that, "(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

⁸Title 29 U.S.C. § 794a(a)(2) provides that, "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

⁹Title 42 U.S.C. §12133 provides that, "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."

915 (5th Cir. 2000). The Medicaid program is a cooperative program that is financed jointly by the federal and state governments. See 42 C.F.R. § 430.0 (1999)¹⁰. Once a state enters the program, it is charged with the program's administration within its borders. See *id.* The program is voluntary; however, once a state chooses to join, it must follow the requirements set forth in the Medicaid Act and in its implementing regulations. See *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

The plaintiffs in the instant case contend that the United States Constitution and the Medicaid Act require adequate notice be given to recipients of Medicaid benefits once the participating state determined to terminate the recipient's coverage, citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Title 42 U.S.C. § 1396a(a)(3)¹¹; 42 C.F.R. 431.206¹²; and 42 C.F.R. § 431.210¹³.

¹⁰42 C.F.R. § 430.0 provides that, "Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services."

¹¹Title 42 U.S.C. § 1396a(a)(3) provides, in pertinent part that, "a State plan for medical assistance must – (3) provide for granting a fair hearing before the State agency to an individual whose claim for medical assistance under the plan is denied or not acted upon with reasonable promptness."

¹²42 C.F.R. § 431.206 requires that (a) The agency must issue and publicize its hearing procedures; (b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing – (1) Of his right to a hearing;

According to the plaintiffs, the "notice" provided by the Mississippi Division of Medicaid informing plaintiffs that benefits under the PLAD category would be terminated failed to inform the plaintiffs of other benefits for which they might be eligible, such as elderly and disabled benefits, and/or to provide for a hearing to determine any alternative eligibility for benefits. This notice, say plaintiffs, instead of providing the above information actually implied that elderly and disabled benefits were being terminated forthwith and that further inquiry or challenge would be pointless.

Furthermore, continue plaintiffs, the defendants' assertion that the Medicaid benefits being terminated will be taken up by Medicare was misleading. This is so, say plaintiffs, because Medicare will provide only up to \$600.00 for prescription drugs

(2) Of the method by which he may obtain a hearing; and (3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.
(c) The agency must provide the information required in paragraph (b) of this section--
(1) At the time that the individual applies for Medicaid; (2) At the time of any action affecting his or her claim; (3) At the time a skilled nursing facility or a nursing facility notifies a resident in accordance with § 483.12 of this chapter that he or she is to be transferred or discharged; and (4) At the time an individual receives an adverse determination by the State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act."

¹³42 C.F.R. § 431.210 provides that a notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain-- (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take; (b) The reasons for the intended action; (c) The specific regulations that support, or the change in Federal or State law that requires, the action; (d) An explanation of-- (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

per year. Plaintiffs assert that most of them have prescription drug expenses in this amount or greater each month, and that Medicaid benefits under the PLAD category paid for all of this expense.

Additionally, plaintiffs call this court's attention to the waivers granted for approximately 17,000 PLAD recipients in order that their benefits might continue in full, while the other 50,884 PLAD recipients were not considered for waivers. Plaintiffs say they do not know how this determination was made or what criterion was used.

During oral arguments, this court heard the arguments of the defendants that the State of Mississippi has the right to opt-out of providing benefits under the PLAD category, that the Governor of Mississippi has discretion in this matter, and that all the actions taken by the defendants were approved by both state and federal authorities for Medicaid and Medicare. This court also heard the arguments of the parties on the matter of the adequacy of the notice.

Certainly, a temporary restraining order is an extraordinary remedy that should not be granted unless the movant proves the same elements required generally for injunctive relief: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs any harm to the nonmovant that may result from the injunction; and (4) that the injunction will not undermine the public interest. *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990); and *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974).

This court finds that the plaintiffs have shown a substantial likelihood of success on the issue of whether adequate notice was provided. This court is not

persuaded by what has been presented so far that the notice provided by the PLAD beneficiaries sufficiently meets the requirements of the applicable provisions of the Medicaid Act above cited and/or in its implementing regulations.

This court also finds that the plaintiffs have shown the possibility of irreparable harm if they lose their Medicaid coverage, particularly when they contend they cannot pay for their own health care needs such as their prescription medicines. *See Harris v. Blue Cross Blue Shield of Missouri*, 995 F.2d 877, 879 (8th Cir. 1993); *Massachusetts Association of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir.1983) (cases holding that improper termination of Medicaid benefits necessarily constitutes irreparable harm); and see *Camacho v. Texas Workforce Commission*, 326 F.Supp.2d 794, 802 (W.D. Tex. 2004) (assertion of improper termination of Medicaid benefits satisfies plaintiffs' burden to demonstrate irreparable injury).

Finally, this court finds that the plaintiffs' irreparable harm outweighs any potential injury the defendants may face if a preliminary injunction is granted. A state's budget problems cannot alone serve as an excuse for altering federal eligibility requirements for federal funding; if they could, the federal requirements would become superfluous. *Planned Parenthood v. Sanchez*, 280 F.Supp.2d 590, 606 (W.D. Tex. 2003). Therefore, in this court's view, the threatened injuries to the plaintiffs due to loss of their prescription medicines outweigh any damage the injunction might cause the defendants. Accordingly, the balance of harms supports the granting of injunctive relief.

The defendants have asked this court to impose a security bond requirement pursuant to Rule 65(c) of the Federal Rules of Civil Procedure. Rule 65(c) provides

that, "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof." Courts interpreting this language have concluded the district court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant "no material damage." See *Urbain v. Knapp Brothers Manufacturing Company*, 217 F.2d 810, 816 (6th Cir. 1954), cert. denied, 349 U.S. 930, 75 S.Ct. 772, 99 L.Ed. 1260 (1955); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 636 F.2d 755, 759 (D.C. Cir. 1980); and *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974).

Therefore, in accordance with these authorities, this court hereby dispenses with the requirement of security on the grounds that: (1) the probability of success on the merits favors exercising the court's discretion to dispense with such security; (2) it appears unlikely that the defendants will incur any significant cost or damages as a result of the injunction; and (3) to require a bond would have a negative impact on the plaintiffs' constitutional rights, as well as the constitutional rights of the members of the public.


This court has directed the defendants to show by what method the plaintiffs' PLAD benefits may be restored with the least risk of damage to the computer programming system on which the defendants rely to carry out daily transactional business pertaining to Medicaid benefits. The defendants have presented the court

with three options labeled "A", "B" and "C". The defendants explain that option "A" is the best alternative. This court agrees.

Next, the defendants agree that they will immediately inform providers and the persons eligible for PLAD benefits as of September 30, 2004 that these benefits will continue until further notice from this court. This notice shall include the posting of web-site information to notify the general public; e-mail messages to notify providers; announcements in the various broadcast and print media; and letters to the individuals who enjoyed benefits in the PLAD category until September 30, 2004.

The parties shall reconvene in this court on October 14, 2004 at 10:00 A.M. for further hearing on the other issues involved in this case to include the matter of a preliminary injunction and proceeding as a class action. The motion to intervene by the State of Mississippi also shall be heard at that time.

SO ORDERED this the 1st day of October, 2004


CHIEF JUDGE UNITED STATES DISTRICT COURT

CIVIL ACTION NO. 3:04-cv-784 WS
Order Granting TRO