

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Ruby Bell; Robert Patterson; Eddie Mae Binion;)	
Alocia Brown, by her legal guardian Robert F.)	
Harris; Kevin Harris, by his legal guardian)	
Robert F. Harris; George Crawford, by his)	
trustee Art Huenkemeier; A.L., by her mother)	
and next friend, Diane Bauknight; Ruby)	
Trammell; Della Otis; Mary West; Betty Jo)	No. 06 C 3520
Watkins; T. W., Jo. N. and Ja. N., by their next)	
friend Janie Cook; Jerome Windley, individually)	Judge Ronald Guzman
and on behalf of all similarly situated persons,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
Michael Leavitt, Secretary of the United States)	
Department of Health and Human Services,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
AMENDED MOTION FOR CLASS CERTIFICATION**

I. Introduction

The named plaintiffs, individually and on behalf of three plaintiff classes of similarly situated persons, challenge Section 6036 of the Deficit Reduction Act of 2005, Pub.L. No. 109-171 ("Section 6036"), signed into law by the President in February 2006, as it applies to them. Plaintiffs are low income persons who are age 65 or older, blind, disabled, pregnant, minor children and minor children's caretaker relatives. They receive or are applying for health coverage under Title XIX of the Social Security Act, the federal Medicaid Program, 42 U.S.C. §§1396 et seq. (the "Medicaid Act"). Federal law establishes that to receive Medicaid, persons must be either United States citizens or in certain immigration statuses.

Plaintiffs challenge new procedures the defendant Secretary of the U.S. Department of Health & Human Services ("the Secretary") has adopted for determining whether Medicaid is available for United States citizens pursuant to Section 6036. The new procedures, set forth in "interim final" regulations issued on July 12, 2006, 71 Fed. Reg. 39214 (July 12, 2006), govern all initial and ongoing Medicaid eligibility determinations made on or after July 6, 2006 (hereafter, interim regulations). Included in Plaintiffs' Appendix. These interim regulations unfairly burden plaintiffs with the need to produce certain documentary proof of their citizenship and identity, regardless of whether they have already proven their citizenship and identity, and delay, threaten and ultimately deny plaintiffs health coverage under Medicaid without a fair chance to establish their eligibility. Plaintiffs claim that these procedures violate the Due Process Clause of the Fifth Amendment to the United States Constitution and otherwise exceed the Secretary's statutory authority in violation of the Administrative Procedure Act. Plaintiffs are also moving for a temporary restraining order and a preliminary injunction.

II. Class Definitions

Plaintiffs have moved, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), for an order certifying three classes in this action. The plaintiff classes are defined as follows:

Class A ("Current Medicaid Recipients") is composed of:

All persons who, prior to July 1, 2006, have been determined eligible for health coverage under the Medicaid Program, 42 U.S.C. § 1396 et seq., and who declared on their applications for Medicaid coverage or otherwise that they are citizens or nationals of the United States, or who were made eligible for Medicaid without the need for a declaration of citizenship or eligible alien status under 42 U.S.C. § 1320b-7.

Class B ("Medicaid Applicants and Current Medicaid Recipients") is composed of:

All persons who, on or after July 1, 2006, are receiving or will receive, or are applying or will apply for health coverage under the Medicaid Program, 42 U.S.C.

§1396 et seq., and who on their applications for Medicaid health coverage or otherwise have declared or will declare that they are United States citizens.

Class C ("Medicaid Recipients Who Receive Medicaid Due to Receipt of Supplemental Security Income or Adoption Assistance Benefits") is composed of:

All persons who are receiving or will receive health coverage under the Medicaid Program, 42 U.S.C. §1396 et seq., and who are not required to make a declaration of citizenship under 42 U.S.C. § 1320b-7 in connection with an application for Medicaid because they acquire their eligibility for Medicaid coverage as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act or any other program listed in 42 U.S.C. § 1396a(a)(10)(A)(i)(I) and (II).

See Plaintiffs' Complaint at ¶¶ 18-20.

The three different classes result from differences in legal theories entitling plaintiffs to injunctive and declaratory relief in this case.

Class A consists of all persons eligible for Medicaid as of July 1, 2006, the effective date of Section 6036. Plaintiffs and the members of Class A claim that requiring them to comply with directives in the interim regulations to document U.S. citizenship, when they have already established their citizenship and identity of purposes of Medicaid eligibility, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(a). Complaint at ¶¶ 18.

Class B consists of all members of Class A (persons eligible for Medicaid as of July 1, 2006) plus all persons who apply for Medicaid after July 1, 2006. Plaintiffs and the members of Class A claim that requiring them to document their declarations of citizenship, while also imposing limitations on the types of documentary proof and on the time allotted to comply with the documentation rules, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(a). Plaintiffs' Complaint at ¶¶ 19.

Class C is a subset of Class B, including only persons who are receiving or will receive Medicaid as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act or any other program listed in 42 U.S.C. § 1396a(a)(10)(A)(i)(I) & (II). As a result, none of the Class C members have had to apply separately for Medicaid or declare their citizenship under 42 U.S.C. §1320b-7. On its face, Section 6036 only applies in the context of declarations of citizenship under 42 U.S.C. §1320b-7. Plaintiffs and the members of Class C claim that in applying Section 6036 to them, the interim regulations violate the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A)(i), Section 6036, and the APA, § 706(2)(a). See Plaintiffs' Complaint at ¶¶ 20.

III. The Three Plaintiff Classes Meet The Requirements of Fed. R. Civ. P. 23(a) and (b)(2).

Fed. R. Civ. P. 23 provides that as prerequisites for class certification, the potential classes must satisfy the following criteria: a) numerosity such that joinder is impracticable; b) commonality of facts or law; c) typicality between the class claims and the claims of the named plaintiffs; and d) adequacy of representation by the named plaintiffs and class counsel. In addition, the potential classes here must show that the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). The decision to certify the proposed classes does not depend on the strengths or weaknesses of the asserted claims, but rather on whether the criteria of Rule 23 have been met. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). For the reasons set forth below, three plaintiff classes should be certified.

A. Rule 23(a)(1): Impracticability of Joinder

Fed. R. Civ. P. 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." To sustain a class action, plaintiffs do not need to demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates. Peterson v. H & R Block Tax Servs., 174 F.R.D. 78, 81 (N.D.Ill. 1997); Long v. Thornton Tp. High School Dist. 205, 82 F.R.D. 186, 189 (N.D. Ill. 1979). The court is entitled to make common sense assumptions in order to support a finding of numerosity. Grossman v. Waste Management, Inc., 100 F.R.D. 781, 785 (N.D. Ill. 1984).

Rule 23(a)(1) also encompasses consideration of factors other than the number of persons in the class. Judicial economy and the ability of class members to initiate individual suits are proper considerations in determining whether joinder is impracticable. Moreno v. DFG Foods, LLC, 2003 U.S. Dist. LEXIS 8700 (N.D.Ill., 2003); Patrykus v. Gomilla, 121 F.R.D. 357, 360-61 (N.D.Ill. 1988).

Here, the size of each class demonstrates the impracticability of joinder. Class A, which consists of persons who, as of July 1, 2006, are receiving Medicaid includes at least 33.4 million persons, based on U.S. Census data. Data from the Current Population Survey, 2005 Annual Social and Economic Supplement provide that at least 33 million citizens who are native-born are eligible for Medicaid. See Table HI09, Health Insurance Coverage Status by Nativity, Citizenship, and Duration included in Plaintiffs' Appendix.¹

¹ Table HI09 is also available online at http://pubdb3.census.gov/macro/032005/health/h09_000.htm. The number of U.S. citizens receiving Medicaid could be substantially higher than the 33.4 million persons relied upon here. The Center for Budget and Policy Priorities, in analysis based on review of the Census Bureau's March 2003, 2004, and 2005 Current Population Surveys, and administrative data from the Department of Health and Human Services' Medicaid Statistical Information System, estimated that there are 51 million U.S. citizens receiving Medicaid. See Leighton Ku & Matt Broadus, Ctr. On Budget & Policy Priorities, New Requirement for Birth Certificates or Passports Could Threaten Medicaid Coverage for Vulnerable Beneficiaries: A State-By-State Analysis (February 17, 2006), included in Plaintiffs' Appendix (available online at <http://www.cbpp.org/1-5-06health.htm>).

Class B is likewise too numerous for joinder. Class B consists of all members of Class A (persons eligible for Medicaid as of July 1, 2006) plus all persons who apply for Medicaid after July 1, 2006. All persons applying for or receiving Medicaid are potentially at risk of not being able to show U.S. citizenship or identity as required by the Secretary. Thus, Class B must include at least 33.4 million persons, for the reasons set forth above in the Class A discussion.²

Finally, Class C is too numerous for joinder. Class C consists of persons who are receiving or will receive Medicaid without being required to file separate Medicaid applications as a result of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act or any other program listed in 42 U.S.C. §1396a(a)(10)(A)(i)(I) & (II). Estimates from the U.S. Department of Health and Human Services compiled in April 2005 indicate that there were approximately 523,000 children in foster care in the United States as of September 30, 2003.³ Under federal law, all children on whose behalf Title IV-E federal foster care payments are made are eligible for Medicaid. Numerosity is shown by this data.

² Indeed, based on a survey done by the Opinion Research Corporation and analysis from the Center for Budget and Policy Priorities, the number of Medicaid recipients at risk of being unable to comply with Section 6036's documentation requirements because they have neither a U.S. passport or a birth certificate total up to 1.6 million children and 600,000 adults. See Leighton Ku, Ctr. for Budget and Policy Priorities, Revised Medicaid Documentation Requirement Jeopardizes Coverage for 1 to 2 Million Citizens, (July 13, 2006), included in Plaintiffs' Appendix (available online at <http://www.cbpp.org/7-13-06health2.htm>) and Leighton Ku & Matt Broaddus, Center for Budget and Policy Priorities, Survey Indicates Deficit Reduction Act Jeopardizes Medicaid Coverage for 3 To 5 Million U.S. Citizens, (February 17, 2006), included in Plaintiff's Appendix (available online at <http://www.cbpp.org/1-26-06health.htm>).

³ U.S. Department of Health and Human Services, Trends in Foster Care and Adoption, Adoption and Foster Care Analysis and Reporting System, Administration on Children, Youth and Families. Estimates are based on data submitted by states as of September 15, 2005. See also Pat Redmond, Ctr. for Budget and Policy Priorities, Children in Foster Care May Have To Delay Health Care Because of Federal Regulations on Citizenship Requirement, (July 7, 2006), included in Plaintiffs' Appendix (available online at <http://www.cbpp.org/7-7-06health.htm>).

In addition, other factors make joinder impracticable in Class A, Class B, and Class C. Geographical disbursement of plaintiffs may make joinder impracticable. Patrykus, 121 F.R.D. at 361; Fields v. Maram, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. 2004). Here, plaintiffs are dispersed throughout the 50 states and the District of Columbia. Also relevant is plaintiffs' ability to bring suits to challenge Section 6036 on their own. *Id.* The plaintiffs here, in order to be eligible for Medicaid, are low income as well as elderly, disabled, children (including foster children), and parents of young children. As a result, their financial resources and other barriers make it difficult or impossible to bring their own claims.

B. Rule 23(a)(2): Commonality

To meet the commonality requirement, "there must exist 'questions of law or fact' common to the class." Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998). "A defendant's standardized conduct toward proposed class members, such as a generalized policy that affects all class members in the same way, has been considered sufficient to satisfy commonality." Ligas v. Maram, 2006 U.S. Dist. LEXIS 10856 at *11 (N.D. Ill. 2006) (citing Keele, 149 F.3d at 594 and Gen. Tele. Col of the SW v. Falcon, 457 U.S. 147, 159 n. 15 (1982)). Where a defendant's standardized conduct towards all class members is at issue, not all putative class members must suffer the same injury. Rather, the common question sufficient to meet this criterion is the "uniformity of the defendant's conduct toward the potential members and the plaintiffs' legal theory. *Ligas*, 2006 U.S. Dist. LEXIS at *11 (citing Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)). "The commonality requirement has been characterized as a 'low hurdle' easily surmounted." In re Neopharm,

Inc. Securities Litigation, 225 F.R.D. 563, 566 (N.D. Ill. 2004) (citing Scholes v. Stone, McGuire, & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992)).

Here, the plaintiffs in the three classes challenge the Defendant's application of Section 6036. Every member in each of the three proposed classes is now required to provide specified documentation to establish United States citizenship and identity pursuant to the requirements of the interim regulations, as they interpret Section 6036. The claims of all three classes attack aspects of the Secretary's application of Section 6036.

In addition, Class A has already met Medicaid eligibility requirements, including the establishment of citizenship and identity, at the initial determination of their eligibility. Thus, for this class, a common question is whether the initial determination of citizenship is final entitling the recipient, as a matter of due process, to not be required to re-establish citizenship unless a new fact or information indicates that the original determination was made in error or the circumstances of citizenship have changed.

Members of Class B all have to document their citizenship under the interim regulations' truncated list of acceptable documents and short time limits. Class B members all have common claims as to the legality of these requirements.

Members of Class C-children eligible due to receipt of Foster Care and Adoption Assistance-have gained access to Medicaid in a way that does not implicate Section 6036, yet the interim regulations apply the Secretary's interpretation of Section 6036 to them. The common question of law presented for Class C is whether it is legal for the Secretary to apply Section 6036 to them at all.

C. Rule 23(a)(3): Typicality

To meet the typicality requirement, the named plaintiffs' claims or defenses must be "typical ... of the class." Keele, 149 F.3d at 594. The typicality requirement, although closely related to the commonality question, focuses on the class representative. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." Id. at 595 (citing De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)). "Typical does not mean identical, and the typicality requirement is liberally construed." Gaspar v. Linvatec Corp., 167 F.R.D. 51, 57 (N.D. Ill. 1996).

Plaintiffs in this case meet the typicality requirement. Each of the individual named plaintiffs must satisfy the Secretary's directives applying Section 6036's requirement for proof of United States citizenship and identity or they will not be eligible for Medicaid, and this is just like all other class members. There is no difference in the legal claims of the named plaintiffs and the class members.

D. Rule 23(a)(4): Adequacy Of Representation

The adequacy of representation determination "is composed of two parts: the adequacy of the named plaintiff's counsel, and the adequacy of . . . protecting the different, separate, and distinct interest of the class members." Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 598 (7th Cir. 1993); Susman v. Lincoln American Corp., 561 F.2d 86, 90 (7th Cir. 1977).

To determine whether class counsel is qualified, courts look to the professional qualifications, skills, experience and resources of counsel. Armstrong v. Chicago Park District, 117 F.R.D. 623, 630-31 (N.D. Ill. 1987). Plaintiffs' counsel here are uniquely

qualified to competently prosecute this action. The attorneys have years of experience in litigating class actions. They are all long-time legal services and public interest lawyers, in cooperation with pro bono counsel, who have devoted their legal careers to representing the disadvantaged, primarily those who are low-income and on Medicaid. Attorneys John Bouman of the Shriver National Center on Poverty Law and Stephanie Altman and Thomas Yates of Health & Disability Advocates have years of experience as lead counsel or with major responsibility for class actions in the United States District Court for the Northern District of Illinois. Class actions that one or more of these attorneys has worked on include Memisovski v. Maram, 2004 U.S. Dist. LEXIS 16772 (N.D.Ill. 2004); and Shvartsman v. Apfel, 138 F.3d 1196 (7th Cir. 1998). In addition, Mr. Bouman was a lead counsel on Youakim v. McDonald, 926 F.Supp. 719 (N.D.Ill.), aff'd in part and rev'd in part, 71 F.3d 1274 (7th Cir. 1994), cert. denied 518 US 1028 (1996). David Morrison and Mary Anderson of Goldberg Kohn also have major experience in complex litigation, including class action litigation. Finally, Sarah Somers of the National Health Law Program and Gene Coffey of the National Senior Citizens Law Center also have years of experience working on class action cases involving Medicaid. Because of this extensive relevant experience, plaintiffs' counsel should be found to be adequate to pursue the claims of the plaintiff classes.

As to the second factor under Fed. R. Civ. P. 23(a)(4), the named plaintiffs have instituted this litigation to declare the Secretary's directives applying Section 6036 unlawful and enjoin their application. If the relief sought is granted, both the named and unnamed plaintiffs will benefit equally. Because the relief will be the same for all class members and named plaintiffs if plaintiffs prevail in this litigation, the class members all have the same interest in this litigation. See Johnson v. Heckler, 100 F.R.D. 70, 75 (N.D.Ill. 1983).

The plaintiffs and their counsel have interests coextensive with the class members, and their attorneys' experience demonstrates their qualifications to pursue this matter vigorously on behalf of the class.

E. Rule 23(b)(2): Defendant Has Acted On Grounds Generally Applicable To Each Class

In addition to meeting the requirements of Fed. R. Civ. P. 23(a), a class must also satisfy one of the subsections of Rule 23 (b). Rule 23(b)(2) allows a class action to proceed if:

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The Federal Rules Advisory Committee's Comment to Rule 23(b)(2) explains the subsection as follows:

This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes, U.S.C.S. (Matthew Bender & Comp.) May 2006.

Here, plaintiffs allege that the Secretary has acted and will continue to act on grounds generally applicable to each class. See Complaint at ¶¶ 14-17, 48-50. All members of the three classes are affected by the interim regulations applying Section 6036's requirements that they provide specific types of proof of their U.S. citizenship and identity. And, all class

members will be affected if relief is ordered to remediate the harm caused by the Secretary's application of Section 6036. The requirement of Fed. R. Civ. P. 23(b)(2) is met. See Alliance to End Repression v. Rochford, 565 F.2d 975, 979 (7th Cir. 1977); Heckler, 100 F.R.D. at 75; Dixon v. Quern, 76 F.R.D. 617, 620 (N.D. Ill. 1977).

IV. Certification of a Nationwide Class Is Appropriate Here.

In Califano v. Yamasaki, 442 U.S. 682 (1979), the Supreme Court outlined the principles for certifying a nationwide class action. In affirming the district court's decision to certify a nationwide class that included only named plaintiffs from the Ninth Circuit, the Court stated that:

Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23(b)(2), the limitations on class size associated with Rule 23(b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.

Id. at 702 (citing Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414-20 (1977)).

The Secretary is applying the challenged specialized documentation of citizenship and identity rules in the interim regulations to all Medicaid recipients and applicants in all states and the District of Columbia; the nine named plaintiffs who are at risk of being found not eligible for Medicaid are typical of all members of the proposed classes. Residence in Illinois or in the Seventh Circuit has no impact on application of these rules. Section 6036 applies to all Medicaid applicants and recipients nationwide; Medicaid recipients in Illinois are affected by the same challenged policies as Medicaid recipients in California, Missouri, Michigan, and North Carolina, the home states of named plaintiffs not from Illinois.

Nationwide class certification is wholly appropriate in this case which involves the lawfulness of policies applied nationally through the interim regulations in all 50 states and

the District of Columbia; certification would be a legitimate and normal application of Fed.R.Civ.P. 23. See e.g., Sullivan v. Zebley, 493 U.S. 521, 526 (1990); Ferrell v. Pierce, 743 F.2d 454, 456 (7th Cir. 1984); and Tustin v. Heckler, 591 F.Supp. 1049, 1066-1069 (D.N.J. 1984).

V. Conclusion

For the reasons stated, the Court should (1) certify the three classes in this case and allow this case to be pursued as class action pursuant to Rule 23(a) and (b)(2).

DATED: July 21, 2006

Respectfully submitted,

By /s/ Mary E. Anderson
One of Their Attorneys

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