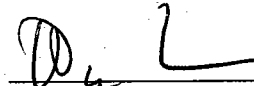


johnbouman@povertylaw.org
danlesser@povertylaw.org
mstapleton@povertylaw.org
marieclairetran@povertylaw.org

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, hereby certify that I caused to be served upon those individuals on the service list below, copies of the foregoing Motion for Leave to File Brief of Defendant-Intervenors-Appellants, by hand-delivery on June 23, 2008, except as to Richard P. Caro, who was served by depositing a copy of same addressed to the address on the service list, proper postage prepaid, into the U.S. mail at 50 E. Washington St., Chicago, Illinois, on June 23, 2008.



Dan Lesser

SERVICE LIST

Larry D. Blust
Marc S. Silver
Katarzyna K. Dygas
Barnes and Thornburg LLP
One N. Wacker Dr., Suite 4400
Chicago, Illinois 60606
msilver@btlaw.com
larry.blust@btlaw.com
katarzyna.dygas@btlaw.com

Thomas Ioppollo
Roger Flahaven
Gary Griffin
Peter C. Koch
Alice E Keane
Office of the Attorney General of Illinois
100 West Randolph—13th Floor
Chicago, IL 60601
tioppollo@atg.state.il.us
rflahaven@atg.state.il.us
griffin@atg.state.il.us
pkoch@atg.state.il.us
akeane@atg.state.il.us

Paul J. Gaynor
Carl Bergets
Malino Rao
Office of the Attorney General of Illinois
100 West Randolph—13th Floor
Chicago, IL 60601
pgaynor@atg.state.il.us
cbergetz@atg.state.il.us
mrao@atg.state.il.us

Richard P. Caro, J.D.
111 Groveland Avenue
Riverside, IL 60546-2628
rrc@rpdjd.com

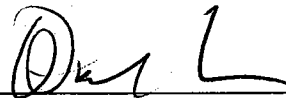
F. Thomas Hecht
Floyd Perkins
Claudette P. Miller
Ungaretti and Harris LLP
70 W. Madison
Suite 3400
Chicago, IL 60602
fthecht@uhlaw.com
cpmiller@uhlaw.com
fdperkins@uhlaw.com

2. This appeal is an interlocutory appeal from the April 15, 2008, order of the circuit court granting a preliminary injunction which enjoins Defendants Illinois Department of HealthCare and Family Services and Director Barry S. Maram from expending any public funds related to the preservation and expansion of the FamilyCare program..
3. Defendant-Intervenors-Appellants are recipients of the FamilyCare medical assistance at issue in this case. They have a specific interest in the continued receipt of health coverage and protection of their due process rights.
4. On May 6, 2008, Defendant-Intervenors-Appellants, individually and on behalf of a class, filed a petition in the circuit court to intervene as defendants. A copy of the May 6, 2008, Petition is attached as Exhibit A. The circuit court granted that petition on May 12, 2008, and the defendant-intervenors have been participating as parties in the ongoing litigation in the circuit court while this interlocutory appeal is pending.
5. Gregory and Robin Jacaway had petitioned the circuit court to intervene as defendants on December 22, 2007, but the circuit court denied that motion on December 27, 2008, on the basis that the petitioners' interests would be adequately represented by the parties in the case.
6. Defendant-Intervenors-Appellants seek leave from this court to file a brief with respect to the interlocutory appeal. Although they were not a party to the litigation on April 15, 2008, when the circuit court entered the order currently on appeal, or when the Notice of Appeal and Docketing Statements were filed,

they have since been made parties, and they have a specific interest in the outcome of the appeal.

7. Defendant-Intervenors-Appellants are specifically interested in addressing the trial court's erroneous interpretation of 305 ILCS 5/5-2, which puts the provision in direct conflict with Federal Medicaid law with which Illinois must comply, does not properly defer to the administering agency's longstanding interpretation of the provision as acquiesced in by the General Assembly, and threatens the continued receipt of medical assistance by hundreds of thousands of Illinois residents.
8. Defendant-Intervenors-Appellants' Brief addresses only the issue of the trial court's interpretation of 305 ILCS 5/5-2. It incorporates by reference the Defendant-Appellants' arguments on the remaining issues in the case.

Respectfully Submitted,



One of the attorneys for the defendant-intervenors-appellees

John M. Bouman
Daniel J. Lesser
Margaret Stapleton
Marie Claire Tran
Sargent Shriver National Center on Poverty Law
50 E. Washington, Suite 500
Chicago, IL 60602
(312) 263-3830

EXHIBIT A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
 COUNTY DEPARTMENT, CHANCERY DIVISION

RICHARD P. CARO, a State of Illinois Taxpayer;)
 on behalf of and for the benefit of the taxpayers of)
 the State of Illinois; RONALD GIDWITZ; and)
 GREGORY BAISE,)

Plaintiffs,)

v.)

ROD R. BLAGOJEVICH, Governor of the)
 State of Illinois; ILLINOIS DEPARTMENT OF)
 PUBLIC HEALTH; DAMON ARNOLD, Director of)
 Illinois Department of Public Health;)
 ILLINOIS DEPARTMENT OF)
 HEALTHCARE AND FAMILY SERVICES;)
 BARRY S. MARAM, Director of Illinois)
 Department of Healthcare and Family Services; and)
 DANIEL W. HYNES, Comptroller,)

Defendants.)

Case No. 07-134953

The Honorable James R. Epstein
 Presiding Judge

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 COOK COUNTY ILLINOIS
 CHANCERY DIV.

GREGORY JACAWAY, ROBIN JACAWAY,)
 ELISSA JESLIS, and DANIEL JESLIS, individually)
 and on behalf of all similarly situated people,)

Petitioners.)

PETITION FOR LEAVE TO INTERVENE AS DEFENDANTS

Petitioners, Gregory Jacaway, Robin Jacaway, Elissa Jeslis, and Daniel Jeslis (collectively, "Petitioners"), individually and on behalf of a class of defendant-intervenors, by their attorneys and pursuant to Section 2-408 (a)(2) and (b)(2) of the Illinois Code of Civil Procedure, respectfully petition to intervene as Defendants in the above-captioned matter, and in support thereof, state as follows:

1. Petitioners receive health coverage under the FamilyCare Program. They have a specific interest in the continued receipt of health coverage and protection of their due process rights, and

they are exposed to specific hardships that none of the current parties can claim in this case. Petitioners should be allowed to intervene as a matter of right because their interests are not adequately represented, and they may be bound by an order or judgment in this matter. In the alternative, petitioners should be allowed permissive intervention because their defense against Plaintiffs' action poses questions of fact and law in common with the pending matter.

2. On November 7, 2007, DHFS filed a Notice of Emergency Amendments and a Notice of Proposed Amendments to the administrative rules governing the Medical Assistance Programs, 89 Ill. Adm. Code 120, with the Secretary of State regarding the FamilyCare program, which, in pertinent part, provides:

Complete Description of the Subjects and Issues Involved. This emergency rulemaking preserves FamilyCare benefits for approximately 15,000 to 20,000 parents and other caretaker relatives with income above 133 percent up to and to include 185 percent of poverty who were previously covered under 89 Ill. Adm. Code 125. Further, the emergency rulemaking expands FamilyCare to cover an additional 147,000 uninsured parents and other caretaker relatives with income up to and including 400 percent of poverty.

See 31 Ill. Reg. 15854. FamilyCare provides comprehensive health insurance to beneficiaries, who pay premiums and co-payments on a sliding scale.

3. The Illinois General Assembly's Joint Committee on Administrative Rules ("JCAR") considered the proposed FamilyCare rules at its November 13, 2007, meeting and voted by a vote of 9-2-0 to object to and suspend DHFS's Emergency Rule.

4. On December 18, 2007, Plaintiffs, Richard P. Caro, Ronald Gidwitz, and Gregory Baise ("Plaintiffs"), filed a Second Amended Complaint for declaratory and injunctive relief seeking to declare illegal and enjoin the expenditure of public funds in relation to the expansion of the FamilyCare program under the Emergency Rule.

5. On December 22, 2007, Petitioners Gregory Jacaway and Robin Jacaway filed a petition to intervene as Defendants. On December 27, 2008, this Court denied that petition to intervene, on the basis that the petitioners' interests would be adequately represented by the parties in the case. *See* 12/27/07 order.

6. JCAR considered the proposed Permanent FamilyCare Rule at its February 13, 2008, meeting and its February 26, 2008, reconvened meeting, and voted by a vote of 8-2-0 to object to and prohibit filing of the rulemaking to the extent that it expands medical assistance to persons other than those formerly receiving medical coverage under a federal State Children's Health Insurance Program ("SCHIP") waiver for caretaker relatives of children covered by SCHIP. That is, JCAR approved the rulemaking to the extent that it transferred the prior program that had been funded by SCHIP to the Medicaid program, thus effecting a new way to claim federal matching funds to cover beneficiaries with family income at or below 185% of the federal poverty level.

7. On March 10, 2008, DHFS also submitted the documents regarding its Notice of Adopted Amendments to Volume 89 of the Illinois Administrative Code to the Secretary of State for inclusion in the next issue of the Illinois Register.

8. In a letter dated March 21, 2008, the Secretary of State informed DHFS that it could not accept DHFS's Adopted Amendments for publication in the Illinois Register because the rules had "the same purpose and effect as the emergency rule that has been suspended."

9. On April 15, 2008, this Court enjoined the Illinois Department of HealthCare and Family Services and Director Barry S. Maram from enforcing the Emergency Rule or expending any public funds related to the FamilyCare program created by the Emergency Rule. *See* 4/15/08

Order. It also enjoined Comptroller Daniel W. Hynes from authorizing payments related to the Emergency Rule. *Id.*

10. On April 21, 2008, Plaintiff-Intervenors Ronald Gidwitz and Gregory Baise ("Plaintiffs") filed a motion for the entry of a compliance order with the Court's 4/15/08 Order. Specifically, Plaintiffs Gidwitz and Baise seek an order that would, in part, direct the Executive Branch Defendants to (1) notify all providers and participants that the adult FamilyCare program is terminated, (2) promptly dis-enroll all existing adult participants in the FamilyCare program, and (3) cease presenting to the Comptroller vouchers authorizing payments of invoices for goods or services rendered to adult FamilyCare participants.

11. On May 1, 2008, the Court granted Plaintiffs leave to file a Third Amended Complaint, which challenged the Defendants' authority to operate the FamilyCare program under the Permanent Rule.

12. Petitioners Gregory and Robin Jacaway reside in Springfield, Illinois. Since December 1, 2007, they have been premium-paying beneficiaries of health care coverage under the FamilyCare program. They are parents of two minor children, who are enrolled in the Illinois KidCare medical assistance program. Petitioners had been insured through Gregory's employment, but because his employer downsized and Gregory lost his job, their employer-sponsored insurance coverage ended at the end of October 2007. The Petitioners became eligible for FamilyCare on December 1, 2007, as a result of the program expansion challenged in this case. Since his job loss, Mr. Jacaway has enrolled in and has now completed additional job training. He is actively seeking full time work in his new field, heating and air conditioning. In the meantime, both Mr. and Mrs. Jacaway are working part time jobs and are without employer-sponsored health insurance coverage. Their family income fluctuates due to petitioners' part

time employment and currently is well below 400 percent of the official Federal Poverty Level for their family size. Although they have used their FamilyCare and KidCare coverage very little, they value having it available as they recognize that being uninsured would leave them vulnerable to catastrophic bills if anyone in their family developed a serious illness or suffered an accidental injury.

13. Petitioner Elissa Jeslis and her husband Daniel have been enrolled in the FamilyCare program since January 2007. Their 16-month-old son is enrolled in the All Kids program. At the time the Jeslises enrolled in the FamilyCare program, Ms. Jeslis was not employed and Mr. Jeslis's employer did not offer health insurance coverage. Prior to enrolling in FamilyCare, the Jeslises purchased private health insurance that had a monthly premium of \$350 and a \$2000 deductible. This insurance coverage had become unaffordable for them and without FamilyCare they would have become uninsured. The Jeslises have a continuing need for FamilyCare coverage for the next few months until they become eligible for the health insurance offered by Mr. Jeslis's new employer.

14. Petitioners seek to intervene in this case, on behalf of themselves and a class of similarly situated persons, because they have a vital interest in maintaining their health coverage, protecting their due process rights, and ensuring that their medical providers are paid for medical services they received as FamilyCare enrollees.

15. If allowed to intervene, Petitioners would file the attached Motion for Leave to File Answer and Affirmative Defenses. *See* 735 ILCS 5/2-408(e). A copy of this motion is attached hereto as Exhibit A. In addition, they will vigorously assert their Due Process and other legal rights in connection with the implementation of this court's injunction, should it proceed.

16. . . . Petitioners are entitled to intervene in this case as a matter of right under Section 2-408(a)(2) of the Code of Civil Procedure. That section provides:

- (a) Upon a timely application anyone shall be permitted as of right to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action

735 ILCS 5/2-408(a)(2). In order to satisfy the requirement that a person "will or may be bound by an order or judgment in the action," a person must have "an interest greater than that of the general public, such that a party will stand to benefit or suffer by the legal operation of a judgment...." *City of Chicago v. J. Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d 140, 150, 468 N.E.2d 428 (1st Dist. 1984).

17. Petitioners' interest in the subject matter of this dispute is greater than the interest of the general public because they are beneficiaries of the healthcare program made available to them under the administrative rules challenged by the Plaintiffs. The Court's 4/15/08 Order directly implicates the petitioners' right to continued health care benefits. In addition, Plaintiffs are now seeking a compliance order that would terminate petitioners' FamilyCare coverage in a manner that violates their constitutional due process rights under the U.S. Constitution, *see Goldberg v. Kelly*, 397 U.S. 254 (1970); *Youakim v. MacDonald*, 71 F.3d 1274 (7th Cir. 1995), and their procedural rights under the Medicaid Act, 42 U.S.C. § 1397aa(a)(2), and the Illinois Public Aid Code, 305 ILCS 5/11-7.

18. Petitioners benefit from their health coverage and will be seriously adversely affected by the actions of the parties to comply with the 4/15/08 Order and any other subsequent injunctive relief ordered by this Court. Petitioners, thus, stand to either benefit or suffer by the legal operation of a judgment or order in this case. Moreover, Petitioners may be bound by a

judgment or order in this case under the doctrine of res judicata, to the extent that a subsequent court finds that Defendants were in privity with Petitioners. *City of Rockford v. Unit Six of Policemen's Benevolent*, 362 Ill.App.3d 556, 840 N.E.2d 1283 (2d. Dist. 2005) (stating that “[a] nonparty may be bound under privity if his interests are so closely aligned to those of a party that the party is the virtual representative of the nonparty.”)

19. Although the Court previously denied a petition by the Jacaways for intervention in this case, it should grant this petition because there has been a material change in circumstances. The Court denied the previous intervention petition on the basis that parties already present in the case (presumably the defendants) could adequately represent petitioners' interests. For one thing, since the Court's order denying the Jacaways' attempt to intervene, JCAR has acted (in its February 26, 2008, motion) to make it clear that it reads 305 ILCS 5/5-2 to be adequate authority for the Department of Healthcare and Family Services to transfer the FamilyCare program into the Medicaid program without importing TANF requirements, a position that this Court was not aware of when it entered the April 15 Order, but which directly contradicts this Court's reading of 305 ILCS 5/5-2 that underlies that order. In addition, and importantly for intervention purposes, at the present time, there is no party that can adequately represent petitioners' interests now that termination of their health care benefits appears imminent. The defendants do not have the same incentive as do the petitioners to challenge the merits of the Court's 4/15/08 order, nor do they have standing to assert the petitioners' due process rights claims. Indeed, petitioners' interests would likely conflict with those of the defendants with respect to crafting any remedial orders. For instance, the petitioners have an interest in asserting their due process rights when and if the defendants begin the termination process. The petitioners' position on these issues with respect to the thoroughness of the administrative procedures, notices, hearings and residual

eligibility rules are highly likely to demand more costs and personnel than defendants would commit to on their own, and even defendants' positions on these issues are far more accommodating to petitioners' rights than the thoughtless summary shutdown demanded by plaintiffs. Likewise, petitioners have an interest in assuring that defendants pay medical providers for care the petitioners received as FamilyCare beneficiaries; if defendants do not pay these bills, petitioners could be liable for devastating medical costs they never would have incurred had they been uninsured. See *J. Hancock, supra*, 127 Ill. App. 3d at 144-47 (holding that the city's public health interest in a building code case was or may be inadequate to protect a condominium owner's more specific private health interests); see also *Bredberg*, 24 Ill.2d 612, 623, 182 N.E.2d 742, 747 (1962) (allowing intervention of individual landowners and explaining that "the city, the only defendant named in the counterclaim, is primarily concerned with the citywide zoning pattern and cannot be guided solely by a consideration of *individual hardships*") (emphasis added). The Court should grant this petition for intervention as a matter of right.

20. In the alternative, petitioners should be permitted to intervene under Section 2-408(b)(2) of the Code of Civil Procedure, which, in pertinent part, provides:

(b) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

735 ILCS 5/2-408(b)(2).

21. Petitioners' defense against Plaintiffs' challenge to the administrative rules has questions of law and fact in common with those in the main action. There is "a minimal 'commonality' requirement for permissive intervention." *J. Hancock, supra*, 127 Ill. App. 3d 140, 144. Petitioners' arguments in defense of the administrative rules are identical or closely akin to those raised in the main case.