UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PATRICIA WILSON-COKER ET AL.,	:	
Plaintiffs	:	
	:	
v.	:	Civil Action No.
	:	3:00 CV 1312 (CFD)
DONNA SHALALA ET AL.,	:	
Defendants	:	

RULING ON CLASS CERTIFICATION

The plaintiffs in this case are the Connecticut Department of Social Services, its commissioner, Patricia Wilson-Coker, and three individuals who are eligible for both Medicare and Medicaid benefits and have received or are receiving home health care services as part of those benefits. They bring this action against U.S. Secretary of Health and Human Services Donna Shalala and Nancy-Ann Deparle, Administrator of the Health Care Financing Administration.[1] The plaintiffs seek to reverse an administrative policy implemented by the defendants in December 1999, which restricts the ability of the State of Connecticut to recover from third parties the costs of home health care services provided to recipients of both Medicare and Medicaid benefits. They request declaratory and injunctive relief, as well as costs and attorneys' fees.

The plaintiffs have filed a motion for class certification [Document #8], which is GRANTED for the following reasons.

I. Background

[1]The current Secretary of Health and Human Services and Administrator of the Health Care Financing Administration have not yet been substituted as defendants.

The overlap of Medicare and Medicaid eligibility is central to the plaintiffs' claims in this case. Medicare is a federally funded and administered health insurance program for elderly and disabled individuals who are covered by Social Security. Medicaid is a welfare program providing health care for certain categories of the poor, including the elderly and disabled. Both programs cover home health care services for low-income elderly and disabled individuals.[2] Accordingly, although Medicaid is considered the "payor of last resort for health care," Mot. Class Certification at 4, some low-income elderly and disabled individuals are dually eligible for Medicare and Medicaid benefits, including home health care services.

Both Medicare and Medicaid are administered by the Health Care Financing Administration ("HCFA"), a division of Health and Human Services ("HHS"). However, while Medicare is funded entirely by the federal government, Medicaid costs are shared equally by the federal government and state participants in the program, including the State of Connecticut. State participants in Medicaid are also responsible for the day-to-day administration of Medicaid within guidelines established by the HCFA.

Under the system in effect prior to December 1999, when a home health care provider ("the provider") provided care for an individual dually eligible for both Medicare and Medicaid that it believed was not covered by Medicare, it would bill the Connecticut Department of Social Services ("DSS") under Connecticut's Medicaid program. DSS would then review the bill for services and, if it

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[2]Home health care services include, among other services, nursing care, physical or occupational therapy, medical social services, and the services of home health care aides. See Defs.' Mem. Opp'n at 2-3.

determined that the services should ultimately be paid by Medicare, it would file a request for "an initial determination" by a "fiscal intermediary." A fiscal intermediary is usually a private entity that has contracted with HHS to make Medicare coverage determinations and handle payment to health care providers.[3] The intermediary would then instruct the provider to file a Medicare claim for services so that the intermediary could then make a Medicare coverage determination. If the intermediary determined that the claim was covered by Medicare, DSS would be entitled to recover the costs of services directly from the provider and, in turn, the provider would receive payment from the federal government under the Medicare program. If, however, the provider failed or refused to submit a Medicare claim for services within six months, the provider was itself responsible for the costs of services and DSS would be entitled to recover previous Medicaid payments from the provider. Accordingly, there was an incentive for providers to comply with the federal administrative scheme for this "third party liability" program and submit Medicare claims to an intermediary.

On December 3, 1999, however, HCFA's Medicaid director sent a letter to all third party liability program participants, including the State of Connecticut. The letter set forth, in part, new procedures through which the State of Connecticut must seek to recoup costs paid under the Medicaid program when it contends those costs should have been covered by Medicare. The letter indicated that recovery of such costs directly from a provider was no longer permitted. The letter also indicated

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[3]As a condition of Medicaid eligibility, the State of Connecticut must seek payment from other third-parties such as health insurers, including payment from Medicare. Medicaid coverage is also contingent on Medicaid beneficiaries assigning to the State of Connecticut their rights to receive payment for medical care. See 42 U.S.C. § 1396k(a). Connecticut law similarly provides that DSS is a subrogee of any right of recovery that a Medicaid beneficiary might have against a medical insurance provider for the costs of care paid by Medicaid. See Conn. Gen. Stat. § 17b-265.

that providers can no longer be required to file Medicare claims. As a result, the plaintiffs contend, if a provider fails to seek Medicare payments, DSS cannot recover costs paid under the Medicaid program to a recipient who is dually eligible to receive those benefits under the Medicare program. There is also no longer an incentive for providers to seek Medicare payments. If a provider fails to submit a Medicare claim, the plaintiffs contend, then DSS can only recoup its costs from Medicaid beneficiaries through liens on their property. The federal government thus reduces its Medicare payments, but the states absorb more costs under Medicaid and beneficiaries face increased charges and the prospect of more Medicaid liens.[4]

The plaintiffs contend that these changes in the federal administrative scheme deprive them of their rights to receive payment for medical services in violation of the requirements of the Medicare program, 42 U.S.C. § 1395 et seq., the Medicaid program, 42 U.S.C. § 1396 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. § 533, and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The plaintiffs seek class certification pursuant to Federal Rule of Civil Procedure 23. The defendants have filed an opposition to the motion on the ground that class relief is an unnecessary formality.

II. Class Certification Requirements

The plaintiffs request that the Court certify a class consisting of:

All residents of Connecticut who have been, are, or become simultaneously eligible for

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[4]In general, Medicare may not seek repayment of benefits from its covered patients, while Medicaid may.

> both Medicare and Medicaid coverage, and, contemporaneously with their dual eligibility, have been, are, or become in need of, or have been or are receiving or begin to receive, home health care from a provider of home health care services.

Mot. Class Certification at 1. The plaintiffs contend that their claims satisfy the class action requirements of Rule 23(a) and (b)(2). See Mot. Class Certification at 9-17.

Rule 23 provides, in relevant part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
>
> (2) 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.

Fed. R. Civ. P. 23(a), (b)(2); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997).

The defendants do not dispute that the plaintiffs' claims satisfy the requirements for class certification under Rule 23(a) and (b)(2). However, they object to the motion on the ground that a class action is unnecessary and therefore would be a needless formality. See Defs.' Mem. Opp'n at 1-2. Specifically, the defendants argue that a class action is unnecessary because any declaratory or injunctive relief awarded to the plaintiffs would inure to the benefit of the proposed class, regardless of whether the class is certified. See Defs.' Mem. Opp'n at 1-2, 6-11.

III. Necessity Doctrine

Under a line of cases beginning with Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974), courts in this circuit have indicated that class certification may not be necessary when plaintiffs seek certain kinds of injunctive and declaratory relief against a government official or agency. See, e.g., Berger v. Heckler, 771 F.2d 1556, 1566-67 (2d Cir. 1985) (holding that class certification is not necessary in an action against the Department of Health and Human Services when the Secretary agreed to the enforcement of a decree in favor of non-parties to the suit); Lincoln CERCPAC v. Health & Hosps. Corp., 920 F. Supp. 488, 493 (S.D.N.Y. 1996) (noting that "[i]f plaintiffs are granted their relief, it will affect all former and future CERC patients irrespective of whether they are included in a class action"). In Galvan, the court explained the justification for this rule:

> [I]nsofar as the relief is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality . . . [W]hat is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the judgment run to the benefit not only of the named plaintiffs but of all other similarly situated.

490 F.2d at 1261. The court also reasoned that class certification was not needed because the State of New York had acknowledged the applicability of a judgment to individuals other than the plaintiff, and had voluntarily taken concrete steps towards redressing the alleged harm. Id. ("The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy."). The Second Circuit later clarified this standard, explaining that "[s]ince it is ordinarily assumed that state officials will abide by the court's judgment,

where the State has admitted the identity of issues as to all potential class litigants class certification is indeed unnecessary." Hurley v. Ward, 584 F.2d 609, 611-12 (2d Cir. 1978).

Several subsequent decisions have distinguished Galvan based on the difference between prohibitory and mandatory relief.[5] In Connecticut State Department of Social Services v. Shalala, for example, which is related to the instant case, the district court held that the plaintiffs' declaratory and injunctive claims against the Department of Health and Human Services would not preclude class certification. See No. 3:99CV2020 (SRU), 2000 WL 436616 (D. Conn. Feb. 28, 2000). The plaintiffs in Shalala moved for class certification based on the Department of Health and Human Services' failure to provide written, timely and accurate coverage decisions to certain dually eligible Medicare and Medicaid recipients in Connecticut who were receiving home health care services. See id. at *1. In granting the motion for class certification, the district court rejected the defendant's contention that class certification was unnecessary because any benefit to the named plaintiffs would inure to the proposed class. See id. The court reasoned that, because the plaintiffs sought both prohibitory and mandatory injunctive relief, and because the defendant had not formally committed to granting class-wide relief or otherwise addressed the plaintiffs' concerns, the situation differed from Galvan and merited class certification. See id. at *2-3; Jane B. v. New York City Dep't Soc. Servs., 117 F.R.D. 64 (S.D.N.Y. 1987) (distinguishing Galvan on the grounds that the plaintiffs in the instant case were seeking relief "that would require defendants to take affirmative steps to remedy existing

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[5]A prohibitory injunction "seeks only to maintain the status quo," but a mandatory injunction "is said to alter the status quo by commanding some positive act." Tom Doherty Assocs., Inc. v. Saban Entm't, 60 F.3d 27, 34 (2d Cir. 1995). However, the Second Circuit has expressed some doubt as to whether a court is typically able to discern "whether the status quo is to be maintained or upset." Id.

unconstitutional conditions . . . and to implement standards that comport with the mandates of federal and state laws and regulations"); see also Marisol A., 126 F.3d at 378 (holding that the district court did not abuse its discretion in certifying a class in an action where plaintiffs sought declaratory and injunctive relief from "central and systemic failures" of the welfare system); Comer v. Cisneros, 37 F.3d 775, 796 (2d Cir. 1994) ("[P]attern of racial discrimination cases for injunctions against state or local officials are the 'paradigm' of Fed. R. Civ. P. 23(b)(2) class action cases."). The district court in Shalala also determined that class certification was necessary because there still existed a risk that the named plaintiffs' claims would become moot before the case was completed. See 2000 WL 436616, at *4; see also Reynolds v. Giuliani, 118 F. Supp. 2d 352, 391 (2d Cir. 200) (discussing mootness).

As in Shalala, the plaintiffs in this case seek mandatory injunctive relief. In particular, they request that the Court enter orders requiring fiscal intermediaries to direct providers to submit Medicare coverage claims at the request of DSS, and orders permitting DSS to recover health care costs paid to providers under Medicaid when Medicare liability is established. See Compl. Part XII. Thus, the plaintiffs effectively seek an order directing the defendants to alter their conduct by reinstating the administrative scheme in place prior to December 1999. See Shalala, 2000 WL 436616, at *3.

In addition, unlike the government defendant in Galvan who withdrew an allegedly unconstitutional policy, the defendants here have not yet taken any "tangible and identifiable steps towards redressing the harms that the plaintiffs attacked." Shalala, 2000 WL 436616 at *3. While the defendants assert that the plaintiffs only challenge their administrative procedure for recouping Medicaid costs, and thus that any judgment would bind them with respect to DSS and all dually eligible Medicaid and Medicare beneficiaries, the defendants have not formally committed to granting class-wide relief or

taken any concrete steps to address the plaintiffs' concerns. See id.; see also Daniels v. City of New York,199 F.R.D. 513, 515 (S.D.N.Y. 2001) ("[T]here are legitimate concerns over the scope of relief that can be awarded in the absence of class certification.). Further, although the defendants contend that they are entitled to a good faith presumption that they will abide by any court order granting relief to the plaintiffs, they have offered no proposed agreement that they would apply any judgment in this case to all members of the putative class. See Shalala, 2000 WL 436616 at *3. Thus, as in Shalala, the assurances of the defendants fall short of those in Galvan.

IV. Mootness

The plaintiffs also contend that class certification is necessary in order to avoid the mootness of their claims. Specifically, the plaintiffs contend that without class certification the defendants could moot their claims for injunctive relief by paying for the costs of their medical care before this action is terminated. See Reply Mem. at 7; see also Reynolds, 118 F. Supp. 2d at 391; Shalala, 2000 WL 436616, at *4.

In response, the defendants contend that class certification is unnecessary because the State of Connecticut is the true claimant in this case, not the individually named plaintiffs, who have not suffered harm or been threatened with harm as a result of the changes in the federal administrative scheme.[6] The defendants contend that DSS, as the subrogee of any right of recovery that a Medicaid beneficiary might have against a medical insurance provider for the cost of care paid for by Medicaid, is the proper party to enforce any judgment in the future because it is the only plaintiff that will benefit directly from

[6]The class certification motion in this case was filed by the individually named plaintiffs only, although the state plaintiffs support the motion.

the judgment. See Defs.' Mem. Opp'n at 8, 11.

As in Shalala, however, DSS's interests and the interests of the other plaintiffs may diverge at some point in the future. See 2000 WL 436616, at *4. Specifically, the dually eligible Medicaid and Medicare beneficiaries have an interest in ensuring that DSS does not levy liens in order to recover the costs of their Medicaid benefits. See id. Further, the plaintiffs have presented evidence that such harm is likely to occur in the future. They have offered the affidavit of Marcus Tilton, a fraud and recovery official at DSS. The affidavit indicates that DSS will seek recovery from the individual plaintiffs for Medicaid payments paid to them for home health care services that are not covered by the Medicare program. See Marcus Tilton Aff.; see also Reply Mem. at 8-9. The declaration illustrates that these plaintiffs have a real interest in the changes in the federal administrative scheme that is distinct from the State of Connecticut's interest in those changes. Accordingly, the Court concludes that class certification is also necessary in order to protect the individual plaintiffs' interests and avoid mootness of their claims. See Shalala, 2000 WL 436616, at *4.

V. Conclusion

For the preceding reasons, the plaintiffs' motion for class certification [Document #8] is GRANTED.

SO ORDERED this ____ day of August 2001, at Hartford, Connecticut.

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CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE