

1988 WL 48237

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United States District Court, N.D. Illinois, Eastern
Division.

William JONES, et al., Plaintiffs,
v.
Otis R. BOWEN, M.D., Defendant.

No. 87 C 7419. | May 9, 1988.

Opinion

MEMORANDUM OPINION AND ORDER

SUZANNE B. CONLON, District Judge.

*1 Plaintiffs are three aliens and two United States citizens who purport to be representatives of a class of persons who have been denied or will be denied social security numbers ("SSNs") or duplicate social security cards. They filed this action against Otis R. Bowen, M.D. ("defendant"), Secretary of the United States Department of Health and Human Services, alleging that the Social Security Administration's denial of SSNs without a hearing violates the Social Security Act, 42 U.S.C. §§ 401 *et seq.* and the Fifth Amendment. Plaintiffs moved for a preliminary injunction and to certify the class.

Defendant moved to dismiss the complaint on the grounds that plaintiffs lack standing to sue, that the court does not have subject matter jurisdiction over the claims and that the complaint fails to state a claim upon which relief can be granted. Defendant currently seeks to stay discovery and briefing of plaintiffs' motion to certify the class, pending resolution of his motion to dismiss. For the reasons that follow, defendant's motion to stay is denied.

Rule 23(c)(1) of the Fed.R.Civ.P. provides:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

Rule 23(c) unambiguously requires that the district court certify or decline to certify the class before acting on the merits. *Hickey v. Duffy*, 827 F.2d 234, 237 (7th Cir.1987); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 363, (7th Cir.1987); *Jiminez v. Weinberger*, 523 F.2d 689, 697 (7th Cir.1975) (where a class action is brought pursuant to Rule 23(b)(3), it is imperative that class members be

identified early enough to enable notice to be sent to class members and to allow them a meaningful opportunity to request exclusion from the class). Early class determination enables the parties to assess potential settlements and identifies the parties who will be bound by a judgment. *Id.* Where there is no certified plaintiff class, a defendant may be subjected to subsequent suits brought by other members of the putative class, as to whom the earlier judgment would not be *res judicata*. See *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n. 1.¹ Failure to decide the certification question also may deprive the district court's disposition of the finality required for an appeal. See *Glidden v. Chromalloy American Corp.*, 808 F.2d 621 (7th Cir.1986). Accordingly, the Seventh Circuit has expressly cautioned district courts against disposing of putative class actions without deciding whether a class should be certified. *Id.*

Defendant attempts to distinguish this case from cases in which the district court ruled on the merits before certifying (or declining to certify) a class. Defendant asserts that the court may dismiss this case without addressing the merits. In fact, defendant's motion to dismiss raises arguments that require this court to examine the merits of plaintiffs' claims. For example, defendant contends that "plaintiffs' claim that the absence of formal administrative review procedures violates the [Social Security Act] is groundless," and that "plaintiffs have no due process right to a formalized administrative review procedure." Memorandum in Support of Motion to Dismiss at 25. Defendant's attempt to distinguish this case from those cited by plaintiffs is not persuasive.

The strong preference in this circuit for early certification compels the court to determine plaintiffs' motion for certification first. Without ruling on class certification, the court cannot determine which parties shall be bound by any judgment entered. If defendant succeeds in his motion to dismiss, he would not be protected from the filing of future suits by other potential class members. Accordingly, defendant's motion to stay all proceedings is denied. Plaintiffs are ordered to file their memorandum in support of class certification by May 16, 1988. Defendant shall file his responding brief by June 6, 1988, and plaintiffs may file a reply by June 16, 1988.

¹ In *Gomez*, the Seventh Circuit expressly acknowledged that the district court's failure to decide the issue of class certification prior to considering defendant's 12(b)(6) motion "may have been error," although it did not deprive the court of jurisdiction over the appeal. *Gomez, supra*, 811 F.2d at 1034 n. 1.

