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United States District Court, D. Connecticut.

ARC/CONNECTICUT et al.
v.
O'MEARA et al.

No. 3:01CV1871(JBA). | Aug. 20, 2002.

Class action was brought challenging state's operation of its home and community based waiver program for mentally retarded individuals. On plaintiffs' motion to amend complaint, and additional plaintiffs' motion to intervene, the District Court, Arterton, J., held that: (1) amendment would be allowed, and (2) intervention would be allowed.

Motions granted.

West Headnotes (2)

[1] **Federal Civil Procedure**
New cause of action in general

Plaintiffs challenging state's operation of its home and community based waiver program for mentally retarded individuals would be allowed to amend complaint; though new claims significantly expanded scope of action, motion was timely, there was no evidence of bad faith or prejudice, and proposed new claims were not futile. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Federal Civil Procedure**
Particular Intervenors

Additional named plaintiffs would be allowed to intervene in class action suit challenging state's operation of its home and community based waiver program for mentally retarded individuals; although new plaintiffs were already members of proposed class, their factual circumstances were not reflected by any currently named plaintiffs. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

Cases that cite this headnote

**Opinion**

***Ruling on Pending Motions [Docs.21 & 43]***

ARTERTON, J.

***1** This action was filed October 2, 2001, by Arc/Connecticut (a statewide not-for-profit advocacy organization) and ten individual plaintiffs, as a class action "on behalf of all persons eligible to receive services under Connecticut's Home and Community Based Waiver for Individuals with Mental Retardation ... who have requested but not received waiver services." Compl. ¶ 20. The Complaint alleges that Connecticut, as part of its Medicaid state plan, provides as an optional service (that is, a service that can be, but is not required to be, included in the state's Medicaid plan) payment for "services in an intermediate care facility for the mentally retarded" ("ICF/MR"). 42 U.S.C. § 1396d(a)(15). "States that provide ICF/MR services may also implement a home and community based waiver program for persons with mental retardation as an alternative to the provision of ICF/MR services.... Such services include an array of home and community-based services for eligible recipients who, in the absence of the waiver program, would require institutionalization in an ISF/MR." Compl. ¶ 31.

The complaint alleges that defendants, the Commissioner of Mental Retardation for the State of Connecticut and the Commissioner of Social Services for the State of Connecticut, have violated their rights under the Medicaid statute, the U.S. Constitution and the Americans with Disabilities Act by failing to provide adequate services under the waiver, failing to provide them with a choice between institutional and home and community based services, failing to provide them with services under the waiver in a reasonably prompt manner, failing to provide them with notice and opportunity to be heard regarding the denial of benefits under the waiver, and failing to provide them with residential and day habilitation services in the most integrated setting appropriate to meet their needs.

In the Report of Parties Planning Meeting [Doc. # 7],

defendants noted, in accordance with the order on pretrial deadlines, that the complaint may have curable defects:

> Notably, the Complaint fails to distinguish between [Department of Mental Retardation ("DMR") ] services generally and Medicaid Waiver services. The defendants maintain that not all services provided by DMR are coverable as Medicaid Waiver services. Plaintiffs fail to allege that they have applied for Medicaid Waiver services (as opposed to applying for DMR services), that they have been denied or placed on a waiting list for Waiver services, or even that the services they have requested from DMR could be covered under the Waiver program.

[Doc. # 7] at 5.

**I. Motion to Amend**

**A. Proposed Amendment**

On February 15, 2002, less than five months after this action was commenced and before the Court's March 1, 2002 deadline for amendments to pleadings, *see* Scheduling Order of December 13, 2001 [Doc. # 10], plaintiffs filed a motion to amend [Doc. # 22]. The proposed Amended Complaint alleges, *inter alia,* that defendants have:

> ***2** (1) implemented the Waiver program "such that it is only available to obtain federal funding for services ... DMR already provides and not to enable individuals who need services to obtain them." This is allegedly accomplished by refusing to allow eligible individuals to apply or discouraging them from applying unless they are already receiving DMR services. Am. Compl. ¶ 2.
>
> (2) limited Waiver services in amount, duration and scope "to only those services the eligible individuals are already receiving." *Id.* ¶ 3.
>
> (3) failed to afford eligible individuals "notice and a fair hearing when they are denied the opportunity to apply for [Waiver] services or are provided services that are unduly limited in amount, duration and scope." *Id.* ¶ 4.
>
> (4) failed to inform eligible individuals of alternatives to ICF/MR services, depriving them of the choice between institutional and home/community based services. *Id.* ¶ 5. The proposed Amended Complaint, as defendants suggest, significantly expands the scope of this case. Plaintiffs themselves appear to concede this, describing the amendment as follows:
>
> > [P]laintiffs' complaint no longer makes the single claim that the class members are persons who are on a lengthy waiting list for waiver services. Rather, the proposed class includes persons who have been misinformed about the Waiver, persons who have been discouraged from applying for the Waiver, persons who are participants in the Waiver program, but are allowed to obtain services that defendants have available rather than the services [t]hat they need, and persons who remain institutionalized because such persons are not permitted to apply for Waiver funding until after they have been discharged from the institution.

Pl.'s Mem. Opp. Mot. Quash [Doc. # 25] at 20–21. Plaintiffs maintain that their proposed amendment is their attempt "to state their claims as clearly as possible at this early stage of the proceeding." Pl.'s Mem. Supp. Mot. Amend [Doc. # 22] at 3. Defendants assert that the new claims will require "factual discovery into a host of areas that are not challenged in the existing complaint," Def.'s Mem. Opp. Mot. Amend [Doc. # 30] at 3, and claim that "[t]hese new proposed claims would unduly burden the defendants by requiring significant additional discovery, and substantially complicate the issues that must be addressed by the Court—resulting in delay in the disposition of this action," *id* .

Beyond prejudice, defendants argue that the proposed amendment is futile. "Without in any way attempting to engage in full-fledged briefing at this preliminary stage," Def.'s Mem. Opp. Mot. Amend [Doc. # 30] at 5, defendants raise five arguments: (1) the proposed class includes as plaintiffs those who have never applied to participate in the Waiver program; (2) the proposed class includes all individuals on the DMR waiting list for residential services, even though plaintiffs allegedly concede that most of these individuals do not immediately need residential services; (3) the proposed class includes residents of ICFs/MR even though a Medicaid regulation provides that an individual currently residing in an ICF/MR is not eligible to participate in the Waiver program; (4) the request for injunctive relief includes a request for an order requiring residential placement of all individuals who need placement, even though such a placement is not a benefit that may be provided under the Waiver program; and (5) the possible scope of the proposed class may exceed the numerical limits of Connecticut's Waiver program.

**B. Analysis**

***3** [1] After a responsive pleading has been filed, "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). "Parties are generally allowed to amend their pleadings absent bad faith or prejudice." *Commander Oil Corp. v. Barlo Equipment Corp.,* 215 F.3d 321, 333 (2d Cir.2000) (*citing State Teachers Retirement Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir.1981)). In exercising its broad discretion in this regard, the Court takes into account considerations of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. *Local 802, Associated Musicians of Greater New York v. Parker Meridien Hotel,* 145 F.3d 85, 89 (2d Cir.1998) (*citing Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)); *see also United States on behalf of Maritime Admin. v. Continental Ill. Nat'l Bank & Trust Co., 889 F.2d 124,* 889 F.2d 1248, 1254 (2d Cir.1989) (discretion of the Court with regard to motions seeking leave to amend "must be exercised in terms of a justifying reason or reasons consonant with the liberalizing 'spirit of the Federal Rules." ') (*quoting Foman,* 371 U.S. at 182 and *citing* Fed.R.Civ.P. 1 (rules to be construed "to secure the just, speedy, and inexpensive determination of every action")).

Although plaintiffs' proposed Amended Complaint broadens the scope of this case, the amendment was submitted soon after the action was commenced and well within the time set by the Court's scheduling order for the filing of amendments. There is no claim of bad faith, undue delay, repeated failure to cure defects by amendment or dilatory motive. Additionally, plaintiffs appear to be responding to defendants' assertion that the original complaint is defective in failing to distinguish between DMR services and Waiver services.[1] Since defendants only claim prejudice "unless there [is] a substantial modification of the Scheduling Order, allowing additional time for factual discovery, the sequential (rather than simultaneous) filing of expert reports, and additional time for the filing of rebuttal expert reports," Def.'s Mem. Opp. Mot. Amend [Doc. # 30] at 3, any prejudice can be obviated by appropriate amendments, as necessary, to the scheduling order.

Mindful of the early procedural posture of the case, the lack of full briefing on these futility issues, which will undoubtedly be raised and developed at subsequent stages of this case, the Court has insufficient basis, at this stage, to conclude that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief," *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (footnote omitted), and thus does not conclude that plaintiffs' proposed amendments are futile. While defendants point to "[t]he requirement of an application ... stated generally in generic Medicaid regulations that apply to all aspects of the Medicaid program" and explicit and implicit requirements in the specific Waiver and implementing regulations at issue, Def.'s Mem. Opp. Mot. Amend [Doc. # 30] at 5 n. 2, the plaintiffs allege that defendants actively mislead otherwise eligible individuals about the availability of Waiver services[2] and refuse to accept applications.[3] Inasmuch as such allegations are claimed by plaintiffs to implicate both the Medicaid and non-Medicaid portions of their claim, defendants have not shown, solely by reference to alleged Medicaid application requirements, that there is no set of facts under which relief can be granted in the entirety of the proposed Amended Complaint.

***4** Defendants base their claim that the proposed class includes persons on the waiting list who do not immediately need residential services on their own assessment and characterization of these individuals rather than on plaintiffs' actual allegations in the proposed Amended Complaint. *See* Def.'s Mem. Opp. Mot. Amend [Doc. # 30] at 6 (characterizing plaintiffs' reference to a DMR classification scheme as an "acknowledgment that *DMR has determined* that most of these individuals do not need residential services in the immediate future") (emphasis added). Defendants assume the validity and correctness of their own classification system (referenced in Am. Compl. ¶ 57) instead of assuming the truth, as the Court must for these purposes, of the plaintiffs' allegation that "[a]ll plaintiffs are eligible for services in an ICF/MR," Am. Compl. ¶ 70.

Defendants' assertion that current ICF/MR residents should not be included in the class based on a Medicaid regulation (42 C.F.R. § 441.301(b)(1)(ii)) that excludes such individuals from receiving Waiver services while they are residents in an ICF/MR is unavailing, as plaintiffs assert that the putative class includes ICF/MR residents who are "eligible for [Waiver services] and are institutionalized *because they are unable to access* [Waiver] funding for community residential services they need." Am. Compl. ¶ 37 (emphasis added). Thus, plaintiffs' challenge to the alleged improper implementation of the Waiver program as perpetuating plaintiffs' institutionalization should be permitted by way of amendment.

Defendants' arguments regarding the relief proposed in the Amended Complaint (potential class size versus the limited number of waiver slots available and an assertion that plaintiffs cannot seek residential placement via remedial order) are vastly premature, as no class has been quantified or certified, much less has any liability determination been made for which appropriate injunctive relief can be fashioned, notwithstanding the proposed Amended Complaint's prayer for relief. *See, e.g., Owens*

*v. Housing Authority of Stamford,* 394 F.Supp. 1267, 1274 (D.Conn.1975) ("The propriety of the redress requested must, of course, await more advanced steps in this litigation.").

**II. Motion to Intervene**

[2] On June 3, 2002, fifteen additional disabled individuals moved to intervene in the action. The proposed intervenors are represented by the same counsel as the original plaintiffs, and the allegations against defendants are identical to those raised in the proposed Amended Complaint. Defendants oppose the motion because of the expansion of legal issues in the proposed Amended Complaint, which the Court has now determined will be permitted, and because the class is already adequately represented and the proposed intervenors add no new issues.

A party "may be permitted to intervene in an action [under Rule 24(b) ] when an applicant's claim or defense and the main action have a question of law and fact in common." Fed.R.Civ.P. 24(b).

> ***5** Permissive intervention is wholly discretionary with the trial court. The principal consideration set forth in the Rule is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. The court also will consider whether the applicant will benefit by intervention. Other relevant factors include the nature and extent of the intervenors' interests, whether their interests are adequately represented by the other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

*U.S. Postal Service v. Brennan,* 579 F.2d 188, 191–192 (2d Cir.1978) (citations & internal quotations omitted).

Given the basis for defendants' objection that the intervenors bring nothing new to the table, there can be no dispute that there are common questions of law and fact between the claims of the proposed intervenors and the original plaintiffs, which counsels in favor of permitting intervention. Further, because the proposed intervenors and original plaintiffs are all represented by the same attorneys and the proposed intervenors are already part of the proposed class, the Court discerns no potential delay or prejudice in the adjudication of the rights of the original parties.

To defendants' arguments of redundancy, plaintiffs respond that while the proposed intervenors may be covered by the proposed class definition, "the facts and circumstances relating to each of the putative intervenors" highlight or show "aspects of illegal conduct not covered by allegations relating to the existing plaintiffs." Pl.'s Reply [Doc. # 52] at 10. They note that several of the intervening plaintiffs allege factual circumstances supporting the claim of illegality which are not reflected by any of the current plaintiffs: that defendants failed to inform them of feasible alternatives under the Waiver or to offer them a choice of either ICF/MR or Waiver services, and that defendants have refused to identify their need for residential supports in their individual plans and that defendants have failed to provide fair hearings to challenge limited and inadequate waiver services.

Beyond plaintiffs' claim that the additional plaintiffs are necessary to maintain an Article III case or controversy as to all allegations in the complaint and to "add to the Court's understanding of the scope and breadth of the claims," Pl.'s Mem. [Doc. # 44] at 30 (*quoting German v. Federal Home Loan Mortg. Corp.,* 896 F.Supp. 1385, 1392 (S.D.N.Y.1995)), defendants' opposition to intervention assumes the certification of this case as a class action. However, denial of plaintiffs' motion for class certification would leave the proposed intervenors "competing for the same pool of limited state resources" as the original plaintiffs, Pl.'s Mem. [Doc. # 44] at 28, and would presumably simply result in the filing of a second lawsuit similar to this suit.[4]

***6** For all of the reasons set out above, the Court concludes that it is an appropriate exercise of discretion to permit these proposed intervenors to join this suit as plaintiffs.

**III. Conclusion**

For the reasons set out above, plaintiffs' Motion to Amend [Doc. # 21] and Motion to File an Intervening Complaint [Doc. # 43] are GRANTED. The Clerk is directed to docket the Amended Complaint and the Intervening Complaint.

Footnotes

1 While defendants' assertion presupposes an amendment alleging that each individual applied for Waiver services specifically and was thereafter rejected, plaintiffs have responded more broadly by claiming that defendants' implementation and alleged undue limitation of the Waiver program is itself improper.

2 *E.g.,* Am. Compl. ¶ 26 ("Defendants advised Mrs. Austin–Small that an application for the Waiver made no sense because the Waiver has nothing to do with obtaining residential services.").

3 *E.g.,* Am. Compl. ¶ 28 ("When she specifically requested permission to apply for Waiver funding to pay for a community residential placement, Mrs. Sage was told that she couldn't apply until DMR located a residential placement for Paula.").

4 The Court awaits completion of briefing on the recently filed motion for class certification, and expresses no opinion as to its merits.