UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HEALTH CARE FOR ALL, INC., *et al.*, **Plaintiffs,** **v.** **MITT ROMNEY, *et al.*,** **Defendants.**	**CIVIL ACTION** **NO. 00-CV-10833-RWZ**

DEFENDANT STATE OFFICIALS' REPLY TO PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Out of the seven claims alleged in their Second Amended Complaint, plaintiffs now concede that two of the statutory provisions on which they rely (Counts I and IV) fail to unambiguously confer individual rights subject to private enforcement under Section 1983 and that a third provision (Count V) presents a "greater analytical challenge" for plaintiffs given the First Circuit's adverse decision in Long Term Care Pharm. Alliance v. Ferguson, 362 F.3d 50, 57-59 (1st Cir. 2004). (Plaintiffs' Opp. at 4, n.4). Plaintiffs also concede that there are no disputed factual issues and that resolution of the State Officials' motion involves a question of law turning on the proper interpretation of the Supreme Court's decision in Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). (Plaintiffs' Opp. at 1-3).

Despite these concessions, plaintiffs contend that the State Officials' motion should be denied because the State Officials allegedly misread Gonzaga by putting too much emphasis on the need for individual, rights-creating language and downplaying the Medicaid Act's broad statutory goal of benefitting those persons eligible to receive financial assistance under a participating State's plan. See id. at 6-7. As the First Circuit recognized in reversing its own earlier decision in the private rights arena, see Long Term Care, 362 F.3d at 57-59, the Supreme Court was not engaging in idle chatter when it stressed in Gonzaga that nothing short of an

"unambiguously conferred right" can support a cause of action brought under § 1983, even where the action is brought "by a class of the statute's principal beneficiaries." Gonzaga, 536 U.S. at 281-83 (citing Suter v. Artist M, 503 U.S. 347, 357 (1992)). And, although the Court did not overrule its prior decisions in Blessing v. Freestone, 520 U.S. 329 (1997) and Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990), the Court soundly rejected any interpretation of those cases – such as that attempted to be resurrected by plaintiffs here – "as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." Gonzaga, 536 U.S. at 283. Contrary to this clear demand, plaintiffs identify no individual, rights-creating language in the Act or any of the statutory provisions on which they continue to rely. Instead, they assert – without citation to any authority – that "[w]ith the entitlement nature of Medicaid comes the beneficiaries' legal right to enforce the Act's requirements against non-compliant states." (Plaintiffs' Opp. at 4). This *ispe dixit* begs the question: there can be no private right of enforcement – even by a group of the statute's principal beneficiaries – "where the text and structure of a statute provide no indication that Congress intends to create new individual rights."[1] Gonzaga, 536 U.S. at 286. No such unambiguous intent has been demonstrated here.

The focus of the Act, like most funding legislation, is not on the rights of individual Medicaid recipients but, rather, on the state as the regulated entity.[2] See Alexander v. Sandoval,

---

[1]While plaintiffs, as persons eligible to receive financial assistance under the Act, are entitled to due process in connection with any termination decision, the State Officials are not alleged to have terminated plaintiffs' eligibility for benefits and, even if any such individual plan decisions were at issue here, the Act (and applicable state regulations) affords all the process that is due through the fair hearing proceedings. See Goldberg v. Kelly, 397 U.S. 254, 266-70 (1969); 42 U.S.C. § 1396a(a)(3).

[2]Plaintiffs overreach when they assert that the Act is intended not just to fund but to "arrange and provide" actual dental services to eligible individuals. (Plaintiffs' Opp. at 4). The very case that plaintiffs cite in support of this mistaken proposition, Schwieker v. Gray Panthers, 453 U.S. 34, 36 (1980), states that the Act is intended to create a program to provide "federal funds to States that pay for medical treatment for the poor." Furthermore, the phrase "medical

532 U.S. 275, 288 (2001) ("statutes that focus on the person regulated rather than the individuals protected [do not] confer rights on a particular class of persons'"). The particular statutory provisions on which plaintiffs rely are not intended to confer privately enforceable rights; instead, they are intended to provide a yardstick for the Secretary to measure a state's systemwide compliance with the conditions imposed on continued federal funding. See Gonzaga, 536 U.S. at 281. This conclusion is bolstered by the fact that the Act vests the Secretary with broad authority to enforce claims -- identical to those alleged here – challenging a state's alleged failure to administer its plan in compliance with the Act's requirements. See 42 U.S.C. § 1396c(2).[3] Given this centralized enforcement mechanism, it is "implausible to presume" that Congress intended individual Medicaid recipients, like plaintiffs here, to act as self-appointed private attorneys general seeking redress for a state's perceived failure to administer its plan in compliance with federal law. See Gonzaga 536 U.S. at 290 and 292 (Breyer, J., concurring); Long Term Care, 362 F.3d at 58. Indeed, section 1983 is intended to be a vehicle for the redress of federal rights, not mere violations of federal law. Gonzaga, 536 U.S. at 282. This case, therefore, presents no reason to depart from the well-settled rule that, "'[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the [Secretary] to terminate funds to the State.'" Gonzaga, 336 U.S. at 280 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (emphasis added).

---

assistance," as used in the Act's enabling provision, is itself defined as the "the payment of part or all of the cost" of certain enumerated services, not the actual delivery of such services. 42 U.S.C. §§ 1396, 1396d(a); Bruggeman v. Blagojevich, 324 F.3d 906, 910 (7th Cir. 2003).

[3]Plaintiffs erroneously contend that the Secretary's enforcement authority is irrelevant to determining whether Congress intended to permit private causes of action because they "have not brought claims under this provision of the Act." (Plaintiffs' Opp. at 7). The question however is not what strategy plaintiffs chose to pursue, but one of Congressional intent. Gonzaga establishes that a centralized enforcement mechanism of the sort provided in the Act "bolsters" the conclusion that Congress did not intend to create a new private right, even where, as here, the enforcement mechanism is not "sufficiently comprehensive" to alone foreclose a private enforcement scheme. Gonzaga, 536 U.S. at 284-85, n. 4, 289-90, n.8.

Plaintiffs also mistakenly contented that 42 U.S.C. § 1320a-2 precludes any argument that no private right of enforcement exists under the Act. (Plaintiffs' Opp. at 5-6). By its terms, Section 1320a-2 provides simply that a provision of the Social Security Act is "not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan." The State Officials concede that the determination of whether a private right of action exists here does not turn on the fact that all of the subject provisions are contained in a State plan requirements section of the Act. (State Officials' Mem. at 12, n.8). Rather, the State Officials contend that no unambiguous private right exists for all of the other reasons identified by the Courts in Gonzaga and Long Term Care (i.e., no rights-creating language; aggregate, not individual, focus; centralized enforcement mechanism). The plain language of § 1320a-2 establishes that it was not intended to preclude reliance on such additional grounds. See 42 U.S.C. § 1320a-2 ("[t]his section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements . . . "); Harris v. James, 127 F.3d 993, 1002-03 (11th Cir. 1997).

Furthermore, with regard to the particular statutory provisions on which they continue to rely, plaintiffs fail to demonstrate any meaningful basis upon which to distinguish the First Circuit's prior holding that the equal access provision, 42 U.S.C. § 1396a(a)(30), has "no rights creating language and identifies no discrete class of beneficiaries – two touchstones in Gonzaga's analysis. . . ." Long Term Care, 362 F.3d at 57. Plaintiffs' argument with respect to the reasonable promptness provision, 42 U.S.C. § 1396a(a)(8), and comparability provision, 42 U.S.C. § 1396a(a)(10)(B), reduces to the proposition that because these provisions use the word "individual" they create privately enforceable rights. See Plaintiffs' Opp. at 8-10. Gonzaga requires more than a passing reference to individuals; it requires plaintiffs to establish an unambiguous congressional intent to create new private rights. (State Officials' Mem. at 9, 26). Several courts (in addition to those cases already cited) have held that no such unambiguous

congressional intent is reflected in either the comparability or reasonable promptness provision. See Watson v. Thorne, No. 03-227, 2004 WL 1445113, *3 (D. Or. June 24, 2004) (comparability provision does not "contain rights-creating language unequivocally conferring an individual right"); Sanders v. Kansas Dep't of Social and Rehabilitation Servs., No. 03-4075-SAC, 2004 WL 1089212, *37 (D. Kan. Apr. 29, 2004) (reasonable promptness provision "does not contain the explicit rights-creating language described in Gonzaga"). Equally without merit is plaintiffs' attempt to equate the provisions at issue here with the literal "laundry list" of specifically enumerated individual rights set forth in the statute at issue in Rolland v. Romney, 318 F.3d 42, 53, n. 10 (1st Cir. 2003). See Plaintiffs' Opp. at 11.

Lastly, apparently recognizing the weakness of some of their remaining claims, plaintiffs urge this Court to withhold summary judgment on all the claims if it is shown that only partial judgment is warranted.[4] Whatever applicability such a procedure might have in other cases, it makes little sense here since plaintiffs' claims are directed at discrete provisions of the state plan. A more efficient solution would be to allow summary judgment on all of the claims, thereby avoiding the expense and delay of a protracted trial, and permitting plaintiffs an expedited path to appellate review on what the parties agree is purely a question of law. This approach also would permit the First Circuit an opportunity to resolve the seemingly inconsistent results reached by the panels in Bryson and Long Term Care. See State Officials' Mem. at 22, n.13.

---

[4]Similarly, apparently hoping to obtain a more lenient standard of review, plaintiffs suggest that the State Officials' motion should be converted to one for judgment on the pleadings under Rule 12(c) because it does not rely on materials beyond the pleadings and presents only a question of law. See Plaintiffs' Opp. at 1-2. However, Rule 56 is the proper vehicle for disposing of actions where there is no factual dispute and only a question of law is presented. 10A Charles A. Wright *et al.*, Federal Practice & Procedure § 2712 at 198 (1998). The rule also expressly provides that a summary judgment motion may be filed "with or without" supporting materials. Fed. R. Civ. P. 56(b); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). Plaintiffs, in any event, have supported their opposition with materials beyond the pleadings, thereby precluding reliance on Rule 12(c). See Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 n.5 (1st Cir. 1998).

Respectfully submitted,

THOMAS F. REILLY
ATTORNEY GENERAL

Maite A. Parsi, BBO #554009
James J. Arguin, BBO #557350
Assistant Attorneys General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: July 8, 2004