

EUNICE SMITH, et al.
Plaintiffs

v.

S. ANTHONY McCANN, et al.
Defendants

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CIRCUIT COURT FOR
BALTIMORE CITY *

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CIVIL DIVISION *

IN THE

CIRCUIT COURT

FOR BALTIMORE CITY

Case No.: 24-C-05-007421

* * * * *

MEMORANDUM

This case is before the court upon Defendants' Motion to Dismiss. Plaintiffs are recipients of long-term care benefits under the Medical Assistance Program. They seek injunctive and declaratory relief on their own behalf, and on behalf of a class of persons said to be similarly situated, against defendants, who administer the Medical Assistance program in the state of Maryland. The suit concerns a policy relating to the deduction of certain non-covered medical expenses for purpose of determining a recipient's responsibility for cost of care. Plaintiffs contend that the policy violates the federal Medicaid statute and that the manner in which it has been adopted and implemented violates the Maryland Administrative Procedure Act.

Count I of the Complaint alleges that defendants' policy violates 42 U.S.C § 1396a(r)(1)(A)(ii) because it "fail[s] to deduct for necessary medical care." It asserts that the court is empowered to grant relief under Maryland's Declaratory Judgment Act, as well as 42 U.S.C. §1983. Count II alleges that the defendants have violated the Maryland Administrative Procedure Act because the challenged policy has been promulgated and implemented without compliance with the rule making requirements set forth in the Act. Count III alleges that defendants have violated 42 U.S.C. §1396c(2), which provides for the Secretary of Health and Human Services to take action on a finding that a State plan fails to comply with the statute. It

also asserts that relief may be granted pursuant to the Declaratory Judgment statute and section 1983.

Defendants' motion cites two grounds for dismissal. The first argument is that plaintiffs have failed to exhaust available administrative remedies. Defendants contend that plaintiffs should avail themselves of a procedure under which Medicaid recipients may appeal a post-eligibility deduction calculation. Defendants also contend that plaintiffs' claims under section 1983 must be dismissed because the federal statutes on which plaintiffs base their claims do not confer an individual right of action upon them.

Exhaustion of Remedies

Persons such as plaintiffs have a right to appeal from the Department's determination regarding post-eligibility deductions. Defendants argue that because plaintiffs have failed to do so, the court should refuse to entertain these claims in accordance with the well-established rule requiring resort to available administrative remedies.

Two of the counts contained in the complaint purport to state claims under 42 U.S.C. § 1983. Although the question has been regarded as not completely settled (*see* Annotation, *Exhaustion of State Administrative Remedies as prerequisite to Federal Civil Rights Action*, *Based on 42 U.S.C.A. § 1983*, 47 A.L.R. Fed 15); the Court of Appeals of Maryland has flatly stated that resort to state administrative remedies is not required before filing suit under section 1983. *Maryland Reclamation Associates v. Harford County*, 342 Md. 476, 492-93 (1996). In *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the Supreme Court held that exhaustion was not required in a context not unlike that involved here. The court concludes that exhaustion of the remedy involved here is not a prerequisite to the assertion of plaintiffs' claims under section 1983.

As to Count II, it appears that Md. Ann. Code, State Gov't Article § 10-125 permits plaintiffs to bring a declaratory judgment action challenging the validity of a regulation regardless of whether they have raised the issue in an underlying agency proceeding. This claim appears to fall within the ambit of this statute. Therefore, Count II is not subject to dismissal for failure to exhaust administrative remedies.¹

Section 1983 Cause of Action

Defendants' second argument is that the claims asserted under section 1983 fail to state a cause of action because the sections cited by plaintiffs do not create a private right of action.

In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Supreme Court identified three factors to be looked at in determining whether a statute creates an individual right enforceable through section 1983. The three factors are: that Congress must have intended the provision in question benefit the plaintiff; that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources; and that the provision giving rise to the asserted right impose a binding obligation, i.e., that it must be couched in mandatory, rather than precatory, terms. 520 U.S. at 340-341. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court emphasized that in determining whether Congress intended that the provision confer individual rights, the court must focus on whether Congress's intent was unmistakable, rejecting "the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283.

¹ As plaintiffs point out, given the unvarying nature of the policy adopted by defendants, resort to the administrative procedure might be viewed as futile. However, Maryland precedent relating to the exhaustion doctrine does not lend itself to the conclusion that a court may lightly dispense with the requirement that a party exhaust administrative remedies. See, e.g., *Brown v. Fire and Police Employees' Retirement System*, 375 Md. 661 (2003).

The parties have directed the court's attention to a number of cases that consider whether different provisions of the Social Security Act create private rights. As plaintiffs note, a conclusion that one section does or does not give rise to a private cause of action does not compel a similar conclusion about another section, given the differences in language and function among the different sections of the Act. However, the analysis applied to the various sections of the Act by different courts in the numerous decisions cited by the parties is useful in applying the principles of *Blessing* and *Gonzaga* to the section at issue here. The court has examined the cases cited by the parties, as well as a case decided after the date of the hearing on the motion. *See Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006). It is not necessary to list all of those cases here.

The statute on which Count I is based, 42 U.S.C. § 1396a(r)(1)(A), provides as follows:

(r) Disregarding payments for certain medical expenses by institutionalized individuals

(1)(A) For purposes of sections 1396a(a)(17) and 1396r-5(d)(1)(D) of this title and for purposes of a waiver under section 1396n of this title, with respect to the post-eligibility treatment of income of individuals who are institutionalized or receiving home or community-based services under such a waiver the treatment described in subparagraph (B) shall apply, there shall be disregarded reparation payments made by the Federal Republic of Germany, and there shall be taken into account amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including--

(i) medicare and other health insurance premiums, deductibles, or coinsurance, and;

(ii) necessary medical or remedial care recognized under State law but not covered under the State plan under this subchapter, subject to reasonable limits the State may establish on the amount of these expenses.

In light of the precedent applying *Blessing* and *Gonzaga* to the Social Security Act, the court concludes that this statute does confer an individual federal right upon plaintiffs. *See S.D.*

ex rel. Dickson v. Hood, 391 F.3d 581, 603 (5th Cir. 2004)(section 1396a(a)(10)(A); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004)(section 1396a(a)(8); *Watson v. Weeks, supra*, 436 F.3d at 1159 (section 1396a(a)(10). The language of this section appears to the court to be as unambiguous in its "rights-creating" language as the statutory sections reviewed in those opinions. Furthermore, the second two prongs of the *Blessing* test are satisfied. Therefore, the court concludes that Count I states a cause of action.

The same cannot be said of section 1396c, which is the basis of Count III. In contrast to the language of section 1396a(r), which focuses on the treatment of the income of individuals, and speaks of taking into account certain items in connection with that treatment, section 1396c is plainly a statute explicitly empowering the Secretary to take action. Its language forecloses any inference that it confers a right on individuals. Therefore, Count III fails to state a claim, and will be dismissed.

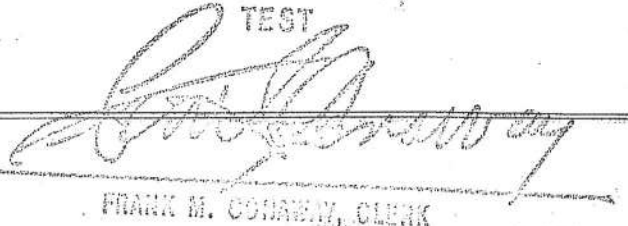
A separate order will be entered embodying these rulings.

Dated: March 10, 2006

W. MICHAEL PIERSON
Judge

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ORDER

In accordance with a Memorandum of even date, it is this 10th day of March,

2006,

ORDERED that Defendants' Motion to Dismiss be and it hereby is **GRANTED in part**
and **DENIED in part**, and further

ORDERED that Count III of the complaint be and it hereby is **DISMISSED**, and further

ORDERED that the motion is otherwise **DENIED**.

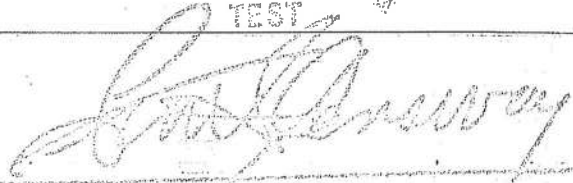
W. MICHEL PIERSON

Judge

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