UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD NELSON, et al.,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY, et al.,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER AND MOTION FOR STAY PENDING APPEAL

INTRODUCTION

The State Defendants ("Defendants") have filed a motion to certify this Court's February 7, 2006 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). They argue that the issues of whether Plaintiffs' claims are sufficiently ripe to confer standing and whether there is a private right of action under 42 U.S.C. § 1396a (a)(30)(A) meet the criteria for immediate interlocutory appeal. On March 1, 2006 the parties filed a stipulation agreeing to dismissal of the Medicaid claim. The remaining issue, standing, does not justify interlocutory review. Accordingly, this Court should deny the Defendants' motion to certify that issue for appeal. Moreover, Defendants' motion for stay pending appeal should be denied in any case because the potential for harm to Plaintiffs and others is too significant to delay progress of this litigation.

ARGUMENT

I. The Motion for Certification should be denied because the issue of whether Plaintiffs' claims are sufficiently ripe to confer standing does not meet the prerequisites for a discretionary appeal.

To justify certification of an issue for permissive interlocutory appeal, a defendant must show that "exceptional circumstances justify a departure from the policy of postponing appellate review until after the entry of a final judgment." *Shepherd Investments International, Ltd. v. Verizon Communications, Inc.,* No. 03-C-0703, 2005 WL 1475323, *1 (E.D. Wis. June 22, 2005) *quoting Fisons Ltd. v. United States* , 458 F.2d 1241, 1248 (7th Cir. 1972); *see also Herdrich v. Pegram,* 154 F.3d 362, 368 (7th Cir. 1998) (stating that "[c]ertificates of appealability are generally disfavored . . ."). Specifically, defendants must show that: (1) there is a question of law; (2) it is controlling; (3) the issue is contestable in that there is substantial ground for difference of opinion; and (4) its resolution will promise to speed up the litigation. *Ahrenholz v. Board of Trustees of Univ. of Ill.,* 219 F.3d 674, 675 (7th Cir. 2000); *Shepherd Investments International, Ltd.*, *supra*. "Unless *all* these criteria are satisfied, the district court may not and should not certify its order . . . for an immediate appeal under section 1292(b)." *Ahrenholz,* 219 F.3d at 675 (emphasis original). The question of whether Plaintiffs' claims are sufficiently ripe to confer standing does not meet all of these factors.

A. The standing issue is not a proper question of law for certification.

As the Seventh Circuit has emphasized, "a question of law, as used in section 1292(b) has reference to . . . the meaning of a statutory or constitutional provision, regulation, or common law doctrine . . ." *Ahrenholz* at 676; *see also Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1007 (7th Cir. 2002). It should be "free from a factual context" and "something the court of appeals could decide quickly and cleanly without having to study the record." *Ahrenholz* at 677. *See*

also, e.g., Boim, 291 F.3d at 1007 (certifying questions of interpretation of federal statutes, specifically: (1) whether funding an international terrorist organization is an act of terrorism under 18 U.S.C. § 2331; (2) whether 18 U.S.C. § 2333 incorporates the definitions of terrorism found in other statutes; and (3) whether a civil cause of action for aiding and abetting international terrorism lies under these statutes.); *U.S. EEOC v. Sidley, Austin, Brown & Wood,* 406 F. Supp. 2d 991, 993 (N.D. Ill. 2005) (certifying the "purely legal" question of whether the EEOC may pursue claims on behalf of individuals who failed to file charges under the ADEA).

In this case, a determination of whether Plaintiffs have standing involves more than a clean interpretation of the meaning of a statutory, constitutional or regulatory provision or common-law doctrine. The question is enmeshed in the factual context. This Court based its determination that Plaintiffs have standing on its evaluation of a number of factual allegations, including allegations that family care service providers would withdraw from the program unless reimbursement rates were increased, Plaintiffs would suffer trauma as a result, that the State Defendants control the rates of reimbursement and that an increase in the rates would mean that providers would not leave the program. *Nelson v. Milwaukee County*, 2006 WL 290510, *3 (E.D. Wis. 2006). Thus, if the Court of Appeals were to evaluate this Court's determination it would be required to engage in a detailed analysis of the many factual allegations rather than a "quick and clean" analysis of a strictly legal question. *See* JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 101.81 (3d Ed. 2005) (noting that the determination of ripeness is frequently difficult because it "necessarily includes a number of complex issues to be resolved [including] whether sufficient facts are established or whether the matter is too abstract [or] whether harm is likely to occur . . ."). Defendants have failed to meet their burden of establishing this factor.

B. This issue is not contestable for the purposes of a permissive appeal.

"An interlocutory review should not be allowed merely to provide a review of difficult rulings in hard cases." *Boese v. Paramount Pictures Corp.*, 952 F. Supp. 550, 560 (N.D. Ill. 1996) (citations omitted). To satisfy the requirement that an issue be contestable, "it is not enough that there be a difference of opinion, there must be a substantial ground for such difference." *Shepherd Investments,* at *2. Far from meeting that standard, Defendants have not identified any opinion or other authority that actually conflicts with this Court's decision. The only case that Defendants cite, *Tobin for Governor v. Illinois State Bd. of Elec.,* 268 F.3d 517 (7th Cir. 2001), presents no conflict. The *Tobin* court found that the plaintiffs' claims that their constitutional rights had been violated in connection with an election were moot because the election had already taken place. *Id.* at 528. It also found that they lacked standing to complain of the same injury occurring in the future because at least four unlikely contingencies had to occur for the injury to be replicated.[1] In the instant case, Plaintiffs have alleged - and presented evidence - that their injury is imminent because their service providers will withdraw if the rates are not increased. In contrast to *Tobin*, plaintiffs have shown that this single contingency is highly likely to occur.

Defendant argues that neither the Court nor Plaintiffs cited any cases with similar facts supporting the Court's conclusion that standing exists. Brief, at 5. This is inaccurate. As just one example, *Bennett v. Spear,* 520 U.S. 154 (1997), cited in the Court's opinion, fully supports its conclusion. 2006 WL 290510 at *4. The *Bennett* plaintiffs alleged that a directive from the defendant U.S. Fish and Wildlife Service would cause the Bureau of Reclamation, a non-party,

[1] The same candidates would have to decide to run for office, more than 25,000 signatures in support of those candidates would have to be collected, those signatures would need to be determined sufficient by a hearing officer, and the elections board would have to reverse the hearing officer and issue a written opinion with identical objections. *Tobin,* at 528.

to take actions that would injure the plaintiffs. Similarly, Plaintiffs in this case allege that Defendants' actions will cause providers, non-parties, to take actions that will injure Plaintiffs. The Supreme Court in *Bennett* held unanimously that the plaintiffs had standing, noting that a defendant's actions need not be the last step in a chain of causation to be fairly traceable to the injury. *Id.* at 169. The same principle applies in this case.

Even if Defendants had shown a lack of precedent, it would be immaterial. A showing that there are substantial grounds for difference of opinion cannot be satisfied merely by showing lack of judicial precedent; rather, "the moving party must still show that there is a substantial likelihood that the district court ruling will be reversed on appeal." *Boese v. Paramount Pictures Corp.*, 952 F.Supp. at 560-1; *Hollinger v. In re Bridgestone/Firestone,* 212 F. Supp. 2d 903, 909 (S.D. Ind. 2002) (holding that movant must show "substantial conflicting positions").[2] Moreover, any lack of identical cases is simply indicative of the individualized nature of ripeness decisions, which are:

> . . . often *sui generis*. Most litigation has idiosyncratic features and the various integers that enter into the ripeness equation play out quite differently from case to case, thus influencing the bottom line.

Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 536 (1st Cir. 1995); *see also* MOORE'S FEDERAL PRACTICE § 101.81. Thus, a rule requiring that the non-moving party or court cite a case based on identical facts reaching the same conclusion before denying a request

[2] A district court will be affirmed on any additional ground that is supported by the record and has not been waived. *Crane v. Indiana High School Athletic Assn.*, 975 F.2d 1315, 1319 (7th Cir. 1992). The Court found no need to reach Plaintiffs' supplemental arguments about the essential nature of group home living for people with disabilities, *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 787 (7th Cir. 2002), or the significant interest in continuing existing relationships with staff and other residents under the Supreme Court's association cases, *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984); *Bd. of Dir. of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). These arguments would, however, provide yet another basis for affirming the Court's decision on standing.

for interlocutory appeal would result in nearly all ripeness determinations being appealable, which would run counter to the caution of *Ahrenholz* and the intent of §1292(b). Defendants have not met their burden with regard to this criterion.

C. Granting an appeal on this issue is highly unlikely to expedite the litigation.

The Seventh Circuit denies most §1292(b) requests, thus, Defendants must demonstrate something extraordinary to justify the obvious delays that result from simply making the motion. *Ahrenholz*, 219 F.3d at 675. The law "does not contemplate that an immediate appeal [be allowed] solely on the ground that [it] may advance the proceedings in the district court." *Id.* at 676 (citation omitted); *see also Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97, 100 (S.D.N.Y. 1995) (certification "must materially advance" the litigation) (citations omitted). "Special care must be taken to avoid the risk that a § 1292 appeal may actually impede, rather than expedite the conclusion of the entire case." *Fisons,* 458 F.2d at 1248.

This case does not involve a dispute over historical events. Rather, the operation of the Family Care program is ongoing and impacts the Plaintiffs in a very personal way. Milwaukee County received a large increase in the capitated rate for calendar year 2005 compared to 2004. www.dhfs.state.wi.us/LTCare/StateFedReqs/CaptitatedRates.htm. County staff announced at provider meetings in early 2005 that a new residential rate structure was being developed. [Dkt. 53-SRCA Memo, at 6-7 & 13-14]. Then it was learned that those additional funds would first be used to repay previous shortfalls instead of allocating at least some portion to residential providers immediately. [Dkt. 79- Cook Aff. ¶4 9 & Ex. I]. There was still hope for increased residential rates, but it now appears that the funding situation has gotten even worse and that residential providers will not be receiving any increases at all.

Milwaukee County expected an additional $3.7 million annual increase for 2006 and had already committed it to another class of providers rather than to residential services. Family Care faces $1.8 million shortfall, Milwaukee Journal Sentinel, January 22, 2006. Unfortunately, however, the County did not receive any annual capitated rate increase for 2006 and providers are "hurting." *Id.* This latest failure to increase rates is likely to push more providers over the edge. Thus, the likelihood that the Plaintiffs and other AFH/CBRF residents will be forced to move is greater now than at any other time since this case was filed. That, in turn, threatens the interim agreement that resolved the original preliminary injunction motion. [Dkt. 20-Transcript of Agreement].

The issues in this case cannot be put on a shelf during an interlocutory appeal. Administrative efficiency will be best served by deciding the pending class motion and resolving the entire case as soon as practical, rather than focusing on a single issue. Certification under §1292(b) will not expedite the litigation.

D. Whether this issue is controlling is immaterial.

The standing issue may be controlling, however, satisfaction of that factor alone cannot justify granting interlocutory appeal. *Shepherd Investments*, *supra*. Otherwise interlocutory appeals would be granted routinely rather than as extraordinary relief.

II. The proceedings should not be stayed pending the resolution of the request for an interlocutory appeal.

The State Defendants have also moved for a stay of further proceedings in this matter pending the interlocutory appeal. A stay pending application for an interlocutory appeal requires a separate determination and order. 28 U.S.C. § 1292(b). "Congress could have required but did not require the granting of permission for interlocutory appeal to be accompanied always by a stay of the lower court proceedings." *Reed v. Rhodes*, 549 F.2d 1050, 1052 (6th Cir. 1976). It

should be denied if "potential harm to plaintiffs . . . outweighs any benefit that may be gained by awaiting the Court of Appeals' decision." *Powell v. National Football League* , 711 F.Supp. 959, 961 (D. Minn. 1989). The district court in *Powell* certified issues for an interlocutory appeal but denied the stay and ruled on additional motions including class certification. *Id.* at 967. Because a §1292(b) appeal may prolong litigation, "a stay of proceedings in the district court pending an appeal . . . will seldom if ever be granted." *Fisons,* 458 F.2d at 1248, n. 16.

In *Reed,* a school desegregation class action, the district court had certified the case for interlocutory appeal and stayed all further proceedings. The Sixth Circuit, however, dissolved the stay because the value of the constitutional interests at stake outweighed the potential administrative inconvenience to the district court if its efforts in formulating a remedy were undone by a reversal on the merits. 549 F.2d at 1052, *citing Swann v. Charlotte-Mecklenburg Board of Education*, 399 U.S. 926 (1970). Like the *Reed* and *Swann* cases, the potential harm in delaying further proceedings here far outweighs any administrative burden. As discussed above, the plight of the individual Plaintiffs is getting worse along with the magnitude of the rate dispute. The issues are systemic so it is appropriate to proceed with the class motion. Accordingly, regardless of this Court's ruling on the certification question, it should deny the stay motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the motion to certify issues for interlocutory appeal and the motion for a stay.

Date: March 16, 2006

Respectf ully submitted,

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