

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

**Susan Lavon Lankford; Rachel Ely; Jan Everett,)
as next friend of Joseph Everett; Donald)
Eugene Brown, Laura Lee Greathouse,)
Kimberly Vogelpohl, Adam Daniel Thomason,)**

Plaintiffs,

v.

**Gary Sherman, Director, Missouri Department)
of Social Services, in his official capacity,)**

Defendant.

No. 05-4285-CV-C-DW

COMPLAINT

INTRODUCTION

1. Plaintiffs are low income Missouri residents who receive their health services through Missouri's Medicaid program. Plaintiffs suffer from a range of disabilities, including quadriplegia, paralysis, diabetes, and cardio-pulmonary disease. To address their conditions, their respective doctors have prescribed for them certain durable medical equipment.

2. Defendant has promulgated an emergency regulation, Mo. Rule 13 C.S.R. § 70-60.010, effective September 1, 2005, that eliminates Medicaid coverage of the durable medical equipment that Plaintiffs need. As a result, some Plaintiffs will go without the prescribed items while others will be forced to make the difficult choice between paying for their health care needs or other necessities, such as food and shelter. Such choices should not have to be made because the emergency rule violates federal Medicaid law.

3. The Medicaid Act requires coverage of the prescribed durable medical equipment as a condition of the State's participation in the Medicaid program. As set forth in their Request for Relief, Plaintiffs seek declaratory and injunctive relief to enjoin Defendant from implementing the invalid state rule and thereby violating the federal Medicaid mandates.

JURISDICTION AND VENUE

4. This action arises under the Social Security Act. The Court has jurisdiction pursuant to 28 U.S.C. § 1331, which gives district courts original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States, and 28 U.S.C. §§ 1343(a)(3) and (4), which give district courts original jurisdiction over suits to redress the deprivation under color of state law of any rights, privileges, or immunities guaranteed by the Constitution or by acts of Congress.

5. Plaintiffs' action for declaratory, injunctive, and other appropriate relief is authorized by 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Susan Lavon Lankford is a Missouri Medicaid recipient living in Sullivan, Missouri, who suffers from a variety of medical conditions, including chronic obstructive pulmonary disease (COPD), bronchitis, asthma, emphysema, sleep apnea, irritable bowel syndrome (IBS), colonitis, diverticulitis and acid reflux.

8. Plaintiff Rachel Ely is a Missouri Medicaid recipient living in Ava, Missouri, who, following a series of strokes, has limited use of her arms and legs and has been diagnosed with sleep apnea.

9. Plaintiff Joseph (“Joey”) Everett, who appears in this action through his mother and next friend, Jan Everett, is a Missouri Medicaid recipient living in New Haven, Missouri, who has suffered traumatic brain injury and is partially paralyzed.

10. Plaintiff Donald Eugene Brown is a Missouri Medicaid recipient living in Kansas City, Missouri, who is a paraplegic.

11. Plaintiff Laura Lee Greathouse is a Missouri Medicaid recipient living in Lone Jack, Missouri, who, following a stroke, has limited mobility and sleep apnea.

12. Plaintiff Kimberly Vogelpohl is a Missouri Medicaid recipient living in Hillsboro, Missouri, who suffers from, among other things, emphysema, COPD, crushed vertebrae, back pain, and bowel and bladder problems.

13. Plaintiff Adam Daniel Thomason is an applicant for Medicaid benefits, living in Poplar Bluff, Missouri, who earlier this year became a paraplegic.

14. Defendant Gary Sherman is the Director of the Missouri Department of Social Services and, as such, has the responsibility to administer the Medicaid program consistent with the Medicaid Act. He is sued in his official capacity.

STATUTORY AND REGULATORY FRAMEWORK

15. Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396-1396v, establishes the Medicaid Act. The objective of the Medicaid Act is to enable each State to furnish medical assistance to families with children and to aged, blind, or disabled individuals whose incomes and resources are insufficient to meet the costs of necessary medical services and to furnish “rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.” 42 U.S.C. § 1396.

16. If a state participates in the Medicaid program, it must comply with all the provisions of the Medicaid Act and implementing regulations. *See* 42 U.S.C. § 1396a. Missouri participates in Medicaid. Mo. Rev. Stat. § 208.152.

17. The Medicaid Act includes mandatory and optional eligibility coverage groups and mandatory and optional service coverage requirements. 42 U.S.C. §§ 1396a(a)(10), 1396d(a).

18. The Act requires states to cover individuals who are “categorically needy.” 42 U.S.C. § 1396a(a)(10)(A). The categorically needy include certain children and pregnant women who meet federal poverty level standards, families and children who meet the eligibility standards of the now-repealed AFDC program, working disabled individuals, and persons who are aged, blind, or disabled. 42 U.S.C. § 1396a(a)(10)(A)(i).

19. States, like Missouri, that have elected to provide Medicaid using more restrictive definitions of blindness or disability or more restrictive financial eligibility standards than are currently used by the federal Supplemental Security Income (SSI) program, must also cover aged, blind, and disabled individuals whose incomes exceed the categorical eligibility levels when they incur sufficient enough medical expenses to “spend down” to Medicaid eligibility

levels. *See* 42 U.S.C. § 1396a(f) These individuals are considered to be categorically needy.

Id.

20. The Medicaid Act requires that “the medical assistance made available to any [categorically needy] individual . . . shall not be less in amount, duration or scope than the medical assistance made available to any other such individual.” 42 U.S.C. § 1396a(a)(10)(B)(i); *see also* 42 C.F.R. § 440.240(b) (requiring that “the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group: (1) The categorically needy.”) This requirement is known as the “comparability requirement.”

21. The Medicaid Act lists mandatory and optional Medicaid services. The Act requires states to cover home health services for any individual who is entitled to nursing facility services. 42 U.S.C. § 1396a(a)(10)(D). *See also* 42 U.S.C. § 1396d(a)(7) (listing “home health care services” as medical assistance).

22. Regulations implementing the Medicaid Act home health provisions provide that durable medical equipment is a “required service” and includes “[m]edical supplies, equipment, and appliances suitable for use in the home.” 42 C.F.R. § 440.70(b)(3).

23. A State must establish reasonable standards, consistent with the objectives of the Medicaid Act, for determining the extent of coverage of durable medical equipment and other home health services. *See* 42 U.S.C. § 1396a(a)(17). In doing so, a State must ensure that the amount, duration, and scope of coverage are reasonably sufficient to achieve the purpose of the service. 42 C.F.R. § 440.230(b). Furthermore, a State may not impose arbitrary limitations on

mandatory services, such as home health services, based solely on diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c).

24. In an official statement of agency policy, the U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services (CMS), the agency charged with implementation of the Medicaid Act at the federal level, has clarified that a State may develop a list of pre-approved items of medical equipment as an administrative convenience, but:

An ME [medical equipment] policy that provides no reasonable and meaningful procedure for requesting items that do not appear on a State's pre-approved list, is inconsistent with the federal law discussed above. . . . [T]he process for seeking modification or exception must be made available to all beneficiaries and may not be limited to sub-classes of the population (e.g., beneficiaries under the age of 21). . . . [A] state will be in compliance with federal Medicaid requirements only if, with respect to an individual applicant's request for an item of ME, the following conditions are met: The process is timely and employs reasonable and specific criteria by which an individual item of ME will be judged for coverage under the State's home health services benefit.

CMS, *Dear State Medicaid Director* (Sept. 4, 1998), at

<http://www.cms.hhs.gov/states/letters/smd90498.asp>.

25. Neither the Medicaid Act nor the implementing regulations require that a Medicaid recipient of home health services be "homebound" in order to receive home health services such as durable medical equipment. In an official statement of agency policy, CMS has clarified that the federal law bars a homebound requirement as a condition of receipt of Medicaid home health services, including durable medical equipment. CMS, *Dear State Medicaid Director Letter* (July 25, 2000), at <http://www.cms.hhs.gov/states/letters/smd725a0.asp>.

FACTUAL ALLEGATIONS

26. During the 2005 Legislative Session, the Missouri General Assembly enacted legislation authorizing more than \$600 million in cuts to the state's Medicaid program. These cuts were instituted through two pieces of legislation, SB 539 and HB 11.

27. On January 26, 2005, Governor Matt Blunt announced his proposed state budget for fiscal year 2006. Among other Medicaid cuts, Governor Blunt proposed to eliminate durable medical equipment as a covered Medicaid service for adult recipients except those who qualify because they are pregnant or blind.

28. Mo. Rev. Stat. § 208.152 provides statutory authorization for the services that are provided through Missouri's Medicaid program. The statute has provided, among other things, that wheelchairs, prosthetics and orthopedic devices must be covered Medicaid services. To implement the Governor's proposed Medicaid cuts, the Missouri General Assembly passed SB 539, which amends Mo. Rev. Stat. § 208.152 to eliminate the statutory requirement that Missouri Medicaid cover wheelchairs, orthopedic devices and prosthetics for all Medicaid recipients. SB 539 also created a new section, Mo. Rev. Stat. § 205.152.2, mandating that Missouri Medicaid cover wheelchairs, prosthetics and orthopedic devices for children, pregnant women, and persons who are blind. The Governor signed SB 539, which takes effect August 28, 2005.

29. On May 5, 2005, the Missouri General Assembly passed HB 11, budget legislation that authorizes funding for the Medicaid program and other Department of Social Services programs. HB 11, as passed, retained most of the Governor's proposed cuts to medical equipment and supplies. The Department's cost estimates that accompanied the bill listed the

following services as deleted for Medicaid recipients who are adults and not pregnant or blind: artificial larynx, augmentative communication devices, wheelchair batteries and accessories, three-wheeled scooters, decubitus care equipment (equipment that prevents tissue breakdown), hydraulic patient lifts, trapeze equipment, orthotics, hospital beds and specialized mattresses, bed side rails, commodes and bed pans, and all other medical equipment and supplies including but not limited to catheters, canes, crutches, walkers, nebulizers, parenteral nutrition, and infusion pumps. HB 11 did appropriate funds for a few specific items of durable medical equipment for non-blind adult recipients including wheelchairs (but not batteries or accessories), prosthetics, oxygen and respiratory equipment, and ostomy supplies. The Governor signed HB 11 on or about June 23, 2005, and it became effective July 1, 2005. However, the medical equipment cuts authorized by SB 539 cannot take effect until August 28, 2005.

30. On August 11, 2005, the Department of Social Services filed an emergency rule amending Missouri's Medicaid coverage of durable medical equipment. 13 C.S.R. § 70-60.010. Effective September 1, 2005, Defendant's new rule eliminates coverage of all but a few listed items of durable medical equipment for most categorically needy recipients.

31. Categorically needy recipients who are pregnant, blind, or children will maintain Medicaid coverage for durable medical equipment that includes but is not limited to:

Prosthetics; orthotics, oxygen and respiratory care equipment; parenteral nutrition, ostomy supplies; diabetic supplies and equipment; decubitis care equipment; wheelchairs; wheelchair accessories and scooters; augmentative communication devices; and hospital beds.

13 C.S.R. § 70-60.010(6). Durable medical equipment also continues to be covered in nursing home settings, as part of the per diem nursing home rate, with the exception of custom and power wheelchairs, prosthetic devices, and volume ventilators. *Id.* § 70-60.010(8).

32. For all other categorically needy Medicaid recipients, coverage of durable medical equipment is eliminated, with the exception of the items on the following list:

- prosthetics, excluding an artificial larynx;
- ostomy supplies;
- diabetic supplies and equipment,
- oxygen and respiratory supplies and equipment, excluding CPAPS, BiPAPS, nebulizers, IPPB machines, humidification items, suction pumps and apnea monitors; and
- wheelchairs, excluding wheelchair accessories and scooters.

Id. Included among the medical equipment excluded altogether for these categorically needy recipients are orthotics (such as cushions to help avoid bed and pressure sores), parenteral nutrition (for persons who are unable to eat orally), augmentative communication devices (that allow persons with speech disabilities to speak), hospital beds and bed rails, and lifts (that allow persons to transfer, for example, from bed to wheelchair).

33. On or about July 11, 2005, Defendant posted a Division of Medical Services Provider Bulletin on its website notifying providers that “Medicaid recipients receiving home health services will receive all federally mandated medically necessary services.” Missouri Department of Social Services, *Missouri Medicaid Program Changes* (July 12, 2005), at http://www.dss.state.mo.us/dms/bulletins/bulletin27-26_2005ju112.pdf. According to Missouri’s Home Health Provider Manual, the only recipients eligible for home health services are those who are homebound and require either intermittent skilled nursing services or physical, occupational, or speech therapy. Missouri Home Health Provider Manual § 13.14.D.

34. On or about August 1, 2005, Defendant sent a letter to approximately 370,000

Medicaid recipients, stating:

Beginning September 1, 2005, your Medicaid or MC+ card will no longer cover the services listed below in the Missouri Medicaid/MC+ program except for children or persons receiving Medicaid under a category of assistance for pregnant women, the blind, and nursing facility residents. Eliminated services include: . . .

Durable Medical Equipment (examples eliminated include but are not limited to, wheelchair accessories and batteries, three wheeled scooters, decubitis care cushions and mattresses, patient lifts, trapeze, all body braces (orthotics), hospital beds and side rails, commodes, catheters, canes, crutches, walkers, BiPAP, CPAP and nebulizers, parenteral and enteral nutrition, artificial larynx, and augmentative communication devices).

Missouri Department of Social Services, *Important Notice Regarding Services for Medicaid and MC+ adults* (Aug. 1, 2005) at <http://dss.missouri.gov/dms/dated/msreductrecip.htm>.

Plaintiff Susan Lavon Lankford

35. Plaintiff Susan Lankford is a 48-year-old woman who is enrolled in the Medicaid program. For the past ten years, she has suffered from a number of medical conditions, including chronic obstructive pulmonary disease (COPD), bronchitis, asthma, emphysema, sleep apnea, irritable bowel syndrome, colonitis, diverticulitis and acid reflux.

36. Because of her COPD, sleep apnea and related respiratory problems, Ms. Lankford requires certain durable medical equipment. She uses an oxygen machine to breathe at various times throughout the day. Ms. Lankford also uses an oxygen machine and a continuous positive airway pressure (CPAP) machine to help her breathe while sleeping. The CPAP machine requires various accessories that must be replaced on a regular basis. Filters need to be replaced about three times a month; the oxygen hose must be replaced about once a month; there are four other hoses that need to be replaced about once every three months. There are also noseplugs,

headgear, and other parts that need to be replaced at least every three-to-six months. Medicaid has covered the cost of the CPAP machine and accessories.

37. Plaintiff Lankford also uses a nebulizer at least four times a day to convert her asthma and bronchitis medication into a mist that she can inhale. Use of the nebulizer helps open her bronchial tubes and air passageways. The nebulizer has various parts and accessories, such as the mouthpiece, connectors, cups and hoses that need to be replaced once or twice each month in order to keep infection down. Medicaid has been covering the costs of the nebulizer and associated parts.

38. Ms. Lankford received a letter dated August 1, 2005 from the Missouri Department of Social Services Division of Medical Assistance informing her that, beginning September 1, 2005, Medicaid has eliminated coverage of, among other things, CPAP machines and nebulizers.

39. Ms. Lankford is already experiencing serious financial stresses and nearing bankruptcy. Her car has recently been repossessed. Her sole income is \$576 a month in SSI, and she has no savings. She supports herself and her two children. Ms. Lankford cannot afford to purchase or rent the medical equipment, accessories, and equipment parts that she needs.

40. Ms. Lankford needs the equipment and accessories for her daily subsistence and has been told by her pulmonary specialists that she would die without the CPAP machine. Without the nebulizer and accessories, she will not get proper treatment for her COPD and her breathing problems will worsen.

Plaintiff Rachel Ely

41. Plaintiff Rachel Ely is a 37-year-old Medicaid recipient who lives in Ava, Missouri. Just prior to her eighteenth birthday, she suffered three strokes, required an emergency craniotomy, and underwent open-heart surgery to replace her mitral valve. Ms. Ely now has very limited use of her right arm and leg but is now able to lift her left arm and leg. She has managed to start walking in a platform walker. Ms. Ely has been diagnosed with sleep apnea.

42. Ms. Ely depends on durable medical equipment, specifically a manual and electric wheelchair, including maintenance and batteries; leg braces and arm splints; and a CPAP machine. The leg braces help support her ankle and knee joints and avoid broken bones. The arm splints keep her left arm, hand and fingers from curling up. Medicaid has covered these items. Every few months, Medicaid has covered the adjustment costs for the braces and splints as Ms. Ely's body changes.

43. In August 2005, Ms. Ely received a letter from the Department of Social Services notifying her that Medicaid would not cover any of these items as of September 1, 2005. Because of the impending cutback, her equipment company has refused to adjust or modify her leg braces and splints. The leg braces no longer fit correctly. Ms. Ely is also experiencing problems with her electric wheelchair. The switch is not working, and the supply company told Ms. Ely it would charge her \$50.00 for the repair.

44. Ms. Ely uses the CPAP machine at night to address her sleep apnea. Without it, Ms. Ely is at risk for high blood pressure and possibly more strokes.

45. Plaintiff Ely receives \$579.00 a month in SSI. She cannot afford to pay both her living expenses and her medical expenses (which will also include heightened copayments on Medicaid-covered services as of September 1, 2005).

Plaintiff Joey Everett

46. Plaintiff Joey Everett is a 21-year-old Medicaid recipient living in New Haven, Missouri. When he was 17 years old, Mr. Everett was in an automobile accident and suffered traumatic brain injury, a lacerated spleen, and a broken pelvis. He is partially paralyzed and experiences non-purposeful movement and severe muscle spasms. Joey cannot swallow or eat through his mouth.

47. In early August 2005, Joey's mother, Jan Everett, received a letter from the Department of Social Services stating that Medicaid will no longer cover many of Joey's durable medical equipment needs after August 31, 2005.

48. Joey depends on a range of medical equipment and supplies. He receives all of his nourishment and all his of medications through a G-button and tubing. His nourishment is through Jevity nutritional formula. Jevity costs \$24 a case, and Joey uses about six cases a month. The G-button costs \$135 each month. The dressing used around the G-button (to prevent infection) costs \$5.50 a box, and Joey uses about three boxes a month. Vials of sodium chloride, at a cost of \$18 for a two month supply, are also needed for the G-button. According to the Department of Social Services' letter, these items and supplies will no longer be covered.

49. Mr. Everett also relies on Cath tip syringes to receive his medications and feedings, at a cost of about \$16 for 30 syringes. According to the Department of Social Services letter, these will no longer be covered.

50. Joey also needs catheters (costing \$30 to \$50) and a suction machine to keep him from choking on his saliva. The Department letter stated that Medicaid will no longer cover these items. Mr. Everett is also incontinent and must use external catheters and drainage bags. The Department's letter stated that these items will no longer be paid for by Medicaid. Joey relies on other items, such as mouth swabs and dressings for the pain patch on his arm. These items also will no longer be covered after September 1, 2005.

51. Plaintiff Everett's doctor asked the Department of Social Services for an exception on Joey's behalf, for the Jevity, Enteral Button Kit, Gauze Sponges, Syringes, Urinary Drain Bag and Catheter, and Feeding Bags. The request was denied. Joey's doctor has sent a letter appealing the decision.

Plaintiff Donald Eugene Brown

52. Plaintiff Donald Eugene Brown is a 51-year-old Medicaid recipient who lives in Kansas City, Missouri. He has been paralyzed from the chest down since 1978. In 1998, he was injured in a car accident, resulting in amputation of his right leg and no feeling or movement in his left leg.

53. Mr. Brown needs a manual wheelchair, including repairs and maintenance; wheelchair cushions; and catheters and bags. The wheelchair cushions help alleviate pressure sores and cost about \$300. The catheters and bags are used to collect Mr. Brown's urine. While the Plaintiff has, on occasion, boiled and reused old catheters, this leads to an increased chance of bladder infections.

54. In August 2005, Mr. Brown received a letter from the Department of Social Services telling him that Medicaid coverage of his wheelchair maintenance and repairs, cushions, and

catheters would end. Currently, he receives \$578 in monthly SSI. He cannot afford to purchase the items of medical equipment himself and, at the same time, meet other daily living needs.

Plaintiff Laura Lee Greathouse

55. Plaintiff Lee Laura Greathouse is a 60-year-old Medicaid recipient who lives in Lone Jack, Missouri. Prior to 2001, Ms. Greathouse was employed as a vice president of Blue Cross Blue Shield; however, she was forced to retire from her job due to problems associated with a sleep apnea disorder. Ms. Greathouse suffered a stroke in 2003. She qualifies for Social Security disability benefits (currently \$1251 per month) and spend down Medicaid.

56. Ms. Greathouse is unable to bathe or cook for herself. She has required multiple tracheotomy operations to address her sleep apnea. Mounting medical expenses have caused Ms. Greathouse and her husband to lose their home and savings. Their private insurance has reached its maximum.

57. Plaintiff Greathouse receives home health care through the Medicaid program. Her physicians have prescribed durable medical equipment for her, including tracheal tubes, a CPAP machine and humidifier attachments, and an electric wheelchair. Ms. Greathouse's trach tube also has a speaker attachment that allows her to talk. This equipment must be cleaned and maintained routinely.

58. Ms. Greathouse recently received a letter from the Department of Social Services telling her that Medicaid will no longer cover the cleaning equipment and replacement parts for the tracheal tube, the humidifier attachment to the CPAP, or the batteries that allow her wheelchair to move.

Plaintiff Kimberly Vogelpohl

59. Plaintiff Kimberly Vogelpohl is a 35-year-old Medicaid recipient who resides in Hillsboro, Missouri with her husband and four children. She suffers from emphysema, COPD, severe asthma, cardiology problems, high blood pressure, mental health issues caused by physical illness and stress, crushed vertebrae in her lower lumbar area, high cholesterol, and bowel and bladder problems.

60. Following a recent hospitalization, Ms. Vogelpohl was ordered to be on oxygen in order to stabilize her breathing problems. She was also prescribed an oxygen concentrator and a hospital bed. The hospital bed allows her to sleep on an incline, thus alleviating breathing problems. Ms. Vogelpohl was also was prescribed a walker, a potty chair, and a nebulizer (for taking her medications). The nebulizer and other equipment were ordered to help keep her out of the hospital.

61. Ms. Vogelpohl has received a letter telling her that her medical equipment will no longer be covered by Missouri Medicaid starting on September 1, 2005. She cannot afford to pay for these pieces of medical equipment. She does not know how she can stay out of the hospital without the equipment.

Plaintiff Adam Daniel Thomason

62. Plaintiff Adam Daniel Thomason is a 23-year-old man living in Poplar Bluff, Missouri, who was injured in a car accident on March 18, 2005. His spinal cord was crushed, and he is now a paraplegic. Before his injury, Mr. Thomason was insured through his job at Kroger's grocery. He reached the benefit cap under this insurance at the end of April and was forced to apply for the Medicaid program in May 2005. He expects to receive notice of approval imminently.

63. Mr. Thomason needs durable medical equipment. He currently uses an old wheelchair. The arm rests do not stay locked when he lifts his body to relive the pressure on it. The foot pedals will not stay tightened. Mr. Thomason is at risk of further injury using a defective wheelchair. Requests for a port-a-pot and transfer bench are pending, and Mr. Thomason will also need a shower bench. Mr. Thomason also needs five or six catheters per month.

64. Mr. Thomason currently receives about \$100 a week from work-related disability, but that will run out next month. Mr. Thomason cannot afford to buy the necessary items of durable medical equipment for himself.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

65. Plaintiffs restate and incorporate by reference paragraphs 1 through 64, above.

66. Mo. Rule 13 C.S.R. § 70-60.010 violates the Medicaid Act comparability provision, 42 U.S.C. §§ 1396a(a)(10)(B), enforceable by Plaintiffs pursuant to 42 U.S.C. § 1983, in that it eliminates coverage of most items of durable medical equipment for some categorically needy

individuals, including Plaintiffs, while covering those same items for other categorically needy individuals.

SECOND CLAIM FOR RELIEF

67. Plaintiffs restate and incorporate by reference paragraphs 1 through 66, above.

68. Defendant's regulation, Mo. Rule 13 C.S.R. § 70-60.010, which eliminates coverage of most durable medical equipment for Plaintiffs as described herein, is contrary to the comparability requirements of federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(B) and implementing regulations, and is thus preempted by the Supremacy Clause of the United States Constitution, art. IV.

THIRD CLAIM FOR RELIEF

69. Plaintiffs restate and incorporate by reference paragraphs 1 through 68, above.

70. Defendant's regulation, Mo. Rule 13 C.S.R. § 70-60.010, violates the Medicaid Act reasonable standards provision, 42 U.S.C. § 1396a(a)(17), enforceable by Plaintiffs pursuant to 42 U.S.C. § 1983, in that it is inconsistent with the objectives of the Medicaid Act and unreasonably limits categorically needy recipients who are not blind, pregnant or children to a pre-approved list of medical equipment as described herein.

FOURTH CLAIM FOR RELIEF

71. Plaintiffs restate and incorporate by reference paragraphs 1 through 70, above.

72. Defendant's regulation, Mo. Rule 13 C.S.R. § 70-60.010, which eliminates coverage of most durable medical equipment for Plaintiffs, allowing them access to only a limited listing of items as described herein, is contrary to the reasonable standards requirements of federal Medicaid Act, 42 U.S.C. § 1396a(a)(17), and interpretive federal guidelines, and is thus preempted by the Supremacy Clause of the United States Constitution, art. IV.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask that this Court:

A. Assume jurisdiction over this action;

B. Issue a declaratory judgment holding that: (1) Mo. Rule 13 C.S.R. § 70-60.010 violates the comparability requirements of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), and the reasonable standards requirements of 42 U.S.C. § 1396a(a)(17) and is thus invalid; and (2) Mo. Rule 13 C.S.R. § 70-60.010 is inconsistent with the requirements of 42 U.S.C. §§ 1396a(a)(10)(B) and 1396a(a)(17) and their implementing federal regulations and guidelines, and is thus preempted by the Supremacy Clause of the United States Constitution, art. IV.

C. Grant preliminary and permanent injunctions that prohibit Defendant Sherman from implementing and enforcing Mo. Rule 13 C.S.R. § 70-60.010.

D. Award reasonable attorneys' fees and costs of the Missouri Protection & Advocacy Center; Law Offices of Thomas E. Kennedy, III, L.C; St. Louis University Legal Clinic; Gateway Legal Services; National Health Law Program, AARP Foundation Litigation; National Senior Citizens Law Center, Welfare Law Center, and Assistive Technology Law Center.

D. Grant such other and further relief as may be just and proper.

Date: August 29, 2005

Respectfully Submitted,

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