

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
Andrea Young, et al.,)	
)	
Plaintiff,)	No. 1:19-cv-03526-JEB
)	
)	
v.)	
)	
)	
Alex M. Azar, et el.,)	
)	
Defendants.)	
_____)	

**THE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES’
UNOPPOSED MOTION TO INTERVENE AND INCORPORATED
MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to Federal Rules of Civil Procedure 24(a) and (b), and LCvR 7(a), the Michigan Department of Health and Human Services (“MDHHS”) moves to intervene in the above-captioned case to ensure this litigation does not unnecessarily disrupt the Medicaid benefits of the 650,000 Michigan residents covered by the State’s Healthy Michigan Plan (“HMP”), authorized pursuant to a Section 1115 Medicaid demonstration project. Although this Court has struck down the approval of other state demonstration projects with elements similar to Michigan’s current HMP demonstration, there are a number of unique, unrelated provisions of Michigan’s program that do not result in any individuals losing

Medicaid coverage. MDHHS seeks to intervene to ensure that this litigation does not result in vacatur of the HMP Demonstration as a whole.

This Court has recently allowed the affected state to intervene in four other actions challenging the federal approval of Section 1115 Medicaid demonstrations,¹ and the same result should apply here.²

BACKGROUND

Michigan's "Adult Benefits Waiver" ("ABW") was first approved by the Secretary of the U.S. Department of Health and Human Services ("HHS"), through the Centers for Medicare & Medicaid Services ("CMS"), in January 2004, and it was extended in December 2009. Through the ABW Demonstration, the State provided Medicaid benefits to low-income adults otherwise ineligible for Medicaid.

After the Affordable Care Act ("ACA") provided states with the ability to expand Medicaid to all adults with incomes up to 133 percent of the federal poverty level ("FPL"), the Michigan Legislature directed the State to implement coverage of this new population through a Section 1115 waiver that would test innovative

¹ See *Rose v. Azar*, Docket No. 19-cv-02848-JEB (D.D.C. Oct. 16, 2019) (granting Indiana's unopposed motion to intervene); *Philbrick v. Azar*, Docket No. 19-cv-00773-JEB (D.D.C. Apr. 25, 2019) (granting New Hampshire's unopposed motion to intervene); *Gresham v. Azar*, Docket No. 18-CV-01900-JEB (D.D.C. Sept. 6, 2018) (granting Arkansas' unopposed motion to intervene); *Stewart v. Azar*, Docket No. 18-cv-152-JEB (D.D.C. Mar. 30, 2018) (granting Kentucky's unopposed motion to intervene).

² MDHHS has consulted with counsel for the parties, and the parties do not oppose this motion.

approaches to beneficiary cost sharing and financial responsibility for care for the new adult eligibility group. *See* Healthy Michigan Plan Section 1115 Demonstration, Special Terms & Conditions, at 4 (Dec. 21, 2018), https://www.michigan.gov/documents/MDHHS/Healthy_Michigan_Plan_Extension_Approval_12.21.2018_641786_7.pdf; Mich. Pub. L. No. 107 (2013).

In response to this directive, Michigan received federal approval of a transformation of the existing ABW Demonstration to encompass the entire ACA expansion population, establishing the Healthy Michigan Plan or “HMP” Demonstration. The waiver was approved on December 30, 2013, with an effective date of April 1, 2014. A state plan amendment implementing the expansion was also approved on June 26, 2014, with an effective date of April 1, 2014, to coincide with the HMP demonstration. The HMP Demonstration, as first approved, waived several provisions of federal Medicaid law to allow the State to: track and require beneficiaries to pay cost sharing through “MI Health Accounts;” provide incentives for beneficiaries to engage in healthy behaviors; charge additional premiums for certain individuals above 100 percent of the FPL; and laid the framework for a delivery system for the ACA expansion population. Under the HMP Demonstration approved in 2013, the ACA expansion population would not lose coverage for not meeting the cost sharing and healthy behavior requirements.

In December of 2018, the Secretary of HHS – through CMS – approved a five-year extension of the HMP Demonstration. Under the extension, the HMP

Demonstration generally retained the same benefits, delivery system and features of the prior demonstration, but added three new features: a requirement that certain beneficiaries above 100 percent of the FPL pay additional premiums as a condition of eligibility; a requirement that certain beneficiaries above 100 percent of the FPL engage in healthy behaviors as a condition of eligibility; and a requirement that non-exempt beneficiaries complete community engagement activities as a condition of eligibility.

ARGUMENT

I. Federal Rule of Civil Procedure 24(a) provides MDHHS the right to intervene.

Federal Rule of Civil Procedure 24(a) sets forth the circumstances in which a party may intervene as a matter of right. The D.C. Circuit Court of Appeals has explained that, to intervene as of right, (1) the “application must be timely;” (2) the applicant must demonstrate that the action “threaten[s] to impair” “a legally protected interest” of the intervenor; and (3) “no party to the action can be an adequate representative of the applicant’s interests.” *Krasner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec., Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). MDHHS’s motion meets all of these criteria and should be granted.

A. The Motion is timely.

There is no set timeframe for determining if a motion to intervene is timely. Rather, courts must “weigh[] the factors of time elapsed since the inception of the

suit . . . and the probability of prejudice to those already parties to the case.” *Id.* at 886 (internal quotations omitted) (quoting *United States v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)).

The pending briefing set for this matter is directed at answering this Court’s inquiry into the relationship between the issues raised in this matter, and the recent decision from the D.C. Circuit in *Gresham v. Azar*. Pleading deadlines for the federal Defendants have been stayed pending the Court’s resolution of this question. There is no probability of prejudice, as indicated by the parties’ lack of opposition to this motion, and therefore the motion is timely.

B. This action threatens to impair MDHHS’s legally protected interests.

The Plaintiffs have challenged the federal approval of Michigan’s Section 1115 HMP Demonstration Project approved in December 2018. Among other things, the Plaintiffs request that this Court “preliminarily and permanently enjoin Defendants from implementing . . . the approval of the Michigan HMP Amended Extension Application.” Compl. at 51.

MDHHS has a sufficient legally protected interest to justify intervention as of right, given that the Plaintiffs ask this Court to strike down in its entirety the HMP Demonstration that MDHHS operates. In similar actions brought against the federal Defendants, this Court has granted motions to intervene by the affected States. *See supra* note 1. Similar to these other cases, MDHHS applied for and received the federal approval of the demonstration that is being challenged; is

responsible for the demonstration's approval implementation; and would be responsible for picking up the pieces if the demonstration approval was vacated. More specifically, if the entire HMP Demonstration as a whole is vacated, as Plaintiffs request, MDHHS could be faced with dismantling the program, including all of the program features that have been in place since 2014 (and were never challenged when they were first approved). Under such circumstances, MDHHS would be responsible for developing a new program to provide Medicaid benefits to over 650,000 individuals and otherwise managing the fall-out from the elimination of a program that has been in place for over five years.

Accordingly, this action threatens the legally protected interests of MDHHS.

C. MDHHS's interests are not adequately represented by the parties.

The applicant is not adequately represented by the parties "if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (internal quotations omitted); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("A movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation.'). A movant need only show representation of its interest "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Only MDHHS can adequately represent Michigan's interest in this action, which relate to Michigan's unique program, not the federal Defendants' policies and practices regarding Medicaid demonstration projects overall. While the federal government may have a uniform process for approving Section 1115 demonstrations, each state program has unique features, and therefore the interest of the federal government and Michigan may diverge.

Moreover, only MDHHS can advocate for the state-specific interests that shaped the HMP Demonstration, speak to its implementation in Michigan, explain how the project interconnects with other aspects of Michigan's Medicaid program, and explain the implications of any remedies the Court is considering. Michigan may distinguish its program from those of other states, while the federal government may choose to defend its policies with respect to all states. Accordingly, MDHHS's interests may not be adequately represented by any of the parties. Therefore, the Court should grant MDHHS's motion to intervene as of right.

II. Alternatively, MDHHS should be permitted to intervene under Federal Rule of Civil Procedure 24(b)(2).

Under Federal Rule of Civil Procedure 24(b)(2), "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issues or made under the state or executive order."

Intervention is permitted under this rule because MDHHS is a state agency, and the Plaintiffs are challenging the approval of the HMP Demonstration, which state law required MDHHS to apply for and implement, Mich. Pub. Act No. 208, § 107(b) (June 22, 2018). As noted above, the motion is timely and will not “unduly burden or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). Therefore, the Court should grant the motion for intervention even if it concludes that MDHHS may not intervene as of right.

III. MDHHS’s requests relief from Federal Rule of Civil 24(c) at this time.

Under the Federal Rules of Civil Procedure, and this Court’s Local Rules, a motion to intervene must “be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” Fed. R. Civ. P. 24(c); LCvR 7(j). With regard to the inclusion of a pleading, this Court has stated that “it may permit a degree of flexibility with technical requirements when the position of the movant is apparent from other filings.” *Ying Qing Lu v. Lezell*, Docket No. 11-cv-1815, 2012 WL 1929904, at *1 (D.D.C. May 29, 2012); *see also Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004) (regarding non-inclusion of a pleading under Rule 24(c), stating that the Court “find[s] no reason to bar intervention based solely upon this technical defect, if defect it be”).

MDHHS’s position and interest in the litigation is evident from the Complaint, this motion and incorporated memorandum, and similar lawsuits brought to enjoin similar programs in other states. *See supra* note 1; *see also*

Hughes v. Abell, Docket No. 09-cv-220, 2014 WL 12787807, at *7 (D.D.C. Feb. 10, 2014) (“[B]ecause the requirement is designed to help determine whether the movant has a claim or defense that shares a common question of fact, courts have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for a motion.” (internal quotations omitted)).

Thus, at this stage in the proceedings, the purpose of Rule 24(c) has been satisfied, *Ying Qing Lu*, 2012 WL 1929904, at *1, and MDHHS therefore proposes to file a dispositive motion or other appropriate pleading according to the schedule set forth in the federal rules, or in whatever schedule the Court may establish.

Because this case has only recently begun, there will be no delay in the proceeding and no prejudice to any party by allowing MDHHS to intervene and file pleadings on the same schedule and under the same circumstances as the other parties. *Cf. Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 314-15 (6th Cir. 2005) (noting that some circuit courts have permitted strict enforcement of Rule 24(c) where there is some prejudice to the parties). Therefore, MDHHS asks that this Court excuse it from submitting pleadings with its intervention motion and instead order MDHHS to abide by the same schedule and timeframe for filing pleadings as the other parties in this matter.

CONCLUSION

For the foregoing reasons, the Court should grant MDHHS's unopposed motion to intervene.

Respectfully Submitted,

/s/ Toni L. Harris

Toni L. Harris (P63111)
Attorney for Michigan Department of
Health and Human Services
Assistant Attorney General
Michigan Department of Attorney
General
Health, Education & Family Services
Division
P.O. Box 30758
Lansing, MI 48909
(517) 335-7603
HarrisT19@michigan.gov

/s/ Philip J. Peisch

Philip J. Peisch, D.C. Bar No. 1005423
Brown & Peisch PLLC
1233 20th Street, NW, Suite 505
Washington, D.C. 20036
(202) 449-4261
ppeisch@brownandpeisch.com

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to any CM/ECF participants.

/s/ Toni L. Harris
Toni L. Harris (P63111)
Attorney for Michigan Department of
Health and Human Services
Assistant Attorney General
Michigan Department of Attorney
General
Health, Education & Family Services
Division
P.O. Box 30758
Lansing, MI 48909
(517) 335-7603
HarrisT19@michigan.gov