

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| _____ |) | |
| RUBY BELL, <i>et al.</i> , |) | |
| |) | No. 06 C 3520 |
| Plaintiffs, |) | |
| v. |) | Judge Guzmán |
| |) | |
| MICHAEL O. LEAVITT, Secretary of |) | |
| Health and Human Services, |) | Magistrate Judge Levin |
| |) | |
| Defendant. |) | |
| _____ |) | |

OPPOSITION TO PLAINTIFFS’
AMENDED MOTION FOR CLASS CERTIFICATION

On July 21, 2006, plaintiffs filed their First Amended Complaint challenging the validity of the Interim Final Rule with Comment Period, effective July 6, 2006, which implemented the documentation of citizenship requirements mandated by Congress in section 6036 of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4. Simultaneously, plaintiffs moved for preliminary injunctive relief against the operation of the Rule as well as certification of a nationwide class of plaintiffs pursuant to Federal Rule of Civil Procedure 23(a), (b)(2).

As defined by the plaintiffs in the Amended Motion for Class Certification, the nationwide class consists of three groups: (A) “All persons who, prior to July 1, 2006, have been determined eligible for health coverage under the Medicaid Program, 42 U.S.C. § 1396 *et seq.*, and who declared on their applications for Medicaid coverage or otherwise that they are citizens or nationals of the United States or who were made eligible for Medicaid without the need for a declaration of citizenship or eligible alien status under 42 U.S.C. § 1320b-7”; (B) “All persons who, on or after July 1, 2006, are receiving or will receive or are applying, or will apply for health coverage under the Medicaid Program, 42 U.S.C. § 1396 *et seq.*, and who on their

applications for Medicaid health coverage or otherwise have declared or will declare that they are United States citizens”; and (C) “All persons who are receiving or will receive health coverage under the Medicaid Program, 42 U.S.C. § 1396 *et seq.*, and who are not required to make a declaration of citizenship under 42 U.S.C. § 1320b-7 in connection with an application for Medicaid because they acquire their eligibility for Medicaid coverage as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act or any other program listed in 42 U.S.C. § 1396a(a)(10)(A)(i)(I)&(II).” Pls.’ Am. Mot. for Class Cert. at 1-2. In the Memorandum in Support of their Motion, Plaintiffs state that Class A consists of “all persons eligible for Medicaid” as of July 1, 2006; that Class B consists of “all members of Class A” as well as “all persons who apply for Medicaid after July 1, 2006”; and that Class C “is a subset of Class B” intended to cover “Medicaid recipients who receive Medicaid due to receipt of Supplemental Security Income or adoption assistance benefits.” Mem. in Supp. of Pls.’ Am. Mot. for Class Cert. at 2-4.

Despite the plaintiffs’ purported “division” of the class into three subgroups¹, the overall class that plaintiffs seek to certify would encompass all current and future Medicaid recipients and applicants, with no temporal limitation. The requirements of Rule 23 prohibit certification of such an overbroad class.

The claims of the named plaintiffs, who have failed to demonstrate an imminent risk of losing benefits as a result of the Interim Final Rule or section 6036, are neither typical nor adequately representative of the claims held by the majority of the class. In fact, as the named

¹ The plaintiffs’ subgroups are both overbroad and overlapping, resulting in a model that is poorly suited for identification of separate classes and claims. For example, the plaintiffs admit that subgroup B subsumes subgroup A. Mem. in Supp. of Pls.’ Am. Mot. for Class Cert. at 3. Similarly, subgroup C, which includes recipients of Medicaid “who are not required to make a declaration of citizenship under 42 U.S.C. § 1320b-7,” *id.* at 3, is also included within subgroup A, *id.* at 2. These overlapping class definitions would make it difficult for the Court to limit relief to a single class.

plaintiffs seek to enjoin the operation of a Rule that benefits millions of individuals within the proposed class, the interests of the named plaintiffs are in direct conflict with those benefitted by the Rule. Inexplicably, plaintiffs have not removed from their amended complaint those named plaintiffs (or potential class members) who, based on plaintiffs' own description of their circumstances, are now exempt from the additional documentation requirement of the statute by virtue of the Rule itself. These individuals cannot challenge the Rule and, presumably, would not want to do so. These impediments demonstrate that the claims presented by the plaintiffs are unsuited for nationwide certification.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 sets forth a two-part test that plaintiffs must satisfy to demonstrate that their claims are suitable for class resolution. First, the plaintiffs bear the burden of establishing that the proposed class satisfies all four prerequisites contained in Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). FED. R. CIV. P. 23(a); Harriston v. Chicago Tribune Co., 992 F.2d 697, 703 (7th Cir. 1993); Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993).

If the plaintiffs demonstrate that these threshold requirements are met, they must then satisfy one of the requirements of Rule 23(b). Here, the plaintiffs propose certification pursuant to Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). Certification under Rule 23(b)(2) does not allow individuals to opt out of the class, so the result

is binding on all members. See Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 763 (7th Cir. 2003).

In addition to this express two-step analysis, there are two implicit requirements contained within Rule 23. “First, a proposed class definition must be ‘precise, objective and presently ascertainable.’” O’Neill v. Gourmet Sys. of Minnesota, Inc., 219 F.R.D. 445, 450 (W.D. Wis. 2002) (quoting In re Copper Antitrust Litig., 196 F.R.D. 348, 353 (W.D. Wis. 2000)); see also Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980); Gustafson v. Polk County, 226 F.R.D. 601, 607 (W.D. Wis. 2005). “Second, the named plaintiffs and the class they seek to represent must have standing.”² Id.; see also 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.1 (3d ed. 2005). These are the minimum requirements for establishing a claim suitable for class resolution. See Adashunas, 626 F.2d at 603.

ARGUMENT

I. THE NAMED PLAINTIFFS LACK STANDING TO REPRESENT A CLASS

“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any

² Courts, including the Seventh Circuit, have dealt with the standing of named plaintiffs to serve as the representatives of a class in various ways. Some have examined standing as a separate requirement implicit in Rule 23. See, e.g., Adashunas, 626 F.2d at 604; Portis v. City of Chicago, 347 F. Supp.2d 573, 575-76 (N.D. Ill. 2004); Anderson v. Capital One Bank, 224 F.R.D. 444, 449 (W.D. Wis. 2004); O’Neill, 219 F.R.D. at 450. Others have examined the standing of the named plaintiffs to sue as an aspect of the typicality and adequacy of representation requirements. See, e.g., Davis v. Ball Mem’l Hosp. Ass’n, Inc., 753 F.2d 1410, 1420 (7th Cir. 1985); Kedziora v. Citicorp. Nat’l Servs., Inc., 883 F. Supp. 1155, 1160 (N.D. Ill. 1995). However, despite the difference in categorization of the standing inquiry in the class action context, courts agree that no class can be certified on behalf of individuals who have themselves failed to demonstrate injury-in-fact. See, e.g., O’Shea v. Littleton, 414 U.S. 488, 494 (1974); Hall v. Beals, 396 U.S. 45, 48-49 (1969); 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.1.

other member of the class.”³ O’Shea v. Littleton, 414 U.S. 488, 494 (1974); see also Robinson v. City of Chicago, 868 F.2d 959, 967-68 (7th Cir. 1989); Portis v. City of Chicago, 347 F. Supp.2d 573, 575-76 (N.D. Ill. 2004); Magnuson v. City of Hickory Hills, 730 F. Supp. 1439, 1443 (N.D. Ill. 1990), aff’d, 933 F.2d 562 (7th Cir. 1991). As explained in detail by the Defendants’ Memorandum in Opposition to the Plaintiffs’ Amended Motion for T.R.O. and Preliminary Injunction, the named plaintiffs in the present case have failed to demonstrate a concrete injury in fact traceable to the Interim Final Rule, or that their challenge is ripe for adjudication. See Defs.’ Mem. in Opp. at 10-20.

Initially, almost half of the named plaintiffs are expressly exempted from the documentation requirements of section 6036 by the Interim Final Rule because they are entitled to Medicare or because they currently receive Medicaid by virtue of their receipt of SSI benefits. See id. at 10-12. Of the remaining named plaintiffs, not one has alleged that he or she has been threatened with termination or revocation of Medicaid benefits based upon the requirements of the Interim Final Rule. See id. at 13-14. Thus, it remains entirely speculative whether, at some unspecified point in the future, *any* of these plaintiffs will ultimately be denied benefits as a result of the Rule’s documentation requirements. See, e.g., id. at 13-17; Egan v. Davis, 118 F.3d 1148, 1150 (7th Cir. 1997) (“Persons who actually *lose* as a result of the administrative appeal would be appropriate plaintiffs, but as we have stressed no such person is before the court.”)

³ In Payton v. County of Kane, the Seventh Circuit cited O’Shea as support for the well-worn notion that named plaintiffs may not acquire standing by “piggy-backing” on the claims of other class members. 308 F.3d 673, 682 (7th Cir. 2002). In the course of this decision, the Seventh Circuit adopted a form of the “juridical link” doctrine, which allows injured plaintiffs to litigate their claims against multiple defendants, even if the named plaintiffs were not individually injured by each defendant. Id. at 678-80. However, the doctrine does not apply where a named plaintiff has suffered *no* concrete injury from the defendants’ actions or where the Rule 23(a) prerequisites have not been met. See Moffat v. Unicare Midwest Plan Group, Slip Op., 2006 WL 897918, at *8 (N.D. Ill. Apr. 6, 2006); Portis, 347 F. Supp.2d at 579. In addition, the doctrine would have no application in the present case where the plaintiffs are requesting relief against a single defendant.

(emphasis added). Accordingly, the named plaintiffs have not demonstrated that their own claims are appropriate for judicial resolution, let alone adequately representative of, typical of, or share common questions of law or fact with the claims of the class as a whole. See Payton v. County of Kane, 308 F.3d 673, 682 (7th Cir. 2002) (“This is not a case where the named plaintiff is trying to piggy-back on the injuries of the unnamed class members. That, of course, would be impermissible ‘Standing cannot be acquired through the back door of a class action.’”) (quoting Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (Burger, C.J., dissenting)); see also Davis v. Ball Mem’l Hosp. Ass’n, Inc., 753 F.2d 1410, 1420 (7th Cir. 1985) (“[Plaintiffs] could not fulfill the requirements as class representatives because . . . they failed to possess the same interests and suffer the same injuries as the class members.”); Magnuson, 730 F. Supp. at 1443 (“Certainly, a representative who lacks standing . . . does not have claims typical of the class as a whole.”).

II. THE NAMED PLAINTIFFS’ CLAIMS ARE NOT TYPICAL OF THE CLAIMS OF THE MEMBERS OF THE PROPOSED CLASS⁴

“[T]he typicality requirement ‘primarily directs the district court to focus on whether the named representatives’ claims have the same essential characteristics as the claims of the class at large.’” Retired Chicago Police, 7 F.3d at 596-97 (quoting De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)). Although factual distinctions need not necessarily defeat certification of a class, compliance with this requirement is necessary to ensure effective

⁴ The deficiencies in the typicality of the named plaintiffs’ claims are also evidence of the lack of commonality in the class, as a class member exempted by the Rule from the documentation requirements of section 6036 shares nothing in common with an individual who is allegedly harmed by compliance with the documentation requirements. Cf. Patterson v. General Motors, 631 F.2d 476, 481 (7th Cir. 1980) (“Although a class action will not be defeated solely because of some factual variations among class members’ grievances, plaintiff in this case has simply asserted no facts relating to other members of the purported class.”) (internal citation omitted). After all, the class is defined broadly to include all Medicaid recipients and applicants, but the mere receipt of or application for Medicaid cannot alone establish commonality.

representation of the class as a whole. *Id.* at 597. Accordingly, the typicality requirement “‘compares the claims of the class representative with those of other class members’ and ‘asks: Is the injury in fact which the plaintiff has suffered of the same kind suffered by members of the class?’” *O’Neill*, 219 F.R.D. at 453 (quoting 1 *NEWBERG AND CONTE, NEWBERG ON CLASS ACTIONS* § 2.07, at 2-48 (3d ed. 1992)). This analysis “‘requires a showing by the plaintiff that the defendants’ challenged conduct as it has allegedly injured the plaintiff is reflected in the defendants’ similar or other practices toward class members in the same way it is manifested in the defendants’ conduct specifically affecting the plaintiff.’” *Id.* (quoting 1 *NEWBERG AND CONTE, NEWBERG ON CLASS ACTIONS* § 3.19, at 3-111).

A. A Majority of the Proposed Class Is Unaffected by the Documentation Requirements of Section 6036 or the Interim Final Rule

The speculative nature of the injury alleged by the plaintiffs in the First Amended Complaint has produced a proposed class definition that is without limitation as to the injury suffered by the members of the proposed class, and therefore includes a majority of individuals who have *no* potential for being injured as a result of the Interim Final Rule. Thus, even assuming that the named plaintiffs have been injured because they are unable to document their citizenship, this injury is not shared by those members of the proposed class who are unaffected by the documentation requirement. This fact presents a major impediment to certification of the class, as the class claim fails to allege that all members of the class “‘have suffered a constitutional or statutory violation.” *Adashunas*, 626 F.2d at 603; *see also O’Neill*, 219 F.R.D. at 451 (“Plaintiff’s claim is overly broad because it includes an untold number of persons who are at no risk of suffering the injury about which plaintiff complains.”); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D. S.D. 1982) (“The definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf.”).

The plaintiffs have defined the class in such a way that all current recipients and future

applicants for Medicaid would be included within the class, even if they are exempt from the additional documentation requirements or can readily fulfill them.⁵ See Mem. in Supp. of Pls.’ Am. Mot. for Class Cert. at 5-6 (stating that proposed class includes “at least” the “33.4 million persons” currently receiving Medicaid). The proposed class would therefore include those individuals who would have no difficulty meeting the documentation requirements set forth in the Interim Final Rule, all those who are expressly exempted from the documentation requirements of section 6036 by the Interim Final Rule because they are eligible for Medicaid on the basis of their receipt of SSI benefits or because they are eligible for Medicare, 71 Fed. Reg. 39214, 39215-39216 (July 12, 2006), as well as those applicants who, even in the absence of the Rule, are not otherwise eligible for Medicaid. In fact, “in this case it is likely that many of the members of plaintiff[s]’ proposed classes have suffered *no injury at all* because they possess a form of identification acceptable under” section 6036 or the Interim Final Rule. O’Neill, 219 F.R.D. at 453. Thus, even assuming that all the named plaintiffs may ultimately be affected by the operation or implementation of the Rule in a negative manner (which is, on its face, impossible due to the Rule’s exemptions), no such risk—speculative or otherwise—exists for a majority of the proposed class. Accordingly, the named plaintiffs’ alleged injuries, including the defendant’s course of conduct that allegedly produced such injuries, is not typical of the members of the class.⁶ See id.; Banks v. Sec’y of the Indiana Family and Soc. Servs. Admin., 790 F. Supp.

⁵ In fact, everyone in the United States is a potential class member, as the class includes all individuals who “will apply” for Medicaid in the future. Pls.’ Am. Mot. for Class Cert. at 1. However, even if the proposed class were limited to current recipients or those applicants who have filed for benefits as of the date of the First Amended Complaint, the plaintiffs’ own estimates demonstrate that the number of individuals potentially burdened by the documentation requirements would constitute a fraction of the total number of recipients and applicants included within the proposed class. See Mem. in Supp. of Pls.’ Am. Mot. for Class Cert. at 6 n.2.

⁶ Courts have also found the existence of an overbroad class that includes individuals who have suffered no injury to defeat commonality, see J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, (continued...)

1427, 1432 (N.D. Ind. 1992) (holding that lack of reimbursement lawsuits by Medicaid providers against other members of class—a necessary element to the existence of injury-in-fact—disproves typicality and numerosity).

B. The Existence of Over 50 Different Medicaid Programs Responsible for Administering the Requirements of Section 6036 and the Interim Final Rule Defeats Typicality

Although the federal government establishes rules governing federal financial participation in the Medicaid program, the program is administered on the state level. See, e.g., Am. Med. Ass'n v. Weinberger, 522 F.2d 921, 923 n.1 (7th Cir. 1975). Thus, while the federal government oversees state and territorial Medicaid programs receiving federal funding to ensure compliance with federal law, local officials retain “considerable discretion” in developing and implementing such programs, including deciding whether to ultimately award benefits to a particular individual. See id. The operation of this dual system can be seen in the manner in which the Interim Final Rule implements the requirements of section 6036.

Section 6036 of the DRA of 2005, Pub. L. 109-171, 120 Stat. 4, forbids federal monies from being “expended for medical assistance for an individual who declares . . . to be a citizen or national of the United States for purposes of establishing eligibility for benefits under this title, unless” “there is presented satisfactory documentary evidence of citizenship or nationality . . . of the individual.” 42 U.S.C. § 1396b(i)(22), (x)(1). Thus, in enacting the requirements of section 6036, the Interim Final Rule provides that, in order to receive federal funding, “States must

⁶(...continued)

1290 (10th Cir. 1999) (“This broad [class] definition would include not just children whom New Mexico improperly denied assistance, but also children who actually receive all services required under the ADA and Rehabilitation Act. Children receiving appropriate services have no claim under these statutes. Thus, the district court correctly stated that ‘there is no one statutory or constitutional claim common to all named Plaintiffs and putative class members.’”) (quoting K.L. by Dixon v. Valdez, 167 F.R.D. 688, 691 (D. N.M. 1996)), and to prohibit certification pursuant to Rule 23(b)(2), see Maldonado v. Ochsner, — F.R.D. —, 2006 WL 2042376, at *4 (E.D. La. Mar. 24, 2006).

secure documentary evidence of U.S. citizenship and identity with respect to individuals who have declared under section 1137(d) of the Act that they are citizens or nationals of the United States unless an exemption applies.” 71 Fed. Reg. at 39215. The Rule then provides both exemptions from and an expanded list of types and categories of documents that satisfy the requirements of section 6036. Id. at 39222-39229.

The states and territories, however, maintain the primary responsibility for administration of these documentation requirements under the Rule, including a large amount of discretion as to the precise manner in which the requirements are enforced. For example, states must determine whether to verify citizenship for an individual through a match with the State Data Exchange (“SDX”) database or state vital statistics agency, id. at 39216; whether to exempt individuals from the “reasonable opportunity” period provided by the state, id.; and whether an individual is searching for documents in good faith, id. States must also decide how to assist the homeless, mentally impaired, physically incapacitated, or other individuals having difficulty locating documents, id. at 39216, 39219. Most importantly, however, the states will have the final say as to whether documents of a certain level in the Rule will be accepted, id. at 39215; whether the documentation requirements have been met for each applicant and current recipient; how the fair hearing required by the Rule will be administered if an applicant is denied, id. at 39217; and whether it will forego federal funding and provide state funding for applicants and recipients who fail to produce the appropriate documentation.

All of these questions regarding implementation of the documentation requirements may be answered in a different manner by each state or territory. And the individual class members’ injuries and claims will be affected by the answers. For example, if a resident of State A applies for Medicaid but is given little assistance by the state in his search for documents, no extension beyond the “reasonable opportunity” period, and is ultimately determined not to be searching for documents in good faith, that individual will be in a much different position than an individual in

State B whose state chooses to provide extensive assistance to individuals unable to locate documents, extends the “reasonable opportunity” period, or foregoes federal funding altogether to provide such individuals with state benefits equal to what Medicaid provides. In fact, the difference between the two states’ administration of the Rule may be determinative of the success of each claim. Thus, the claims of the residents of State A in a lawsuit challenging their denial of benefits would not be typical of those claims, if any, held by the residents of State B. See Barney v. Holzer Clinic, Ltd., 110 F.3d 1207, 1214 (6th Cir. 1997) (“The suit was litigated and decided under Ohio Medicaid law: neither party has given us any indication of whether medical assistance programs in other states might lead to a different result. This suggests both that the named plaintiffs’ claims are not typical . . . and that they could not adequately represent such a class.”); see also Shvartsman v. Apfel, 138 F.3d 1196, 1201 (7th Cir. 1998) (citing differences in the “range in INS processing delays across different geographic regions” as factor undermining typicality of proposed nationwide class); Phelps v. Harris, 86 F.R.D. 506, 512-13 (D. Conn. 1980) (holding that statewide, rather than nationwide class, was appropriate because “different insurance carriers are responsible for the administration of the Part B program, including the hearing process, in different states”).

The impact of differing state administration on the typicality of the claims of the members of the proposed class can be seen in the past and current approaches that various states and their citizens have taken to citizenship documentation requirements. Prior to the enactment of section 6036, federal law permitted, as a minimum requirement, that citizenship could be established by declaration. See 42 U.S.C. § 1320b-7(a), (d)(1)(A). However, certain states, including Montana, New Hampshire, New York and Texas, chose to go beyond the minimum, requiring some documentary evidence establishing citizenship. See HHS, Office of the Inspector General, “Self Declaration of U.S. Citizenship for Medicaid,” OEI-02-03-00190 (July 2005), at 9 (included in Appx. in Supp. of Pls.’ First Am. Compl. at Tab 26). The residents of these states, who must

already present some form of documentation beyond self-attestation to establish eligibility for Medicaid, stand in a much different posture with regard to the requirements of section 6036 than the named plaintiffs, who allege harm from the mere uncertainty of complying with the newly implemented requirements.

Moreover, the residents of at least one state or territory have already taken a different view than the named plaintiffs here regarding the impact of the Interim Final Rule. Residents of the District of Columbia had sued the District seeking to enjoin Medicaid officials from instituting the citizenship documentation requirements of section 6036. See Susan Levine, Challenge to Citizenship Rule Dropped: Residents' Coverage No Longer in Jeopardy, Attorneys Say, WASH. POST, Aug. 5, 2006, at B3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401551.html>. However, after the issuance of the Interim Final Rule, the lawsuit was dismissed. See id. According to the plaintiffs' attorneys, the Rule's exemption of Medicaid recipients made eligible on the basis of receiving SSI or their entitlement to Medicare benefits "was enough to protect all but one of the plaintiffs named in the District litigation." Id. Attorneys for the plaintiffs also indicated that the last individual "is not in immediate jeopardy because of the city's more generous interpretation of the regulation." Id. This view is certainly not typical of that held by the named plaintiffs, who seek to invalidate the Rule and draw D.C. residents back into litigation by virtue of certifying a class pursuant to Rule 23(b)(2) which contains no opt-out rights.

III. THE CONFLICTS BETWEEN CLASS MEMBERS AND THE NAMED PLAINTIFFS DEMONSTRATE THAT ADEQUACY OF REPRESENTATION IS LACKING

The adequacy of a class representative depends on two factors: (1) "the adequacy of the named plaintiff[s'] counsel," and (2) "the adequacy of representation provided in protecting the different, separate and distinct interest of the absentee members." Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986). "[T]he law is clear that a single class cannot be

fairly and adequately represented by the entirely different and separate named plaintiffs if the members of that class have antagonistic or conflicting interests.” Id. Such concerns are particularly relevant where the plaintiffs seek to certify a class pursuant to Rule 23(b)(2), as the class members are unable to opt out of the class. Retired Chicago Police, 7 F.3d at 598.

By challenging the operation and implementation of the Interim Final Rule, the named plaintiffs have created a conflict of interest with those individuals who are only benefitted by the Rule’s existence. The Rule provides vastly greater opportunities to establish documentation of citizenship than section 6036 alone and exempts millions of Medicare and SSI recipients who are not exempted by the plain language of the statute—those “most likely to have difficulty obtaining documentation of citizenship.” E.g., 71 Fed. Reg. at 39216, 39218-39219. By being forced to join a lawsuit that poses a greater potential for future harm than the status quo, these individuals are placed in a position of litigating against their own self-interest.⁷ Cf. Retired Chicago Police, 7 F.3d at 598 (holding that “actual and potential conflicts” in class exist because class includes “[m]embers who had actually benefitted” from action that plaintiffs challenge); Clay v. Amer. Tobacco Co., 188 F.R.D. 483, 493 (S.D. Ill. 1999) (“The election of a remedy that does not benefit the entire class and that is not the remedy that would be chosen by the entire class . . . creates a conflict of interest.”). Accordingly, the plaintiffs, who seek to enjoin the operation of a Rule that benefits millions of members of the class, are not adequate representatives of the interests of these individuals.

⁷ This conflict exists for each subgroup identified by the plaintiffs, and it is not cured by the fact that the First Amended Complaint seeks relief, in the alternative, against section 6036 itself. For example, the plaintiffs’ Administrative Procedure Act claim is necessarily limited to the Rule, creating the possibility that the Court could ultimately grant relief against the Rule but take no action against section 6036. Such a result would be manifestly adverse for millions of potential class members.

IV. NATIONWIDE CLASS CERTIFICATION IS INAPPROPRIATE

Even if the Court were to set aside the impediments to certification of the plaintiffs' proposed class, the class should not be certified on a nationwide level. As the Supreme Court cautioned in Califano v. Yamasaki:

[N]ationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.

442 U.S. 682, 702 (1979). In the present case, there are numerous issues that weigh against nationwide certification, including the fact that the requirements of section 6036 and the Interim Final Rule may be administered in over 50 different ways by states and territories, cf. Shvartsman, 138 F.3d at 1201; Barney, 110 F.3d at 1214, that residents in at least some states seem to be satisfied with the Interim Final Rule and their State's planned implementation thereof (such as the named plaintiffs in the District of Columbia lawsuit), and that many (if not most) class members would not want the Rule that plaintiffs challenge in the present lawsuit to be invalidated.

If a class is appropriate⁸, the lawsuit should be confined to the State of Illinois. Six of the named plaintiffs reside in Illinois. Illinois is the only state that has submitted an amicus brief and that has a resident who is a named plaintiff. Accordingly, Illinois is also the only state that has attempted to provide the Court with any information as to the specific effect of the Rule or the

⁸ Geographic limitation of the proposed class would not resolve the fact that the proposed class includes a large number of individuals who are not injured in any manner by section 6036 or the Interim Final Rule.

Rule's implementation on one of the named plaintiffs. If the class were limited in such a manner, the Court, assuming arguendo that it finds that it has jurisdiction over plaintiffs' amended complaint, would be better able to focus on the effect of the Interim Final Rule as implemented by the State of Illinois on the resident named plaintiffs.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the Court deny class certification or, in the alternative, limit the geographic scope of the class to the State of Illinois.

Dated August 25, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2006, I caused a true copy of the foregoing Opposition to Plaintiffs' Amended Motion for Class Certification to be served on plaintiffs' counsel electronically by means of the Court's ECF system in accordance with Fed. R. Civ. P. 5, LR 5.5, and the General Order on Electronic Case Filing.

s/ Eric R. Womack

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