UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AS TO NAMED PLAINTIFFS AND PROPOSED CLASS

Plaintiffs hereby move pursuant to Federal Rule of Civil Procedure 15 for leave to file an amended and supplemental complaint for declaratory and injunctive relief on behalf of the named plaintiffs and, pursuant to Federal Rule of Civil Procedure 23(b)(2), a proposed class of similarly situated consumers. Plaintiffs attach a copy of the proposed amended and supplemental complaint as Exhibit A, along with a redlined version as Exhibit B. Defendants take no position at this time but reserve the right to oppose after reviewing the proposed amended complaint.

BACKGROUND

As the Court is aware, this case is an Administrative Procedure Act ("APA") challenge to a federal rule (the "Separate-Billing Rule") that purports to reinterpret Section 1303 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18023, a provision establishing special rules for coverage of abortion care in insurance plans offered through ACA health benefit exchanges. The Separate-Billing Rule requires issuers providing abortion coverage in an individual-market plan

on an exchange to send two separate paper or electronic bills to consumers each month—one for the abortion-related portion of their premium and the other for all other coverage. The rule also requires those issuers to begin telling consumers to pay their premium in two separate transactions, thus requiring consumers to submit two checks or money orders or make two electronic payments every month.

Plaintiffs are a provider of comprehensive reproductive health care services and four consumers around the country who are enrolled in ACA plans that cover non-Hyde abortion care and who will be harmed by the Separate-Billing Rule. In their complaint, filed on February 11, 2020, Plaintiffs seek a declaration that the Separate-Billing Rule is unlawful and an order vacating the rule and preventing the Defendants from requiring the rule's implementation. Compl. ¶ 111, ECF No. 1; *see also* 5 U.S.C. § 706(2) (providing that a court "set aside" a rule held unlawful under the APA).

The Separate Billing Rule initially required implementation by June 27, 2020, an aspect of the rule that Plaintiffs challenged in their original complaint as arbitrary and capricious under the APA. *See* Compl. ¶¶ 102–03. However, on May 8, 2020, three days after filing their Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment, ECF No. 35-1 ("Defs.' Cross-Mot."), Defendants published an Interim Final Rule ("IFR") postponing the Separate-Billing Rule's implementation date by sixty days, to August 26, 2020, in light of the COVID-19 pandemic. *See* Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program, Interim Final Rule, 85 Fed. Reg. 27,550 (May 8, 2020). The IFR took immediate effect. The

revised implementation date remains arbitrary and capricious because it continues to fall far short of what issuers told Defendants would be necessary to fully implement the rule, even *before* the issuers began dealing with a national pandemic. Accordingly, Plaintiffs now seek to challenge the revised operative implementation date announced in the IFR.

In addition, in their May 5, 2020, Cross-Motion for Summary Judgment in this case, Defendants assert that the Court cannot vacate the Separate-Billing Rule in its entirety, even if the Court grants summary judgment to Plaintiffs. Defs.' Cross-Mot. at 40–41. Instead, Defendants assert that the Rule should be set aside only as to Plaintiffs. *Id.* After Plaintiffs filed their complaint in this case, another judge in this district issued a limited-scope permanent injunction in an APA challenge involving a different U.S. Department of Health and Human Services ("HHS") rule. The Fourth Circuit, sitting en banc, is now considering the propriety of that remedy on appeal, such that any decision may ultimately affect this Court's consideration of the appropriate remedy here if this Court determines that the Separate-Billing Rule is unlawful. *See Mayor & City Council of Baltimore v. Azar*, No. CV RDB-19-1103, 2020 WL 758145, at *17 (D. Md. Feb. 14, 2020), *argued en banc*, No. 19-1614 (4th Cir. May 7, 2020); *see also Mayor & City Council of Baltimore v. Azar*, No. CV RDB-19-1103, 2020 WL 1873947, at *4 (D. Md. Apr. 15, 2020) (denying plaintiff's motion for reconsideration regarding the scope of remedy); *Mayor & City Council of Balt. v. Azar*, 799 F. App'x 193, 195 (4th Cir. 2020), *as amended* (Mar. 30, 2020), *as amended* (Mar. 31, 2020) (denying government's motion for stay pending appeal).

ARGUMENT

A court should grant leave to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a). Likewise, on "motion and reasonable notice, the court may, on just terms," permit

supplementation of a complaint to "set[] out any transaction, occurrence, or event that happened after the date of" the original complaint. Fed. R. Civ. P. 15(d). The "standards used by a district court in ruling on a motion to amend or on a motion to supplement are nearly identical." *Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002). "In either situation, leave should be freely granted," *id.*, absent some compelling reason to the contrary, such as prejudice to the opposing party, futility, or bad faith, *see, e.g.*, *Int'l Refugee Assistance Project v. Trump*, No. 17-CV-2921, 2018 WL 9945001, at *1 (D. Md. Nov. 2, 2018) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Justice requires granting Plaintiffs leave to file an amended and supplemental complaint here.

1. Plaintiffs' motion to add class allegations under Federal Rule of Civil Procedure 23(b)(2) on behalf of the named Consumer Plaintiffs (Plaintiffs Barson, Hambrick, DiDato, and Hollander) and similarly situated individuals should be granted.

Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action" that is arbitrary, capricious, contrary to law, or adopted without procedure required by law. 5 U.S.C. § 706(2). If a court "set[s] aside" a rule after review, *id.*, the rule is "annul[led]" or "vacate[d]," and therefore without effect. Set Aside, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (describing vacatur as the "ordinary practice" to address unlawful agency action in an APA case).

If this Court grants summary judgment to Plaintiffs, vacatur of the entire rule, which would prevent its implementation throughout the country, is the appropriate remedy, and is indeed the only remedy sufficient to give Plaintiffs full relief. *See, e.g.*, *Roe v. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020) (rejecting the argument that "extending relief to those who are

similarly situated to the litigants" in an APA case at the preliminary-injunction stage where injunction was nationwide "is categorically beyond the equitable power of district courts" (citing *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017))). In this respect, Plaintiffs rely not only on the APA's presumption of vacatur for unlawful agency action, but numerous other considerations warranting nationwide relief, including: (1) Consumer Plaintiffs reside in four different states; (2) Plaintiff Planned Parenthood of Maryland has a multi-state patient population that is by its nature fluid (as will be described in a forthcoming declaration in support of Plaintiffs' opposition to Defendants' Cross-Motion for Summary Judgment); (3) Plaintiffs would still sustain injuries, such as premium increases, if the Court permits Defendants to implement the Separate-Billing Rule for everyone but Plaintiffs; and (4) there is a strong national interest in ensuring the uniform application of Section 1303.

However, Defendants argue in their Cross-Motion for Summary Judgment that Plaintiffs are not entitled to vacatur of the rule even if they prevail and that this Court should instead enjoin the rule's application only as to Plaintiffs. Defs.' Cross-Mot. at 40–41. They rely on a decision issued in this district since the filing of Plaintiffs' original complaint, which is now on appeal before the Fourth Circuit and was argued earlier in May. *Id.* at 41; *see supra*, Background. Although Consumer Plaintiffs believe that Defendants' argument as to remedy is meritless and unworkable, they are also cognizant of the Separate-Billing Rule's impending implementation deadline and the need to obtain broad relief in advance of that time. As a result, Consumer Plaintiffs have determined that the addition of class allegations on behalf of affected consumers around the country is the most efficacious way of ensuring that the scope of remedy is nationwide and that consumers around the country are protected from this unlawful rule.

Permitting Plaintiffs to amend their complaint to add Rule 23(b)(2) class allegations will not prejudice Defendants. Plaintiffs are not proposing to change the substance of their APA claims, and—as evidenced by the attached proposed amendment—they continue to seek a declaration that the rule is unlawful and an order from this Court vacating the Separate-Billing Rule, just as they did in their original complaint. The addition of the class allegations would not require revisions to the previously filed briefs, and briefing on class certification could proceed on a parallel track without interruption of the merits briefing. Plaintiffs are also seeking to amend the complaint in good faith in light of legal developments since the case was filed and recent explication of Defendants' position in the case. Moreover, amendment would not be futile: the named Consumer Plaintiffs are appropriate representatives for consumers similarly situated and meet all other requirements for class certification.

Amendment of the complaint to add class allegations would also promote judicial economy. The Separate-Billing Rule affects more than three million consumers nationwide, and more than 156,000 in Maryland alone. Compl. ¶ 1. Because Defendants have now indicated they wish to require each consumer to litigate in order to obtain relief from the rule, other consumers may be forced to bring separate litigation if Plaintiffs are not able to add class allegations here. Should those consumers file in this Court, the suit would be related to this one, all toward an end that could easily be accomplished in this case alone. D. Md. L.R. 103(b).

2. Justice also requires leave for Plaintiffs to supplement their complaint with a challenge to a "transaction, occurrence, or event that happened after" Plaintiffs filed their original complaint. Fed. R. Civ. P. 15(d). Specifically, Plaintiffs' original complaint challenged the Separate-Billing Rule's then-operative June 27, 2020, implementation date, arguing that it was arbitrary and capricious under the APA. However, Defendants' issuance of the IFR, which

became effective upon publication in the Federal Register on May 8, 2020, superseded the original implementation date of the Final Rule. In the IFR, Defendants adopted a new implementation date of August 26, 2020, and purported to balance the earlier costs and asserted benefits of establishing that implementation date with new information regarding the COVID-19 pandemic and its impact on issuers during this time. *See* 85 Fed. Reg. at 27,553, 27,600. Given HHS's evolving rationale for the implementation date and the superseding final agency action Defendants issued earlier this month, supplementation is necessary to ensure that Plaintiffs can obtain full relief from Defendants' actions causing them injury. *See, e.g.*, *Griffin v. Cty. Sch. Bd. of Prince Edward Cty*., 377 U.S. 218, 226 (1964) ("[A]mendments [under Rule 15(d)] are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.").

No countervailing interest supports denial of Plaintiffs' motion to supplement with a challenge to the IFR. Plaintiffs filed this Motion shortly after the IFR took effect—in good faith and without any prejudice to Defendants. Supplementing the complaint is not futile and, in fact, is necessary to address the changed implementation date of the rule since Plaintiffs filed the complaint. Moreover, supplementation would not delay the ongoing summary judgment proceedings. Defendants will need to produce to Plaintiffs the administrative record pertaining to the portion of the IFR that delays the Separate-Billing Rule's implementation date. However, given that Defendants issued the IFR without an official notice-and-comment period, that record is likely to be very small. Plaintiffs anticipate that, within a week of receiving that record, they could file a short letter brief supplementing their motion for summary judgment to address the IFR and the Separate-Billing Rule's new implementation date. Defendants could then file a

similar letter brief shortly thereafter or combine any response to Plaintiffs' letter brief with Defendants' reply brief due on June 1, 2020.

CONCLUSION

For these reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Leave to File Amended and Supplemental Complaint for Injunctive and Declaratory Relief.

Respectfully submitted,

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