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SHORT FORM ORDER

INDEX No. 99-3392

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 4/1/03
ADJ. DATE 11/18/03
Mot. Seq. #007 - Mot D; CASEDISP

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In the Matter of the Application of

MARGARET MURRAY, on behalf of herself and all similarly situated individuals,

Plaintiff-Petitioner,

MARGARET HEWITT, EDWARD BEERS, in his capacity as Administrator/Executor of the Estate of CHRISTINE BEERS, GERALD LOCURCIO, Infant JOSEPH MONTANYE by CAROL MONTANYE, KATHIE GRASSI, WAYNE GARDNER, DONALD BLAIS and GREGORY TOBIN, on behalf of themselves and all similarly situated individuals,

Plaintiff-Intervenors,

for a Judgment pursuant to $3001 and Articles 9, 78, and 86 of the C.P.L.R. and 42 U.S.C. $1983

-against-

DENNIS WHALEN, as Acting Commissioner of the New York State Department of Health, BRIAN J. WING, as Commissioner of the Office of Temporary and Disability Assistance of the New York State Department of Family Assistance, and JOHN WINGATE, as Commissioner of the Suffolk County Department of Social Services,

Defendants-Respondents.

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Upon the following papers numbered 1 to 38 read on this motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers

6-36 ; Replying Affidavits and supporting papers 37-38 ; Other defendants' memorandum of law; plaintiffs' memorandum of law; defendants' reply memorandum of law (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Dennis Whalen and Brian J. Wing for an order (i) pursuant to **CPLR** 3211(a)(1), (2), **(5),** and **(7)** dismissing the class action complaint, and (ii) pursuant to **CPLR** 2221 granting leave to reargue so much of plaintiffs' prior application (Mot. Seq. #001) for article 78 relief, *inter alia,* **as** was for class certification, which was granted by order of this **Court** (Klein, **J.**) dated January 13,2003, and, upon reargument, decertifying the class, is granted to the extent of dismissing the complaint, and is otherwise denied.

This is an action for declaratory and injunctive relief brought on behalf of a class of Medicaid applicants and recipients as well as the named intervenors.[1] By order dated January 13,2003, this **Court** (Klein, **J.**) granted certification of the following class:

> All present and past Medicaid applicants and recipients in New York State, not members of any similarly certified class action, who
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> **(A)** have not received Medicaid reimbursement for expenses incurred between January 1, 1988 and March 10,1998 for qualified medical care received during the period commencing on the first day of the third month prior to the month **of** their Medicaid applications and continuing until the date on which their Medicaid applications were filed [the "pre-application period"], and whose applications for reimbursement were or would have been denied based upon their failure to obtain services from Medicaid-enrolled providers; and/or
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> (B) have not received Medicaid reimbursement for expenses incurred between **January** 1, 1988 and April 22,1998 for qualified medical care received during the period commencing on the day after their Medicaid applications were filed and continuing until the date on which they received valid Medicaid identification cards [the "pending application period"], whose applications for reimbursement were or would have been denied based upon their failure to obtain services from Medicaid-enrolled providers, and who did not receive written notice regarding the availability, scope, and limitations of Medicaid reimbursement at the time of their Medicaid applications.

By way of this action, the plaintiffs seek, *inter alia,* to extend to the current class the rulings in **a** series of prior lawsuits ***(Carroll v DeBuono,*** 998 F Supp 190 **[ND *NY*** 19981; ***Chalfin v Sabol,*** 247 AD2d 309,669 NYS2d 45 [1998]; ***Seittelmun v Sabol,*** 158 Misc 2d 498,601 NYS2d 391 [1993], *mod* 217 AD2d 523,630 NYS2d 296 [1995], *appeal dismissed* 87 NY2d 860,639 NYS2d 312 [1995], *lv* ***grunted*** 90 NY2d 809,664 NYS2d 271 [19971, ***mod*** 91 NY2d 618,674 NYS2d 253 [1998]) challenging the validity of 18 ***NYCRR*** § 360-7.5(a)(5), which governs reimbursement to Medicaid recipients of medical expenses incurred during **both** the pre-application and pending application periods (collectively,

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[1] By order dated March 7,2000, this Court (Klein, J.) denied as moot the individual claims asserted by the original named plaintiff, Margaret Murray, noting that they had been extinguished upon reimbursement **of** her medical expenses following the commencement of this action.

"the retroactive period"). The regulation provides, in pertinent part, as follows:

> (a) Payment for medical care provided under the [Medicaid] program will be made to the person or institution supplying the care. However, payment for services or care may be made, at the [Medicaid] rate or fee in effect at the time such services or care were provided, to the following:
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> * * *
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> *(5)* a recipient or his/her representative for paid medical bills for medical expenses incurred during the period beginning three months prior to the month of application for [Medicaid] and ending with the recipient's receipt of his/her [Medicaid] identification card, provided that the recipient was eligible in the month in which the medical care and services were received *and that the medical care and services werefurnished by a provider enrolled in the [Medicaid' program* [emphasis added].

In each of those cases, the courts invalidated that part of the regulation which limited Medicaid reimbursement during the pre-application period to services furnished by Medicaid-enrolled providers. Among the reasons cited by the courts was that it improperly added a limitation to reimbursement which did not exist in the federal Medicaid retroactive reimbursement provisions (42 USC § 1396a[a][34]; 42 CFR 435.914), that the limitation was inconsistent with the remedial purpose of the federal law, that there was no authorization for such a limitation in the applicable federal statutes and regulations, that even if there were such authorization, eligible recipients would have no reason at that time to seek out Medicaid providers or familiarize themselves with Medicaid regulations. In addition to declaring the regulation void, the District Court in ***Carroll*** granted injunctive relief, permanently enjoining the defendant state and county commissioners from further applying the invalidated regulation. The courts did not invalidate the regulation insofar as it limited reimbursement during the pending application period, recognizing that, at the time of application, an applicant may be notified of the requirement that services be obtained fkom enrolled providers. However, in both ***Carroll*** and ***Seittelman,*** it was found that the applicants had not been so notified and, therefore, that they could not be denied reimbursement based solely on that requirement. The plaintiffs in each of the subject cases also sought to certify a plaintiff class of Medicaid recipients. In ***Carroll,*** the District Court denied class certification, citing the Eleventh Amendment as a bar to directing state officials to make retroactive payment of benefits denied prior to its order, and finding such certification unnecessary for prospective benefits on the assumption that the defendants would apply the declaratory and injunctive relief granted. Class certification was granted, however, in both ***Seittelman*** and ***Chalfn.*** The class in each case was virtually identical, *i.e.*, "all New York City Medicaid recipients whose applications for reimbursement of medical and other expenses incurred during the period commencing on the first day of the third month prior to the month of their applications for Medicaid and continuing until the time they receive their valid Medicaid identification cards were denied after January 1, 1988 [in ***Seittelman***, after December 16, 1988] based upon their failure to obtain services fkom Medicaid-enrolled providers, whether expressly or impliedly, and whose denials were affirmed after an administrative hearing." Significantly, in neither ***Seittelman*** nor ***Chalfin*** did the courts direct the taking of remedial measures on behalf of any Medicaid claimant not a member of the ***Seittelman*** or ***Chalfin*** classes.

In response to the foregoing cases, in or about April 1998, the New York State Department of Health changed its reimbursement policy by issuing to all local social service districts General Information System ("GIS") Message 98MA/011, dated April 21, 1998, and GIS Message 98TA/DC011, dated April 23, 1998, which directed the districts to modify their reimbursement procedures as follows:

> Effective for applications and/or requests for reimbursement filed or pending on or after March 11, 1998 [the date of the ***Carroll*** decision], you must modify your direct reimbursement procedures to assure that Medicaid recipients receive reimbursement for Medicaid services purchased fiom non-Medicaid enrolled providers during the retroactive eligibility period, if otherwise eligible. This does not apply to services purchased from non-Medicaid enrolled providers after the day of application and before the day the recipient received a Medicaid identification card * * *.
>
> Also, effective immediately, you must ensure that each Medicaid applicant * * * is informed in writing of the availability of reimbursement of paid medical expenses during the three month period prior to the month of application and that, if determined eligible, direct reimbursement will be made for Medicaid services between application date and date of receipt of the identification card only if furnished by Medicaid-enrolled providers.

The plaintiffs do not deny having received timely notification of the new policy.

The plaintiffs commenced this action on March 5, 1999. Apart from class certification, the plaintiffs seek the following declaratory and injunctive relief on behalf of the class:

- DECLARING that defendants' failure to implement a policy, practice and procedure between January 1, 1988 and March 10, 1998 to insure that all New York State Medicaid recipients received Medicaid reimbursement for the cost of qualified medical care received during the pre-application period regardless of whether their medical providers were Medicaid-enrolled was arbitrary, capricious, an abuse of discretion, and a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I §§ 6 and 11 of the New York Constitution, 42 U.S.C. § 1396a(a)(1), (a)(5), (a)(10)(B), (a)(19), and (a)(34), 42 C.F.R. §§ 431.10, 435.902, and 435.934, New York Social Services Law §§ 363, 363-a and 364(1) and (2), and defendants' affirmative duty to aid the needy under Article XVII § 1 of the New York State Constitution and the government operations rule of the stare ***decisis*** doctrine and the judicial precedents of Seittelman, Chalfin, Massand[2] and Carroll.

- DECLARING that defendants' failure to implement a policy, practice and procedure between January 1, 1988 and April 22, 1998 to insure that all New York State claimants were provided with clear and detailed written information regarding the availability, scope and limitations of Medicaid reimbursement for the cost of qualified medical care received fiom non-Medicaid-enrolled providers during the retroactive period, and about the requirement that all qualified medical care obtained during the application-pending period be obtained fiom Medicaid-enrolled

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[2] ***Matter of Massand v Hammons*, 240 AD2d 276, 662 NYS2d 754 (1997).**

providers, was arbitrary, capricious, an abuse of discretion, and a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1396a(a)(19), 42 C.F.R.§§ 431.18, 435.902, 435.905(a) and (b), Article I § 6 and Article XVII § 1 of the New York State Constitution, New York Social Services Law § 363, 18N.Y.C.R.R. §§ 350.7(g), 351.1(b)(1)(I), 355.1, 355.2, 360-2.1(c), 360-2.5(a) and 360-2.6(d), and the government operations rule of the ***stare decisis*** doctrine and the judicial precedents of Seittelman, Chalfin, Massand and Carroll.

- DECLARING that defendants' failure to implement a policy, practice and procedure between January 1, 1988 and April 22,1998 to insure that **all** New York State Medicaid claimants who were not provided with clear and detailed written information at the time of Medicaid application regarding the availability, scope and limitations of Medicaid reimbursement, received Medicaid reimbursement for the cost of qualified medical care incurred during the application-pending period regardless of whether their medical providers were enrolled in the Medicaid program was arbitrary, capricious, an abuse of discretion, and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1396a(a)(1), (a)(5), (a)(10)(B), (a)(19), and (a)(34), 42 C.F.R.§§ 431.10, 431.18, 431.246, 435.902, 435.905(a) and (b), and 435.914, Article I $ 6 and Article XVII § 1 of the New York State Constitution, New York Social Services Law §§ 363,363-a and 364(1) and (2), 18N.Y.C.R.R. §§ 350.7(g), 351.1(b)(1)(I), 355.1, 355.2, 360-2.1(c), 360-2.5(a) and 360-2.6(d), and 360-7.5(a)(1), and the government operations rule of the stare ***decisis*** doctrine and the judicial precedents of Seittelman, Chalfin, Massand and Carroll.

- ENJOINING ***AND*** DIRECTING defendants to implement a policy, practice and procedure to insure that **all** New York State Medicaid claimants receive Medicaid reimbursement for the cost of qualified medical care incurred during the pre-application period between January 1,1988 and March 10, 1998, regardless of whether their medical providers were enrolled in the Medicaid program.

- ENJOINING AND DIRECTING defendants to implement a policy, practice and procedure to insure that **all** New York State Medicaid claimants who applied for Medicaid between January 1, 1988 and April 22,1998 and who were not given clear and detailed written information about the scope and limitations of Medicaid reimbursement at the time of their applications, including the requirement that all qualified medical care obtained during the application-pendingperiod be obtained fiom Medicaid-enrolled providers, receive Medicaid reimbursement for the cost of qualified medical care incurred during the application-pendingperiod regardless of whether their medical providers were enrolled in the Medicaid program.

The plaintiffs also seek the following relief on behalf of the intervenors:

- DECLARING that the defendants' denials of the requests of intervenors Hewitt, Beers, Locurcio, Montanye, Grassi, Gardner and Blais for Medicaid reimbursement for the cost of qualified medical care that they incurred during the retroactive period on the ground that such care was obtained fiom non-Medicaid-enrolledproviders were arbitrary, capricious, an abuse of discretion, and a violation of the Due Process Clause of the Fourteenth Amendment to the United

States Constitution, 42 U.S.C. § 1396a(a)(1), (a)(3), (a)(5), (a)(10)(B), (a)(19), and (a)(34), 42 C.F.R.§§ 431.10, 431.206(b) and (c), 431.210, 435.902 and 435.914, Article I § 6 and Article XVII § 1 of the New York State Constitution, New York Social Services Law §§ 22(12), 363, 363-a and 364(1) and (2), 18 N.Y.C.R.R. §§ 355.4, 358-2.2, 358-2.15, 358-3.3(a)(2), 360-2.5 and 360-2.6(c), and the government operations rule of the *stare decisis* doctrine and the judicial precedents of Seittelman, Chalfin, Massand and Carroll.

a DECLARING that the failure of state defendants and their agents to provide intervenor Tobin with clear and detailed written information about the availability, scope and limitations of Medicaid reimbursement for the cost of qualified medical care received from non-Medicaid-enrolled providers during the retroactive period, and his consequent deprivation of Medicaid reimbursement for the cost of qualified medical care her [sic] received from non-Medicaid-enrolled provider [sic] during the retroactive period fiom April 1, 1995 through October 31, 1995, were arbitrary, capricious, an abuse of discretion, and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I §§ 6 and 11 of the New York State Constitution, 42 U.S.C. § 1396a(a)(1), (a)(5), (a)(10)(B), (a)(19), and (a)(34), 42 C.F.R.§§ 431.10, 431.18, 431.246, 435.902, 435.905(a) and (b), and 435.914, New York Social Services Law §§ 363,363-a and 364(1) and (2), 18 N.Y.C.R.R. §§ 350.7(g), 351.1(b)(1)(I), 355.1, 355.2, 360-2.1(c), 360-2.5(a) and 360-2.6(d), defendants' affirmative duty to aid the needy under Article XVII of the New York State Constitution and the government operations rule of the *stare decisis* doctrine and the judicial precedents of Seittelman, Chalfin, Massand and Carroll.

a ORDERING defendants to provide intervenors with Medicaid reimbursement for the cost of qualified medical care that they incurred fiom non-Medicaid-enrolled providers during the retroactive period.

Finally, the plaintiffs seek an award of "costs and disbursements, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, and/or CPLR 909, and/or CPLR Article 86."

The defendants now seek dismissal of the complaint on the grounds that the plaintiffs' claims for declaratory and injunctive relief are moot, that the doctrine of sovereign immunity bars their claims for monetary relief, that this lawsuit cannot be maintained as an article 78 proceeding because it was not timely commenced and because the plaintiffs failed to exhaust their administrative remedies, and that the plaintiffs have no cause of action under 42 USC § 1983.

Upon careful review, the Court finds that the plaintiffs' causes of action are time-barred. The claims for declaratory relief pleaded on behalf of the class, which are directed at the defendants' failure prior to March 11, 1998 (and April 23,1998) to implement a policy consistent with the governing federal statutes, effectively challenge the validity of the prior reimbursement policy under 18 NYCRR § 360-7.5(a)(5). As such, they concern a quasi-legislative act of an administrative body (see, *New* York *City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194,616 NYS2d 1 [1994]), which is reviewable in an article 78 proceeding and governed by a four-month statute of limitations (see, CPLR 217). The fact that the plaintiffs have couched their claims in constitutional terms does not avoid the limitations bar, as the essence of the plaintiffs' challenge is directed at the specific actions of an administrative agency (see,

Matter of Roebling Liqs. v Urbach, 245 AD2d 829,666 NYS2d 328 [1997], *appeal dismissed and lv denied* 91 NY2d 948,671 NYS2d 710 [1998]). Even assuming, as the plaintiffs contend, that their claims accrued as late as April 1998, it is clear that this action was commenced well beyond the four-month limitations period and, therefore, is untimely. The plaintiffs' claims for injunctive relief, which seek to extend the retroactive effects of the *Seittelman* and *Chalfin* rulings to members of the plaintiff class, and the claims for declaratory relief pleaded on behalf of the intervenors, are likewise barred as the plaintiffs failed to preserve their right to challenge the validity of the underlying regulation *(see, Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono,* 91 NY2d 716,674 NYS2d 634 [1998]; *New York City Health & Hosps. Corp. v McBarnette, supra; cf. ,New York City Health & Hosps. Corp. v Bane,* 87 NY2d 399,639 NYS2d 985 [1995]). The law does not afford potentially aggrieved litigants the benefit of a toll enabling them "to sit on their existing rights pending the outcome of an early challenge brought by others" *(New York City Health & Hosps. Corp. v McBarnette, supra* at 206,616 NYS2d at 7). Accordingly, as the plaintiffs' remaining claims for monetary relief are merely incidental to the granting of equitable relief, the complaint is dismissed.[3]

The plaintiffs' arguments to the contrary are without merit. Initially, the Court rejects the plaintiffs' claim that any consideration as to whether this action was timely commenced is barred by "law of the case." While it was noted in the July 24,2001 order of this Court (Klein, J.) granting the plaintiffs' motion for leave to intervene that the defendants had "failed to demonstrate" that any of the proposed new causes of action was time-barred, the Court did not address, much less determine, the substantive issue of whether any such cause of action was timely pleaded *(see, Baldasano v Bank of N.Y.*, 199 AD2d 184,605 NYS2d 293 [1993]). As "law of the case" does not apply except to legal determinations that were necessarily resolved on the merits in the prior decision *(e.g. , Gilligan v Reers,* 255 AD2d 486,680 NYS2d 621 [1998]), it does not pertain here. The plaintiffs' further claim that the action is timely because it was brought pursuant to 42 USC § 1983, governed by a three-year statute of limitations, and not as a "standard" article 78 proceeding, is also rejected. In *Will v Michigan Dept. of State Police,* 491 US 58, 109 S Ct 2304 (1989), the United States Supreme Court held that state officers, acting in their official capacities, may not be held liable pursuant to 42 USC § 1983 unless the relief sought is prospective in nature. Here, the declaratory relief requested by the plaintiffs on behalf of the class is exclusively retrospective; as for the injunctive relief requested, although the plaintiffs have framed their request for such relief in prospective terms, it is apparent that the defendants' new policy is in accord with federal law and that there is no continuing violation of law to be enjoined, so that the effect of such relief would be likewise entirely retrospective *(cf., Hebrew Hosp. Home v Novello*, 303 AD2d 255,755 NYS2d 838 [2003]). Accordingly, the complaint does not state a claim under 42 USC § 1983. To the extent that the plaintiffs seek ancillary "notice relief' on behalf of the class, that is, written notice of a renewed opportunity to submit reimbursement claims for the costs of qualified medical care received prior to the effective dates of the revised policy, the Court notes the absence of any prospective relief to which such notice may be ancillary *(see, Ward v Thomas,* 207 F3d 114 [2d Cir 20001). Finally, as the plaintiffs failed to timely assert their claims for retroactive relief, whatever rights they may have assumed in the wake of the *Seittelman* and *Chalfin* decisions were prospective only *(compare, New*

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[3] CPLR 908, which requires that notice of a "proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs," is not triggered where, as here, a dismissal is involuntary *(see, Matter of Empire Blue Cross & Blue Shield Customer Litig.*, 1995 WL 594723 [Supreme Ct, New York County, Sept. 29, 1995]).

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York City Health & Hosps. Corp. v Bane, supra, with New York City Health & Hosps. Corp. v McBarnette, supra) and the defendants were under no obligation to guarantee them the same relief as was afforded to the members of the ***Seittelman*** and ***Chalfin*** classes ***(see, id.).***

Since the dismissal of the complaint renders the issue of class certification academic, the defendants' request for leave to reargue is denied as moot.

Dated: MARCH 29, 2004

J.S.C.

__X__ **FINALDISPOSITION** ____ **NON-FINAL DISPOSITION**