

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

COALITION FOR PARITY, INC.)
601 Pennsylvania Avenue, NW)
9th Floor, South Building)
Washington, DC 20004)

Plaintiff,)

v.)

Case No. 1:10-cv-00527)
Judge Kollar-Kotelly

KATHLEEN SEBELIUS)
in her official capacity as Secretary, United States)
Department of Health and Human Services,)
200 Independence Avenue, SW)
Washington, DC 20201)

UNITED STATES DEPARTMENT OF HEALTH)
AND HUMAN SERVICES)
200 Independence Avenue, Sw)
Washington, DC 20201)

HILDA L. SOLIS,)
in her official capacity as Secretary, United States)
Department of Labor,)
200 Constitution Avenue, NW)
Washington, DC 20210)

UNITED STATES DEPARTMENT OF LABOR,)
200 Constitution Avenue, NW)
Washington, DC 20210)

TIMOTHY F. GEITHNER,)
in his official capacity as Secretary, United States)
Department of Treasury,)
1500 Pennsylvania Avenue, NW)
Washington, DC 20220, and)

UNITED STATES DEPARTMENT OF THE)
TREASURY,)
1500 Pennsylvania Avenue, NW)
Washington, DC 20220)

Defendants.)

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S APPLICATION FOR

TEMPORARY RESTRAINING ORDER

Pursuant to the Court's request, Defendants respectfully submit the following informal statement of their position in opposition to Plaintiff's Application for Temporary Restraining Order.¹

The Paul Wellstone and Pete Dominici Mental Health Parity and Addiction Equity Act of 2008 (the "Act") was enacted as Section 511 and 512 of Public Law 110-343.² The Act amended ERISA, the Internal Revenue Code and the Public Health Services Act with parallel provisions. Under the Act, a group health plan (or health insurance coverage offered in connection with such a plan) that provides both (1) medical/ surgical benefits and (2) mental health benefits or substance use disorder ("MH/SUD") benefits cannot impose a financial requirement or treatment limitation applicable to MH/SUD benefits that is more restrictive than the predominant financial requirement or treatment limitation applied to substantially all medical/ surgical benefits covered by the plan or coverage. In addition, no separate cost-sharing or treatment limitations can be applied only with respect to MD/SUD benefits. The Act is self-implementing and went into effect on a rolling plan year basis for plan years beginning after October 3, 2009. For a typical calendar year plan, the Act currently is effective, regardless of

¹As the Court is aware, Defendants were not informed that an application for temporary restraining order had been filed until counsel for Defendants received a call from the Court at 10:30 am this morning. Defendants did not receive a copy of Plaintiff's filing until 11:30 am this morning, despite prior representations by Plaintiff's counsel that any complaint or other papers in this matter would be sent by email before they were filed. The following informal statement briefly summarizes the preliminary position which Defendants intend to articulate more fully before the Court this afternoon.

²A technical correction to the effective date for collectively-bargained plans was made by Public Law 110-460.

any regulations.

Plaintiff seeks emergency relief (within two days) to stay Defendants' enforcement of the Interim Final Rules (the "Rules") issued by the Departments of Labor, Treasury, and Health and Human Services on February 2, 2010, 75 Fed. Reg. 5410 (Feb. 2, 2010), to further implement the Act, on the ground that the Rules were promulgated in the absence of notice and comment, as allegedly required under the Administrative Procedures Act ("APA"). 5 U.S.C. § 553(b), (c). Plaintiff's claims, however, are meritless. The Rules were issued pursuant to *express statutory authority* to "promulgate *any* interim final rules as the Secretary determines are appropriate" to carry out those sections of the Internal Revenue Code, ERISA, and Public Health Services Act which encompass the Act. See 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92 (emphasis added). Moreover, as expressly stated in the Rules, "[t]hese rules are being adopted on an interim final basis because the Secretaries have determined that without prompt guidance some members of the regulated community may not know what steps to take to comply with the requirements of [the Act], which may result in an adverse impact on participants and beneficiaries with regard to their health benefits under group health plans and the protections provided under [the Act]." 75 Fed. Reg. 5410, 5419 (Feb. 2, 2010).³ Accordingly, Plaintiff cannot demonstrate a likelihood of success on the merits.

³Therefore, in addition to having express statutory authority to issue interim final rules under the Act, the Secretaries of Treasury, Labor, and Health and Human Services (the "Secretaries") were authorized to dispense with the notice and comment requirement pursuant to the "good cause" exception to the APA. See 5 U.S.C. § 553(b) ("Except when notice or hearing is required by statute, [the notice requirement] does not apply . . . when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").

Aside from the deficiency in Plaintiff's showing on the merits, Plaintiff has failed to demonstrate that it will suffer any irreparable harm in the absence of a temporary restraining order. Despite Plaintiff's assertions to the contrary, a temporary restraining order is not necessary to maintain the status quo. At the earliest, the Rules apply to group health plans and group health insurance issuers for plan years beginning on or after July 1, 2010.⁴ Thus, while the Rules become effective on April 5, 2010 (*i.e.*, are published in the Code of Federal Regulations), they will not be enforced or otherwise applied until at least July 1, 2010. Plaintiff stands to suffer no harm as a result of the Rules becoming "effective" on April 5, 2010.⁵ Therefore, a temporary restraining order is both unnecessary and inappropriate.

Plaintiff's claims are both premature and reparable. Any harm Plaintiff claims from the costs of compliance with the challenged Rule is monetary and does not rise to the level of irreparable harm. Plaintiff's Complaint is a thinly-veiled attempt to advance the pecuniary interests of its members by asking this Court to allow it to maintain a system of discriminatory roadblocks to mental health care. Although the health plans or insurance companies that employ Plaintiff's members might understandably prefer to maintain this system for as long as possible – at the expense of individuals who need mental health services but cannot afford them – the public interest weighs against allowing them to do so. To the extent Plaintiff claims that it faces

⁴With respect to certain collectively-bargained plans, the Rules are not applicable for plan years beginning before the later of either the date on which the last of the collective bargaining agreements relating to the plan terminates or July 1, 2010.

⁵Plaintiff's suggestion that it faces potential litigation from private parties as of the effective date of the Rules is inaccurate and misleading. Plaintiff is correct that private parties can seek to enforce their rights under the Act prior to July 1, 2010. However, the Rules are not applicable until July 1, 2010. Therefore, the statutory private right of action to challenge compliance with the Act itself exists now, irrespective of the Rules.

a potential enforcement action, its subjective fears are speculative. No such action is currently contemplated and, if one occurred, Plaintiff's members could challenge any final adverse decision and assert all the claims they raise in their Complaint.

Lastly, Plaintiff's request for emergency relief comes nearly *two months after* the Interim Final Rules were issued yet only *two business days before* their effective date. This lengthy delay undermines Plaintiff's claim that it will suffer irreparable harm if the Court declines to grant preliminary relief. Because irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction," Bell & Howell: Mamiya Co. v. Masel Supply, 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 431 (1973)), any delay by a plaintiff in seeking preliminary relief is a relevant factor when considering whether the plaintiff has met his burden to show irreparable harm. "[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir. 1995) (internal citation omitted). Indeed, "[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm." Newdow v. Bush, 355 F. Supp. 2d 265, 292 (D.D.C. 2005); Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975) (plaintiffs waited 44 days until after final regulations were issued although they had notice of a public comment period); Mylan Pharm. v. Shalala, 81 F. Supp. 2d 30, 43-44 (D.D.C. 2000) (noting that an over two month delay "further militates against a finding of irreparable harm"). Plaintiff's application for a temporary restraining order (or, for that matter, for any preliminary injunctive relief) under these circumstances is unwarranted because, to the extent that an

emergency situation exists (and it does not), it is one that Plaintiff has created. Quince Orchard v. Hodel, 872 F.2d 75, 79 (4th Cir. 1989) (denying preliminary injunction where the imminent nature of any potential harm to plaintiff is the “product of his own delay in pursuing this action”).

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff’s Application for Temporary Restraining Order and issue a briefing schedule on the merits of Plaintiff’s claims.⁶

DATED: April 1, 2010

Respectfully Submitted,

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⁶Per the Court’s request, Defendants anticipate that they will be able to provide the Court with the Administrative Record by Tuesday, April 6, 2010. However, the issue presented by Plaintiff – whether the Secretaries were authorized to issue the Rules on an interim final basis in the absence of notice and comment – is purely legal in nature and, therefore, Defendants maintain that review of the Administrative Record is not necessary for a ruling on Plaintiff’s Application for Temporary Restraining Order.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER** was served on the following counsel of record on April 1, 2010, by electronic mail.

Jeffrey L Poston
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s/ Bonnie J. Prober

BONNIE J. PROBER