UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

----------------------------------------------------------

FRANCES T. DeMARCO, by her Agent,

LUCIANO M. DeMARCO, and LUCIANO

M. DeMARCO, individually, Civil Action No.

 Plaintiffs, PLAINTIFFS’ BRIEF IN SUPPORT

 v. OF MOTION FOR TEMPORARY

 RESTRAINING ORDER AND

GARY D. ALEXANDER, Secretary, PRELIMINARY INJUNCTION

Pennsylvania Department of Public Welfare,

 Defendant.

----------------------------------------------------------

 The plaintiffs, Frances and Luciano DeMarco, ages 76 and 78, are moving for a temporary restraining order and preliminary injunction to prevent the Pennsylvania Department of Public Welfare (the “DPW”) from terminating Mrs. DeMarco’s medical assistance (“Medicaid”) benefits. Mrs. DeMarco has been receiving Medicaid to help pay for her nursing home care continuously since 2003. The DPW is violating 42 U.S.C. § 1396r-5(c)(4) by counting Mr. DeMarco’s savings as a resource available to his wife, putting her resources over the Medicaid resource allowance, in the face of that statute expressly providing:

 Separate treatment of resources after eligibility for benefits

 established. During the continuous period in which an institutionalized

 spouse is in an institution and after the month in which an institutionalized

 spouse is determined to be eligible for benefits under this subchapter, *no*

 *resources of the community spouse shall be deemed available to the*

 *institutionalized spouse.* (Emphasis supplied)

 The family home was held in Mr. DeMarco’s name alone since 2003. In 2010 he sold it and received net proceeds of $245,732.07 which he placed into an account in his own name to have to pay for his own future care needs. He now lives in an apartment near the nursing home so he may visit his wife regularly.

 After the DPW issued and then rescinded several notices to discontinue Mrs. DeMarco’s Medicaid coverage because of the $245,732.07 in Mr. DeMarco’s name, it ultimately issued a June 29, 2011 notice that her Medicaid coverage would be terminated effective July 13, 2011 because of those funds of her husband’s. A copy is attached as Exhibit “D” to the Complaint. She made a timely request for an administrative “Fair Hearing,” so the DPW continued her Medicaid benefits unchanged pending the Fair Hearing decision. On September \_\_, 2011, the DPW affirmed the discontinuance of her Medicaid coverage, so now she has no source of payment for her nursing home care. A copy of the Fair Hearing decision is attached as Exhibit “E” to the Complaint.

 The basis for the DPW determination and Fair Hearing decision was a June 27, 2011 “Policy Clarification” PMN15842440 which states that if a “community spouse” like Mr. DeMarco, *see*, 42 U.S.C. § 1396r-5(h)(2), sells his home, the entire value of the property should be counted as a resource available to an “institutionalized spouse,” *see*, 42 U.S.C. § 1396r-5(h)(1), like Mrs. DeMarco. This new policy is flatly contradictory to the prohibition on counting resources of a community spouse as available to an institutionalized spouse after the month the institutionalized spouse has been determined to be eligible for Medicaid under 42 U.S.C. § 1396r-5(c)(4).

 The test for issuance of a preliminary injunction is well known. The moving party, here the DeMarcos, must show a reasonable probability of success on the merits, irreparable injury, that preliminary relief will not result in even greater harm to the nonmoving party (here the Secretary of the DPW), and that granting preliminary relief would be in the public interest. *See*, *Iles v. DeJongh*, 638 F.3d 169, 172 (3d Cir. 2011). The plaintiffs satisfy all four criteria. Since there are no disputed issues of material fact, just disputed questions of law, the court might wish to convert this motion to one for summary judgment under Fed. R. Civ. P. 65(a)(2).

 The plain language of 42 U.S.C. § 1396r-5(c)(4), the starting point for any statutory construction, *see*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), supports the plaintiffs. That section was enacted as part of the “spousal impoverishment” protections of the Medicare Catastrophic Coverage Act of 1988, 102 Stat. 754, 42 U.S.C. § 1396r-5 (the “MCCA”). That act establishes a bifurcated process which treats the resources of a community spouse like Mr. DeMarco as available to his institutionalized spouse in the initial determination of her Medicaid eligibility, 42 U.S.C. § 1396r-5(c)(2), but then provides in 42 U.S.C. § 1396r-5(c)(4) that after the month of initial eligibility “no resources of the community spouse shall be deemed available to the institutionalized spouse.” Based on that plain and straightforward language, the DeMarcos clearly are likely to prevail on the merits of their claim that the discontinuance of Mrs. DeMarco’s Medicaid benefits based on Mr. DeMarco’s resources is illegal.

 The plain, unambiguous language of the statute is buttressed by the legislative history, although resort to legislative history is unnecessary where the statutory meaning is clear. *Chevron*, *supra*. In H.R. Rep. No. 100-105, 100th Cong., 1st Sess., at 71, *reprinted in* 1988 U.S.C.C.A.N. 857, 894, a situation akin to the DeMarcos’ was described: “Thus, if while the care of the institutionalized spouse is being paid for by Medicaid, the community spouse’s resources grow to exceed the $48,000 initial limit, *the State would not be authorized to require the community spouse to apply any excess toward the cost of care of the institutionalized spouse”* (emphasis supplied).

The legislative history of subsequent amendments to § 1396r-5, while not concerning the provisions of § 1396r-5(c)(4) at issue here, are consistent with the original 1988 legislative history. In H. Conf. Rep. No. 964, 101st Cong., 2d Sess. 872 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2577, the Conference Committee on the Omnibus Budget Reconciliation Act of 1990 stated that the clarifying amendments relating to spousal impoverishment provided “that the assessment and allocation of a couple’s resources is to occur only at the beginning of the first continuous period of institutionalization.” Contrary to that, under the DPW policy the allocation of a couple’s resources occurs not only at the beginning of institutionalization, but whenever thereafter the community spouse has more countable resources.

Likewise, in H.R. Rep. No. 247, 101st Cong., 1st Sess. 494 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2217, the Committee stated that “the total value of the resources in which either spouse has an ownership interest is computed as of the beginning of a continuous period of institutionalization of the institutionalized spouse. The Committee bill would clarify that this computation is to occur only once, at the beginning of the first continuous period of institutionalization.” Again, the DPW policy permits the total value of the resources in which either spouse has an ownership interest to be computed more than once, at the beginning of institutionalization and later if the community spouse’s countable resources were to increase.

 There likewise is no question that the DeMarcos are being irreparably injured by the discontinuance of Mrs. DeMarco’s Medicaid benefits to pay for her nursing home care. The denial of Medicaid benefits has repeatedly been recognized as irreparable injury. *See*, *Mass. Ass’n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983); *Becker v. Toia*, 439 F.Supp. 324, 336 (S.D.N.Y. 1977); *Bass v. Richardson*, 338 F.Supp. 478, 489 (S.D.N.Y. 1971). If Medicaid is not available to cover Mrs. DeMarco’s nursing home bill she will be at risk of discharge or, if she should require brief acute hospitalization, of not being readmitted to a nursing home. Just such concerns have recently been held to meet the irreparable injury test for preliminary injunctive relief. *See*, *Sorber v. Velez*, 2009 U.S. Dist. LEXIS 98799, \*-8-9 (D.N.J. 2009); *James v. Richman*, 2006 U.S. Dist. LEXIS 28384, \*12-13 (M.D. Pa. 2006). If Mrs. DeMarco’s bill goes unpaid, Mr. DeMarco could be liable for it under Pa. C.S.A. § 4102; *see*, *Porter v. Karivalis*, 718 A.2d 823 (Pa. Super. 1998).

 The DeMarcos further face irreparable injury the longer they go without relief in their favor because the Eleventh Amendment to the Constitution of the United States substantially limits the right to recover retroactive benefits in this action. As a general rule state officials have an Eleventh Amendment immunity against an award of retroactive relief such as damages or restitution of wrongfully denied public benefits. *See*, *Edelman v. Jordan*, 415 U.S. 651 (1974). While this court or the Third Circuit on any appeal might follow holdings from other courts that in Medicaid eligibility cases there is a limited three month exception to that general rule because the requirement of 42 U.S.C. § 1396a(a)(34) for Medicaid coverage effective three calendar months prior to the month of application is part of current eligibility, *see*, *Morenz v. Wilson-Coker*, 415 F.3d 230, 237 (2d Cir. 2005); *Bernard v. Kansas Health Policy Authority*, 2011 U.S. Dist. LEXIS 19698, \*18 (D. Kan. Feb. 28, 2011), absent such a ruling in this case, and in short order in any event, there would be a loss of a day of Medicaid coverage for each passing day.

That Eleventh Amendment problem has been recognized as establishing irreparable injury in cases concerning Medicaid eligibility and related issues from the court of appeals for this circuit, *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991), as well as other circuit courts and district courts from within and without the Third Circuit. *See*, *Kansas Health Care Ass’n, Inc. v. Kansas Dept. of Soc. & Rehab. Services*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Community Pharmacies of Indiana, Inc. v. Indiana Family & Soc. Services Admin.*, 2011 U.S. Dist. LEXIS 73817 (S.D. Ind. July 8, 2011); *Sorber v. Velez*, 2009 U.S. Dist. LEXIS 98799, \*10 (D.N.J. 2009); *James v. Richman*, 2006 U.S. Dist. LEXIS 28384, \*13 (M.D. Pa. 2006).

There likewise is no question that this irreparable harm to the plaintiffs far outweighs any potential harm to the defendant should he ultimately prevail in this action. The Supreme Court held four decades ago, in the context of the right of a recipient of public benefits to continued receipt of those benefits pending a hearing decision, “The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.” *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). *See also*, *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983), stating that when courts are faced with a conflict between financial concerns and preventable human suffering, they often “have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor,” *followed in Community Pharmacies of Indiana, Inc. v. Indiana Family & Soc. Services Admin.*, 2011 U.S. Dist. LEXIS 73817, \*13 (S.D. Ind. July 8, 2011) [concerning a potential $212 million State budget shortfall if an injunction were granted rather than the modest monthly financial impact on the DPW budget in this case]; *Sorber v. Velez*, 2009 U.S. Dist. LEXIS 98799, \*10-11(D.N.J. 2009).

Likewise issuance of a preliminary injunction would be in the public interest. Requiring a state Medicaid agency to comply with federal law is, by definition, in the public interest, *see, California Hospital Ass’n v. Maxwell-Jolly*, 2011 U.S. Dist. LEXIS 10523, \*5 (E.D. Cal. Jan. 28, 2011); *Hiltibran v. Levy*, 2010 U.S. Dist. LEXIS 143363m \*22 (W.D. Mo. Dec. 27, 2010); *Sorber v. Velez*, *supra*, at \*11-12. That is true in cases like this, just as ordering compliance with any other federal law is in the public interest, *see*, *e.g.*, *DS Waters of Am., Inc. v. Princess Abita Water, L.L.C.*, 539 F.Supp. 2d 853, 864 (S.D. La. 2008); *Burnola v. Greater Toledo YMCA*, 133 F.Supp. 2d 1034 (N.D. Ohio 2001).

Accordingly the plaintiffs’ motion for a temporary restraining order and preliminary injunction ordering the defendant to cause the DPW to continue to provide Medicaid benefits for the plaintiff Frances DeMarco without counting the resources of her husband Luciano DeMarco, should be granted, and that order should be effective as of three calendar months prior to the month the order is entered (or the date her Medicaid benefits were terminated by the Fair Hearing decision, if within those three months) pursuant to *Morenz v. Wilson-Coker*, *supra*, 415 F.3d at 237. *See also*, *Bernard v. Kansas Health Policy Authority*, 2011 U.S. Dist. LEXIS 19698, \*18.

Dated: September \_\_\_, 2011

Respectfully submitted,

s/ Kathleen M. Martin

O’DONNELL, WEISS & MATTEI, P.C.

Kathleen M. Martin, of Counsel

41 East High Street

Pottstown, Pennsylvania 19464-5426

Tel: (610) 323-2800

Fax: (610) 323-2845

kmartin@owmlaw.com

s/Kemp C. Scales

KEMP C. SCALES, ESQ.

Pro Hac Vice application to be filed

115 South Washington Street

P.O. Box 346

Titusville, Pennsylvania 16354

Tel: (814) 827-2788

Fax: (814) 827-9521

kemp@scaleslawoffices.com

s/ René H. Reixach

WOODS OVIATT GILMAN LLP

Pro Hac Vice application to be filed

700 Crossroads Building

2 State Street

Rochester, New York 14614

Tel: (585) 987-2858

Fax: (585) 987-2958

rreixach@woodsoviatt.com

Attorneys for the Plaintiffs