

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CASE NO. 3:18-cv-00008-GFVT**

COMMONWEALTH OF KENTUCKY,)
ex rel. MATTHEW G. BEVIN, GOVERNOR,)
)
SCOTT W. BRINKMAN, in his official capacity)
as Acting Secretary of the CABINET)
FOR HEALTH AND FAMILY SERVICES,)
)
STEPHEN P. MILLER, in his official capacity)
as Commissioner of the DEPARTMENT)
FOR MEDICAID SERVICES,)
)
Plaintiffs)
)
v.)
)
RONNIE MAURICE STEWART, GLASSIE)
MAE KASEY, LAKIN BRANHAM, SHANNA)
BALLINGER, DAVE KOBERSMITH, WILLIAM)
BENNETT, SHAWNA NICOLE McCOMAS,)
ALEXA HATCHER, MICHAEL WOODS, SARA)
WOODS, KIMBERLY WITHERS, KATELYN)
ALLEN, AMANDA SPEARS, DAVID ROODE,)
SHEILA MARLENE PENNEY, and QUENTON)
RADFORD)
)
Defendants.)
)
KENTUCKY ASSOCIATION OF HEALTH)
PLANS, INC.)
)
Intervening Plaintiff.)

**MEMORANDUM IN SUPPORT OF MOTION OF KENTUCKY
ASSOCIATION OF HEALTH PLANS, INC. TO INTERVENE AS PLAINTIFF**

The Kentucky Association of Health Plans, Inc. (“KAHP”) files this Memorandum in Support of its Motion to Intervene as a Plaintiff in this action. The proposed Intervening Complaint is attached to this Memorandum as Exhibit A.

INTRODUCTION

The Commonwealth of Kentucky (the “Commonwealth”) participates in Medicaid, a program authorized by Title XIX of the Social Security Act which financially assists states in providing health care to specified low-income persons. KAHP is a trade association comprised of various health benefit plans which administer Medicaid coverage to residents of the Commonwealth, under the regulations and laws of the Commonwealth and the Federal Government. In 2010 the Federal Government enacted the Patient Protection and Affordable Care Act (“ACA”). The ACA enabled states to choose to expand their Medicaid coverage to include individuals who previously did not qualify for Medicaid (the “Medicaid Expansion”).

In 2014, Governor Steve Beshear directed the Commonwealth to participate in the Medicaid Expansion. As a result, KAHP’s members began administering benefits to able-bodied adults with incomes below 138% of the federal poverty level, who were previously ineligible for Medicaid. In June 2016, Governor Matt Bevin directed the Commonwealth to apply for a waiver, under Section 1115 of the Social Security Act, to Medicaid’s requirements. This waiver, known as Kentucky HEALTH, alters the administration of the Kentucky Medicaid benefits program previously approved by the Centers for Medicare and Medicaid Services (“CMS”). From June 2016, to the present, KAHP members have expended significant resources in preparation for the implementation of Kentucky HEALTH’s requirements currently scheduled for July 2018.

On January 12, 2018, CMS notified the Commonwealth that Kentucky HEALTH was approved. That same day, Governor Bevin issued an executive order authorizing the changes

contemplated in Kentucky HEALTH. On January 24, 2018, 16 residents of the Commonwealth filed a putative class-action lawsuit against various Federal officials and agencies seeking to prevent the implementation of Kentucky HEALTH. On February 19, 2018, officials from the Commonwealth instituted this action against the plaintiffs in the January 24, 2018 lawsuit.

KAHP has a significant interest in the claims raised in this litigation. KAHP's members include health plans that have been preparing for the implementation of Kentucky HEALTH. These members will incur harm if Kentucky HEALTH is not upheld in that KAHP members will suffer a significant loss of resources expended in preparation for the administrative changes and implementation timeline required by Kentucky HEALTH. Through this motion, KAHP seeks to timely intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) or, alternatively, to intervene permissively under Fed. R. Civ. P. 24(b)(2). It does so in order to assert and protect their substantial interests in the administration of the Medicaid Expansion in Kentucky, the regulatory requirements at issue in this action that are not otherwise adequately represented by the existing parties.

ARGUMENT

I. KAHP IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER FED. R. CIV. P. 24(A)(2).

Under Fed. R. Civ. P. 24(a)(2), a party is entitled to intervene as a matter of right when: (i) the motion to intervene is timely; (ii) the applicant has an interest in the property or transaction that is the subject matter of the litigation; (iii) disposition of the action as a practical matter may impair or impede the applicant's ability to protect that interest; and (iv) the parties already in litigation cannot adequately protect that interest. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984). "Rule 24 is broadly construed in favor of potential intervenors." *Purnell v. Akron*, 925

F.2d 941, 950 (6th Cir. 1991). KAHP meets the requirements for intervention and, accordingly, should be granted leave to intervene as a matter of right in this proceeding.

A. The Motion to Intervene Is Timely.

In determining whether a motion to intervene is timely, courts look to the following factors:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties...; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989).

Considering these factors, intervention by KAHP is timely. This action is still in the very early stages and granting intervention will not require the alteration of any schedule established by the Court.

Plaintiffs filed their Complaint in this case on February 19, 2018. Docket Number 1. Summonses were issued to the named Defendants that same day. Docket Number 3. Defendants have not yet filed their answers, and indeed there have been no further filings with the Court. Thus, the point to which the suit has progressed and the length of time KAHP has been aware of the action both weigh strongly in favor of intervention.

Moreover, no prejudice to the original parties will result from KAHP's intervention. No scheduling order has been entered, indeed no meetings have been scheduled at all. Thus, intervention will not result in any delays or modifications to any existing schedule, and will not delay a final resolution of this case. *See* 7C Wright & Miller, *Federal Practice & Procedure* § 1916 ("If the intervention will not delay the termination of the litigation intervention ordinarily will be allowed.").

B. KAHP and Its Members Have a Substantial Interest in the Subject Matter of this Action.

KAHP is a non-profit trade association which represents the interests of its members. KAHP's members include insurance companies administering Medicaid benefits to eligible residents in the Commonwealth. The Commonwealth, through this action, seeks a judicial declaration that Kentucky HEALTH is consistent with the Social Security Act, the Administrative Procedure Act, and the United States Constitution (the "Kentucky Action"). KAHP's members have spent and will spend significant sums of money in order to comply with Kentucky HEALTH and its implementation timeline, and would incur further costs should this Court not grant the requested relief.

The declaratory judgment Plaintiffs seek would insulate KAHP's members from harm, as those members made administrative and operational changes in preparation for Kentucky HEALTH. Denial of this relief would dramatically increase uncertainty for KAHP's members related to the requirements to administer Medicaid with which they must comply. KAHP thus has a substantial and significant interest in this matter.

The Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The requirement of an "interest" in litigation is "construed liberally" under Rule 24(a). *Hatton v. County Bd. of Ed. Of Maury County, Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970). Courts have long held that an economic interest is sufficient to support intervention under Fed. R. Civ. P. 24(a). *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) ("economic independence" is a ground for intervention under Rule 24(a)); *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992) (economic interest supported intervention). KAHP satisfies the requirement of a sufficient interest in this case.

For the above reasons, KAHP has a substantial economic interest in the outcome of this litigation, which easily satisfies the requirement of an interest in this case sufficient to support intervention of right under Fed. R. Civ. P. 24(a).

C. The Interests of KAHP Will Not Be Adequately Represented by the Existing Plaintiffs.

The burden of proving inadequate representation sufficient to warrant intervention is “minimal.” *Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989). In determining whether an existing party adequately represents the interests of an intervening party, courts generally consider three factors: (1) if there is collusion between the representative and an opposing party; (2) if the representative fails in the fulfillment of his duty; and (3) if the representative has an interest adverse to the proposed intervenor. *Purnell v. City of Akron*, 925 F.2d 941, 949-50 (6th Cir. 1991).

The existing Plaintiffs in this case cannot adequately represent the interests of KAHP. The economic consequences of any ruling that alters the regulatory burden of administering Medicaid fall squarely on KAHP’s members. If the Commonwealth of Kentucky has an economic interest in the outcome of this litigation at all, it is markedly different than the economic interests of the businesses which provide coverage for the Medicaid Expansion. The Commonwealth’s officials serving as Plaintiffs in this action are responsible for administering and enforcing laws and executive orders in the Commonwealth. In that role, the Commonwealth represents the interests of the general public, and for this reason will of necessity be less able to advocate the position of the regulated business community.

In contrast, KAHP represents the interests of its members which are required to implement the changes mandated by Kentucky HEALTH. In similar circumstances, courts have held that the regulated industry should be accorded intervening status to assert its unique interests. *See NRDC v. Nuclear Energy Regulatory Comm’n*, 578 F.2d 1341 (10th Cir. 1978) (reversing district court’s

denial of intervention by trade association and members of industry even where another industry member had already intervened); *Nat'l Wildlife Fed'n v. Hodel*, 661 F.Supp. 473, 474 (E.D. Ky. 1987) (industry intervenor is not adequately represented by the Secretary of the Interior or state regulatory agency in action regarding the scope of Federal Surface Mining Act).

The interests of KAHP concerning the issues raised in this litigation differ significantly from the interests of the Commonwealth of Kentucky. As a result, the existing Plaintiffs cannot adequately represent KAHP's interests in this matter. Furthermore, any resolution of this matter between the existing Plaintiffs and Defendants should necessarily reflect the interests of the KAHP's member health plans which will be required to execute any such resolution.

KAHP's Motion to Intervene is timely, will not prejudice the existing parties to this case, and demonstrates that KAHP's members have a substantial interest in the subject matter of this case, the protection of which may be impaired by the disposition of this case. Accordingly, KAHP respectfully requests that it be granted intervention of right under Fed. R. Civ. P. 24(a) and be allowed to participate as an Intervening Plaintiff in this case.

II. ALTERNATIVELY, THE COURT SHOULD GRANT KAHP LEAVE TO INTERVENE PURSUANT TO FED. R. CIV. P. 24(B)(2).

Permissive intervention may be granted in any action if: (i) the motion to intervene is timely; (ii) it reflects a claim or defense for a question of law or fact in common with the main action; and (iii) it will not unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(1), (3). The requirements of this rule are to be liberally construed in favor of intervention. *See United States v. Marsten Apts.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997) (compiling cases regarding liberal construction of Rule 24); *Warheit v. Osten*, 57 F.R.D. 629, 630 (E.D. Mich. 1973) ("It is well understood that the rule should be read to allow intervention in as many situations as possible.").

As set forth above, KAHP's intervention in this matter is timely, will not prejudice the rights of the existing parties, and will not delay the adjudication of this case. Furthermore, KAHP and its members have a substantial and significant interest in the defense of the claims raised by Plaintiffs. KAHP meets the elements necessary for permissive intervention. Thus, KAHP respectfully requests that if the Court declines to grant intervention as of right under Rule 24(a), that it be granted permissive intervention under Rule 24(b).

CONCLUSION

For the reasons set forth above, KAHP respectfully requests that the Court grant its Motion to Intervene as Plaintiff, and enter the order submitted herewith.

Respectfully submitted,

/s/ Brent R. Baughman

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was filed this 2nd day of March, 2018, using the Court's ECF system and will be served on the following:

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