State Bar of Michigan

Administrative Law Journal

A publication of the State Bar of Michigan Administrative Law Section

Welcome to the New World of Medicaid Hearings

By Josh Ard[1]

An area of administrative law that is likely to see significant growth in the near future is Medicaid appeals by applicants for coverage. There are several reasons why this is a reasonable prediction. The first is based on demographics. A significant percentage of persons who are most likely to file appeals are elderly applicants for nursing home coverage, and the upper end of the age spectrum is growing the most rapidly. The second is that the rules and regulations governing eligibility have changed rather dramatically recently. Third, reacting to these changes has led to considerable confusion in both policy drafting and in agency reactions to applications. Fourth, Michigan and the federal government are facing increasing financial challenges, which could help motivate a tougher stance on questions of eligibility for benefits. Fifth, many questions that could have been ignored under old policies have to be addressed now, such as how to address continuing tithes and gifts to religious institutions. There are no policies on point or experience that could be readily applied to these novel disputes.

Summer 2008, Issue 32

Table of Contents

Overview of Medicaid

Medicaid is a joint federal-state program. The federal government contributes more than 50 percent of the funding and sets certain constraints on state actions, although states have considerable leeway in shaping policies.[2] Michigan, like the majority of states, has agreed to be no stricter than federal Social Security Income (SSI) requirements in setting eligibility criteria.[3] Medicaid is a needs-based (i.e., welfare) program that requires various thresholds for eligibility. The successful applicant must meet certain criteria, such as being a minor, a person with a disability or blindness, or being 65 or over in age. The successful applicant must also demonstrate both financial and medical needs.

Although the majority of Medicaid recipients are minors, more of the expenditures are on long-term care services, especially for the elderly. Medicaid pays roughly one-half of the total costs of nursing homes in the nation, a much higher percentage in poorer communities. Contrary to what most Americans believe, Medicare does not pay for extended long-term care services, only for short-term rehabilitation in a nursing home. Typical health insurance plans do not provide for long-term care. Long-term care insurance, as the name indicates, does provide such services, but the market penetration of such plans has remained low. Some veterans and spouses of veterans qualify for help under aid and attendance benefits, but for most Americans

Continued on page 3

The *Administrative Law Journal* is published by the Administrative Law Section of the State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012. Send proposed articles to Jack Dempsey, Dickinson Wright PLLC, at this email address: *jdempsey@dickinsonwright.com*

Announcements

Administrative Law Section Chair Named State Cemetery Commissioner

On June 2, 2008, Department of Labor & Economic Growth Director Keith W. Cooley named 2007-2008 Administrative Law Section Chair Stephen J. Gobbo Michigan's new cemetery commissioner. Since 2000, Mr. Gobbo served as the manager of the Compliance, Legal and FOIA Unit within the Enforcement Division of the Bureau of Commercial Services until recently when he became the director of the Legal Affairs Division of the Bureau. His new responsibilities will include protecting consumers and their loved ones from the practices of unscrupulous private cemetery owners and operators. The Administrative Law Section wishes to congratulate him on his appointment and challenging new endeavor.

Nominations Needed for 2008-2009 Administrative Law Section Council Members

Administrative Law Section Chair-Elect Mark J. Burzych is currently accepting nominations for Administrative Law Section council members for 2008-2009. There are a total of 12 council members. All council members must be members of the Administrative Law Section. There are four vacancies for three-year terms expiring in 2011 and one vacancy for a two-year term expiring in 2010. You may submit your nominations to Mr. Burzych by contacting him at Fahey Schultz Burzych Rhodes, PLC, 4151 Okemos Rd., Okemos, MI 48864, (517) 381-0100 telephone; (517) 381-5051 facsimile; *mburzych@fsblawyers.com.* Council member elections will take place at the Administrative Law Section's Annual Meeting at the Hyatt Regency Dearborn on September 18, 2008, at 9 a.m.

Bar Dues Waived for SBM Members on Full-Time Active Duty in the U.S. Armed Forces

Dues have been waived for up to four years for SBM members engaged in full-time active duty in the United States Armed Forces. The waiver, recommended by the State Bar of Michigan Representative Assembly, is intended to relieve the burden on lawyers whose professional careers have been disrupted by deployments into active military duty.

The American Bar Association has called for all bar associations to consider dues exemptions for military members. Michigan is among the first states to implement such an exemption. The waiver takes effect October 1, 2008 — the same date that dues are payable by SBM members.

Greg Ulrich, a member of the State Bar Board of Commissioners and sponsor of the resolution before the Representative Assembly, hailed the recent Michigan Supreme Court order regarding the waiver.

"The waiver recognizes sacrifices by Michigan lawyers serving in the military," Ulrich said. "They are drawn away from their families and daily lives by their commitment to protect us all."

Ulrich also noted other measures voluntarily undertaken by the legal community to respond to the needs of soldiers and veterans, especially the disabled, such as the University of Detroit Mercy Law School Veterans Law Clinic and Thomas M. Cooley Law School's Service to Soldiers program.

Welcome to the New World. . .

Continued from page 1

the first source of payment must be from private funds. These expenditures are a challenge for ordinary families to sustain for long. The official average monthly cost of a private nursing home bed in Michigan is $6,191 for 2008, although the actual costs, especially in southeast Michigan, can be several thousand dollars more, often over $100,000 per year. Not surprisingly, there is considerable interest among nursing home residents and their families to qualify for governmental assistance to help defer these costs.

There are two components to financial eligibility—income and resources.[4] Income is not much of a barrier in Michigan. The only requirement is that the applicant (or applicant + spouse) must have income less than the actual nursing home bill. The vast majority of older Michiganians have less income than that. The major hurdle is resource eligibility. A single individual can have no more than $2,000 in countable resources. Various assets, such as a homestead (unless it is in a trust), clothing, furniture, and one vehicle, are not countable. Bank accounts and most investments are countable. The requirements are more generous when there is a community spouse—one who lives in the community and not an institution. That spouse may be allowed to retain additional countable resources. For 2008, the additional amount is somewhere between $20,880 and $104,400,[5] depending on the amount of countable resources the couple owned at the time of the institutionalized spouse's first 30-day continuous stay in a hospital or nursing home. The additional protected spousal amount can be raised pursuant to a court hearing or an administrative hearing.

Once eligible, all of a single individual's income except for up to $60 per month is required to be spent on the nursing home bill. The $60 could be used for non-covered expenses such as hair care. The rules for married couples are more complicated and designed to allow the community spouse sufficient income to live on, which may require diversion of some or all of the institutionalized spouse's income to the community spouse.

Constitutional Requirements for Medicaid hearings

Apparently, there are significant due process issues arising from some states' handling of Medicaid hearings. Because Medicaid is a welfare-like entitlement, hearings should have to meet the standards in *Goldberg v Kelly*, 397 US 254 (1970). William J. Browning summarized his views of what these requirements are in a recent article, "Demanding Due Process From State Medicaid Agencies," NAELA Journal, vol. 3, no. 2, 2007, pp. 107-117. He proposed the following categories:

A. Adequate Notice

B. Right to Face Your Accuser and Right to Subpoena Witnesses

C. Burden on the State

D. Neutral and Well-Trained Hearing Officers

E. Right to Record

F. Due Process for Medicaid Estate Recovery Hearings

It appears that Michigan is in a much better position than many of our sister states. For example, the State Office of Administrative Hearings and Rules should generally receive high marks on point D.

The Federal Deficit Reduction Act

On February 8, 2006, Congress allegedly passed the Deficit Reduction Act of 2005. The process was strange, to say the least. The vote in the Senate was tied, but Vice President Cheney broke the tie. The margin in the House was two votes after the leadership kept the vote open for several hours until they could round up enough votes to get a majority. It turned out that the versions passed by the House and Senate were not identical. The discrepancy involved a provision that is irrelevant for financial eligibility by individuals. Needless to say, several suits were initiated to challenge the law, because both houses are supposed to pass identical bills before a bill can become a law, but up until now no court has struck down the law, deferring to congressional representations that everything was proper.

Provisions of this law greatly tightened eligibility rules. One example is the rules for divestments, essentially gifting property to reduce wealth. Before the Deficit Reduction Act, Michigan's policy on divestment was quite liberal. All gifts made in a calendar month were added together and divided by the official average cost of a private nursing home bed. The result determined the number of months after the gift that the person was ineligible for Medicaid assistance. The number was equal to the whole number, and fractions were dropped. Examples may be instructive. In January 2006, the

Continued on the next page

Continued from page 3

divisor was $5549. Consider the following chart:

Total monthly divestments in January 2006	Resulting Penalty in months of ineligibility for benefits
$5500	None
$11,000	One
$12,000	Two

In fact, under the old rules, a person could serially divest (give away slightly less than twice the penalty figure each month) and at the end of this series, when resources were low enough, apply. All penalties would have expired by then.

The Deficit Reduction Act changed that dramatically. Penalties are to start applying only after the applicant becomes otherwise eligible for assistance (that is, when income and resources are both low).[6] This should be emphasized: The applicant must be found in a condition in which there is no possibility of paying the bill with his or her own funds, yet governmental assistance is not available. Perhaps someone else, such as a relative, would pay. Perhaps the nursing home would be stuck with a nonpaying resident they could not easily pawn off on someone else. The end effect of this would be to raise the cost of business, which would soon be reflected in increases in patient pay rates. Also, states are forbidden from rounding down as Michigan did. Rather, there are daily penalties. In essence, this means that every current gift of $206.40 results in one day's ineligibility after one is otherwise qualified.

The Deficit Reduction Act required many other changes, such as in annuity policies.[7] Congress required that state rules reflect these changes immediately. Michigan did not promulgate corresponding regulations until the summer of 2008, but applied them retroactively to divestments made on or after February 8, 2006.

Unrelated State Policy Changes

Michigan has made several other changes in eligibility requirements recently, which have had the effect of making eligibility more difficult. For example, income-producing real property used to be exempt as long as it generated a 6 percent return on equity, and this return was reflected in the income that the applicant paid toward the nursing home bill. In April 2007, the value of income-producing real property that could be exempted was capped at $6,000.[8]

Another example of a major change is a significant tightening of rules governing home caretaker and personal care service contracts. Essentially, this rule forbids lifetime contracts, preventing payments for services after the time the applicant enters a nursing home. This regulation is likely to be challenged, because it appears to be more restrictive than SSI eligibility, which is a violation of Michigan's Medicaid compact. SSI allows lifetime contracts for in-kind support and maintenance.[9] The Michigan regulation is particularly suspect for obligations such as property taxes that are due even though the owner is in a nursing home. These needs will continue to exist even after nursing home entry.

Promulgation of Medicaid Policy

Case workers make decisions based on policy manuals that are available online. See *http://www.mfia.state.mi.us/olmweb/ex/html/*, especially the Program Eligibility Manual and the Program Administrative Manual. It is not always clear whether the statements in these manuals are interpretive rules or actual regulations. In either case, the department does not have to comply with the Administrative Procedures Act:

> (3) The family independence agency may develop policies to establish income and asset limits, types of income and assets to be considered for eligibility, and payment standards for assistance programs administered under this act. Policies developed under this subsection are effective and binding on all those affected by the assistance programs. Policies described in this subsection are exempt from the rule promulgation requirements of Act No. 306 of the Public Acts of 1969. Not less than 30 days before policies developed under this subsection are implemented, they shall be submitted to the Senate and House standing committees and appropriation subcommittees with oversight of human services.
>
> (4) The family independence agency may develop policies to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds. Policies developed under this subsection are effective and binding on all those affected by the programs. Policies described in this subsection are exempt from the rule promulgation requirements of Act No. 306 of the Public Acts of 1969.[10]

Presumably, the changes mandated by the Deficit Reduction Act are governed by subsection (4).

Normally, there is no question about the ability of an agency to change eligibility rules retroactively. There is no

federal or state constitutional barrier to retroactive changes in tax laws or eligibility laws. The barriers to retroactive applicability of laws and regulations in Michigan are punitive statutes and regulations, for example, criminal laws. The open question is the penalty period for divestments. The term *penalty* certainly implies a type of punishment. A person who made a divestment in December 2006 is certainly subject to a penalty, although there was no Michigan regulation that indicated such at the time of transfer. Many states that have implemented changes to comply with the Deficit Reduction Act did not apply the penalty retroactively. A further issue, of course, is retroactivity with respect to what? Michigan might not have promulgated a regulation before any disqualifying divestment was made, but Congress established the penalty in a federal statute.

A Brief Look at Some of the New Regulations

There are some obvious errors in recent policy manuals, which can lead to considerable difficulties. Case workers are not attorneys and cannot be expected to detect a patent error. For example, the description of penalties resulting from divestments reverses the dates:

> Once you have determined the baseline date, you determine the look back period. The look back period is 60 months for all transfers made on or before February 8, 2006 and 36 or 60 months (depending on the type of resource transferred) for transfers made after February 8, 2006.[11]

In fact, there are two different penalty periods (36 months from the individual directly and 60 from a trust attributed to the individual) for transfers *before* February 8, 2006. Afterwards, the window will gradually become 60 months for all. That will only start making a difference on February 8, 2009, which is 36 months after the start of the new regime, because the uniform transfer period only applies to transfers made after the date of the Deficit Reduction Act. By February 8, 2011, there will be a uniform 60-month lookback period.

Likewise, the loan policy is clearly erroneous. It says that all loans and loan proceeds are countable unless:

> The note, loan, or mortgage must prohibit the cancellation of the balance upon the death of the lender.[12]

This was meant to be a restriction on loans made *by the applicant* to others, such as family members. It makes no sense as applied to commercial loans obtained by the applicant. I daresay that no loan or mortgage instrument from a bank discusses what would happen if the bank dies. Presumably, bankruptcy or purchase by another entity is not the same as death.

A Forthcoming Issue: Medicaid Estate Recovery

Federal Medicaid law requires states to have an estate recovery program in place.[13] The purpose is to try to collect payment from the estates left by decedents who received nursing-home-based Medicaid after age 55. Apparently, this is the only program with such a recovery feature. Doctors who received federal aid for medical school or grants, businessmen who received tax rebates, and other beneficiaries of congressional largesse are not subject to any such recovery. Michigan was the last state to implement such an estate recovery program. A law was enacted last September, but has not gone into effect yet.[14] It depends on approval by the federal government (which is rumored to be in question) and promulgation of regulations by the state agency.

Assuming that the law does go into effect, there are likely to be a number of resulting hearings. Estate recovery only applies to items in the decedent's probate estate, and there are numerous exemptions. Also, there is a procedure for families to claim hardships. Some of the provisions in the statute are vague, reflecting the fact that it resulted from a late night, last-minute compromise. Consider some of the provisions:

> (i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the Medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.
>
> (ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.[15]

Does the average price refer to assessed values or to actual sales? Some counties may have few sales during a year, skewing results. Does the primary income-producing asset refer to the primary source of income or simply to the asset that produces the most income, even if more income is obtained from a salary? Unless these questions are clarified in regulations, we can expect numerous hearings.

Issues That Were Not Relevant Before

The old rules on divestment made many issues moot. I recall one call I received from an attorney concerned that her client had roughly $20,000 stolen by her granddaughter who was her guardian. The theft occurred more than four months before the client needed to apply for Medicaid, so all she had to do was treat the theft as if it were a gift, and she achieved eligibility. That is no longer possible for thefts occurring after February 8, 2006. Presumably, the applicant would say that

Continued on the next page

thefts are not gifts, and hence not divestments. Frail, penurious nursing home residents cannot be expected to vigorously pursue all legal remedies against their exploiters. Presumably, the state will need to develop some sort of subrogation procedures. In the interim, confusion about how to treat these cases is likely to lead to more hearings.

Likewise, tithing and other gifts to religious institutions are newly problematic. For contributions made before February 8, 2006, questions never arose unless the total gifts for the month exceeded $11,000. Thus, ordinary tithing and even one-time gifts such as to an organ purchase fund hardly ever became an issue. That is not so clear now. The Deficit Reduction Act passed largely on a straight Republican party-line vote. Many of the votes came from representatives from the Deep South's Bible Belt. Some of these representatives said there was no way that gifts to churches would ever be penalized, but their assurances do not have the force of law. Individual states have to create policies. There will be massive political problems if word gets out that people were denied Medicaid because they continued their longstanding policy of tithing. On the other hand, there will be major constitutional issues if churches are treated differently from other charities. If charities receive an exemption, then there will be scams creating pseudo-charities that really provide benefits to family members. It would be hard to claim that gifts to religious institutions are transfers for value. In short, state policy will have to address an issue that they could have ignored. Under the Deficit Reduction Act, all divestments made on or after February 6, 2008, are supposed to be totaled up, and once $206.40 is reached in a five-year period, there will be a penalty. This will also raise questions about birthday gifts, Christmas and Hanukkah gifts, and so forth.

Continuing Confusions

Medicaid allows claimants to correct deficiencies in documentation even after a case worker issues a denial or termination.[16] Thus, the task of an administrative law judge is not so much to determine whether the worker was right at the time, but whether the decision is correct based on the possibly expanded record at the time of the hearing. Also, this same item contains the following:

> The department must assure that clients receive the services and assistance to which they are entitled. Concerns expressed in the hearing request should be resolved whenever possible through a conference with the AHR or, if none, the client, rather than through a hearing.[17]

This seems to indicate that the worker is obligated to receive additional documentation and allow the claimant to cure deficiencies up to the time of the hearing, and obviate the need for a hearing if this is done successfully. I thank John Payne for suggesting this section.

New Faces in Hearings

Until recently, Medicaid hearings commenced by beneficiaries were relatively rare. The rules were relatively liberal, and any competent attorney with experience could craft a plan that obtained eligibility without much difficulty, that is, for clients with modest means. Nowadays, the rules are tougher, and there is less consistency from the state actors. There are reports of radically different responses from county to county over the same issue. Some of the policy positions are clearly erroneous.

There are reasons why nursing homes themselves might file hearing requests. The Deficit Reduction Act authorizes them to file a hardship appeal on behalf of one of their residents. This is probably going to be used with increasing frequency. The penalty provisions of the Deficit Reduction Act are draconian. A person who had no idea that she would lose a month of coverage from Medicaid for helping out a grandchild with a debt problem is likely to be in a nursing home without resources to pay, and a penalty period that prevents her from receiving Medicaid. Unlike landlords, nursing homes cannot simply evict residents in arrears. Rather, they have to find a suitable placement, which would probably have to be another nursing home owing to the resident's medical status. The underpaid nursing home will probably be unlikely to find another nursing home foolish enough to accept a nonpaying patient. Unless they can pawn her off on an unsuspecting hospital allegedly because of some medical condition that requires hospitalization, the nursing home will have to absorb the cost, unless they can aid the resident in receiving a hardship waiver. These factors are likely to lead to more hearings and more appearances by attorneys who know little about how Medicaid hearings work.

Endnotes

1 The views herein are solely those of the author. Josh Ard is an officer in the Administrative Law Section Council, a former chair of both the Consumer Law and Elder Law and Disability Rights Sections, a member of the Probate and Estate Planning Section council, and is currently the chair of the Unauthorized Practice of Law Committee.

2 The Federal Medical Assistance Percentage for Michigan in 2008 is 58.10 percent. *See* Federal Register, (Volume 71, Number 230), *Federal Financial Participation in State Assistance Expenditures, FY 2008, http://aspe.hhs.gov/health/fmap08.htm* (accessed May 20, 2008).

3 Section 106 of the Social Welfare Act defines "medically indigent individual" to include an individual receiving SSI income. See MCL 400.106(1)(a).

4 "Resources" are defined as "all client's and spouse's assets and income." See Michigan Department of Human Services, *Program Eligibility Manual 405,* at page 1, *www.mfia.state.mi.us/olmweb/ex/pem/405.pdf* (accessed June 6, 2008). Income is discussed in more detail in Michigan Department of Human Services, *Program Eligibility Manual 500*, *www.mfia.state.mi.us/olmweb/ex/pem500.pdf* (accessed June 6, 2008).

5 See U.S. Department of Health and Human Services, *2008 SSI FBR Resource Limits*, *http://www.cms.hhs.gov/MedicaidEligibility/Downloads/1998-2008SSIFBR112007.pdf* (accessed June 3, 2008).

6 See 42 USC 1396p.

7 See Michigan Department of Human Resources, *Program Eligibility Manual 401*, *http://www.mfia.state.mi.us/olmweb/ex/pem/401.pdf*, at 4-5 (accessed July 21, 2008).

8 See Michigan Department of Human Resources, *Program Eligibility Manual 400, www.mfia.state.mi.us/olmweb/ex/pem/400.pdf*, at page 21 (accessed July 21, 2008).

9 See SS POMS SI 01150.005.

10 See MCL 400.6

11 See *Program Eligibility Manual 405,* p. 4.

12 See *Program Eligibility Manual 400*, p. 23.

13 See 42 USC 1396p(b).

14 See PA 74 of 2007, MCL 400.112g-k.

15 See MCL 400.112g(e).

16 See *Program Administrative Manual 600(1).*

17 See *Program Administrative Manual,* Item 600(11).

2007-2008 Pending Administrative Law Legislation

Senate Bill 0559 (2007), amending Section 39 of the Administrative Procedures Act, MCL 24.239

This bill, out of concern that the agency rule promulgation process lacks enough legislative oversight, amends the Administrative Procedures Act, requiring that an agency's request for rulemaking include a cost-benefit analysis to avoid the promulgation of regulations that are too costly. Such an analysis would be filed electronically with the State Office of Administrative Hearings and Rules together with the request for rulemaking before any changes to an administrative rule could be initiated. The cost-benefit analysis would consider who would be directly affected by the rule, the cost of the rule borne by the promulgating agency, statewide compliance costs to businesses and other groups, an estimate of its primary and direct benefits, its ability to reduce costs to stakeholders, any increase in revenue to state or local government, and any of its secondary or indirect benefits. This bill was reported favorably with a substitute bill by the Committee of the Whole and placed on the order of third reading on June 28, 2007, with no further action taken.

Senate Bill 1302 (2008), adding Section 45b to the Administrative Procedures Act

This bill requires that the State Office of Administrative Hearings and Rules post a notice of all rules and policy changes on its website. This would include rules sent to the committee, in which case the posting must occur at least two business days after transmittal to the committee and include "clear instructions on any existing administrative remedies or appeals available to the public, a summary of the changes in policy contained in the rules, and any instructions regarding the method of complying with the rules." It would also include rules filed with the Secretary of State with the effective date of the rules. This bill was referred to the Committee on Government Operations and Reform on May 7, 2008, with no further action taken.

Senate Bill 1303 (2008), amending Section 45 of the Administrative Procedures Act, MCL 24.245

This bill requires an assessment of the impact of rules on the private sector. More specifically, it requires an agency to prepare an impact statement that now includes "an estimate of whether the implementation of the rule would allow any governmental agency to compete in the regulated activity against the private sector." The bill was referred to the Committee on Governmental Operations and Reform on May 7, 2008, with no further action taken.

Administrative Law Cases

Michigan Supreme Court

In *Michigan Association of Home Builders v Director of Dep't of Labor and Economic Growth*, No. 135023 (June 25, 2008), the Court held that judicial review of an agency decision in a non-contested case proceeding, i.e., rulemaking or other similar administrative proceeding, is limited to a review of the administrative record below. The Court's memorandum opinion held "that judicial review of an administrative rule, which by definition constitutes a non-contested case, is limited to the administrative record and that the administrative record may not be expanded by a remand to the administrative agency."

Justice Weaver did not concur in the decision and would have granted leave to appeal.

✳

The Court in *Ross v Blue Care Network of Michigan*, No. 131711, issued a 5-2 decision on April 23, 2008, overturning the Court of Appeals on a question of judicial review of administrative agency decision-making.

At issue was the administrative process found in the Patient's Right to Independent Review Act, MCL 550.1901 et seq. Under the act, an independent review organization (IRO) makes a recommendation to the Office of Financial and Insurance Regulation (OFIR) commissioner upon a patient's request for review of a denial of certain medical insurance coverage by an insurer.

Plaintiff filed a complaint with the OFIR after her spouse's HMO had rejected his out-of-network cancer treatments. The IRO assigned to the case found that the treatments constituted an emergency and so should have been covered. The commissioner found, however, that only one period of hospitalization was of an emergency nature, and that in-network care could have been relied on for other medical treatment.

The Court of Appeals found that the commissioner had to give deference to the IRO's decision on issues of medical necessity and clinical review. It decided that the commissioner had authority only to determine whether the IRO's recommendation complied with the contract of insurance. The Supreme Court held that the act refers to the IRO decision as a "recommendation," and "that the act provides that the commissioner is not bound by such recommendations."

Michigan Court of Appeals

Chrisdiana v Department of Community Health, Court of Appeals Nos. 276347, 276440 (April 29, 2008)

The Court of Appeals was called on to review a circuit court decision involving denial of Medicaid and related health benefits to a resident alien.

Plaintiff was an Indonesian citizen legally residing in the U.S. pursuant to a J2 visa (given to dependents/spouses of persons with J1 visas); her spouse resided in the U.S. pursuant to a J1 visa ("non-immigrant visa" given to "exchange visitors" or aliens with no intention of abandoning their foreign residences in the country as students, scholars, teachers, etc.) Plaintiff became pregnant and applied for public health benefits, which were denied after an administrative hearing.

Primarily at issue was whether plaintiff was a "resident" of Michigan under the agency's "Program Eligibility Manual" that requires an applicant for benefits to meet certain "eligibility factors" to receive medical assistance services. The manual mandated "residency" for all services sought, including Medicaid and related public programs.

Submissions

The *Administrative Law Journal* welcomes unsolicited manuscripts, particularly those dealing with issues of law, government, and public policy in Michigan, and letters to the editor. There is no average or expected length to submissions.

Inquiries, information, suggestions, and items for publication can be directed to the Publications Committee: Jack Dempsey of Dickinson Wright PLLC (*jdempsey@dickinsonwright.com*) and Kim Breitmeyer of the Michigan Department of Labor and Economic Growth (*breitmeyerk@michigan.gov*).

The Court held: "[D]efendants' residency requirements do not conflict with any controlling federal law, nor does the application requirement of presenting any immigration documentation that the applicant might have for the purpose of determining residency. Plaintiff actually had the requested documentation to provide, and she does not satisfy the definition of a Michigan 'resident.' Therefore, the trial court properly upheld the agency denial of plaintiff's Medicaid and ESO Medicaid applications."

Guardian Environmental Services, Inc v Bureau of Construction Codes and Fire Safety, Court of Appeals No. 276564 (May 13, 2008)

This case involved a declaratory judgment action arising from a dispute between a licensed mechanical contractor and the Bureau, charged with the enforcement of the Electrical Administrative Act (EAA), MCL 338.881 et seq. Plaintiff argued that the EAA permitted it to perform work involving "replacement" and "upgrading" of energy management systems without an electrical contractor's license. The Bureau determined that statute did not permit installation of low-voltage lighting without the subject license. Plaintiff requested that the Electrical Administrative Board overrule that decision, but the Board upheld the Bureau's interpretation of the EAA. Plaintiff then petitioned the Michigan Department of Labor and Economic Growth for declaratory relief; the department denied the request.

Plaintiff sought a declaratory judgment from the circuit court, which held that a statutory exception allowed performing the disputed work based on a plain-language interpretation of the EAA. Upon review, the Court agreed, finding that, "[b]ecause the Bureau's construction of MCL 338.887(3)(i) was contrary to the intent of the legislature, as expressed in the unambiguous language of the statute itself, a cogent reason existed for the trial court not to defer to the Bureau's erroneous interpretation. Accordingly, the trial court neither violated the separation of powers doctrine nor exceeded its authority in rejecting the Bureau's invitation to defer to its construction of MCL 338.887(3)(i)."

Attorney General v Michigan Public Service Commission, Court of Appeals Nos. 275135, 275198 (May 31, 2008)

In two companion cases, the Court was called on to rule on the Public Service Commission's interpretation of its authority to approve a natural gas rate increase for Consumers Energy Company, enabling the company to recover $17,427,000 from natural gas ratepayers for contributions to the Low Income Energy Efficiency Fund (LIEEF).

The Customer Choice and Electricity Reliability Act (CCERA), MCL 460.10 et seq., created the LIEEF, which was intended "to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes." MCL 460.10d(7).

The attorney general (and the Association of Businesses Advocating Tariff Equity in No. 275198) asserted that the commission had no authority to impose natural gas rate increases on customers for contributions to the LIEFF. At issue was whether the Commission had authority to mandate continued ratepayer contributions to the fund after the initial six-year period authorized in the CCERA. The Court rendered a detailed explication of the CCERA's provisions as they related to the fund and relied on that legislative interpretation to uphold the Commission.

The Court found that the agency's interpretation of its authority to administer the LIEFF was a reasonable interpretation of the power conferred on it by the legislature, and was consistent with its ratemaking authority under MCL 460.6 et seq. The Court thus held that "the absence of specific statutory language regarding the authority to secure funds for the LIEFF through operation and maintenance expenses does not serve to preclude the PSC from funding the LIEFF by these means."

In Memoriam – Nelson Westrin

Nelson Westrin, the first director of the Michigan Gaming Control Board, died on May 28, 2008. Mr. Westrin, 61, passed away from an infection he developed while fighting prostate cancer.

According to the *Lansing State Journal*, Mr. Westrin "was a lifelong public servant, rising from a criminal trial attorney in the Ingham County Prosecutor's Office to a long career in the state Attorney General's Office, where he eventually advised the governor's office on tribal gaming issues. In 1993, then-Gov. John Engler named him the state racing commissioner, then, in 1996, appointed him to head the newly created Michigan Gaming Control Board."

The Board came into existence after voters in the 1996 election approved creation of three casinos in Detroit. A chief function of the Board after its formation was to establish the administrative rules to govern operations at the casinos before their opening.

Mr. Westrin was vice chair of the National Indian Gaming Commission, as well as an attorney at the Detroit-based law firm of Honigman, Miller, Schwartz & Cohn, LLP.

Funeral services were held at St. Gerard's Roman Catholic Church in Lansing.