I am writing this on the last day of the Maryland legislative session. When the session began in January, we were told by our advisors that in a year such as this, when anything that had any chance of costing the State money had a very low chance of being passed into law, it would be possible for the legislature to approve legislation that did not cost the state money, especially bills that would have had difficulty passing in the past.

As a result, it has been a productive year for the Elder Law Section and a successful one in achieving some of our goals. For example, early in the session, Laurie Frank and I gave our briefing about the unprecedented delays in the processing of Medical Assistance (Medicaid) applications to the Senate Finance Committee and the House Health and Government Operations Committee together with the House Appropriations Subcommittee on Health and Human Services. This led to the creation of a bi-weekly study group that is still ongoing, being attended by advocacy groups, including our section and Legal Aid, and nursing home representatives, working together with DHR, DSS and DHMH to improve the application process, especially in dealing with the 60 month lookback requirement for nursing home Medicaid applications.

While we worked with the state agencies to improve Medicaid, our section also followed the bill designed to require that DHMH develop and implement a streamlined process for Medicaid redeterminations and we were heavily involved and supported another bill designed to require DHMH to send a specified notice of a right to appeal when the department did not render an eligibility determination for a specified applicant within a specified period of time.

At this time, Special Needs Trust legislation championed by our group looks like it is likely to pass. Jason Frank and Mary O’Byrne have been at the forefront of this legislation. This legislation is designed to end the multiple times that DHMH has attempted to issue regulations relating to Special Needs Trusts that contradict federal law. Together with Jennifer Goldberg representing Legal Aid, comments to the regulations were submitted which successfully beat them back each time.

Other proposed regulations we have responded to involved fair hearings before OAH. Together with Jennifer Goldberg acting on behalf of Legal Aid, our Council Member Bill Gatesman drafted and submitted comments.

We worked on amendments to the Power of Attorney Act with the Maryland Retirement system (Rachel Cohen) and the Estate and Trusts Section (Richard Wright). Bill Gering as our liaison to the

Continued on page 2
Message from the Chair...
continued from page 1

Estates & Trusts section, has followed the Maryland Trust Act and other bills involving estates and trust.

Many thanks to Karren Jo Pope-Onwukwe, Cathy Stavely, and Cathy Surace, among many, who worked on the Health Care Decisions Act “Medical Orders for Life Sustaining Treatment Form” (MOLST).

We also supported the Nursing Home Staffing Requirements legislation and have been following the long term care insurance bills.

Ed Law has successfully launched the Special Needs Law Study Group which was another goal of our section and judging from the healthy attendance at the first meeting, we expect the group to continue strong.

Jason Frank has kept our Elder Law CLE alive and prospering with the next CLE scheduled for May 6, 2010 about Medicaid.

Plans for Law Day on May 2nd are progressing and Larry Adashek is again coordinating what has been a successful program in the past and proves to be again this year.

Morris Klein and Larry Adashek put together this session’s legislative summaries and identified those bills likely to be of interest to our section.

We are now planning a Section Meeting to review this legislative session on Tuesday, May 10, 2011 at 6 pm at the MSBA Headquarters. Dinner will be served.

For the Annual MSBA meeting in Ocean City, Leslie Fried and LaRue Lennon have put together a program called “Implementing Health Care Reform – What every Elder Law attorney should know”. Two of the speakers are Vicki Gottlich and Morris Klein (presenting the CLASS Act).

Many thanks to Camilla McRory for faithfully preparing the minutes and sending them in record speed to us. Thanks to Bill Gering and LaRue Lennon for pinch hitting for Camilla when she could not prepare the minutes.

I would like to thank all the members of our Council, including those members I have not mentioned above who are, Larry Blosser, Barry Fierst, Sharon Krevor-Weisbaum, Kathy Mancusi, Jeff Myers, Richard Neuworth, Gina Shaffer, Elena Boisvert, and Ben Woolery, each of whom has brought to our meetings and our work a unique insight and energy that has immeasurably enhanced the discussions and provided us with valuable points of view.

Hope you enjoy this issue. Many thanks to Elena Boisvert for making it happen.

Nomiki Weitzel
Chair 2010-2011

Register Now
MSBA Annual Meeting

June 8-11, 2011
Ocean City, MD

www.msbaannualmeeting.com


Quote of the Month

The preacher called the other day and said at my age I should be thinking about the hereafter. I told him, "Oh, I do that all the time."

No matter where I am--in the parlor, kitchen, upstairs, or down in the basement--

I ask myself, 'What am I here after?'"

-Author Unknown
Pre-Existing Medical Expenses and 

Smith v. Colmers

By Ron Landsman

The settlement of the “PEME” class action suit against Maryland Medicaid has important implications for all nursing home residents and in particular for those who still have unpaid nursing home bills from prior to May 12, 2010. The suit, Smith v. Colmers, Balt. City Cir. Ct., No. 24-C-05-007421, sought to compel Maryland Medicaid to comply with Federal law and deduct from current income an applicant’s medical expenses incurred before eligibility and unpaid at the time of initial eligibility. In the settlement, the Department of Health and Mental hygiene (DHMH) agreed to implement the Federal requirement going forward, and also agreed to pay $16 million to nursing homes for past uncompensated, pre-eligibility care. That $16 million was paid in two tranches, the first in August 2010 and the second earlier this year. In exchange for their share of this settlement fund, participating nursing homes waived all of their claims for pre-eligibility expenses owed by residents for the period August 1, 2002, through May 12, 2010.

For the future, there are three important implications for nursing home residents and their families.

- The pre-eligibility medical expense deduction is now fully available. It is spelled out in the Eligibility Manual, pp. 1000-35. Any medical or remedial expense that the resident incurred, but which is not paid at the time of initial eligibility, can be paid out of post-eligibility income. Of course, that is income that would otherwise have gone toward current nursing home charges. Medicaid makes up the shortfall, so that the nursing home continues to get full payment under its current Medicaid contract while old bills are being paid.

- Because the deduction includes nursing homes bills incurred during the “retro” period – the three months before initial eligibility it protects from involuntary discharge residents who have fallen into arrears. While the right to continued PEME deductions may not technically preclude discharge based on failure to pay a prior bill, it reverse the facility’s incentive to discharge the resident, since with PEME the nursing home gets paid more than the full Medicaid rate.

- Most nursing home residents who had unpaid bills prior to Medicaid eligibility during the settlement period, August 1, 2002, through the date of settlement, May 12, 2010, are freed of that liability if their nursing home participated in the $16 million claim fund. Nursing homes that applied to get any unpaid preeligibility bills paid under this settlement waived their claim to unpaid preeligibility charges for any resident incurred during the settlement period. This may come up in current discharge proceedings, as it did in one recent case, or in claims failed against a deceased resident’s estate (likely arising from the presence of a former home).

The settlement itself resulted in securing the deduction and making clear its scope. For example, it is also available to individuals getting waiver benefits and applies even if the charges were incurred during the period of a lapsed application. Although the reason for ineligibility is usually being over-scale, the reason for ineligibility is generally irrelevant.

One exception: consistent with Federal policy, there is no deduction for expenses incurred during a period of ineligibility by reason of a transfer of assets under 42 U.S.C. § 1396p(c). A number of issues that have arisen since the settlement have been resolved. A payment made by a resident or family member during the retro period that is applied to a preretro period bill does not reduce the deduction for expenses incurred during the retro period.

The deduction is available for all pre-eligibility medical expenses for the full amount incurred. Ancillary charges for over-the-counter goods that would normally be provided by the nursing facility as part of its service package are deductible.

The Smith v. Colmers settlement resolved an important issue of federal law and provided significant sums of money to nursing homes for previous uncompensated, preeligibility care. In giving certainty to Medicaid recipients and practitioners concerning the deduction of pre-eligibility expenses going forward, it protects Maryland citizens from the vagaries of a Medicaid application process that is unnecessarily complicated and difficult.

Visit www.msba.org/sec_comm/sections/elder/ for all the latest updates!
ELDER ABUSE... the road less traveled

By Karen Jo Pope-Onwukwe

Recently, I read an article about a fourteen (14) year old that was arrested for beating his sixty-six (66) year old grandmother with a hammer. I cried. I am sure that this was not the first instance of abuse the grandmother suffered and I am sure that there are many people wringing their hands because they observed or heard inappropriate interactions between the grandmother and grandson. But, they did not know what to do. Abuse in later life includes neglect, exploitation, sexual assault, domestic violence, dating violence and stalking. Since 2005, June 15th has been set aside for World Elder Abuse Awareness Day (WEAAD), to make sure that our communities can identify elder abuse. The problem now seems to be what steps do we take to get help to the victims of elder abuse before they are beaten with a hammer?

On March 2, 2011 the Senate Special Committee on Aging held a hearing entitled, “Elder abuse, neglect, and financial exploitation” at the hearing the federal Government Accountability Office released their report which found a rising number of elder abuse cases threatens to overwhelm inadequately staffed adult protective service agencies in many states. Most people probably only recall 90 year old Mickey Rooney testified that he had experienced elder abuse because that was the lead story on the evening news.

Fortunately, there was much more testimony given that day, Kay Brown, director of education, work force and income security at the Government Accountability Office, testified that states are seeing increasingly complex cases involving multiple types of abuse. Kathleen Quinn, executive director of the National Adult Protective Services Association, described as the “boots on the ground in the fight against elder abuse” — testified that states are not keeping pace with the rise in frequency and complexity of elder abuse.

In the Report’s survey, 25 of the 39 responding states reported that total funding for adult protective services over the past five years decreased or remained the same. As a result, staffing and training have suffered at state agencies handling elder abuse cases.

Dr. Mark Lachs, co-chief of geriatric medicine at Cornell University testified, “People move from system to system, from housing to law enforcement to any number of venues, and no one has ownership of the entire case.” Citing the federal Administration on Aging, the Government Accountability Office report stated that there is no common state-level definition of elder abuse. To address these issues, the Report calls for the Secretary of Health and Human Services to develop a national resource center to collect elder abuse information and to determine what state-level elder abuse data would be useful for all states. The chairman of the Special Committee on Aging, Senator Herb Kohl, Democrat of Wisconsin, reintroduced the Elder Abuse Victims Act at the March 2nd hearing. The bill would establish an office of elder justice within the federal Justice Department.

Locally, there is anecdotal evidence of an increase in elder abuse, but as the federal report stated there is no data available. The Maryland Crime Victims’ Resource Center, Inc. (MCRVC) received a grant award to support the development of a new local Elder Justice Community Coalition in Anne Arundel, Prince George’s, and Calvert Counties (an award was also given to Baltimore County). The multidisciplinary coalition will seek to improve elder abuse awareness and intervention efforts, for more information or to get involved please call Project Director, Merry O’Brien, at 301-952-0063. You may also visit us on facebook, even if you aren't a Facebooker, you can still bookmark and view the page: http://www.facebook.com/pages/Protect-Elders-Against-Crime-Exploitation-PEACE?119001931467915.

President Barack Obama included $777 million dollars over four years in the final health care reform bill (Obamacare). An appropriation of $195 million for FY 2011 is included in the Labor Health and Human Services Education Appropriations bill. The most direct and immediate impact of this money would be financial support for state and local government adult protective services (APS) and long-term care ombudsman programs that respond to complaints of abuse and neglect in nursing homes. This may be the first step towards getting help to victims of elder abuse.

Section News

The Council has been following several pieces of legislation throughout the Session and Morris Klein and Larry Adashak will provide an overview at the next Elder Law Section meeting which will be held on Tuesday, May 10 at 6pm at Bar Headquarters, 520 West Fayette Street, Baltimore. Dinner will be provided. Please let Theresa Michael know if you plan to attend at tmichael@msba.org.
Once again, the Elder Law Section Council, along with the Public Justice Center and the Homeless Persons Representation Project signed onto a letter prepared by the Legal Aid Bureau concerning proposed amendments to the Fair Hearing Regulations. A copy of the letter and the State’s response follows through page 7.

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February 28, 2011

Michelle A. Phinney
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Department of Health and Mental Hygiene
201 W. Preston St. Rm. 512
Baltimore MD 21236
Via e-mail: Michelle A. Phinney, regs@dhmh.state.md.us

RE: Comments on Re-Proposed COMAR 10.01.04, Fair Hearing Appeals under the Maryland State Medical Assistance Program

Dear Ms. Phinney:

We are writing regarding the newest set of proposed changes to the regulations regarding fair hearing appeals in the Maryland Medical Assistance Program, published in the January 28, 2011 Maryland Register. These comments are joined by the Public Justice Center, Homeless Persons Representation Project, and the Maryland State Bar Association Elder Law Section.

We recognize that the Department of Health and Mental Hygiene (the “Department”) is taking the time to work through these regulations carefully, and we appreciate those efforts. However, the new regulations and the policy decisions implicit in them remain deeply troubling, as they will have the practical effect of limiting current Maryland fair hearing rights and decreasing the likelihood that Medical Assistance applicants and recipients will prevail upon appeal.

By removing several of the current protections for Medical Assistance applicants and recipients, the new regulations make it more difficult for Marylanders to challenge a decision by the Department. Medicaid fair hearings are an essential part of ensuring the human right to accessible health care. The beneficiary protections that are removed in these new regulations include the following:

1. No more right to assistance in filing an appeal

The new regulations remove the requirement that the Department assist an applicant or recipient who is filing an appeal.
COMAR 10.01.04.04A(2). This is particularly disturbing given that so many Medicaid applicants and recipients are low income older adults and persons with disabilities, who may have great difficulty making a fair hearing request on their own. These changes will have especially detrimental effects for applicants or recipients who have limited English proficiency.

2. No more right to receive a summary before a hearing

The new regulation removes the requirement that the Program or its delegate agency provide any summary before a fair hearing. See COMAR 10.01.04.05. Such summaries are the best way for parties to learn why the application was denied or services were terminated. Without knowing the factual and legal reasons for the denial, it is extremely difficult for appellants to prepare for and succeed in a fair hearing. While the notice itself is required to include the reasons for the intended action and the specific regulations or law that supports the decision, the notices are very short, computer-generated CARES letters that do not include enough factual or legal detail, particularly for those who are representing themselves.

3. No more right to assistance with expenses associated with the hearing

The new regulations remove the requirement that the Program will pay for the expenses associated with an appellant attending a fair hearing, including transportation and babysitting costs. See COMAR 10.01.04.03. In fact, the new regulations not only remove any requirement on the Program to pay for such expenses, they remove the possibility of the Program paying such expenses (despite the fact that payments for such expenses are subject to federal financial participation under 42 C.F.R. §431.250). Given the high price of gas, the lack of public transportation, and the distance required for attendance at fair hearings, this will have the practical effect of limiting appellants’ ability to attend hearings and thus pursue their Medical Assistance rights.

4. No more public record of hearing decisions

The proposed regulation eliminates COMAR 10.01.04.08D, which provided that the “Office of Administrative Hearings shall maintain a copy of the decision, with the name of the appellant and witnesses deleted, in a reference file of hearing decisions that will be accessible to the public.” This change decreases transparency and accountability in the Medical Assistance Program.

5. No more right to challenge recoveries based on a good faith basis for the appeal

The new regulations repeal a very important procedural protection for Medical Assistance recipients regarding recoveries. The current 10.09.24.13C, which is repealed under these newly proposed regulations, states that the recovery provision “shall not apply to a person who requested a hearing and extended benefits resulting from a bona fide belief that the local department of social services has taken an adverse action erroneously.” By repealing this section, Medical Assistance recipients who have a good faith basis for their appeal will be discouraged from filing fair hearing requests. At the same time, Maryland will not be able to collect significant monetary amounts, as Medical Assistance serves those who are indigent and lack resources to pay for their own health care.

We remain concerned about the sections regarding sending a notice less than 10 days before an adverse action. COMAR 10.01.04.03B(10) generally requires 10 days notice before an adverse action. It appears that COMAR 10.01.04.03C(9), which exempts this requirement anytime an action will occur in less than 10 days, is an exception that would obviate the rule. We also remain confused about benefits pending the appeal process in COMAR 10.01.04.10, when such benefits are required to be granted, and how that requirement intersects with COMAR 10.01.04.03.

The comments in this letter are designed to supplement, not repeat, the comments made in our letters dated December 7, 2009, January 28, 2010, and September 10, 2010. We appreciate the Department’s responsiveness to some of our specific concerns about such issues as electronic filing of appeals, examination of the appellants’ records, and the possibility of a stay
of the administrative law judge’s decision. Building on those changes, we would suggest you include nursing facilities in the section regarding examination of the Appellant’s records. See COMAR 10.01.04.03B(9). We also share the concerns of the Maryland Disability Law Center, and join them in urging you to limit the access of the Program to the appellant’s medical record under Health General Article §4-305 to only those records related to the issue in the case. See COMAR 10.01.04.06C(3).

We would welcome the opportunity to continue to discuss these issues, so that the health rights of low income Maryland Medicaid beneficiaries can be protected.

Sincerely yours,

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cc: Assistant Attorney General Meredith Borden Secretary Joshua Sharfstein Acting Secretary Theodore Dallas Honorable Paul G. Pinsky Honorable Anne Healey

Upcoming Section Events:

Annual Meeting: June 8-11, 2011. Ocean City, Maryland IMPLEMENTING HEALTH CARE REFORM
This session will focus on the myriad of changes in Medicare, Medicaid, private health insurance and the new long-term care insurance program included in the Affordable Care Act.

Sponsored By: Elder Law Section

Program Chairs: Leslie B. Fried, Esq. and LaRue G. Lennon, Esq.

Speakers: Gene Coffey, Esq. National Senior Citizens Law Center; Vicki Gottlich, Esq. Center for Medicare Advocacy; Morris Klein, Esq., Law Offices of Morris Klein; Christopher P. Dean, Esq., Ober/Kaler
VIA EMAIL

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Re: Comments on Proposed COMAR 10.01.04

Dear Ms. Goldberg, Ms. Roberson, Ms. Johnson and Ms. Weitzel:

The Department of Health and Mental Hygiene (“DHMH”) is in receipt of your letter dated February 28, 2011 regarding the proposed changes to the Medical Assistance fair hearing regulations, COMAR 10.01.04, published in the Maryland Register on January 28, 2011. DHMH appreciates your thoughts on the proposed changes and has seriously taken your comments into consideration. In particular:

1. DHMH disagrees that the change to COMAR 10.01.04.04A(2) will have detrimental effects for applicants or recipients who have limited English proficiency. As notices of ineligibility or service change will continue to be in both English and Spanish, DHMH believes individuals will continue to be fully apprised of their appeal rights to the same level that they are now. The proposed change also does not prohibit DHMH or its delegate agency from assisting individuals with appeals should either elect to do so. Either or both of DHMH or its delegate agency may continue to assist in appeals when resources so permit. The change only makes clear that such assistance is not an obligation.

2. DHMH has reconsidered its position that hearing summaries should not be required before a hearing. DHMH will be re-proposing the regulations shortly and removing the
3. DHMH has reviewed the frequency with which individuals have taken advantage of the current right in COMAR 10.01.04.03 to utilize transportation and babysitting paid for by DHMH as part of the fair hearing process. It does not appear that such services are frequently utilized, if at all. Although federal financial participation may be available for such services, state funds would also be required to maintain them. It does not seem prudent at this time to expend state funds on such services, especially when they do not appear to be heavily relied upon.

4. The proposed change to COMAR 10.01.04.08D was at the request of the Office of Administrative Hearings, which maintains all of the records. DHMH must defer to the Office of Administrative Hearings’ requests in these matters.

5. DHMH anticipates and hopes that all individuals that utilize the fair hearing process do so in good faith under the belief that DHMH or the delegate agency acted erroneously. Accordingly, there does not appear to be any need to have a specific provision that the recovery provision apply to this specific group of appellants.

6. DHMH has reviewed COMAR 10.01.04.03C again. The repurposed regulations that will be published shortly will clarify the rules about advance notice in accordance with 42 CFR § 431.213.

Please note that DHMH has also agreed to accept all of the comments the Maryland Disability Law Center submitted in response to the proposed regulation in its later dated February 28, 2011. Those changes will also be reflected in the reproposal.

Please let me know if you have any further questions.

Sincerely,

Meredith L. Borden
Assistant Attorney General

cc: Michele Phinney
    Lorie Mayorga
    Diane Herr
    Amy Gentile
    Susan Harrison
Volunteer Opportunities

Maryland Legal Aid Bureau & MVLS invite you to an attorney training in Baltimore:

"How to represent a low income client in a nursing home discharge case"

Tuesday, May 10th
9:30 AM to 1:30 PM
Location:
Whiteford, Taylor & Preston
Seven Saint Paul Street
Baltimore, Md. 21202

The Maryland Legal Aid Bureau and the Maryland Volunteer Lawyers Service invite all interested attorneys who are admitted to practice law in Maryland and in good standing to attend a free seminar on the basics of handling nursing home discharge cases for low income clients. Experienced elder law attorneys will guide you through the process of assisting an at-risk client in a discharge case.

All attendees will be assigned one pro bono case representing a low income client. Mentors and malpractice insurance will be provided by MVLS.

Program Details

Speaker: Jennifer Goldberg, Esq. Assistant Director of Advocacy for Elder Law and Health Care, Maryland Legal Aid Bureau

Program Details: Presentation will start promptly at 9:30 AM. Written materials will be handed out during the program. The presentation will include a detailed question and answer session.

Location: The law offices of Whiteford, Taylor, & Preston are located in the Wachovia Bank Building, Seven Saint Paul Street, Baltimore, Md. 21202

Transportation: Parking garages can be found throughout the immediate area, including at South Charles Street & Lombard Street and at South Charles Street & Redwood Street. The WTP office is a half block from the Charles Center Metro Subway station and four blocks from the Central Light Rail University Center station.

To register: Download a registration form here. Please return the completed form to Richard Chambers, Deputy Director of MVLS, via fax at 443-451-4081 or via email to richard@mvlslaw.org

If you cannot attend this training, but would like to provide pro bono assistance to low income clients in need of legal help, please call Richard Chambers at 443-451-4064

Any Ideas?

We are always looking for ideas and articles for the Newsletter. Please contact Elena Boisvert at meboisvert@comcast.net with any suggestions.