

STATE OF MINNESOTA
SECOND JUDICIAL DISTRICT

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DISTRICT COURT

DISTRICT CASE TYPE: Civil

COURT FILE NO.: 62-CV-11-5203

(Chief Judge Kathleen R. Gearin)

In Re Temporary Funding of Core
Functions of the Executive Branch of
the State of Minnesota

***AMICUS CURIAE* MEMORANDUM OF
CARE PROVIDERS OF MINNESOTA, INC.
AND AGING SERVICES OF MINNESOTA IN
SUPPORT OF TEMPORARY FUNDING OF
GOVERNMENT ASSISTANCE PROGRAMS
SERVING VULNERABLE CITIZENS**

I. INTRODUCTION

“Yet somehow our society must make it right and possible for old people not to fear the young or be deserted by them, for the test of a civilization is in the way that it cares for its helpless members.”¹ Often legal memoranda are treated as an intellectual exercise, a battle between wills, or simply words on pages that have no real consequences for the lives of citizens. This is no such case. The discontinuation of payments to Medicaid providers and Medicaid waived service providers will have a severe negative effect on the lives of tens of thousands of Minnesota’s most frail and vulnerable citizens. The discontinuation of payments would violate both the federal and Minnesota constitutions. This *amicus curiae* Memorandum is offered in support of public assistance beneficiaries receiving necessary health care and services covered by established state and federal programs – specifically Medicaid² providers who require Medicaid payments to continue providing services to the beneficiaries.³

¹ PEARL BUCK, MY SEVERAL WORLDS 337 (1954).

² In Minnesota the Medicaid program is known as Medical Assistance.

³ Medicaid provider payments include Medicaid payments to nursing facilities; Medicaid waiver payments include payments through the Elderly Waiver (EW), Community Alternatives for Disabled Individuals (CADI), Community Alternative Care (CAC), Traumatic Brain Injury (TBI), and Developmental Disabilities (DD) programs.

Aging Services and Care Providers of Minnesota request this Court grant the Motion of Petitioner Attorney General Lori Swanson with respect to temporarily funding the payment of Medicaid programs designed to assure for the safety and welfare of Minnesota's citizens. Aging Services and Care Providers disagree with Governor Dayton's Response classifying Medicaid and Elderly Waiver provider payments as not being a "critical service" and request the Court disregard the exclusion of those payments in Exhibit B of the Governor's Response. The Governor includes "Medicaid" in his list of core services, but excludes payments to providers. Medicaid payments are paid through providers who care for the elderly, poor and infirm. *See* Minnesota Department of Health and Human Services, *Medical Assistance*, attached as *Amicus* Ex. A. In order to include "Medicaid" as a critical service, it must include payments made to providers who serve the recipients of Medicaid. If no payments are made to the providers, then the Medicaid recipients will never receive Medicaid.

II. BACKGROUND FACTS AND LAWS

a. Overview of Minnesota senior care providers and their dire financial situation.

Aging Services of Minnesota and Care Providers of Minnesota, Inc. are trade associations comprised of 385 nursing home providers and 750 senior housing and assisted living establishments. According to Minnesota Department of Human Services data from 2009, approximately 29,852 seniors were served by the nursing facilities every day, of which 17,269 relied on Medicaid payments for their care. In 2008 the Department of Human Services reported that over 26,000 residents in assisted living facilities relied on Elderly Waiver benefits to pay for their care. Each organization represents a widely diverse group of providers, from traditional nursing homes to highly specialized subacute centers and every type of disability services and senior housing provider. *See* Aging Services of Minnesota website at

www.agingservicesmn.org and Care Providers of Minnesota website at www.careproviders.org.

Aging Services and Care Providers launched a joint venture known as the Long Term Care Imperative in 1999 (Imperative). The Imperative advances innovative ideas for delivering and funding quality senior services throughout Minnesota. The Imperative's members provide necessary care and services to Minnesota's most vulnerable citizens. Continuation of these services is required by both federal and state law and is consistent with state public policy, as set by statute and the Minnesota Constitution. As organizations reliant on continued government payments to provide necessary care to their public assistance residents, patients and clients, Minnesota Medicaid providers have no alternative sources of revenue to pay for the care these vulnerable Minnesotans must receive.

In 2010, 56.9% of all resident days in Minnesota nursing facilities were paid by Medicaid. Many providers will not have financing sufficient to weather a cessation of the government payments: eighty-six Twin Cities metropolitan-area facilities reported a median of 10.8 days of cash on hand.⁴ Minnesota nursing facilities carried a total median operating margin of less than 1% for 2010, with facilities in West Central, Northeast, and Northwest Minnesota reporting operating margins of -1.95%, -1.14%, and -1.15%, respectively.⁵

Many other providers rely on payments from Minnesota's Elderly Waiver program to pay for the assisted living services they supply to elderly and disabled citizens who are able to live outside nursing homes. These payments must continue or the citizens in these buildings will be without necessary assistance. The vulnerable people who utilize the Elderly Waiver program rely upon assisted living services to eat, bathe, walk, take medications, and to live. If the services are terminated, even temporarily, people will be put at risk to their health and

⁴ "Financial Condition of Minnesota's Nursing Facilities: 2010," data collected, analyzed, and reported by Larson Allen, LLP (April 2011). This figure is based on the responses of 248 facilities to a survey mailed in January 2011.

⁵ 20 West Central, 16 Northeast, and 12 Northwest facilities responded to the January 2011 survey.

safety. For example, one Elderly Waiver services provider and member of Aging Services writes:

We have 16 seniors at Guardian Angels by the Lake who receive Elderly Waiver services and two of those also have Group Residential Housing. To put a person to these numbers I would like you to know resident [B],⁶ she is 87 years old, has diabetes and schizophrenia. She receives help with all activities of daily living such as medication management, toileting, and dressing and grooming. She also receives her medications from medical assistance. [B] has only one daughter who is not able to help provide care or the financial means to assist her mother. Without the Elderly Waiver program she would most likely be in a nursing home or her most basic care needs would not be met in a home situation. [B] does well here with her daily activities and routine. She is familiar with her caregivers and is very comfortable with them. When her routine is changed this causes [her] great anxiety and unneeded stress. We at Guardian Angels by the Lake are her family. We care for her seven days a week 24 hours a day with love and respect. We know how to anticipate her needs. If she were to lose funding for her cares this would be a great hardship on her as to where she might not recover physically and mentally.

We urge you to consider her as you deem what are essential services in the State of Minnesota. Please think of the impact this will have on her and many other of our seniors.

Sincerely,
Annette Greely, MS, LNHA
Guardian Angels by the Lake Assisted Living

In addition, providers serve vulnerable Minnesotans through other Medicaid waiver programs⁷ designed for residents with very specialized needs, such as traumatic brain injuries and developmental disabilities. Minnesota's Alternative Care and Group Residential Housing programs are also important means of providing needed care to Minnesota's seniors. Payment of these state funded programs must be continued for those most in need and vulnerable.

⁶ B is a pseudonym used to protect her privacy pursuant to law.

⁷ "Home- and community-based waiver programs, such as Minnesota's [Elderly Waiver, CADI, CAC, TBI, and DD programs], allow persons who would otherwise be eligible to receive Medicaid benefits in a traditional institution to instead obtain care in their homes or in community-based residences. *Young v. Jesson*, No. A10-1303 (Minn. Ct. App., Apr. 12, 2011), citing *Ball v. Rodgers*, 492 F.3d 1094, 1098 (9th Cir. 2007); see also Minn. Stat. § 256B.0915.

Should state financial support for Minnesota's nursing homes and assisted living facilities be cut off, providers will be forced into the choice of either evicting or involuntarily discharging residents for nonpayment pursuant to 42 U.S.C. § 1396r(c)(2)(A)(v) and Minn. Stat. § 144.651, subd. 29, or providing "free care" for as long as their limited finances will allow. As the financial data above indicates, providers will not be able to provide this care for long before the downward spiral of events such as missing payroll and an inability to pay vendors for basic necessities such as food for residents will eviscerate providers' ability to care for residents and force them to close. Some residents will be forced to live with family and friends who are unable to meet their needs, while others will simply have no place to go.

- b. Minnesota courts have ordered temporary funding for critical services during past government shutdowns, and have always included Medicaid payments to providers as a critical service.**

Faced with a similar threat of a government shutdown, on June 29, 2001, and June 23, 2005, this Court approved an order that funded, temporarily, certain "core functions" of the Minnesota state government. *Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding*, Ramsey County District Court No. C0-05-5928 (Chief Judge G. Johnson, June 23, 2005) (Att'y General Pet., Ex. 4); *Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding*, Ramsey County District Court No. C9-014725 (Chief Judge L. Cohen, June 29, 2001) (Att'y General Pet., Ex. 1). In addition to finding that the Minnesota Medicaid program is a core function that merits continued funding, in 2005 this Court held that:

[t]he Supremacy Clause of the United States Constitution, Article VI, mandates that any funds paid by the State as a result of participation in federal programs must continue.

Slip. Op. at 3–5, ¶¶ 7–9 and 7–8, ¶ 8 (Att’y General Pet., Ex. 4). As explained below, the June 29, 2001 and June 23, 2005 reasoning of this Court is sound.⁸ Additionally, the Minnesota Supreme Court upheld a decision of this Court on the merits in a fiscal dispute between the executive and legislative branches. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 368 (Minn. 2010).

The United States Constitution, the federal Medicaid laws and state common law allowing continued payment of Medicaid to avoid endangering beneficiaries provide ample legal authority for this Court to avert a shutdown of core functions.

c. The residents in nursing homes and residential facilities are defined by Minnesota statutes as “vulnerable adults.”

The State of Minnesota has a law which protects vulnerable adults from maltreatment. *See* Minn. Stat. § 626.557; Minn. Stat. § 626.5572. This law automatically defines Medicaid beneficiaries receiving services from certain facilities, such as nursing homes, residential facilities, nonresidential facilities and home care providers, as "vulnerable" for the purposes of protection from maltreatment:

Public Policy. *The legislature declares that the public policy of this state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment; to assist in providing safe environments for vulnerable adults; and to provide safe institutional or residential services, community-based services, or living environments for vulnerable adults who have been maltreated.*

Minn. Stat. § 626.557, subd. 1. (emphasis added). *See also* Minn. Stat. § 626.5572, subd. 21 (definition of Vulnerable Adult); Minn. Stat. § 626.5572, subd. 6 (definition of facility).

d. Governor Dayton’s shutdown plan will effectively end Medicaid in Minnesota.

In his Response (Exhibit B, page 3), Governor Dayton creates the false impression that his plan allows the continuance of Medicaid and other health care entitlement programs. At the

⁸ Within hours of Judge Cohen's June 29, 2001 Order, the legislative impasse was resolved.

same time, Governor Dayton calls for the ceasing of payments to providers under those same programs. In the case of Medicaid, in all but the rarest of circumstances⁹ Medicaid payments are made directly to providers. See Minnesota Department of Health and Human Services, *Medical Assistance*, attached as *Amicus Ex. A*. Governor Dayton's plan will effectively end the Medicaid program in the State of Minnesota.

- e. **The Federal Medicaid program requires that the State continue to pay providers; if Minnesota stops, then the Federal Government will halt its contribution.**

Minnesota participates in the federal Medicaid program via the Medical Assistance program enacted by Minn. Stat. ch. 256B. The federal Medicaid program is established under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396v. When states participate in the Medicaid program, they must comply with intricate federal statutory requirements. *Harris v. McCrae*, 448 U.S. 297, 301 (1980); see also 42 U.S.C §§ 1396a, 1396c. If the state complies with the federal requirements, the federal government contributes 50–65% of every dollar spent on Medicaid recipients. See 42 U.S.C. 1301(a)(8)(A).

Federal contribution to the Medicaid program is dependent on the State of Minnesota actually spending its matching state share. See *Harris v. McCrae*, 448 U.S. 297, 301 (1980) (citing 42 U.S.C. § 1396b(a)(1)). A state cannot unilaterally alter or suspend Medicaid payments to providers without providing proper and timely notice to the Centers for Medicare & Medicaid Services (CMS), in order to secure requisite federal approval. See 42 C.F.R. § 430.15. A unilateral suspension places Minnesota's continued receipt federal Medicaid support at risk, and places continued CMS approval in jeopardy. See 42 § U.S.C. 1396c. CMS will stop paying the federal match to Minnesota if the state stops making payments as required.

⁹ There is one Medicaid demonstration project called the Money Follows the Person Rebalancing Demonstration Program (MFP) that makes payments directly to the Medicaid recipient. See Deficit Reduction Act of 2005 § 6071; 2010 Affordable Care Act § 2403.

A shutdown of Minnesota's Medicaid services would violate federal law by jeopardizing access to care. Under 42 U.S.C. § 1396a(a)(30)(A), states must pay providers amounts that "are sufficient to enlist enough providers so that care and services are available . . ." to eligible Medicaid recipients. Known as the "equal access provision" this federal law is binding on states participating in the Medicaid program.

III. ARGUMENT

- a. **The Supremacy Clause of the United States Constitution requires the State of Minnesota to continue funding its Medicaid program despite the absence of a state budget for fiscal year beginning July 1, 2011, and this Court should therefore grant the Petition of Attorney General Lori Swanson for temporary funding.**

Under the Supremacy Clause of the United States Constitution,¹⁰ states may not enact laws that conflict with the substantive provisions of the governing federal Medicaid law. Once a state has voluntarily elected to participate in the Medicaid program, it must comply with all federal standards. *See, e.g., Harris v. McRae*, 448 U.S. 297, 301, 308, 309 (1980); *New Jersey Ass'n of Health Care Facilities, Inc. v. Gibbs*, 838 F.Supp. 881, 887 (D.N.J. 1993). States must follow any regulations established by the Secretary to implement the Medicaid Program. *See, e.g., Armstrong, et al v. Palmer*, 879 F.2d 437, 439 (8th Cir. 1989), (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 43 (1981)).

There is precedent for finding federal Medicaid law controls when it conflicts with state Medicaid provisions. In the context of conflicting state and federal Medicaid statutes regarding the ability of a county to recover from the estate of a spouse of a Medicaid recipient, the

¹⁰ The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. CONST. art. VI, cl. 2.

Minnesota Supreme Court found that “federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law.” *In re Estate of Barg*, 752 N.W.2d 52, 64 (Minn. 2008) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987)). Additionally, the Minnesota Court of Appeals has characterized “federal [Medicaid] regulations” as “enjoying supremacy.” *Care Providers of Minnesota, et. al. v. Gomez*, 545 N.W.2d 45, 47 (Minn. Ct. App. 1996).

The Minnesota legislature has expressly recognized the supremacy of federal law to maintain federal Medicaid support:

Subd. 2. Federal requirements. If any provision of this section and sections 256B.421, 256B.431, 256B.432, 256B.433, 256B.47, 256B.48, 256B.50, and 256B.502, is determined by the United States government to be in conflict with existing or future requirements of the United States government with respect to federal participation in medical assistance, the federal requirements shall prevail.

Minn. Stat. § 256B.41, subd. 2.

The Supremacy Clause and federal and state Medicaid law requires this Court to order funding to continue despite Minnesota's temporary state budget impasse.

b. The State’s constitutional responsibility to protect the life and liberty of its citizens trumps any narrow view of Article XI, § 1 regarding the appropriation of money from the State Treasury.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” DECLARATION OF INDEPENDENCE [¶ 2] (1776). Residents of Minnesota’s nursing homes and assisted living facilities are among our state’s most vulnerable and helpless citizens. Federal entitlement programs such as Medicaid have, for better or worse, caused these citizens to become completely dependent on government support as they enter the

twilight of their lives. Should Minnesota abdicate its responsibility to care for these citizens, the government will be the direct cause of the demise of their life, liberty, and pursuit of happiness.

When the Minnesota Constitution states in Article XI, § 1 that “[n]o money shall be paid out of the treasury of this state except in pursuance of an appropriation by law,” it does not contemplate that there will be no appropriations for *any expenditures whatsoever*. Clearly, the provision would ban actions such as an executive agency doubling its allocated budget on its own initiative, but *amici* posit that a complete elimination of state Medicaid spending with the effect of turning tens of thousands of citizens out of their care facilities could not possibly have been the original intent of the drafters. Indeed, Article I, § 1 of the Minnesota Constitution declares that “[g]overnment is instituted for the security, benefit and protection of the people” This Court must ensure the government of the State of Minnesota continues to protect the lives of vulnerable Medicaid and Medicaid waiver recipients as well as recipients of funding from Minnesota’s Alternative Care and Group Residential Housing programs.

c. If the State of Minnesota interrupts its services and payments under the Medicaid program, that interruption could subject the State to causes of action by affected individuals, providers and the federal government.

The United States Supreme Court has held that the federal Medicaid program creates enforceable statutory rights which providers or beneficiaries may assert under 42 U.S.C. § 1983. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 509–520 (1990). Public assistance benefits cannot be terminated without affording the beneficiary due process of law. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In the context of Medicaid support for nursing home residents, the United States Supreme Court has found that federal Medicaid laws confer “an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified.” *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). Providers and

beneficiaries would be equally aggrieved by nonpayment, with the beneficiaries being even more affected as their very homes and means of support would be cut from underneath them. CMS may also be concerned that the state is not complying with its federal commitments in administering its Medicaid program.

Even when state law is silent, Minnesota Courts have fashioned appropriate relief to prevent Medicaid beneficiaries from being uprooted from their homes because of threatened non-payment to the provider of services. In *LeZalla v. State of Minnesota* and *State of Minnesota v. Harmony Nursing Homes*, the Court of Appeals recognized the rights of Medicaid residents and facilities to continue to receive public assistance benefits despite the facility's withdrawal from the Medicaid program. 366 N.W. 2d 395, 401 (Minn. Ct. App. 1985), review denied, July 17, 1985. Over the objections of the Department of Public Welfare, the Court reasoned that the Medicaid laws must be "construed not only according to legislative intent but also according to the consequence of a particular interpretation." *Id.* Ceasing Medicaid payments to the withdrawing facility and uprooting residents from their homes meant "the very group that the statutes were designed to benefit would be endangered. Such a result would be absurd" *Id.* To avoid that risk, the Court ordered the Department of Human Services to continue to pay Medicaid revenue to a provider exercising its right to withdraw from the program. *Id.* Importantly, the Court issued that Order even though, at that time, no legislative appropriation earmarked continued payment to withdrawing providers. *Id.*

A Minnesota Court of Appeals case involving an 80 year old Alzheimer recipient of elderly waiver Medicaid benefits supports *amici's* position that the state cannot restrict access to Medicaid and Medicaid waiver benefits by "terminating its contract with appellant's chosen provider, absent evidence that this provider was not properly licensed or otherwise unqualified to

provide appellant's care." *Young v. Jesson*, No A10-1303 (Minn. Ct. App., Apr. 12, 2011). By terminating payments to Medicaid and waiver programs such as the Elderly Waiver, the state is defaulting on its contracts with providers and leaving all recipients in the same position as the petitioner in *Jesson*. Like *LeZalla*, the court in *Jesson* ordered payments to continue to the provider.

IV. CONCLUSION

Cessation of payments to Medicaid providers will have devastating consequences for the seniors served by Minnesota's nursing homes and senior housing providers. Without Medicaid payments, providers will quickly deplete their limited finances and be unable to provide care to their residents.

As the Supreme Court of the United States stated in *O'Bannon*, "federal Medicaid laws confer "an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). No Medicaid payments to providers is the ultimate governmental interference with Medicaid recipients' right to be in a qualified home. Such an action is a violation of the Supremacy Clause of the United States Constitution and an unnecessarily restrictive interpretation of the Minnesota Constitution.

The cessation of payments by the state in *LeZalla* and *Jesson* affected only a few facilities and their Medicaid residents. Here, the matter under review by this Court will affect all Minnesota Medicaid beneficiaries and their chosen service providers. This Court should follow its own precedent from 2001 and 2005 by correctly defining critical services to include payments necessary to fund the Medicaid program – services Minnesota is obligated to provide by the Supremacy Clause of the United States Constitution.

Residents in our facilities are asking their administrators who will take care of them and where they will be able to live in the event of a government shutdown. The very fact that elderly Minnesotans are asking these questions is a tragedy, but the fact that their concerns may very well be realized offends the basic notions of justice. For the foregoing reasons, Aging Services and Care Providers respectfully urge the Court to issue an order requiring temporary funding for all Medicaid services and other publically funded programs providing care to Minnesota seniors and allow those payments to be made to service providers.

Dated: 6/20/2011

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Medical Assistance

[Home](#) > [Health care](#)

Shutdown planning information

Some state services may be disrupted July 1 if there is not an approved budget. Households with people enrolled in Medical Assistance and other Minnesota Health Care Programs will get a [notice \(PDF\)](#) in the mail about the possible shutdown. Copies of notices and other shutdown planning information are on the [DHS shutdown planning web page](#).

MinnesotaCare enrollees must continue to [pay their monthly premiums](#) by the due date even if the government shuts down.

Medical Assistance now available to some adults without children

Adults without children with incomes at or below 75 percent of the federal poverty guideline may qualify for Medical Assistance (MA) starting March 1. This is for individuals who do not have children under age 21 living with them and meet income limits of:

- \$677 a month or \$8,124 a year for one person
- \$911 a month or \$10,932 a year for a married couple.

New applicants can apply through their [county human services office](#).

People who were enrolled in [General Assistance Medical Care](#) or [MinnesotaCare](#) who met the new MA rules are being moved to MA automatically. Enrollees were sent a notice in the mail explaining the change and what they need to do, if anything.

Additional information and related links are available at www.dhs.state.mn.us/MAexpansion.

Medical Assistance overview

Medical Assistance (MA) is the largest of Minnesota's publicly funded health care programs, providing coverage for an average of more than 600,000 people each month. Currently, more than half of those are children and families; the remaining are people 65 or older and people who have disabilities.

People apply for MA through their local county human service offices. More than two-thirds of those enrolled receive all their health care through health plans. The remaining get care on a fee-for-service basis, under which providers bill the state directly for services provided.

MA is Minnesota's Medicaid program. It is jointly funded with state and federal funds. The Minnesota Department of Human Services oversees the program statewide. The federal Centers for Medicare and Medicaid Services oversees Medicaid nationally.

In some cases, MA can pay for medical bills going back three months from the date the county receives an individual's application. Even if their income is too high, applicants can qualify if they have enough medical bills to meet a spenddown (similar to an insurance deductible).

