



CMA Weekly Alert – July 5, 2007

## **LESSONS FROM NURSING HOME ADVOCACY: HELPFUL STRATEGIES FOR ASSISTED LIVING EVICTIONS**

Oregon has been a national leader in “rebalancing” its long-term care program - shifting its Medicaid beneficiaries from nursing homes to home and community-based settings. Oregon increasingly relies on assisted living to meet its residents’ long-term care needs, and, until 2007, 85% of its 431 assisted living and residential care communities accepted Medicaid payments. But, since November 2006, Assisted Living Concepts, Inc. (ALC) stopped admitting new Medicaid residents at all 19 of its Oregon facilities and two other corporations, Mountain West Retirement Corp. and Sunwest Management, Inc., also terminated or are prospectively phasing out their Medicaid participation. The result has been the loss of at least 12% of the facilities in the state and the eviction of some Medicaid residents.<sup>1</sup>

ALC, a company operating 207 assisted living facilities with 8324 units in 17 states, decided to reduce its participation in the Medicaid program in additional states as well.<sup>2</sup> Implementing its “strategy to move towards a higher mix of private pay residents,”<sup>3</sup> ALC began terminating or not renewing its Medicaid contracts on a facility-by-facility basis. In the first quarter of 2007, ALC declined to renew 14 Medicaid contracts and withdrew 226 Medicaid units. Hundreds of residents have been required to move from ALC facilities this year, including 209 people in 19 Texas facilities.<sup>4</sup> ALC intends to terminate its 20 remaining Texas contracts. In the first three months of 2007, an average of 1,741 Medicaid beneficiaries lived in assisted living facilities owned by ALC.<sup>5</sup>

ALC residents who were displaced in Texas, Oregon, Nebraska, and Indiana have included people over age 100 who had lived in their facilities for many years.<sup>6</sup> An Oregon case manager “told a state legislator of watching frail elderly people, called in one at a time, crying and pleading with a company vice president to let them remain at the center.”<sup>7</sup>

The issue of a health care provider terminating its Medicaid contract is not new. Nearly 30 years ago, a number of nursing homes withdrew from the Medicaid program. Some residents challenged their facilities’ actions in court. More recently, the Vencor Corporation’s similar withdrawal from Medicaid led Congress to enact the Nursing Home Resident Protection Amendments of 1999.<sup>8</sup> Although the assisted living industry is not regulated at the federal level and the 1999 amendments apply only to nursing facilities, experience with nursing home withdrawals from the Medicaid program may suggest strategies to advocates representing residents of assisted living facilities who want to remain in their homes.<sup>9</sup>

### **Litigation**

Although nursing home cases included claims based on various provisions of the Medicaid statute,<sup>10</sup> the most frequent, and perhaps strongest, claims made by residents in these earlier cases were based on state law claims, usually common law contract and tort theories.

Residents alleging **breach of contract** typically argued that when they entered the facility, usually as private-pay residents, they were told that they could remain after their funds were exhausted and they converted to Medicaid. The legal claim sought to enforce the oral promise of lifetime residency.<sup>11</sup>

Pleadings in **tort** alleged that the nursing facility's withdrawal from Medicaid placed residents who were threatened with transfer at substantial risk of harm because of transfer trauma. Plaintiffs alleged that when nursing facilities knowingly and intentionally placed residents in danger, they breached the duty of care.<sup>12</sup>

**State consumer protection laws** generally codify common law contract principles. Facility misrepresentations that give rise to common law contract claims may also support actions based on state consumer protection law.<sup>13</sup>

**State human rights laws** may provide alternative theories. In a Minnesota case,<sup>14</sup> residents alleged that the facility's termination of its Medicaid provider agreement with the state, and subsequent eviction of Medicaid beneficiaries, violated the state's Human Rights Act,<sup>15</sup> which prohibits owners of real property from discriminating against people because of their status as recipients of public assistance.

**Federal funding** under various Housing and Urban Development or Farmers Home Administration programs may implicitly or explicitly require participation in the Medicaid program.<sup>16</sup>

Many of the early nursing home cases were settled. The nursing facility either signed a new provider agreement with the state or agreed to retain the Medicaid beneficiaries who lived there.

## **Legislation and regulations**

State legislation could replicate the protection enacted in the federal Nursing Home Resident Protection Amendments of 1999, and achieved in the litigation described above, and allow existing residents to remain.

State agencies may have authority under existing state law to enact rules to require assisted living facilities to retain current residents, while withdrawing from the Medicaid program prospectively. Such emergency rules were enacted in 1979 in Illinois.<sup>17</sup>

## **Conclusion**

As the federal and state governments encourage the use of "non-institutional" alternatives, including assisted living, to meet long term care needs, the need for protection of residents moving into alternative facilities becomes more pronounced. States and the federal government should prohibit displacements of residents whose assisted living facilities decide to terminate their participation in the Medicaid program.

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- <sup>1</sup> Robin J. Moody, *Portland Business Journal*, “Little room left for Medicaid patients; Assisted living facilities turn from program,” *The Business Journal Serving Greater Milwaukee* (May 25, 2007), <http://milwaukee.bizjournals.com/milwaukee/othercities/portland/stories/2007/05/28/story5.html?b=1180324800%5E1467831>
- <sup>2</sup> “Assisted Living Concepts, Inc. Announces 2007 First Quarter Results; Continues to Successfully Position Towards a Higher Private Pay Market,” (May 3, 2007), [http://www.marketwire.com/mw/release.html\\_b1?release\\_id=248007](http://www.marketwire.com/mw/release.html_b1?release_id=248007).
- <sup>3</sup> “Assisted Living Concepts, Inc. Announces Strong 2006 Fourth Quarter and Year End Financial Results; Outlines Expansion Plans,” Market Wire (Feb. 27, 2007), <http://www.sys-con.com/read/342756.htm>.
- <sup>4</sup> Guy Boulton, “Caregiver puts out Medicaid recipients; Milwaukee firm runs assisted living facilities,” *Milwaukee Journal Sentinel* (May 19, 2007), <http://www.jsonline.com/story/index.aspx?id=607996>.
- <sup>5</sup> *Id.*
- <sup>6</sup> David Pittman, “Facility ends state subsidy for elder care; Aged forced to pay up,” *Amarillo Globe-News & Amarillo.com* (March 15, 2007).
- <sup>7</sup> Guy Boulton, “Caregiver puts out Medicaid recipients; Milwaukee firm runs assisted living facilities,” *Milwaukee Journal Sentinel* (May 19, 2007), <http://www.jsonline.com/story/index.aspx?id=607996>.
- <sup>8</sup> 42 U.S.C. §1396r(c)(2)(F) (Continuing Rights in Case of Voluntary Withdrawal from Participation) (making voluntary withdrawal from Medicaid prospective only and requiring nursing facilities that voluntarily withdraw from Medicaid to retain Medicaid residents and current private-pay residents who are spending down to Medicaid).
- <sup>9</sup> See Toby S. Edelman, “Nursing Homes’ Withdrawal from Medicaid,” 17 *Clearinghouse Review* 867 (Dec. 1983).
- <sup>10</sup> One claim is that beneficiaries’ “best interests” are violated by facility withdrawal. 42 U.S.C. §1396a(a)(19).
- <sup>11</sup> Contract claims were alleged in *Haglund v. Lake Ridge Health Care Center*, File No. 464148 (Minn. Dist. Ct., Ramsey Co., filed Aug. 1983); *Schultz v. Friendship Village of Greater Milwaukee, Inc.*, No. 79-CV-1889 (Wis. Cir. Ct., Dane Co., filed June 1979); and *Warren v. Franklin Hosp. Dist.*, No. 78-CV-2362 (E.D. Ill. Sep. 1983).
- <sup>12</sup> *Cambridge Comm. Of Elders, Inc. v. Mannell d/b/a Mary Beth Nursing Home*, No. 77-3782 (Mass. Sup. Ct., Middlesex Co., filed July 1977); *Schultz v. Friendship Village of Greater Milwaukee, Inc.*, No. 79-CV-1889 (Wis. Cir. Ct., Dane Co., filed June 1979); *Roberson v. Wood*, No. CV 78-4321 (E.D. Ill. Filed Aug. 30, 1978), 500 F. Supp. 854 (E.D. Ill. 1980), 464 F. Supp. 983 (E.D. Ill. 1979).
- <sup>13</sup> In *Haglund*, *supra* note 10, plaintiffs alleged that the nursing home made misleading statements and engaged in deceptive practices to encourage plaintiffs to move into their facility, in violation of Minnesota’s Prevention of Consumer Fraud Act, Minn. Stat. §325F.68.
- <sup>14</sup> *Haglund*, *supra* note 10.
- <sup>15</sup> Minn. Stat. §363.03.
- <sup>16</sup> The court rejected HUD claims (§236 claims) in *Gonella v. Budd Terrace, Inc.*, C.A. No. C81-1125A (N.D. Ga., filed June 11, 1981).
- <sup>17</sup> Illinois Department of Public Aid (now Illinois Department of Healthcare and Family Services), “Provider Voluntary Withdrawal” (Emergency Rule 4.1405) (1979).