

## Elder Law and Special Needs Section

### Memorandum Regarding Long Term Care Enrollment Delays

Structural Delays in Enrollment in MLTC Plans and Denials of Reimbursement Claims Impede Access to Care After Medicaid Approval

Elder # 11

October 2, 2015

With the implementation of mandatory Managed Long Term Care (MLTC) for all long term home care services, there are continuing issues regarding the delay in receiving those services. Individuals in immediate need prior to the determination of eligibility are the subject of the *Konstantinov v. Daines* matter. We look forward to the resolution of that matter, as well as the promulgation of regulations for expedited Medicaid approval pursuant to Chapter 57 of the Laws of 2015. This Memorandum, however, addresses the issue of the process after Medicaid approval. To ameliorate harm from the delays inherent in the new MLTC system before the MLTC services begin, we urge the Department to implement GIS MA 15/11 in a meaningful way, and to revise its policy on reimbursement as set forth below.

Even in an optimal situation, patients have to wait at least two months, and more likely three months, before they can receive services after Medicaid is approved. The patient must schedule a conflict-free assessment and then must enroll and be assessed for MLTC services, a process which can take up to a month to occur. The enrollment process in EMEDNY takes several weeks at best, since enrolment must occur by the 19<sup>th</sup> of the month prior to the start of services. Surplus income and any other Medicaid issues must be resolved prior to enrolment, since a number of MLTC providers will not provide care if there is surplus income, apparently in violation of Medical Assistance regulations.

For patients who need these medically-necessary services on a daily basis, their health and safety are compromised by this delay. Therefore, in many cases, they are receiving privately hired fee-for-services personal care prior to the application for Medicaid. Mostly, this is paid by non-legally responsible relatives, if the patient is lucky enough to have adult children of sufficient means to pay for several months of care at up to \$8,000-\$9,000 per month for live-in care. For obvious reasons, this should not be the rule.

It is helpful that the Department has released GIS MA 15/11 “reminding” districts of the existing 18 NYCRR § 505.14 (b)(5)(iv), which allows for fee-for-services personal

care after the Medicaid determination if an assessment cannot be done in five (5) days. While the GIS message clearly acknowledges the issue of delay, it does not provide a procedure to actually allow for this service to be provided. Districts have generally abandoned fee-for-service personal care and home attendant programs, so there are no providers available which can supply this service, previously provided under contracts which are now long-expired. Moreover, there is no notice of the availability of these services or advisement of who the patient actually can engage to provide these services. Even the providers are unable to advise patients of these services and are largely unaware of any mechanism to receive payment under a fee-for-service arrangement; instead, every recipient is being advised that they must enroll with an MLTC provider and will receive nothing until then. We believe the Department must provide guidance to the Districts on providing services under this regulation, since to do otherwise is in violation of the New York Constitution. The provision and the GIS are meaningless unless the patients actually have access to care.

The corollary issue to this difficulty in actually receiving fee-for-service personal care during the “waiting period” for MLTC is the Department’s regulation denying Medicaid recipients and non-legally responsible relatives reimbursement for paid services after Medicaid has been approved and the Medicaid card has been issued, unless the medical care and services were furnished by a provider enrolled in the Medicaid program. 18 NYCRR 360-7.5(a)(4)(ii). We are aware that the New York Court of Appeals upheld the Department’s discretion to limit reimbursement to Medicaid providers for the period after the Medicaid card was issued. *Seittelman vs. Sabol*, 674 N.Y.S.2d 253 (1988). However, the basis for the Court’s holding in 1988 no longer justifies this limitation in the era of MLTC, for several reasons.

The main justification cited in *Seittelman* for limiting reimbursement for services provided post-application to services provided by Medicaid providers was the assumption that “at the time of application, the Medicaid applicant would be aware that any needed medical services should be obtained from an enrolled provider.” *Id.* Now, 25 years after *Seittelman*, the only home care provider that can bill Medicaid is an MLTC plan or a certified home health agency (CHHA). These are not viable options for applicants. An individual cannot privately pay an MLTC plan for services. While a CHHA is a Medicaid provider, it does not provide and cannot be privately retained to provide stand-alone personal care services – the service that most Medicaid applicants are seeking. Consumer Directed Personal Assistance Programs (CDPAP), though Medicaid providers, cannot be privately retained to provide services while the Medicaid application is pending.

Many applicants for personal care services privately obtain services from a Licensed Home Care Services Agency (LHCSA). Though licensed by the State, and providing services paid for by Medicaid, because of a complex thicket of Medicaid regulations, a LHCSA is not technically a Medicaid-enrolled provider. Exceptions are made for LHCSAs to contract with a County DSS to provide fee-for-services personal care services and bill Medicaid for those services. LHCSAs also serve as subcontractors to CHHAs or to MLTC plans, which in turn bill Medicaid for services provided by the LHCSA. It is not uncommon for the same LHCSA that provided services privately

while the Medicaid application and MLTC enrollment was pending to then continue providing the same services, using the same aides, after the MLTC enrollment is completed. Yet State policy denies reimbursement for services provided by such LHCSAs because they are technically not Medicaid providers. See, e.g. FH# 7038066J (Nassau Co. Sept. 18, 2015). In one Suffolk County hearing, reimbursement was denied even though the provider was in fact a Medicaid provider. FH 7082181Y (8/28/15)(Decision is confusing as it appears to have typographical errors re various dates). Denial in such cases is ironic, if not unlawful, since the same LHCSA might very well be a Medicaid provider under contract to the local DSS or as a subcontractor to an MLTC plan.

Apart from the near impossibility of privately hiring a Medicaid provider to provide personal care services, the “waiting period” after the Medicaid card is issued and before enrollment in the MLTC plan is effective is not created by the patient, who has no control over the process. Instead, it is the result of a system designed by State DOH with inherent bureaucratic delays built in. The very fact that MLTC enrollment can only commence on the 1<sup>st</sup> of the month, and only if a series of requirements are met by the 19<sup>th</sup> of the preceding month, causes a delay of six weeks or more after Medicaid approval. It has already been established that the patient is financially eligible for the services, and thus eligible for Medicaid coverage. The Department’s denial of a means for obtaining Medicaid home care services immediately upon issuance of the Medicaid card, while also denying reimbursement for services privately obtained for lack of any alternative, denies Medicaid recipients services which they are entitled to in violation of state and federal Medicaid law

Based upon the foregoing, we are requesting that the Department create procedures to provide adequate and appropriate notification of the availability of fee-for-service personal care services after the determination of Medicaid eligibility and to allow for reimbursement for otherwise covered services during the period prior to the provision of services under the MLTC program.

Memorandum prepared by: Deepankar Mukerji, Esq. and Valerie Bogart, Esq.  
Section Chair: Julie Ann Calareso, Esq.