Food Stamp Fraud and Overissuance

The Clearinghouse has a new Executive Director—see NCLS Board Chair Barry Hager's announcement inside!
I. Introduction

This article provides various federal practice pointers for legal services attorneys who are inexperienced in litigation or who may be inexperienced in federal court. Although it focuses on issues confronting attorneys who represent clients needing Medicaid benefits, the issues and advice may also be useful to others. The article is not meant to be comprehensive but rather a more informal collection of tips based on the author's experience in litigating Medicaid class actions in federal court. /1/

II. Before Filing a Case

Suppose that you have completed your research, and you have determined that your client has a legal injury that needs to be redressed in court. You have written or are in the process of preparing a demand letter /2/ to determine whether settlement is possible. As you do so, bear in mind that public benefit cases are more likely to be settled when there is a serious threat of imminent litigation. It rarely hurts the chances of settlement to proceed swiftly with preparing your case for court; indeed, it may hasten serious attention to an issue that might otherwise not be a priority for the potential defendant.

Similarly, you may find that your state Medicaid agency will take a new demand letter from you more seriously in the future once you have sued the agency, regardless of the outcome of the litigation. An attorney's ability to be effective in negotiation is certainly affected by many subjective, as well as objective factors, but do not underestimate how quickly an attorney's reputation for aggressive advocacy is enhanced by some history, however scant, of litigation. Other objective factors over which you have control will increase your effectiveness. These are how prepared you are on both the issues of law and the specific relief sought and how tenacious you are in pursuing that remedy.
A. Exhaustion of the Administrative Process

Many Medicaid issues are first presented in an administrative hearing, and use of the administrative process is efficient and effective in individual cases. However, rarely is the administrative hearing and appeals process effective for class relief. A court case is more effective for a change in law or policy. Exhaustion of administrative remedies is not required under Section 1983 in a Medicaid case. /3/ Exhaustion of state judicial remedies is also not a prerequisite to this type of litigation. /4/

B. Enforceable Rights

For years legal services advocates have enforced their clients' rights under the Medicaid statute in federal court. A recent Supreme Court case /5/ however has raised serious questions about the extent of court access by Social Security Act beneficiaries, e.g., AFDC and Medicaid beneficiaries. Suter v. Artist M. /6/ held that children in foster care could not enforce certain federal statutory provisions mandating that a state make reasonable efforts to avoid removing children from their families and to reunite foster children with their families to the extent possible. /7/ These provisions of the Adoption Assistance and Child Welfare Act /8/ were held to be unenforceable because they are mandated in the statute as requirements of a state plan.

Although the Suter holding itself is very narrow, the Supreme Court's ruling intimidated poverty attorneys everywhere because of some rather far-reaching dicta about state plan provisions and enforceable rights. /9/ Suter did not hold that beneficiaries under the Social Security Act could not sue states for failing to comply with state plan requirements, but some state defendants have argued this. Notably, the Court confirmed its recent ruling in a Medicaid case upholding the right of health care providers to enforce state plan provisions mandating reasonable reimbursement rates. /10/ As a result, in most Medicaid cases, the Suter issue is unlikely to arise. If Suter and the issue of enforceable rights arises in a case you are working on, contact someone familiar with the issue for specialized assistance. /11/

C. Choice of Court

Since Medicaid is a cooperative federal/state program, it is governed by both federal and state law (statutes, regulations, and administrative policy and procedure). /12/ As a result, in most cases, there are issues of both federal and state law at stake. Since there is concurrent jurisdiction in federal and state court on federal issues pursuant to Section 1983, /13/ you have a choice between filing in state or federal court. The decision of whether to go to federal or to state court in a Medicaid case, like most other cases, is for the most part based on strategic factors peculiar to a specific state or to a specific region within a state. As a result, these considerations cannot be addressed in detail here.
For assistance with this decision, consult with someone locally. Most states have state support centers or state support units with attorneys who have information about the local courts and judges. /14/ If there is no support center in your state, ask around. You can usually locate one or two legal services or public interest lawyers in your area who have the litigation expertise you need for advice on the choice-of-courts issue. If not, try the private bar. Do not be embarrassed to ask questions on this issue. Most litigators have an opinion on this issue based on their experience and would be pleased to share it with you. It is an important decision--sometimes the most important decision--in determining the outcome of a case, so do not be shy about collecting the necessary information.

Factors to consider in choosing a forum include on which bench the jurist who is most likely to be favorable to your case sits? To determine this, try to answer questions such as: If you file in a particular court, which judge(s) might hear your case? Are they particularly disposed in favor or against poor clients? Are they in favor of or against state government? Are they in favor of or against the federal government? If your case involves a technical or arcane aspect of the Medicaid program, you may favor a judge with a reputation for being particularly intelligent. Which judge is smart enough or patient enough to sort through the arcane aspects of the Medicaid program? Once you have determined which judge or judges are likely to be most favorable, you should evaluate the odds of getting that judge(s).

Other factors that come into play in the choice-of-court decision include whether there are any particular procedures or relief available in one jurisdiction, but not another, /15/ as well as convenience or expense to you and your client. /16/ Until recently, state court was considered advisable whenever retroactive damages were an important element of the desired relief. Retroactive damages against a state defendant are generally not available in federal court as a result of restrictive interpretations of the Eleventh Amendment, /17/ but such relief had been readily available in state court. This changed significantly in 1989 when the Supreme Court made it difficult to obtain retroactive relief in state court as well. /18/

D. Should You Bring a Class Action?

Class actions are available to challenge a policy or the interpretation of a statute or regulation. Often in Medicaid cases, a class action is appropriate and is the most efficient method to determine an issue of law that will affect many clients or potential future clients. To decide whether a class action or an individual action is appropriate, consider how many people are likely to be affected in the same way as is your client. Generally, a case that turns on a particular client's facts is not appropriate for class action relief, whereas a case that turns on a legal determination is.

For example, assume your case revolves around whether your client meets the standard of care needed for admission to a nursing facility. The determining factors in such a case would be: your client's frailty, her medical needs, and whether she can be left alone and for
how long. Other clients are unlikely to be in the exact same situation. An individual action is appropriate in this type of case.

In another situation, the issue of your case may be whether your client's net or gross income should be used for purposes of determining Medicaid eligibility. This issue will be resolved on the basis of how income is defined in the statute, regulation, or policy. Many clients will be affected by a determination of whether to count gross or net income. Although different clients have different amounts of income that will affect whether they are Medicaid eligible, many clients' cases will be decided by this one legal determination concerning income. A class action should be considered in this situation.

Attorneys who are not experienced litigators, or at least who are not experienced in federal court litigation, may be reluctant to file a class action because they believe it to be too much work or too risky. This may not necessarily be true, and a representative action should be considered. /19/ Class action cases are a very efficient way for legal services attorneys with limited resources to obtain relief for a large number of clients or potential clients. Moreover, although litigation itself is time consuming, the incremental work for proceeding on a legal issue on behalf of a class, rather than on behalf of an individual, is usually minimal.

It is generally unlikely that differences in the factual background of a claim will affect the ultimate legal question. The class action device saves resources for both the courts and the parties. /20/ Additionally, a class action may be the only way effectively to bind the agency to a course of action. /21/

Class actions are usually decided by summary judgment and thus do not require extensive factual development that would necessitate considerable discovery. By contrast, in a factually dependent case, the possibility of numerous depositions must be explored, and the burden of this discovery, including time and expense, may be considerable.

As a result, whenever you are contemplating a lawsuit based on an issue of law, such as a departmental or agency policy or an interpretation of a statute or regulation, you are urged to consider filing a class action rather than an individual action. The federal criteria for a class action pursuant to Fed. R. Civ. P. 23 can usually be met, and classes are easily certified in most federal courts. /22/

1. Class Definition

The most important decision you will make about your class is how it is defined. Care should be taken in defining a class that will properly suit your needs in achieving appropriate relief, and you will avoid a great deal of frustration later. Although it is possible to redefine a class at any time in the litigation, it is not simple or common. Sometimes the exact parameters of a potential class are clear and well known so that the class is easy to define. Other times some line drawing or some arbitrary decisions may
need to be made. Consider such factors as geographical location and time frames. It is recommended that the class be defined as broadly as possible on the theory that it is easier to narrow a class definition later if necessary than it is to expand it. Narrowing the class can usually be accomplished by agreement with the defendant, whereas class expansion may need to be accomplished by formal motion and briefing.

Legal services advocates tend to think in terms of state- or countywide class actions, but circumstances may make a circuitwide or even a nationwide class action desirable. A circuitwide class may be appropriate when you are relying on a particular federal appellate case that is binding in your circuit. A nationwide class action is generally risky but may be appropriate in a case with very favorable chances of success or very limited opportunities for litigating the issue.

2. Numerosity

When commencing litigation, you may find it frequently difficult to determine the size of the class. Having an estimate of class size is useful when filing a class certification motion in order to demonstrate that the class meets the requirements of Fed. R. Civ. P. 23(a)(1), the so-called numerosity requirement, which is a misnomer. As a result, many attorneys decide to delay filing for class certification until they are able to conduct discovery on the class size. Usually, this is not necessary for several reasons. First, you may be able to get some statistics that will reveal approximate class size. Peruse your library. Be resourceful about people, organizations, or agencies to call to provide information or sources. Do not overlook friendly contacts within HHS or the state agency.

Second, you can usually make an educated guess about class size by relying on other known statistics, e.g., how many elderly Medicaid recipients there are in your state or county. This is fairly safe to do when you think large numbers are involved. Moreover, courts have ruled that classes that include future members who are unascertainable automatically meet the Rule 23(a)(1) requirement. Estimates of class size, though rough, are rarely contested by defendants.

Although there is no harm in conducting discovery to determine class size, it may not be necessary to take the time at the outset. Almost any challenge to a policy affects many persons. When you know there are at least 40 or 50 people in the class, numerosity is not likely to be questioned. Often in Medicaid cases preliminary relief must be sought to ensure continued or immediate health benefits. Unless the class is certified, the temporary relief will be applied only to individuals. Consequently undue delay should be avoided. In necessary cases, discovery can be done later.

E. Whom to Name as Defendants
Although law school teaches us to sue every possible defendant, in legal services Medicaid practice we have found that one or two defendants are enough. It is my practice usually to name the head of the state agency when suing the state and the Secretary of HHS when suing the federal government. I also name the agency that he or she administers in the caption. For example, to sue the federal government in a Medicaid case, I would sue Donna Shalala, Secretary, Department of Health and Human Services. I have never found any advantage in naming additional persons, and I avoid the time and expense of serving extra copies of the pleadings on numerous persons.

III. Preliminary Relief

Since Medicaid cases involve obtaining health benefits for poor people, preliminary relief is almost always warranted to avoid the loss of health care or the deprivation of medical services for your clients. Sometimes a TRO is necessary, but more commonly a preliminary injunction is pursued. TROs can be obtained ex parte upon a showing of compelling facts to preserve the status quo for very short periods of time. They are generally disfavored by the federal courts for class relief but will be granted upon a strong showing of need.

To obtain a preliminary injunction, a showing of irreparable harm must be made. Usually this is done by declarations of clients and/or experts. Make the declarations as personal and dramatic as possible, using little or no legalese. Declarations can be very moving and cannot be overemphasized as a good way to educate the judge about the real effects of the defendants' policy on human beings. Even though live witness testimony seems even more desirable for the "humanizing" aspect of case, it generally is discouraged by the federal bench as too time consuming and is rarely used in a legally oriented Medicaid case. There are also some distinct advantages to declarations. Live witnesses are subject to cross-examination and may, in any event, be unreliable. On the other hand, declarations are reviewed and edited in advance and are thus more controllable. Declarants, of course, must carefully review their declarations before signing them and must be able to defend them, if necessary. If you do not think a declaration will be supportive, you can decline to submit it. Moreover, most of the facts contained in declarations are not contested. This may be very useful in developing a record or for quoting later.

In addition to preventing irreparable harm, securing a preliminary injunction may also avoid, or at least minimize, some of the Eleventh Amendment problems in obtaining retroactive damages. This is because prospective relief, which is not barred by the Eleventh Amendment, can begin from the first determination of defendant's wrongful conduct.

In order to obtain preliminary relief for an entire class, you will probably need to file your motion for class certification at the same time as, or before, the motion for preliminary injunction. Often, NSCLC files motions for preliminary relief and class certification.
simultaneously with a complaint. Although it seems like quite a lot of work at the outset, it ensures broad relief as soon as possible. Moreover, if you are successful at the preliminary injunction stage, you have essentially won, at least on a temporary basis, most, if not all, of the relief you need for your clients. As a result, you need not aggressively seek full trial or summary judgment. Having glimpsed the judge's preliminary view of the case as favorable to you, defendants may be much more inclined to settle a case than they were at the outset. Even if you decide not to file for preliminary relief, you will probably want to move for class certification fairly promptly. /39/

IV. Deference

Although not directly related to the issues under discussion, an article that discusses Medicaid litigation would not be complete without at least mentioning "deference," a concept that frequently comes up in cases involving government agencies. A court will defer to an agency in an area of its expertise. /40/ Consequently, the Medicaid advocate who disagrees with HCFA may be faced with the need to overcome this tendency of the courts to defer. One must distinguish the case as one in which deference is not appropriate or show that even with deference the federal view cannot be adopted by the court.

There are basic principles to defend against deference. When the statutory language at issue is clear and unambiguous, it is controlling, and deference is not appropriate. /41/ Thus, wherever possible, arguing that the statute and congressional intent are clear is the first line of defense. At least one Supreme Court case found that statutory interpretation, unlike detailed factual findings, is "the province of the court." /42/ Using this theme, one can advocate that the issue before the court is a legal determination, and not a factual determination within the agency's expertise. Regulations that have been promulgated are given more deference than mere interpretive guidelines. /43/

V. Summary Judgment

Medicaid cases challenging an interpretation or policy lend themselves to summary judgment. Unless you have already obtained preliminary relief, you, as plaintiff's representative, will want to proceed to judgment as soon as possible.

VI. Settlement

Settlements generally take the form of either a consent decree or a stipulation and dismissal of the action. The consent decree is by far the preferable option. In any case in which compliance or enforcement becomes a problem either in the immediate or distant future, a consent decree is essential because it allows you to go immediately back into court with an enforcement motion. Even when you do not expect compliance problems, it is safer to insist on a consent decree that can be enforced if circumstances change down
the line. You may not always be able to determine at the time of settlement how the judgment may be useful to your clients later. /44/

On the other hand, if you settle with a stipulation and dismissal, you have no way of enforcing compliance without filing a new action. Defendants, of course, prefer dismissals.

Another key factor to keep in mind in negotiating a settlement is somewhat related. Make sure that you will be able to determine whether there has been full implementation and compliance with all aspects of the judgment. Methods of monitoring compliance include mandating a report or periodic reporting, obtaining copies of notices, or allowing the periodic inspection of files. Put the burden on the defendants, to the extent possible, to demonstrate to you that they have complied.

VII. Attorney Fees

Attorney fees are available to prevailing parties from lawsuits against either the state or the federal governments. Fees against the state are available pursuant to the Civil Rights Attorneys Fees Awards Act, /45/ and against the federal government pursuant to the Equal Access to Justice Act. /46/

A. Declarations

Be sure to keep a record of all of your "billable" time from the very beginning of the case. To support an application for attorney fees, you must present a contemporaneous record of time spent, using reasonable billing judgment. Although legal services attorneys do not as a regular practice bill their time, most of us can figure out pretty quickly what time in a case should be considered billable, and what time was wasted or duplicative and should not be billed. If you are truly unsure about how to make these subjective judgments, talk to a friend in private practice.

Unless your program has a computer program or specific system in place for keeping track of time, I suggest you keep a separate log on paper for each of your open cases in litigation. Make a few columns on each page and jot down the date, time spent, /47/ and nature of the activity as soon as you complete a task. For example, an entry might read, "5/21/93, Draft SJ motion, 1.75 hours." These sheets can form the basis for an attachment to your supporting declaration.

Your declaration must indicate, at a minimum, who you are, where you work, and how many years you have practiced law. To support a particular hourly rate, it is helpful to have a survey of the fees charged in the community /48/ or a local "expert" who can declare that the rate you have requested is a reasonable one for an attorney of your experience in the locale.
B. Prevailing Party

Usually, there is not much controversy over the issue of prevailing party--either you won the case and are the prevailing party or you did not, and you are not the prevailing party. There are, however, a few instances when it is an issue: if you obtain a judgment or a settlement on some, but not all of the issues in the case or if the case becomes moot due to intervening legislation after preliminary relief, but before injunction. /49/

C. Rates

Under Section 1988, attorney fees are available at the market rate in the relevant community. The relevant community is generally where the action is filed. To support higher rates for out-of-town counsel, declarations supporting their necessity in the case are required. /50/

Rates awarded against the federal government are more limited pursuant to the EAJA. A statutory rate of $75 per hour is generally imposed. In most courts, the statutory amount may be raised upon request by adding cost-of-living increases since 1981, /51/ which, depending upon the community, can add as much as $65 per hour. Additionally, under unusual circumstances, the rate can be raised due to the existence of special factors, /52/ such as the limited availability of qualified attorneys for the proceedings or distinctive knowledge and skill. Particularized knowledge of Medicaid was considered a special factor, supporting a higher hourly rate, in a Medicaid case in Nevada. /53/

VIII. Appeals

Many Medicaid class actions are appealed by the losing party. Only two issues are raised here concerning appeals. First, when faced with an adverse decision, the Medicaid advocate may want to file a motion to secure a stay pending appeal. Conversely, after a favorable decision, you may need to oppose a motion for a stay pending appeal. /54/

The federal rules require that an appealing party post a bond pending appeal, but this bond can be waived under appropriate circumstances when appellants are indigent persons.

IX. Conclusion

Federal class action litigation can be exciting and enjoyable. This article encourages legal services attorneys or other public interest advocates to consider doing more of this type of litigation. I have attempted to provide a collection of tips and advice based upon my knowledge and experience. /55/ Some of the opinions and suggestions are universally accepted. Others are more individual or tailored to Medicaid litigation.
The inspiration for this article was the positive responses and requests for follow-up from a litigation tips session included in a substantive law training.

Demand letters before filing a class action against a government entity are required by regulation for LSC-funded legal services programs. Sound legal practice also suggests sending demand letters to avoid litigation whenever possible.


Id.


Id.

Suter, 112 S. Ct. at 1368-70.


Tim Casey at the Center on Social Welfare Policy and Law in New York has organized a Suter network and docket for monitoring and assisting in litigation on this issue. For assistance in a Medicaid case, contact the author at National Senior Citizens Law Center, L.A. office, or the National Health Law Program.


The National Legal Aid and Defenders Association's (NLADA) telephone directory contains a listing of state support centers.

For example, California state courts permit taxpayer representative actions that can obtain statewide relief without the formality of class actions.
For example, the most favorable court may be 200 miles away, and practical considerations of getting to and from the courthouse may be relevant. Convenience to witnesses is a lesser factor but in certain cases may be important to consider.


For a good compilation of class action information generally, see NEWBERG, CLASS ACTIONS (1977 & 1984 Supp.).


See note 22, infra.

Some defendants will argue that a class action is not necessary because a ruling on a legal issue against the government will also be applied to others. This argument, sometimes called the "necessity doctrine," is disfavored except in the Sixth Circuit, where it is sometimes used. Even in the Sixth Circuit, however, the argument that a class action is not necessary can be defeated by showing that a class is necessary for enforcement and full relief. For example, class certification may be granted (1) if the government is not complying with an individual judgment properly, and a second individual cannot bring an enforcement action, and (2) other individuals may not be able to recover any relief or as many benefits due to statutes of limitation, mootness, or Eleventh Amendment barriers.

E.g., Sherman v. Griepentrog, 775 F. Supp. 1383 (D. Nev. 1991) (Clearinghouse No. 45,811), a Medicaid case challenging the counting of VA "unreimbursed medical expenses" as income for Medicaid, was filed as a Ninth Circuit-wide action because a previous case, Summy v. Schweiker, 688 F.2d 1233 (9th Cir. 1982), ruled on the same issue for the SSI program.

For example, two national class actions recently filed by the National Senior Citizens Law Program include a Medicare case filed to ensure federal compliance with a mandatory nationwide statute (high probability of success), Sarrassat v. Sullivan [1990 Transfer Binder] Medicare & Medicaid Guide (CCH) 38,504 (N.D. Cal. May 17, 1989) (Clearinghouse No. 43,444); and a Medicaid case attempting to enforce the Pickle Amendment in Section 209(b) states. In the latter case plaintiffs are extremely difficult to identify and the statute involved was passed many years ago. See Noland v. Sullivan, 785 F. Supp. 179 (D.D.C. 1992), appeal pending, No. 92-5067 (D.C. Cir. filed 1992) (Clearinghouse No. 46,246).

FED. R. CIV. P. 23(a)(1) not merely is a numerosity requirement but also includes other factors that show the impracticality of joinder, e.g., geographical disbursement, inability of individuals to bring separate actions, and identification of class members. See,
e.g., National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 599 (N.D. Cal. 1986).


/27/ See NEWBERG, supra note 19, for lists of these cases as well as sample cases on all other class issues.

/28/ See part III, infra.

/29/ Id.

/30/ This was probably suggested so that, even if the case went badly, at least one defendant could be ultimately found liable. The many-defendant strategy is probably still good practice in cases involving money damages.

/31/ This leaves out, as separate defendants, HCFA (the entity within HHS that administers the Medicaid program and that you will be dealing with), HHS itself, and the HCFA administrator--all popular defendants in Medicaid cases.

/32/ Of course, it would be different in a case in which individuals within the department acted differently or illegally in a personal capacity and may be subject to individual liability or punitive damages. In addition, in certain cases you may wish to name a particular official responsible for the policy under attack.

/33/ FED. R. CIV. P. 65.

/34/ MICHAEL R. MASINTER, FEDERAL PRACTICE MANUAL FOR LEGAL SERVICES ATTORNEYS 58 (1989). This manual is an excellent source of information on federal practice generally.

/35/ Sometimes attorneys ask what the difference is between an affidavit and a declaration. Declarations are statements of personal knowledge sworn under penalty of perjury, whereas affidavits also contain a notarized signature. In federal court, declarations are sufficient and notarized signatures are not necessary. FED. R. CIV. P. 6(d).

/36/ Besides relying on traditional medical experts, consider using other available persons to help paint a sympathetic picture for your clients, e.g., social workers, researchers, teachers, clergy, and economists.

/37/ If you wish to present live testimony at a preliminary injunction hearing, be sure to call and advise the court of this in advance of the hearing.

/39/ Most federal courts now have local rules mandating that motions for class certification be filed within a certain number of months.


/41/ Id.


/43/ E.g., compare the level of scrutiny used in Rust v. Sullivan, 111 S. Ct. 1759 (1991), with Lynch v. Dawson, 820 F.2d 1014, 1020 (9th Cir. 1987).

/44/ It is not unusual for legal services attorneys to rely on judgments or consent decrees entered years ago by other attorneys to bring enforcement motions when new issues arise.


/47/ Time is usually indicated in tenths or quarter hours.

/48/ For example, attorneys in Los Angeles can rely on a survey of attorneys in the Los Angeles area for billing rates of attorneys that has been broken down by year of graduation.

/49/ See EAJA Manual, supra note 46.

/50/ E.g., higher rates were obtained for out-of-town counsel in Darling v. Bowen, Medicare & Medicaid Guide (CCH) 39,211 (W.D. Mo. 1991) (Clearinghouse No. 42,592), through declarations showing that the case was complex and that local expertise was unavailable.

/51/ The original EAJA statute was passed in 1981.


/54/ See Mowbray v. Kozlowski, 725 F. Supp. 888 (W.D. Va. 1989) (Clearinghouse No. 45,170), as a good example of opposing a stay pending appeal in a Medicaid case, in which the injunction was eventually vacated, 974 F.2d 593 (4th Cir. 1990).

/55/ Attorneys at NSCLC and other LSC support centers are available for advice and consultation, as well as cocounseling in major cases. The support centers exist for your support, so feel free to call them.