

Inside This Issue

<i>Empire Justice Center & the Subprime Mortgage Crisis</i>	1
<i>New Housing Laws Provide Assistance for Domestic Violence Survivors</i>	6
<i>Language Services for Limited English Proficient Individuals in New York State Court and Agency Administrative Proceedings</i>	9
<i>Empire Justice Organizational Priorities</i>	11
<i>Dual Eligibles Participating in Medicare Advantage Plans</i>	14
<i>Regulatory Roundup</i>	15
<i>Are Bank Freezes Thawing?</i>	17
<i>SSA Announces 2008 Cost of Living Increase</i>	18

Legal Services Journal
is published by:

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

December 2007 issue.
Copyright © 2007,
Empire Justice Center
All rights reserved.
Articles may be reprinted
only with permission
of the authors.

Available online at:

www.empirejustice.org

Empire Justice Center and the Subprime Mortgage Crisis

By Barbara vanKerkhove and Warren Wightman

Empire Justice Center has been at the forefront of local and statewide advocacy efforts to address the current subprime and non-traditional mortgage lending foreclosure crisis. We have been working locally with the Greater Rochester Community Reinvestment Coalition (GRCRC)¹ and the City of Rochester's Foreclosure Task Force to determine the extent of foreclosures in Rochester and Monroe County and to develop options for homeowners at risk of foreclosure. We also represent clients with predatory loans and/or who are at risk of foreclosure.

Empire Justice Center, GRCRC and several GRCRC members belong to New Yorkers for Responsible Lending (NYRL), a state-wide coalition of more than 130 member organizations that promotes access to fair and affordable financial services and the preservation of assets for New Yorkers and their communities. Empire Justice and NYRL have asked the Governor to include funding in his executive budget to address foreclosures in New York State. In addition, Empire Justice has testified at several public hearings and forums on the current crisis and has recommended actions for addressing it and for preventing it from recurring in the future.

This article summarizes our testimony and recommendations²

Empire Justice Center convenes the Greater Rochester Community Reinvestment Coalition (GRCRC), consisting of over 30 organizations and individuals working to improve lending, investments and services to lower income and minority families and communities in the

Rochester area. Since it was established in 1993, the Coalition, along with Empire Justice Center, has released nine analyses of lending data on home mortgage and small business loans made public in compliance with the Home Mortgage Disclosure Act (HMDA) and the Community Reinvestment Act (CRA). We have used the analyses to identify strengths and weaknesses in lending patterns and to generate ongoing discussion with the banks whose data we study³

The Current Foreclosure Crisis

Home mortgage foreclosures are on the rise in New York State. According to RealtyTrac.com, 72,339 foreclosures have been filed in New York between January and August 2007.⁴ Nationally, since mid-2007 over 800,000 homeowners have entered foreclosure.⁵ The most recent RealtyTrac data shows that in New York State, four of the top 5 metro areas saw increases of 50 percent or more in the number of properties in foreclosure when compared to the third quarter of 2006.⁶ (See Table 1 for details).

How do we get a better handle on the extent of the current "mortgage mess" in New York communities? Currently, the only way to determine the extent of subprime and non-traditional lending in our communities is through the publicly available HMDA mortgage lending data which includes information that lets us identify "high cost loans."

The term "high cost loan" refers to a loan with an APR (annual percentage rate)

(Continued on page 2)

Subprime Mortgage Crisis—continued

(Continued from page 1)

exceeding a certain threshold when compared to the interest rate on a U.S. Treasury Security of the same maturity. For first lien loans the threshold is 3 percent above Treasury rate; for subordinate lien loans the threshold is 5 percent above Treasury rate. A 10 year first lien loan which is 3 percent higher than the yield of a 10 year US Treasury bill would therefore be shown in the HMDA data as a high cost loan.



It should be noted that these “high cost” loans do not comprise the entire universe of all subprime loans. High cost loans, as defined here and captured in the publicly available HMDA data, make up only a subset of loans considered to be subprime or “non-traditional” home loans. The broader category of loans that are potentially unaffordable, and which are causing the current foreclosure crisis, is much larger than is reflected in the HMDA data.

“Non-traditional” home loans, also called “exotic” loans, are those that break with long-standing practices in the lending markets by relaxing eligibility requirements, sometimes drastically. Examples are mortgages that require no down payment, no proof of income, no loan-to-asset ratio restrictions, no payments on principal, and even “negative amortization” loans for which the principal balance *increases* over a substantial part of the loan’s term.

What can be gained, then, by looking at the high cost loans found in the HMDA data? They are the best estimate we have of broader subprime and non-traditional lending trends, particularly in small geographies and in categories identified by borrower characteristics. And, as we have been reading in the news over the past 10 months, it is in the subprime and non-traditional lending markets where the “mortgage meltdown” and the bulk of foreclosures is occurring.

According to a recent report in the Wall Street Journal, in 2006 there were more than 142,000 high cost loans made in New York State - 28 percent of all mortgages. Of the metropolitan areas examined, Nassau-Suffolk had the highest percentage - 30 percent. This was followed by the New York-Wayne (NJ)-White Plains area

and Glens Falls with 28 percent.⁷ (See Table 2 for high cost loans in New York Metropolitan Areas.)

In addition, over 80 subprime lenders have either filed for bankruptcy, been acquired, closed their doors, or have stopped making loans.⁸ Homeowners with loans from these lenders, and who are at risk of foreclosure, will find it much more difficult to work something out with lenders who are themselves in trouble. And this is exactly the sector where more defaults are likely to occur - loans from subprime lenders.

Using the Budget to Keep New Yorkers Out of Foreclosure

Building on and Existing Model that Works

Across the state there exists a network of housing default counselors and legal services attorneys that already work with homeowners at risk of foreclosure.

By working with the homeowner, the lender and, in more difficult cases with a legal services or private attorney, these housing counselors have a successful history of helping borrowers regain control of their household finances, maintain their property and help stave off the decline of local neighborhoods.

After intense one-on-one financial analysis and counseling, a successful home rescue allows the housing default counselor to provide one of the following three services:

1. Direct negotiation with the lender to seek a reasonable and affordable solution to allow the borrower to stay in his or her home
2. Referral of the borrower to a consumer attorney when the affordable solution is not one the lender is willing to provide, or when the borrower needs legal intervention
3. Referral of the borrower to a refinance program when options 1 and 2 are not feasible.

This model has been proven to work in communities across the state. For example, Rochester and Monroe County have a very successful foreclosure prevention program at The Housing Council. In 2006, of the 608 defaulting borrowers who received counseling, **90 percent were successful in avoiding foreclosure.**

Despite the fact that mortgage foreclosure **filings** increased in Monroe County between 2004 and 2006, foreclosure **sales** continued to decline, a decline that goes back to 2002. We believe that this consistent de-

(Continued on page 3)

Subprime Mortgage Crisis—continued



(Continued from page 2)

crease in the number of foreclosure sales in Monroe County is due to the counseling provided homeowners at The Housing Council - backed up by legal assistance such as that provided by Empire Justice.

A program like The Housing Council's could be enhanced and replicated throughout New York with appropriate funding and products. Our first recommendation to the Governor, therefore, was to:

1. Fund Housing Counseling and Education.

Provide \$5 million in funding to the New York State Banking Department for distribution to:

- *HUD-approved housing counseling agencies with demonstrated capacity to deliver post-purchase, foreclosure prevention counseling*
- *Legal services attorneys*
- *Not-for-profit organizations that provide foreclosure preventive outreach and education*

Governor Spitzer and Attorney General Cuomo should be commended for their recent decision to provide \$2 million in funds to match private grants to not-for-profit counselors and civil legal services organizations that provide counseling and legal assistance to homeowners facing delinquency and foreclosure. This money will help build on an existing model that is already working in New York State.

We urged the Governor to get this program off the ground as soon as possible using the guidelines described above and to encourage banks, community foundations and other grant-making entities to make private funds available to the counseling agencies.

We also asked the Governor to increase the funding so that the total available is at least \$5 million.

Helping Other Agencies Work with Homeowners

While there are several counseling agencies in New York State with the demonstrated capacity to provide foreclosure prevention counseling and legal assistance, our work on Rochester's Foreclosure Task Force suggests there are several areas in New York State where

homeowners in default and foreclosure will not be able to find the quality assistance they need. Therefore, our second recommendation was to:

2. Fund Training and Technical Assistance for Foreclosure Prevention and Legal Assistance.

Provide \$2 million in funding to non-profit housing counseling agencies and civil legal services providers. Training in best practices and effective techniques in combination with direct individual assistance with difficult cases will result in dramatically more efficient advocacy on behalf of homeowners.

This funding will also help to keep advocates up to date on changes in the law, industry practices and new opportunities for homeowners at risk of losing their homes. The Division of Housing and Community Renewal should develop an RFP process to ensure that the organizations providing the training and individual technical assistance have demonstrated success in working with, and representing, clients in default or foreclosure, and/or dealing with the problems caused by predatory loan practices.

Helping Homeowners Who Are Not Eligible for Existing Assistance Programs

When default counseling and legal assistance is not sufficient to help borrowers keep their homes because lenders are not willing to negotiate affordable mortgage payments, because the loans do not have illegal terms a lawyer can litigate, or because the homeowners are not eligible for other loan assistance, such as the SONYMA "Keep the Dream" program or Treasury Secretary Paulson's "Hope Now Alliance" plan, the borrowers must have other options that will allow refinancing out of the unaffordable loans. We asked the Governor to provide such an option by including in the budget a:

3. **State Foreclosure Fund.** *Provide \$100 million to establish a foreclosure remediation fund to assist individuals facing foreclosure who are not eligible for public or private loan assistance. The fund would be implemented using sound eligibility criteria, and serve individuals who received an unaffordable loan on their primary residence and now face foreclosure.*

Understanding Foreclosures

The current foreclosure crisis makes it clear that New Yorkers, the New York State Banking Department and the Attorney General need a better understanding of the extent of foreclosures in communities across the state.

(Continued on page 4)

Subprime Mortgage Crisis—continued

(Continued from page 3)

In New York, foreclosure data are currently available only at the county level, and for most counties are not available online. One must either purchase the data from private vendors, or undergo laborious data collection at county clerks' offices. There is no state repository for this data, which should be gathered and made available for analysis and use by state officials and the public. Therefore, we urged the Governor to include in the budget:

4. **Funding for Foreclosure Data Collection.** *Require the Banking Department to collect foreclosure data from counties throughout the state, create a public repository for this data, and adequately fund this process.* This will help the Banking Department and Attorney General identify communities and mortgage originators that are disproportionately represented in the foreclosure data and act swiftly to address the problems.

Preventing New Predatory Practices and Future Foreclosure Crises

The recommendations outlined above will help stem the current foreclosure crisis, but action is needed to address the new crop of subprime and nontraditional home loan products and new abuses that continue to develop. The loans we are seeing today, and the foreclosure crisis before us, are the result of these new exotic products, coupled with a very hard sell of subprime and nontraditional loans not only to low- and moderate-income Americans but to middle-income Americans as well.

The successful anti-predatory lending law New York passed in 2002 needs to be updated. Therefore, we continue to urge the New York State Legislature to:

PASS THE NEW YORK STATE RESPONSIBLE LENDING ACT OF 2007. (A.8972A)

To combat this new wave of lending, we need to enact the New York State Responsible Lending Act of 2007 ("Responsible Lending Act") into law. This legislation will do several things:

First, the Responsible Lending Act will mandate that lenders make loans that people can afford. Lenders will be required to verify borrowers' income. Responsible lenders do this without question. This requirement is not only for the sake of homeowners, but is also a matter for the market. It will help to level the playing field for the benefit of the ethical lenders who should be doing the lending.

Secondly, the Responsible Lending Act will get rid of practices in the subprime and nontraditional loan market which allow brokers and lenders to make it appear to the borrower that their loan is affordable when in fact, it is not.

One ploy to create the façade of affordability is failing to escrow for property taxes and insurance. Borrowers are deceived by being shown a monthly payment that appears lower than their current payment, but which does not contain an escrow for taxes and insurance.

Another tactic is to schedule balloon payments in the future which make the monthly payments lower than if the loan was amortized regularly over the 30 year loan term. One adjustable rate mortgage Empire Justice recently reviewed had the borrower making \$3,000 to \$5,000 in monthly payments on a \$487,000 loan. However, at the end of the 30 year term, the borrower would still owe \$325,000!

The Responsible Lending Act also addresses a third scheme, loans that negatively amortize – meaning that the principal balance actually increases over time. The payment the borrower is required to make is less than a fully amortized payment of principal and interest, causing the loan to increase over time and costing the borrower considerably more in interest while gaining no equity in the home.

Finally, and probably most important, the Responsible Lending Act provides consumers with basic protections so that mortgage brokers will be working in their best interests. Mortgage brokers can be helpful to borrowers, assisting them in working through the process to obtain loans that meet their needs. The majority of mortgage brokers in our state probably do operate under this principle simply because of their business and personal integrity. Unfortunately it is apparent that a significant number of unscrupulous brokers act primarily in their personal interests and have no qualms about taking advantage of their clients. Most brokers are compensated in ways that incentivize them to push clients into costlier loans—both in terms of loan size and interest rates. Again, it is a matter of leveling the playing field so that the honest brokers who do try to assist homeowners can thrive.

Federal Preemption of state laws governing lending

The courts have determined that federal laws and regulations override state laws governing nationally chartered banks, and even the subsidiaries of national banks that are located in another state. So, why should

(Continued on page 5)

Subprime Mortgage Crisis—continued

(Continued from page 4)

New York pass a law that could be preempted? Empire Justice Center has been very much involved in the formulation of the Responsible Lending Act. We believe a New York statute would significantly impact subprime and nontraditional home mortgage lending.

First, the Responsible Lending Act would in fact apply to most subprime and nontraditional home loans—such as those made through mortgage brokers and independent mortgage bankers. Secondly, although following the

preemption ruling of the Office of the Comptroller of the Currency (OCC) in 2003, Banking Law 6-L did not technically apply to nationally chartered banks, the law still affected the lending practices of these banks. We did not see a split in some banks making those loans while others could not. We believe this was because no bank wanted to be seen as violating the spirit of a law that regulated the most egregious practices within the industry. We anticipate the 2007 Responsible Lending Act to similarly raise the bar for lending practices across the board.

Table 1: Foreclosure Activity for New York's Largest MSAs—Q3 2007

Rate Rank Among Nation's Top 100 MSA's	MSA	Foreclosure Filings		Properties with Filings		
		Total Filings	1 filing for every #HH	Properties with Filings	Pct. Change from Q2 2007	Pct. Change from Q3 2006
73	SUFFOLK/NASSAU, NY	2,321	429	N/A	N/A	N/A
77	NEW YORK/WAYNE/WHITE PLAINS, NY-NJ	9,240	472	7,302	19.1	93.8
80	BUFFALO/CHEEKTOWAGA/ TONAWANDA, NY	960	541	643	67.9	-32.2
84	ROCHESTER, NY	695	631	617	-39.3	58.2
88	ALBANY/SCHENECTADY/TROY	449	836	232	-17.7	176.2
95	SYRACUSE, NY	249	1,139	156	20.0	48.6

As Found at: <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelIID=9&ItemID=3609&acct=64847>

Table 2: Number and Concentration of High Rate Loans in New York State Metropolitan Areas (2006)

Metropolitan area	State	High-rate loans		High-rate loan volume	
		Number	As pct. of all mortgages (%)	In dollars (millions)	As pct. of total volume (%)
Ithaca	N.Y.	286	11.8	25	8.9
Albany-Schenectady-Troy	N.Y.	8,657	27.3	964	23.1
Rochester	N.Y.	7,117	23.5	528	18.2
Poughkeepsie-Newburgh-Middletown	N.Y.	7,352	27.5	1,400	27.7
Buffalo-Niagara Falls	N.Y.	6,706	24.3	507	19.7
Glens Falls	N.Y.	1,507	28.3	159	26.1
Syracuse	N.Y.	4,732	24.2	361	20.4
Utica-Rome	N.Y.	2,074	24.8	149	25.0
Kingston	N.Y.	1,701	25.3	267	24.7
Elmira	N.Y.	661	26.1	43	24.8
Binghamton	N.Y.	1,714	26.1	123	24.5
Nassau-Suffolk	N.Y.	34,420	30.3	9,167	28.3
New York-Wayne-White Plains	N.Y.-N.J.	75,107	28.3	22,536	25.3

Source: WSJ research | Methodology

Source: "The United States of Subprime," by Rick Brooks and Constance Mitchell Ford, *The Wall Street Journal*, October 11, 2007, as found at: <http://online.wsj.com/article/SB119205925519455321.html>. Graphic for this table found at: <http://online.wsj.com/public/resources/documents/retro-SUBPRIME07.html>.

1. See below for more information on GRRC.
2. Complete versions of the testimony can be found on the Empire Justice Center website at: <http://www.empirejustice.org/content.asp?ContentID=2883> and <http://www.empirejustice.org/content.asp?contentid=2809>
3. The HMDA and CRA small business lending data for each previous calendar year is publicly available from the Federal Financial Institutions Council under the aegis of the Federal Reserve Board.
4. <http://www.realtytrac.com/states/New%20York.html>
5. <http://www.nytimes.com/2007/12/09/opinion/09sun1.html>
6. <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelIID=9&ItemID=3609&acct=64847>
7. <http://online.wsj.com/article/SB119205925519455321.html>
8. <http://online.wsj.com/public/resources/documents/info-subprimeloans0706-sort.html>

New Housing Laws Provide Assistance for Domestic Violence Survivors

A Brief Examination of Housing Challenges Faced by NY's Domestic Violence Survivors

By Amy Schwartz

Domestic violence survivors face tremendous economic and housing-related hurdles when they attempt to break free of an abuser. Often the choices are poor—remain with an abuser or become homeless. Sadly, studies conducted both across the country and in New York confirm these concerns by demonstrating that domestic violence is a leading cause of homelessness for women. A December 2007 study conducted by the U.S. Conference of Mayors found that of the U.S. cities surveyed, 39% reported that domestic violence was a primary cause of homelessness in households with children.¹ In New York City, a 2002 study indicated that almost half of all parents had experienced domestic violence and 25% of all homeless parents were rendered homeless as a direct result of the abuse.²

For many families forced to flee their houses and their apartments, domestic violence programs and homeless shelters provide a crucial safe haven. However, these services are limited and traditionally crisis-oriented so they provide families with few longer-term solutions to their housing needs. A dearth of affordable private housing stock, public housing or Housing Choice vouchers (Section 8) in many communities poses other challenges for those transitioning from shelters or those in need of permanent housing.

To compound this problem, housing discrimination by landlords and agents is a widespread issue for women who are abused. Despite the fact that they may be innocent tenants, domestic violence survivors regularly face evictions based upon the violent and criminal acts perpetrated upon them by their abusers simply because the landlord became aware of the abuse or the survivor called the police or sought the assistance of the courts. In the community of East Rochester, NY, a so-called nuisance ordinance requires landlords lose their rental unit permits and evict the unit's tenant where the police are called to a tenant's home more than three (3) times in a 12-month period or if domestic violence occurred in the unit.³ This ordinance provided no exceptions for domestic violence survivors who were the targets of the abuse or legitimately called law enforcement for help. Some survivors transitioning from residential domestic violence shelters into the larger community report being denied housing when current or potential landlords or sellers learn of their history and their situation. In one similar case in New York, a landlord conditioned rental of an apartment on the requirement that a woman divorce her husband who had a criminal history and whose release from jail was imminent.⁴ The underlying

facts of that case served as the basis for a 1985 NYS Attorney General Opinion which stated that such conduct may be unlawful marital status discrimination and, further, discrimination against domestic violence victims in housing accommodations may be unlawful gender discrimination.⁵ In effect, practices such as these blame and punish the victim for the violent acts of her abuser against whom she wields no control. Doubtless, such discriminatory actions have an overall chilling effect on women who reasonably fear that calling the police for help or taking other measures to protect themselves and their children will result in an eviction or an inability to secure appropriate housing for the family.

Alarmed by consistent reports of housing discrimination against domestic violence survivors, in February 2003 the American Bar Association issued a Report to the House of Delegates heralding its support of federal, state, territorial and local legislation that would prohibit such forms of housing discrimination.⁶ Congress also responded by including strong provisions specifically prohibiting public housing authorities and Section 8 Voucher programs from discriminating against victims of domestic violence, dating violence and stalking in its 2005 reauthorization of the federal Violence Against Women Act (VAWA 2005).⁷ Among other VAWA 2005 provisions, the federal law also prohibits evictions or terminations from housing based upon acts of violence perpetrated upon the victim, and allows for Voucher portability, lease bifurcation, and victim-friendly transfer policies. However, while this law provides crucial protection to those survivors in certain federally-assisted housing programs, it offers no help to survivors and their children accessing housing stock in the much larger private market.

Alternatively, domestic violence survivors who had

A December 2007 study conducted by the U.S. Conference of Mayors found that of the U.S. cities surveyed, 39% reported that domestic violence was a primary cause of homelessness in households with children. In New York City, a 2002 study indicated that almost half of all parents had experienced domestic violence and 25% of all homeless parents were rendered homeless as a direct result of abuse.

(Continued on page 7)

New Housing Laws—continued

(Continued from page 6)



rental housing but needed to terminate their leases early and relocate to a safer place also faced challenges. Despite awareness of the resident's safety

concerns, landlords were often unwilling to terminate the survivor's lease early without the tenant incurring significant financial penalty such as balloon clauses that made all rents due and payable until the end of the lease term. As a result, survivors were generally forced remain in the unit or break their leases and face money judgments together with a poor landlord reference that would only serve to increase their "undesirable" status as a tenant.

The combination of these factors—discrimination, risk of eviction, lack of early lease termination protections, emergency shelter shortages, lengthy waiting lists for public housing and limited vouchers for housing subsidies—conspired to make it increasingly difficult for victims within New York State to secure and maintain safe and permanent housing, thus placing abused women and their children at serious risk of long-term or periodic homelessness. With few viable options, survivors were often forced to return to their abusers.

A recent state law in New York and a local law in Monroe County both seek to assist domestic violence survivors with some of these challenges.

Early Lease Termination for Domestic Violence Survivors

This 2007 amendment to Real Property Law § 227-c, as well as the Criminal Procedure Law §§530.12, 530.13, Domestic Relations Law §240, and Family Court Act §§446, 656, 842 and 1056(5) provides that a civil or criminal court which issued a domestic violence survivor's temporary or permanent order of protection also has the authority to issue an order terminating her written or oral residential lease early. Upon receiving this order, the tenant-survivor is released from any further liability for the rental agreement and may vacate the premises without financial penalty. Notably, only survivors with orders of protection may qualify for this relief and they must make application for this relief in the same court that issued their order of protection, rather than in the housing courts. While the order of protection is in effect, she may initiate a proceeding to terminate

her lease even where the underlying proceeding has been completed. Survivors with orders of protection from foreign jurisdictions may also access this relief. It is a public policy violation for landlords and tenants to waive or modify this right to early lease termination. This law became effective on October 1, 2007 and is indeed complex and not suitable for use by all survivors in all situations. Prior to initiating a proceeding, advocates will want to study these statutes and discuss with the client the many challenges associated with accessing it.

Before commencing a court action for lease termination, the survivor must have attempted to negotiate a termination with the landlord to no avail and so state this in her petition. In filing her petition for relief, the survivor-tenant must provide 10 days notice of the proceeding to the landlord, as well as to any joint tenants, even if that joint tenant is the abuser. All of these parties have the right to be heard by the court. As a result, she will be bringing her landlord and any co-tenants into non-traditional housing venues such as Family Court,

Supreme Court, or Criminal Court. If the abuser is not a co-tenant, s/he should not be given notice of the proceeding or an opportunity to be heard.

The survivor-tenant must also demonstrate that, despite the existence of the order of protection, a continuing, substantial risk of physical or emotional harm exists to her or her child, that relocation will substantially reduce the risk. For those survivors where the order of protection seems to be working, demonstrating this actual risk of harm may be difficult or impossible, despite her fear and belief that the current housing unit is unsafe. Where the termination order is granted, the survivor must insure that all sums or arrears due under the lease are timely paid and she must return the property free of occupants (unless the occupant is the abuser or a co-tenant who is continuing his/her tenancy). If she owes any arrears or prospective rental payments, she may be hard-pressed to come up with the sums due. The law also empowers the court to sever joint tenancies the survivor may have entered into with other co-tenants rather than terminate tenancy in its entirety.

Further, the law outlines procedures for adjustments in rent and for the setting the termination date. For many, the law provides no quick fix as the court has discretion to set the lease termination date many months after the survivor-tenant's request for relief--no earlier than 30 days and no later than 150 (approximately five months) after the due date of the next rental payment after notice is served on the landlord. Given the 10 day notice period combined with the termination date, it could be as little as 40 days and as many as 160 before the lease

(Continued on page 8)

New Housing Laws—continued

(Continued from page 7)

actually ends. For that reason alone, this law may not be useful for many victims who need it and advocates should safety plan with the survivor around this issue. Additionally, current NY state law does not yet provide anti-discrimination protections for domestic violence survivors in housing. Therefore, if she discloses the abuse to the landlord in attempting to obtain this relief, she may risk eviction or other discriminatory acts by the landlord.⁸

As of December 2007, the NYS Office of Court Administration issued the forms for the petition and order for lease termination cases pending in Family Court only.⁹ Nothing has yet been promulgated for Criminal or Supreme Court cases, but they are forthcoming.

Monroe County's Local Law Protecting the Right to Shelter for Victims of Domestic or Dating Violence

In September 2007¹⁰, a local law was introduced by Legislator Carla M. Palumbo to prohibit discrimination against victims of domestic or dating violence in Monroe County. The law unanimously passed the County Legislature on December 11, 2007. While limited to Monroe County residents, this law provides key assistance to victims and may serve as a model for other municipalities until the New York State Legislature is willing to pass similar state-wide protection.

Under Monroe County law it is now an unlawful discriminatory act for the owner, lessor, lessee, sub-lessee, assignee, or managing agent or other person having the right to sell, lease, rent, or approve the sale, rental or lease of housing accommodations to refuse to sell, rent or lease or to refuse to continue to rent or lease a housing accommodation because of a person or group's actual or perceived status as victims of domestic or dating violence. The law also prohibits the altering of the terms, conditions, or privileges of the sale, rental, or lease of housing accommodations because of the person or group's actual or perceived status as victims of domestic or dating violence. Further, it is unlawful to alter the furnishing of facilities or services in connection with housing accommodation because of the person or group's actual or perceived status as victims of domestic or dating violence.

The definition of "victims of domestic violence or dating violence" is broad and includes any person subjected to an act or series of acts that are or would be violations, misdemeanors, or felonies under state or federal law and the acts were committed by current or former spouses, domestic partners, current or former cohabitants, or dating partners. The acts of abuse must have resulted in physical or emotional injury or have created the risk of physical or emotional harm, whether

or not the conduct resulted in criminal charges, prosecution, or conviction. As with similar domestic violence anti-discrimination laws¹¹, this law also requires persons certify their status as a domestic violence victim with documentation such as police reports, domestic violence incident reports, valid order of protection, proof from an attorney, district attorney, domestic violence or victim advocate, medical professional or health care provider, clergy, or counselor.

Endnotes

1. U.S. Conference of Mayors & Sodehxo, Inc., *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities—A 23 City Survey* (December 2007). Available online at: <http://usmayors.org/HHSurvey2007/hhsurvey07.pdf> (last visited December 18, 2007)
2. Institute for Children and Poverty, *The Hidden Migration: Why New York City Shelters are Overflowing with Families* (2002).
3. See Code of the Town/Village of East Rochester §144-13. Note: a federal lawsuit against the municipality was commenced by Empire Justice Center and Monroe County Legal Assistance Corporation in February 2007 regarding, among other claims, the discriminatory impact this ordinance has on victims of domestic violence.
4. *Cox v. The Related Companies et al.*, (Monroe Co. Sup. Ct. 1986) (unpublished decision on file with the author)
5. New York State Attorney General Formal Opinion No. 85-F15 (November 22, 1985).
6. American Bar Association, Young Lawyers Division and Commission on Domestic Violence, *Report to the House of Delegates*, February 2003. Available on-line at: http://www.abanet.org/domviol/ABA_Policies/128_1_1.PDF (last visited December 18, 2007).
7. The various public housing and Section 8 Housing Choice Voucher provisions from of the 2005 Violence Against Women Act are codified at: 42 USC 1437d(c)(3); 42 USC 1437d(l)(5) &(6); and 42 USC 1437f(d)(1)(B)(i) & (ii); 1437f(f)(8),(9) & (10).
8. Note, if she is in Section 8 or public housing, VAWA 2005 outlaws such discriminatory conduct--see endnote vii.
9. Available on-line at: <http://www.courts.state.ny.us/forms/familycourt/pdfs/gf-38.pdf> and <http://www.courts.state.ny.us/forms/familycourt/pdfs/gf-39.pdf> (last visited December 18, 2007).
10. Monroe County Administrative Code & Charter, not yet codified. The law will likely be in effect before or by March 2008. For more information about the new law contact Jamie Romeo from the Monroe County Legislature at : (585) 753-1930.

For a comprehensive and up-to-date national listing of housing-related domestic violence laws visit Legal Momentum's website at: <http://legalmomentum.org/legalmomentum/files/housingaug2007.pdf>.

Language Services for Limited English Proficient Individuals in New York State Court and Agency Administrative Proceedings

By Michael Mule

A recent amendment by the New York State Unified Court System Office of Court Administration (OCA) to the New York State Uniform Court Rules and a proposed Model Code of Conduct for Administrative Law Judges by the New York State Bar Association take different approaches to addressing the right of limited English proficient (LEP) individuals to receive language services, interpreter and translation services, in state court and agency administrative proceedings.¹

Access to New York State Courts for LEP Individuals

The obligation to provide language services to LEP individuals is based on Title VI of the Civil Rights Act of 1964 (Title VI). On December 1, 2003, the United States Department of Justice (DOJ) sent a letter advising OCA of its obligation under Title VI to provide meaningful access and appropriate language services to LEP individuals as described in the 2002 DOJ LEP Guidance.² Over the last several years OCA has recognized the right of LEP individuals to have language services in all state court proceedings and court offices.

In April 2006 OCA stated the obligation of New York's Judiciary "to ensure that all New Yorkers—regardless of language fluency or hearing impairment—can receive the equal justice to which the Constitution and laws of this State entitle them."³ OCA noted how, unlike Federal or other state courts, New York long ago decided to provide interpreting services not only to "criminal defendants but also parties in civil cases, witnesses, and crime victims."⁴

OCA commitment was to ensure "New York's courts fulfill the promise of equal justice that is all New Yorkers' birthright, regardless of nationality."⁵ Based on this commitment, Empire Justice Center asked OCA to articulate its current policy to provide interpreters for LEP individuals in criminal and civil proceedings. OCA responded in October 2006 with a policy that described the right of LEP individuals to receive language services "in all New York's courts and court agencies."⁶

New York's local Justice Courts also have an obligation to provide language services to LEP individuals. In the November 2006 "Action Plan for the Justice Courts," OCA described how the linguistic diversity of New York's courts is not limited to State-paid courts.⁷ OCA

outlined several steps it will be taking to improve language services and vindicate the constitutional rights of LEP litigants in Justice Courts.⁸

The right of LEP individuals to receive meaningful access to any state court is now part of the Uniform Court Rules. In October 2007 OCA amended the Uniform Court Rules to add Section 217 which requires criminal and civil trial courts to provide interpreter services for LEP individuals.⁹ This new section requires all trial courts to appoint interpreters when a party or guardian or a minor in a Family Court proceeding is LEP and an interpreter is needed to ensure their meaningful participation in the court proceeding.¹⁰ LEP individuals must also receive interpreting services at court clerk offices.¹¹

Language Services for LEP Individuals in Administrative Proceedings

The Model Code of Judicial Conduct for State Administrative Law Judges (Code) was proposed by the New York State Bar Association Committee on Attorneys in the Public Service and the Subcommittee on the Administrative Law Judiciary on October 24, 2007. While the Code prohibits prejudice in administrative proceedings based on national origin, it does not accurately describe the existing obligation of state agencies to provide language services to limited English proficient (LEP) individuals.

Canon 3, 7(a), of the Code describes the "practices that a state administrative law judge may appropriately follow and may find helpful in advancing the ability of a litigant not represented by an attorney or other relevant professional to be fully heard," including "(v) being attentive to language barriers that may affect parties or witnesses." The permissive discretion of the current text falls short of existing federal and state recognized obligations to ensure LEP individuals are provided meaningful access to administrative proceedings.

The obligation to provide language services to LEP individuals in administrative proceedings is based on Title VI of the Civil Rights Act of 1964, requirements of federal funded programs administered by New York State agencies, and previously recommended practices for New York administrative law judges.¹²

(Continued on page 10)

Language Services—continued

In addition to the 2002 DOJ LEP Guidance which describes the language service obligations of state agencies that receive federal funding, the 2003 Department of Health and Human Services (HHS) LEP Guidance described how “individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the context of administrative proceedings, the use of certified interpreters is strongly encouraged.”¹³ All state entities which receive Federal Medicaid and/or SCHIP funds including State agencies are covered by the guidance.¹⁴

Federal statutes also require interpreters at administrative hearings. Under the Food Stamp Act, if an LEP individual requests an administrative hearing “the State agency is required by § 272.4(c)(3) to provide bilingual staff or interpreters who speak the appropriate language, [and] the State agency shall insure that the hearing procedures are verbally explained in that language.”¹⁵

A New York State Court also required an administrative law judge (ALJ) to provide an LEP individual an interpreter at a Medicaid fair hearing to ensure she was provided the constitutional opportunity to be heard.¹⁶ Because the ALJ did not provide her an interpreter she was deprived of a right she was entitled to by Federal and State law without due process of law.¹⁷

New York State agencies have also acknowledged their obligation to provide language services to LEP individuals. The Department of Labor has provided interpreters for LEP individuals at unemployment benefits hearings since 1983.¹⁸ The Department of Health has recognized its obligations under the HHS LEP Guidance.¹⁹ Recently the Office of Children and Family Services described its commitment to ensure meaningful access to agency programs for LEP individuals.²⁰

The obligation to provide interpreters to LEP individuals at administrative proceedings was also part of Manual for Administrative Law Judges and Hearing Officers (Manual).²¹ The Manual stated “[w]here a witness is unable to speak or understand the English language, there will be a need to receive the witness's testimony through an interpreter.”²² It also recommends each agency maintain a list of qualified interpreters.²³ Several members of the Committee that created the recent Code also served on the advisory review committee for the Manual.

The current proposed Model Code of Judicial Conduct for State Administrative Law Judges should be revised to incorporate the existing obligations of an administrative law judge to ensure LEP individuals have meaningful access to state administrative proceedings.

Endnotes

1. LEP refers not only to spoken language but includes individuals that are Deaf or hard of hearing and communicate using American Sign Language (ASL) even though these rights are protected under the Americans with Disabilities Act of 1990.
2. See Department of Justice, Letter to State Courts, available at: <http://70.86.230.142/archive/larc/newsitedesign/DOJGuidance/DOJCourtLEPLetter.pdf>. (PDF).
3. New York State Office of Court Administration, Court Interpreting in New York: A Plan of Action, 2, (2006), available at: www.courts.state.ny.us/courtinterpreter/action_plan.pdf (PDF).
4. *Id.*
5. Page 3, Unified Court Report.
6. See Letter from Nancy M Mangold, Director, Division of Court Operations, October 3, 2006, available at: <http://tinyurl.com/2qcy8s> (PDF).
7. See New York State Office of Court Administration, Action Plan for the Justice Courts, 28-29, (2006), available at: <http://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf>.
8. *Id.*
9. N.Y.Ct.Rules, § 217.1 is currently only available at http://www.courts.state.ny.us/rules/trialcourts/217_amend.pdf (PDF).
10. See, N.Y.Ct.Rules, §217.1(a).
11. See, N.Y.Ct.Rules, §217.2.
12. This term “administrative law judges” includes hearing officers and others designated to conduct agency proceeding.
13. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,316, (2003), available at: <http://tinyurl.com/3xb85z> (PDF)
14. See Center for Medicare and Medicaid Services, “Dear State Medicaid Director” Letter, August 31, 2000, available at: www.cms.hhs.gov/smdl/downloads/smd083100.pdf (PDF)
15. 7 C.F.R. § 273.15 (i)(1), available at: <http://tinyurl.com/3anbq4> (PDF).
16. *Matters of Rivera v. DeBuono*, Civ. No. 22701062, N.Y. L.J., May 6, 1999, (N.Y. Sup. Ct. May 6, 1999).
17. *Id.*
18. See *MLC v. Sitkin*, 79 Civ. 5899(RLC) (S.D.N.Y., 1983), Stipulation and Order of February 18, 1997, available at: <http://tinyurl.com/263xq8> (PDF).
19. See New York State Register, 20, May 17, 2006, available at: <http://tinyurl.com/2qb44t> (PDF).
20. See New York State Office of Children and Family Services, The Needs of and Services for Persons with Limited English Proficiency (LEP), 48, (2007) available at: <http://www.ocfs.state.ny.us/main/reports/LEP2007.pdf> (PDF).
21. See, New York State Department of Civil Service, Manual for Administrative Law Judges and Hearing Officers, 99-102, (2002), available at: http://www.cs.state.ny.us/pio/hearingofficermanual/manual_for_hearing_officers.pdf [hereinafter *Manual*]
22. Manual, pg. 99.
23. *Id.*

Empire Justice Organizational Priorities

By Kristin Brown

Each year, Empire Justice develops a proactive legislative agenda that reflects our organizational goal of making the law work for all New Yorkers. This year, our agenda focuses on three broad areas – access to legal and other critical human services, strengthening public benefits and public health programs and assisting New Yorkers facing financial crises. All three areas are tied to the need to recognize and support the substantial number of New Yorkers living at or below the federal poverty level and the many more individuals and families that hover at the brink of financial insolvency as a result of falling victim to predatory lending practices.

The recent release of poverty data from the 2006 American Community Survey conducted by the US Census Bureau highlights the need for the State to focus on efforts that will help low income New Yorkers and their children step over the poverty line and into the middle class. Indeed, our state maintains the widest gap between rich and poor in our nation; we have the distinction of holding the highest poverty rate of all the northeastern and Midwestern states; and in four of our upstate cities, more than 40% of children live in poverty.

Despite the limitations presented by the State's current budget gap, we believe that our state can and must do more to assist our lower income and disadvantaged New Yorkers. However, in recognition of the difficult funding decisions that must be made in the coming budget cycle, in addition to the policy priorities we have identified and recommend implementing as matter of fairness and justice, Empire Justice has also identified a number of policy solutions that can save the state and local governments money through drawing down additional federal resources and increasing efficiencies in public benefit programs. Our recommendations for action are outlined below.

Access to Legal and other Human Services

- Continue to Invest in Access to Justice – maintain and increase last year's historic new investment in state funding for civil legal services by providing a total of \$25 million to be administered by a new Office for Civil Justice in the Executive.
- Save the state money by bringing more federal dollars to New York – invest \$10.74 million in the Dis-

ability Advocacy Program to help more low income disabled individuals obtain federally funded SSI/SSD benefits.

- Ensure low income families can afford quality child care – cap child care subsidy co-payments at 10% of household income and make eligibility requirements uniform across the state.
- Increase federal resources to support work supports and services for individuals eligible for public assistance – commit to phasing out use of the federal Temporary Assistance for Needy Family (TANF) block grant to fund the state's Earned Income Tax Credit.
- Ensure that all victims of domestic violence have fair access to Family Court and certain criminal protection by expanding the Family Court Act and Criminal Procedure Law definitions of "family and household member" to include individuals in dating and intimate relationships, as well as caregivers.

Strengthening Public Benefits and Public Health Programs

- Streamline and simplify all programs (Medicaid, Food Stamps, Public Assistance and Child Care) with a goal of improving the lives of public benefits recipients; cut administrative costs for government agencies; ensure continuity of coverage and seamless transition between programs; reduce churning & eliminate unnecessary documentation requirements; and maximize federal contributions to New York by ensuring that applicants eligible for programs with federal funding enroll and stay enrolled. (Please see "Streamlining Agenda" article for specific details)
- Provide welfare recipients with the means to meet the basic needs of their household while on assistance – provide a long overdue increase the welfare grant.
- Ensure state and local agencies meet their obligations to ensure individuals with Limited English Proficiency have meaningful access to language services they need to effectively communicate when

(Continued on page 12)

Empire Justice Priorities—continued

(Continued from page 11)

accessing health care, government services and benefits.

- Stop children from being poisoned by lead in their homes by enacting the primary prevention solutions contained in “The Childhood Lead Poisoning Primary Prevention and Safe Housing Act” A.7533 (Peoples)/S.4121(Perkins) and “*The Childhood Lead Poisoning Prevention and Safe Housing Act*” A.6399C(Gantt)/S.6350(Robach).
- Minimize medical debt for low-income consumers by encouraging hospitals to create and publicize financial assistance programs—restrict hospital reimbursements from the state’s Indigent Care Pool to services for patients actually enrolled in those financial assistance programs.

Assisting New Yorkers Facing Financial Crisis

- Keep victims of the subprime market in their homes and on the tax rolls – invest in foreclosure prevention measures including \$10 million in funding for housing counseling and civil legal services, the creation of a \$100 million statewide home rescue fund, and begin collecting and making available to the public statewide foreclosure data.
- Ensure that low income individuals are not placed at financial risk by inappropriately freezing bank accounts containing funds that are exempt from seizure (this includes Social Security, disability benefits, pensions, child support and other essential income) S.6203(Volker)/A.8527(Weinstein)
- Help protect New York consumers from obtaining mortgage loans that put their financial stability at risk - pass the New York State Responsible Lending Act of 2007 and support federal legislative efforts to regulate mortgage lending. A.8972A(Towns)

Streamlining & Simplification Agenda

1. Overarching Goals

- a. Maximize access to public benefits for low-income New Yorkers by ensuring continuity of coverage and seamless transitions between programs
- b. Maximize the effectiveness of state expenditures on benefit programs by reducing churning & eliminating unnecessary documentation requirements

- c. Maximize federal contributions to New York by ensuring that applicants eligible for programs with federal funding enroll and stay enrolled

Streamlining and Simplification Across Benefit Programs

In order to move toward the goal of seamless transitions between benefit programs we need to:

- a. Achieve statewide uniformity for administering all benefit programs.
- b. Simplify and coordinate application processes for individuals eligible for multiple benefits (FS, MA, child care, HEAP, etc. NOTE: The Working Families Initiative establishes statewide standards for granting waivers of face to face interviewing and finger imaging requirements for working households and seniors applying for food stamps. We need to make more of these kinds of changes across programs.

For example, if seniors and disabled New Yorkers were able to apply for Food Stamps and New York’s Medicaid Savings Programs together, we could maximize federal dollars for New York by increasing participation in both the federally funded Food Stamps program and the federally funded Low Income Subsidy available under Medicare Part D, even as we help struggling older and disabled households.

- a
- c. Implement greater use of technology across all programs. NOTE: Not only would greater use of technology streamline administrative processes, it would also help state programs meet requirements under the Americans with Disabilities Act.
 1. Video conferencing should be available for home bound individuals, those living in rural areas, and incarcerated individuals.
 2. Telephone interviews should also be available as an alternative to face-to-face interviews. NOTE: The Working Families Initiative has put this in place in the food stamp program for working families
 3. Online applications should be offered as an alternative to paper applications. NOTE: Online applications should become an alter-

(Continued on page 13)

Empire Justice Priorities—continued

native and not a substitute. Otherwise we risk constructing a new barrier for seniors, LEP/immigrants, disabled and other people without access to computers.

1

4. Electronic management of applications and renewals files. We need to make it possible for applicants and recipients to access information from their file electronically (check on application status, report changes, check benefit balance, locate a phone number to speak to a live person, etc.) NOTE: Currently applicants can check their PA/FS benefit balance electronically, but not information for other programs.

5. Create common databases to allow for data matching and eliminate the need for workers to establish financial eligibility more than once for different programs

3. Specific Streamlining Proposals for Specific Benefit Programs

a. Medicaid

1. Eliminate face-to-face requirement
2. Require renewals on a biennial basis (every other year) rather than every year. NOTE: In order to satisfy federal requirements, year one could be full recertification and year two would involve only a postcard mailing -- "If nothing else in your life has changed, sign here."
3. Consolidate eligibility categories (bring single and childless couples up to a level similar to other medically need individuals)
4. Eliminate finger imaging
5. Eliminate the asset test
6. Eliminate mid-year reporting requirements made unnecessary by continuous eligibility for adults
7. Streamline the application process for New York's Medicaid Savings Programs (MSPs) by eliminating requirements for interviews and resource documentation. New York also needs to fix the SSI-related budgeting problem for multi-person households applying for MSPs.
8. Eliminate public assistance rules that currently

apply to single and childless couples applying for Medicaid, i.e.:

9. Drug and alcohol screening and treatment
10. Transfer of asset penalty for community Medicaid
11. Room and board test in standard-of-need budgeting
12. Provide a state portal for enrollment and recertification of MA eligibility. NOTE: a state portal could provide the opportunity to pilot some of the suggested streamlining changes. The pilot could be implemented on a geographic basis or a population basis or for a smaller program (i.e. MSPs initially rather than all of Medicaid).

b. Food Stamps

1. Streamline application/recertification
2. Remove finger imaging
3. Improve direct certification for school meals

c. Child Care

1. Expand use of simplified child care application
2. Standardize child care co-pays and eligibility requirements across the counties
3. Eliminate child support requirement

1

d. Public Assistance

1. Eliminate automobile asset limit test. NOTE: This would make PA consistent with other benefit programs and avoid discrimination against people with disabilities inherent in the current rule which provides for an increased exemption in value for automobiles used for work

Dual Eligibles Participating in Medicare Advantage Plans Pitfalls and Pointers

By Cathy Roberts

Some low-income Medicare beneficiaries participate in Medicare Advantage (“MA”) plans, where Medicare Part A (hospitalization), Part B (outpatient) and sometimes also Part D (prescription drug) services are provided through a private health insurance plan, rather than through the traditional or original Medicare model.

MA plans must offer all the services that traditional or original Medicare provides, but are not required to offer the same level of cost-sharing. MA plans may offer additional services not provided by original Medicare, such as routine dental or vision coverage. However, MA plans may limit their services to a fixed provider network and/or subject their participants to HMO-type or other additional requirements.

Dual eligibles may encounter unexpected problems when they enroll in an MA plan. Advocates should be on the lookout for:

- Aggressive or misleading marketing practices. Because dual eligibles can enroll in MA plans at any time, unlike non-dual eligibles who are generally limited to the annual open enrollment period, they are particularly vulnerable to marketing abuses, particularly during those months outside of the annual open enrollment period. A dual eligible may be eligible for retroactive disenrollment from their MA plan if they were the victim of misleading marketing. Dual eligibles can always prospectively disenroll – even if no marketing abuse occurred -- due to their continuous enrollment period.
- Situations in which the dual eligible is WORSE off being in the MA plan rather than original Medicare. MA plans may restrict rather than expand a dual eligible’s options. Under original Medicare, a beneficiary goes to any health care provider who accepts Medicare. In an MA plan, a dual eligible may be limited to the doctors who participate in the plan.
- Ensuring coordination of coverage with Medicaid. The beneficiary should be able to receive medically necessary services like transportation through Medicaid if they are not covered by the plan. However, some beneficiaries have simply been told “we don’t cover that service” by their MA plan without being directed to their local Medicaid worker.
- Confusing cost-sharing rules and, depending on the dual eligible’s status, increased payment liability. Unlike Part D, where dual eligibles receiving the full Low Income Subsidy have the same level of cost sharing, cost-sharing is NOT necessarily the same

for all dual eligibles enrolled in MA plans. CMS issued a memo in the spring of 2007 to state Medicaid directors entitled “Cost Sharing in Medicare Advantage Plans” which stated: “*To properly determine Medicaid liability for Part C [Medicare Advantage] cost sharing for a dual eligible it is necessary to determine the individual’s Medicaid coverage group and the type of Part C cost-sharing.*” What follows is part of the cost-sharing matrix contained in the memo:

Medicare Part C Cost Sharing Chart

Part C Premium for Basic Medicare Part A and Part B Benefits	Medicare Deductibles, Coinsurance & Co-pays (except Part D)
QMB Only	Required
QMB plus Medicaid	Required
SLMB Only	Not allowed
SLMB plus Medicaid	Conditional
QI	Not allowed
Other FBDEs (full benefit dual eligibles)	Conditional
QDWI (Qualified Disabled Working Individual)	Not allowed

As you can see from the chart, beneficiaries receiving QMB -- the Qualified Medicare Beneficiary program which pays for individuals’ Part B monthly premiums and any premiums, deductibles and co-pays not covered by Part B – should not have any cost sharing in Medicare Advantage plans. However, other dual eligibles may have to cover the cost of co-pays, premiums and deductibles on their own if they want to stay in the MA plan. You can get the entire CMS memo and full cost-sharing matrix on the Center for Medicare Advocacy’s website at www.medicareadvocacy.org.

For Medicare beneficiaries receiving full Medicaid coverage, there are usually more disadvantages, rather than advantages, to enrolling in an MA plan. If you encounter a dual eligible who is having problems with an MA plan, remember that the beneficiary can disenroll at any time. For questions about this article or Medicare Part C or Part D issues affecting dual eligibles, please contact Cathy Roberts in the Albany office at (518) 462-6831 x 23 or croberts@empirejustice.org.

Regulatory Roundup

By Susan C. Antos

Regulatory Round Up reports on administrative rule making of interest to public benefits specialists. The rulemaking described below appeared in the New York State Register from October 17, 2007 to December 19, 2007. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (cwiggins@empirejustice.org). Any comments submitted by Empire Justice Center on proposed regulations, are available at www.empirejustice.org. From the "Issue Areas" bar, click on the "Public Benefits" section, go to "Cash Assistance" and then "Comments on Regulations."

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
10/24/07	12/23/07	352.8 352.23(d) 352.29(h) 387.17(d)	Changes Regulatory References from "Temporary Assistance" to "Public Assistance:" This proposed regulation will replace references to "temporary assistance" with "public assistance" to conform to the Social Services Law.
10/24/07	12/23/07	415.9(i)	Market Rates for Subsidized Child Care: This proposed rule, which is also being promulgated on an emergency basis, provides updated rates for the payment of child care services received by low income families. These rates vary by geographic area, age of the child and type of care.
10/17/07	12/01/07	347.10	Child Support Standards Chart: The Office of Temporary and Disability Assistance has revised the child support standards chart to reflect the revised poverty income guidelines as reported by the federal Department of Health and Human Services. For calendar year 2007, the self support reserve is \$13,738. As a general rule, child support respondents with incomes below the self-support reserve will only be required to pay \$50 per month in child support, or \$25 if below the poverty level.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
10/18/07	11/07/07	11 N.Y.C.R.R. 362-2.7(d), (e), (f) and 362-2.8	Healthy New York Program: This rule requires the Healthy New York Program to offer a high deductible health plan (at least \$1,150 for individuals and \$2,300 for family coverage), thereby creating an insurance product compatible with health savings accounts, which allow users to deposit pre-tax money into an account and withdraw the money tax free for medical expenses. The rule also requires the Healthy New York plans offer prostate cancer screening, limited home health visits (40 per year) and post hospital or surgery physical therapy visits (30 per year), benefits not covered previously.

Emergency Rule Making

Date of Filing	Rules Expire On	Regulations Affected	Summary
10/30/07	1/27/08	9 N.Y.C.R.R. 6174	Confirmation of a Victim of Human Trafficking: This rule sets forth the process to allow a victim of human trafficking to receive federal, state and local benefits and services if they have been "confirmed" as a human trafficking victim by the Division of Criminal Justice Services (DCJS) or a district attorney's office. The Human Trafficking director of DCJS will consult with the Office of Temporary and Disability Assistance. The regulation also sets forth the appeal procedures at DCJS. In 2007, the United States Department of State estimated that approximately 14,500 to 17,500 people were trafficked into the United States each year for forced labor, involuntary domestic servitude or sexual exploitation. New York State is a frequent hub of such activity.

Are Bank Freezes Thawing?

By Kate Callery & Louise Tarantino



Seizures of exempt funds in bank accounts continue to be in the news. Both Tanya Douglas and Johnson Tyler of South Brooklyn Legal Services appeared on the CBS eve-

ning news last month, recounting the plights of clients who have had their accounts illegally frozen. See the May 2007 edition of the *Disability Law News* for more background on bank accounts and exempt funds in the news. While possible legislative fixes in response to the publicity slowly wend their way through various state and federal legislatures, a bevy of federal agencies has banded together to “protect” the accounts of bank depositors funded by exempt federal benefits.

The Department of Treasury Office of the Comptroller of the Currency and Office of Thrift Supervision, The Federal Reserve System, The FDIC and The National Credit Union Administration have promulgated “Proposed Guidance on Garnishment of Exempt Federal Benefit Funds.” See 72 Fed. Reg. 55273-55276 (September 28, 2007).

According to the announcement, “This proposed guidance has been developed to encourage financial institutions to have policies and procedures in place with respect to handling garnishment orders and sets forth best practices, including procedures designed to expedite notice to the consumer of the garnishment process and release of funds to the consumer as quickly as possible...The agencies have developed this proposed guidance to encourage financial institutions to minimize the hardships encountered by federal benefit funds recipients and to do so while remaining in compliance with applicable law...”

Advocates have questioned the efficacy of this “guidance,” which “encourages,” rather than requires financial institutions to have policies and procedures in place. It seems to be a way to placate lawmakers, while adding little of substance. Comments are due on or before November 27, 2007.

In the meantime, Johnson Tyler, expert defroster of frozen accounts, reports that one more bank has been added to his list of institutions that will not honor re-

straints if there is no comingling. According to Johnson, Citibank looks back two months to determine comingling. Johnson has also learned that that any direct deposit of Social Security payments received by Citibank after a restraint is placed is available to the account holder and not to the creditor. A caveat, however, seems to be that the debtor must request this, and may have to go through the chain of command to have the request honored.

Johnson previously reported that Banco Popular, New York Community Bank and Chase will also honor not restraints if the money in the account is clearly exempt under federal law. He believes, however, that they will freeze accounts that appear to contain comingled funds and, unlike Citibank, will not protect the subsequent direct deposit check.

Samples of letters of letters that Johnson has successfully used to “unfreeze” accounts are available as by contacting mpeterson@empirejustice.org. Just ask for DAP# 413.

SSA Announces 2008 Cost of Living Increase

By Kate Callery & Louise Tarantino

The Social Security Administration (SSA) has announced that the cost-of-living increase for Social Security benefits and for the SSI Federal Benefit Rate (FBR) for 2008 will be 2.3%. This will raise the SSI FBR from \$623 to \$637 per month for an individual and from \$934 to \$956 for an eligible couple.

For retirees, a portion of the increase in monthly benefits will go to pay the increase in the Medicare Part B premium, which will be \$96.40 per month for those individuals earning no more than \$82,000 per year.

Other changes for 2008 include an increase in the earnings required for a quarter of coverage to \$1,050 per month, and an increase in the substantial gainful activity (SGA) level to \$940 per month for disabled persons and \$1,570 for blind disabled persons.

SSA has a good fact sheet comparing 2007 with 2008 numbers at its website: <http://www.ssa.gov/pressoffice/factsheets/colafacts2008.pdf>. Additionally, an updated SSI Benefit chart for New York is available at Empire Justice Center's website, www.empirejustice.org.



STAFF

Albany Office

119 Washington Ave., Albany, NY 12210 ♦ (518) 462-6831 ♦ Fax: (518) 462-6687
Email: Nkrupski@empirejustice.org

Anne Erickson, President & CEO

Susan C. Antos, Attorney
Public Benefits & Child Care

Kristin Brown
Director of Legislative Advocacy

Dishpaul Dhuga, J.D.
Immigration & Domestic Violence

Kirsten Keefe, Attorney
Consumer

Nancy C. Krupski
Manager of Information Technology

Cathy Roberts, Sr. Paralegal
Health

Louise M. Tarantino, Attorney
Disability

Barbara Weiner, Attorney
Food Stamps, Immigration Benefits

Connie Wiggins,
Administrative Assistant

Dorey Roland-Savio,
Administrative Assistant

Saima Akhtar, Law Intern
Benefits Law Database

Jessica Ansert, Law Intern
Fair Hearing Bank

Rochester Office

1 West Main Street, Suite 200, Rochester, NY 14614 ♦ (585) 454-4060 ♦ (585) 454-4019
Email: mpeterson@empirejustice.org

Bryan D. Hetherington, Chief Counsel

Allison Bates, Hannah S. Cohn Equal Justice
Fellow

Catherine M. Callery, Attorney
Disability Benefits

Rebecca Case Grammatico, Attorney
Consumer

Gladys Castro
Administrative Assistant

Doris Cortes, Paralegal
Disability Benefits

Katherine Courtney, Attorney
Disability Benefits

Trilby de Jung, Attorney
Health

Peter Dellinger, Attorney
Consumer Law, Civil Rights

Rita Eygabroad, C.A.S.H

Rebecah Corcoran, Finance Assistant
Jonathan Feldman, Attorney
Education, Civil Rights

LJ Fisher, Attorney
Disability Benefits

Jane Gabriele, Attorney
Education

Sarah Gilmour, Attorney
Disability & Civil Rights, Health Care,
Housing

Angela Hale, Paralegal,
Disability Benefits

Michael Hanley, Attorney
Housing

Tina Harper, Paralegal
Disability Benefits

Tim Holler
Grants and Office Administrator

Kristi Hughes, Director
Development & Administration

Candice Lucas, C.A.S.H
Ruhi Maker, Attorney
Community Reinvestment, Consumer

Michael Mule, Attorney
Civil Rights, Disability Rights, Language
Access

Michelle Peterson
Training & Publications Coordinator

Brandi Rauber, Paralegal
Consumer

Tania Santiago
Administrative Secretary

Becky Schroeder
Director of Finance & Human Resources

Amy Schwartz, Attorney
Domestic Violence

Barbara van Kerkhove, PhD
Community Reinvestment

Warren Wightman
Administrative Secretary

White Plains Office

Hudson Valley Poverty Law Center
80 North Broadway, White Plains, NY 10603 ♦ (914) 422-4329 ♦ Fax: (914) 422-4391
Email: Rcisneros@law.pace.edu

Linda Bennett-Rodriguez, Attorney
Immigration

Rob Cisneros, Attorney
Immigration

Long Island Office

Empire Justice Center at the Public Advocacy Center, Touro Law School
225 Eastview Drive, Room 222, Central Islip, NY 11722

Don Friedman, Managing Attorney
(631) 650-2306

Linda Hassberg, Attorney
(631) 650-2305