GREATER UPSTATE LAW PROJECT Vol. 2003 No. 5 October 2003

Legal Services Journal

Food Stamp Overpayment Case Settled

By Barbara Weiner

On September 4, 2003, Judge Joan M. Azrack, Magistrate, Federal District Court of New York, Eastern District, approved the settlement reached by the parties in Thompson v. Wing, a case concerning the State's implementation of the Treasury Offset Program (TOP) to collect food stamp overpayment debts. The settlement was approved at the close of a fairness hearing attended by well over 100 members of the Thompson class. They came to learn more about the lawsuit and how it affected them. Many spoke eloquently about the financial struggles they faced as low income individuals and families. They told Judge Azrack how distressing it had been when a much awaited tax refund was suddenly taken to repay the government for a debt they often did not believe they owed. Furthermore, in many cases, notice from the Treasury Department that their tax refund had been intercepted by New York State was the first they had heard about the alleged food stamp debt. A substantial number of those present at the hearing were low income workers who had not received food stamp benefits for years at the point that their federal tax refund was suddenly taken.

Thompson v. Wing, 98-CV-7628, filed in December of 1998, was brought as a class action, both on behalf of those who had their federal tax refund taken in the past to repay an overpayment of food stamp benefits and those who were at risk of having a refund intercepted in the future. The lawsuit challenged the state's failure to ensure that the alleged debtors had been provided with all the due process rights to which they were entitled, including notice and an opportunity to be heard, before their tax refunds were taken. The case was brought by Jane Greengold Stevens, who was at the time an attorney with the Social Justice Project at Brooklyn Law School and who now works at the New York Legal Assistance Group (NYLAG); Barbara Weiner, a staff attorney of GULP, and Connie Carden, also with NYLAG.

(Continued on page 2)

INSIDE THIS ISSUE:

Thompson Settlement—continued

(Continued from page 1)

The Treasury Offset Program

The Treasury Offset Program (TOP) permits the federal government to recover on a variety of types of debts by offsetting the debt against other federal payments, such as federal tax refunds, which would otherwise be due the debtor. However, before a food stamp overpayment can be certified for offset, federal regulations provide that the claim must be "past due and legally enforceable", or, in the current language of the federal food stamp regulations, "delinquent."[*See 7 CFR § 273.18(n).*]

In 1996, when the New York State Department of Social Services (now the Office of Temporary and Disability Assistance or OTDA) began using the federal offset program, it had no system in place to ensure that, before the offset of the federal tax refund took place, the debt had been "properly established" by the local social services district. The federal food stamp rules require that before a food stamp agency can collect an alleged food stamp overpayment through TOP or any other method, the debtor must be provided with written notice that sets forth the amount claimed to be an overpayment, the inclusive dates of the overpayment and the basis for the agency's assertion that the food stamp recipient was not entitled to these benefits. In addition, the notice must advise the debtor that he or she can challenge the claim at a fair hearing. If a hearing is requested, the agency cannot certify the debt for offset until the case is decided. [*See 7 CFR § 273.18(e).*]

New York's Implementation of TOP

Not only had New York certified debts which had not been properly established at the local district level, the state also failed to adhere to certain requirements governing the TOP certification process itself. For example, claims were certified even though the individual was in receipt of food stamp benefits at the time the debt was certified for collection through the offset program. Food stamp regulations require that overpayment claims against food stamp recipients be recovered through recoupment.

Some debts were more than 10 years old at the time of certification of the claim for offset, a violation of TOP rules. Some individuals had their federal tax refunds taken while they were in bankruptcy proceedings, also prohibited. In addition, the plaintiffs argued that the pre-offset notice sent by OTDA to debtors against whom claims were to be certified for offset failed to provide enough information about the claim to enable the debtor to identify the claim and determine whether or not it met the offset requirements. This was especially true for many of the claims that OTDA certified for offset during the first years of the program, which often were very old claims. (During the settlement discussions, OTDA and USDA reached an agreement to suspend collection action on many of these old claims. See *Food Stamp Program Updates,* LSJ, August 2003, page 20.) In addition, the pre-offset notice did not adequately inform the alleged debtor of the circumstances under which offset should not occur, depriving debtors of the very information they needed to determine whether they should appeal the offset.

The Thompson Settlement

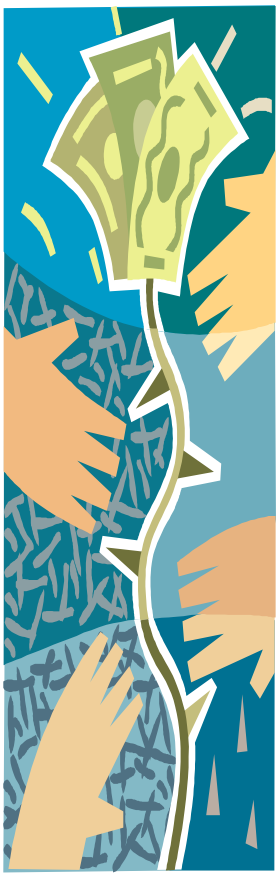
In 1999, while the Thompson parties were in settlement discussions, it was agreed that OTDA would stop collecting TOP food stamp overpayment claims while settlement discussions were in progress. Now that a settlement has been reached and approved by the Court, it

(Continued on page 3)

Thompson Settlement—continued

(Continued from page 2)

is anticipated that TOP will again be utilized by the state to collect food stamp overpayment claims. Because the settlement was approved in early September, the program will probably not get in full gear until next year, for interception of tax refunds for food stamp overpayment claims in the year 2005 (for tax year 2004). Several provisions of the settlement affect the claims collection and tracking system itself. For example, the claims accounting and tracking system (known as CAMS) has been modified to require the local districts to insert the date that the initial notice of food stamp overpayment was sent. This notice must provide all the information about the claim and the debtor's right to a fair hearing. Entering this information into the system will help to exclude claims from certification to TOP which have not been properly established by the local district.



A pre-offset notice has been agreed upon by the parties that will provide debtors with more information about the claim OTDA intends to submit to TOP, to enable the debtor to better identify the overpayment(s) OTDA is seeking to recover through offset. In addition, the notice provides an explanation of the available grounds for challenging OTDA's decision to certify the claim for offset.

Local districts must also insert the "date of discovery" of the overpayment into the claims tracking system, to ensure that the claim does not cover a period of overpayment in excess of that allowed by the regulations (one year back from the date of discovery for Inadvertent Household or Agency Error claims; six years for Intentional Program Violation claims).

Relief for Debtors Who Had Their Tax Refunds Intercepted

Certain individuals who had their tax refunds taken during the period the program was in operation will get their refunds returned without having to ask for a review. They include all those individuals who are revealed in the records of OTDA to have had the claim against them certified and their tax refund taken:

a.) while they were in receipt of food stamp benefit, or;

b.) were making voluntary payments on the claim, or

c.) for a claim that was more than 9 years old at the time it was certified, or

d.) for a claim based on a period of overpayment that exceeded one year from the date of discovery (in these cases, the State is obligated only to return that portion of the refund that represents the part of the claim exceeding the allowable time limits).

Of the approximately 25,000 people who had their federal tax refunds intercepted during the years OTDA used TOP to recover food stamp overpayment claims, the State estimates that about 4,000 will have their refunds returned automatically. This amounts to the return of

(Continued on page 4)

Thompson Settlement—continued

(Continued from page 3)

about $2.2 million to low income households. The remaining 20,000 or so individuals who had their refunds taken will receive a notice from OTDA with as much particular information about the claim for which their refund was offset as is available from CAMS; will clearly set out the grounds under which the offset may not have been correct and will provide an opportunity to the debtor to ask for a review. This notice will be accompanied by a letter from class counsel providing some background information about the lawsuit and encouraging people to as for a review.

If an individual requests a review, OTDA will direct the local district to examine his or her file to see if the claim should not have been recovered through offset. If the local district finds in its own file information that the debtor or the claim falls into one of the categories outlined above, or if the district finds no evidence in the file that the debtor was sent proper notice, with an opportunity for fair hearing, before the claim was submitted to TOP for offset, the refund will be returned.

Getting the Word Out

Most of the 4,000 individuals whose previously intercepted tax refunds will be returned automatically have already received notice from OTDA advising them of this and asking them to confirm their address and Social Security number. Everyone else whose tax refunds were intercepted will be sent a notice that provides some information about the overpayment claim(s) for which their tax refund was taken and setting out the circumstances under which a claim should not have been referred for offset. The notice will include an attachment that allows the recipient to check off a request for a review and send it back to OTDA in a stamped, self-addressed envelope. People whose tax refunds were intercepted will be receiving these notices over the coming year.

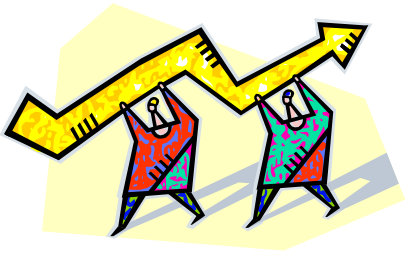
Clients may be confused about why they are getting these notices and what to do about them. The offices of plaintiffs' counsel were overwhelmed with thousands of calls from people after OTDA sent out the fairness notice, informing people about the proposed settlement provisions and the hearing scheduled for September 4th. Although we don't anticipate the next series of notices to elicit quite such a response, in order to assist legal services programs and other community advocates to answer the questions they may be getting about the Thompson lawsuit, we have developed a "Question and Answer" informational memo that can be given to clients. It is available at our website a http://gulpny.org/Public%20Benefits/Food%20Stamps/ThompsonvWing/ClientInformational.htm. You can also call the Albany GULP office at (518) 462-6831 or (800) 635-0355 for hard copies for those who don't have access to the Internet.

New Census Data Shows Increase in Poverty Children, Minorities, Married Couples Hard Hit

By Anne Erickson

The latest data from the US Census show 34.6 million people living in poverty in the United States in 2002, up from 32.9 million in 2001. The number of those living in poverty increased by 1.7 million people; the poverty rate rose from 11.7% to 12.1%.

The Census report offers mostly national data, but it does break down average poverty rates over two- and three-year periods for the individual states. The average poverty rate in New York rose slightly, from 14.0% (2000-2001) to 14.1% (2001-2002). Only ten states had higher 3-year (2000-2002) average poverty rates than New York: Alabama, Arkansas, the District of Columbia, Louisiana, Mississippi, New Mexico, Oklahoma, South Carolina, Tennessee, Texas and West Virginia. Among our neighboring states, Connecticut's 2001-2002 average poverty rate of 7.8%, New Jersey's rate of 8%, and Massachusetts' rate of 9.5% were all significantly lower than New York's poverty rate of 14.1%.



Poverty Among Children in America

Shamefully, the poverty rate remained higher among children than adults in the United States under the age of 18. While the Census Bureau claims the poverty rate for children was "unchanged," the data indicates an increase. In 2002, 16.7% of all children were living in poverty, up from 16.3% in 2001. Over 12 million children in this country now live in households with incomes at or below the poverty line. In just one year, the number of children living in poverty increased by 400,000. As the Census notes, "children represented a disproportionate share of the people in poverty (35.1%) as they were only one-fourth (25.5%) of the total population."

It is the youngest children that are hit hardest. The poverty rate among related children under the age of six rose from 18.2% in 2001 to 18.5% in 2002. Of the 400,000 newly poor children, over 100,000 of them are under the age of six.

Poverty Among Families

"The poverty rate and number of families in poverty increased to 9.6 percent, or 7.2 million in 2002, up from 9.2 percent or 6.8 million in 2001," according to the Census, which found that "both married-couple families and families with a female householder and no husband present experienced an increase" in poverty. While the poverty rate increased slightly among female householders, from 26.4% to 26.5%, the poverty rate among married couples rose more dramatically, increasing from 4.9% in 2001 to 5.3% in 2002.

In looking at the number of families in poverty, the Census found 3.5 million female-headed households and 2.7 million married families in poverty in 2001. In 2002, approximately 3.6 million female-headed households and over 3 million married-couple households were living in poverty. Almost 300,000 married couples joined the ranks of the poor between 2001 and 2002.

(Continued on page 6)

Census Data Shows Increase in Poverty—continued

(Continued from page 5)

Minorities Hard Hit

Race and ethnicity continue to be defining factors when it comes in poverty. For White/Non-Hispanic children, the poverty rate dropped slightly, from 9.5% in 2001 to 9.4% in 2002. The poverty rate for White/Non-Hispanics of all ages was 8%. While the number of White/Non-Hispanic children in poverty (4.1 million) was more than the number of Black children in poverty (3.6 million) or the number of Hispanic children in poverty (3.8 million), the rate of poverty among Black and Hispanic children was over three times that of White children. Among Blacks of all ages, the poverty rate was between 23.9% and 24.1% (with new categories of Race within the Census to allow multiple racial responses). The poverty rate for Black children was the highest of all age/race groups, increasing from 30.2% in 2001 to as high as 32.3% in 2002. The poverty rate among Hispanic children rose from 28% to 28.6%.

Poverty Among the Elderly

Among the elderly (65 years old and older), the poverty rate remained unchanged at 10.4%, but as their ranks continue to grow, the number of seniors living in poverty increased from 3.4 million to 3.6 million between 2001 and 2002.

Poverty Despite Work

While those who work have a lower poverty rate than those who are not in the labor force, working is not an absolute guard against poverty. Close to 40% of those in poverty held either a full or part-time job. Indeed, the Census found that "among the working-age poverty population, 11.2 percent held full-time year-round jobs in 2002." In other words, 2.6 million people found themselves living in poverty in 2002, despite working full time, all year. Another 6.3 million part-time workers were in poverty.

Sources: Current Population Reports, U.S. Census Bureau, *Poverty in the United States: 2002,* September 2003.

Number of Uninsured on the Rise New York Holds Steady at 15.8% Still Above the National Average of 15.2%

By Anne Erickson

United States Census data released at the end of September show 43.6 million individuals without health insurance nationally, an increase of 2.4 million people over the previous year. The percentage of those without health coverage stood at 15.2% up from 14.6% in 2001.

New York had a three-year average of 15.8% of its population living without health insurance. Only 11 states had uninsured rates that were as high, or higher than New York's. Texas had the highest rate of uninsured at 24.1%; Rhode Island had the lowest at 8.3%.

Hispanics were more than twice as likely to be uninsured, with an uninsured rate of 32.4%. Over 20% of African-Americans were uninsured in 2002, while fewer than 11% (10.7%) of non-Hispanic whites were without health coverage.

According to the Center on Budget and Policy Priorities, "the primary factor behind the increase in the numbers of uninsured was an erosion in both adults' and children's private health insurance coverage, driven by the weak economy, rising unemployment and the increasing cost of health care." Nationally, 61.3% of all residents of the United States were covered by employment-based health insurance in 2002. This was down from the 62.6% in 2001. In fact, the Urban Institute found that the uninsured rate among non-elderly adults held steady at 17%, with employer-based coverage falling from 72.2% in 2001 to 70.5% in 2002. Publicly funded coverage rose from 4.7% to 5.7% guarding against even greater erosions in health coverage.

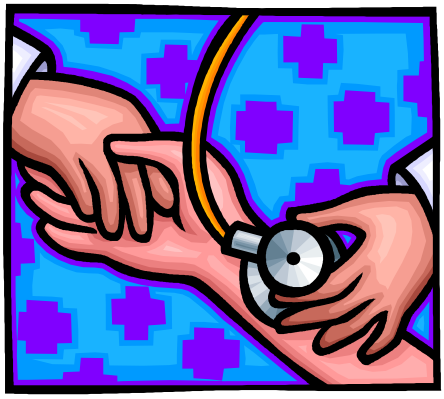
In New York, Medicaid covered over 1.3 million children (1,325,666) in calendar year 2001. By the end of calendar year 2002, almost 1.5 million children (1,480,134) were covered by Medicaid. In 2001, over 614,000 non-disabled adults received their health coverage through Medicaid. In 2002, that number had risen to over 862,000. (These numbers include Child Health Plus enrollment, but they do not include those enrolled in Family Health Plus.)

Had Medicaid not been in place, over 154,000 children and 248,000 adults in New York would have likely joined the ranks of the uninsured.

Notes:

Center on Budget and Policy Priorities, *Number of Americans Without Health Insurance Rose in 2002*, September 2003

Urban Institute, *Gains in Public Health Insurance Offset Reductions in Employer Coverage Among Adults*, September 2003.



Cuts in VAWA Funding Slam Legal Services Programs Throughout New York State

By Amy Schwartz
Domestic Violence Legal Program Coordinator

Although details are still emerging, it appears as if legal services organizations throughout New York have been hit hard by recent funding decisions made by the Department of Justice under the federal Legal Assistance to Victims Grants Program. Applications for this most recent round of funding were submitted in January 2003 and, in mid-September, the Department of Justice began their award announcements. For many previous grantees, these announcements came long after funding under the prior 18 month grant period had expired. As of the date of this article, a comprehensive national list of programs and organizations who did receive funding has not yet been made available to the public on the Violence Against Women Office website (available at http://www.ojp.usdoj.gov/vawo/stategrants.htm).

However, in New York State at least eight organizations providing civil legal services to domestic violence clients have reported denials for continued funding. Geographically, it appears as if the most dramatic cuts have taken place in the communities outside of New York City, leaving many of Upstate's battered clients with no or limited access to civil legal assistance.

Organizations who have reportedly been affected thus far include:

- *Southern Tier Legal Services* (providing services in Allegany, Cattaraugus, Chautauqua, and Steuben counties),
- *The Legal Aid Society of Rochester* in partnership with Legal Assistance of the Finger Lakes, Monroe County Legal Assistance Corporation, Oak Orchard Legal Services, Greater Upstate Law Project, and Volunteer Legal Services Project (providing services in Monroe, Orleans, Genesee, Wyoming, Seneca, Ontario, Livingston, and Wayne Counties)
- *The Legal Aid Society of Northeastern New York* (providing services in Albany, Schenectady, Rensselaer, Greene, Columbia, Washington, Warren, and Saratoga counties)
- *Niagara County Legal Services* (providing services in Niagara county)
- *Legal Aid Society of Mid New York* (providing services in Delaware, Otsego, Schoharie, Montgomery, Fulton, Madison, Herkimer, Oneida, and Lewis counties)
- *Legal Services of the Hudson Valley* (providing services in Ulster, Orange and Sullivan counties)
- *South Brooklyn Legal Services* (providing services in the borough of Brooklyn)
- *Albany Law School Family Violence Clinic* (providing services in the Capital District region)

The Legal Assistance for Victims Grant Program was designed to strengthen and increase the availability of legal assistance for victims of domestic violence, sexual assault, and stalking by providing victims with representation and legal advocacy legal matters arising as a consequence of the abuse or violence. To that end, this funding allowed for the provision of civil legal assistance in such cases as family law (i.e. divorce, custody/visitation, child support, and family offense matters), immigration, housing, administrative agency proceedings, and other similar civil proceedings.

It remains to be seen what service provision to New York's victims of domestic violence, stalking, and sexual assault will look like in the aftermath of these cuts. Some communities have the benefit of several organizations who provide legal assistance and advocacy to these clients via *pro bono* legal services programs and domestic violence shelter-based legal services. Other legal services organizations have different funding that will allow them to continue at least some service provision to battered clients in spite of these drastic cuts, while others are struggling to determine whether this news will result in both programming and staffing losses.

The new RFP for funding is expected to be out sometime in early 2004.

ADMINISTRATIVE HEARING SKILLS TRAINING

Sponsored by the New York Legal Services Training, Leadership and Diversity Workgroup

Dec. 8 - 10, 2003
Binghamton Regency Hotel
Binghamton, NY

The *New York Legal Services Training, Leadership and Diversity Workgroup* is presenting a three-day Administrative Hearing Training December 8-10, 2003 in Binghamton.

Training Overview: Designed for newer attorneys and paralegals, as well as for more experienced advocates who feel that they could benefit from a basic training on administrative hearing skills. The training provides participants with an opportunity to build and reinforce skills to prepare for and present a case at an administrative hearing. The training consists of large group presentations and small group practice sessions, and includes a mock administrative hearing.

Topics Include: Legal analysis and creating a theory of the case; case development through discovery and further analysis; proof of facts and evidentiary issues; preparing a case for hearing, including witness preparation; and presenting a case at hearing, including opening/closing statements and direct/cross examination of witnesses. In addition to learning skills common to administrative practice generally, participants will have opportunities to meet with experts in an individual substantive area to discuss issues particular to their area of expertise. The Greater Upstate Law Project, Inc., a certified CLE provider, administers the training. Twelve CLE credits will be awarded.

Registration information: The registration fee for the training is $325, which includes all meals and training materials. Hotel reservations must be made separately and are the responsibility of the registrant. Please see the next page for additional registration information. Please return the attached registration form along with a check by Nov. 8, 2003. Please note that we expect this program to be fully subscribed. In the event of oversubscription, priority will be given to legal services staff on a first come, first served basis.

Questions? Please e-mail Michelle VanOrman at mvanorman@wnylc.com.
or phone (585) 295-5729.

Administrative Hearing Skills Training
Registration

Name:_____

Program:_____

Work Address (inc. city, state, zip):_____

_____

Phone:_____ Email:_____

Length of legal/paralegal practice:_____
Length of employment in legal services:_____

Primary substantive area(s) of administrative practice:_____

Please indicate any special needs (e.g., dietary, accessibility):_____

Registration Fee: Legal assistance program staff: $325
(includes all meals and course materials).

All others: Registration fee is $525.00. Registrations from non-legal assistance programs will be accepted on a space-available, first-come, first-served basis. Priority will be given to registrants from legal services programs until Nov. 1, 2003.

Hotel Information: Hotel reservations must be made separately with the Binghamton Regency Hotel. The GULP rate is $66.00 per night. Please contact the hotel at 607-722-7575.

Please submit your registration form, together with a check payable to Greater Upstate Law Project, Inc. A check must accompany the form(s) or the registration will not be processed. Registration deadline: November 8, 2003.

Send completed forms and checks to:

Michelle VanOrman
Greater Upstate Law Project, Inc.
80 St. Paul Street, Suite 660
Rochester, NY 14604

Refund policy: All registration fees are final. There will be no refunds unless the training is fully subscribed and the cancelled participant can be replaced by a participant from the waiting list. Thank you for your cooperation.

GULP Urges Caution When Encouraging Marriage

By Kristin Brown

In August and early September the New York State Office of Temporary and Disability Assistance (OTDA) conducted a series of round table forums to solicit ideas about how to meet the expected federal requirement for states to establish "marriage initiatives".

The Bush Administration has made the creation of marriage initiatives in each state a priority within the reauthorization of the Temporary Assistance to Needy Families (TANF) program. In fact, the current version of the TANF reauthorization bill includes $500 million over five years for the development of these programs. Given the dramatic increase in poverty among married couples reported in the story on census data in this issue of the Legal Services Journal, the connection the Administration has made between marriage and economic stability is clearly questionable. Advocates have worked hard on the federal level to remove the marriage initiative language from the TANF reauthorization bill, however it now looks like those efforts will be unsuccessful.

Thus, while GULP does not consider encouraging couples to marry to be an appropriate activity for the government to undertake, we do feel that it is critical for advocates at the state and local levels to be at the table when these programs are developed.

To this end, GULP worked closely with the NYS Coalition Against Domestic violence to develop discussion points for advocates and to encourage attendance at the forums the OTDA held in Rochester Albany and New York City. We were very pleased to see so many concerned individuals attend, provide input and express their concerns in a constructive manner.

GULP's top recommendations include:

- Don't begin the development of marriage initiative programs until the federal government requires the state to do so.

- Assemble a statewide commission or task force that would include representatives of the advocacy community, consumers, relevant state agencies, the legislature and other appropriate players. The commission would be charged with reviewing marriage initiative programs that other states have developed, looking at current research on marriage and the family, and making recommendations to the state on what type of programming New York should undertake. As many as ten other states have already successfully created such commissions or held educational conferences to collect and analyze data and make recommendations for action. By creating such a commission, the state will be able to take action, while at the same time waiting for definitive outcomes from marriage initiatives that have already been undertaken in other states to provide guidance on what programs may work.

- Establish a panel to review existing state laws, regulations, and policies to identify any current practices that create a disincentive to marriage. The panel should include not only state agency representatives, but also members of the legal services, domestic violence and other com-

(Continued on page 12)

What's New in Welfare

By Susan Antos

New Shelter Allowance: The new shelter allowances go into effect on November 1, 2003. There is a link to them on the OTDA web site at: http://www.otda.state.ny.us/default.htm. For your budgeting pleasure, when calculating underpayments and correcting alleged retroactive overpayments, the old regulation can be found in the case assistance section under the public benefits button at the GULP web site at: http://www.gulpny.org/Web%20Templates/Public_Benefits/CashAssistance.htm.

New Commissioner: The new acting Commissioner of the Office of Temporary and Disability Assistance is Rober Doar, who replaces Brian Wing. Mr. Doar has been with OTDA since 1995, most recently as Executive Deputy Commissioner and before that as Deputy Commissioner of Child Support.

GULP Urges Caution—continued

(Continued from page 11)

munities. Once the panel has made recommendations, the state should take action to address the problems as appropriate. GULP has already identified a number of laws that could be changed that would address existing disincentives (for more information see www.gulpny.org/Public%20Benefits/marriage/marriagelinks.htm).

- Fund civil legal services programs to work with families to remove legal barriers to marriage. For example, helping to dissolve a previous marriage so that a couple can marry or pursue child support to increase financial stability.

Any action the state takes to address the anticipated federal requirement to encourage couples to marry must be developed in conjunction with the NYS Office of the Prevention of Domestic Violence and the NYS Coalition Against Domestic Violence to make certain that every precaution is taken to ensure women and their children are not placed at risk by participating in such programs.

GULP will continue to monitor this issue as TANF reauthorization moves forward. Please contact Kristin Brown, (kbrown@wnylc.com) if you have any questions.

Undocumented Farmworkers May Get Relief and Representation

On Tuesday, September 23, 2003, Sen. Edward Kennedy (D.-Mass.), Rep. Howard, Berman (D.-Calif.), Sen. Larry Craig (R.-Idaho), Rep. Chris Cannon (R.-Utah), Rep. Ciro Rodriguez (D-Tex. and chair of the Congressional Hispanic Caucus) announced at a press conference their introduction of legislation containing a compromise among them and between the United Farm Workers of America and major agribusiness employer organizations.

The bill provides that farmworkers who become temporary residents under the program should be treated for all purposes other than immigration law as permanent resident aliens, making them eligible for federally-funded legal services. Especially important is a separate provision that authorizes LSC-funded entities to provide "legal assistance directly related to an application for adjustment of status. . . " Consequently, many undocumented farmworkers will be eligible for assistance from LSC-funded entities when initially applying to become temporary residents and through later stages of the process.

The compromise contains two major parts: (1) a legalization program that allows undocumented farmworkers who have been working in American agriculture to apply for temporary immigration status and gain permanent immigration status upon completing a multi-year agricultural work requirement, with the right of their spouses and children to become immigrants once the farmworker becomes a permanent resident immigrant, and (2) revisions to the H-2A agricultural guest worker program that streamline the process by reducing employer's paperwork and time frames for H-2A applications, revise the wage-setting process, create incentives for employers to negotiate in good faith with labor unions, and give the guest workers the right to enforce their H-2A rights in federal court. FJF will be strongly supporting this compromise because, despite significant concessions on H-2A issues, there are advances under the H-2A program and the compromise would allow undocumented farmworkers to come out of the shadows and gain the freedom to demand better wages and working conditions.

The press conference also included Arturo Rodriguez, President of the United Farm Workers, Cecilia Munoz, Vice President of the National Council of La Raza, Bob Vice, former head of the California Farm Bureau and co-chair of a national agribusiness coalition on immigration and labor, as well as others. All agreed that the compromise resulted from arduous negotiations over controversial issues and that it needs to be passed as-is (without amendments), first by the Senate and then by the House, and then signed by the President. The goal is enact it during the next two months.

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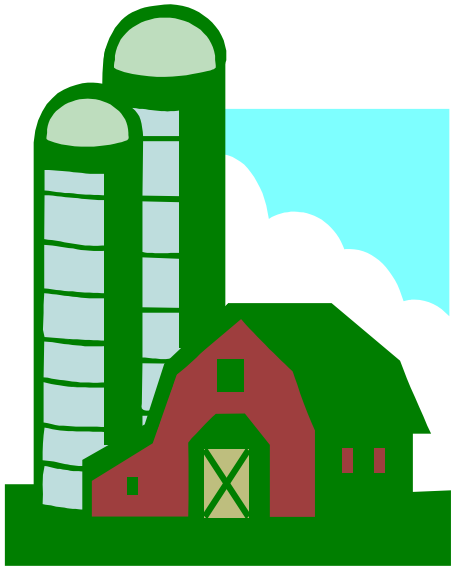


Second Circuit Approves Fibromyalgia Case

By Kate Callery & Louise Tarantino

Continuing its recent foray into the disability world after a long hiatus, in July the Second Circuit issued a favorable decision in a fibromyalgia case - with an opinion that will undoubtedly be cited by advocates in future fibromyalgia, treating physician, pain and credibility cases, just to name a few!

In *Green - Younger v. Barnhart*, 335 F.3d 99 (2d. Cir. 2003), the Court of Appeals found that the ALJ had erred as a matter of law by requiring the claimant to produce objective medical evidence to support her claim. The Court also found that SSA erred in failing to accord controlling weight to the treating doctor's opinions, when the doctor had diagnosed fibromyalgia based on currently acceptable diagnostic techniques.

This case involved volumes of medical evidence and findings, a long history of attempted treatments (more than 18 medications tried in a year), pain management programs, corroborating diagnoses, and a treating doctor who tried everything because the claimant really wanted to go back to work. The voluminous medical record may account in part for the strong points made by the Court.

The ALJ also had rejected the treating doctor's opinion because he had allegedly relied on the claimant's subjective complaints. Citing *Flanery v. Chater*, 112 F.3d 346, 350 (8th Cir. 1997), the Circuit stated expressly, however, that a patient's subjective complaints, or history, is an essential diagnostic tool; a treating doctor's reliance on this evidence does not undermine the value of that doctor's opinion. 335 F.3d at 107 (quotes omitted). *(Helpful Hint: Use this point in other cases where subjective complaints are part of the diagnostic process, such as mental impairments.)*

Further, the Circuit reminds us that objective findings are not required in order to find that a claimant is disabled. 335 F.3d at 108 [citing *Donato v. Sec'y of Health and Human Services*, 721 F.2d 414, 418-419 (2d Cir. 1983); *Cruz v. Sullivan*, 912 F.2d 8, 12 (2d Cir. 1990); *Eiden v. Sec'y of Health, Educ. and Welfare*, 616 F.2d 63,65 (2d Cir. 1980); *Cutler v. Weinberger*, 516 F.2d 1282, 1286-87 (2d Cir. 1975); *Cline v. Sullivan*, 939 F.2d 560, 566 (8th Cir. 1991)].

This holding is very important in fibromyagia cases, since fibromyalgia is diagnosed in part by a set of clinical signs and symptoms but also by ruling out other conditions. The Court, referring to its earlier fibromyalgia decision in *Lisa v. Sec'y of Health and Human Services,* 940 F.2d 40, 44-45 (2d Cir. 1990), noted that "fibromylagia is a disabling impairment and 'there are not objective tests which can conclusively confirm the disease." 335 F.3d at 108 (*citations omitted).*

The Court gave short shrift to the other reports in the record that were inconsistent with the treating doctor's reports, noting that none of them constituted substantial evidence to support the conclusion that the claimant could work. 335 F.3d at 107-108. Again, the Circuit injects a welcome note of common sense into the scheme of weighing the evidence. The Court looked at the physical therapist's work fitness report prepared for the claimant's employer, which was a one-shot deal, and noted that the evaluating therapist herself qualified her results to say that they needed further verification - and, indeed, contrary findings resulted from the subsequent evaluation.

Next, the Court looked at the two CE re-

(Continued on page 20)

The Rocky Road To State Medicaid Reform: An Update On The Senate Roundtables

By Trilby de Jung

Last June, Senator Bruno announced a bipartisan Senate Task Force on Medicaid reform with representation from health care providers, local governments, health care experts and employee unions and plans to hold a series of roundtables across New York State over the summer and early fall (for more detail, see "Medicaid Reform Takes to the Road with "Public" Roundtables," August 2003 LSJ). Senator Meier, co-chair of the Task Force, described it's mission as "containing costs while preserving the integrity of the health care system." While Senators upstate expressed enthusiasm, the advocacy community reserved judgment -- pressing for consumer representation, and looking for possible common ground – reform possibilities that would increase consumer access, improve health outcomes, and save real money.

The Task Force got off to a very disappointing start as it held the first two roundtable discussions in Albany and New York City. The format and content of discussions improved as the co-chairs, Senators Meier and Hannon, got more comfortable with the process and local Senators invited some more diverse speakers. Nonetheless, in the end advocates have reason to fear that the Task Force recommendations will be heavily oriented toward cutting both eligibility and services for existing programs.

Early Roundtable Discussions

While ostensibly all roundtable meetings have been open to the public, seats at the table are by invitation only. At the first couple of meetings, the meeting table was actually set up on a stage at some distance from the audience. This odd arrangement meant that several of the invited panelists sat on stage with their backs to the audience. Even the question and answer period at the conclusion of the first two discussions was reserved for the Task Force Advisory Panel Members. Despite formal requests and meetings with Senate staff, the New York State Medicaid Defense Group (NYS MDG, a statewide consumer advocacy coalition) was unable to obtain an invitation for consumer representation at any of the scheduled roundtables.

The content of the early roundtable discussions was vague and rambling, with virtually no data on health care utilization, patient outcomes, or specific cost breakdowns. Invited speakers shared anecdotes and stories that illustrated their concerns about the size of New York's Medicaid program; employers taking advantage of Family Health Plus; and older New Yorkers transferring assets to qualify for Medicaid. As one participant described it, "There was very little opportunity for meaningful discussion. The process is designed to allow the Senate to dress its recommendations for cuts in the larger context of systemic reform and quality improvement."

After the first two meetings, Senator Paterson the "bipartisan" Task Force's lone Democrat, complained to editorial boards upstate. He described his colleagues on the Task Force as wasting valuable time making discredited comparisons between New York's Medicaid budget and California's (California pays for Medicaid type expenses with other public dollars) – rather than thinking creatively about how to improve preventive care and move aged and disabled recipients out of costly institutional care and into community settings.

Some Improvement in Later Discussions

Subsequent roundtables improved somewhat. The meeting in Saranac Lake included discussion of barriers to accessing service in rural areas, like the low provider rates paid by Medicaid. The Senators expressed interest in consumer driven payment systems, such as cash

Update on Senate Roundtables—continued

(Continued from page 15)

and counsel, and the need for community based supports and services rather than a continued focus on institutional care. Although participation remained by invitation only, Burt Danovitz, the Director of Utica's Resource Center for Independent Living, played an active role, providing specific information about innovative ways New York could access enhanced federal funding for at home services.

In Buffalo, the roundtable began with anecdotes about employer use of Family Health Plus and transfers of assets, but evolved into a constructive discussion of promising waiver programs, including CASA, PACE, and an Erie County initiative to provide intensive case management to individuals receiving substance abuse treatment. Invited speakers praised disease management programs capable of improving patient outcomes and reducing reliance on expensive emergency care.

Senator Hannon even shared the microphone with members of the Buffalo audience, allowing consumer organizations to make important points about the vital role Family Health Plus plays in reducing the number of uninsured New Yorkers, and the importance of stable insurance coverage to efficient and effective service delivery. County Executives repeatedly expressed their concern about escalating local costs and expressed their willingness to work with the state on new service delivery models that could save money and improve patient outcomes.

In the End, Cuts are Likely

At the final roundtable in Binghamton, a last minute invitation was extended to the Citizen's Action Network to actually take a place at the table and share its research on the issue of a state takeover of the local share of Medicaid. Citizen Action is proposing a tax on stock transfers to fund the first step toward a more limited financial role for counties. County Executives were heard again on the need for a wider and more flexible tax base to fund the Medicaid program, but the state response was less than enthusiastic. Senator Meier saw little merit in a stock transfer tax, noting that "we could start calling it the New Jersey stock exchange…"

Although again, the Task Force discussed promising local initiatives that demonstrated the ability to save Medicaid dollars, at the end of the day it was far from clear that reform, as opposed to cuts, could realistically address the budgetary crisis. Near the close of the meeting, a local Senator posed the question (paraphrased by a roundtable participant): Now that we've heard all of these proposals that can save some money – can any of these solutions really make a large enough impact on the budget so that we would not have to cut services?" The question went unanswered.

Where from Here?

The Task Force is now engaged in subcommittee meetings in four areas: Acute care, Long-term care, Pharmaceuticals, and Local government and Administrative Process. Each subcommittee is to report its conclusions and priorities to the Task Force chairs by October 27. The goal is to have recommendations for the Legislature by the end of the year. Input from consumer advocates is still important, so check the health law page of the GULP website for names and addresses of the Senators on the Task Force. Write to local members, or directly to the chairs, Senators Meier and Hannon. You'll also find reform proposals submitted to the Task Force from the NYS MDG.

Assembly staff have indicated that their side of the legislature will probably come up with some Medicaid reform activity of its own. This year's legislative session is sure to be rife with reform and cost savings proposals.

New York's New Responsible Lending Law Means Increased Protections Against Predatory Practices

By Jane Gabriel and Barb van Kerkhove

A client comes to see you. "Mr. Gilbert" is a widower with two small children. He is concerned about a refinance of his mortgage. He is alarmed by the terms, but is unsure about his rights.

His home is his only asset. He has been paying on his VA loan for many years and has built up some equity. A contractor knocks on his door and offers to make a few minor repairs and to arrange the financing. Mr. Gilbert is contacted by a well-known finance company that tells him he does not qualify for a $1200 loan, but that it can refinance his home to cover the cost of the work. Warning the lender that he cannot afford to pay more, the company reassures him that his monthly payment will remain the same. Mr. Gilbert feels pressured to proceed as the contract work has already begun. All the arrangements are made over the phone and Mr. Gilbert is invited in long enough to sign. As promised, the monthly payment on his new 20-year loan is the same.

Soon, however, things begin to go array. When Mr. Gilbert tries to stop payment to the contractor due to shoddy workmanship, he finds that the finance company has already sent the check to the contractor. After reviewing his documents and consulting a local credit union, Mr. Gilbert discovers that there are a several terms in the loan of which he was unaware. The loan's annual percentage rate (APR) is 12 percent, much higher than his VA loan of 7.5 percent fixed. He is being charged for credit life insurance that he doesn't remember approving. He paid thousands in fees, as well as 7.25 percent in points without any subsequent reduction in his interest rate. In addition, the loan includes a balloon payment at the end of the 20 year term that is almost as much as the total amount of the original mortgage. When Mr. Gilbert contacts the finance company he is told that he is bound by the terms of the loan and if he defaults, he will lose his home. Upon asking about the life insurance charge, the finance company tells Mr. Gilbert that the life insurance is for its own protection. The next week Mr. Gilbert receives a set of papers in the mail from the finance company that, if signed, would "flip" him into another loan with a slightly lower APR of 11.5 percent but charge another set of points and fees.

Mr. Gilbert, whose circumstances are from an actual case, represents a typical client who has been victimized by a predatory lender. The use of the term 'predatory' is very appropriate. Unscrupulous lenders have discovered how profitable it can be to prey on the elderly and low-income who are equity-rich, but whose credit forces them to look to sub-prime markets for their borrowing needs. They target these people by using readily available public records and then pro-actively offering them loans. These lenders routinely conceal both the terms and the actual closing costs charged to borrowers, require that they pay thousands in points, tell them they only qualify for outrageous interest rates and flip borrowers into loans with higher rates than they have been paying.

In the past, this client's legal recourse was limited to a fairly broad federal law and a New York State Banking Regulation. However, New York State has a carefully crafted new consumer protection law. New Yorkers for Responsible Lending (NYRL), a 90-member coalition, conducted an extensive two-year education campaign about the legislation.

The new law (Chapter 626 of the laws of 2002) adds Section 6-1 to New York's Banking Law, Section 771-1 to the General Business Law and Section 1302 to the Real Property Actions and Proceedings Law. The bill was crafted so that it would cut out the predatory aspects of the subprime market while keeping subprime lending profitable.

(Continued on page 18)

Predatory Practices—continued

(Continued from page 17)

Loans have to exceed specific thresholds to be considered "high-cost" loans and to be covered by the law. High-cost home loans are defined as first lien mortgage loans with interest rates at least 8 percentage points over the U.S. Treasury Securities with similar lengths of maturity OR a loan in which the points and fees exceed 5 percent of the "total loan amount."

This new law has many limitations and prohibitions that would have helped Mr. Gilbert.

When making a high-cost home loan, a lender is prohibited from:

Including Terms Not in Consumer's Best Interests

- Making a loan without considering the borrower's ability to repay;
- Using a repayment schedule that, through negative amortization, causes the principal to increase rather than decrease;
- Requiring that the borrower make more than two periodic installment payments in advance.

Circumventing the Rights of Borrowers

- Paying a contractor directly from the proceeds of the loan. Proceeds must either go directly to the borrower or be made payable jointly to the contractor and borrower;
- Accepting or giving any fee or payment other than for goods or services actually rendered.

Requiring Insurance and/or Excessive Points to Make the Loan

- Directly or indirectly financing any points and fees in excess of 3 percent of the loan;
- Except within narrow guidelines, using proceeds of the loan to finance any of the following types of insurance: (a) credit life, (b) credit disability, (c) credit unemployment, (d) credit property insurance, or (e) any other health or life insurance.

- Financing debt cancellation or suspension agreements using high-cost home loans.

Including Balloon Payments

- Including scheduled balloon payments that are more than twice the amount of the average of earlier monthly payments unless the balloon payment is scheduled to be paid at least 15 years after the date of the loan.

Loan Flipping

- "Flipping" or refinancing an existing home loan into a new loan that does not have a tangible net benefit to the borrower;
- Charging a borrower to modify, renew, extend or amend an high-cost home loan if, after the changes, it still qualifies as a high-cost home loan OR, in the alternative, the APR has not been reduced by at least two percentage points;
- Charging of points and fees when refinancing an existing high-cost home loan if the loan being refinanced is held by the same lender or its affiliate;
- Refinancing of special mortgages. In the event that the borrower has a home loan that is originated, subsidized or guaranteed by: (a) a state, (b) a local or tribal government, or (c) a non-profit organization, AND that either has a below-market interest rate or non-standard payments that benefit the borrower, the lender is prohibited from replacing that loan with a high-cost home loan that

(Continued on page 19)

Predatory Practices—continued

(Continued from page 18)

causes the borrower to lose the unique benefits of the existing loan UNLESS the lender can document that borrower received HUD certified loan counseling.

Exceeding Limitations on Acceleration, Default, and Arbitration

- Accelerating repayment of the loan unless the acceleration is due to the borrower's failure to comply with the terms of the loan;
- Increasing the interest rate as a penalty for default;
- Encouraging borrowers to default on an existing loan or any other consumer debt;
- Including terms that compel arbitration that is oppressive or denies consumers their rights.

This new law affords borrowers some powerful remedies. In the event that any of the predatory practices described in the law are found, the Attorney General, Superintendent of Banks, or any party to the high-cost home loan may act to void the loan. The lender must reimburse any payments already made to them and forfeit any future payments. This includes principal and interest as well as all related charges.

Under certain circumstances, a lender will be forgiven for good faith failures IF they act to cure the violation. However, intentional violations open the door for actual damages and, in certain cases, statutory damages including a stiff penalty—either $5,000 or twice the amount paid in points, fees and closing costs, whichever is greater.

Selling these loans into the secondary market does not cleanse them. Any assignees or bona fide purchasers of high-cost home loans that bring an action against a borrower in default by more than 60 days or in foreclosure are held to the same standard as the original lenders. Borrowers may assert against subsequent holders of these loans the same claims in recoupment and all defenses to payment (without time limit) available to them against the original lender.

Additionally, Section 6-1 of the Banking Law allows a court to order injunctive, declaratory, or other equitable relief as well as attorney's fees against the lender.

Refinancing or purchasing a home can be difficult and stressful under the best of circumstances. Now, for any home loans made after April 4, 2003 New York homeowners have a valuable tool to protect themselves from disreputable lenders.

Second Circuit Approves Fibromyalgia Case—continued

(Continued from page 14)

ports in the record, noting as always that these doctors do not examine the claimant. The first CE relied only on the work fitness report that was later contradicted, which hardly supports the conclusion that the claimant could work. The second CE rejected the claim because the claimant did not show evidence of deficits of motor function or arthritis. The Court disposed of this report by noting the obvious - there was no evidence of motor function or arthritis because the claimant was not complaining about deficits in motor function or from arthritis - she was complaining about debilitating pain from fibromyalgia! Similarly, their reports could not constitute substantial evidence to refute the treating physician. 335 F.3d at 107-08.

The Court also analyzed the ALJ's credibility determination-something not often done by appellate courts. It found that the treating physician's diagnosis actually bolstered the plaintiff's credibility for the very reasons that the ALJ claimed it was undermined. The Court recognized that the relative lack of physical findings actually served to confirm the diagnosis. Again citing *Lisa* (940 F.2d at 44), the Court "recognized that '[i] n stark contrast to the unremitting pain of which fibrositis patients complain, physical examinations will usually yield normal results - a full range of motion, no joint swelling, as well as normal muscle strength and neurological reactions.' " 335 F.3d at 108-09 (*citations omitted).*

The Court also refuted the ALJ's reliance on the fact that the plaintiff only took one pain medication. A careful review of the records showed that the treating physician had reduced the number of pain medications because they were not working, not because her pain had lessened. The Court pointed out that sometimes the strength rather the number of painkillers is what matters. 335 F.3d at 109.

As noted above, this is not the first time that the Circuit has visited fibromyalgia issues. It is worth remembering that in *Lisa*, the Circuit reversed a district court decision upholding SSA's determination to deny benefits and to reject medical evidence obtained after that ALJ hearing. In particular, the claimant had obtained a diagnosis of fibromyalgia after the hearing, which the Court found shed considerable light onto the seriousness of her condition. The Court noted that fibromyalgia was not easily detected, lacked objective tests, and the process for diagnosis was one of exclusion. These findings may be relevant in a number of cases, where the diagnosis of fibromyalgia is made late in the game, maybe even after a number of failed applications, and in that sense is truly a retrospective diagnosis that sheds light on the claimant's past complaints. *See Lisa,* 940 F.2d at 44, *citing Wagner v. Secretary of Health and Human Services,* 906 F.2d 856 (2d Cir. 1990).

In another encouraging move, the Court of Appeals reversed Ms. Green-Younger's claim and remanded it for the immediate calculation of benefits. A recent and similar district court case reported in the July *Disability Law News* resulted in the same outcome. That case - *Soto v. Barnhart*, 242 F.Supp.2d 251 (W.D.N.Y. 2003) contains great language on many of the same issues discussed in *Green-Younger* - but we now we have the Court of Appeals to cite as authority as well!

"Clarification" of SSA Policy Results in Regs and Rescissions

By Kate Callery & Louise Tarantino

Whenever the Social Security Administration (SSA) issues new regulations that simply "clarify longstanding rules," it makes us very nervous that it is, in reality, changing the rules to be more consistent with the agency's own interpretation.

And so it goes with final regulations issued on August 26, 2003 at 68 Fed. Reg. 51153-51167, entitled "Clarification of Rules Involving Residual Functional Capacity Assessments; Clarification of Use of Vocational Experts and Other Sources at Step 4 of the Sequential Evaluation Process; Incorporation of 'Special Profile' Into Regulations." These final rules will be effective September 25, 2003, and will apply to all administrative determinations and decisions made on or after that effective date, regardless of the date on which the application was filed.

Specifically, the new regulations revise 20 C.F.R. §§404.1505 and 416.905 to spell out that when SSA considers previous work, it only considers past relevant work, which is work that was performed within the past 15 years, that was substantial gainful activity and that lasted long enough for the claimant to learn how to do it. The amendments to these sections also note that SSA will use the same residual functional capacity (RFC) assessment developed at Step 4 to analyze Step 5 criteria of ability to perform other work.

Sections 404.1512 and 416.912 are amended by adding a new paragraph that states that a determination must be made that a claimant is unable "to make an adjustment to other work." Although SSA professes that its use of this phrase is nothing new (it used it in 1978!), seems like a new concept to us. This language is picked up in 20 C.F.R. §§404.1520 and 416.920 where Step 5 is described as a consideration of RFC (already developed at Step 4), age, education and work experience to see if the claimant can make an adjustment to other work.

The definition of RFC at 20 C.F.R. §§404.1545 and 416.945 explains that RFC "is the most you can still do despite your limitations." This incorporates into the regulations the same language that SSA provides in another clarification, SSR 96-8p.

In addition to a new definition of past relevant work, described above, 20 C.F.R. §§404.1560 and 416.960 also provide that vocational expert testimony may be used at Step 4 to help SSA determine if a claimant can perform past relevant work. In these sections, SSA also clarifies that at Step 5, it is not responsible for providing additional evidence of RFC or for making another RFC assessment because it uses the same RFC assessment that was made at Step 4.

SSA discusses two special medical-vocational profiles at 20 C.F.R. §§404.1562 and 416.962. The first is familiar to advocates: a claimant with marginal education and work experience of 35 years or more of arduous unskilled labor is entitled to a finding of disability if the claimant is no longer able to do this kind of work due to a severe impairment. SSA considers this special profile at Step 5 before considering the grid rules because it has decided that if a claimant meets this profile, he or she does not have the ability

(Continued on page 26)

Regulatory Roundup

By: Susan Antos

This article reports activity in the New York State Register from August 13, 2003 to October 1, 2003. Two new rules have been proposed. Severn rules were adopted and one rule was promulgated on an emergency basis. Two regulations have been continued: a regulation proposed in March 2003 regarding lost or stolen ID cards, and a regulation proposed in April 2003 regarding the continuation of benefits to a child when a parent dies. 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 (clewis@wnylc.com) or Nancy Krupski (nkrupski@wnylc.com) at GULP, Albany

Notice of Proposed Rulemaking

Date of Filing	Last Day to Comment	Regulations Affected	Summary
10/1/03	11/22/03	311.1(a) 352.29(i)	**Residency Requirements:** As a result of litigation which struck down New York's public assistance residence requirements [Saenz v. Roe, 526 U.S.489, 110S. Ct. 1518 (1999); Brown v. Wing, 170 Misc. 2d 554 aff'd 241 A.D. 2d 956 (4th Dep't. 1997); Aumick v. Bane, 161 Misc. 2d 271 (1994)], the regulations establishing such requirements are invalid. This proposed regulation would repeal these regulations.
9/3/03	10/18/03	351.8 (c)(2); 352	**Determination of Need and Veteran's Payments:** This proposed regulation revises the regulations to reflect OTDA policy which has existed since 88 INF-59, p.4 regarding the treatment of paid rent in the month of application. Additionally this proposed regulation exempts veteran's benefits paid to compensate for spina bifida disability of the children of female Viet Nam veterans for Safety Net as well as federally funded public assistance benefits.

Regulatory Roundup, continued

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
9/9/03	9/24/03	352.20(c)	**Eligibility for Safety Net Assistance:** This regulation expands the category of Safety Net Assistance recipients who are eligible to receive the 49% earned income disregard to include households containing a pregnant woman as well as households with a dependent child (the current regulation). The regulation was amended to conform with the statute. Social Services Law 131-a(8)(a)(iii).
7/28/03	8/13/03	352.22(e)	**Trust Assets:** This regulation revises the current rule regarding assets held in trust for an infant, which currently exempts such assets if they are under $1,000. The change allows the trust of either an adult or a child to be exempt so long as it dies not exceed the resource levels in 352.22(b), currently $2,000, or $3,000 if the applicant or recipient is over the age of 60. On the one hand, this will allow greater amounts to be set aside in trust for infants or adults when there is no other income in the household. On the other hand, for households that do not have assets at or near the resource exemption limits, infant trust accounts under $1,000 which were previously exempt will now be subject to invasion.
8/19/03	9/3/03	387.14	**Eligibility for Food Stamps:** This amendment extends categorical eligibility for food stamps to recipients of non-emergency, non-federally participating Safety Net Assistance. This is less important now that the food stamp vehicle exemption rule is more generous than the public assistance rule.
8/19/03	9/3/03	Part 358	**Fair Hearings:** These regulations revise the fair hearing regulations in Part 358 to clarify many of the administrative changes made as part of welfare reform. For example, reference is made to the Department of Labor and 12 NYCRR Part 1300, and agency names which were changed as a result of welfare reform are corrected (i.e. Aid to Dependent Children is changed to Family Assistance.

Regulatory Roundup, continued

Notice of Adoption—continued

Date of Filing	Effective Date	Regulations Affected	Summary
8/19/03	9/3/03	Part 358	**Fair Hearings:** These regulations revise the fair hearing regulations in Part 358 to clarify many of the administrative changes made as part of welfare reform. For example, reference is made to the Department of Labor and 12 NYCRR Part 1300, and agency names which were changed as a result of welfare reform are corrected (i.e. Aid to Dependent Children is changed to Family Assistance. Additionally, the regulation respond to the decision in Moon v. New York State Department of Social Services, 207 A.D. 2d 103 (1995), which held that only Administrative Law Judges, not attorneys, had the authority to issue subpoenas in fair hearings. The regulation specifically states that attorneys have the same authority to issue subpoenas in fair hearings as is possessed by attorneys under §2302 of the Civil Practice Law and Rules.
8/26/03	9/10/03	358.32 387.14 387.17	**Food Stamp Reporting:** These regulations implement the November 21, 2000 federal Food and Nutrition Service regulations regarding the time for reporting earnings information to social services districts. Between certification periods, households will only be required to report increases in income that exceed 130% of the monthly poverty income guidelines for the household size.
8/26/03	9/10/03	358-3.2 387.14 387.17	**Food Stamp Certification Periods:** This regulation implements provisions of federal food stamp regulations regarding certification periods. 7 CFR 273.10(g). Certification periods are now 12 rather than the previous 6 months and 24 rather than 12 months when all adult members are elderly or disabled.
8/26/03	9/10/03	358.228 358.29 358-3.1(f)(9), 10 358-(f)(11),(12) 387.7(a),(g) 387.14(g)(i)(ii) 387.17(a)(4)(5) 387.17(d)(9)(iv) 387.17(d)(9)(v)	**Eligibility for Food Stamps:** These regulations restore the provisions of the final federal food stamp regulations regarding the requirements for conducting interviews with households at their initial certification for food stamp eligibility, notice requirements when appointments are missed and when households receive "requests for contact" and provisions of shortening or lengthening certification periods in 7 CFR 73.2(e), 273.12(c)(3), 273.10(f)(4)(5).

Regulatory Roundup, continued

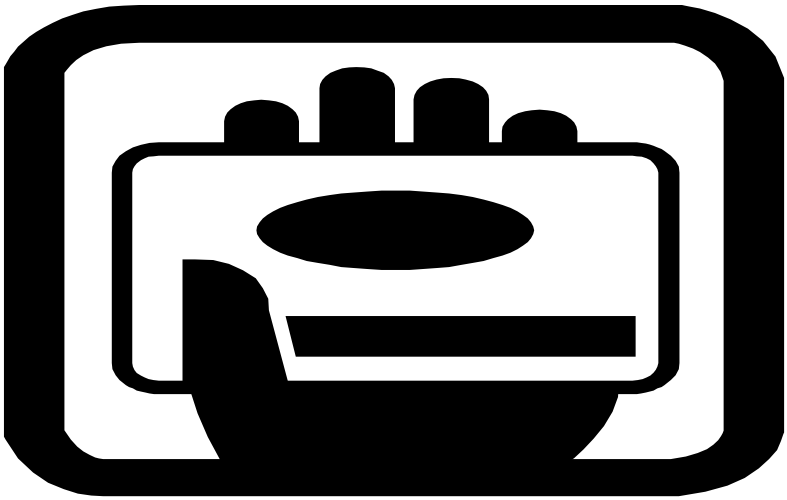
Notice of Continuation

The October 1, 2003 State Register contains a Notice of Continuation of a proposed regulation which would prohibit the discontinuance of public assistance to a child when an adult caretaker relative dies, for up to three months, or until the child has been provided for. Additionally, the proposed regulation would eliminate the requirement that overpayments be recovered from children and would limit the recovery to adult household members.

The August 27, 2003 State Register contains a Notice of Continuation of a proposed regulation which would impose a fee for a lost or stolen identification card. This notice advises that the regulation as proposed on March 19, 2003 has been amended to:

- Eliminate the ability of a social services district to charge fee if a card was stolen or its security features compromised.
- Permit fair hearings over the imposition of the fee
- Limit the imposition of the fee to cards lost or destroyed within the previous 18 months

A notice of continuation allows the State 6 more months to adopt the regulation.



Clarification of SSA Policy Results—continued

(Continued from page 21)

to adjust to other work, regardless of age. SA is also adding a second special medical-vocational profile to these sections: a claimant of advanced age (at least 55 years old), with a limited education or less, with no past relevant work, with a medically determinable impairment. SSA notes that a claimant meeting this special profile would usually be found disabled using the grid rules, however, a claimant with solely "non-exertional" limitations might not qualify without this special profile. Furthermore, a claimant meeting this special profile would not require an RFC assessment.

As a result of these regulatory amendments, SSA also announced on August 26, 2003 the rescission of two relevant Acquiescence Rulings (AR), AR 90-3(4)--*Smith* v. *Bowen*, 837 F.2d 635 (4th Cir. 1987) and AR 00-4(2)--*Curry* v. *Apfel*, 209 F.3d 117 (2d Cir. 2000). 68 Fed. Reg. 51317-51318.

In the *Curry* decision, the Second Circuit held that, at Step 5 of the sequential evaluation process, SSA has the burden of proving that a claimant has the residual functional capacity to perform other work that exists in the national economy. SSA notes that among the issues "clarified" by the final rules discussed above is the responsibility that the agency has at Step 5 for providing evidence that demonstrates other work that a claimant can do that exists in significant number in the national economy. But, SSA's position is that it does not have the burden to prove what residual capacity is because that finding was made at Step 4 when the claimant has the burden of proof.

Keep in mind that *Curry* is still good law in the Second Circuit and that the new regulations make clear that there must be an RFC assessment to support a decision and the assessment must be supported by substantial evidence. So, at Step 5, the agency must still meet its burden of showing the existence of other work that a claimant can perform, given the previously determined RFC.

We hope to continue to "clarify" this issue for you as we read and digest these new regulations over the coming months.

New York Domestic Violence Legislative Update

By Amy E. Schwartz and Meghan M. Lynch

The following is a summary of the domestic-violence related bills that passed both houses and/or were recently signed into law:

Video Voeurism and Unlawful Dissemination of Images

Sponsors: A08926 Schimminger/ S03060 Marcellino

Action: 6/12/03 passed Senate and Assembly
6/23/03 signed by the Governor

Summary: Called "Stephanie's Law", this new law creates the crime of "unlawful (surreptitious) video surveillance" in premises where the unsuspecting person is being secretly observed or recorded by video. It is also now unlawful to commit the crime of unlawful surveillance and then disseminate, publish, or sell the images improperly obtained. While the law was specifically advanced by female and child crime victims who had been secretly observed by voyeurs with whom they had no intimate relationship, doubtless the law will provide an avenue of assistance for domestic violence survivors whose current or former intimate partners are misusing video technology as tool of abuse and degradation.

The new series of laws amends Penal Law §250.00 and further adds new sections to the Penal Law including: §250.40 (a definitional section,), §250.45 (Unlawful Surveillance in the Second Degree), §250.50 (Unlawful Surveillance in the First Degree), §250.55 (Dissemination of An Unlawful Surveillance Image in the Second Degree), §250.60 (Dissemination of An Unlawful Surveillance Image in the First Degree), §250.65 (Additional Provisions).

Under the new law, it is now unlawful to intentionally and for the purpose of sexual arousal, amusement, entertainment, profit or abuse to use or install a digital, mechanical, or other electronic imaging device to secretly view, broadcast, or record visual images of an unknowing person at a time and in a location where that person had a reasonable expectation of privacy. It is also illegal for such surreptitious devices to be used or installed in locations such as a bedroom, changing or fitting room, bathroom, shower, under a person's clothing, or inside a guestroom of a hotel/motel/ inn. The law further creates a rebuttable presumption that such installation and use was done for no legitimate purpose. PL§250.45 is a Class D felony.

The law also targets repeat offenders by creating a bump-up provision on PL §250.50. Accordingly, a new surveillance offense along with prior convictions for the same within the last ten years will constitute a Class E felony.

Under Section 250.65 of the Penal Law, the surveillance law specifically exempts particular individuals or businesses who may legitimately use video surveillance in the regular course of business, such as (1) law enforcement who are using video surveillance as a part of their authorized duties; (2) security systems where written notice is posted; and (3) clearly obvious video surveillance devices or systems.

Penal Law Sections 250.55 and 250.60 also creates the new nisdemeanor and felony offenses of "disseminating the unlawful surveillance image." Dissemination may include publishing or selling the improperly obtained images. By statute, "dissemination" has been broadly defined as giving, providing, lending, delivering, mailing, sending, forwarding, transferring, transmitting images

Domestic Violence Legislative Update—continued

electronically or otherwise to another. "Publishing" is considered: (1) dissemination to 10 or more people; (2) disseminating the image with the intent to sell; (3) making the image available to the public as above described. "Selling" requires dissemination along with an exchange "for something of value." By definition, therefore, "selling" is not necessarily limited to the exchange of money. This law also contains bump-up provisions raising a new offiense to a felony if the actor has a prior conviction.

Sections 168-a and 168-d of the Corrections Law were also amended by this statute. Persons convicted of the offenses as defined in PL §250.45(2), (3), or (4) are now to be registered as sex offenders with all of the attendant responsibilities and mandates. These new laws took effect on August 22, 2003.

Extension of the Duration of Article 8 Orders of Protection

Sponsors: A08923 Paulin / S05532 Saland

Status: 6/18/03 passed Senate and Assembly
9/22/03 signed by the Governor

Summary: This new law amends §842 of the Family Court Act which governs the terms and conditions of dispositional Orders of Protection.

First, the statute now reads that an Order of Protection shall set forth conditions for a period not to exceed two years. This law increases the possible maximum length of an Order of Protection from one year to two years.

Second, the law similarly increases the possible maximum length of an Order of Protection where aggravating circumstances are present from the previous three years to a maximum term of five years. In addition to the current statutory list of possible aggravating cricumstances, the new law also states that an extended order may be granted upon a finding of the court that the conduct alleged in the petition is a violation of a valid Order of Protection.

Finally, the statute also states that any finding of aggravating circumstances maust be both stated on the record in court, as well as on the Order of Protection itself. Further,if an Order of Probation is in effect, the Order of Protection issued pursuant to §842 must state this within the body of the order. This law will take effect in 30 days.

Stalking Against Ten or More Persons

Spondors: S00519 Balboni / A03974 DiNapoli

Status: 1/28/03 passed Senate; 4/14/03 passed Assembly; 9/18/03 delivered to the Governor

Summary: This bill amends §120.55 of the Penal Law relating to Stalking in the Second Degree by adding a new subsection. Under the new law, it will be a Class E felony for an actor to commit the offense of Stalking in the 3rd Degree [PL§120.50(1)] and such conduct was directed against ten (10) or more persons in ten (10) or more separate transactions. Under the previous version of Stalking 3rd, acts committed againse three or more persons was a Class A Misdemeanor. This amendment bumps theses offenses up to a felony level if the conduct is committed against ten or more persons. This bill is awaiting delivery to the Governor. If signed, the law will take effect on November 1, 2003

Continuation of the Mandatory Arrest and Primary Aggressor Law

Sponsors: S03999 Golden / A08691 Weinstein

Domestic Violence Legislative Update—continued

Status: 5/19/03 passed Senate; 6/16/03 passed Assembly; 8/5/03 signed by the Governor

Summary: By statute, the mandatory arrest and primary aggressor laws were scheduled to expire on September 1, 2003. This new law extended the sunset date another two years through September 1, 2005. Other than a modification of the expiration date, no other substantive changes were made to the law. The law took effect immediately.

Expanded List of Predicate Offenses for Criminal Contempt in the First Degree

Sponsors: A08999 Lentol / S5596 Johnson

Action: 6/17 passed Assembly; 6/18/03 passed Senate; 8/5/03 signed by the Governor

Summary: By amending §215.51 of the Penal Law, the legislature closed a loophole in the felony-level criminal contempt statute. Under the prior wording of §215.51(c), the only recognized predicate offense for a felony-level contempt charge was the previous conviction of a misdemeanor-level criminal contempt in violation of an Order of Protection. As a result, if a person was convicted of Criminal Contempt in the First Degree (a Class E felony) and then subsequently committed another act of criminal contempt involving an Order of Protection within five years, the conviction for the prior felony contempt offense would not serve to elevate the commission of the new crime to a felony. This remedial law provides that a prior commission of a felony-level violation of an Order of Protection OR a misdemeanor-level offense now will both serve as predicates for the charge of Criminal Contempt in the First Degree, if the person commits a new act of criminal contempt within five years of the original conviction. The law will take effect November 1, 2003.

Criminal Order of Conditions

Sponsors: A06895-A Eddington / S02970-A Flanagan

Action: 6/19/03 passed Senate; 6/20/03 passed Assembly; 9/17/03 signed by the Governor

Summary: Amends §330.20 of Criminal Procedure Law. Currently, when a defendant is found not responsible by reason of mental disease or defect, the court may set forth certain protections and provisions within an order of conditions. This legislation allows for the inclusion of "stay away" provisions within an order of conditions that can protect victims and their families/households upon the release of an offender. Special emphasis is placed on those offenders who have been subject to a prior stay-away order of protection. The new order of conditions would operate similarly to an order of protection, and the defendant may be arrested and confined if found to be in violation of the order. These orders may be filed with police or sheriff's office. The Mental Health Commissioner will also be required to notify the victim upon the issuance of such order. The law will take effect immediately.

Extension of the Food Stamp Assistance Program (FAP)

Sponsors: S04625 Meier / A06505-A Glick

Action: 5/21/03 passed Senate; 6/9/03 passed Assembly: 8/19/03 delivered to the Governor

Summary: Amends §95 of the Social Services Law. This legislation extends the FAP program until 9/30/2005 and ensures that all those who are eligible for FAP and not eligible for food stamps under the federal Farm Security and Rural Investment Act of 2002 continue to receive FAP assistance (i.e. certain battered immigrant victims.) This law took effect immediately and was retroactive to April 1, 2003.

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