William E. Morris Institute for Justice

202 East McDowell Road, Suite 257, Phoenix, AZ 85004-4536

Phone 602-252-3432 **Fax 602-257-8138**

1996-2012

AUGUST 2012 NEWSLETTER

For friends and supporters of the Institute, here is an update on some of our activities this past year as we celebrate our 16th year of advocacy on behalf of low-income Arizonans.

Litigation

Challenge to Legislature Taking Mortgage Settlement Funds for State General Fund

Morones v. Horne – Earlier this year, Arizona, other states and the federal government sued five major banks over their mortgage foreclosure practices. A consent decree was entered. There are three pots of funds. Each state received a direct settlement payment to be used for mortgage-related purposes. Arizona's share of these funds was $97 million. Each state decided how to use these funds. Arizona's Attorney General ("AG") agreed to put the funds in a "Court Ordered Trust Fund" to be used for mortgage related purposes including help for distressed homeowners. Subsequently, the legislature passed a bill requiring the AG to put $50 million of the settlement funds into the state general fund. The transfer could have occurred as early as May 2012.

The Institute and the Arizona Center for Law in the Public Interest filed a lawsuit in Maricopa County Superior Court challenging the intended transfer of the funds claiming the transfer would violate state law, the Arizona Constitution and the AG's fiduciary duty under the Court Ordered Trust Fund. The AG agreed not to transfer the funds prior to January 1, 2013, to allow the parties sufficient time to brief the matter. Oral argument on plaintiffs' request for a preliminary injunction is scheduled for August 22, 2012.

Challenge to AHCCCS Freeze on Enrollment of Proposition 204 Persons

Fogliano v. State - In 2000, Arizonans voted by initiative in Proposition 204 to include all persons up to 100% of the federal poverty level in the Arizona Healthcare Cost Containment System ("AHCCCS"), our state Medicaid program. The largest group of persons added by Proposition 204 is adults without minor children in the household often referred to as "childless adults." Until 2011, all persons eligible under Proposition 204 received AHCCCS. The legislative budget for 2012 reduced AHCCCS funding by about $540 million dollars from 2011. It also gave AHCCCS discretion on how to manage this funding cut and operate the system with "available" funds.

In March 2011, the Governor submitted to the federal government an amended request for the AHCCCS program that included many cuts in services and reductions in eligibility, including

a freeze on AHCCCS enrollment for childless adults.

In April 2011, AHCCCS published a proposed administrative rule that gave it complete discretion whether to provide AHCCCS to childless adults, to freeze enrollment, or to terminate or reduce AHCCCS coverage for childless adults depending on its monthly review of revenues. The federal government approved the freeze on enrollment for childless adults and AHCCCS implemented the freeze on July 8, 2011. AHCCCS expected at least 100,000 childless adults eligible under Proposition 204 would be denied coverage in the first year of the freeze.

The Institute, the Arizona Center for Law in the Public Interest and the Arizona Center for Disability Law filed *Fogliano et al. v. State et al.*, in Maricopa County Superior Court in June 2011, challenging these changes. The complaint sought declaratory and injunctive relief. Judge Brain ruled against plaintiffs and we filed an appeal to the Appellate Court. The Appellate Court ruled against plaintiffs. The court found the requirement to include all persons up to 100% of the federal poverty level in the AHCCCS program was a mandatory obligation, but decided that whether the state had used all "available" state funds, was a non-justiciable question. The Arizona Supreme Court refused to hear the appeal.

The freeze is currently in effect. Childless adults will be eligible for AHCCCS under the Affordable Care Act on January 1, 2014.

Challenges to Heightened and Mandatory AHCCCS Copayments

Wood v. Betlach (Copay Case #2) – This federal case challenges the mandatory and heightened copayments for medications, office visits and use of the emergency room approved on October 21, 2011, by the federal government for childless adults in the AHCCCS program. We claim the approval of the copayments violates the Administrative Procedure Act because it violates federal requirements for waivers. This case follows the *Newton-Nations* case described below.

We filed for class certification and a preliminary injunction in May 2012. We are waiting for rulings from the court. Co-counsel is the National Health Law Program.

Newton-Nations v. Rodgers (Copay Case #1) – This federal case challenged the heightened and mandatory copayments AHCCCS imposed on 100,000 persons in 2003 for prescription medications and office visits. These persons were added to AHCCCS, the state Medicaid program by Proposition 204 (persons with incomes up to 100% of the federal poverty level) and the state law allowing coverage for persons who "spend down" their medical expenses so their incomes are 40% of the federal poverty level. From 2003 until mid-2010, the class grew to over 250,000 persons.

Plaintiffs claimed the federal government's approval of the challenged copayments violated several federal laws. We also claimed AHCCCS' notices violated the federal constitution and the Medicaid Act.

For over 6 years, there was a statewide injunction that prohibited AHCCCS from imposing the copayments on the certified class. The injunction saved low-income persons several million dollars each month and ensured access to medical services necessary to maintain the class' health and well-being.

In March 2010, the district court ruled against plaintiffs and we filed an appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed in part. The Ninth Circuit found the Secretary of Health and Human Services' approval of the copays violated the Administrative Procedure Act, and the Ninth Circuit's prior decision in *Beno v. Shalala.* The court noted the only purpose of the waiver was to save money, a reason not sufficient for a demonstration project. The court also accepted our expert's testimony that copayments have been heavily studied the last 35 years and are not novel or experimental.

The court reversed the district court's decision, remanded to the district court to vacate the Secretary's approval of the copayments and remand to the Secretary for further consideration consistent with the opinion. This decision is important because it reiterates the statutory requirements for demonstration projects and the analysis in the *Beno* case, which the Secretary has failed to comply with. The court affirmed the district court's decision that persons not in the state plan, even if they were in an optional Medicaid group, could be treated as expansion populations.

Concerning the notice claim, the court questioned whether the notices satisfied constitutional due process requirements. The court remanded the matter back to the district court to determine if AHCCCS was still using defective notices and if the issue of the notices was moot.

On remand, both defendants filed motions to dismiss based on mootness. The district court granted the motions. We have appealed the dismissals to the Ninth Circuit. Co-counsel in this case is the National Health Law Program.

Administrative Advocacy with Federal Agencies

The Institute often addresses state agency issues with the federal government. Because of our work in the public benefits area, we are in a unique position to raise the legal and policy concerns of low-income Arizonans.

Objections to Amended AHCCCS Demonstration Waiver Request

In 2011, the Governor submitted a request to the Center for Medicare and Medicaid Services ("CMS") to amend the state's demonstration waiver request. This amended request included the following proposals:

1. Freeze enrollment for childless adults on July 1;
2. $50 annual penalty for adult smokers;
3. $50 annual penalty for the obese and persons with chronic medical conditions who do not adhere to a care plan;
4. Six month redeterminations, instead of 12 months, for all childless adults and for parents between 75-100% of the federal poverty level ("FPL");
5. Eliminate enhanced medical services for older youth ages 19-20 without children;
6. Freeze enrollment for parents between 75-100% of FPL on October 1, 2011;
7. Eliminate emergency medical services for immigrants;
8. Mandatory copayments for all adults except long term care recipients;
9. Mandatory copayments for children who do not meet well exam requirements; do not follow obesity care plans; or do not manage their chronic diseases;
10. Penalty for all missed appointments; and

11. Eliminate non-emergency transportation for non-disabled adults in Pima and Maricopa Counties. All other non-disabled adults would pay a transportation copayment.

The Institute submitted detailed objections and comments to CMS for all the requests listed above on behalf of the Institute, the Arizona Center for Law in the Public Interest and the National Center for Law and Economic Justice. We also testified against the waiver request at a public meeting. Subsequently, we submitted a separate letter to CMS objecting to Arizona's continued demonstration project and how that may affect health care reform requirements in Arizona. In addition to the groups above, the National Health Law Program joined in this letter.

In October 2011, CMS denied request nos. 2, 3, 4, 6, 7 and 9. CMS approved request nos. 1, 5 and 8. CMS also approved copayments for taxi transportation in Pima and Maricopa Counties and a $3.00 missed appointment fee outside Pima and Maricopa Counties. We are monitoring implementation of the changes to the program including the taxi copayment and the missed appointment fee.

Civil Rights Complaint: Verification and Reporting Law

As part of the budget bills passed in 2009, the legislature passed House Bill 2008, Sections 1 and 2, that "to the extent allowed by federal law" required persons applying for state and federal public benefit programs to present a document from an arbitrary list of 12 documents to establish citizenship or immigration status. No federal law allows the use of this limited group of documents. The state law requires government employees to report persons who are violating "federal immigration law" and the law has criminal sanctions for local and state employees who do not follow the law. The law caused confusion and fear and deterred persons from applying for public benefits and services.

Both AHCCCS and the Arizona Department of Economic Security ("DES") implemented policies in response to HB 2008. The Institute commented on these policies and sought to ensure the rights of immigrant applicants and recipients were protected. Despite our efforts, the Institute felt the agencies' implementation of the law violated federal laws.

The Institute, working with the ACLU of Arizona and the National Immigration Law Center, filed a Civil Rights Complaint against DES and AHCCCS with the Office for Civil Rights/U. S. Department of Health and Human Services ("DHHS"). We claimed the law and the agencies' policies and practices violated various federal laws including Title VI of the Civil Rights Act of 1964, by using a restrictive group of acceptable documents to show citizenship or immigration status. The reporting requirements also conflicted with federal law and guidance. We claimed DES and AHCCCS policies did not take sufficient steps to protect immigrants' rights to apply for benefits without the threat of the agencies reporting persons to the federal government; relied improperly on SAVE responses for reporting; violated the confidentiality requirements in federal law; and improperly allowed immigration-related questions to be asked in interviews and on the online multi-program application, One-e Application. DHHS began but has not completed its investigation.

Advocacy – Access to State Courts

The Institute has a major focus on eliminating barriers to access to justice and access to the courts.

TurboCourt

The Arizona Supreme Court ("AOC") is moving toward a statewide electronic filing system referred to as "TurboCourt." The Institute, on its own behalf and on behalf of legal services, sent a letter to the Arizona Supreme Court regarding our concerns about TurboCourt, including that there is no fee waiver or deferral for the additional TurboCourt fees; any fees must be paid with a credit card; the TurboCourt pleadings and instructions are not in Spanish; and there is no suppression of fees for legal services programs. We are concerned TurboCourt may be a barrier to access to the courts. In response, the AOC agreed that a fee waiver and deferral process must be included in TurboCourt. We will continue to monitor TurboCourt's implementation and expansion.

Limited English Proficiency Services

The Institute sent a letter to the AOC concerning courts in Arizona that do not provide language assistance to non-English speakers as required by Title VI of the Civil Rights Act. Under Title VI, courts must provide qualified translators, translation of vital documents, website accessibility and other translation services. We requested that the courts develop Limited English Proficiency plans. In response, the AOC drafted a sample LEP policy that we commented on. We will monitor this process.

Fee Waivers and Deferrals

Low-income Arizonans are entitled to fee waivers and deferrals to ensure access to the courts under state law and the state and federal Constitutions. As legal services staff throughout the state identify problems with the implementation of fee waivers and deferrals, the Institute addresses their concerns. Currently, the Institute is working to ensure fee waivers and deferrals in family law cases in Yuma, Mohave and Pinal County Superior Courts.

Administrative Advocacy with State Agencies

The Institute works with legal services staff and community groups to improve the programs low-income persons rely upon. Legal services staff often identify policies and practices that violate federal and state laws, but because of funding restrictions, they cannot file class actions. In those cases, they often seek the assistance of the Institute. Recently, we addressed the following policy and procedural matters with DES and AHCCCS:

Improper Unemployment Insurance Overpayments

Community Legal Services ("CLS") asked MIJ to address a systemic issue with DES. The problem was that claimants received Emergency Unemployment Compensation ("EUC") benefits at a time DES determined the claimants should have been receiving regular unemployment insurance benefits. The typical scenario begins when the claimant exhausts her regular benefits and then receives EUC benefits. During the time that the claimant collected regular and EUC benefits, she worked on and off as a seasonal or part-time worker. At some point, with the new earnings, the claimant

became eligible for a new regular unemployment insurance claim. The claimant was unaware she was eligible for a new regular claim. At the same time that the claimant became eligible for regular benefits, DES determined she is ineligible for EUC benefits and sent the claimant an overpayment notice. This is an administrative issue totally in control of DES. DES has the authority to waive these overpayments but often does not. CLS assisted over 20 persons who had overpayment notices. We estimated there are at least one thousand persons who received the over-payments and had no legal assistance.

We sent DES a letter requesting that DES prevent those overpayments from occurring and correct any overpayments that were issued. DES remedied the computer problem and agreed to review over 360 cases and allow the claimants to request waivers of the overpayments and to revise its notices. We will monitor.

One-e Online Application

DES and AHCCCS started to use a joint online application for benefits. The application did not comply with federal requirements in several respects. A major concern was that the application required every person using the application to designate themselves as a "citizen" or "legal resident." Under federal law it is unlawful for the application to ask these questions of non-applicants and persons applying for benefits where immigration status is not relevant. The application failed to give a person the option to not apply for themselves until after the person answered the citizenship and immigration questions. The questionnaire also required a person to answer the questions even if they were applying for a program, such as emergency medical services, where a certain immigration status is not required.

The Institute sent DES written comments and discussed this matter with DES staff. DES agreed to work on making the application compliant with federal law. DES and AHCCCS convened a work group to fix the application. With the new state verification law (House Bill 2008), this project took on urgency. Given the fear in the immigrant community, it was imperative that DES and AHCCCS remove any barriers to persons applying for public benefits and the Institute sent a letter to AHCCCS summarizing our concerns.

Initial changes were made to the application so that a person can identify themselves and others as a "citizen" or "immigrant status" with a drop down menu of choices including a category of "other." DES and AHCCCS agreed to remedy the other violations. We included this matter in the Civil Rights Complaint described above.

Child Care Assistance Restriction

Arizona uses federal Child Care and Development Funds ("CCDF") to provide child care assistance to low-income families. Under federal law, only the immigration status of the child is relevant for eligibility. State law unlawfully limits child care assistance to parents and guardians lawfully in the country. DES policy implements state law. The Institute sent a letter to DES objecting to its policy.

Although DES should have disclosed this restriction to the federal government, DES' prior application for child care funds failed to inform the federal government of the unlawful policy. When DES filed its renewal of its CCDF state plan this summer, we submitted objections and comments to the federal

government explaining DES' use of the unlawful restriction. We will see what action the federal government takes.

Americans with Disabilities Act Compliance at DES

Legal services staff informed us that DES was not providing reasonable accommodations and auxiliary services, such as sign language interpreters to clients, in violation of the Americans with Disabilities Act ("ADA"). We reviewed DES' policies and wrote a letter to DES requesting that it develop effective ADA policies. DES agreed. We obtained the services of a national ADA expert, Cary La Cheen with the National Center for Law and Economic Justice in New York, to assist DES. DES finalized its ADA policy and procedures. Ms. LaCheen and the Institute are monitoring DES' implementation of the policy and procedures.

Monitoring

The Institute receives monthly reports from DES concerning its timeliness in processing claims for food stamps, cash assistance, medical assistance and unemployment insurance; the number of persons who get hardship exemptions for the TANF program; and the number of persons affected by DES' drug testing policy. These reports are effective because DES knows the Institute is monitoring its compliance and if we observe a problem we contact DES immediately

Legislative Advocacy Update

Susan ("Susie") Cannata continued as the Institute's lobbyist for the 2012 Arizona Legislative Session. This was Susie's sixth year as our lobbyist. She lobbied for the interests of low-income Arizonans with a focus on the budget, as well as legislation related to housing, consumer affairs, public benefits, unemployment insurance and domestic relations.

The Institute provides hearing testimony and informational handouts to legislators on key bills. Often the Institute is the only advocacy group working to defeat a bill. This past legislative session was very difficult for low-income Arizonans.

We worked to defeat many bills including the following bills. Unless otherwise noted, the bills died during the legislative process.

HB 2127: This bill would have required tenants (but not landlords) to disclose prior experience with bedbug infestation and allowed courts to rely on police citations to establish wrong-doing in or near the premises for renters and their guests. We opposed this bill and the police citations section was stricken. We obtained an amendment to require bedbug disclosure by landlords before the bill died.

HB 2128: This bill added two new sections to when a tenant has abandoned a rental unit that were not predicated on unpaid rent or absence from the unit like other abandonment provisions.

HB 2200: This bill would have increased the amount of money a tenant must pay to stay in a rental unit pending an appeal of an eviction order.

HB 2364: This bill changed the fee a party could be charged for representation at an unemployment insurance appeal from up to $750 to 10% of the amount in dispute.

HB 2511: This bill would have changed the service requirements for certain evictions including those after foreclosure and trustee sales and specifically provided jurisdiction of these cases was in justice court.

HB 2582: Resurrected failed bill from last year to require AHCCCS and food stamp EBT cards to have picture I.D. and for stores to check I.D.

SB 1310: This bill would have increased small claims case limit from $2,500 to $5,000. Governor vetoed.

SB 1311: This bill would have increased exclusive jurisdiction of justice courts from $10,000 to $15,000.

SB 1387: This bill would have allowed a landlord who rents a room to give an immediate termination of tenancy notice and change the locks (without judicial oversight).

SB 1492: This bill would have given unwed fathers presumptive equal custody rights with the mother if paternity was acknowledged or determined.

SB 1495: This bill required random drug testing of unemployment insurance applicants and violated federal UI law and the 4th Amendment.

HCR 2056: Would have changed Arizona's minimum wage law.

SCR 1032: Would have sent issue of increased justice court jurisdictional limits to voters.

Other bills we opposed but that were signed into law:

HB 2129: Bill allows landlord access to unit without notice to tenant if tenant requests maintenance.

HB 2519: Omnibus unemployment insurance ("UI") bill: Lots of provisions to make it harder to get UI including increasing by 100% the amount of wages needed to qualify for UI.

HB 2664: Allows debt buyers to presumptively establish debt by using the last billing statement or "electronic data;" changes definition of interest rate; and makes other changes adverse to debtors.

Unemployment Insurance Guide

The Institute prepared the first ever comprehensive Arizona unemployment insurance guide for claimants and advocates to use. It is available in English and Spanish on the MIJ website, morrisinstituteforjustice.org, or by calling the Institute at 602-252-3432.

2012 Legal Services Directory

The June 2012 Legal Services Directory is available on the MIJ website, morrisinstitute forjustice.org., or by calling the Institute.

Continuing Legal Education

On September 20, 2012, the Institute will sponsor a CLE "Taking the Politics Out of Redistricting (Or Not)." The presenters will be Linda Mc Nulty and Joe Kanefield. The CLE will be at the Quarles & Brady law firm in Tucson and the Lewis & Roca law office in Phoenix from 3 – 4:30 p.m. The cost is $100, with all the money going to the Institute. Fifty dollars may be a tax deductible.

Tucson and Phoenix Annual Fundraisers

After the CLE on September 20, 2012, the Institute will hold its annual fundraisers in Tucson and Phoenix between 4:30 – 5:30 p.m. hosted by Quarles & Brady in Tucson and Lewis and Roca in Phoenix. The Institute is a qualified organization for the Arizona "working poor" tax credit. We thank both firms for their support and generosity.

The Institute's Board of Directors

Mary Jo O'Neill, President
Ronda Beckerleg-Thraen, Vice President
John Gallagher, Treasurer
Ben Hufford, Secretary
Corey Aday
Jennifer Barnes
Eric Dahlstrom
Leslie Nixon
Luis Ochoa
Andy Silverman
Milton Wagner

Staff

Ellen Sue Katz, Director
James Hannon, Volunteer IT
Julie Ferrell, Volunteer Accountant

Donations

Your support is needed to continue the many projects we have undertaken on behalf of low-income persons in Arizona. Please send your donations to the William E. Morris Institute for Justice, 202 East McDowell Road, Suite 257, Phoenix, Arizona 85004-4536, or make contributions online at morrisinstituteforjustice.org. (starting August 15, 2012). Remember that the Institute is a qualified organization for the "working poor" tax credit and donations to the Institute may qualify for a tax credit on your state income taxes.

Westlaw

A special thanks to Bryan Cave for providing the Institute with Westlaw.