

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
OTHER CIVIL

Robert Fischer, Gabriella Raspa, and James
Beede, on behalf of themselves and all others
similarly situated,

Civil File No. _____
Judge _____

Plaintiffs,

and

Tim Pawlenty, Governor of the State of
Minnesota, Thomas Hanson, Commissioner,
Minnesota Department of Management and
Budget, and Cal Ludeman, Minnesota
Department of Human Services,

Defendants.

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR A
TEMPORARY RESTRAINING ORDER

I. MATERIAL FACTS

A. General Assistance Medical Care

This case involves General Assistance Medical Care (GAMC). On May 14, 2009, the Legislature passed a bill appropriating funds for GAMC during the 2010-2011 biennium. The 2011 appropriation of \$381,081,000 was eliminated by the Governor's line-item veto. Without funding for fiscal year 2011, which begins on July 1, 2010, the GAMC program would end. At the present time, no new legislation has been passed to extend or to modify GAMC.

On May 14, 2009, the Governor did sign an appropriation for GAMC for fiscal year 2010. The appropriation was for \$345,223,000. (Laws 2009, Ch 79, art. 13, sec. 3, subdiv. 5 (d)) On the day that he signed the appropriation, he also announced that he would unallot a portion of the appropriation. In June, he removed \$15,879,000 from the 2010 GAMC

appropriation through unallotment.¹ After unallotment, the funding for GAMC in 2010 remained at \$329,344,000. The most recent estimates as to the status of GAMC funding indicate that over \$26 million of this \$329,344,000 will remain unexpended at the end of March, 2010. (See footnote 3, below)

The defendants plan to terminate the GAMC program effective March 31. They plan to effect this termination date and to send notices to GAMC recipients advising of the termination on Saturday, March 6. (See Affidavit of Galen Robinson.)

Plaintiffs are asking the Court to issue a temporary restraining order preventing the termination of GAMC on March 31. Because a substantial sum of money appropriated for GAMC will remain unexpended on March 31, and because \$15.879 million was illegally unallotted from the program, there is sufficient funding from the legally enacted appropriation for 2010 to maintain the GAMC program at least until the end of April, 2010.

B. Unallotment

The legal issue presented in this case is Plaintiffs' claim that the Governor's unallotment of \$15,879,000 from GAMC in 2009 was unauthorized by the unallotment statute and was unconstitutional.

The unallotment statute is triggered when the probable receipts for the general fund will be less than anticipated for the remainder of the biennium. Minn. Stat. 16A.152 subdiv. 4. The material facts related to the triggering of the unallotment statute therefore start with the receipts that were anticipated at the time of the unallotment.

In the February 2009 forecast by Commissioner Hanson, receipts were anticipated to be \$30.7 billion for the 2010-2011 biennium. When the Governor submitted his revised budget to

¹ This is the amount identified in Commissioner Hanson's 7/16/2009 unallotment summary and it was recently confirmed in his 2/17/10 "transfer report" for fiscal year 2010.

the Legislature on March 17, 2009, the level of receipts anticipated in his budget was the \$30.7 billion from the February forecast. And when the Legislature passed its appropriation bill and the Governor signed the appropriations into law on May 14, 2009, the level of anticipated receipts was the \$30.7 billion from the February forecast. On May 14, 2009, when the Governor signed the legislative appropriations into law, he knew that the authorized appropriations exceeded the anticipated receipts of \$30.7 billion by approximately \$2.7 billion. This potential deficit was not caused by any unanticipated reduction in probable receipts for the general fund. It was known to all when the appropriations legislation was enacted and signed into law.

The Governor announced his intent to unallot from the now legally enacted appropriations on the same day that he signed the appropriations into law, May 14. On May 18, the Legislature submitted a revenue bill to the Governor. The bill raised sufficient revenue to pay for the appropriations enacted on May 14. On May 21, after the legislative session ended, the Governor vetoed the revenue bill. The potential deficit caused by the May 14 appropriations now became an actual deficit. The deficit did not occur because of any unanticipated decline in anticipated revenues. It was known to all prior to the start of the 2010-2011 biennium.

In June, the Governor fulfilled his promise to unallot. In effect, he now unilaterally enacted a budget that reflected his legislative priorities. This certainly occurred in the unallotment of the 2010 GAMC appropriation. In GAMC, his unallotment of more than \$15 million reduced the legislative appropriation of \$345 million to less than \$330 million. This reduction was in line with the Governor's initial budget proposal to the Legislature for GAMC in 2010 (\$333.074 million), which had not been enacted into law by the Legislature.

Because the unallotment process rather than a line-item veto was used by the Governor to reduce the appropriation, the Legislature was denied its right, given in the Minnesota Constitution, to attempt to override the Governor's decision.

At no time in this process had the probable receipts for the general fund become less than the \$30.7 billion anticipated in the February 2009 budget forecast. At no time in this process had the legal authority to unallot as conferred by Minn. Stat. § 16A.152 subdiv. 4 been triggered.

The unallotment of \$15,879,000 from GAMC was unauthorized by law and was unconstitutional.

II. OVERVIEW OF THE ISSUES

The setting in which this litigation and the plaintiffs' Motion for a Temporary Restraining Order (TRO) are being brought is unusual in three respects.

First, the precise legal issue of unallotment raised in this case has recently been considered and decided in this Court. This favors the plaintiffs in their showing of a reasonable likelihood of success on the merits.

Second, the remedy being sought in this TRO involves only a one-month extension of the GAMC program. And it appears to be undisputed that over \$26 million is in fact available to fund the remedy that is being sought in the TRO. The only dispute in this case involves the unallotment from GAMC of an additional amount, \$15,879,000. When this unallotted amount is restored to GAMC and added to the money that is conceded to be available, the total funding available for the extension of GAMC past March 31 will be more than \$42 million. This amount is more than enough to fund fully the relief being sought in the TRO.

Third, the issue of irreparable harm will involve a comparison of the GAMC program with a second medical program to which GAMC recipients will be transitioned when the GAMC

benefits are withdrawn. Consequently, both programs must be understood in order to see the irreparable harm that will occur when GAMC benefits are terminated.

It seems appropriate to discuss each of these three aspects of the case, since they form the basis for the requested relief. The final portion of the Memorandum will then provide more specific examples of the irreparable harm that will occur when GAMC is withdrawn from the named plaintiffs and from other class members.

With respect to a discussion of the legal issues related to unallotment, it seems most reasonable, if the Court wishes, to make available to the Court the detailed briefs that the parties have already filed in the Supreme Court rather than to make the same arguments in a more abbreviated fashion within this Memorandum.

Because the plaintiffs do meet all applicable standards for a Temporary Restraining Order, the Court should enjoin the termination of the GAMC program at the end of March and should enjoin the defendants from effecting computer changes (now scheduled for Saturday, March 6) that would effect the termination of the program by sending notices to all GAMC recipients that their benefits will end on March 31.

A. Plaintiffs Have a Reasonable Likelihood of Success on the Merits of their Legal Claims.

The legal issue in the present case is identical to the one recently litigated in *Brayton v. Pawlenty*, Ramsey County District Court File No. 62-CV-09-11693. Both cases challenge the manner in which the Governor used unallotment powers in 2009, prior to the start of the 2010-2011 biennium. In *Brayton*, Judge Kathleen Gearin held that the exercise of unallotment power before the start of the biennium was beyond the scope of the statute and that “the specific manner in which the Governor exercised his unallotment authority . . . was unconstitutional.” *Brayton*,

Order and Memorandum, page 4, attached hereto as Exhibit 1.² Since the plaintiffs' burden in the present Motion for a Temporary Restraining Order is to establish only a likelihood of prevailing on the merits of their legal claim (see *Dahlberg Bros., Inc. v. Ford Motor Co., Inc.*, 272 Minn. 264; 137 N.W.2d 314, 321-22 (Minn. 1965)), the legal analysis given in *Brayton* should be sufficient to meet that limited threshold.

B. Funding for GAMC is Sufficient to Continue the Program past March 2010.

This litigation involves the short term funding of General Assistance Medical Care. GAMC provides essential medical services to the poorest people in the state.

In May of 2009, the Governor exercised his line-item veto to eliminate all funding for GAMC in fiscal year 2011. As matters now stand, in the absence of some new legislation to extend or modify GAMC, the GAMC program is going to end in the coming months. The dispute in the present case will likely determine only whether the program dies at the end of March or at the end of April. Defendants currently propose to send out notices on Saturday, March 6, telling GAMC recipients that their participation in the program will end on March 31. (See Affidavit of Galen Robinson.)

It is important to note the substantial amount of money remaining for GAMC funding that is actually not in dispute. Everyone should agree – both Plaintiffs and Defendants – that as of March 31, 2010, the Department of Human Services is projected to have \$26,659,000 in unexpended funds for GAMC.³ The February 2010 Minnesota Financial Report released this

² Although the Supreme Court will hear argument in *Brayton* on March 15, the resolution of the issues by the Supreme Court will come too late to protect the GAMC plaintiffs in this case. The *status quo* can be preserved and irreparable harm avoided only if termination of the GAMC program on March 31 and the notice of termination to be sent on March 6 are enjoined through a temporary restraining order.

³ This number comes from a fiscal note provided by DHS to accompany Bill # S2168-3E, which modified and extended the GAMC program. This fiscal note, at pages 8-9, said that the February

week acknowledged a more rounded number of \$26 million: “Since the program [GAMC] is expected to end on April 1, 2010, the \$26 million remaining in the appropriation will be carried forward” February 2010 Report, page 52. The \$26 million carried forward from the unexpended GAMC appropriation will, absent this Court’s issuance of a TRO, be “used for a different purpose or cancelled at the end of the biennium.” *Id.*

So the starting point in this case, before any argument over the legality of unallotment, is as follows: The Governor unallotted \$15,879,000 from the 2010 GAMC appropriation of more than \$345 million. This left over \$329 million to fund GAMC in 2010. This amount, \$329 million, was both appropriated and allotted specifically for poor people, like the plaintiffs, who rely on GAMC for their essential medical services. It was the amount left *after* the Governor’s unallotment. Nevertheless, the defendants now propose to take more than \$26 million in money specifically appropriated for GAMC and spend it on some other as yet undetermined purpose rather than for the purpose specified by the Legislature in the appropriation. In Plaintiffs’ view, this is inappropriate.

And, when the \$15,879,000 in unallotted funds is added to the more than \$26 million that is unexpended at the end of March, there is over \$42 million available to fund GAMC for the month of April. Because the current monthly costs of the GAMC program, as projected for March of 2010, are under \$34 million,⁴ even after the TRO is issued and the GAMC program is

2010 forecast had changed and that \$26.659 million “will not have been incurred assuming the GAMC program ends at the end of March 2010.” The note advised the Legislature that this amount would therefore be available to help fund a program replacing or extending GAMC after the end of March. The new legislation, however, was vetoed by the Governor, and the attempt to override the veto failed on March 1. See the document attached hereto as Exhibit 2 for relevant pages of the fiscal note.

⁴ See Exhibit 2, the fiscal note, page 9.

extended to for the month of April, some significant portion of the \$42 million appropriated for GAMC will still remain to be carried forward.

C. The Loss of GAMC will Cause Irreparable Harm to GAMC Recipients, Even if they are Placed on Transitional MinnesotaCare.

The third unusual aspect of the case involves assessment of the harm to be experienced by the plaintiffs when they are put off GAMC. The loss of GAMC medical coverage will obviously cause harm. The defendants will argue, however, that the harm is mitigated by the defendants' plan to transition GAMC recipients on to Transitional MinnesotaCare, another medical benefit program. The assessment of harm therefore lies in the holes that exist in this proffered safety net of Transitional MinnesotaCare (TMC). These holes are significant and are documented at page 10 of Department of Human Services Bulletin #10-21-03, issued on February 25, 2010. A copy of this DHS comparison is attached as Exhibit 3.⁵

The first major difference between the programs involves basic hospital coverage. There is no co-pay for hospital bills on GAMC. TMC requires a 10% hospital co-pay. In addition to the difference in co-pays, there is a major difference in the scope of hospital coverage. While GAMC provides full coverage for hospital bills, TMC limits annual hospital coverage to a maximum of \$10,000. A participant in Transitional MinnesotaCare who incurs a large hospital bill will be personally responsible for paying, not only the 10% co-pay, but also 100% of amounts in excess of \$10,000. The burden of this change on GAMC recipients is massive. In fiscal year 2008, GAMC paid \$55 million for in patient hospital care.⁶ If such bills had been incurred under Transitional MinnesotaCare standards, the 10% co-pay alone would have

⁵ A more complete review of GAMC benefits and a comparison with MinnesotaCare is given in an Information Brief from the House Research office dated October, 2009, and attached hereto for reference as Exhibit 4.

⁶ See Exhibit 4, page 8. Total GAMC expenditures in 2008 exceeded \$262 million and in patient hospital care accounted for 21% of this spending.

imposed liability of over \$5,500,000 on GAMC recipients. Since 92% of GAMC enrollees in 2008 had income under 25% of federal poverty guidelines (\$226 per month for an individual),⁷ there is no likelihood that GAMC recipients could afford hospital care under the TMC standards.

The second major shortcoming of Transitional MinnesotaCare when compared to GAMC lies in coverage for prescriptions. TMC has a relatively low co-pay of \$3 for each prescription, but there is no monthly limit on the total co-payment. GAMC differs in the following respects: GAMC has (1) no co-pay for mental health drugs, (2) a \$1 co-pay for generic prescriptions, (3) a \$3 co-pay for brand name drugs and (4) a \$7 per month maximum on prescription co-pays. For individuals with mental health issues (44% of recipients have mental health diagnoses and another 16% have “chemical health” diagnoses⁸), and for individuals with a large number of prescriptions, the difference in co-pays for these programs is significant. And there is one other major difference with respect to prescriptions. A pharmacy in GAMC cannot refuse service to a GAMC recipient if the GAMC recipient reports that he or she cannot afford the co-pay. In Transitional MinnesotaCare, on the other hand, a pharmacy must fill only one prescription without a co-pay, but it can then deny all future services unless both the current and the past co-pays are met.⁹

A third significant difference in the programs involves the co-pay for necessary doctor visits. There is no co-pay for GAMC. There is a small co-pay of \$3 per visit in Transitional MinnesotaCare. The problem with the co-pays here, as in the prescription drugs, is that on Transitional MinnesotaCare the medical provider is entitled to refuse service if there are any past

⁷ See Exhibit 4, page 10, footnote 11; see also page 13.

⁸ See Exhibit 4, page 15.

⁹ See Exhibit 3.

co-pays that have not been met. Since GAMC does not impose a co-pay for medical visits, this risk of being refused needed medical services does not exist.

A fourth difference in the programs involves transportation to medical appointments. In GAMC, all medical transportation is covered. In TMC only emergency transportation is covered.¹⁰

For individuals on GAMC who are subsisting on 25% of poverty level income, these added costs of medical care will cause irreparable harm in April, 2010 if a TRO is not issued.

These general considerations should be sufficient to warrant the issuance of a temporary restraining order. The plaintiffs have a reasonable likelihood of success on the merits of their legal claim. The TRO will preserve the *status quo* for GAMC recipients at a time when all parties admit that there remains more than \$26 million to fund the program, with over \$42 million being available when illegal unallotments are restored. If the TRO is issued, there is little or no administrative burden. The defendants simply have to refrain from making their computer changes on Saturday, March 6. All requirements of *Dahlberg Bros., Inc. v. Ford Motor Co., Inc.*, 272 Minn. 264; 137 N.W.2d 314 (Minn. 1965) for the issuance of the requested temporary injunctive relief have been met.

III. IRREPARABLE HARM TO PLAINTIFFS AND THEIR CLASS; LIMITED HARM TO DEFENDANTS

A. Harm to Plaintiffs

The difficulty in discussing the irreparable harm to the plaintiffs in this case is largely a matter of perspective. As noted above, 92% of the people on GAMC, based on 2008 data, live at 25% of the federal poverty level. This is \$226 per month. The lawyers in this case and average Minnesotans likely lack imagination sufficient to understand what this means. It's living on less

¹⁰ See exhibit 3.

than \$8.00 a day. For the General Assistance recipients on GAMC, who make up about half of the GAMC population, the income is even lower. It is \$203 per month. It is less than \$7.00 a day.

For a people like Robert Fischer, who subsists on \$203 per month, facing a 10% charge for a hospital expense is simply an impossible financial burden. For Gabriella Raspa, who is better off financially than most other GAMC recipients, her medical hospitalizations in 2009 would have bankrupted her if she had been on Transitional MinnesotaCare. Even her ability to buy required medications and equipment for her daily diabetes prescriptions would be called into question. For James Beede, who gets some medical services from the VA as well as from GAMC, he relies on GAMC for essential dental work that would not be covered by Transitional MinnesotaCare. The affidavit of Jane Doe, a class member who is on GAMC and whose income is \$203 per month, confirms that she would have no way of paying the Transitional MinnesotaCare co-pays for her eleven prescriptions. More than 15% of her monthly income would be expended on even the modest co-pays for drugs, not to mention the additional costs for visits to her doctors.

It may be suggested that, because GAMC is scheduled to end at some time in the coming months, there is no significant harm from having it end on March 31 rather than at the end of April or May. There is no logic to such an analysis. The fact that we mortals will all die does not lessen the harm of the event, whenever it may occur.

The harm to these poor Minnesotans will be irreparable if they are terminated from GAMC on March 31. They meet the applicable legal standards for a TRO.

B. Minimal Harm to Defendants

If the TRO is issued to prevent the computer changes on Saturday, March 6, the administrative burden to the defendants will be minimal. If the GAMC program ends when it runs out of money in May or thereafter, the defendants will have ample opportunity to change their computer systems and to give all required legal notices of the changes.

The financial impact of the TRO is also limited. This is true for two reasons. First, most of the money being spent to implement the TRO is money over which there is no dispute. About 75% of the money needed to fund GAMC for April comes from the \$26 million that is available and not in dispute. Second, there is no cost savings in real dollars from placing GAMC recipients into Transitional MinnesotaCare. Although the benefits from MinnesotaCare are less than those provided by GAMC, for some reason the costs per recipient are higher. Indeed, according to the DHS February 2010 Forecast, it appears that there may have been a saving in actual dollar spent when DHS deferred termination of the GAMC program from its originally scheduled termination date at the end of February.¹¹ It appears that the importance of the shift from GAMC to Transitional MinnesotaCare does not arise from any savings in real dollars. It is basically an accounting issue, since MinnesotaCare is paid from a special provider tax rather than from the state's general fund.

The harm to the defendants from extending GAMC for the month of April is not significant. The harm to the people who receive GAMC is substantial. The TRO should be issued.

¹¹ See DHS February 2010 Forecast, attached as Exhibit 5.

IV. CONCLUSION

Plaintiffs have met all applicable standards for a temporary restraining order. The Court should enjoin the termination of the GAMC program on March 31 and should also enjoin notices and computer changes that would effect this termination.

Respectfully Submitted,

MID-MINNESOTA LEGAL ASSISTANCE

March 4, 2010

By: _____
Michael Fargione ID # 028253
Anne Quincy ID # 0270131
430 First Avenue North, Suite 300
Minneapolis, MN 55401-1780
(612) 746-3763

Attorneys for Plaintiffs