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DISTRICT COURT

COUNTY OF RAMSEY

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SECOND JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. 62-cv-11-5203
The Honorable Kathleen R. Gearin

In re Temporary Funding of Core
Functions of the Executive Branch of the
State of Minnesota

**MEMORANDUM OF *AMICUS CURIAE*
MINNESOTA HOSPITAL
ASSOCIATION**

INTRODUCTION

As of July 1st, 2011, 790,000 of Minnesota's most medically-needy residents face an uncertain future with respect to their health care. Should the State Legislature fail to reach a budget agreement -- and absent intervention by this Court -- the well-being of these Minnesotans will be put at significant risk. Emergency rooms may fill beyond capacity, the health of sick children may be compromised by long waits and cuts in services, pregnant women may go without prenatal care, disabled persons and the elderly may be unable to carry on their daily activities due to the unavailability of medical professionals and mentally-ill persons may lack access to needed prescriptions. The health of Minnesota's most vulnerable residents should not be jeopardized as a result of the budget impasse. Therefore, Minnesota Hospital Association ("MHA"), and the sixteen health systems and 145 community-based hospitals it represents, urge the Court to take immediate steps to protect these Minnesotans, as required by law.¹ As set forth herein, MHA respectfully requests that the Court grant in full the June 13, 2011, Petition of

¹ MHA hereby certifies that this *amicus curiae* brief was authored by the undersigned counsel with additional help from MHA's staff. No one other than the amicus and its members has made a monetary contribution in support of this brief. *Cf.* Minn. R. App. P. 129.03.

MHA's top priority is to ensure that patients and communities in need have meaningful access to health care services. MHA members ardently strive to achieve this goal even under the most adverse of circumstances, as demonstrated by the care North Memorial Medical Center recently provided to Minnesotans who were affected by the devastating tornado that hit North Minneapolis on May 22, 2011. Seventy-five percent of the patients who sought care at North Memorial following the tornado receive Medicaid. Neither a natural disaster nor a state government shutdown will deter MHA members from carrying out their mission.

However, if the Medicaid and MinnesotaCare programs remain unfunded and providers go unpaid, Minnesota hospitals will inevitably be forced to make difficult choices in order to carry on their work despite significant financial hardship. Unfortunately, Minnesota hospitals that serve the poorest and most vulnerable residents will be hardest hit by a lack of state payments. The amount of money paid to these hospitals for the services they provide cannot be easily replaced. According to Minnesota state estimates, in 2011, Medicaid fee-for-service payments to hospitals will total \$545.7 million.⁵ That translates to approximately *\$1.5 million per day paid* to Minnesota hospitals, and does not include payments from MinnesotaCare, managed care organizations that administer coverage for Medicaid or MinnesotaCare beneficiaries, or any other state health care programs.⁶

If Minnesota hospitals cannot pay their basic operation expenses, they will eventually be forced to take drastic measures. Such actions include: reliance on limited cash reserves to meet

⁵ See Minnesota Department of Human Services, Background Tables for the Expenditure Forecast - February 2011 Forecast (2011), available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=id_016358&RevisionSelectionMethod=LatestReleased (last visited June 20, 2011).

⁶ See *id.*

ongoing financial obligations;⁷ mass employee layoffs or furloughs; reduction or elimination of patient services, and; increased borrowing to fund payroll and pay vendors and delays in key investments in capital expenditures. In addition, lenders may step in to protect their investments at hospitals by engaging in: wholesale replacement of hospital managers; temporary takeovers of management duties by third parties, and; decreases in bond ratings resulting in immediate or subsequent increases in the interest rates paid by hospitals on their debt. The following are specific examples from MHA members regarding how a lack of funding of Medicaid and MinnesotaCare will influence them, both in the short and long-term. Such scenarios will likely be replicated at other providers throughout Minnesota. For example:

- North Memorial Medical Center will suffer a limited ability to provide crucial emergency medical services to the entire Midwest region. North Memorial operates one of the largest hospital-based ambulance and air care systems in the country, treating more than one million patients from International Falls to the Dakotas, Western Wisconsin and Iowa. In addition, North Memorial is a leading provider of EMS training and emergency preparedness in Minnesota. A government shutdown with no payments to North Memorial would severely limit its ability to care for patients and undertake emergency preparedness efforts across the Midwest.
- Children’s Hospitals and Clinics of Minnesota receive a substantial portion of operating revenues from Medicaid.⁸ A shutdown would put tremendous pressure on Children’s ability to provide urgently needed critical care services to premature babies and children with cancer, heart disease or complex surgical conditions. Moreover, because many private providers may decline to provide service during a cessation of Medicaid, it is expected that even more families will turn to Children’s as an alternate source of health care. Thus, Children’s resources may be strained to the limit without any sustaining source of funding. Children’s is determined to do everything possible to ensure continuity of care to its patients, but significant financial constraints could limit its ability to respond to the demand.

⁷ Cash reserves are measured through a metric of hospital financial health defined as “Days Cash on Hand Ratio” – the money available to fund ongoing hospital expenses in the event that all operating cash flow ceases. See Minnesota Hospital Financial Ratios 2010 (“MHA 2010 Ratio Book”) at 23. In Minnesota, the median number of Days Cash on Hand Ratio is twenty-seven days. Metropolitan area hospitals – where the majority of Medicaid services are provided – have an even lower Days Cash on Hand Ratio, with the median number at sixteen days. *Id.* In fact, one in four metropolitan hospitals report just over twelve days cash on hand. *Id.*

⁸ Medicaid represents approximately 42% of Children’s total revenue, representing \$12 million in payments per month. Medicaid is the single biggest source of operating funds for all services that Children’s provides to babies and kids in Minnesota.

- New Ulm Medical Center and other community hospitals will be adversely impacted by patients' limited access to state-operated Community Behavioral Health Hospitals (CBHHs), which provide needed mental health and substance abuse services. As a result of a reduction in the services performed by CBHHs, hospitals such as New Ulm will be pressured to fill in the gaps, leading to longer emergency room stays, added transportation costs and additional staff time dedicated to finding placement for patients who need care.
- Fairview Health Services will see weekly revenue drop by more than \$2 million per week if payments do not flow through Medicaid. Even for a large system like Fairview, \$2 million per week is a significant amount of money. As a result, in the event of a shutdown, Fairview may delay or cancel capital expenditures and projects, delay investments in care delivery reform and clinical integration efforts, and implement temporary or permanent work-force reductions.

Ultimately, the brunt of these hardships will be borne directly by the 790,000 elderly, disabled, pregnant, mentally-ill, low-income and child patients who rely on Medicaid and MinnesotaCare for their basic health needs. These individuals will suffer most from any reduction in health care services and the resultant confusion, anxiety and stress that will accompany abrupt gaps or lengthy delays in the provision of care. Denied access to needed hospital services, prescription drugs and mental health and chemical dependency treatments, these patients will face dire health consequences and potentially irreparable harm. For some, the results may be tragic.

II. MHA URGES THE COURT TO GRANT THE PETITION OF THE ATTORNEY GENERAL BASED ON PRIOR PRECEDENT

Minnesota simply cannot allow its most vulnerable and medically-needy residents to shoulder the negative and potentially life-altering consequences of the State's budget impasse. That is why MHA fully endorses the Petition of Minnesota Attorney General Lori Swanson. MHA agrees whole-heartedly with the Attorney General that Medicaid and MinnesotaCare are core functions of government vital to the health, livelihood and survival of Minnesotans. These programs must be maintained during a government shutdown.

The Attorney General’s arguments for the continuation of the Medicaid and MinnesotaCare programs during the anticipated government shutdown are well supported by the law. In fact, in 2001 and 2005, this Court granted substantially similar petitions filed by former Attorney General Mike Hatch. In those cases, the Court held that “the core functions of the executive branch arise from the State and Federal Constitutions, as well as mandates of the federal government pursuant to the Supremacy Clause.” *Executive Branch Core Functions 2005*, Concl. of Law ¶ 5 (June 23, 2005); *Executive Branch Core Functions 2001*, Concl. of Law ¶ 5 (June 29, 2001). The Court proceeded to hold that “in the event of a government shutdown, payments to recipients [of Medicaid and MinnesotaCare] will continue as a core function of government.” *Executive Branch Core Functions 2005*, Concl. of Law ¶ 5 (June 30, 2005); *see Executive Branch Core Functions 2001*, Concl. of Law ¶ 10 (noting that core functions include “the proper provision of healthcare” and “the application and maintenance of federal and/or State contracted or mandated programs . . . such as . . . medical assistance”). Since 2005, nothing has made Medicaid and MinnesotaCare less essential to patients’ health, welfare and survival. Thus, like the Attorney General, MHA urges the Court to stand by its prior rulings and again hold that these programs are “core functions” of government that must persist during a shutdown.

III. THE ATTORNEY GENERAL’S PETITION SHOULD ALSO BE GRANTED BECAUSE MINNESOTA IS OBLIGATED TO CONTINUE THE PROVISION OF MEDICAID AND MINNESOTACARE SERVICES UNDER ITS AGREEMENTS WITH THE FEDERAL GOVERNMENT

Additionally, MHA agrees with the Attorney General that Minnesota’s failure to fund Medicaid and MinnesotaCare would result in the breach of important obligations and agreements the State owes to the federal government, in violation of the Supremacy Clause. *See* U.S. Const., Art. VI, cl. 2. There is no dispute that, pursuant to the agreements Minnesota has undertaken, federal law mandates that the State finance Medicaid and MinnesotaCare. *See* 42 U.S.C.

§ 1396a(a)(2) (state plans for medical assistance must “provide for financial participation by the State”). As previously determined by this Court, before Minnesota was eligible to participate in Medicaid, the State had to assure the federal government, through certification or plan submission, that it would promptly provide Minnesota residents the medical benefits for which they were eligible and would share in the cost of operating the program. *See Executive Branch Core Functions 2005*, Findings of Fact ¶ 9 (June 23, 2005). Under the so-called Maintenance of Effort provisions of the Patient Protection and Affordable Care Act⁹ and the American Recovery and Reinvestment Act,¹⁰ Minnesota must maintain Medicaid coverage until January 2014 for adults and until October 2019 for children. Indeed, Minnesota cannot terminate its agreement with the federal government unless it submits and gets approval for a “phase-out plan” at least six months prior to any phase out. Minnesota has not submitted such a plan. Should Minnesota fail to fulfill its obligations under Medicaid, “it is subject to severe federal fiscal sanctions and, indeed, could be banned from continued participation in the program[.]” *Executive Branch Core Functions 2005*, Findings of Fact ¶ 9 (June 23, 2005). Accordingly, as recognized by this Court, “[t]he Supremacy Clause . . . mandates that any funds paid by the State as a result of participation in federal programs must continue.” *Id.* at Concl. of Law ¶ 8.

IV. MHA URGES THE COURT TO REJECT PORTIONS OF THE GOVERNOR’S PROPOSED CONTINGENCY PLAN

In addition to the position of the Attorney General, MHA generally supports Minnesota Governor Mark Dayton’s revised position, *see* Governor’s First Supplemental Response (June 21, 2011), as it recognizes Medicaid and MinnesotaCare as core functions of government,

⁹ Public Laws 111-148 & 111-152, Sec. 2001, subsection (b) (amending 42 U.S.C. § 1396(a), Sec. 1902 by adding subsection (gg) (adults) and 42 U.S.C. § 1397cc(d)(3), Sect. 2105(d)(3) by inserting new subsection (A) (children).

¹⁰ Public Law 111-5, Sec. 5001, subsection (f)(1).

ensures provider payments will be made in connection with these programs and allows newly eligible participants to enroll. As the Governor states, “[t]he life and safety of the people of Minnesota is paramount” and “a government shutdown would threaten the lives and safety of the people of Minnesota.” (Governor’s Response at 1, 9.) In addition, the Governor notes that “[i]f federal law expressly commands ongoing state funding, the State may be required under the Supremacy Clause . . . to continue it.” (*Id.* at 8.) In recognition of the core functions of Medicaid and MinnesotaCare, the Governor has designated as a “statewide objective” in the event of a government shutdown the “provision of benefit payments and medical services to individuals.” (*Id.* at 12.)

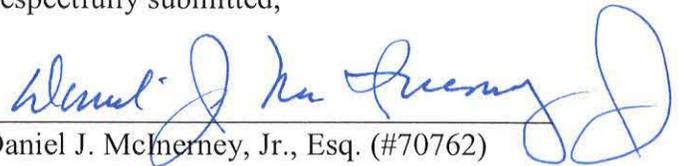
The Governor’s contingency plan, however, is inferior to the Attorney General’s proposed Core Services and the Court should adopt the Attorney General’s approach. For example, although this brief’s focus is on Medicaid and MinnesotaCare, it is worth noting that the Governor’s contingency plan will not fund licensure renewal for health care professionals. The failure of the Governor’s plan to fund licensure renewal will have a severe impact on the ability of Minnesota hospitals to adequately care for all Minnesotans. This Court determined in 2005 that license renewal for health care professionals was a core function of government. *See Executive Branch Core Functions 2005*, Ex. B (June 23, 2005). If physicians, nurses, therapists and other health care providers are unable to renew their licenses during a shutdown, they will be unable to provide critical care to patients. This potential and significant gap in services can be easily addressed by the Court by following the precedent established in 2005 and including professional license renewal as a core function.

CONCLUSION

For all of the foregoing reasons, MHA respectfully requests that the Court: allow it to participate in this action as *amicus curiae*; grant the relief sought in the Attorney General's June 13, 2011, Petition; and hold, consistent with its 2001 and 2005 precedent, that the Medicaid and MinnesotaCare programs are core functions of government that must continue to operate during a government shutdown.

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Respectfully submitted,



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