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Smith v. O'Halloran: Nursing Home Reform in the Courts

by John Robert Holland

This article reports on both the history and recent Tenth Circuit developments in *Smith v. O'Halloran*, which is a challenge by Colorado nursing home residents to the way in which Medicaid nursing homes are inspected and reimbursed nationwide. If upheld, this case will have a profound effect on the quality of care delivered to residents in virtually all of the nursing homes in this country.

The Commencement of Litigation

In 1975, Michael Patrick Smith was a severely disabled 21-year-old man living in a Lakewood, Colorado, nursing home. Michael had muscular dystrophy and was so gravely ill that he required hospitalization. While he was hospitalized, his $25 monthly Medicaid personal needs check was allegedly improperly endorsed and cashed by nursing home personnel without his permission. Also, Smith was a poet and complained that no one at the nursing home would take the time to write down the stanzas he composed in his head. These complaints, together with those of several other residents of the nursing home, led to the filing of a major class action lawsuit in May 1975.(fn1) Michael's contact with the Legal Aid Society resulted in the threat of immediate eviction from his nursing home.

Suit was instituted not only on Michael's behalf, but on behalf of all 18,000 persons residing in skilled or intermediate care nursing homes participating in the Medicaid program. Named as defendants were what was then HEW (now HHS), the Colorado Health and Social Services Departments and the nursing home and its owners. Damages were sought from the nursing home. Injunctive and *mandamus* relief were sought against the government agencies to compel them to develop an inspection system in which, as a condition of federal and state reimbursement, the nursing home would actually protect its residents and assure that their care needs would be identified and met. The federal government was spending, as of 1983, almost $8 billion on these nursing homes each year.

The earliest proceedings in the case sought and obtained injunctions against the nursing home based on a federal nursing home regulation Patients Bill of Rights and against eviction or other reprisals against Michael. Although he weighed only approximately ninety pounds at the time, Michael insisted on coming to court in a bed to tell Judge Matsch personally of his complaints.

His voice was so weak that it had to be amplified to be heard. At this hearing, plaintiffs' counsel obtained the right to unimpeded access to the clients and to meet alone with groups of them in the defendant nursing home.(fn2)

As a result of intense, often late night meetings, by the time of the first hearings, aides, orderlies, medical record-keepers and even a former nursing home administrator were disclosing observations of poor care in the facility and began swearing in a series of affidavits to a litany of horrors and abuses which, in open court, Judge Matsch said sent chills up his spine.

A few examples of the abuse and neglect allegations placed before the court were as follows. A blind woman had been kept on thorazine for years without an underlying psychiatric basis, despite highly unpleasant side effects. For social activity, this resident was sent with many others to a workshop where she separated fish hooks all day for a few pennies an hour. A number of residents requiring regular bowel assistance programs had none and repeatedly became severely impacted. A resident with a full body cast could not keep flies out of her face and was covered with them while being kept isolated in her room. A teenage girl developed such horrendous bed sores from not being turned that she was forced to lie face down on a pram full time for months. An elderly patient received such poor skin and hand care that his fingernails had grown into the skin of his hand. Patients perceived as disobedient were given cold showers or had their wheelchairs taken away. Numerous residents allegedly were kept tractable and quiescent through the overuse of tranquilizing medications. There was also evidence of cockroaches in patients' cereal and throughout the facility.

A 1976 state-conducted facility-wide audit of the residents' personal needs accounts, including Michael Smith's, disclosed that they had not been maintained in a manner which even provided a basis for determining the amounts due or what was put into the accounts of the individual residents.(fn3) A similar audit of patient care undertaken at the insistence of lay advocates for these clients led a physician working for the Colorado Department of Social Services to write a report on the nursing home youth wing.

It concluded that for the fifty-eight residents in this wing, care plans were either totally inadequate or nonexistent and that all of these residents had been diagnosed as having no, very poor, minimal, limited or guarded rehabilitative potential, although, in fact, many could have learned to live independently. The report concluded that these residents were being warehoused and deprived of their federal Medicaid entitlements to high quality medical, rehabilitative, nursing and psychosocial care.(fn4)

The Nature of Plaintiff's Attacks and Discovery

Plaintiff's stated sub-class damage claims against the nursing home defendants for (1) both individual and group negligence in the sense of a common disaster, such as an airplane crash; (2) maintenance of a private nuisance; (3) breach of fiduciary responsibilities; (4) a third-party beneficiary theory premised on the assertion that, as intended beneficiaries of the state/federal Medicaid provider agreements with the nursing homes, they were entitled to damages for the nonreceipt of the agreed upon entitlements; (5) an analagous implied cause of regulations under 28 U.S.C. § 1331; and (6) violation of their civil rights under 42 U.S.C. § 1983.

Those claims which were bifurcated from the government claims are still pending in the U.S. District Court for the District of Colorado. Jury trial has been requested. At least for the moment, the claims against the federal and state governments have been decided by the Tenth Circuit Court of Appeals entirely in favor of the statewide plaintiff class. Before discussing this recent decision, however, an outline of the case history which preceded it is necessary for an understanding of the result.

Against the government defendants, the plaintiffs' theory was that if the defendant nursing homes were providing inadequate care, it must be because, in significant part, government inspectors were not focusing on or judging the quality of the care actually being delivered to the residents. In short, the plaintiffs' claim was that nursing homes were being reimbursed without regard to the care they were providing. The plaintiffs' request was that the federally mandated inspection system in place in all fifty states be voided and that the court order the development of a new system of enforcement capable of ensuring actual delivery of adequate care to nursing home residents as a condition of Medicaid reimbursement.

The governments in question responded to this claim by waging a paper battle, which lasted several years, against federal court *mandamus* and injunction jurisdiction over the federal defendant Secretary's discretion to regulate however she sees fit. Finally, in April 1978, Judge Matsch decisively asserted jurisdiction, certified the statewide plaintiff class as requested and discovery began.

The plaintiffs' discovery concerned the question of the quality of care being delivered in nursing homes, not only in Colorado but nationwide. It also involved an inquiry into the nature and adequacy of the so-called survey and certification inspection system for Medicaid and Medicare nursing homes across the country. Teams of plaintiffs' lawyers made numerous trips to Washington, D.C. and other federal record depositories to review and obtain hundreds of thousands of federal nursing home memoranda documents. Moreover, plaintiffs' counsel deposed all responsible federal government program officials up through the Medicaid line of authority.

Resistance at a program level to documentary discovery was great. Despite repeated inquiries, program officials on whom counsel relied were told that documents counsel suspected were in existence did not exist. However, as in the investigation of the initial nursing home facilities, nameless friendly federal bureaucrats repeatedly turned over examples of the very documents requested, but not forthcoming from program officials. On the basis of these documents, plaintiffs' counsel was able to file compel motions which forced the government's lawyers to allow counsel to go through the individual office files of top federal nursing home program administrators.

What was learned was truly amazing. In 1974, the Senate Committee on Long Term Care of the Senate Special Committee on Aging issued its report, entitled *Nursing Home Care in the United States: Failure in Public Policy*.(fn5) This report, with its nine supporting papers, was based on hearings in twenty-five cities. It concluded that the federal Medicaid survey-certification system, which was challenged in this lawsuit, is a failure because it requires the states to focus on a "paper" review of nursing home facilities' theoretical capabilities for providing care, rather than on whether the care is actually being provided. It further found that 50 percent of the nation's Medicaid and Medicare nursing homes were and are providing substandard care with one or more life-threatening conditions.

Partially in response to these Senate committee reports in late 1974, President Nixon and then HEW Secretary Casper Weinberger launched the so-called "long-term care facility improvement campaign." The stated purposes of this multi-million dollar campaign were to train federal and state nursing home inspectors and to redesign the federal Medicaid/Medicare nursing home quality standards and survey-certification enforcement process. The new process would focus facility program participation decisions on the question of whether residents were actually receiving needed care of acceptable quality rather than on a facility's paper capacity of proving it. In HEW's own words, the time

had come "to put the patient first."(fn6)

As part of this campaign and in reaction to the committee reports, HEW decided to conduct its own survey of conditions in the nation's nursing homes. According to HEW, the survey conducted as part of its long-term care facility improvement campaign was the most extensive and scientifically valid study of nursing home conditions ever undertaken. Almost 300 facilities were surveyed nationwide. Enough facilities were reviewed to provide a reliable picture of conditions in all skilled nursing homes in the country.

HEW's statistically based national findings of poor care were essentially the same as those of the Senate's Special Committee on Aging reports. It was found that although the current inspection system includes numerous federal survey forms, inspection manuals, action transmittals, etc., and that all states participating in the Medicaid program must use these forms, they represent no more than a "paper" review. Some $60 million a year is being spent by the federal and state governments to inspect and certify nursing homes nationwide using this mandatory system. However, in discovery plaintiff's obtained overwhelming evidence that this system, by its very nature, was incapable of assuring that residents actually received high quality care.

By the time of trial, in literally hundreds of documents obtained by plaintiffs' counsel, it was admitted by the federal government that its system can only measure the theoretical paper capacity of a facility to render care, but cannot evaluate the care actually given. As the government put it as early as February 1976:

Federal regulations focus on facilities not patients. A facility's capacity to deliver a given level of care has been more important than whether the patients actually receive this care or, in fact, whether the care meets minimum requirements.(fn7) Indeed, the government stated that the poor quality of care it found in the nation's nursing homes in its survey is:

fundamentally traceable to the fact that federal regulations, the method of reimbursement, and the survey/ certification process focus on the institutional framework within which care is provided rather than on the patients.(fn8)

Even as late as 1980, the federal government admitted in the Federal Register that in the conduct of federal survey/certification inspection, "state surveyors rely almost totally on records, documentation and written policies on the assessment of care provided."(fn9)

The case discovery also established that from 1974 to 1980 the government had spent millions of dollars developing the so-called "PACE" program for long-term care. This was a patient classification system which the government ignored in 1974 when it promulgated the current inspection system. The PACE program, therefore, was never implemented, even though it was described to Congress as follows:

PACE is systematic, continuous, objective, practical and effective. It is a base for measure of the patients' status, the care given and the outcome of care. PACE, therefore provides an excellent opportunity to change the survey and certification process from one of paper compliance to one in which determination of compliance is on the basis of outcomes of care and thus the quality of care.(fn10)

The State Switches Sides

As this evidence was developing in discovery, plaintiff's began meeting with top state officials who administer the federal survey-certification system in Colorado. Fed up with administering a system they were powerless to change, that could not be waived if the state wanted to remain part of the Medicaid program and which, in a powerful disincentive for states to develop their own separate systems, was 100 percent federally funded at the time, in April 1978 the state of Colorado switched sides.

The state of Colorado sought leave to file a complaint in intervention. In support of this motion, granted by Judge Matsch, the state asserted in the first sentence of its complaint that it agreed with the plaintiff's that the challenged federal survey-certification system in use in Colorado is "a national disgrace," and incapable of insuring that Medicaid recipients receive the appropriate, high quality care to which they are entitled under the Medicaid Act and regulations. Indeed, former Colorado health director Anthony Robbins stated in a court affidavit at the time that, in his opinion, based on extensive experience, the current system is "an open invitation to mistreat patients while ostensibly operating within the law."(fn11)

After years of discovery, negotiations with the federal defendant led to the publication by HHS of proposed regulations so much in keeping with the plaintiffs' and the state of Colorado's demands that a conditional stay of the case was agreed to in mid-1980. The stay broke down in January 1981 when the Reagan administration withdrew the proposed changes and announced that, rather than reforming the system as had been publicly promised since 1976, it was time for nursing homes to be deregulated and to "police themselves."(fn12)

The Trial and the Ruling of the District court

Thus, trial was finally commenced in mid-1982. Gruesome state and national evidence of poor care, the defective nature of the challenged inspection system and the existence of a clear patient-oriented survey assessment

system which could replace the one at issue, was presented. State surveyors from Colorado and other states testified to their experience and frustrations with the mandatory federal system.

Colorado state nursing home inspectors charged with implementing the federal survey-certification system unanimously testified that, based on their extensive hands-on experience, 80 percent of the approximately 18,000 patients living in Colorado nursing homes were and are receiving only custodial care. According to these inspectors, these patients receive "bed and board and an occasional wash up," rather than medical care and rehabilitative services appropriate to their needs, as required by the Medicaid Act. They further testified that only from 20 to 25 percent of the services required to be delivered under the Medicaid Act and regulations were actually being provided to the plaintiff class.

After trial, Judge Matsch found that plaintiff's had shown that many Medicaid-certified nursing homes provide so little care that they are really not more than "orphanages for the elderly." He also concluded that plaintiff's had shown that the challenged survey system is inherently incapable of assuring that nursing home residents actually receive their benefits. Specifically, he found that the system is defective because it is "facility-oriented" rather than "patient-oriented" and that not only was this "characterization appropriate," but "HHS has admitted it repeatedly." Most important to the subsequent appeal, the judge found:

It is clear from the evidence in this case that it is feasible for the Secretary to require the use of a patient care management system which would control the assessment of patient needs, facilitate the development of an appropriate patient care plan, provide the mechanism for monitoring the delivery of care by the facility itself and by the state review teams, give HHS the means for validating the state reports, and probably improve the quality of health care services provided for all Medicaid recipients.

Therefore, according to the judge, the problem with the plaintiffs' case was not the proof, but the law. Plaintiff's case had to be dismissed because the court found that the tapestry of federal Medicaid provisions plaintiff's relied on created no duty on the part of the defendant Secretary to promulgate a system of enforcement which assures that Medicaid residents actually receive their Medicaid benefits under federal laws.

In Judge Matsch's view, "Medicaid is not a program for the federal government to provide medical services. Rather, it is a system of federal funding of state plans to furnish health care to needy persons...." Having found that the current system was defective in its orientation and that a remedy could be feasibly devised which would "probably improve the quality of health care services provided for all Medicaid recipients," Judge Matsch held that feasibility and desirability were not the issue. The question, said the judge, "is whether the failure to introduce and require the use of such a system is a violation of the statutory duty. The answer is no."

The court held that, despite contradictory language, the Medicaid Act and implementing regulations do "not provide a substantive standard for the medical care to be provided." Further, consistent with its perception of the Medicaid program as nothing more than a funding mechanism, it held that granting *mandamus* to compel development of an effective enforcement system which could assure delivery of high quality care was utterly inappropriate. Since the court believed that the Medicaid Act created no entitlements to any particular level of care, the Secretary had no duty to force the states to inspect in such a way that would insure the delivery of any particular level of care. The court also found that the states were free to erect their own separate systems of enforcement on top of the challenged mandatory federal one. Thus, Judge Matsch concluded:

In sum, the plaintiffs' position is a distortion of the statutory scheme of the Medicaid Act. The primary planner and the initial actor in this welfare program is the state. The national government, acting through the Secretary, provides financial assistance for the provision of services under the state plan and for its administration. The federal enforcement mechanism lies in the reduction of the amount of payments or termination of payments through a disapproval of a plan which no longer is meeting the statutory requirements for participation. Accordingly, even if it is assumed that the members of the plaintiff class have some statutory entitlement to a certain standard of "quality care" and that there has been a denial of that entitlement, the enforcement remedy could not be a writ of mandamus against the Secretary to impose additional requirements on the state. The limit of the mandamus remedy would be an order for the Secretary to terminate all payments by a disapproval of a plan gone awry. This is not the relief sought in this case.

The court went on to state that granting the relief requested by plaintiff's would be to "substitute feudalism for federalism ... transform Medicaid into a national health care program ... [and] rewrite the statute." In so holding, the court again noted that it too believed "there is a manifest need for improvement in the condition of nursing homes and the care which is provided to welfare patients who are housed in them." However, it concluded that providing the requested remedies would offend "constitutional restrictions on the separation of powers among the branches of government."

The Tenth Circuit Reverses the District Court

On October 29, 1984, the Tenth Circuit Court of Appeals reversed and remanded the ruling of the district court. In so doing, the Tenth Circuit set out a carefully written exegesis of the history and purpose of the various federal laws which comprise the Medicaid Act and reaffirmed a number of points fundamental to the rights of Medicaid and Medicare nursing home residents nationwide.

The court noted that (1) plaintiff's had presented widespread evidence of "deplorable conditions in many nursing homes"; (2) the district court correctly found and the record amply supports the conclusion that the current enforcement system is "facility-oriented and not patient-oriented"; and (3) the court concurred with Judge Matsch that the development of a patient-oriented inspection system is "clearly feasible."

The court then turned its attention to the Secretary's duty and stated that, rather than the passive funding mechanism described by Judge Matsch, the Medicaid Act is to:

provide both medical assistance to aged, blind or disabled individuals whose means and resources are insufficient to meet the costs of necessary medical services to help such individuals attain or retain capabilities for independence or self-care. The court noted that the Act repeatedly talks about meeting the "current health needs," "promoting the maximum physical well-being of our patients," and assuring the "appropriateness and high quality of the care and services furnished to Medicaid recipients." Moreover, the existing implementing federal regulations require that:

each patient receives rehabilitative nursing care as needed, [and a facility has a] comprehensive program of care directed towards each patient achieving the optimal level of self care and independence, [which provides for] meeting the social and emotional needs of recipients.

Regarding the district court's ruling, the Tenth Circuit held:

The district court erred in finding that the burden of enforcing the substantive provisions of the Medicaid Act is on the states. [Rather,] The Secretary of Health and Human Services has a duty to establish a system to adequately inform herself as to whether the facilities receiving federal money are satisfying the requirements of the act, including providing high quality patient care. The duty to be adequately informed is not only a duty to be informed at the time a facility is originally certified but also a duty of contingent supervision. Nothing in the Medicaid Act indicated Congress intended the physical facilities to be the end product. Rather the purpose of the act is to provide medical assistance and rehabilitative services.

Having concluded that "in fact the quality of care provided to the aged is the focus of the Act," Judge McKay wrote:

We must conclude that a failure to promulgate regulations that allow the Secretary to remain informed, on a continuing basis, as to whether the facilities receiving federal monies are meeting the requirements of the Act, is an abdication of the Secretary's duty. [And because] the purpose and focus of the Act is to provide high quality care ... by promulgating a facility oriented system, the Secretary has failed to follow that focus and such failure is arbitrary and capricious.

In researching its conclusions, the court also noted that shortly after Judge Matsch's decision and "directly in response to the District Court's ruling in this case," Congress amended the Medicaid Act to reaffirm "the Secretary's duty under existing law because Congress believed the district court misinterpreted the statute."

The Tenth Circuit was careful to recognize the Secretary's discretion in the performance of her statutory duty, but nevertheless ordered the district court to oversee development of a mandamus remedy. The remedy would compel the Secretary to promulgate regulations which both "ensure that states comply with the congressional mandate to provide high quality medical care and rehabilitative services," and ensure that the Secretary is herself continuously informed "as to whether the nursing home facilities receiving Medicaid funds are actually providing high quality medical care."

Conclusion

At this writing, plaintiff's are awaiting the Secretary's decision as to whether a petition for certiorari will be filed with the U.S. Supreme Court. Plaintiff's are also beginning preparations for the remedy stage at the district court level and shortly intend to file appropriate motions, including a request for certification of a national class.

It is hoped that as a result of this litigation, all states will be required to certify that nursing home program beneficiaries are being continuously provided with appropriate high-quality, rehabilitative nursing, psychosocial and medical care. This is care residents of nursing homes are entitled to receive and which is essential to their ability to attain and retain independence and self-care.

In the final analysis, it has been proven that the current system is incapable of assuring that resident care needs are being competently assessed by the facilities involved in the Medicaid program. Plaintiff's in this litigation only seek to make nursing home regulation focus on the program's intended benefits by implementing an individual resident care needs evaluation assessment system which is well developed and fully field tested. The current "paper" system

has permitted the appearance of legality while unintentionally sanctioning abuse, neglect and mistreatment. It is hoped that a new patient-oriented system will protect this most frail and vulnerable segment of this nation's population.

NOTES

Footnotes:

1. The original civil filing number of this case was 75M539. The published district court opinion, *In re the Estate of Michael Patrick Smith v. Thomas J. O'Halloran,* appears at 557 F.Supp. 289 (D. Colo. 1983). The slip opinion numbers of the soon-to-be-published Tenth Circuit opinion in the case are 83-1442 and 83-1466. The Tenth Circuit's opinion and final judgment were issued October 29, 1984.

2. It should be noted that the pressures and responsibilities placed on counsel taking on a single client residing in a nursing home can be very great. It can involve calls from clients requiring immediate action day or night. Moreover, residents of nursing homes who muster the courage to complain against their keepers are often subjected to severe pressures from both the institution and relatives to retract their complaints. Sometimes poor care may further deteriorate as a result of airing complaints in any form. Such pressures are difficult to combat and may require judicial and other intervention. Counsel may have to request numerous restraining orders to protect a client from retaliation that could be life-threatening. Although it may also require finding a client a new place to live, the impact of a sudden transfer to new living quarters could be life-threatening in itself. Counsel may be able to alleviate such problems by holding pre-litigation meetings with top nursing home staff and administrators, backed up by the Health Department nursing home inspection division. In the course of the litigation described herein, nursing staff members who talked to plaintiffs' counsel also took their complaints about the nursing home to a public hearing at the state legislature. This led to the wholesale firing of the persons on whom the initial clients were most dependent for protection. As a result, over time, quite a number of these clients were moved out of the facilities being sued.

3. Colorado Department of Social Services audit of the records of Heritage House Nursing Home for the period of August 1970 through January 1976, respecting the handling of residents' personal needs and other monies.

4. *Medical Nursing Care Review of Patients at Heritage House Nursing Home Youth Wing Report,* prepared by Division of Medical Assistance, Colorado Department of Social Services, March 10, 1975.

5. Subcommittee on Long Term Care of the Senate Special Committee on Aging, S. Rep. No. 93-1400 and nine supporting papers, 93rd Congress, 2d Session, 1974.

6. HEW news release announcing Phase II of the Long Term Care Facility Improvement Campaign, February 12, 1976.

7. *Id.*

8. Proposal for Phase II of the Long Term Care Facility Improvement Campaign by Faye G. Abdellah, Assistant Surgeon General and Director of the Office of Nursing Home Affairs, HEW, February 4, 1976.

9. 45 Fed. Reg. 473, 68 (1980).

10. The PACE Program for Long Term Care, HFCA, paper first prepared June 1977.

11. Affidavit of Dr. Anthony Robbins, April 1978, on file in the federal district court.

12. Written text of speech by HHS HCFA Administrator Carolyn Davis, to the American Health Care Association, given on October 31, 1981.

The author wishes to state that over the many years of this litigation he has been assisted at various stages by a number of dedicated co-counsel whose joint efforts have brought the case to its current posture. In no particular order, the valuable contributions of the following persons must be acknowledged: Kathleen Mullens, Kristie Hansen, Patricia Butler, Maurice Knalzer, Joseph deRaismes, Michael Huotarl, Viji Kemanis, Debbie Eisenberg, Dennis Sousa, Jon Nicholls, George Hacker and Tucker Trautman.

This column is prepared by the CBA Disability Law Committee to acquaint lawyers with new developments in the area of disability law. This month's column was written by John Robert Holland, formerly director of litigation for the Legal Aid Society of Metropolitan Denver. Since 1979, he has been in private practice with the firm of John Robert Holland, P.C.

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