

January 31, 2005

Ms. Marilyn Hennessey
President
Retirement Research Foundation
8765 West Higgins Road Suite 430
Chicago, IL 60631-4170

Dear Marilyn:

Thank you and the board of the Retirement Research Foundation so very much for your collective commitment to advocacy for the elderly poor.

With the funds we are proposing here, NSCLC will be able to provide effective sustained advocacy for low-income seniors needing long-term care in the face of very real and immediate threats to Medicaid.

I am happy to answer any questions about the work described in here and look forward to hearing from you or your staff.

Sincerely,

Edward C. King
Executive Director

Enclosures

Medicaid Advocacy Project

Applicant: National Senior Citizens Law Center
1101 Fourteenth Street NW Suite 400
Washington, DC 20005
202/289-6976

Purpose: To protect low-income seniors in nursing homes and on Medicaid from state attempts to cutback benefits illegally, and to preserve beneficiaries' right to go to court when states fail to comply with Medicaid law

Project Director: Gene Coffey

Project Length: 24 months

Total Cost: \$675,200

Request: \$200,000

Medicare Advocacy Project: Project Summary

Introduction: The National Senior Citizens Law Center (NSCLC) seeks \$200,000 over two years to challenge illegal state Medicaid cutbacks; safeguard Medicaid beneficiaries' access to courts; ensure that the needs of elderly Americans, particularly those needing long-term care, are reflected in the upcoming policy debates about Medicaid; and involve state advocates in responding to federal Medicaid developments affecting the elderly. Support from the Retirement Research Foundation will increase NSCLC's attorney capacity to respond to the growing number of state actions to illegally cut Medicaid benefits and enhance NSCLC's capacity to represent low-income elderly people in the Washington debate over Medicaid.

Background: Medicaid, the nation's largest health care program, serving five million low-income elderly, is at a critical juncture. While states continue to cut services and beneficiaries out of their programs, the current political wisdom holds that opponents of Medicaid in Congress will attempt to significantly reduce benefits and will try again to eliminate Medicaid as an entitlement program. Indeed, one national organization has labeled the upcoming battle to preserve the program's scope and coverage the "Mother of All Medicaid Fights."

Access to Medicaid could be limited in several ways. First, Congress may simply cap the federal government's financial contribution to the states. This would force states to implement broad cuts to their own programs. Because the elderly are disproportionately dependent on Medicaid, they would undoubtedly lose coverage. As par of, or as an alternative to, a federal cap, Congress could also eliminate the mandatory elements of the program. In this scenario, states then would have full discretion to shape their own Medicaid programs. States would no longer have to provide a minimum package of benefits to certain populations, nor would they be beholden to important beneficiary protections, such as the spousal impoverishment protections in the long-term care program. Separately, Congress may also, as it did two years ago, simply cut or substantially reduce the services that are most costly.¹ With long-term care consuming 37% of all Medicaid costs, long-term care services could be a prime target for individual attack.²

Meanwhile, as this debate proceeds, states will continue to cut their Medicaid programs. Tennessee has just announced that it is cutting 300,000 individuals from Medicaid, while New York will attempt to eliminate \$1 billion from its Medicaid program. Mississippi is on the verge of eliminating 65,000 elderly and disabled individuals from Medicaid, and New Hampshire is considering eliminating nursing facility services as a mandatory Medicaid service. These stories are hardly unique, as virtually every state is trying to find ways to reduce its Medicaid programs.³ NSCLC and other advocates have responded by suing on behalf of Medicaid consumers to block

¹ The Medicare Modernization Act of 2003 prohibits states from providing coverage through Medicaid for prescription medication to any Medicare beneficiaries.

² See *Kaiser Commission on Medicaid and the Uninsured*, "The Medicaid Program at a Glance," January, 2004.

³ Every state in the nation and the District of Columbia included at least on Medicaid "cost containment" measures in their FY 2004 and 2005 budgets. *Kaiser Commission on Medicaid and the Uninsured*, "The Continuing Medicaid Budget Challenge: State Medicaid Spending Growth and Cost Containment in Fiscal Years 2004 and 2005," October 2004.

the illegal cuts. Mississippi and Kentucky, to cite two examples, were both blocked by federal judges last year from enforcing illegal Medicaid cuts. Inevitably, additional lawsuits will be necessary in the immediate future.

In this environment, it will be essential that the elderly have a voice in Medicaid policy debates and have lawyers who are prepared to challenge illegal state Medicaid cuts. NSCLC is uniquely qualified to fill this dual role. NSCLC has a national reputation for some of the finest health law advocacy on behalf of low income elderly people in the courts and in Congress, within the constraints of rules governing 501(c)(3) organizations. NSCLC requests the Retirement Research Foundation's assistance to allow the organization to perform this essential work.

Significance: Seventeen states made the reduction of long-term care coverage and disease management programs part of their Fiscal Year 2005 budgets, and eleven states have instituted cost controls on home and community based-care programs.⁴ Court action to prevent some of these cuts has been essential, because many states have either illegally reduced services, or illegally effectuated their cuts. Examples of the methods, or attempted methods, to roll back long-term care coverage are as follows:

Making illegal changes in eligibility standards: The Medicaid statute requires states to provide long-term care services under reasonable eligibility standards linked to *medical necessity*, not *affordability*. However, some states have tried to manipulate eligibility standards. Kentucky, for example sought to cut 3,300 residents in long-term care in nursing facilities and in the community from Medicaid despite the absence of any improvements in their conditions. Despite a successful challenge by NSCLC and Kentucky advocates, other states are still considering this identical approach. Oregon continues to move forward with its similar cost-reducing method, and the District of Columbia has proposed adopting the same approach.

Implementing legal changes illegally: In the mass effort to implement potentially legal changes, states frequently make mistakes and terminate or propose to terminate the Medicaid coverage of individuals who remain eligible. They also frequently deny the procedural rights of beneficiaries that are guaranteed under both the U.S. Constitution and federal law. The procedural rights are designed to prevent mistakes and to protect individuals from erroneous terminations. These include the right to a written notice detailing the reason for a proposed termination, and the right to a screening for eligibility of other categories of Medicaid coverage.

In 2004, NSCLC successfully stopped two state Medicaid cuts in federal courts based at least in part on the states' failure to honor the procedural rights of the Medicaid beneficiaries. First in Kentucky, and then in Mississippi, the federal judges presiding over the cases ruled that the state could not advance their Medicaid cuts unless and until they had properly afforded the Medicaid beneficiaries their due process rights. Undoubtedly, however, the need to protect these important procedural rights will arise again in the context of a state Medicaid cut.

⁴ *The Continuing Medicaid Budget Challenge: State Medicaid Spending Growth and Cost Containment in Fiscal Years 2004 and 2005*, Kaiser Commission on Medicaid and the Uninsured, October, 2004.

Requesting illegal waivers of Medicaid law: Even before the budget crisis developed, the federal government was encouraging states to experiment with their Medicaid funds to expand care through “demonstration programs.” Demonstration programs, or “waivers,” have historically aimed at expanding coverage to uninsured individuals at higher income levels and to persons not traditionally eligible for Medicaid coverage. However, the waivers being encouraged by the federal government now appear to be designed to accomplish the opposite—reducing coverage. Connecticut, Massachusetts and Minnesota have all submitted waivers that would, if approved, allow them far greater authority than currently allowed by federal law to deny Medicaid coverage for long-term care services. The federal law currently permits states to impose certain penalties on individuals who reduce their assets by making large financial gifts to third parties shortly before entering a nursing home. However, these three states are asking for the authority to impose penalties, i.e., deny coverage, on individuals who have made even small gifts as many as six years before requesting coverage. The Connecticut waiver has been pending for almost three years because of the dramatic policy implications surrounding it and the questions regarding its legality. The waiver’s terms are so harsh and clearly illegal that it is amazing that they are being considered at all.

Other waivers of questionable legality are surfacing. New Hampshire is debating whether to submit a waiver that would eliminate nursing facility services as a mandatory Medicaid service in the state Medicaid program, and to require family members (e.g., spouses, children, siblings, etc.) to pay for the cost of individual’s long-term care before Medicaid may be approved. NSCLC contends that the federal law that permits waivers was meant to help states expand coverage through innovative programs, rather than to provide an end-run around the mandatory requirements. If any of these waivers are approved, they must be challenged in court.

The Request: NSCLC seeks funding for support to allow 1,000 hours per year for two years for litigation and litigation assistance in the cases described above. This equates to .5 FTE. Existing experts will be used; their current work for this level of effort will be assigned to a new attorney.

We also seek funding for communication and information sharing. This includes adding to and updating our website to include special updates on Medicaid coverage for the elderly. The site will include, among other things: information on federal legislation; updates on state proposals to reduce Medicaid eligibility or funding; news on CMS communications with states regarding Medicaid waivers, and updates on approvals or denials; and information about state-based advocacy coalitions. NSCLC also will convene local and state Medicaid advocates for the elderly on monthly teleconference calls to focus on legislative, statutory, regulatory and policy developments, as well as ongoing cases and legal issues concerning Medicaid for elderly persons. Participants will receive valuable materials in advance to prepare; the calls themselves each will be about one hour in length.

Requested funds also will allow NSCLC to provide expertise, information, networking, and advocacy on issues critical to the elderly and to enforceability of the Medicaid entitlement at the Federal level.

NSCLC attorneys, acting within the constraints of its charter as a 501(c)(3) organization, will seek to maintain and strengthen policies that respond to the needs of the low-income elderly and protect entitlement enforceability. For more than thirty years, NSCLC has carefully followed the rules permitting charitable non-profits to provide commentary, suggest improvements, assist in the recruitment of witnesses, drafting of testimony, and otherwise lend support to improved policy in this arena.

Medicare Advocacy Project National Senior Citizens Law Center

Introduction and Summary

The National Senior Citizens Law Center (NSCLC) seeks \$200,000 over two years to **challenge** illegal state Medicaid cutbacks; **safeguard** Medicaid beneficiaries' access to courts; **ensure** that the needs of elderly Americans, particularly those needing long-term care, are reflected in the upcoming policy debates about Medicaid; and **involve** state advocates in responding to federal Medicaid developments affecting the elderly. Support from the Retirement Research Foundation will increase NSCLC's attorney capacity to respond to the growing number of state actions to illegally cut Medicaid benefits and enhance NSCLC's capacity to represent low-income elderly people in the Washington debate over Medicaid.

Medicaid, the nation's largest health care program, serving five million low-income elderly, is at a critical juncture. While states continue to cut services and beneficiaries out of their programs, the current political wisdom holds that opponents of Medicaid in Congress will attempt to significantly reduce benefits and will try again to eliminate Medicaid as an entitlement program. Indeed, one national organization has labeled the upcoming battle to preserve the program's scope and coverage the "Mother of All Medicaid Fights."

Access to Medicaid could be limited in several ways. First, Congress may simply cap the federal government's financial contribution to the states. This would force states to implement broad cuts to their own programs. Because the elderly are disproportionately dependent on Medicaid, they would undoubtedly lose coverage. As part of, or as an alternative to, a federal cap, Congress could also eliminate the mandatory elements of the program. In this scenario, states then would have full discretion to shape their own Medicaid programs. States would no longer have to provide a minimum package of benefits to certain populations, nor would they be beholden to important beneficiary protections, such as the spousal impoverishment protections in the long-term care program. Separately, Congress may also, as it did two years ago, simply cut or substantially reduce the services that are most costly.¹ With long-term care consuming 37% of all Medicaid costs, long-term care services could be a prime target for individual attack.²

Meanwhile, as this debate proceeds, states will continue to cut their Medicaid programs. Tennessee has just announced that it is cutting 300,000 individuals from Medicaid, while New York will attempt to eliminate \$1 billion from its Medicaid program. Mississippi is on the verge of eliminating 650,000 elderly and disabled individuals from Medicaid, and New Hampshire is considering eliminating nursing facility services as a mandatory Medicaid service. These stories

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are hardly unique, as virtually every state is trying to find ways to reduce its Medicaid programs.³ NSCLC and other advocates have responded by suing on behalf of Medicaid consumers to block the illegal cuts. Mississippi and Kentucky, to cite two examples, were both blocked by federal judges last year from enforcing illegal Medicaid cuts. Inevitably, additional lawsuits will be necessary in the immediate future.

In this environment, it will be essential that the elderly have a voice in Medicaid policy debates and have lawyers who are prepared to challenge illegal state Medicaid cuts. NSCLC is uniquely qualified to fill this dual role. NSCLC has a national reputation for some of the finest health law advocacy on behalf of low income elderly people in the courts and in Congress, within the constraints of rules governing 501(c)(3) organizations. NSCLC requests the Retirement Research Foundation's assistance to allow the organization to perform this essential work.

Significance

A. The Federal Level

The Administration and its powerful Congressional allies will attempt to make radical changes to the Medicaid program this year.⁴ The coverage of long-term care will likely be at the center of this debate on Medicaid. Currently, Medicaid is the single greatest payment source for long-term care services in the nation, accounting for 43% of all costs.⁵ Because of the crippling cost of long-term care services and the critical need on the part of hundreds of thousands of elderly for this level of care, Medicaid has been indispensable to the well-being of aging Americans. Indeed, the fight to preserve Medicaid's role in long-term care will be part of a larger political debate about how much publicly-funded care will be offered to elderly people during their final state before death. Unfortunately, the weakening political will to keep social welfare promises was exposed most recently by the Medicare Modernization Act of 2003 (MMA). MMA actually *reduces* benefits for the poorest among elderly people. As of 2006, these seniors must exchange the more comprehensive coverage offered by state Medicaid programs for the more austere benefits of the new Medicare Part D program. The Medicare debate of 2003 foreshadows the debate on Medicaid, and long-term care services are especially vulnerable.

³ Every state in the nation and the District of Columbia included at least on Medicaid "cost containment" measures in their FY 2004 and 2005 budgets. *Kaiser Commission on Medicaid and the Uninsured*, "The Continuing Medicaid Budget Challenge: State Medicaid Spending Growth and Cost Containment in Fiscal Years 2004 and 2005," October, 2004

⁴ "President Bush is readying a new budget... [L]obbyists and lawmakers' aides, speaking on condition of anonymity, say he will focus [his budget savings] on Medicaid... [T]he chairman of the House and Senate budget committees—Rep. Jim Nussle, R-Iowa, and Sen. Judd Gregg, R-N.H.—may want to go further than whatever savings Bush proposes." *Albany Times Union*, January 21, 2005.

⁵ See *Medicaid and Long-Term Care Fact Sheet*, Georgetown University Long-Term Care Financing Project, May, 2003.

In addition to the potential attack on long-term care coverage, there lurks an equally dangerous possibility. States are undoubtedly concerned about maximizing access to health insurance, and have been at times very generous in their Medicaid programs. But from the program's inception, states have occasionally illegally denied or terminated low-income individuals from coverage. In these situations, it has been crucial for Medicaid beneficiaries to be able to redress this treatment in court. No other practical enforcement mechanism exists. The federal government can declare a state out of compliance but only has the option of stopping *all* of its Medicaid funding, a nuclear option that has never been used.

However, the right of beneficiaries to seek redress in federal courts is under increasing pressure. In recent years, certain judges have begun to narrow the right of beneficiaries to initiate these actions. Even so, some governors have observed that they "always lose" when forced to defend illegal state Medicaid cuts in court.⁶ Thus, enough pressure may build to add restrictions in the law against the legal enforcement of the Medicaid Act by Medicaid beneficiaries. If so, the coverage and service provided by the Medicaid Act will be meaningless in some states.

For example, when Kentucky manipulated its eligibility standard for Medicaid coverage of long-term care in 2003, NSCLC was able to challenge this measure on behalf of a class of 3,300 Kentucky residents in federal court. The court blocked the state's implementation of this arbitrary eligibility standard, specifically stating, "Plaintiffs are correct that there is no precedent for the proposition that a state can alter eligibility for a mandatory Medicaid service simply because the state does not wish to pay the price required to provide the service to all eligible recipients." As a result, Kentucky was ultimately forced to reinstate the coverage of all 3,300 Medicaid beneficiaries. These beneficiaries will have no remedy if Congress decides to block the private enforcement of the Medicaid Act.

Low-income seniors will need experts to provide input on proposals to change Medicaid, analyze the potential impact, and recommend changes or counterproposals. Indeed, certain members of Congress *want* such a voice. Senators Jeff Bingaman (D-N.M.) and Gordon Smith (R-Or.) intend to form a commission on Medicaid for the purpose of carefully reviewing the needs of Medicaid's populations and determining how best to change the system. Inspiration for the commission, which would require congressional action, comes from the 1983 Social Security Commission that President Reagan and Congress appointed and which has been credited with pushing through important reforms that increased the solvency of a program that, at the time, was borrowing from Medicare to pay benefits. A bipartisan commission would be a forum for input from those best suited to understand the intricacies of Medicaid and the needs of beneficiaries.

B. The State Level

Seventeen states made the reduction of long-term care coverage and disease management programs part of their Fiscal Year 2005 budgets, and eleven states have instituted cost controls

⁶ Arkansas Gov. Mike Huckabee, *New York Times*, December 20, 2004.

on home and community based-care programs.⁷ Court action to prevent some of these cuts has been essential, because many states have either illegally reduced services, or illegally effectuated their cuts. Examples of the methods, or attempted methods, to roll back long-term care coverage are as follows:

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Implementing legal changes illegally: In the mass effort to implement potentially legal changes, states frequently make mistakes and terminate or propose to terminate the Medicaid coverage of individuals who remain eligible. They also frequently deny the procedural rights of beneficiaries that are guaranteed under both the U.S. Constitution and federal law. The procedural rights are designed to prevent mistakes and to protect individuals from erroneous terminations. These include the right to a written notice detailing the reason for a proposed termination, and the right to a screening for eligibility of other categories of Medicaid coverage. In 2004, NSCLC successfully stopped two state Medicaid cuts in federal courts based at least in part on the states' failure to honor the procedural rights of the Medicaid beneficiaries. First in Kentucky, and then in Mississippi, the federal judges presiding over the cases ruled that the state could not advance their Medicaid cuts unless and until they had properly afforded the Medicaid beneficiaries their due process rights. Undoubtedly, however, the need to protect these important procedural rights will arise again in the context of a state Medicaid cut.

Requesting illegal waivers of Medicaid law: Even before the budget crisis developed, the federal government was encouraging states to experiment with their Medicaid funds to expand care through "demonstration programs." Demonstration programs, or "waivers," have historically aimed at expanding coverage to uninsured individuals at higher income levels and to persons not traditionally eligible for Medicaid coverage. However, the waivers being encouraged by the federal government now appear to be designed to accomplish the opposite-reducing coverage. Connecticut, Massachusetts and Minnesota have all submitted waivers that would, if approved, allow them far greater authority than currently allowed by federal law to deny Medicaid coverage for long-term care services. The federal law currently permits states to impose certain penalties on individuals who reduce their assets by making large financial gifts to third parties shortly before entering a nursing home. However these three states are asking for the authority to impose penalties, i.e., deny coverage, on individuals who have made even small gifts as many as six years before requesting coverage. These particular waivers are extremely

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controversial. Indeed, the Connecticut waiver has been pending for almost three years because of the dramatic policy implications surrounding it and the questions regarding its legality. The waiver's terms are so harsh and clearly illegal that it is amazing that they are being considered at all.

Other waivers of questionable legality are surfacing. New Hampshire is debating whether to submit a waiver that would eliminate nursing facility services as a mandatory Medicaid service in the state Medicaid program, and to require family members (e.g., spouses, children, siblings, etc.) to pay for the cost of individual's long-term care before Medicaid may be approved. NSCLC contends that the federal law that permits waivers was meant to help states expand coverage through innovative programs, rather than to provide an end-run around the mandatory requirements. If any of these waivers are approved, they must be challenged in court.

Objectives and Methodology

Objective 1: Increase the number of successful court challenges to illegal cutbacks and illegal attempts to waive Medicaid requirements.

Litigation. This is the most direct and significant assistance which NSCLC provides to state advocates, and the need for NSCLC to provide this assistance is pervasive. The **Mississippi** suit NSCLC filed with a Mississippi legal aid office on behalf of 50,000 low-income elderly and disabled residents is about to resume, and the fight will undoubtedly be intense. Additionally, NSCLC has challenged **Oregon's** Medicaid long-term care cuts. A central issue in the litigation is currently under review by the U.S. Court of Appeal for the Ninth Circuit, and a favorable decision will require a resumption of the proceedings at the district court level.

NSCLC has also been contacted by legal aid attorneys in several states regarding their states' Medicaid developments. **Tennessee** legal aid attorneys have communicated with NSCLC about a potential challenge to the state's termination of 300,000 Medicaid beneficiaries. Legal aid attorneys in **New Hampshire** have been regularly updating NSCLC about the state's legislative proposal to seek a waiver from the federal government that would, if approved, eliminate nursing facility services from the state's package of Medicaid benefits. **District of Columbia** advocates have met with NSCLC regarding the state's proposed regulation to limit long-term care services to only those individuals requiring skilled nursing facility care, a facially illegal definition of long-term care.

NSCLC lawyers and other elderly advocates are also bracing themselves for the possible CMS approval of the "transfer of asset waivers" that **Connecticut, Minnesota, and Massachusetts** have submitted. If one, or all three, are approved, immediate litigation would be necessary to avoid application of excessively punitive penalties against elderly individuals in need of long-term care. NSCLC has discussed legal strategy with members of the National

Academy of Elder Law Attorneys (NAELA) and is prepared to play a leading role in the litigation.

NSCLC may have to turn down requests for assistance without additional staff. Indeed, NSCLC was forced to turn down a request **Georgia** legal aid advocates to challenge a change in the eligibility standard for long-term care because this case came up while litigation the Kentucky and Mississippi cases. Therefore, it is crucial to have funds and staff to litigate when the need arises when the need arises. We propose that RRF fund a half-time FTE position over the two years for litigation and litigation assistance.

Communication and information sharing. NSCLC will add a special section to its **website** devoted to legal issues in Medicaid advocacy for the elderly. The site will include, among other things: information on federal legislation; updates on state proposals to reduce Medicaid eligibility or funding; news on CMS communications with states regarding Medicaid waivers, and updates on approvals or denials; and information about state-based advocacy coalitions. At present, NSCLC delivers some of this information in its NSCLC Washington Weekly. However, use of the Web site to include this information will allow for faster delivery of important federal and state developments.

Monthly telephone conference calls: NSCLC will convene local and state Medicaid advocates for the elderly to focus on legislative, statutory, regulatory and policy developments, as well as ongoing cases and legal issues concerning Medicaid for elderly persons. The calls will be a forum for devising and coordinating national advocacy strategies. Participants will receive valuable materials in advance to prepare; the calls themselves each will be about one hour in length.

Objective 2: During upcoming Congressional debates over Medicaid, provide expertise, information, networking, and advocacy on issues critical to the elderly and to enforceability of the Medicaid entitlement.

NSCLC will ensure that the needs and interests of the low-income elderly are represented in the legislative process, especially with regard to long-term care, skilled nursing facilities, assisted living, and home care issues, by drawing on NSCLC's considerable expertise in these areas, and marshalling the expertise of advocates and researches with whom NSCLC works regularly.

Policy analysis and commentary. Within the constraints of its charter as a 501(c)(3) organization, NSCLC will seek to maintain and strengthen policies that respond to the needs of the low-income elderly and protect entitlement enforceability. For more than thirty years, NSCLC has carefully followed the rules permitting charitable non-profits to provide commentary, suggest improvements, assist in the recruitment of witnesses, drafting of testimony, and otherwise lend support to improved policy in this arena.

Communication and Information Sharing. NSCLC will connect field legal and policy advocates through regular conference calls, a listserv, web postings, meetings, presentations, writing, and informal contracts, in order to keep them informed of pertinent developments. Communications also will ensure that positive aspects of the record, role, and impact of Medicaid enforcement litigation are accurately presented in the debate as needed.

Evaluation: This project will conduct evaluations at regular intervals to identify the impact and predictive accuracy of our plans, the perceived usefulness of our services by advocates, and the possible need for course corrections as the project unfolds. We will focus on whether we are able to implement the strategy and methods described in this proposal, and if not, to identify the factors at work that are impeding implementation. A log of critical events in each state with potential litigation will be kept, so that we can document and analyze decisions to take action or not. Once litigation begins, intensive documentation is necessary, which will provide the basis for later evaluation. Similarly, events regarding upcoming policy debates over Medicaid will be highly documented by newspapers, magazine articles and congressional records. NSCLC will keep a log of all relevant clippings, its own papers, and meetings, so that we can later assess our impact. Other indicators of the value of our services will be: participation in monthly telephone calls, participation in the list-serv, feedback and visits on the website and calls for technical assistance on cases.

Dissemination

A major component of the project is to disseminate information about accomplishments so that advocates can build upon them. NSCLC will disseminate information through its Web site, its newsletter, the *Washington Weekly*, and through its conference calls with advocates. The budget includes resources to produce material for the NSCLC Web site aimed at the advocate-generalist as well as to litigators and policy specialists and for advocates' conference calls.

Budget and Timetable

Preserving access to the courts for Medicaid beneficiaries and using that access to challenge illegal cutbacks in benefits are two core NSCLC objectives. Approximately one third of our annual budget is devoted to these objectives. We are seeking support for Retirement Research Foundation to add new muscle to our efforts by enabling us to hire a highly skilled public policy counsel, to devote an additional 50% time FTE to Medicaid cutbacks litigation and legal support for advocates across the country, and to add more services for advocates across the country, and to add more services for advocates.

Plans for Continued Support

We believe that success will breed success in the project, and that we will continue to raise funds for a heightened level of advocacy. One stumbling block is the small number of

foundations that have embraced policy advocacy on seniors' issues, and the small number of individual donors who support litigation. NSCLC is committed to changing that dynamic. Given the historic moment, foundation may well recognize the important role played by advocacy, including litigation, in assuring the development and implementation of effective health care and other delivery systems for the benefit of older people and for this nation. We are preparing a short video on the Kentucky case which we hope will bring the issue alive to donors.

Raising awareness and commitment among foundations and donors will require a concerted effort on our part. We hope that the Retirement Research Foundation will be a partner with us in showing how powerful and satisfying this kind of advocacy can be.

Personnel

Gene Coffey, NSCLC Staff Attorney, will serve as the project director and primary litigator for Medicaid cutback cases. Gene served as co-counsel in the case against the state of Kentucky (*Kerr v. Holsinger*) and led the team of advocates in the Mississippi case, *Vinson v. Barbour*. In addition to litigating, Gene has tracked Medicaid developments at both the state and national level since joining the NSCLC staff in October, 2002. Before joining NSCLC, Gene spent six years as a staff attorney at Legal Services of Northern Virginia, specializing in Medicaid issues.

Jeanne Finberg, NSCLC Staff Attorney, will also serve as a litigator for Medicaid cutback cases. Ms. Finberg is a nationally recognized Medicaid expert with more than 25 years experience in health policy and poverty litigation with an emphasis on health benefits for seniors. She has written extensively and published numerous articles and chapters on low income health issues, especially on Medicaid and the elderly poor, and is on of very few advocates with expertise on issues involving both Medicaid and Medicare. She has recently returned to National Senior Citizens Law and manages the Oakland office. She has litigated numerous class action cases which have resulted in more benefits and improved access to Medicaid. At Consumers Union, publisher of *Consumer Reports* magazine, Ms. Finberg created an advocacy project to monitor the conversion of Blue Cross of California from a non-profit to a for-profit HMO which resulted in the formation of two foundations worth more than \$3 billion dedicated to health care charity, and which spawned similar conversion monitoring efforts nation-wide. She is a cum laude graduate of Stanford University and the University of San Francisco School of Law.

Simon Lazarus, NSCLC's Public Policy Counsel, has primary responsibility for all work with national organizations for educating policymakers and for overseeing the communications strategy. Si has served as Associate Director of President Jimmy Carter's White House Domestic Policy Staff (1977-81), as a partner in Powell, Goldstein, Frazer, and Murphy LLP (1981-2002), and as Senior Counsel to Sidley Austin Brown & Wood LLP (2002-). He is a Trustee of the Center for Law and Social Policy, and writes frequently on issues of law and policy. His articles have appeared in the *Atlantic*, the *Washington Post Outlook* (Sunday opinion) *Section*, the Democratic Leadership Council's magazine *Blueprint*, and *The American Prospect*. His *Atlantic Monthly* article, "The Most Dangerous Branch?", an analysis of Supreme

Court decisions that undercut the right of private citizens to enforce their federal rights in court, has been republished in two books, *The Best American Political Writing 2003* Royce Flippin, ed. (Avalon Press), and *Principles and Practice of American Politics: Classic and Contemporary Readings*, 2d ed., Samuel Kernell and Steven S. Smith, eds. (CQ Press). He graduated from Yale Law School, where he was Note & Comment Editor of the *Yale Law Journal*.

Edward King, NSCLC Executive Director, serves as a resource on litigation and policy advocacy. He is responsible for approving the strategic direction of the project, particularly the litigation strategy, and for insuring that the project meets its goals and timetables. Ed returned as Executive Director of NSCLC in 2001, a position which he held in 1981, when the newly formed Federated States of Micronesia (F.S.M.) until 1992. He also served part-time in three other courts, as a justice of the Supreme Courts of the Republic of Palau and of the Commonwealth of the Northern Mariana Islands; and as a Federal Magistrate Judge of the U.S. District Court for Hawaii. Prior to his first stint at NSCLC, King was the Directing Attorney of the University of Detroit Law School Center for Urban Law and Housing (1970-1972), and Deputy Director and Chief of Litigation of Micronesian Legal Service Corporation (1972-1976).

About NSCLC

The National Senior Citizens Law Center (NSCLC) was founded in 1972 to advocate for low-income elderly and disabled people. For more than 30 years, NSCLC has served legal services programs and civil rights attorneys as “lawyers’ lawyers,” specializing in laws affecting low-income elderly people. We are national experts on public benefits, administrative law and litigation under Medicaid. Most of our attorneys have over 20 years experience, much of which has been devoted to sophisticated representation of poorer people against powerful private interests or government entities.

In its 30-plus years, NSCLC has won many precedent-setting cases and hundreds of cases that reinstate benefits to classes of poor people served by Medicaid and SSI programs. NSCLC’s record these important victories besides last year’s in Kentucky and Mississippi:

NSCLC co-counseled a successful suit that required California to provide adequate services in the community to persons forced to live in the largest nursing home in the country. NSCLC had special responsibility for sovereign immunity issues. (2004)

With NSCLC’s help, immigrants in California won a challenge to eligibility rules in a California program that provides benefits for immigrants who were no longer eligible for federal SSI benefits as a result of the 1996 welfare reform legislation. (2003)

NSCLC successfully sued a government agency on a disparate impact theory over age discrimination in a reduction in force. This was the first case in which a plaintiff class was certified in an age discrimination case against the federal government. (2000)

Medicaid clients in Alabama and Georgia sued and won reinstatement of benefits through settlements that protected them and others in similar situations. Had our clients not stepped forward, they and tens of thousands of other people who became ineligible for Supplemental Security Insurance (SSI) benefits would have been stranded without Medicaid benefits. (1997)

NSCLC negotiated a settlement that enhanced food stamp access for elderly and disabled people applying for SSI. (1996)

Social Security Disability claimants in Alabama, Florida and Georgia brought an action with NSCLC's help which forced the government to change the way it calculates past due benefits. The revised method resulted in eligibility for SSI and consequently, additional Medicaid benefits worth \$50 million a year for thousands of people annually. (1995)

California nursing home residents filed a statewide class action represented by NSCLC that resulted in an order requiring the state to comply with the federal Nursing Home Reform Act. This case was closely watched by other states, who would have flouted the law had California won. (1992)

NSCLC also advocates for its clients in Congress and before regulatory agencies. NSCLC was a leader in developing the Nursing Home Reform Law. NSCLC staff provides technical assistance to approximately 600 cases yearly; trains 2,500 advocates and assists several major advocacy networks: legal aid attorneys, protection and advocacy attorneys and advocates serving the elderly under the Older Americans Act. NSCLC disseminates a weekly newsletter, a monthly mailing on disability and a bimonthly publication on long-term care; and maintains a web site with weekly postings on legal developments.

Conclusion

Sometimes, as the saying goes, you need a lawyer to get a doctor. At both the federal and state level, Medicaid is in as precarious a position as it has been at any point in its history. The potential for aggressive restructuring by Congress is clearly evident, and the need for legal advocacy in federal court will continue so long as states seek to reduce their Medicaid obligations. Now is the time to invest in knowledgeable, committed advocates who understand the intricacies of Medicaid and can navigate a court room or a congressional debate. A grant from Retirement Research Foundation capitalizes on NSCLC's leadership role among advocates and leverages its expertise at a critical juncture.

National Senior Citizens Law Center
Retirement Research Foundation
Medicaid Project

	<u>Year 1</u>		<u>Year 2</u>		<u>Total</u>	
	RRF	Other	RRF	Other	RRF	Other
Personnel						
Salaries						
Staff Attorneys	\$40,000	\$945,000	\$40,000	\$94,500	\$134,500	\$189,000
Executive Director	\$5,000	\$26,250	\$5,000	\$26,250	\$31,250	\$52,500
Administrative Support	\$5,000	\$13,250	\$5,000	\$13,250	\$18,250	\$26,500
Total Salaries	\$50,000	\$1,084,000	\$50,000	\$134,000	\$184,000	\$268,000
Benefits @25% of salaries	\$12,500	\$33,500	\$12,500	\$33,500	\$46,000	\$67,000
Total Personnel	\$62,500	\$1,117,500	\$62,500	\$167,500	\$230,000	\$334,000
Other Direct Expenses						
Consultants Fees	\$18,000	\$0	\$18,000	\$0	\$18,000	\$0
Web-Site Support	\$6,000	\$0	\$6,000	\$0	\$6,000	\$0
Travel	\$1,500	\$5,000	\$1,500	\$5,000	\$6,500	\$10,000
Telephone	\$1,200	\$2,400	\$1,200	\$2,400	\$3,600	\$4,800
Printing & Postage	\$1,800	\$2,400	\$1,800	\$2,400	\$4,200	\$4,800
Total Other Direct Expenses	\$28,500	\$9,800	\$28,500	\$9,800	\$38,300	\$19,600
Total Direct Expenses	\$91,000	\$177,300	\$91,000	\$177,300	\$268,300	\$354,600
Overhead	\$9,000	\$603,000	\$9,000	\$60,300	\$69,300	\$120,600
Total Expenses	\$100,000	\$2,237,600	\$100,000	\$237,600	\$337,600	\$675,200

Medicaid Advocacy Project Budget Notes National Senior Citizens Law Center

Personnel: Gene Coffey, project director at 30 percent time to assure the overall success of the project; to direct the development of the web page, assuring production of content for the web page (sample pleadings, rulings, and other court documents; news bulletins, practice tips, FAQs and other technical assistance information, and links to other sites); and to litigate Medicaid cutbacks cases. Jeanne Finberg at 20 percent time to litigate Medicaid cases with or in addition to Gene Coffey, to contribute material to the web page and to convene the advocates calls.

Edward C. King at 5 percent time for expert advice and review of court filings. Mr. King has been instrumental in developing litigation strategy for NSCLC's Medicaid cutback cases.

Administrative Support: \$XXXX: Christy Ross, NSCLC web master and publications coordinator at 3 percent time (83 hours) to post content on the web and liaison with web site technical support. Secretarial support at 12 percent FTE to handle litigation document production, mailings to advocates and project-related support for attorneys.

Benefits: Benefits are calculated at 25% of salaries.

Consultants' Fes: \$XXXX/year for 150 hours of representation, all expenses included, on Medicaid issues by Simon Lazarus, public policy counsel for advocacy @ \$XXXX/hour. This work is in addition to and separate from Mr. Lazarus' work for NSCLC on other issues.

Website Support: \$5,000/year for technical support, specifically: to design and put up on the internet a separate page for the Medicaid Advocacy Project that fits into NSCLC web site architecture; link that page to other web sites as directed by NSCLC; insure pages are linked internally to other relevant sections of the web site; monitor the Medicaid Advocacy section of the NSCLC web site for bad links and inappropriate postings; monitor usage levels and recommend changes as appropriate; keep posted materials up-to-date; answer general inquiries and forward special requests to project director.

Travel: Two trips for two days each to states to appear in court or at a meeting to advance a negotiation, or for other litigation-related work. This estimate is linked to the increased staff time devoted to litigation which the Retirement Research Foundation grant will fund.

Based on the last three cases on Medicaid cutbacks, we anticipate at least two trips per case. For example, in *Haley v. Barbour* (Mississippi), so far Gene Coffey has taken two trips: once to negotiate with the state attorney and once to argue in court for a temporary restraining order on behalf of the plaintiffs. In *Kerr v. Holsinger* (Kentucky) the court

arguments were handled by our co-counsel, but Mr. Coffey traveled to Kentucky once to train local legal services attorneys and Mr. King traveled once to participate in the hearing on the consent decree. Costs are estimated @ \$750 per trip or \$350/trip airfare and \$400 for three days/two nights for hotel, meals and ground transportation.

Printing and Postage: Photocopying @ \$600/year for litigation documents and other project-related materials. Postage @ \$600/year to mail materials to advocates prior to the advocates' conference call. These packets are typically 20-50 pages each, since they include copies of documents as well as the agenda.

Overhead: Overhead is calculated at 15 percent.