

ELDER LAW

Legislative Update: 'Silver,' Proposed Changes to Medicaid Eligibility

BY DANIEL G. FISH



Governor George Pataki's recent budget proposal again seeks to change federally enacted Medicaid eligibility rules. The budget contains exactly the same restrictive provisions regarding Medicaid eligibility that the Legislature rejected last year.<sup>1</sup> It proposes to increase the look-back period from thirty-six to sixty months, end spousal refusal, change the date on which the penalty-period begins to run, and create a penalty-period for home care transfers.<sup>2</sup>

**'Silver v. Pataki'**

Although the Medicaid proposal is essentially identical to the proposal made last year, the budgetary context is very different this year. The difference is *Silver v. Pataki* (Court of Appeals of New York, 2004 N.Y. Lexis 3796). An understanding of the fate of the Medicaid proposal this year requires an understanding of this case.

The Governor and the Legislature have been engaged in a long standing dispute, of constitutional proportions, over the authority that each has in the budget process.

Both sides claimed that the other had encroached upon constitutionally designated boundaries. The disagreement became so contentious that it resulted in litigation, *Silver v. Pataki*. On December 16, 2004, the New York State Court of Appeals issued its decision in that case and profoundly altered the landscape under which the budget is now being considered.

**Executive Budgeting**

The New York State budget has been late for the past 20 years. However, the current public debate over chronic delays in enacting the state budget is not new. A report by a committee to the 1915 State Constitutional Convention complained about the delays in the budget making process and recommended that the system be overhauled. Until that time the budget had originated with the Legislature. As a reform, the report suggested that the budget process begin with the Governor, rather than the Legislature. The report argued that the Legislature was ill-equipped for the budget process because the members were elected on a local basis, not state-wide. The Governor was thought to be better suited for initiating the budget process because state-wide election led to greater accountability and the Governor had greater budgetary expertise gained from the fact that the various state agencies reported to the Governor.

The New York State Constitution was ultimately amended in 1926 to implement this recommendation, called "executive budgeting". It was thus by constitutional amendment that the balance of power in the budgetary process shifted toward the Governor. Executive budgeting has been the format for more than 75 years and is the format that we operate under today. The Governor receives proposals from the various state agencies and creates a proposed budget that is submitted as an appropriations bill to the Legislature.

**No-Alteration**

The constitutional amendment not only established the Governor as the progenitor of the budget, but, it severely limited the Legislature's possible response to the executive budget. The Legislature may strike out or reduce an item but otherwise may not alter the appropriations bill. This is called the concept of "no-alteration" and it only applies to the appropriations bill. The Legislature has a third option, of refusing to pass the appropriations bill and forcing change in the Governor's position through negotiation.

The appropriations bill is submitted by the Governor and if passed by the Assembly and Senate requires no further action by the Governor, it automatically becomes law. As a further restriction upon the Legislature, no other appropriations bill may be considered until the Governor's budget is acted upon. After the executive budget is acted upon, the Legislature may submit bills to increase spending, but they must be single items bills, in effect subject to a line-item veto of the Governor.

These two concepts, executive budgeting and no-alteration of the appropriations bill, set the stage for *Silver v. Pataki*. The case revolved around the budget battles of 1998 and 2001.

In 1998, the Governor submitted his appropriations bill and it was passed by the Legislature. Then the Legislature passed non-appropriations bills which the Governor believed improperly undid the appropriations bill that had just passed.

In 2001, the Governor submitted an appropriations bill that the Legislature believed had improper non-appropriations material, for the purpose of giving it no-alteration protection. The Legislature rejected the budget and submitted 37 separate budget bills. The Governor signed them and filed litigation seeking to hold them unconstitutional ab initio.

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The Court of Appeals ruled in favor of the Governor regarding both the 1998 and the 2001 budgets. It held that the Governor is the “constructor” of the budget and the Legislature’s role is limited to that of “critic”. The court could easily have side-stepped this case by ruling that the issue was moot given the fact that the budgets for the years in question were long since settled and no longer of any practical significance. The court chose to rule on the merits and *Silver v. Pataki* now permeates the entire budget process this year as all sides try to understand its implications. The New York State Court of Appeals website has a web cast of the oral argument in the case at [www.courts.state.ny.us/ctapps](http://www.courts.state.ny.us/ctapps).

The core issue in the case is how to distinguish between appropriations matters and non-appropriations matters. The plurality opinion (by Judges R.S. Smith, in which Judges Graffeo and Read concur) acknowledges this when it says

“...we recognize that the Governor’s power to originate appropriations bills is susceptible to abuse. A Governor could insert into what he labeled ‘appropriations bills’, and thus could purport to shield by the no-alteration clause, legislation whose primary purpose and effect is not really budgetary.”

The concurring opinion (by Judge Rosenblatt in which Judge G.B.Smith joined) thought that the plurality opinion failed to give enough guidance to the Governor and Legislature in future budget negotiations. It suggests some guidelines for a bright line test to distinguish appropriations from non-appropriations matters:

“The more an executive budget strays from the familiar line-item format, the more likely it is to be unauthorized, non-budgetary legislation. As an item exceeds a simple identification of a sum of money along with a brief statement of purpose and a recipient, it takes on a more legislative character.” “The more an appropriation actively alters or impairs the State’s statutes and decisional law, the more it is outside the Governor’s budgetary domain.” “As budget provisions begin to cast shadows beyond the two-year budget cycle, they look more like non-budget legislation”.

The dissent (by Chief Judge Kaye in which Judge Ciparick concurred) found that the Governor had intruded in the Legislature’s domain and offered as an example of a non-appropriation matter in an appropriations bill, a single item pertaining to public school funding “...in the form of 17 closely-printed pages.”

Two justices in the dissent and two justices in the concurrence had concerns that this decision could lead to executive abuse. The concurrence believed that it could happen in the future and the dissent believed that it had already occurred.

Action on the Medicaid eligibility proposals in the Governor’s appropriations bill this year are now subject to the new order in the budgetary process created by *Silver v. Pataki*. The Medicaid proposal itself raises the central issue of the case. Although the proposed eligibility changes are linked in a general sense to the overall Medicaid appropriation, they are programmatic in nature and because many of them require a federal waiver, they are unlikely to result in any savings this year.

1. For a full discussion of these provisions see this column March 11, 2004 and September 13, 2004.
2. In addition, the Governor’s budget contains a new proposal to centralize Medicaid litigation in the office of the New York State Attorney General. Currently, much of the Medicaid litigation such as claims against estates or spousal claim suits is handled at the county level. There is also a proposed amendment to the partnership for long-term care insurance program. Last year the partnership long-term care policy requirements were modified to make this insurance more attractive by permitting the purchase of policies of less than three years duration. The language proposed this year would close a perceived loophole, by making it clear that some estate recoveries or liens against homes would be permitted if individuals purchased coverage of less than three years duration.