

## ATTORNEY AFFIDAVIT

NOW COMES Karen B. Johnson, of Groton, Massachusetts, and hereby deposes and states that:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts.
2. I am a shareholder in the law firm of Madge & Johnson, P.C., with its principal place of business at 3 Lan Drive, Suite 101, Westford, Massachusetts 01886.
3. As part of our practice, our office is engaged to assist our clients with preparing and submitting MassHealth long term care applications.
4. Upon determining that our clients meet the eligibility criteria for MassHealth services, we will often avail ourselves of the MassHealth regulation that will allow our clients to receive MassHealth services up to 90 days prior to the filing of their MassHealth application. *See* 130 CMR 520.004(C).
5. We avail ourselves of this provision in order to prepare an application that is clear, complete and demonstrates MassHealth eligibility.
6. Previously, our submissions were reviewed by MassHealth caseworkers and our applications approved without a denial the vast majority of the time.
7. In the last few years, our interactions with MassHealth have changed.
8. In 2017, all of the applications we submitted were denied.
9. In 2017, all of the applications were denied because, “[The applicant] did not give MassHealth the information it needs to decide your eligibility within the requested time frame.”
10. To my knowledge and belief in all instances, the information needed to determine eligibility was provided if not at the time of application, then prior to the date specified in any Information Request received.
11. In all instances, our office needed to file for a Fair Hearing in order to prosecute the application and preserve the original date requested for MassHealth coverage to begin.
12. In all instances, our clients were approved for MassHealth coverage.
13. The time from date of the denial letter to date of the approval letter averaged about two (2) months.

14. Upon information and belief in all instances, the material that was alleged to be missing was sent to MassHealth at the time of application, and again after receipt of the denial letter and in some cases several times before approval was achieved.
15. Upon information and belief, in the majority of cases, MassHealth was only responsive to resolving the issue of the erroneous denial once a Fair Hearing request had been filed, and in some cases not until a day or two before the Fair Hearing was scheduled to be conducted.
16. Upon information and belief, none of the applications submitted in 2017 involved trusts.
17. Upon information and belief, none of the applications submitted in 2017 involved disqualifying transfers of any sort.
18. Upon information and belief on more than one occasion my staff, in speaking with the MassHealth caseworker was advised that the denial was issued “in error” because the file was not processed by the MassHealth caseworker fast enough and that as a result the “system” automatically issued the “denial letter”.
19. On several occasions, when speaking with MassHealth caseworkers we were advised that the application would be approved and that no Fair Hearing would be required.
20. Pursuant to page 2 of a “typical” denial notice for failure to provide information, the applicant, if it provides the needed paperwork to achieve eligibility within 30 days and is eligible, MassHealth will determine eligibility as of the date they receive this information. *See* Exhibit A (partially redacted to protect client confidentiality), highlighted portion on Page 2.
21. In all cases, had our office not filed an appeal for a Fair Hearing, our clients would have lost their original requested MassHealth coverage date under the provision referenced in Paragraph 20 herein and instead would have only achieved coverage when MassHealth later determined them eligible, roughly 2 months later.
22. In all cases, had our office not filed an appeal for a Fair Hearing, our clients would have been responsible for nursing home payments of between \$24,000 and \$30,000, representing two months’ worth of nursing home costs at the private pay rate.
23. In all cases, this loss was prevented because our clients sought out competent legal counsel.
24. To my knowledge, only a small percentage of MassHealth applicants use competent legal counsel to assist them in applying for MassHealth coverage and are therefore at greater risk of not understanding the importance of timely filing for a Fair Hearing in order to preserve their requested date of MassHealth coverage under their originally filed application.
25. Although we have been successful each time in achieving MassHealth eligibility for our clients and have been successful in preserving the eligibility date requested so that our clients did not suffer any liability to pay the nursing home for days that should have been covered by

MassHealth, our clients did suffer. While the application was denied and on appeal, our clients suffered anxiety about whether the applicant would be evicted from the nursing home for failure to pay. Our clients during this time received bills from the applicant's nursing home indicating that they were responsible for the care of the applicant at the private pay rate for the time the applicant applied for MassHealth coverage until approval of MassHealth coverage was secured.

26. In addition to suffering emotionally from MassHealth's erroneous denials, my clients suffered financially in the form of higher legal fees and costs. These additional legal fees include additional time spent trying to communicate with MassHealth to determine what information is being sought and the time and the cost of producing that additional information one or more times. In some instances where the matter is not resolved until a day or two before the Fair Hearing has been scheduled and MassHealth has been unresponsive, the attorney responsible for overseeing the application must prepare for the hearing by documenting all information provided to MassHealth and organizing the exhibits to be produced showing that such information is all that is necessary to determine eligibility and that such information was previously submitted to MassHealth prior to the deadline for submitting such information.

27. These additional fees can range from a few hundreds of dollars to a thousand dollars or more, depending on how much time is spent before approval can be achieved.

28. Many other lawyers have told me that they had similar experiences as I have described above. I have also heard from other lawyers that they receive denials that do not contain specific reasons for the denial, that if the applicant who is denied has a trust that there is no indication in the denial notice whether the denial stems from any provision in the trust (never mind which provision of the trust MassHealth finds problematic); I have also heard that other lawyers have requested subpoenas from the hearing officer so that they can determine the grounds for denial and that such requests are routinely denied; I have also heard that other lawyers have attempted to review the MassHealth applicants' case files to determine the grounds for denial and routinely the case files do not contain the reasons for the denial, especially on cases involving trusts and other complicated countable assets; I have heard that MassHealth employees often cite attorney-client privilege as their reason for not providing the reasons for the denial before the scheduled fair hearing.

29. On several occasions in years prior to 2017, I have had to represent my clients at Fair Hearings on a legal issues that I had previously prevailed on in other applications for MassHealth.

30. An example of this involved the treatment of VA Aid and Attendance Benefits which are not supposed to be counted in determining MassHealth eligibility if certain conditions are met. *See* 130 CMR 520.008(G) and 130 CMR 520.015(E). In all cases, these conditions were met and the applications were denied or the income counted erroneously because MassHealth erroneously determined that the amounts received were not VA Aid and Attendance Benefits. Despite producing a copy of the Fair Hearing decision in a prior matter involving the same legal issue: is the amount excluded as VA Aid and Attendance Benefits?, the application of a subsequent client was denied because the excluded benefit was counted as an asset of the applicant, rendering them erroneously ineligible. This necessitated the client paying several thousands of dollars in legal



fees for me to prepare and attend a Fair Hearing on this issue. Producing a copy of the prior Fair Hearing decision and showing that the circumstances were identical was not sufficient. I needed to prove the underlying case using the VA methodology for determining Aid and Attendance benefits. The MassHealth agency needed to expend significant resources in issuing a substantially similar decision as I had received in the first case.

31. In my experience, only in the instances of defending non-countable trusts has MassHealth submitted a legal memorandum in defense of its positions.

32. Consistent with the experience of other lawyers, I was not provided a copy of this legal memorandum in advance of the Fair Hearing but only at the time of the Fair Hearing.

33. Consistent with the experience of other lawyers, it was necessary for the Fair Hearing record to be kept open so that I would be permitted to review and respond to the information in the MassHealth legal memorandum.

34. Consistent with the experience of other lawyers, when I received the denial letter involving trusts, it did not indicate a reason other than the applicant was over asset. The table in the denial letter intended to show why the applicant is not eligible indicated an amount as "other" and showed a sum that sometimes could be linked to the trust easily but in other instances we could only guess as to how MassHealth got the amount indicated.

35. Upon information and belief, in no denial letter actually received by our office did it indicate a specific reason for why an asset was a countable resource.

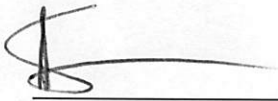
36. As a result, in all instances I needed to either discuss the matter with the MassHealth caseworker or go to the Fair Hearing in order to learn why my client was denied MassHealth benefits.

37. Consistent with the experience of other lawyers, not knowing in advance what legal arguments MassHealth used in determining ineligibility made the actual Fair Hearing proceeding difficult as I was only able to introduce witness evidence based on the arguments I had anticipated MassHealth might have made. In one case, I was prepared to introduce evidence to refute an argument that MassHealth had not made. Had I introduced such evidence, I would have opened the door for MassHealth to make an argument that had not previously made, thereby putting my client in jeopardy. Luckily, I scanned quickly the MassHealth legal memorandum before I proceeded and saw that the argument was not made.

38. Forcing a client to choose between proceeding without advance knowledge for why the applicant was denied or having to incur additional expenses by requesting a continuance of the Fair Hearing and to keep the record open so that a thoughtful response can be made the MassHealth legal memorandum is particularly problematic for clients of limited means as they may not be able to afford to pay us to prepare for two Fair Hearings and we cannot take the chance that our request for a continuance might be denied so we must be prepared for the first Fair Hearing.

39. This lack of knowledge of why an application is denied until the Fair Hearing may be particularly problematic for a pro se applicant/appellant as they may not know that they have the right to ask for a continuance in order to address MassHealth's reason for the denial and may lack the knowledge to ask to keep the record open to prepare a written response to the MassHealth denial, with or without the assistance of counsel.

SIGNED under the pains and penalties of perjury on this 11<sup>th</sup> day of May, 2018.

A handwritten signature in black ink, appearing to read 'Karen B. Johnson', is written over a horizontal line.

Karen B. Johnson

# EXHIBIT A

CHELSEA OFFICE  
45 - 47 SPRUCE STREET  
CHELSEA MA 02150-3675

Commonwealth of Massachusetts  
Executive Office of Health  
and Human Services  
Office of Medicaid  
www.mass.gov/masshealth

Worker Name: Lucy Gucciardi  
Tel: (617) 551-2062  
TTY: (888) 665-9997  
Fax: (617) 889-3285

Medicaid ID : [REDACTED]



556/D \*000894\*  
MADGE AND JOHNSON PC  
c/o PRIMROSE PARK  
3 LAN DRIVE SUITE 101  
WESTFORD MA 01886

Attn: MADGE AND JOHNSON PC

Re: Notice sent to [REDACTED]

Date: 09/14/2017

Notice: 58166830

SSN: XXX-XX-[REDACTED]

Dear [REDACTED]

Important! This health-care benefits notice tells you the decisions we have made about certain programs that you may be eligible for. Please read the whole notice to find out about your health-care benefits.

## MassHealth Long-Term-Care Services in a Nursing Facility

MassHealth has reviewed your application for MassHealth long-term-care services which you filed on 07/31/2017. You are not eligible for MassHealth long-term-care services for the following reasons:

### Reason and Manual Citation

You did not give MassHealth the information it needs to decide your eligibility within the required time frame. 130 CMR 515.008

If your application for MassHealth was denied because you did not give us the information or proof we needed to decide if you are eligible for MassHealth, you can either:

continued...



# Exhibit A

CONFIDENTIAL  
PROPERTY OF [REDACTED]  
ALL RIGHTS RESERVED  
NO PART OF THIS DOCUMENT IS TO BE  
REPRODUCED OR TRANSMITTED IN ANY  
FORM OR BY ANY MEANS, ELECTRONIC  
OR MECHANICAL, INCLUDING PHOTOCOPYING,  
RECORDING, OR BY ANY INFORMATION  
STORAGE AND RETRIEVAL SYSTEM, WITHOUT  
THE WRITTEN PERMISSION OF [REDACTED]

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THE WRITTEN PERMISSION OF [REDACTED]

[REDACTED]

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THE WRITTEN PERMISSION OF [REDACTED]

[REDACTED]

[REDACTED]

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STORAGE AND RETRIEVAL SYSTEM, WITHOUT  
THE WRITTEN PERMISSION OF [REDACTED]

- \* send us some of the needed information or proof within 30 days of the date on this notice (if you are eligible for MassHealth, the date we get the needed information or proof will be your reapplication date.); or
- \* ask for a fair hearing if you want us to go back to your original application date.

**MassHealth Community-based Services**

MassHealth has decided that the following members of your family are not eligible for MassHealth for the following reasons.

Name	SSN/DOB	Medicaid ID
[REDACTED]	[REDACTED]	[REDACTED]
<b>Reason and Manual Citation</b>		
You did not give MassHealth the information it needs to decide your eligibility within the required time frame. 130 CMR 515.008		

If your application has been denied because you did not submit the verifications needed to determine your eligibility, you are not required to complete another application if you submit one or more of the verifications within 30 calendar days of the date on this notice. The date on which we receive the initial missing verifications will become your reapplication date.

Call the phone number at the top of this notice if you have any questions about this notice. If you don't have a copy of the Member Booklet, please call to request one. It has important information about MassHealth coverage and rules.

For information about appealing our decisions, see the Request for a Fair Hearing page of this notice.

**Health Safety Net**

The Health Safety Net will not pay for services given to the individual(s) listed below. You must pay for services you get at a hospital or community health center. Please call the number at the top of this notice if you have any questions about this decision.

Name	SSN	Medicaid ID
[REDACTED]	XXX-XX-[REDACTED]	[REDACTED]
<b>Reason and Manual Citation</b>		
You did not give MassHealth the information it needs to decide your eligibility within the required time frame. 130 CMR 515.008		

If you have questions about this Health Safety Net decision, please call the number at the top of this notice. If you do not agree with this Health Safety Net decision, you may contact the Health Safety Net, Attn: HSN Grievances, 100 Hancock Street, 6th Floor, Quincy, MA 02171, or you can call them at 1-877-910-2100.



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Health Connector

Name	SSN/DOB	Medicaid ID
[REDACTED]	XXX-XX-[REDACTED]	[REDACTED]

You did not give MassHealth the information it needs to decide your eligibility within the required time frame. 130 CMR 515.008

If you have any questions about your eligibility, please call the number at the top of this notice.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



## HOW TO ASK FOR A FAIR HEARING

**Your Right to Appeal:** If you disagree with the action by MassHealth, you have the right to appeal and ask for a fair hearing before an impartial hearing officer. The Board of Hearings must get your fair hearing request form no later than 30 calendar days from the date you got MassHealth's official written notice telling you of the action to be taken.

If you want to ask for a fair hearing because MassHealth did not take action on your application or on your request for service, MassHealth did not send you a written notice of the action to be taken, or a MassHealth employee's behavior toward you was coercive or improper, the Board of Hearings must get your fair hearing request form no later than 120 calendar days from the date of your application or your request for service, MassHealth's action, or the MassHealth employee's improper behavior.

**How to Appeal:** To ask for a fair hearing, fill out the fair hearing request form (be sure to fill out Section II-Reason for Appeal) and send a copy with a copy of the MassHealth official written notice to: Appeal Processing Center, P.O. Box 4405, Taunton, MA 02780-0419 or fax them to 1-857-323-8300. Please keep a copy of the fair hearing request form for your information.

**If You Are Now Getting MassHealth:** If the Board of Hearings gets your fair hearing request form before the date the action is taken or, if later, within 10 calendar days of the mailing date of MassHealth's written notice to you, you will keep getting MassHealth until a decision is made on your appeal. If you get MassHealth during your appeal, and then lose your appeal, you may have to pay MassHealth back for the cost of MassHealth benefits that you got during this time period. If you do not want to keep getting MassHealth during your appeal, please check Box A in Section III on the fair hearing request form. If you do not get MassHealth during your appeal, and then you win your appeal, MassHealth will restore your MassHealth benefits.

**Date of Fair Hearing:** At least 10 calendar days before the fair hearing, the Board of Hearings will send you a notice telling you the date, time, and place of the hearing. This will give you time to get ready for the hearing. If you want to have a fair hearing scheduled as soon as possible, check Box B in Section III on the fair hearing request form for an expedited hearing. If you have good cause for not being able to come to the hearing, or if you need a telephone hearing, you must call the Board of Hearings at 617-847-1200 or 1-800-655-0338 before the hearing date. If you do not reschedule or appear on time at the hearing without documented good cause, your appeal will be dismissed.

**Your Right to Be Helped at the Hearing:** At the hearing, you may represent yourself or be represented by a lawyer or other representative at your own expense. You may contact a local legal service or community agency to get advice or representation at no cost. To get information about legal service or community agencies, call the MassHealth Customer Service Center at 1-800-841-2900 (TTY: 1-800-497-4648 for people who are deaf, hard of hearing, or speech disabled).

**If You Need an Interpreter or an Assistive Device:** If you do not understand English and/or are hearing or sight impaired, the Board of Hearings will provide an interpreter and/or assistive device for you at the hearing. Please check either Box C or D, or both, in Section III on the fair hearing request form if you need an interpreter or assistive device, or call the Board of Hearings at 617-847-1200 or 1-800-655-0338 at least five business days before the hearing.

**Your Right to Review Your Case File:** You and/or your representative can review your MassHealth case file before the hearing. To do this, call a MassHealth Enrollment Center at 1-888-665-9993 (TTY: 1-888-665-9997 for people who are

deaf, hard of hearing, or speech disabled) before the fair hearing. Your MassHealth case file is not kept at the Board of Hearings.

**Your Right to Ask to Subpoena Witnesses, and Your Right to Question:** You or your representative may write to the Board of Hearings to ask that witnesses or documents be subpoenaed to the hearing. You or your representative may present evidence and cross-examine witnesses at the hearing. The hearing officer will make a decision based on all evidence presented at the fair hearing.

**NONDISCRIMINATION NOTICE FOR APPLICANTS AND MEMBERS:** Under federal and state law, MassHealth does not discriminate on the basis of race, color, sex, sexual orientation, national origin, religion, creed, age, health status, or handicap.

Name: [REDACTED] SSN: XXX-XX [REDACTED] Medicaid ID: [REDACTED]  
Notice: 58166830 Notice Date: 09/14/2017

\*\*\* Mail or Fax this form \*\*\*

**FAIR HEARING REQUEST FORM**

Fill out all sections that apply. Print clearly.

**SECTION I: Applicant/Member Information**

Name of Applicant or Member: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone No.: ( ) \_\_\_\_\_  
MassHealth I.D. or Social Security Number: \_\_\_\_\_  
Cardholder's Name on MassHealth card (if different): \_\_\_\_\_

**SECTION II: Reason for Appeal**

I, \_\_\_\_\_ want a fair hearing because:  
\_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

**SECTION III: Appeal Information**

(Check the boxes that apply to you.)

- A. I do not want to keep getting MassHealth during the appeal process.
- B. I want an expedited hearing.
- C. I need an interpreter  
(what language?: \_\_\_\_\_) to be provided by the Board of Hearings.
- D. I need an assistive device to be provided by the Board of Hearings.  
(Describe what type of assistive device you need. For example: American Sign Language): \_\_\_\_\_

**SECTION IV: Appeal Representative, if any**

My appeal representative is: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone No.: ( ) \_\_\_\_\_

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