

Lawyers Predict 'Devastating' Impact of New Law Aimed At Reducing Medicaid Fraud

BY ANDREW HARRIS

MINEOLA — A new law intended to reduce the federal budget deficit will have a "devastating" impact on middle-class and poor New Yorkers trying to qualify for Medicaid, according to Garden City attorney Deborah S. Barcham, a sentiment shared by many of her fellow elder law practitioners.

The 2005 Deficit Reduction Act cleared Congress by the narrowest of margins. The House approved the measure 216-214. The Senate deadlocked in a 50-50 tie, requiring Vice President Dick Cheney to cast the deciding vote.

In signing the bill into law, President George W. Bush singled out entitlement programs like Medicaid as drains on the federal budget.

Mr. Bush warned, "The bill tightens the loopholes that allowed people to game the system by transferring assets to their children so they can qualify for Medicaid benefits. Along with governors of both parties, we are sending a clear message: Medicaid will always provide help for those in need, but we will never tolerate waste, fraud or abuse."

That sentiment raised the ire of local lawyers who objected to the notion that their clients were gaming the system.

"It's just wrong," said Bernard Krooks, managing partner of Littman Krooks in Manhattan and president of the New York state chapter of the National Academy of Elder Law Attorneys (NAELA). Mr. Krooks, who testified last year when the bill was in the House of Representatives, described his reception there as "hostile."

Changes made to the program by the act will increase the amount of time authorities can look back at an applicant's asset transfers to determine whether there was a concerted effort to shed wealth for eligibility purposes. The new rules also move up the penalties for excessive transfers made in the run-up to eligibility so that they kick in upon application, just when beneficiaries need the program most.

Ms. Barcham, a partner in Garden City's L'Abbate Balkan Colavita & Contini, conceded that Medicaid eligibility is factored into estate planning decisions, but defended that strategy, saying the idea was to give accrued wealth to one's family instead of the government.

"You've got to give the money to qualify for Medicaid," she said, "so you pass some on to your family so that not everything is eaten up by the cost of nursing homes."

Melville attorney Jennifer B. Cona likened the planning process to the work done by accountants to take advantage of tax laws.

"These folks have paid into the system all of these years, paying taxes all of their lives," she said.

Including Medicaid in estate planning, gives them "an opportunity to get something out," added Ms. Cona, a partner at Genser, Dubow, Genser & Cona.

Vincent J. Russo, a former NAELA president, explained that under the old law, most program applicants were subjected to a three-year review of their financial records and asset transfers. Now, that period has been expanded to a uniform five-year term for all would-be recipients.

Where it is found that assets have been transferred for less than their full value, an applicant will be subjected to a time penalty, during which they will be ineligible for benefits. That period is computed by dividing the value of the transferred property by the average regional monthly cost of a nursing home to a private pay resident.

As of January 2006, that cost in New York City is \$9,132. On Long Island, it is \$9,842.

Mr. Russo, who is based in Westbury and has four offices in Nassau and Suffolk counties, explained that rounding Long Island's divisor up to \$10,000, if an applicant gave away an asset worth \$50,000 within the look-back period, he or she might be subject to a five-month penalty before receiving Medicaid benefits.

Previously, those penalties began to run from the time of the transfer, meaning that under the old three-year look-back period the penalty time for a transfer made more than three years earlier would have lapsed before an application for

benefits is made.

With the new law, the penalty will run from the date of the application. As a result, a patient asking the program to pay for nursing home care will not be able to get Medicaid benefits until the penalty term has run out, even if that senior needs nursing home care right away.



NYLJ PHOTO/RICK KOPSTEIN
Deborah S. Barcham



Bernard Krooks



NYLJ PHOTO/RICK KOPSTEIN
Jennifer B. Cona



NYLJ PHOTO/RICK KOPSTEIN
Vincent J. Russo

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The rule change will have "devastating consequences for the elderly who unfortunately have some money" and must use it to bridge the gap, Ms. Barcham said. Those in the mid-range, who have too much money to automatically qualify for Medicaid but not enough to do without the financial assistance, will feel the sharpest pinch, she added.

These are the people who "are going to wind up spending whatever they made in their lifetimes and are not going to be able to leave much to their children," Ms. Barcham said.

Mr. Russo, who testified before the U.S. Senate two months after Mr. Krooks went before the House, agreed.

"What is really sad is that these changes won't hurt the multimillionaires," he said. "They're going to hurt people of modest means."

Each of the lawyers complained that the revised Medicaid program burdens people who will need long-term care for progressive, degenerative diseases including Alzheimer's, senile dementia and amyotrophic lateral sclerosis or ALS, also known as Lou Gehrig's disease.

The five-year look-back period is an unfair burden to place on the elderly, Mr. Krooks said.

"Most people don't have three years' [worth of financial records], let alone five," he said.

Ms. Cona added that five years is also a long time to wait for eligibility.

"People don't want to give up control of their assets any sooner than they have to," she said. "Five years is just too long."

Both lawyers said they also are counseling their individual clients

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to do their estate planning early and to consider long-term care insurance if they can afford it. Ms. Barcham acknowledged, however, that such insurance is frequently expensive and harder to obtain as one grows older.

The bottom line, Mr. Krooks said, is to deal with those issues well in advance "and not on the nursing home doorstep."

Burden on Nursing Homes

Ms. Cona's firm also represents several metropolitan area nursing homes. Because of the repositioning of the penalty phase from the

time of transfer to the time of admission, she said, many homes may now be asked to care for hospital out-patients when the means to pay for that care may not be there.

She forecasts "huge problems of cash flow for the facilities."

Mr. Krooks, whose firm also represents nursing homes, agreed. It will be those institutions that "are left holding the bag," he said.

"We're advising the facilities to be extremely careful upon admission," he added.

For lawyers seeking to get out from under the legislation, there is a patch of daylight. A drafting error resulted in slightly different versions of the bill being voted on in the House and in the Senate. The House bill allows for 36-months' reimbursement for the rental of certain kinds of durable medical equipment. The Senate edition offered to pay for only 13 months. Both chambers are required to pass identical bills in order for one to become law.

A lawsuit has been filed in Alabama federal court to declare the act unconstitutional said Lawrence E. Davidow of Davidow, Davidow, Seigel & Stern in Islandia and president of NAELA's national organization. A suit by his group may follow.

"We're exploring our options right now," he said. "We'd love to see this thing set aside if possible. We're not going to let it lie."