

Suit Says Bill Signed by Bush Cutting Medicaid Not the One Passed by House

Elder Law Attorney Sues over New 'Law' Affecting Medicaid Transfers

By ElderLawAnswers.com

Feb. 20, 2006 - An Alabama elder law attorney has filed suit in federal district court challenging the constitutionality of the Deficit Reduction Act of 2005 (DRA), which President Bush signed February 8, on the grounds that the bill signed was not the same bill that the House of Representatives passed. The Constitution requires that a bill must pass both houses of Congress and be signed by the President in identical forms to become law.

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Feb. 1, 2006 - It's done. The House has passed and sent to President Bush the budget reconciliation bill that was strongly opposed by most senior citizen advocacy groups and newspaper editorials due to the deep cuts it makes in Medicaid and Medicare. It was a very close vote - 216 to 214. The bill cuts the budget by \$38.8 billion over five years - 50 percent of the cuts over 10 years are in Medicaid and Medicare. [Read more...](#)

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equipment as long as the patient needs it. But in the Senate version of the bill, which narrowly passed in December with Vice President Dick Cheney flying back from the Middle East to cast the deciding vote, payment for oxygen equipment was capped at 36 months. At the same time, the Senate bill capped payments for other equipment rented by

The controversy over the purported new law, which among other provisions would place severe new restrictions on the ability of the elderly to transfer assets before qualifying for Medicaid coverage of nursing home care, has also touched off a partisan battle in the House. Democrats do not appear to be backing down from their insistence that the legislation be voted on once again, a development that House Republicans - who were barely able to muster the votes needed for passage -- would very much like to avoid.

"They know this is wrong," House Democratic Leader Nancy Pelosi charged. "If this isn't stopped, they can send anything to the President. This is unconstitutional."

The Back Story

The bill's troubles stem from provisions regarding Medicare payment for oxygen equipment used in the home. Up till now, Medicare has paid for the rental of such

Medicare beneficiaries, such as wheelchairs, at 13 months.

When the Senate sent the bill to the House, however, the 36-month limit for oxygen tanks was mysteriously inserted into the section of the bill dealing with the other equipment, so 36 months replaced 13 months – an estimated \$2 billion error.

This was the version of the bill that passed the House by two votes. The Senate clerk then corrected the error and this version -- the version only the Senate had passed -- was apparently certified by House Speaker J. Dennis Hastert (R-IL) and Sen. Ted Stevens (R-AK), the president pro-tempore of the Senate, and sent to the President for his signature.

Senate Democrats agreed to pass a follow-up measure affirming that Congress had intended to set the rental period for the other equipment at 13 months, but House Democrats are not being so accommodating. They would like to force another vote, which would give advocacy groups for those affected by the bill's nearly \$40 billion in program cuts more time to convince wavering Republicans to vote against it this time.

While believing that a House revote would be a "great victory," New York ElderLawAnswers member attorney Bernard Krooks thinks such a revote is unlikely. Krooks, who is a past president of the National Academy of Elder Law Attorneys, said that "the way this Republican leadership has done business over the last six or seven years, I would not be surprised if it got done without another vote." If a revote is to happen, Krooks sees it coming through the courts, not Congress.

The Lawsuit

If that is the case, it may well be thanks to Jim Zeigler, an elder law attorney in Mobile, Alabama, who has filed a lawsuit in the U.S. District Court for the Southern District of Alabama challenging the law's constitutionality.

"I don't know whether to have my clients comply with the post-February 8 version that I am alleging is unconstitutionally enacted, or the pre-February 8 law, which obviously is constitutional," Zeigler told ElderLawAnswers. "I'm in need of a declaratory judgment so I'll know."

Zeigler, who was a Bush delegate to the Republican National Conventions in 2000 and 2004 and served on Bush's legal team in Florida in 2004, is currently deciding whether to seek "injunctive relief" from the court – that is, to ask the court to block implementation of the new

"law" until the matter can be decided. Once he makes that decision, he said he believes that the court will quickly rule on his suit.

Zeigler said he is aware of an 1892 ruling by the Supreme Court, *Field v. Clark*, 143 U.S. 649 (1892), that may affect the outcome of his action. In that case, the Court ruled that once a bill is deposited in the public Archives, a court should not look behind the President's signature to question whether it in fact passed both houses. Zeigler is confident that he can demonstrate that *Field* is distinguishable from the case at hand.

"I give credit to Jim Zeigler for filing the lawsuit," said Krooks. "I think he absolutely does have standing as somebody who represents clients who are seniors. He's put in a position of not knowing whether he should use pre- or post-DRA law, so I do hope the court addresses the issue and listens to the arguments on the merits so we can get a resolution of it."

Living in Limbo

In the meantime, Krooks said his firm is operating on the assumption that the DRA is the law. But he noted that subsequent legislative activity, or a possible new presidential signing, could change the law's effective date.

A crucial question seems to be when the Republican leadership knew they had a problem with the bill. According to a Congressional Quarterly article cited in the blog *Balkinization*, the mistake apparently was discovered in mid-January, but was not then corrected because "no agreement could be reached between the House and Senate about how to resolve the difference from the Senate version other than passing a corrective measure after enacting the reconciliation bill."

"I know the speaker knew this was an invalid bill and still gave the go-ahead to send it to the President," Pelosi said. Her demand for an ethics investigation into the bill's passage was shelved on a party-line vote.

- > To read Zeigler's complaint, [click here](#).
- > To read an article in *The Hill* about the ongoing clash in Congress over the bill's constitutionality, [click here](#).
- > To read the latest version of this story at [ElderLawAnswers.com](#) - [click here](#).