

THE HIDDEN DAGGER OF THE 1996 HEALTH CARE REFORM BILL:

CRIMINAL PENALTIES FOR TRANSFERRING ASSETS TO QUALIFY FOR MEDICAID

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On August 21, 1996, President Clinton signed into law H.R. 3101, the Health Insurance Portability and Accountability Act of 1996, also known as the Health Care Reform Bill and the Kassenbaum-Kennedy Bill. The main objective of the bill was to protect health insurance coverage for individuals. Its major provisions guarantee that workers may change jobs without losing health insurance coverage, prohibit the denial of coverage based on preexisting conditions, prohibit the termination of coverage based on the expense of coverage, and guarantee at least a 48-hour hospital stay for childbirth. Buried within this massive piece of legislation, however, is an incongruous provision which has nothing to do with health insurance coverage and which has the potential of causing great harm to the intended beneficiaries of the act - working class individuals. This hidden provision criminalizes the once routine practice of transferring assets in order to qualify at a later date for Medicaid nursing home coverage.

Background

In response to the ever-increasing strain the Medicaid program for long-term and nursing home care has put upon the public coffers, the qualification process for Medicaid has become more difficult. A federal statute first enacted in 1982 enabled states to assert liens against the estates of Medicaid recipients and mandated that states penalize persons applying for medical assistance when they had transferred assets within 30 months of the date of application (the "look-back period"). The Omnibus Reconciliation Act of 1993 expanded the look-back period to 36 months and 60 months for transfers into trusts, eliminated a 30-month cap on the period of ineligibility which would be assessed against transfers (A penalty period), and instituted mandatory estate recovery programs by the states. The new provision in the Kennedy -Kassenbaum Health Care Reform Act, however, adds criminal penalties to the already stringent penalty periods.

The provision at issue was appended to 42 U.S.C. ' 1320a-7, entitled A Criminal Penalties for Acts Involving Medicare or State Health Care Programs. Prior to this amendment, '1320a-7 criminalized the procurement of public health benefits through fraudulent misrepresentation, conversion or concealment of assets. The proscribed activities (fraud, conversion, and concealment) have criminal underpinnings under other existing laws, both statutory and common. The activities can all be categorized as *malum in se* - acts which involve illegality from the very nature of the transaction, upon principles of natural, moral, and public law. The statute reflected Congress' intent to crack down on Medicaid fraud and gave the federal government a potent means of carrying out this goal.

Title 42 U.S.C.' 3120a-7 sets forth criminal penalties for engaging in any of the proscribed activities,

including maximum fines of \$10,000 and imprisonment up to one year.

These penalties are harsh, but the sanctioned activities are, after all, activities which otherwise could be deemed criminal even in the absence of the statute. Thus, the penalties, are in proportion with the actions which they are intended to deter, namely: fraud, conversion, and concealment to procure benefits.

The New Criminal Provision Under the Health Care Reform Act

The Health Care Reform Act has added to the list of proscribed criminal activities an activity which has never, under any common law or statutory scheme, been considered criminal - - transferring assets in order to become eligible for Medicaid. Now appended to the list of sanctioned activities Title 42 U.S.C. '1320a-7 is a paragraph which states that person will also be criminally liable if he:

(6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c).

Thus, as of January 1, 1997, the disposal of assets in order to become eligible for Medicaid for long-term nursing care is a federal crime. Such transfers, however common they may have been in the past, now fall into the category *malum prohibitum* - acts which though not inherently immoral, become so because their commission is expressly forbidden by positive law. Thus, for example, the relatively common practice of transferring real estate into joint ownership with a child prior to entering a nursing home could now be deemed criminal.

Not only will the unwitting senior citizen who makes such transfers face criminal liability, but anyone who aids or advises him, including his attorney, faces similar risk. AWhoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as principal. Thus, what once constituted common and accepted practice in the typical elder law attorney's office now carries potential criminal consequences not only to the client, but to the advising attorney.

Origins and Policy Behind the Provision

Interestingly, the author of this new provision remains unknown, to date. According to one source, even the major sponsors of the Health Care Reform Act, Senators Edward Kennedy (D-Mass.) and Nancy Kassenbaum (R-Kan.) knew nothing about the provision until after passage of the bill. The provision seems to have surreptitiously appeared in the massive Kennedy-Kassenbaum bill with little or no fanfare, and only became known to elder law attorneys on a wide scale just a month or two before the bill was signed into law by President Clinton -- too late for any effective lobbying efforts. One journalist has mused:

"It does not follow that the passage of the new law was based on evidence of widespread

abuse of the Medicaid program. In fact, there were no hearings on the statute. There was no evidence in the legislative history supporting the need for a criminal statute, although one congressional staff expert speculated that it was favored by the long-term care insurance and the nursing home industries."

In the absence of any legislative history relating to this provision, one is left speculate as to its origins. Stephen A. Moses, Director of Research at LTC, Inc., a long-term care insurance industry A think-tank based in Seattle Washington is mentioned in several recent publications on the subject of the new criminalization provision. In his widely publicized criticism of the Medicaid program for long-term care, he quips that wealthier seniors can see a lawyer and turn up poor in 30 days (so as to qualify for Medicaid). Mr. Moses has opined that the new measure would not be aggressively enforced, but has said it will at least have a tremendous chilling effect on the legal community. APlenty of attorneys are scared to death over this.

Is the purpose of this legislation truly to send senior citizens to jail because they have attempted to help their families financially or transfer their nest egg to their loved ones? Or is it designed to inhibit Medicaid planning by attorneys, with the result that more people will buy long-term care insurance? Will it frighten seniors to the point that they refrain from making otherwise legitimate transfers? Or worse, will it inhibit those with legitimate need and eligibility from even applying for benefits?

Impact of the Criminalization of Transfers of Assets

This new provision will have a negative impact on the middle income elderly of the working class and on those attorneys who advise the elderly client and their families. A common concern of the elderly is the burgeoning cost of long-term care, and fear of quickly depleting one's life-long savings for such expenses. Many elderly clients have sought to transfer all or portions of their life savings to provide a comfortable life for their spouse or to guarantee a legacy for their children and loved ones. Properly advising such transfers required care and knowledge regarding the strictures of existing legislation, with its built-in disincentives for such transfers and potential penalties.

Since passage of the Omnibus Reconciliation Act of 1993, a Medicaid applicant is required to list all transfers of assets made for less than fair market value within the look-back period (36 months of the date of the application). The Apenalty period is then calculated by dividing the total value of such transfers by the average monthly cost of nursing care (currently around \$4,000 in Maine). The resulting quotient is the number of months the applicant would be deemed ineligible for Medicaid coverage. For instance, if a person transferred \$200,000 and applied for Medicaid before the look-back period had run, he would be penalized as follows: Assuming an average monthly cost of care of \$4,000, the \$200,000 transferred would be divided by \$4,000, to reach a quotient of 50, and the applicant would be ineligible to receive benefits for 50 months. Thus, the disincentives for transferring assets were already very high and in fact, the penalties have proven to be effective in rendering those who have made asset transfers ineligible for Medicaid. If the goal of policy makers in enacting the new provision was to further discourage the transfer of assets, this certainly could have been accomplished by rewording the statute and increasing the penalties rather than by threatening criminal prosecution.

The inherent unfairness in criminalizing such transfers is perhaps best illustrated by analogy to other areas of the law where the transfer of assets has and remains a legal and viable planning device. Advising the transfer of assets is common practice in tax and estate planning. One of the most familiar scenarios involves estate planning for a married couple. Although the tax code allows every individual a tax credit which essentially shelters \$600,000 in assets from estate taxation, if a couple does not carry out certain transfers of assets, only the second one to die will be able to utilize this tax credit. Thus, an estate planner will typically advise and facilitate the transfer of assets to enable each spouse to take advantage of this credit. The effect of doing so in a combined estate of 1.2 million dollars is to save federal estate taxes of approximately \$235,000. An estate planning attorney would be negligent if she failed to advise a client to make these transfers.

A similar tax avoidance device used by estate planning attorneys is the unlimited \$10,000 annual gift-tax exclusion. This allows an individual to reduce his taxable estate by making gifts of up to \$10,000 each to an unlimited number of persons every year. Thus, the couple with an estate in excess of 1.2 million dollars can eliminate or dramatically reduce their estate tax liability by utilizing these planning devices, notwithstanding the fact that in so doing they may reduce federal revenues significantly.

Elder law attorneys, not unlike tax attorneys and estate planning attorneys, devised methods to allow clients to transfer some assets, thereby saving clients from the need to completely impoverish themselves and their families before qualifying for nursing home coverage. One common method is to advise clients to transfer assets only if they were certain that they would be able to weather the 36-month look-back period without applying for Medicaid. This option is only useful for relatively healthy individuals who foresee no need for nursing home care in the near future, and remains a viable option. For people in immediate need of nursing home care, elder law attorneys developed what has come to be known as the half-a-loaf method. It entails transferring approximately one-half of the applicant's accountable assets, thereby incurring a penalty period but keeping enough assets to privately pay for the care needed during the penalty period. Although this type of asset transfer has been a legitimate method of transferring wealth, not at all unlike gifting and asset shifting to avoid paying estate and gift tax, under the new law, this type of transfer now potentially carries criminal consequences. Whether Medicaid eligibility requirements should be made more restrictive is an issue appropriately left to policy makers. However, because the new law attempts to criminalize an act which is not inherently criminal and which already results in harsh penalties proven to be effective in discouraging such transfers, the imposition of criminal sanctions is unduly punitive and unnecessary.

Technical Problems with the Provision

Aside from the inherent unfairness of the statute and possible constitutional problems, which are beyond the scope of this article, the statute is confusing, improperly cites cross-referenced provisions and is very possibly unenforceable on its face. The most glaring flaw in the statute lies in the fact that although a new crime was created; to wit, knowingly and willfully disposing of assets in order to become eligible for medical assistance, a penalty for this A crime has not been defined. The penalty section of 42 U.S.C. '1320a-7b as set forth above is restricted to fraudulent statements, misrepresentation, concealment, failure

to disclose, or conversion, and Congress did not amend the penalty section to include knowingly and willfully disposing of assets. Because the penalty section makes reference to a very specific list of proscribed activities, none of which describes or encompasses the act of disposing of assets, it would appear that although a new crime has purportedly been established, the crime carries no penalty.

The new provision also contains significant problems of interpretation. In addition to the first two elements of the offense ((1) that a person disposes of assets, (2) with the intent of qualifying for medical assistance), there is a third element: that said action result in the imposition of a period of ineligibility. A imposition of a period of ineligibility seems to suggest that some active step by the State is required. Thus, although the transferor's *mens rea* is present and the proscribed conduct has occurred, the crime itself is not complete until triggered by the action of the State in imposing the period of ineligibility.

Moreover, the new provision refers to Section 1917(c) regarding the imposition of a period of ineligibility which is no longer even part of Title 42. For the sake of further analysis of this provision, it will be assumed that this reference was intended to be 42 U.S.C. '1396a, which lays out in great detail (over 50 pages of code) the requirements which must be followed by the states to qualify for federal grants to states for medical assistance programs and which now includes the provision related to the period of ineligibility. Title 42 '1396 contains the guidelines a state must follow in determining eligibility for Medicaid assistance for long-term care. Of particular relevance is the provision establishing penalty periods for the transfer of assets. '1396p(c)(1)(A) sets out in pertinent part:

[T]he State plan must provide that if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(I), the individual is ineligible for medical assistance for services described in subparagraph (C)(I) . . . during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

Under this provision, it is the State's responsibility to impose a period of ineligibility, based on these guidelines, to persons who have made transfers of assets for less than fair market value during the look-back period.

To trigger the new criminal provision, the transfer must result in the imposition of a period of ineligibility. However, the act of transferring assets for less than fair market value in itself does not necessarily result in a period of ineligibility. Within '1396p(c) is a list of exceptions, or permissible transfers. A period of ineligibility will not be imposed if the transferred asset was a home and certain other conditions existed, if the asset transferred was to or for the sole benefit of the individual's spouse, if the assets were transferred to a trust established solely for the benefit of the individual's child and the child resided in the individual's home for a specified period and provided care to the individual, if the assets were transferred to a trust for the sole benefit of an individual under the age of 65, if the individual intended to dispose of the assets at fair market value or other valuable consideration, if the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or if the State

determines that denial of eligibility would work an undue hardship. Thus a transfer made for any of these reasons, even if made with the intent of qualifying for Medicaid, would not result in the imposition of a period of ineligibility, and in theory, should not result in criminal liability.

If the state has determined that the transfer was not made for a A legitimate purpose, there is yet another condition which must be satisfied before a period of ineligibility will be imposed. Title 42 U.S.C. '1396p(c)(2) provides that A[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that . . .(C) a satisfactory showing is made to the State . . . that (iii) all assets transferred for less than fair market value have been returned to the individual. Thus, a Medicaid applicant who is facing a period of ineligibility due to a transfer of assets must be allowed to undo the transfer thereby preventing the imposition of the penalty period. In effect, a period of ineligibility can not be imposed unless and until the individual is given the opportunity to attempt to procure the return of the assets; and without the imposition of a period of ineligibility, there has been no crime. The constitutional problems with this provision are beyond the scope of this article, but, it would seem that there is an inherent flaw in a statute which attempts to criminalize an action containing an element which can not be proved until the defendant is given the opportunity to undo or mitigate the proscribed act.

In the case when an applicant makes a non-exempt transfer with the intent to qualify for Medicaid, applies for benefits before the look-back period has run, and does not undo the transfer, it is clear that the State will impose a period of ineligibility, and the crime is committed. Fraught with uncertainty, however is the case in which a person makes a transfer and waits out the ineligibility period before applying for benefits. In theory, if one waits out the period of ineligibility before applying for Medicaid, the State would not impose a period of ineligibility, since the time for having done so would have already lapsed. For example, assume a person transfers \$40,000 and the average cost of care is \$4,000 per month; the penalty period will be 10 months - \$40,000 divided by \$4,000/month. If this person waited until 10 months after making the transfer before applying for Medicaid, the state would not impose a period of ineligibility under '1396p(c)(1)(A). Is this person free of criminal liability by virtue of waiting out the penalty period? Although a common sense reading of these provisions would suggest that no penalty period would be imposed under these circumstances, and the new law would not be triggered, a zealous prosecutor might interpret the meaning of A imposition of a period of ineligibility differently. It could be argued that a *de facto* period of ineligibility was imposed, which though not imposed by the state *per se*, was nonetheless imposed by virtue of the applicant having had to wait out the penalty period before applying for benefits. Thus, the only safe transfer of assets for Medicaid planning purposes would be in the case of a person who is absolutely sure he can survive without Medicaid benefits for the full 36 month look-back period, since under the current law, the Medicaid applicant is not required to disclose transfers made prior to the 36-month period preceding the date of the application.

Another major difficulty in prosecuting this new crime will be proof of the requisite element of intent. Criminal liability only inures if one makes the transfer with the intent of qualifying for Medicaid for long-term care. There are many other reasons a person might transfer assets for less than fair market value: An elderly parent might decide to help out an old friend, to fund their grandchild's college education, or help an adult child with a down payment on a home. An individual almost always has some other legitimate motive, other than qualifying for Medicaid, to give away his money. It will be the government's burden,

however to prove that among the reasons the applicant gave away his money was the intent to qualify for Medicaid. To enforce this new criminal provision, the prosecutor will certainly have to do more than speculate as to the likelihood of this motivation.

The legislation is not only poorly drafted in that it contains patent ambiguities, it references nonexistent statutory provisions, and it fails to establish a penalty for the crime. A prosecutor will certainly have many hurdles to overcome in making a conviction under its rubric. Thus, of the three elements of this new crime, 1) the transfer of assets, 2) intent to qualify for Medicaid, and 3) the imposition of a period of ineligibility, the proof of the latter two could prove to be difficult, if not impossible. Is it any wonder that no one in Congress has come forward to claim its authorship or sponsorship?

How to Advise Clients of the New Criminal Consequences of Asset Transfers

Perhaps by the time this article appears, movements will be afoot in Congress to see to the repeal of this badly written and extreme provision. There is currently talk among members of the National Academy of Elder Law Attorneys to lobby for its repeal. There is also talk of a technical corrections bill; this, however, could cut in either direction - to repeal the provision or to correct its flaws so it could more easily be enforced. Until such time, elderly people seeking to transfer assets and the attorneys advising them should proceed cautiously. Because the law is confusing and opinions differ as to exactly what will constitute a criminal transfer, until clarification comes forth, either in the way of a corrective legislation or interpretative case law, the best approach to take in advising clients is to urge caution.

Most attorneys seem comfortable with the interpretation that transfers made prior to the 36-month look-back period will not be criminal. Harry Margolis, an elder law authority issued a sample client advisory in which he distinguishes three types of transfers, based on the timing of the transfer. The first encompasses the person who applies for Medicaid after making a transfer of assets, but before the period of ineligibility had expired. In such case, criminal liability will inure. The next scenario involves the person who waits out the 36 month look-back period (60 months in the case of a trust) and then applies for Medicaid. In this case, Margolis advises there will be no crime. The third scenario is when one transfers assets and waits out the penalty period, but applies for assistance prior to the expiration of the look-back period. In this case, he advises that although such person will have to report the transfer, he will not be ineligible for Medicaid, but depending on how the law is interpreted, might be prosecuted.

Nonetheless, there are probably few who will dare to test the legislation. Would you advise your elderly parents to disregard it and go ahead with a planned a transfer, knowing that they might be applying for Medicaid soon? The fact is, the uncertainties engendered by this legislation will have the greatest impact on the working class elderly - those who can least afford to enter into a costly, legal battle with the government. With a fine of up to \$10,000 and one year in jail at stake, as well as the potential cost of litigation, most elder law attorneys are advising against transfer strategies after January 1, 1997.

Many elder law attorneys are also contacting former clients to notify them of the change in the law. This is particularly important in cases where the attorney has in the past rendered advice regarding the transfer of assets, and where powers of attorney have been drafted which contain gifting provisions pertaining to

Medicaid planning. There will continue to be cases where clients need an attorney's help in facilitating transfers of assets, and where transfers will remain a viable option. However, until further clarification of this new provision becomes available, attorneys should proceed cautiously in advising and facilitating transfers of assets relative to Medicaid planning.