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Statement of Vincent J. Russo, CELA

Vincent J. Russo & Associates, PC
Past President of the National Academy of Elder Law Attorneys

"Saving Money in Medicaid"

A hearing by the:

Special Committee on Aging

United States Senate

Wednesday, July 20, 2005

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Good afternoon. Chairman Smith and Ranking Minority Member Kohl, I congratulate you on calling for this hearing. I appreciate the opportunity to testify as a professional serving the elderly and individuals with disabilities and as a past president and one of the founders of the National Academy of Elder Law Attorneys (NAELA).

Thank you for your interest in our views regarding proposals to save money in Medicaid by changing the transfer of assets rules. Thank you also for your efforts during the budget process to protect Medicaid and your commitment now to minimizing the harm that is done to older Americans and individuals with disabilities as Congress cuts Medicaid spending.

NAELA

The National Academy of Elder Law Attorneys is a national, non-profit association composed of more than 4800 attorneys. NAELA provides information, education, networking, and assistance to lawyers, bar organizations, and others who deal with the many issues involved with legal services for the elderly and people with special needs.

Elder Law

Elder law is a specialized area of law that involves representing, counseling, and assisting the elderly and individuals with disabilities and their families in connection with a variety of legal issues. It is a holistic approach to the practice of law that focuses on the individual rather than a particular area of law. I have included at the end of my statement a list of the areas in which elder law attorneys provide support to older and disabled persons. I hope that it gives you a good picture of the range of concerns we help our clients work through, such as wills, advance directives, trusts, guardianships, government benefits, and long-term care insurance.

The Long-Term Care System

Mr. Chairman, Medicare remains an unfulfilled promise for many Americans with chronic illnesses. In the United States we discriminate in our delivery of health care based on the type of illness one has. If one has an illness like heart disease or cancer, Medicare provides comprehensive care. If one has a chronic illness like Alzheimer’s disease, Parkinson’s, ALS (otherwise known as Lou Gehrig’s disease), or Multiple Sclerosis, the government doesn’t help unless you are impoverished and qualify for Medicaid.

However, until a comprehensive long-term care system for all Americans is in place, it is essential for Medicaid to continue its role as a federal-state program and continue to help pay for the long-term care needs of low and middle-income older individuals and individuals with disabilities. It is in this context that families needing long-term care services engage in financial planning to pay for those services.

Most families needing long-term care feel defeated by having to apply for a "welfare" program after years of working and saving. A colleague of mine from Illinois recently stated that most middle-income seniors who turn to Medicaid for nursing home care are "people who are up against a wall because of a serious illness, who have never depended on a government handout in their lives.” Many are children of the Great Depression and are World War II veterans, our so-called "greatest generation." Most of them are women, who, after losing their husbands to the devastation of chronic illness, have to suffer the indignity of impoverishment and financial dependence on family or the government.

Mr. Chairman, please keep in mind that when people do become eligible for Medicaid, regardless of whether they have engaged in long-term care planning, they must pay all but a small portion of their income each month for their care. Medicaid then pays whatever the difference is between that amount and the Medicaid rate. Thus, costs to Medicaid are always mitigated by the Medicaid recipient’s monthly income.

The bottom line is that our health care system penalizes people who have pursued the American dream, saved for retirement, and then get the wrong disease.

What I Do - Who Comes to Me and Why

Saving money in Medicaid is the topic today, but as this committee in particular knows, real people who need care may be cut from this program as a result of these efforts. And, as I hope I make clear through my testimony, that these are not the type of Americans that anyone on this committee would conclude should be harmed by any Medicaid reform considered by the Congress this year.

Mr. Chairman, when I do long-term care planning, it is a part of a larger planning process that examines the full range of long-term care options, issues and costs relevant to the client’s circumstances. Most often, the lawyer’s help is sought when the need for long-term care has already arrived. It usually involves spouses and children of persons needing nursing home care who have already been heavily invested in providing care to the person for an extended period.

My clients’ goals typically include finding the best quality of health care for their loved one, supplementing the Medicaid personal needs allowance (typically $30 to $50 per month), and paying for non-covered Medicaid services and needs (e.g., dental care, hearing aides, eyeglasses, private duty nurse, clothing, books, flowers, etc.).

Who Doesn't Come to Me for Help with Medicaid and Why

Millionaires do not go on Medicaid. They don't need or want Medicaid. Most can afford the much-preferred home care, even on a 24-hour basis or nursing home care, if required. All would be vulnerable to large capital gains taxes, and gift taxes if they engaged in transfer strategies. Those with retirement plans often face significant taxes if they liquidate the plan prior to death.

I am not here today to present the evidence that there has been a myth created about millionaires on Medicaid, but I do want to call your attention to the June 29th testimony of Judith Feder of Georgetown University before the Senate Finance Committee. She clearly lays out the research on who uses nursing homes, how they pay for the care, what assets are transferred, and how Medicaid is affected. She thoroughly undercuts the myths that most elderly can afford to pay for extended nursing home stays and that they make significant transfers in order to become eligible for Medicaid.

SAVING MONEY IN MEDICAID

For various reasons the federal and state governments now are attempting to find savings in the Medicaid budget. Simply stated, some of those efforts and proposals are ill advised and will hurt the elderly and individuals with disabilities. Other more appropriate proposals would reduce the use of loopholes and aggressive Medicaid planning and preserve the dignity of our elderly citizens after years of working and saving. I will address both today.

Proposed Changes to Medicaid

Over the years, the Congress has enacted provisions to balance the welfare entitlement focus of the Medicaid program with the reality that middle-income Americans have few other options for long-term care. The transfer of assets rules are well designed for accomplishing a balance between the needs of individuals and families with that of fiscal responsibility. The transfer of asset rules include such provisions as:

- Individuals must postpone Medicaid eligibility if they give away assets;
- Only gifts from the recent past (3 years) are looked at, because they are the most likely to have been done with any thought of Medicaid eligibility;
- The penalty starts when the individual gave the money away because that is when the individual would have had it and could have used it for his or her care;
- Transfers of certain assets and transfers to certain individuals are protected from penalties because public policy should not promote or foster homelessness or financial dependency on the government by those whose loved ones need Medicaid; and
- Estate recovery exists so that states can be reimbursed for the monies they have spent to care for the individual on Medicaid in a nursing home.

We have adopted a national public policy to provide a modest degree of financial security to the spouse of an individual who requires long-term care. Through this policy, we have enabled the spouses of individuals who require long-term care services to continue their relationship rather than be forced to choose between poverty and divorce. This will change with the proposals Congress is presently considering.

Making asset transfer penalties more punitive will mainly hurt seniors who are faced with horrific health and income security choices and who are acting in good faith. One proposal to make penalties harsher calls for changing the start of the penalty period from the date of transfers to the date one applies for Medicaid. This has the practical effect of extending the penalty period for years beyond what it is now. In addition, increasing the lookback period to five years would also punish seniors for everyday family transactions and poor recordkeeping.

I would like to note that prior to broad based opposition by aging advocacy organizations representing tens of millions of Americans, the state of Connecticut sought permission from CMS to impose a change in the start date for the penalty period and to increase the lookback period to five years. We were heartened to see that earlier this year Governor M. Jodi Rell (R) of Connecticut withdrew the state's request. Attached to my statement is a letter of opposition to these two ill-advised reforms from 36 aging groups who are part of the Leadership Council of Aging Organizations (LCAO), including such groups as AARP, Alzheimer's Association, National Committee to Preserve Social Security and Medicare, Catholic Heath Association of the United States, National Association for Home Care, Older Women's League, and The Retired Officers Association. I also want to mention that in testimony provided to the Finance Committee on June 15th, the nursing home industry specifically opposed changing the start date of the penalty period. This is because nursing homes well understand that such a shortsighted policy would leave them uncompensated for the care for tens of thousands of individuals.

A few of the likely victims of such measures are: the grandparent caring for a grandchild who provides savings to help pay for the grandchild's education; the devoted church supporter who donates personal assets to the church; the widow who lacks records of her now deceased husband's spending; the caring sister who uses savings to help a needy sister remain in her home. Under the proposals to close transfer of asset rules, each of these individuals will be cut off Medicaid if they subsequently get sick and need long-term care.

What Will Happen if You Change the Start Date of the Penalty Period and Extend the Lookback Period to Five Years?

I will use Chart One to provide examples of how three average Americans would be hurt by the proposed changes in the penalty period start date and extending the lookback period to five years. Chart Two lists the typical activities that are considered transfers that would be penalized under these proposals.

There are rules in place to deal with asset transfers under the Medicaid program. The current law provides that seniors must privately pay for care if significant transfers are made within a three-year lookback period.

Today, I would like to share with you three stories that reflect my more than 25 years of experience counseling thousands of seniors and the experiences of my colleagues around the country. These are representative profiles of real clients. I want to show you how the current rules work and what would happen under the two primary changes that the administration has suggested. Most of my clients desperately desire to take every possible step to maintain their independence and their dignity without help from the government.

RICHARDS STORY

First, I will tell the story of Mary Richards who is age 78. Mrs. Richards has helped her granddaughter since her daughter passed away. From her savings, she contributed $15,000 toward her granddaughter's college tuition in July 2004. At the same time, she continued to use her other monies for her living expenses. A year later she suffered a stroke and was in need of long term care in a nursing home.

Under the current law, if Mrs. Richards were to apply for Medicaid today, she will be Medicaid eligible because the transfer penalty period has expired. The penalty is 3 months from July of 2004 based on a $15,000 transfer and a State divisor of $5,000. The divisor varies from state to state, but is supposed to reflect the average private pay monthly cost of nursing home care.

Under the proposal to change the penalty start date, Mrs. Richards would be denied Medicaid eligibility, beginning today, the day she applies for Medicaid and is in medical need of long-term care. Because the tuition is paid, Mrs. Richards cannot get the money back. She will have trouble getting into the nursing home from the hospital because she will have no money available to pay the nursing home. The hospital would then look to discharge her to her home because Medicare will not pay them. But will it be safe for Mrs. Richards to return home when she cannot afford extensive home care? Her health and well-being would be jeopardized.

GREER STORY

Now, let's turn to John Greer who is a farmer in the Midwest. The farm has been in his family for over 100 hundred years. The plan is for his son to take over for Mr. Greer who is 80 years old.

Under the current law, when Mr. Greer transfers the farm worth $100,000 to his son, he is Medicaid ineligible for 20 months from September 2002.

The transfer was within the 3-year lookback, so it results in a period of Medicaid ineligibility for 20 months. If Mr. Greer needed long-term care during those 20 months, he would have to privately pay for his care.

Let us suppose that today Mr. Greer fractures his hip and requires nursing home care due to complications. He applies for Medicaid.

Under the proposal to change the Medicaid penalty period start date; he would be denied Medicaid because he tried to protect the family farm by transferring it to his son. Where will Mr. Greer get the money to pay for his long-term care? What will happen to him? What will happen to the farm? Will it have to be sold to take care of Mr. Greer? If sold, what will happen to Mr. Greer's son who has worked the farm his entire life and what will happen to his family?

ANDERSON STORY

My last story is about the Anderson family. Steve Anderson was a very private man and he controlled the family finances. In the year 2001, he made a series of withdrawals, which appear to include donations to his church. After fighting a battle with cancer, he died a year later. Mrs.

Anderson had cared for him every step of the way.

Since that time - over the past four years, Mrs. Anderson's health has declined. She has Alzheimer's disease. She has difficulty with paper work and her memory is failing her. Her children have determined that it is no longer safe for her to remain at home; she needs nursing home care.

Under the current law, Mrs. Anderson would be eligible for Medicaid because any transfers made beyond three years (the lookback period) would not be counted against her.

Under the proposal to extend the lookback period to 5 years, Mrs. Anderson, were she to apply for Medicaid today, would have to account for her husband's withdrawals of $25,000 made back in 2001 – more than 4 years ago.

Due to her condition, she would be unable to explain her husband's transfers. She knows some money was spent on donations to the church and some on repairs to the house but no records can be found.

But she would be denied Medicaid because she would be unable to document the $25,000 in withdrawals. In her time of greatest need, she would not able to obtain necessary care under the Medicaid program.

The combination of extending the lookback period and the penalty start date would create the harshest penalty of all on people like Mrs. Anderson. The most vulnerable people in our society will suffer the most.

These three stories are just the tip of the iceberg for the thousands of seniors that live lawful lives, productive lives who look to the government in their hour of need to pay for necessary long term care. This care allows them to live out their lives in dignity.

Members of the National Academy of Elder Law Attorneys with practices like mine counsel the Mrs. Andersons, the Mr. Greers, and the Mrs. Richards every day. Chart Two gives several examples of the kinds of everyday responsible family transactions that will be unfortunately penalized by the proposed changes in the penalty start date and lookback period.

The proposals that I have discussed are – frankly speaking – an attack on mothers and grandmothers who have given their lives and hard earned savings to help raise and support loved ones. They will create unacceptable new obstacles for vulnerable, frail elderly individuals and persons with disabilities to get care, partly because the proposals will require recordkeeping and documentation that is far beyond the normal practices of the elderly, especially poor and chronically ill elders. The harshest impact of these proposals will be on those applicants with Alzheimer's disease and other dementias, who will not be able to provide documentation or recollection for transfers, regardless of how small.

I have provided below additional examples of how these proposals will hurt the elderly and individuals with disabilities. At the end of my testimony I have provided an outline of the current transfer rule and additional analysis of how the changes would affect those that need Medicaid services.

Ways to Save Money in Medicaid by Changing the Asset Transfer Rules

Asset transfers have become a focus of cost cutting discussions. It is clear to me and my colleagues that there are loopholes and abuses under the asset transfer penalty rules. There are steps that can be taken to save the government money with the least amount of harm to seniors and people with disabilities.

These loopholes and abuses must be stopped because they unfairly characterize seniors as "gaming the system" when the vast majority of seniors look to Medicaid as a last resort to pay for long-term care.

Therefore, for several months I have been working with a group of Medicaid experts from around the country in the development of proposals that target the loopholes that have allowed for more aggressive protection of assets from the Medicaid program. It is our belief that these loopholes should be closed and the savings should be used to continue the good work of the Medicaid program.

I will take this opportunity to explain three of the six changes that we are proposing, and I have included the other three in my testimony for your full consideration.

BALLOON ANNUITIES

First, Balloon Annuities should no longer be allowed as a part of Medicaid planning. Seniors struggle to meet their living expenses from their fixed income and annuities can be very helpful in this regard. Unfortunately, annuities have been manipulated to be a Medicaid planning tool.

The abuse occurs with the use of Balloon Annuities. This abusive practice exists because of a loophole under the actuarially sound test. This loophole invites overly aggressive planning behavior and should be closed.

In short, it is now possible to structure a Balloon Annuity with very small payments over the senior's lifetime, which allows the senior to pass on the lion share of the annuity to family while accessing Medicaid for nursing home care. This is wrong because this loophole allows one to instantly convert an asset into an income stream for the sole purpose of taking advantage of the Medicaid program.

The solution is to have Balloon Annuities treated as a transfer subject to the transfer penalty rules. Self-canceling installments

SELF CANCELING INSTALLMENT NOTES

Second, Self Canceling Installment Notes (referred to as "SCINSs") should be outlawed as a Medicaid planning tool and treated as an available asset to pay for long-term care. SCINs work just like Balloon Annuities, which allow people to manipulate the system.

TRANSFER OF ASSETS, WHICH RESULT IN A PARTIAL MONTH PENALTY

Third, Rounding Down of the monthly transfer penalty should be eliminated.

Under the current transfer penalty rules, in some States, you can double the amount transferred while not creating a longer penalty period.

For example in a rounding down state, each month - one could transfer two months of nursing home cost with only one month of penalty. So, in a state with a Divisor of $5,000, transfers of $150,000 should create a penalty period of 30 months. Utilizing this aggressive strategy, the transfer penalty period will only be about 15 months. This was not intended when the laws were enacted under OBRA 1993.

The solution would be to eliminate the "rounding down." Therefore, transfers would result in partial month penalties.

I believe that these changes, if mandated by the federal government, could offer a significant savings to the government without harming average seniors.

Long-Term Care Insurance

Mr. Chairman, when a client comes to see me with significant resources, I suggest that he or she consider seeing a professional who is able to provide information on his or her long-term care insurance options or consider self-insuring.

NAELA and I also support the expansion of the Long-Term Care Insurance Partnership Program. I believe it is time to look carefully at this program and make any changes that are needed to make it a viable alternative in all states. The President has included this in his budget proposal and we believe that it should move forward this year. This proposal will also save Medicaid money in the future.

Medicaid Waivers

Mr. Chairman, as you consider the changes we have proposed, please consider the importance of rule consistency across the country. We understand the desire that states have for flexibility and it can lead to successful innovations, but allowing states to obtain a waiver to impose more restrictive transfer penalty rules will cause real problems. Seniors facing a long-term care crisis may be forced to move to other states to preserve assets for their spouse and heirs. Others may be forced to consider extreme options, such as divorce.

Conclusion

Mr. Chairman, I thank you for the opportunity to present testimony to this distinguished bipartisan committee that has done so much for the older Americans over the years.

As you can see from my remarks, one's life can truly end up on a Wheel of Fortune or misfortune. You spin the wheel and if it lands on heart disease or cancer, your costs are covered; if it lands on Lou Gehrig's disease, Multiple Sclerosis or Alzheimer's disease, you are on your own. If you get the right illness, the government will pay; if you get the wrong illness, they will not. Unfortunately, none of us has much control over which illnesses we contract.

Since savings must be found in the Medicaid program, we believe strongly that closing loopholes is a better solution than creating punitive and unworkable penalties for our seniors, who have contributed so much to our nation and now face chronic illness and the need for long-term care services.

We ask that even in these times of tight budgets that you continue the commitment that you have made to care for millions of Americans through the Medicaid program and that you work to ensure that the Congress does not inadvertently take actions that hurt the very people they want to help.

Mr. Chairman and Members of the Committee, I would be happy to respond to any questions you may have. Thank you.

Additional Examples of How the Proposed Legislation Will Affect the Elderly

Mr. Chairman, I have provided for the Committee's consideration additional "typical examples" of how these proposals will hurt real Americans and their families.

1. <u>A church supporter</u>

Mr. Banks was living independently and actively in Florida though he suffered from diabetes and heart disease. He sold his home for $135,000 and donated 10% of the proceeds, or $13,500, to his local church. Mr. Banks moved to assisted living and thereafter to a skilled nursing facility. Two years later, Mr. Banks had exhausted his funds and would otherwise be eligible for Medicaid but for this $13,500 gift to his church. Instead, Mr. Banks is ineligible for assistance for four months and has no resources to pay for his care during that period. Under existing law, Mr. Banks would have been penalized when he made the $13,500 gift and that penalty period would have elapsed long before his need for public assistance arose.

2. <u>A grandparent caregiver</u>

Mr. and Mrs. Brown are the primary caregivers for their 16-year-old grandchild. Over the last three years they have paid $20,000 for support of their grandchild. Mr. Brown suffers a stroke and needs long term care. Mrs. Brown has total liquid assets of $50,000. Mr. Brown is *otherwise eligible* but will not be approved for Medicaid because of the $20,000 expenditure for his grandchild. Instead, Mrs. Brown will be placed in the precarious position of paying privately for six months that will, at today's costs, totally exhaust her $50,000 nest egg.

3. <u>A family emergency</u>

Mrs. Jones' daughter loses her job due to chronic fatigue syndrome. The daughter is a single parent with two underage children. Mrs. Jones helps her daughter financially in amounts totaling $30,000. Six months later, Mrs. Jones suffers a heart attack and a debilitating stroke requiring long-term care. Two years later an impoverished Mrs. Jones applies for Medicaid and is denied because of the $30,000 gift made several years earlier.

4. <u>Cash-based couple</u>

Mr. and Mrs. Smith live in their own home and pay most of their day-to-day expenses with cash. Mr. Smith generally withdraws about $500 per month for food, gas, newspapers, house wares, car repairs, etc. Generally, he does not keep receipts, at least not in any organized way. Mrs. Smith has never handled their financial affairs and suffers from mild dementia. Unexpectedly, Mr. Smith suffers a stroke and now needs nursing home care. Their current assets and income would make him eligible for Medicaid coverage without difficulty under current law.

His withdrawals of $500 per month will result in a penalty period, unless they are accounted for. His withdrawals add up to $6000 per year in potentially disqualifying transfers, or $18,000 for the three-year lookback. Since Mrs. Smith cannot document the use of the withdrawn money, Mr. Smith will face a penalty period of approximately 4 months. ($18,000 ÷ $4,500/mo (average regional nursing home rate) = 4 month).

7. A helper through hard times

Mr. T, age 80, has been ill for several years since a stroke. His wife, age 75, has been caring for him at home. He became more seriously impaired this past summer when he contracted pneumonia. He was walking with assistance before the pneumonia, but increasing weakness has left him unable to walk. She is continuing to care for him at home, but nursing home placement looks imminent.

Mrs. T has a son from a previous marriage who lives in another state and is not well off. During the last half of 2001, Mrs. T paid his mortgage for him, at $850 per month ($5,100 total). In May of 2002, she gave him $2,200 to help him purchase an automobile so he could commute to and from a new job.

Thus, her total transfers were $7,300. Their own savings are now dwindling. Her husband will be otherwise eligible for Medicaid, but under the President's budget proposal, he will face a penalty period of one month and some days. Mrs. T will have to find a way to pay this out of pocket.

8. A caring sister

Two sisters, both in their 80s, have lived with each other in an apartment for several years. Both have reasonably sufficient assets to cover their anticipated needs. However, one sister has considerably more assets (about $250,000). She is concerned that if she were to become ill and leave the apartment to move into a nursing home, the sister with fewer assts would not be able to afford to remain in the apartment.

The sister with greater assets wishes to take steps to ensure that her sister will be able to continue living in the apartment, if possible, and so she funds an irrevocable trust with $48,000, intended to supplement the poorer sister's costs of living if the need arises.

Under current law and a regional monthly transfer rate of $4500, this transfer will result in a disqualifying period of a little over ten months ($48,000 ÷ $4500/mo = 10.67 months) from the date of transfer. But under the proposal, the caring sister, after spending down all her assets on nursing home care, would then face a penalty period of more than ten months before receiving Medicaid nursing home coverage. Alternatively, if she is aware of the penalty rules, she may be reluctant to help her less fortunate sister in the first place.

9. Helping family

A mother helps her two children - her daughter has medical problems and does not have insurance and her son's daughter (her grandchild) is in a college with expensive tuition. So she helps her daughter by paying $30,000 for health care and she helps her granddaughter by paying $50,000 in tuition. These are significant amounts paid almost five years before she was forced to go into a nursing home. With a five year lookback and a penalty period starting on the day of application, she will be ineligible for nursing home care for more than 17 months (depending upon the state's regional monthly transfer rate). Seniors will not be able to help family members because they will not be able to predict their circumstances.

10. A widow lacking records

Mrs. Waters was married for fifty years. Prior to his death, Mr. Waters handled all financial transactions. Mrs. Waters suffers from dementia and upon Mr. Waters' death is placed in a skilled nursing facility. Her resources are expended and she is applying for Medicaid. She has no knowledge or ability to explain the cash withdrawals totaling $50,000 during the five years preceding her husband's death. Nonetheless, Mrs. Waters is ineligible for Medicaid due to these inexplicable transfers.

11. A mother helping her daughter

Mr. and Mrs. G are in their late seventies and retired. Two and a half years ago, they were living independently and relatively healthy. At that point, one of their daughter's marriage ended and the daughter moved closer to her parents to be near them. She was unemployed at the time and needed to work. Her parents bought her a modest car for $18,000 so that she had transportation to get back and forth to work. The daughter then started working in a series of part-time jobs, which provided her just enough to meet her living expenses.

Two years after giving their daughter the car, Mr. G suffered a major stroke. He lost his ability to speak, walk and use his left arm. He received rehabilitation following the stroke but did not recover all of his abilities. Despite medical advice, his wife insisted on bringing him home. She cared for him herself and paid for services privately for one year. At that point, Mr. G's needs had increased and Mrs. G had become considerably weakened due to the demands of being the primary caregiver. They reluctantly decided that he would be best cared for in a skilled care facility. Mrs. G paid privately for this care for one year. By then, her assets were depleted and she had no more than the amount that would be protected for her as a community spouse. She applied for Medicaid benefits on behalf of her husband and was denied benefits due to the purchase of the car for their daughter.

Medicaid: Penalty Rule Computation

I. Current Law Concerning Penalty for Asset Transfers of Less than Fair Market Value:

The penalty period commences on the first day of the month following the month in which the transfer was made or the first day of the month in which the transfer is made, at the state's option.

II. Proposed Legislation:

Under the President's Proposed Budget, the penalty period would commence on the date of the transfer or the first day of the month during or after which a Medicaid application has been made, whichever is later.

III. Analysis and Issues

1. Under this proposal, seniors and people with disabilities denied Medicaid would, at the time of the denial, be impoverished, have physical and/or mental impairments so severe they could no longer care for themselves, be in need of nursing home or home care, and have no other means (private insurance or

Medicare) of paying for care.

2. The denial of long-term care will trigger adverse medical consequences. The absence of skilled nursing, physical, occupational and speech therapy and necessary assistance with medical care and activities of daily living will adversely affect seniors and people with disabilities who will be denied home care and nursing home admission under this proposal.

3. The harsh penalty that would be created by this proposal would be applied to all those who are unable to immediately recover the funds or the value of property alleged to have been improperly transferred prior to the Medicaid application. Most transferees will have no legal obligation to refund the transfer. In other cases, transferees will be financially unable to make any refund or there will be no transferee from whom to recover. For example, a senior with Alzheimer's who made a $3,000 withdrawal from her savings account thirty six (36) months prior to the Medicaid application would be ineligible for Medicaid long term care benefits for a portion of the month in which she applies. The nursing home or hospital will not be paid for care provided.

4. This proposal would discourage donations to charities, religious and political organizations and candidates for government office. Only those who can predict with absolute certainty that they will not need Medicaid for at least three years could safely make donations.

5. This proposal will harm families by inhibiting older members from providing financial assistance to younger members - with such things as down payments on homes and college tuition - out of fear that they may not qualify for Medicaid nursing home care if unforeseen events leave them unable to care for themselves.

6. In addition to the harm to seniors and those with disabilities, there would be considerable financial harm to health care providers. Hospitals and nursing homes are prohibited from discharging patients unless suitable alternative arrangements can be made, even if it means providing extended uncompensated care.

7. In cases where the nursing home admission has already occurred and the penalty is applied, nursing homes will be required to provide uncompensated care for the duration of the penalty period or until hospitalization. Nursing homes would become financially strapped - influencing staffing levels and the quality of care for all residents.

8. Those in hospitals at the time of the denial would be unable to leave since nursing homes and home care agencies will deny admission if there is no source of payment. Hospitals will become the default providers of care as access to nursing homes is barred during the penalty period. The cost of hospital care to the government will be far higher than it would have been in long-term care.

9. This proposal will most likely not harm those who set out to "game the system" because they most likely will be able to learn how to circumvent it, while those

who have no such intent will likely learn of the policy long after it is too late. In fact, this proposal may encourage more and earlier transfers, while it is unclear how this proposal encourages the purchase of long term care insurance, especially because some of those people are uninsurable.

10. Most long-term care is provided by informal caregivers (e.g. family members). This change could also have far-reaching economic effects if a family member has to leave his or her job to try to take care of a severely incapacitated elder.

Medicaid: Lookback Period

I. Current Law Concerning the Medicaid Lookback Period

Federal law (42U.S.C 1396p(c)) requires states to withhold payment for various long-term care services for individuals who dispose of assets for less than fair market value. The term assets includes both resources and income. The lookback period for both institutional care and home and community based waiver services is 36 months, except the lookback period for trust-related transfers is currently 60 months.

II. Proposed Legislation to Extend the Medicaid Lookback Period to Five Years

The budget bill may include a proposal to change the lookback period to 60 months for institutional care and home care, regardless of whether there have been trust-related transfers.

III. Analysis and Issues

1. The proposal will create unacceptable new obstacles for vulnerable, frail elderly individuals and persons with disabilities to get care, because the proposal will require record keeping and documentation that is far beyond the normal practices of the elderly, especially poor and chronically ill elders. Therefore, low-income elders would be denied admission to a nursing home because of inadequate record keeping.

2. Medicaid recipients who already receive home care services under the current law could lose eligibility under the proposed changes if they had made transfers within the past five years. Services could be abruptly terminated; thereby placing the elderly individual at risk of serious harm and inadequate or inappropriate care in the community.

3. The harshest impact of this proposal will be on those applicants with dementia, who will not be able to provide documentation or recollection for transfers, regardless of how small.

4. The extension of the lookback period is arbitrary and without sound reasoning, other than to look for transfers in order to keep seniors from accessing Medicaid for nursing home care (while increasing administrative costs). The current federal law uses three years, which is a sufficient and reasonable time period to assume that any transfers made were not in contemplation of a future event. The average stay in a nursing home is less than three years. Hence, under current law, most

seniors with more significant assets who transfer assets at the onset of needing long-term care in a nursing home will not receive Medicaid reimbursed nursing home care.

5. Any increase in the lookback period will have a significant impact on administrative overhead and be more burdensome on frail elderly, who must search and obtain records of proof for older transactions. How will the frail elderly (especially those with dementia) do this from a nursing home bed?

6. The proposal suggests that the elderly can predict their medical and financial circumstances five years into the future. An extended lookback coupled with a change in the transfer rules will punish unwitting elders who have helped their families with commonly made gifts and then experience medical events such as a stroke, hip fracture or Alzheimer's disease.

Transfer of Assets: Aggressive Practices and Solutions

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1. **<u>TRANSFER OF ASSETS WHICH RESULTS IN A PARTIAL MONTH PENALTY</u>**

Current Situation:

If an individual seeking Medicaid eligibility has made "uncompensated transfers"—i.e., gifts or other conveyances for which no goods or services were received in return—a "period of ineligibility" for Medicaid is imposed.

The length of the period of ineligibility depends on how much was transferred, when it was transferred, and a particular state's "Medicaid divisor". The Medicaid divisor is supposed to reflect the average cost of an average month in a nursing home in a particular state.

For example, if a state has a Medicaid divisor is $3,300 and an individual transfers a total of $13,000 in the month of December, applying this formula produces a quotient of 3.939 months.

Some states do not impose a fractional period of ineligibility, but instead, "round down" to the lowest whole number. Thus the 3.939 quotient becomes a 3 month period of ineligibility, making the individual ineligible for Medical Assistance through and including February 28th of the following year.

The imposition of a period of ineligibility by a state of an amount equal to the average cost of a nursing home in that state is logical. This logic is distorted, however, when the formula enables an amount equal to nearly the cost of two months in a nursing home to be transferred, yet resulting in only a one month period of ineligibility.

<u>How does this work?</u> Suppose our individual, instead of transferring a total of $13,000 in the month of December, transferred $6,500 in

each of the months of December, January. The period of each of these transfers would be $6,500/$3,300=1.969, rounded down to one month**.** Thus, the individual would receive an advantage due to the "rounding down" aspect of the formula, reducing the transfer penalty from 3.939 months to two months.

Solution

One of the reasons for the current "rounding down" is to avoid imposing a period of ineligibility for Medicaid based on relatively small transfers made for reasons other than securing Medicaid eligibility. For example, if an individual contributed $3,000 to a grandchild's college education in a state with a Medicaid divisor of $3,300, this would result in a quotient 0.909, or a zero month period of ineligibility for Medicaid.

As long as the transfer penalty is limited to transfers for the purpose of qualifying for Medicaid, then the solution would be to eliminate the "rounding down." Therefore, any transfer made for purposes of creating any period of ineligibility for Medicaid—even if less than one month—would result in a partial month of ineligibility.

2. <u>NOTES AND LOANS (INCLUDING SELF CANCELING INSTALLMENT NOTES)</u>

Current Situation

Non-negotiable promissory notes, loans and mortgages that cannot be converted to cash have no market value and according to SSI cash policy is not considered to be a countable resource.

Promissory notes and loans can be negotiated to provide that the loan is forgiven or terminates upon the death of the payee. A parent can thereby transfer considerable sums to children by casting the transfer as a *loan,* which disappears at the parent's death and amounts, in effect, as a disguised transfer. This problem is further compounded because the loan balance is not available for estate recovery.

Solution

Require that to be excluded as an available asset, a promissory note, loan or mortgage must: (1) have a repayment term that is actuarially sound; (2) provide for payments made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and, (3) prohibit of the cancellation of the balance upon the death of the lender.

3. TREATMENT OF TRANSFERS FROM THE FIRST DAY OF THE FOLLOWING MONTH

Current Situation

Allows the States to have the option to either treat the transfer in the month made or as if made on the 1st day of the month following the month of the transfer.

Solution

Mandate the calculation of transfer penalty period beginning with the 1st day of the month following the month of the transfer.

4. ANNUITIES - BALLOON

Current Situation

Since OBRA '93, the transfer of funds to purchase an annuity has not been treated as a transfer of assets nor has the annuity been treated as an available asset if: (1) the annuity contract is irrevocable; (2) the payments are required to be fully made over the annuitant's actuarial life expectancy. Under federal law, there is no distinction between commercial and private annuities.

Certain annuities are designed to make final payment within the annuitant's actuarial life expectancy, but in small monthly amounts so that instead of the payments being made in equal monthly amounts, the bulk of the payments are deferred to the end of the annuity term, resulting in insignificant amounts being made available to the annuitant and the bulk of the funds passing to their beneficiaries.

Why it works? The exclusion of annuities is based only on the total term of payment, i.e. actuarial life expectancy which is a life payout. The rules do not address the method of payout.

Solution

Require that an annuity which is not Qualified Retirement Plans and IRAs must be: (1) irrevocable and non-assignable, (2) actuarially sound; and, (3) provide for the payments to be in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

5. PRIVATE ANNUITIES – ESTATE RECOVERY

Current Situation

Under a Private Annuity, a parent transfers assets to a child in exchange for the child's promise to pay to the parent a sum of money over the parent's actuarial life expectancy. For example, the promise from the child to the parent (the annuity) might be for small monthly payments of interest only, or even less, and a balloon payment at the time of death of the parent (to a designated beneficiary) in accordance with the actuarial tables. Since the parent is sick, it is not likely that they will live as long as the actuarial tables indicate. The payment is not subject to an estate recovery. Litigation around the country has held these transfers to be subject to the Medicaid transfer penalties.

Solution

To make the balance of Annuity payments based on life expectancy subject to an estate recovery.

6. PURCHASE OF A LIFE ESTATE INTEREST IN ANOTHER PERSON'S HOME WITH NO INTENTION OF LIVING IN IT.

Current Situation

A life estate is a property interest that provides that the owner of a "life estate" has the legal right to reside in a property or to the net rental income if that property is leased. Current law allows a parent to purchase a life estate interest in a child's home, and in many states that purchase is not considered a transfer.

For example: Parent age 85, and residing in an Assisted Living facility buys an interest in his son's home for $40,000, never resides in the home, and 90 days later, moves into a nursing home and applies for Medicaid.

Current law fails to require that the parent actually live in the residence. In some circumstances, the parent may have never intended to reside in the residence.

Solution

That the purchase of a life estate interest in a another individual's home be considered an improper transfer, if the purchaser does not reside in the home for a period of 30 days. If the purchaser resides in the home for period of 2 years or more, the purchaser should be permitted to transfer the life estate interest back to the seller, without a penalty being imposed.

LEADERSHIP COUNCIL

of

AGING ORGANIZATIONS

August 20, 2002

The Honorable Tommy Thompson, Secretary
Department of Health & Human Services
200 Independence Avenue, SW
Washington, DC, 20201

Dear Secretary Thompson:

The undersigned members of the Leadership Council of Aging Organizations (LCAO) strongly urge you to reject Connecticut's request for a waiver from Medicaid Transfer of Asset rules. The state is seeking two exemptions from 42 U.S.C. §1396p:

- To impose a penalty period beginning on the date when the applicant is otherwise eligible for Medicaid coverage, *i.e.,* when the individual needs long-term care (nursing home or home care) and lacks the income or resources to pay for that care, and,
- To permit a five-year look-back period for transfers of real property.

We understand the need to prevent individuals from illegally transferring assets in order to improperly qualify for Medicaid benefits. However, the Connecticut proposal would punish people who had never tried to cheat the system. It would be bad for consumers, families, and providers. It would cost, not save, money. Yet it would not likely affect those who try to illegally transfer assets.

In a June 2001 Special Session, the General Assembly authorized the Connecticut Commissioner of Social Services to seek a waiver of federal law from the existing transfer of assets rules under the Medicaid program, subject to the Commissioner submitting the waiver proposal to two committees of the Connecticut General Assembly -- the Human Services and Appropriations Committees -- for public hearing, after which the Committees may "…advise the commissioner of their approval, denial, or modifications, if any, of his application."

The Commissioner submitted the waiver proposal to the two committees in early 2002. The public comments received on the proposed waiver were uniformly negative. The Human Services Committee of the Connecticut General Assembly, after public hearing, unanimously rejected the waiver proposal. The Appropriations Committee failed to approve the proposed waiver by declining to act on it.

The Commissioner of Social Services ignored both the legislative process and the public hearings and submitted the waiver proposal to the Center for Medicare and Medicaid Services (CMS) for approval. Since its submission, both Senators Dodd and Lieberman, as well as all six members of the U.S. House of Representatives from Connecticut have voiced their opposition to the waiver, including Rep. Nancy Johnson, based upon their substantial concerns about the negative effect it would have on persons legitimately needing long-term care services under Medicaid.

Our opposition to the waiver proposal arises from our concern about the likely negative effects of the proposal:

- All of those affected by this waiver will unquestionably need long-term nursing home or home health care, yet be unable to pay for that care. Thus, the health and safety of older and disabled citizens will be seriously jeopardized.

- Those who need nursing home care would not be able to gain entry. Connecticut law allows facilities to deny admission when there is no payment source.

- In cases where nursing home admission has already occurred and the penalty is applied, nursing homes will be required to provide uncompensated care for the duration of the penalty period or until hospitalization.

- Those in a hospital at the time of denial would be unable to leave since nursing homes and home care agencies will deny admission if there is no payment source. Hospitals will become the default providers of care as access to nursing homes is barred during the penalty period.

- The waiver proposal suggests that the elderly can predict their medical and financial circumstances five years into the future. It punishes unwitting elders who have helped their families with commonly made gifts and then experience unforeseeable medical events such as stroke or Alzheimer's disease.

- The waiver proposal wrongly claims that it will expand the use of long-term care insurance. The cost of long-term care insurance is not affordable for many elders. It is definitely not available for many individuals who already have serious chronic illnesses.

- The harsh penalty of the proposed waiver would be applied to all those who are unable to immediately recover the funds or the value of property alleged to have been “improperly” transferred up to five years prior to the Medicaid application. Most transferees will have no legal obligation to refund the transfer (*e.g.,* charitable and religious donations, campaign contributions, etc.). In other cases, transferees will be financially unable to make any refund or there will be no transferee from whom to recover.

- The waiver will create unacceptable new obstacles for vulnerable, frail elderly and disabled persons to get care, because the waiver will require record keeping and documentation that is far beyond the normal practices of the elderly, especially poor and chronically ill elders. Therefore, low-income elders would be denied admission to a nursing home because of inadequate record keeping.

- The waiver will not save money nor encourage the sale of long-term care insurance. The persons most affected are those least able to obtain long-term care insurance.

- The waiver will generate unintended consequences. Rather than stopping asset transfers and encouraging the purchase of long-term care insurance, the proposal will encourage earlier and larger asset transfers by the elderly, discourage responsible decision-making, and ultimately add to Medicaid costs.

In addition, the waiver proposal appears to us to contravene federal law in the following respects:

- The proposed waiver fails to conform to the basic purpose of Section 1115 waivers, since it is devoid of any attempt to expand or improve services or service delivery under a bona fide research or demonstration program. Instead, it is a blatant eligibility restriction intended to cut expenditures.

- Federal law permits waivers of state plan requirements in section 1902 of the Medicaid statute, 42 U.S.C. §1396a. The transfer-of-asset rules created by Congress are not in this section and are not waiveable by CMS. Similar waiver requests by Minnesota and South Dakota were previously denied for this reason by HCFA (now CMS).

- The waiver would permit Connecticut to deny, rather than furnish, medical assistance to those who lack the income and resources to pay for medical care -- thus defeating, rather than promoting, Medicaid and waiver objectives.

For all the foregoing reasons, the LCAO respectfully requests that you reject the Connecticut Transfer of Asset Waiver Proposal. Thank you very much for your consideration of these comments.

Sincerely,

AARP
AFSCME Retirees
Alliance for Retired Americans
Alzheimer's Association
American Association for International Aging

American Association of Homes and Services for the Aging
American Foundation for the Blind
American Geriatrics Society
American Society of Consultant Pharmacists
Association for Gerontology and Human Development in Historically Black Colleges and Universities
B'nai B'rith International Center for Senior Services
Catholic Health Association of the United States
Eldercare America, Inc
Families USA
Gray Panthers
National Association for Hispanic Elderly
National Association for Home Care
National Academy of Elder Law Attorneys
National Association of Area Agencies on Aging
National Association of Nutrition and Aging Services Programs
National Association of Professional Geriatric Care Managers
National Association of Retired and Senior Volunteer Program Directors, Inc.
National Association of Retired Federal Employees
National Association of Senior Companion Project Directors
National Association of State Long-Term Care Ombudsman Programs
National Caucus and Center on Black Aged
National Committee to Preserve Social Security and Medicare
National Council on the Aging
National Hispanic Council on Aging
National Indian Council on Aging
National Senior Citizens Law Center
OWL, the voice of midlife and older women
The Retired Officers Association
United Auto Workers Retired Workers Department
United Jewish Communities
Volunteers of America

cc: The Honorable Tom Scully

NAELA Members as Resources: Issue List

The National Academy of Elder Law Attorneys' (NAELA) has members that are valuable public policy and substantive law resources. Within the membership we have expertise in almost all federal, state and local programs serving or affecting the elderly. Many are willing to be supportive of the work of legislators and regulators, and will provide expert opinions, testimony, articles, and other written materials upon request. Issue areas include, but are not limited to:

Alternative Dispute Resolution
Disability Law
Estate Planning
Health Care Decision Making and End of Life Issues
Health Care Advanced Directives
Long-Term Care Planning
Long-Term Care Insurance
Managed Care
Medicare
Medicare Appeals
Medicaid
Mental Capacity Issues
Nursing Home Care, Law, and Litigation
Public Interest Representation (including Legal Services Corporation and Older Americans Act delivery systems)
Retirement Housing
Retirement Planning
Guardianships, Conservatorships and other Surrogate Decision Making processes
Social Security
Supplemental Security Income
Tax Planning
Trusts and Wills