Guy R. DeFrances
Kenneth W. Mango
Dennis F. Gaffney
E. Jack Shorr
Thomas S. Luby
Bruno R. Morasutti

Of Counsel:
Robert M. Luby
Gary O. Olson
Kimberly Mango Thompson

LUBY • OLSON, P.C.
Attorneys & Counselors at Law
Founded 1939
405 Broad Street, P.O. Box 2695, Meriden, CT 06450
203-639-3560 • 860-343-0909 • Fax: 203-639-3569

Real Estate Line:
203-238-3600
Real Estate Fax:
203-235-6945
Website:
www.lubyolson.com
E-Mail:
attorneys@lubyolson.com

Report From Counsel

Insights and Developments in the Law

Winter 2005/2006

Medicaid Law Update (Title XIX)

By Kenneth W. Mango

Medicaid (Title XIX of the Social Security Act of 1935, as amended) is a federal law designed in 1965 to provide medical assistance primarily to those needy families with dependent children, the aged (65 and over), the blind and the disabled. It is administered by the State of Connecticut in compliance with federal regulations. More recently, our aging middle-class population is looking more and more to Medicaid as they face the prospect of long term institutional care. We are finding that a good number of our clients are becoming increasingly concerned with protecting their assets against the prospect of long term care. There is reason to be concerned. In Connecticut, the *average* cost of care for a private care patient in a long term care facility as of July 1, 2005 is $7,905 per month.

Eligibility

Generally speaking, in order to qualify for Medicaid benefits, a single institutionalized individual may have no more than the following exempt assets:

A. $1,600 in assets;
B. Irrevocable funeral contract of not more than $5,400 or revocable funeral contract of not more than $1,200;
C. A burial plot;
D. Life insurance policies with a *face value* of $1,500 in the aggregate or less and such policies that have *no cash surrender value* regardless of the face value;
E. Essential household items;
F. Personal effects;
G. An automobile with certain qualifications; and
H. A home which an applicant owns and is using as a principal residence. A home owned by an individual who enters a long term care facility keeps its exempt status, provided the individual is expected to return home. If the institutionalized individual is married with a spouse who resides in the home, the home is exempt even though the institutionalized spouse is not expected to return home.

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Gifting

In order to protect assets that are not exempt, a plan of gifting is necessary. When one applies for Medicaid benefits, the State of Connecticut will look back 36 months to determine if a transfer of assets for less than fair market value has occurred during the "look back" period. If so, a computation of a period of ineligibility for benefits is made unless the transfer fits within an exception to the transfer rule. The penalty period is determined by dividing the uncompensated value of the asset transferred by the average monthly cost of nursing home care for a private care patient in Connecticut, i.e., $7,905. The resulting sum is the number of months during which the Medicaid applicant will be disqualified from receiving Medicaid benefits. If the transfer of assets for less than fair market value is made to a trust, the "look back" period is 60 months. The penalty period begins running from the first day of the month in which the transfer was made. In developing a plan of gifting, one should plan on retaining sufficient assets to cover the cost of care during the penalty period. Since the development of a plan of gifting must avoid a myriad of pitfalls, it is recommended that you utilize counsel in preparing the plan.

Legislative Action

The Connecticut Legislature is attempting to limit the ability of senior citizens to protect their assets against the prospects of long term care. On July 13, 2005, the Governor signed into law the Department of Social Services Bill (Public Act No. 05-280), which provides at Sec. 40 that "(b) Any transfer or assignment of assets resulting in the establishment or impo-

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FLSA Overtime Update

Unless an employee falls within an exempt category of workers, the federal Fair Labor Standards Act (FLSA) requires the employer to pay the employee overtime at a rate of one and one-half times the regular rate of pay, for hours worked in excess of 40 hours per week. To be exempt is to be ineligible for overtime. The exemption commonly called the "white collar" exemption is for professional employees.

Federal regulations in place since August 2004 have simplified the test for determining which employees come within the white collar exemption. An employee is a professional if each of the following elements is present:

(1) The employee has the primary duty of performing work requiring advanced knowledge, that is, work that is mainly intellectual in nature and which includes the consistent exercise of discretion and judgment;

(2) The employee has advanced knowledge in a field of science or learning; and

(3) The employee has advanced knowledge that is customarily acquired by a prolonged course of specialized intellectual instruction.

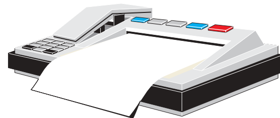
Recent Cases

In one recent case, a company refused to pay overtime to some of its employees who were licensed pharmacists. Much to the dismay of the employees, the company's reliance on the white collar exemption held up in federal court. All of the parties agreed that the second and third parts of the exemption test were met by the pharmacists, leaving a dispute only over whether the pharmacists' work required the consistent exercise of discretion and judgment. The court found that this element also was present.

The pharmacists, with little supervision, routinely made discretionary decisions about dispensing prescribed drugs to patients, and sometimes the process required consultation with the physicians who prescribed the drugs. The only factor suggesting a lack of discretion was the fact that the employees, as a rule, were expected to follow standard operating procedures from their employer. But this argument by the pharmacists was undermined by the fact that they regularly were asked to consult with the employer about the standard procedures and to review them for any suggested improvements. The pharmacists also had the employer's blessing to stray from the procedures if, in their judgment, it was necessary for a patient's health.

Assuming an employee is eligible for overtime pay, questions can arise as to what comprises an employee's regular rate of pay for purposes of calculating the overtime obligation. It is not always as simple as using an employee's base hourly rate or salary. For example, in another recent case, a federal court ruled that the regular pay of municipal firefighters included payments made to them under a city's sick leave buy-back program. A firefighter who had built up a certain amount of sick leave had the right to "sell" it back to the city for a lump-sum payment. Whenever this happened, the employer effectively was paying the firefighters a bonus for good attendance and for work they had already done. It was as much a part of the firefighters' regular compensation as their base hourly wage, so it had to be taken into account in calculating overtime wages.

Junk Fax Protection Act



There may be some finality to the formerly unsettled picture on federal regulation of junk fax transmissions. Since the first federal legislation on the subject, in 1991, there has been an "established business relationship" exception allowing the sending of commercial advertising by fax under certain conditions. In 2003, the Federal Communications Commission issued a regulation that would have effectively removed the exception, requiring express written permission from the recipient for sending any commercial ads by fax. Opposition from business groups prompted the FCC to put off enforcement of that rule three times.

Before the restrictive FCC regulation ever became effective, new legislation has reinstated the established business relationship exemption. It is still illegal to send unsolicited fax advertisements to anyone who has requested that they not be sent. However, unsolicited faxes can be sent if the sender has an established business relationship with the recipient and the fax itself has a conspicuous notice on its first page informing the recipient that it can request not to be sent more such faxes. To combat the sale of fax lists to mass marketers, the law requires businesses to obtain fax numbers either directly from the recipient or from a published source, such as a directory, an advertisement, or a website.

“Pop-Ups” Annoy but Don’t Infringe

An Internet marketing company provided a free software application that keeps track of computer users’ activity on the web in order to deliver targeted advertising for its clients. The software uses an unpublished internal directory with thousands of website addresses and keywords for particular interests of consumers. When the computer user types in particular terms in a browser or search engine, a relevant “pop-up” ad is delivered to the computer.

A company in the contact lens business learned that its website was in the internal directory and that the software caused pop-up ads for competing contact lens retailers to appear on the screens of individuals who visited the company’s website. The contact lens company sued the marketing firm on the theory that the marketing firm had infringed upon a trademark in violation of federal law. From the plaintiff’s standpoint, the actions of the marketing firm were allowing competitors to take a free ride on the plaintiff’s website.

A federal court ruled against the plaintiff contact lens company. A successful trademark infringement lawsuit requires a showing of a protected trademark and a use of that trademark in commerce in connection with the sale or advertising of goods or services, without the plaintiff’s consent. The use of the mark by the defendant also must be such as to likely cause confusion between the plaintiff and the defendant. The action brought by the plaintiff failed primarily due to the court’s ruling that the defendant had never “used” the plaintiff’s trademark in a manner like that in a typical infringement case. First, the defendant reproduced the plaintiff’s website address, which was similar, but not identical, to its trademark. In addition, the pop-up ads, which appeared in a separate window prominently branded with the marketing company’s mark, had no discernible effect on the functioning of the plaintiff’s website.

It was not enough for a successful claim that the defendant and its clients were trying to take advantage of the plaintiff’s goodwill and reputation, which had led people to the plaintiff’s website in the first place. What the defendant was doing was no more legally objectionable than the low-tech counterpart of chain drug stores placing their own store-brand products on shelves next to the higher-priced and trademarked versions of the same products, so as to capitalize on their competitors’ name recognition.

Do You Have Residences in More Than One State?

If you spend time in any given year in residences in different states, somewhere in your travels you also may want to schedule an appointment with your professional tax advisor. One topic for discussion would be the legal concept of domicile.

In simplest terms, a person’s domicile is the place where he or she intends to return after leaving another location. The special significance of where a domicile is established is in tax planning. An individual’s domicile determines which state’s income, gift, and estate tax laws apply, and in which state or states a person, trust, or estate is taxable. The rules that will govern the administration of an estate also depend on the state of domicile. Inadequate attention to establishing and documenting an intended state of domicile could mean that even the best-laid estate plan might go awry because the laws of a different state could apply. The end result could be an unexpected tax burden that otherwise could have been avoided.

Although the basic definition of “domicile” is simple enough, many different criteria may be taken into account in pinpointing a state of domicile. No one factor is controlling, and the states differ in the criteria that they use. The address included in a person’s will may be a good indicator of the person’s domicile. A nonexhaustive list of other factors would take into account in what state a person votes, registers an automobile, has a driver’s license, keeps important personal property, pays state and local income and personal property taxes, last applied for a passport, and keeps the bulk of his or her money. Contrary to the old saying, you can go home again, and it is a good idea to make sure that you and the government agree on where that home is.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Golf Balls Can Be Trespassers

Joyce had nothing against golf or golfers. In fact, she was a regular golfer herself and a member of two different golf clubs. But when her home in a subdivision adjoining a private golf course was continuously pelted with errant golf balls, she and a neighbor with the same predicament eventually took the matter to court and won.

The golf course began operating in the late 1980s, and Joyce moved into her home in the late 1990s. But the fact that she "came to the problem" did not prevent Joyce from winning an injunction to stop, or at least minimize, incoming golf balls and the golfers in search of them. No doubt the court was impressed by the evidence showing the extent of the problem, which went well beyond an occasional Titleist in the flower bed. Among other effects, there were five damaged window screens, one large broken window, dented siding, and a dimpled car hood (only the golf balls are supposed to have dimples). At least one wayward shot struck the house hard enough to trigger a burglar alarm. It got so bad that Joyce all but gave up on using her rear deck, and her young son was instructed to play only in the part of the yard that was shielded from the golf course by the house. The clincher piece of evidence may have been the 1,800 golf balls that Joyce had retrieved from her yard during the five years she had lived in her house.

The winning legal theory for Joyce was continuing trespass. The common conception of a trespass is of someone walking across another's property without permission, but the concept is broader than that. A trespass is any invasion of a landowner's interest in exclusive possession of the property. Propelling physical objects onto someone's property regularly, frequently, and without the owner's consent is a continuing trespass.

As for the appropriate remedy, the court in Joyce's case offered some guidance. If the golf course operators were determined to keep the course as it was, they either would have to acquire the adjacent land, or the right to use such land, for the purpose of accommodating all of those wayward golf shots. More realistically, the defendant could solve the problem by shortening the hole that adjoined Joyce's property, thereby removing the property from the landing area for all those bad shots. This would be somewhat burdensome for the golf club, but it was not such a hardship as could relieve the club of its obligation to end the continuing trespass and give Joyce back the "exclusive possession" of her home.

Medicaid Update

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sition of a penalty period shall create a debt, as defined in Section 36a-645, that shall be due and owing by the transferor or transferee to the Department of Social Services in an amount equal to the amount of the medical assistance provided to or on behalf of the transferor on or after the date of the transfer of assets, but said amount shall not exceed the fair market value of the assets at the time of transfer. The Commissioner of Social Services, the Commissioner of Administrative Services and the Attorney General shall have the power or authority to seek administrative, legal or equitable relief as provided by other statutes or by common law."

Congress is also considering several Medicaid related proposals in the President's budget designed to erode further the ability to protect assets from the cost of long term care. One proposal is to extend the "look back" period from 3 to 5 years. Another proposal is to start the running of the penalty period for gifts from the date of eligibility for long term care services rather than from the date that the gift was made. For example, a $79,050 gift resulting in a 10 month penalty period now starts running from the month the gift is made, presumably at a time when the grantor has set aside enough assets to cover the private care payments to the nursing home for 10 months. The proposal under consideration by Congress would have the 10 month penalty period start on the date the applicant is "eligible", i.e., when the applicant's assets are $1,600 or less. Query who will then make the long term care payments during the 10 month penalty period. This language has been incorporated in the federal budget proposals before Congress, which, in part, are intended to reduce Medicaid spending by $10 billion. The National Governors' Association is in support of the budget proposals which would tighten Medicaid transfer rules, and, in particular, begin the penalty period *not* in the month of the transfer but rather when the applicant is otherwise eligible for Medicaid.

Despite the erosion of options that our citizens can utilize to protect their hard-earned assets from the expenses of long term nursing home care, we shall continue our efforts to provide our clients with the best protection legally available.

[Editor's note: Attorney Mango, Managing Partner of Luby Olson, P.C., is a member of the Elder Law Section of the Connecticut Bar Association.]