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## **Nursing Home Evictions of Medicaid Patients Following Voluntary Withdrawal From Medicaid Program: Current Issues and Congressional Response**

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### **Summary**

Nursing facilities that choose to participate in the Medicaid program must comply with specific requirements relating to patients' rights, including transfer and discharge procedures. However, once a facility has voluntarily withdrawn from the Medicaid program, transfer and discharge protections no longer apply to residents in the facility. In 1998, the Vencor Corporation evicted large numbers of Medicaid residents from its nursing homes pursuant to its decision to withdraw from the Medicaid program. Congressional response following the Vencor case included consideration of H.R. 540 and S. 494, 106<sup>th</sup> Congress companion bills prohibiting transfers or discharges of residents of nursing facilities as a result of a voluntary withdrawal from participation in the Medicaid program. The House passed H.R. 540 on March 10<sup>th</sup>. On March 15<sup>th</sup> the Senate voted unanimously to pass S. 494. President Clinton signed the measure into law on March 25, 1999.

### **Background**

In the spring of 1998, the Vencor Corporation began the process of withdrawing its nursing facilities from participation in the Medicaid program. At the same time Vencor began discharging Medicaid patients from certain nursing homes. In one case, fifty-four Medicaid residents in its Rehabilitation and Healthcare Center of Tampa, Florida were given a discharge notice on March 30, 1998. The residents were not told that Vencor was withdrawing from Medicaid, but rather that the discharges were necessitated by facility renovations. Adverse publicity and action by the Florida Agency for Health Care Administration caused Vencor to reverse its policy regarding Medicaid residents in Florida and in other states. However, the incident highlighted an issue which has prompted congressional attention, i.e., whether Medicaid residents should have the right to remain

in a nursing home once the facility voluntarily ceases to participate in the federal program.

## **Transfer and Discharge Provisions Under The Medicaid Statute**

Under current law, nursing facilities that choose to participate in the Medicaid program must comply with specific requirements relating to patients' rights as set forth in section 1919 of the Social Security Act, 42 U.S.C. § 1396r(C)(2). Generally, a nursing facility may not transfer or discharge any resident<sup>1</sup> of a participating facility unless the transfer or discharge is necessary for the resident's welfare, or because the resident's health has improved enough to leave the facility, or unless the safety or health of others in the facility is endangered, or for non-payment for services, or if the facility ceases to operate. A resident may not be discharged for non-payment for services on the basis that the Medicaid payment rate is less than the private pay rate when a patient converts from private pay status to a Medicaid resident.<sup>2</sup> Various documentation and notice requirements apply to transfers or discharges that are permitted under the Medicaid statute.<sup>3</sup> Civil remedies are provided under the Medicaid statute for use by the Secretary of the Department of Health and Human Services (HHS) and the states when a nursing facility violates the transfer and discharge requirements.<sup>4</sup> These remedies include federal civil monetary penalties of up to \$10,000 per day under certain circumstances.<sup>5</sup>

Since Medicaid nursing home participation is voluntary in most cases, nursing homes may choose to end their participation in the program. Once a facility has left the program, the transfer and discharge protections of the Medicaid statute no longer apply to the facility. Thus, HHS has no authority to prevent evictions of Medicaid residents or other residents after a facility has left the program.

## **H.R. 540/S. 494 and Congressional Action**

H.R. 540, the "Nursing Home Resident Protection Amendments of 1999," was introduced by Representative Jim Davis of Florida, on February 3, 1999. A companion bill, S. 494, was introduced by Senator Bob Graham in the Senate on March 2, 1999. These bills would prohibit transfers or discharges of residents of nursing facilities as a result of a voluntary withdrawal from participation in the Medicaid program, if the nursing facility continues to provide nursing care services. Specifically, a facility would be prohibited from transferring or discharging *any* residents of the facility, whether or not Medicaid recipients, solely because of its withdrawal from Medicaid participation. This means that Medicaid residents would be allowed to continue to stay in the facility, and that

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<sup>1</sup> The Medicaid patients' protections apply to all residents of a participating facility. A facility must "establish and maintain identical policies and practices regarding transfer, discharge, and covered services...regardless of source of payment." 42 U.S.C. § 1396r(c)(4).

<sup>2</sup> 42 C.F.R. § 483.12(a)(2)(v) states that "(f)or a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid."

<sup>3</sup> See 42 C.F.R. § 483.12.

<sup>4</sup> See Sections 1919(h) of the Social Security Act, 42 U.S.C. § 1396r(h), and implementing regulations at 42 C.F.R. §§ 488.400 *et seq.*

<sup>5</sup> 42 C.F.R. § 488.438.

the nursing home, even though it has withdrawn from the Medicaid program, would have to continue to accept the state's Medicaid payment rate as payment in full for such residents. With respect to "private pay" residents in the facility at the time of withdrawal from the Medicaid program, the facility would be required to permit such private pay residents to convert to Medicaid and continue to reside in the facility for as long as it is appropriate for them to do so.<sup>6</sup> In addition, all Medicaid participation agreement requirements would continue to apply to all individuals who were residents of the facility on the day before the day the facility withdrew from the Medicaid program, until such individuals no longer need care

Under H.R. 540 and S. 494 a nursing facility would be required to advise individuals who enter the facility after the facility has voluntarily withdrawn from the Medicaid program that the facility is not participating in Medicaid, and that the facility may discharge the resident from the facility if the resident becomes eligible for Medicaid. This notice must be given to a new resident orally and in writing, and the facility must obtain from the individual a written acknowledgment of the receipt of such information at the time he or she becomes a resident.

H.R. 540 was the subject of a hearing on February 11, 1999 before the Health and Environment Subcommittee of the House Commerce Committee. Support for the bill was expressed by the Health Care Financing Administration of HHS and various senior citizen organizations, such as the American Association of Retired Persons, the National Senior Citizens Law Center, and the American Health Care Association. These groups argue that the additional transfer and discharge protections of H.R. 540/S. 494 are necessary to prevent the "eviction" of residents from facilities that in essence have become their homes. Furthermore, many people who initially come to a nursing home as "private pay" patients do so with the expectation that they will be able to remain in the facility once they have depleted their assets and become eligible for Medicaid payments. On the other hand, others have expressed concerns about the potential financial burden that a facility might incur if it has to carry residents at the Medicaid payment rate indefinitely after the facility has chosen to withdraw from the Medicaid program.

H.R. 540 was reported out of the Health and Environment Subcommittee on March 2, and on March 4<sup>th</sup> the bill was reported out of the House Committee on Commerce. On March 10<sup>th</sup>, the House passed H.R. 540. S. 494 was reported favorably by the Senate Finance Committee on March 4<sup>th</sup>. On March 15<sup>th</sup> the Senate voted unanimously to pass S. 494. President Clinton signed the measure into law on March 25<sup>th</sup>. The provisions of this law will now apply to voluntary withdrawals from participation in the Medicaid program on or after March 25, 1999.

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<sup>6</sup> The provisions of these bills would not affect current regulations allowing a nursing facility to operate "distinct parts" of their facilities as Medicare/Medicaid or Medicaid certified beds. 42 C.F.R. § 483.5. Thus, it is possible that a private pay resident who converts to Medicaid payment status may not be able to remain in the facility if a Medicaid-certified bed is not available.

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