A Compact to Solve New York's Long Term Care Crisis

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An Overview of the Crisis

Anyone who has ever encountered the issue of financing Long Term Care thoroughly comprehends the adversarial nature and needlessly complicated process of applying for Medicaid. Indeed, our current Long Term Care system is in desperate need of reform. Paying for Long Term Care is the single greatest hurdle faced by seniors today who are concerned about planning a future that secures their assets and preserves their dignity. Unequivocally, confronting this problem is of the utmost exigency since Medicaid is the only government assistance program that subsidizes Long Term Care, a vital service to countless seniors and members of our society who are disabled.

Long Term Care is essentially custodial in nature and as such is designed to assist chronically disabled individuals with their daily activities of living over a prolonged period of time as they compensate for their loss of the physical and mental ability to function independently. Providing assistance with activities of daily life, such as eating, toileting, transferring, bathing, dressing, and continence, is the primary function of Long Term Care. Long Term Care is necessary for many seniors and persons with disabilities, but it is also expensive. Medicaid is the most common government program to which seniors and people with disabilities turn; other options, including private pay and Long Term Care insurance, are often too costly or exclusive. Just under 50% of all national spending on nursing home care in 2003 was covered by Medicaid while in stark contrast just under 10% was covered by private insurance,[1] evidence that Medicaid is essential for seniors and people with disabilities when it comes to Long Term Care. However, the primary prerequisite of the current system is an impoverishment process that undermines the quality of life we, as Americans, cherish. The reality is that most seniors and people with disabilities cannot afford to pay for Long Term Care indefinitely but do possess some assets in excess of the stringent Medicaid limits. Many find themselves in health-care limbo since Medicare does not cover Long Term Care services. This puts them in an untenable position where, currently, there is no readily available system to which seniors and individuals with disabilities may turn. Most people agree that no American citizen should be forced into poverty merely to pay for Long Term Care. As a last resort, people who lack private pay funds and/or do not have coverage under a Long Term Care policy turn to Medicaid. So far, no other alternatives have emerged.

The New York State Bar Association Elder Law Section=s Long Term Care Reform Committee has proposed an alternative method of financing Long Term

[1] O=Brien, Ellen, *Medicaid=s coverage of nursing home costs: Asset shelter for the wealthy or essential safety net?* (May 2005) <http://ltc.georgetown.edu>

Care in a way that seeks to help New York State residents access the Long Term Care they need while at the same time curbing the burgeoning costs of the Medicaid Program. This proposal, entitled the ACompact@ program, is aimed toward re-imagining how we determine qualifications for Medicaid assistance. The idea stems from Gail Holubinka, the first Director and primary designer of the NYS Partnership for Long Term Care, who provided the initial concept that blossomed into the Compact proposal. The Compact Working Group, a subcommittee of the Long Term Care Reform Committee, has devised a novel plan that is both realistic and pragmatic.

This summary of the New York State Long Term Care Compact reflects the views of its authors and is neither endorsed nor rejected by the New York State Bar Association and its Elder Law Section. The Compact proposal is a work in progress that reflects the continuing painstaking efforts of the Compact Working Group, whose members include Michael Amoruso, Esq., Howard Angione, Esq., Daniel G. Fish, Esq., Gail Holubinka, Howard S. Krooks, Esq., Louis W. Pierro, Esq., and Vincent J. Russo, Esq. This article reflects only the views of the authors, who currently serve as co-chairs of the Compact Working Group.

The Fundamental Design of the Compact

The cornerstone of the Long Term Care Compact is to create a partnership between seniors and government wherein seniors will pay a fair share for Long Term Care services with the government's support. This program is based upon the belief that public policy concerning social programs should be a contract between seniors and the government where the senior pledges to contribute his/her fair share of the cost-burden of Long Term Care services in exchange for retaining a protected amount of personal assets while receiving government assistance.

Under the current Medicaid system, poverty status is required before one can obtain government assistance to pay for Long Term Care. As a result, most seniors and people with disabilities in need of Long Term Care are faced with a Hobson's choice: spend down the modest estate they have struggled to earn over a lifetime or transfer their assets to children or other relatives voluntarily imposing impoverishment on themselves. However, these transfers count against the applicants who are harshly penalized by a period of refused government assistance in accordance with transfer penalty rules. In fact, there is a movement among several states, and even in the United States Congress, to increase the penalties and so-called "lookback periods" as a way to Asolve@ the Medicaid crisis. What kind of solution is that? Penalties and lookback periods leave applicants both destitute and devoid of assistance, worse off then when they began the process. We, as a society, can do better.

The Compact would rectify this quagmire, utilizing a rather simple approach. Briefly, once individuals are diagnosed as chronically ill, instead of frantically giving away their assets to qualify for Medicaid assistance, they would Apledge@ to use a defined amount of their existing assets to pay for their Long Term Care needs. Until this pledged amount is spent, they remain responsible for their own care, independent of Medicaid, while retaining full access to the aggregate of their income and assets. Once they have spent the pledged amount, applicants then dually retain their Aprivate pay@ status but become eligible for the Compact Subsidy to pay for approximately 90% of their Long Term Care costs. At this point, participants would pay 25% of their monthly countable income to the government's administering agency, using the remaining 75% to pay the portion of their Long Term Care expenses not covered by the Compact Subsidy[2] as well as any other ancillary medical expenses.

Under the Compact program Medicaid becomes the true Asafety net@ it was intended to be when it became law in 1965. This Compact proposal would relieve the ever-burgeoning financial stress placed upon the Medicaid system while at the same time empowering individuals to preserve their dignity and quality of life. In developing the Compact proposal the Compact Working Group members have thoughtfully considered diverse interest groups (i.e., the legislative branch, the executive branch, the insurance industry, the consumer, the health care provider, and the Department of Health) and thought through the vast landscape of many issues impacted by the implementation of such a proposal. Furthermore, the Compact proposal's political appeal is encouraging. Republicans should support the concept of privatization and decreased government spending while Democrats will admire the extension of government benefits it will spawn. The Compact proposal has the kind of bi-partisan appeal that will be instrumental to the achievement of a sweeping change. Above all, the Compact is a common sense approach to our health-care crisis, a crisis that looms ever nearer as we trek headfirst toward the retirement of the baby-boom generation and the continued aging of the American populace.

At the time of this printing, New York State Senator Martin J. Golden, chair of the Senate Aging Committee, has sponsored legislation to implement the New York Compact for Long Term Care. S.3530, the bill=s title, is founded upon the same principles outlined herein. This bill is likely to be re-introduced with revisions in the next legislative session of the New York State Senate.

An In-Depth Analysis of the Compact

There can be no doubt that there are a plethora of questions and issues that are raised when introducing such an inventive concept; therefore, we shall endeavor to address what we consider to be the most salient points of the Compact proposal. The Compact would work within the established infrastructure of the current Medicaid program and would actually serve as an alternative to facilitate a less complicated process, eventually reducing the administrative burdens and costs necessary to operate the program.

The Compact consists of two basic phases: 1) the Pledge period, during which time the applicant is referred to as an Eligible Individual, and 2) the Compact Subsidy period, during which time the applicant is referred to as a Compact Participant.

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[2] See herein, Phase II, The Compact Subsidy.

We will discuss the highlights of each of the two phases throughout the remainder of this article.

Phase I: The Pledge

Pledge Amount: The pledge amount is the lesser of the regional rate (coverage cost of nursing home care in any one of seven regions throughout the state, as published by the Department of Health) calculated for three years (36 months), known as the AMaximum Pledge Amount,@ or one half the value of the Eligible Individual=s countable assets on the Compact Pledge Date (as defined herein), known as the ADollar Pledge Amount.@ An Eligible Individual will have the freedom to elect, at his or her option, the Maximum Pledge Amount even if the Dollar Pledge Amount is lower. The remaining assets not pledged are referred to as the AProtected Amount.@ A Compact Participant will not be required to use any assets designated as a Protected Amount.

If an Eligible Individual has less than $40,000 in countable assets, the Dollar Pledge Amount is limited to the amount in excess of $20,000, with both figures subject to annual adjustment for inflation. Once the Pledge Amount has been spent for qualified Long Term Care services, the Eligible Individual has satisfied his or her obligations under the Compact and enters the second phase of the Compact, which provides assistance equal to the Compact Subsidy Amount (discussed later in the article).

Compact Pledge Date: The Compact Pledge Date is the date upon which the Eligible Individual has satisfied the two requirements to enter into the Compact program contract: 1) the individual qualifies for Long Term Care services, and 2) the government's third party administrator has made a determination of the Pledge Amount and the individual has agreed to the Pledge Amount.

Countable Assets: Unless specifically exempted by the Compact rules, countable assets will continue to include all those defined in ' 366 of New York State Social Services Law, the current Medicaid law in New York.

Homestead Exemption: For purposes of calculating countable assets, a Homestead is exempt regardless of value and regardless of whether the Maximum Pledge or Dollar Pledge Amount is applicable, unless the Homestead was purchased within three years of the Compact Pledge Date. In such event, the Homestead value would be included when computing countable assets unless the Homestead replaces a Homestead sold within a one-year period. If a replacement Homestead was purchased within one year, then countable assets include an amount equal to the difference between the gross sale price of the prior Homestead and the net purchase price of the new Homestead.

Look Back Rules: A cornerstone feature of the Compact concerns the lookback period often associated with the Medicaid program. Under the Compact program, if the Maximum Amount is pledged, there will be no lookback period, Apenalty period,@ or review of financial documentation, making the program friendly for both the user and the administrator. Only when the Dollar Pledge Amount is pledged would a three year lookback period apply, pursuant to which the Eligible Individual would disclose and certify, subject to penalties for perjury, a list of current assets, their values and any asset transfers for less than full consideration within the past three years. Income tax returns, if filed, would constitute the only documents required to be filed, although the government's third party administrator could ask for further documentation to verify assets (and values) as well as the amount of any uncompensated assets transferred. While there would be no penalty period established for asset transfers made within the three year lookback period, under the Compact program, any asset transfers made within three years of the Compact Pledge Date would be added back to the sum of countable assets used for the purposes of determining the Pledge Amount.

Spousal Rules: A married couple must disclose total assets without distinction as to who owns the assets. Likewise, agreements between husband and wife regarding asset ownership contained in any pre-nuptial or post-nuptial agreement, if made less than three years before the Compact Pledge Date, would not be recognized. For the first spouse requiring qualified Long Term Care services, the Compact Pledge Amount would be either the Maximum Pledge Amount or one fourth of the couple=s countable assets (constituting the Dollar Pledge Amount), whichever is less. Assets of a non-pledging spouse who has entered into a pre-nuptial or post-nuptial agreement made more than three years prior to the Compact Pledge Date would not be required to be disclosed under Compact rules.

If the Maximum Pledge Amount applies, then the Protected Amount would be equal to one-half the couple=s countable assets minus the Maximum Pledge Amount. If the Dollar Pledge Amount applies, then one-fourth of the couple=s countable assets would constitute the Protected Amount. Should the second spouse require qualified Long Term Care services, the Pledge Amount of the second spouse would be the lesser of the Maximum Pledge Amount or one half of the couple=s remaining countable assets after subtracting the first spouse=s Protected Amount and, if the first spouse has not completed his or her pledge, the amount needed to complete the first spouse's pledge.

On the death of the first spouse, if the Protected Amount is bequeathed to the surviving spouse, it is not included in computing the survivor=s countable assets when s/he applies for Compact coverage. Furthermore, as long as the Protected Amount has been maintained in a segregated account, growth and income in the account also are protected. The surviving spouse of a Compact Participant is not required to exercise a right of election under ' 5-1.1-A of the Estate Powers and Trusts Law if the Will of the first spouse transfers his/her Protected Amount to someone other than the surviving spouse.

Advisory Committee: Senate Bill S. 3530, as introduced on March 21, 2005 to the New York State Senate, is the first attempt to codify the Compact proposal. The Bill outlines a system for the creation of an Advisory Committee to be put in place to address the many concerns expected to arise through implementation of the Compact program (especially pertaining to the unpredictable nature of the issues that could arise in the spousal context). The main purpose of the Advisory Committee would be to provide for the continued development of the Compact program once implemented. The proposed Committee would consist of seven persons: The Chair of the Elder Law Section of the New York State Bar Association, one member of the Elder Law Section of the New York State Bar Association, two members from statewide advocacy groups that deal with senior issues, two members with at least five years experience in the development of Long Term Care insurance products, and one member with at least five years actuarial or accounting experience in health insurance matters.[3] Individuals on the Advisory Committee would operate under the auspices of the Compact Program Commissioner and would receive no compensation for their work besides that which covers the expenses of their duties.

Estate Recovery: Once the Maximum Pledge or the required Dollar Pledge Amount has been satisfied, there will be no estate recovery of any Protected Amount or the Homestead.

Annuities: The Compact program has three basic rules concerning the treatment of annuities in the Pledge process:

1) Annuities Purchased Within 3 Years of Compact Pledge Date - Principal is treated as a countable asset for pledge purposes if an annuity in permanent payout status was purchased within 3 years of the Compact Pledge Date. However, payout amounts are not treated as Aincome@ later on in the Compact process when the Eligible Individual has completed the Pledge Amount and becomes a Compact Participant, eligible for Compact Subsidy payments.

2) Annuities Purchased Prior To 3 Years of Compact Pledge Date - In contrast, Principal is not treated as a countable asset if a level payment schedule has been in force for 3 or more years before the Compact Pledge Date. However, payout amounts are treated as Aincome@ later on in the Compact process when the Eligible Individual has completed the Pledge Amount and becomes a Compact Participant, eligible for Compact Subsidy payments. The monthly amount of a Alevel payment schedule@ would be based on the value of the assets invested, the anticipated interest, and the person=s life expectancy as established by the Internal Revenue Code and the applicable Treasury Regulations promulgated thereunder.

[3] New York Senate Bill S. 3530, introduced on March 21, 2005.

3) Annuities Not in Permanent Payout Status - Annuities that are not in a permanently established payout status for three years prior to the Compact Pledge Date are treated as countable assets for the purposes of calculating an Eligible Individual=s Pledge Amount.

Irrevocable Trusts: The value of any asset placed in an Irrevocable Trust for less than full consideration within the three year lookback period prior to the Compact Pledge Date would be included when countable assets are computed to determine whether a Maximum Pledge Amount or Dollar Pledge Amount is applicable.

Pre-Plan Funerals: A Pre-Plan funeral purchased by an Eligible Individual for him or herself, a spouse, or children with disabilities, would not be included in the computation of countable assets if purchased before the Compact Pledge is fulfilled. If Pre-Plan funeral arrangements are made after the Compact Pledge Date but before the Compact Pledge has been fulfilled, the Compact Pledge Amount would be adjusted downward to account for the expense.

Debts: All debts, including but not limited to outstanding amounts on credit cards, auto payments, mortgages, home equity loans, reverse mortgages, and the like, would be deducted from the countable assets for purposes of determining the applicable Pledge Amount.

Long Term Care Savings Account (LTCSA): Individuals who applied for Long Term Care Insurance but were denied due to the underwriting process would have the option, under the Compact program, to place a defined amount of money in a Long Term Care Savings Account (LTCSA) each year. This amount would be defined as a sum not to exceed twice the current annual IRA contribution limit (which is presently $4,000) allowed under the Internal Revenue Code and applicable U.S. Treasury Regulations. Amounts placed in the LTCSA annually would be eligible for the same tax deductions available to those who contribute to an IRA account. Also, the amount in the LTCSA would not count when computing an individual=s countable assets. There would be no federal or state income tax consequences when funds from the LTCSA are used to fulfill the Pledge Amount.

When the need for care arises and an Eligible Individual makes a Compact Pledge, LTCSA funds would be used first to meet the Pledge Amount. If funds placed into the LTCSA are insufficient to fulfill the Pledge, the Eligible Individual would be required to use a portion of his/her unprotected countable assets. If any funds remain within the unprotected countable assets upon completion of the Compact Pledge, such funds would be added to the Protected Amount as the Eligible Individual entered Phase Two of the Compact Program (becoming a Compact Participant, eligible for Compact Subsidy payments). If a LTCSA holder should die without using some or even all of the funds placed into the account, the remaining balance would be payable to the state without any federal or state income or estate tax consequences.

Asset Management While Pledge Amount Is Being Paid: Individuals who have made pledges will have the option of placing funds sufficient to fulfill their Compact Pledge into segregated set-aside accounts comparable to those established to assure Medicare=s reimbursement in workers= compensation cases. This is the same principle established in Partnership Policies. Compact participants may make uncompensated transfers from the Protected Amount (the amount remaining after the Pledge Amount is satisfied), although they will be responsible for assuring that their total assets do not fall below the amount needed to fulfill a Compact Pledge.

Inheritance Received After Pledge Amount Is Determined: If a Compact Participant receives an inheritance after the Pledge Amount has been determined and the Compact Pledge Date has passed, the calculation of countable assets and the Compact Pledge Amount is not adjusted to reflect the acquisition of new assets. This is the same principle that applies in New York State Partnership for Long Term Care Policies. If the Compact Participant is unmarried, the additional funds acquired via inheritance after the Compact Pledge Date would be added to his or her Protected Amount. For a married couple, one-half of the additional funds would be added to the Compact participant's Protected Amount and the other half would be considered part of the Compact spouse's countable assets should he/she later apply to participate in the Compact Program. If both spouses have already pledged, then the inheritance would be added to the Protected Amount of each spouse in equal amounts.

Disqualification: Under the proposed New York legislation, Senate Bill S. 3530, grounds for disqualification from the Compact Program are clearly articulated in a manner that seeks to penalize with fairness. Eligible Individuals who fail to fulfill their Compact Pledge would be disqualified from the Compact Program, for failure to comply with a lawful contract. However, such individuals would still retain the right to apply for Medicaid provided that eligibility for that program could be established. Eligible Individuals who are found to have engaged in deceptive or fraudulent practices with respect to fulfilling a Compact Pledge would be disqualified from the Compact Program. In such a case, a fulfilled Compact Pledge would not be recognized, as the individual would no longer be considered eligible to be a participant in the Compact Program. Senate Bill 3530 states that any individual who knowingly makes a false statement or representation, or who by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain or aids or abets any person to obtain coverage under the Compact Program to which such individual is not entitled shall be guilty of a class A misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law.[4]

Phase II: The Compact Subsidy

Compact Subsidy: Once an Eligible Individual has fulfilled his or her Pledge obligations, the government commences its coverage of qualified Long Term Care services. The amount of money the government=s administering agency would pay toward covered services provided to the Compact Participant is known as the ACompact Subsidy Amount.@ This amount is equal to the Medicaid Rate applicable to

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[4] Senate Bill S. 3530, introduced on March 21, 2005.

individuals receiving standard Medicaid coverage. However, providers would be permitted to charge Compact Participants a ACompact Rate@ up to 110% of the Compact Subsidy Amount. Thus, the government's liability for qualified Long Term Care expenses is limited to the Medicaid rate, yet providers may charge Participants at the Compact Rate, a figure that is higher than the Compact Subsidy Amount, but lower than private-pay rates. The Compact Participant is responsible for making whole the ACo-Pay Amount@, which is the difference between the Compact Rate charged by the provider and the Compact Subsidy Amount paid by the government.

Treatment of Income: Once an Eligible Individual has fulfilled his or her Pledge obligation, the second phase of the Compact Program, known as the Compact Subsidy period, commences. The Compact Participant, as the individual is now called, would be required to pay 25% of his/her AMonthly Countable Income@ to the government=s administering agency for the Compact Program. The remaining 75% of the Compact Participant=s Monthly Countable Income would constitute his/her AMonthly Income Allowance@, an amount representing the minimum monthly income that the Compact Participant could retain. A portion of this Monthly Income Allowance would be used to meet the Participant's Co-Pay obligations (discussed above in "Compact Subsidy"), subject to a floor defined as the AMinimum Monthly Income Allowance.@ Co-Pay obligations would cease at the point where the balance remaining from the Participant=s Countable Income fell below this figure.

Countable Income: Monthly Countable Income would include those sources of income identified in ' 366 of New York State Social Services Law, the current Medicaid law, excluding AExempt Income@ and AIncome Deductions@ allowed under the Social Services Law. For example, AExempt Income@ would include Agent Orange payments or Reparation payments while AIncome Deductions@ would include payments for health insurance premiums for Medicare Supplemental health insurance policies. With respect to annuities, payments received from a level payment annuity purchased within three years before the Compact Pledge Date would be treated as an asset rather than as Countable Income. In this case, the value of the annuity would have been treated as a Countable Asset when computing the Pledge Amount.

The Role of Long Term Care Insurance: The initial Compact Pledge can be met in whole or in part through the use of Long Term Care insurance. While certain individuals cannot afford or obtain (for medical reasons) Long Term Care insurance, Long Term Care insurance can still play a vital role in the Compact program. If a Participant remains eligible for further Long Term Care insurance payments once a Compact Pledge has been fulfilled, the policy would serve as a "secondary coverage" to be used for services not paid for by the Compact Subsidy.

Conclusion

The efforts of the Compact Working Group in developing the New York State Long Term Care Compact are by no means complete or etched in stone. However, we hope that the summary of the program as contained in this article will foster a better understanding of the Compact Program and that this article will serve as a model for other states trying to deal with the burgeoning costs of their Medicaid programs. The authors are committed to continuing their exploration of the Compact proposal and will produce a future article with common examples of how the Compact proposal would work in real situations. The bottom line is that the time has come to take a bold step toward reform; the cost of doing nothing to help our seniors is simply too high. Long Term Care is vital and our most vulnerable citizens should not have to impoverish themselves to afford needed services. We are a nation of Acan-do@ people who see a problem and devise a solution that seeks to address the concerns of many. The New York State Long Term Care Compact is the result of that culture. We feel that the New York State Long Term Care Compact, if properly implemented, would solve our Long Term Care problems and, most importantly, help our seniors live in peace and with dignity. We owe this solution not so much to politicians and legislators, but to our own parents, friends and all those who need Long Term Care. The Compact program is an idea whose time has come. It can work. It is time we put our energy together to change the system for the better before we become the very same seniors who find ourselves in need Long Term Care services with no way to pay. This is indeed one issue that is not going away.

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