10-3741-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN F. LOPES, ATTORNEY-IN-FACT, AMELIA P. LOPES,

Plaintiff-Appellee,

v.

DEPARTMENT OF SOCIAL SERVICES, MICHAEL P. STARKOWSI COMMISSIONER OF CONNECTICUT DEPARTMENT OF SOCIAL SERVICES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE AMICUS CURIAE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

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Introduction

On October 17, 2011, the Court invited the views of the Department of Health and Human Services ("Department" or "HHS") on the following two questions:

1. "[W]hether the applicable statutes and regulations, including POMS § SI 01110.115 (which provides that assets are not resources if the individual does not have the 'legal right, authority, or power to liquidate them'), require an income stream from an irrevocable annuity to be considered as 'income' or as a 'resource[.]'" Court Letter dated Oct. 17, 2011, at 2.

2. "[T]he policy implications of resolving this case in favor of the plaintiff or the State." *Ibid.*

Statement of Facts

The following facts are relevant to the government's discussion.

1. Plaintiff has resided at Riverside Health Care Center, a skilled nursing facility in East Hartford, Connecticut, since November 1, 2008. JA 232-234. At the time the complaint was filed, plaintiff was 85 years old. Mrs. Lopes (the community spouse) resides in the home owned jointly with the plaintiff. JA 9. At the time the complaint was filed, Mrs. Lopes was 82 years old. *Ibid.* According to the complaint, Mr. Lopes' care at Riverside was paid for by a long term care policy that paid $67,707 in benefits with the last payment made in February 2010,

ibid., which is when Mr. Lopes' Medicaid application was filed, *id.* at 46. In addition, the Lopes paid $100,000 over and above the long term care insurance benefits for his cost of care. JA 10. As of February 2010, Mrs. Lopes' monthly income was $917 per month from Social Security, plus income from an immediate annuity purchased in February 2010, of $2,340.83 per month (described in the next paragraph), and investment income of approximately $ 250 per month. *Ibid.* Also, prior to the purchase of the annuity, plaintiff and Mrs. Lopes had approximately $166,000 of resources in excess of the adjusted resource amount ($180,735.00) that Mrs. Lopes would be allowed to retain under state and federal Medicaid rules.[1] These excess resources would have rendered the plaintiff ineligible for Medicaid. JA 129.

In early February 2010, two weeks before filing the Medicaid application with the Connecticut Department of Social Services ("DSS"), Mrs. Lopes purchased an immediate single premium annuity ("The Hartford Annuity") for approximately $166,878.99 (which is roughly the amount by which the plaintiff's assets would have exceeded the maximum level allowed to qualify for Medicaid).

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[1] Plaintiff and his wife participated in Connecticut's long term care benefits matching program, which resulted in an increase from the standard cap for the two from $109,560.00 to approximately $180,735.00. See JA 220; Conn. Gen. Stat. § 17b-253.

JA 10, 130. The Hartford Annuity contract provided for six years of fixed monthly payments of $2,340.83 to Mrs. Lopes, commencing on March 1, 2010. JA 10, 60, 84. Over the six year term, Mrs. Lopes will receive approximately $1600 more than the purchase price. See Brief of the Appellee at 2.[2]

The annuity contract provides that Mrs. Lopes can "name, revoke or change the [p]ayee at any time by notifying [u]s in [w]riting." JA 25. It also provides that "[y]ou may assign this contract," but Mrs. Lopes elected to execute an assignment limitation, stating in pertinent part that

> This contract is not transferable. The rights, title and interest in the contract may not be transferred; nor may such rights, title and interest be assigned, sold, anticipated, commuted, surrendered, cashed in or pledged as security for a loan. Any attempt to transfer, assign, sell, anticipate, alienate, commute, surrender, cash in or pledge this contract shall be void of any legal effect and shall be unenforceable against Us.

JA 30.

In early March 2010, plaintiff and Mrs. Lopes requested a letter from The Hartford "confirming" that she may not "cash in, sell or assign the annuity." JA

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[2] It is this income that the plaintiff maintains is income to his spouse and cannot be considered in determining plaintiff's eligibility for Medicaid. There seems to be no question that, had this amount *not* been put in an annuity, it would have been a resource and would have been counted against the plaintiff's Medicaid eligibility — *i.e.*, plaintiff would have had to spend ("spend down") this amount on his care before eligibility would have been established.

130-131, 136-138. The Hartford issued the requested letter a few days later on March 9, 2010. JA 47, 106. The letter did not appear to have been executed as an amendment or rider to the contract.

In reviewing plaintiff's Medicaid application, including plaintiff's resources and income, the DSS sought, in accordance with Connecticut's Uniform Policy Manual ("UPM") § 4030.47, to determine whether the fixed monthly payments from The Hartford Annuity could be sold by Mrs. Lopes for a lump sum cash payment and learned that at least one entity, Peachtree Settlement Funding ("Peachtree"), was willing to buy those fixed monthly payments for a lump sum of $98,880.93. JA 140, 145. DSS notified Mrs. Lopes by way of letter dated April 16, 2010, that Peachtree might be willing to purchase the payments from The Hartford Annuity, and included with the letter the documents provided by Peachtree that would be necessary to complete a payee designation change. JA 140-141, 160. Mrs. Lopes did not respond to the letter. JA 141.

By letter dated May 4, 2010, DSS advised Mrs. Lopes that the single remaining item necessary for determining plaintiff's Medicaid eligibility was proof that she had attempted to sell the fixed monthly payments from The Hartford Annuity. JA 141, 177, 179. The next day, counsel for Mrs. Lopes advised the DSS that Mrs. Lopes would not attempt to sell The Hartford Annuity payment

stream. JA 141, 180. The DSS then requested Mrs. Lopes to confirm directly to the DSS that she was not going to make any attempt to sell the annuity payment stream, and counsel then confirmed that she would not. JA 141, 181, 182. Mrs. Lopes argued that the DSS's request that she pursue sale of the fixed monthly payments was a "legal impossibility," relying on the March 2010 letter from The Hartford. JA 47-48, 50, 72, 81, 102, 105-106, 122, 124 130, 213-214. On May 18, 2010, the DSS denied plaintiff's application on the basis of his "fail[ure] to apply for or try to get assets which may be available to your family." JA 142.

2. Plaintiff challenged the denial of his application. On summary judgment, the district court found in plaintiff's favor, holding that the fixed monthly payments from The Hartford Annuity should be considered income to the community spouse only, not a resource to be counted in determining plaintiff's Medicaid eligibility, regardless of which spouse holds title. JA 216-230. The court held that UPM § 4030.47 is more restrictive than would be allowed under the Supplemental Security Income ("SSI") program in the Social Security Act. JA 222-224. Specifically, the court ruled that the application of UPM § 4030.47 to The Hartford Annuity violates 42 U.S.C. 1396r-5(b)(1) (providing that the income of a community spouse is not counted in determining the eligibility of an institutionalized spouse), and that UPM § 4030.47 further violates 42 U.S.C.

1396a(a)(10)(C)(i)(III) and 1396a(r)(2) because it is allegedly more restrictive than the methodology that would have been utilized by the SSI program by considering this annuity payment stream as a "resource." JA 222-225. The district court thus held that the DSS improperly denied plaintiff's application for assistance.

Discussion

A. Medicaid Income and Resources.

1. Medicaid Income and Resource Limits for Community Spouses.

42 U.S.C. 1396r-5 (enacted in 1988) addresses the allocation of income and resources between spouses when one spouse applies for Medicaid because he requires long term institutional care while the other spouse continues to reside in the community. As described below, the assets of both spouses are considered in determining eligibility, regardless of who holds title; only the institutionalized spouse's income is considered; the income of the "community spouse" is not considered; and the community spouse is allowed to keep the couple's home, one automobile, personal items, and certain other forms of property. 42 U.S.C. 1382b(a) and 1396r-5(c)(5).

The institutionalized spouse is expected to spend down his or her assets and income to defray the costs of his care. To prevent impoverishment of the

community spouse, the Medicaid statute allows the community spouse to retain liquid assets or "resources," up to a certain threshold, also known as the "Community Spouse Resource Allowance" (CSRA). 42 U.S.C. 1396r-5(f)(2)(A). The law also allows the community spouse to receive an allowance from the income of the institutionalized spouse, known as the "minimum monthly maintenance needs allowance," if the community spouse's own income is below a certain threshold. *Id.* § 1396r-5(d)(1), (2).

Liquid assets and other countable "resources" of the two spouses, measured at the time the institutionalized spouse is institutionalized, are divided equally between the spouses. 42 U.S.C. 1396r-5(c)(1)(A)(ii). This division is used to calculate the CSRA. *Id.* § 1396r-5(f)(2). At the time of application for Medicaid, all of the couple's resources are considered available to the institutionalized spouse, minus $1600 for the institutionalized spouse and minus the CSRA for the community spouse as established by each State. *Id.* § 1396r-5(c)(2)(B). Once the institutionalized spouse's eligibility has been established, the resources of the community spouse are no longer considered available to the institutionalized spouse. *Id.* § 1396r-5(c)(4).

The Medicaid statute treats the community spouse's income differently from resources, however. If a community spouse receives income in her own name, it is

not considered to be available to the institutionalized spouse, and therefore, is not considered for purposes of determining his eligibility. 42 U.S.C. 1396r-5(b)(1), (2)(A)(I).

2. Annuities Can Be Income or Resources.

An annuity is a contract by which the annuitant purchases the right to receive monthly payments for a specified period of time in exchange for the payment of an amount of principal. The Medicaid program does not specifically address whether an annuity is income or a resource. In 2005, Congress enacted restrictions on the use of annuities purchased by Medicaid recipients and their spouses to limit improper transfers of assets in anticipation of Medicaid eligibility. Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, § 6012 (2005), codified as amendments to 42 U.S.C. 1396p. To avoid being considered a transfer of assets, an annuity purchased by a Medicaid applicant must be actuarially sound, irrevocable, and non-assignable, and must provide for payments in equal amounts during its term with no deferred or balloon payments. *Id.* § 1396p(c)(1)(G). The annuity contract must name the State Medicaid agency as the remainder beneficiary for at least the total amount of medical assistance paid on behalf of the institutionalized individual under the Medicaid program. *Id.* § 1396p(c)(1)(F)(i). The DRA amendments also require the disclosure of any interest an individual or

community spouse has in an annuity, *id.* § 1396p(e)(1), and provide for notice to the State by the annuity issuer of any changes in the interest or principal withdrawn, *id.* § 1396p(e)(2)(B). The DRA amendments do not specifically address whether payments from an irrevocable and non-assignable annuity are to be treated as income or as a resource.

Social Security Administration (SSA) regulations and policy guidance, however, do address the issue, and that guidance is relevant because a State may consider an individual eligible for Medicaid if he is eligible for certain cash assistance programs under the Social Security Act, including the SSI program established by Title XVI of the Social Security Act. 42 U.S.C. 1396a(a)(10)(C)(i). And, in determining financial eligibility for persons aged 65 or older, a State — with a few exceptions not relevant here[3] — may not use a more restrictive methodology for determining Medicaid eligibility than is used for SSI eligibility, though it is free to use a less restrictive methodology. *Ibid.*; 42 U.S.C. 1396a(r)(2)(A)(i). See also *James v. Richman*, 547 F.3d 214, 218 (3d Cir. 2008)

[3] States are authorized under 42 U.S.C. 1396a(f) to use more restrictive eligibility criteria for the aged, blind, and disabled than are used by SSI, provided that the more restrictive criteria are no more restrictive than those used in the States' Medicaid State plan as of January 1, 1972. Connecticut has not elected to use a more restrictive resource methodology for determining whether an asset is a resource or income.

("the Department [of Public Welfare] can not treat as available resources any assets that the SSI regulations would not treat as available resources"). Therefore, because no Medicaid provision specifically addresses the issue, SSI provisions govern.

While nothing in Title XVI is absolutely on point, SSA regulations for SSI *generally* treat annuities as income. See 20 C.F.R. 416.1121(a) (describing annuities as "unearned income * * * usually related to prior work or service"). SSA's program guidance, Program Operations Manual System (POMS), also states as a "general rule" that annuities are income — albeit "unearned income." POMS § SI 00830.160.B.1.[4]

In addition, the SSA defines a resource as "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. 416.1201(a). The regulation further provides that "[i]f the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource." *Id.* § 416.1201(a)(1). On the other hand, "[i]f a property

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[4] The SSI Programs Operations Manual System is "the publicly available operating instructions for processing Social Security claims," and though "these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect." *Wash. Dept. of Social Servs. v. Keffeler*, 537 U.S. 371, 385 (2003).

right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)." *Ibid.* Thus, generally, assets of any kind are not resources if an individual does not have "the legal right, authority, or power to liquidate them." POMS § SI 01110.115 (attached to Brief of the Appellant at Add. 131).[5]

B. The Court's Questions.

1. Do the applicable statutes and regulations, including POMS § SI 01110.115, require an income stream from an irrevocable annuity be considered as "income" or as a "resource"?

As set out above, under the Medicaid and SSI provisions of the Social Security Act, an irrevocable annuity can be considered either income or a resource depending on its terms. See 42 U.S.C. 1396p(e)(4) (discussing "income or resources" derived from an annuity). SSA regulations do not address whether the income for an irrevocable and non-assignable annuity can be treated as a resource just because it has a market value — *i.e.*, because there is a willing buyer of the annuity's income stream even though the annuity (or a rider) prohibits assignment of that stream. But SSA policy is to look at the specific terms of the annuity to determine whether the annuity is income or a resource. Under 20 C.F.R. 416.1201(a)(1), an asset is a resource only if "the individual has the right,

[5] We also note that 42 U.S.C. 1396p(d)(6) provides that annuities are not to be considered trusts except to the extent the Secretary has specified. To date, the Secretary has not so specified.

authority or power to liquidate the property or his or her share of the property." POMS § SI 01110.115 clarifies that the individual's right must be a legal right, authority, or power. Thus, a right or power to renegotiate the annuity contract would not suffice to make it a resource. In this regard, the POMS provision uses an illustration to make this point: where joint owners of property have entered into a legally binding contract not to sell the property without the other's consent, the property is not a resource if consent to a sale is withheld. At such time as consent is given, the property becomes a resource. Therefore, the natural reading of 20 C.F.R. 416.1201, as clarified in POMS § SI 01110.115, is that SSA will not require an applicant to renegotiate or, possibly, breach a contract in order to recover the value of a resource, such as a non-assignable annuity, in order to qualify for Medicaid.

The foregoing position, moreover, is consistent with the only other court of appeals to address the income/resource question vis-a-vis an irrevocable annuity. See *James v. Richman*, 547 F.3d 214 (3d Cir. 2008). The facts in *James* are nearly identical to those at issue here. James had excess resources of $278,343, and Mrs. James purchased a $250,000 single premium irrevocable annuity with an immediate income stream that could not be transferred, amended, or assigned. The annuity term was eight years, and Mrs. James immediately began receiving

monthly annuity payments of $2,937.71 for that period. The Pennsylvania Department of Public Welfare, as the DSS here, claimed that the James' annuity had a resource value because a finance company in the secondary market for purchasing annuities (J.G. Wentworth) advised that it would purchase her stream of monthly annuity payments for $185,000. *Id.* at 216. That resource, the Department said, disqualified James from Medicaid eligibility, but the Third Circuit held otherwise. It determined that "the Department can not treat as available resources any assets that the SSI regulations would not treat as available resources," *id.* at 218 (citing 42 U.S.C. 1396a(a)(10)(C)(i)(III) and 1396a(r)(2)(B)), and determined that SSI regulations would treat Mrs. James' annuity as income, not a resource, *ibid.* (citing 20 C.F.R. 416.1201(a)(1) and POMS SI § 01110.115)). The "power to liquidate" referred to in the regulation, the court said, "is not simply the *de facto* ability to accomplish a change in ownership of an asset, but must also include the power to do so without incurring legal liability," and Mrs. James "lacks such power * * *." 547 F.3d at 218. To hold otherwise "would tend to undermine the rule that 'no income of the community spouse shall be deemed available to the institutionalized spouse.' 42 U.S.C. § 1396r–5(b)(1)." 547 F.3d at 219. We agree.

That the underlying events in *James* predated the passage of the DRA of 2005 does not make *James* distinguishable from this case. As previously noted, the DRA amendments did not affect the analysis of whether the payment stream from an annuity is income or a resource. See 42 U.S.C. 1396p(e)(4). See also *Weatherbee ex rel. Vecchio v. Richman*, 595 F. Supp.2d 607, 617 (W.D. Pa. 2009) (Congress did not "'ring the death knell' for otherwise compliant annuities" when it enacted the DRA), *aff'd*, 351 F. App'x 786 (3d Cir. 2009). Instead, it addressed a specific set of potential abuses. See pp. 8-9, *supra*.

Morris v. Oklahoma Department of Social Services, 758 F. Supp.2d 1212 (W.D. Okla. 2010), which appears to reach the opposite result, is distinguishable. There, after the two spouses' shares had been determined, the institutionalized spouse attempted to transfer her remaining assets to her husband (the community spouse) to avoid spending down her share of assets. *Morris* distinguished *James* as applying only to asset transfers between spouses *prior* to a determination of eligibility, 758 F. Supp.2d at 1216, and held that allowing a transfer to purchase an annuity for the community spouse *after* an initial determination of eligibility would render the statutory restrictions on spousal assets "toothless," *id.* at 1217. In any event, *Morris* did not squarely consider whether an irrevocable annuity qualifies as a resource or income. Instead, *Morris* appears to stand for the

proposition that the DRA did not affect the provisions of 42 U.S.C. 1396r-5 that require that any resources of the couple in excess of the CSRA be considered as available to the institutionalized spouse, see 42 U.S.C. 1396r-5(c)(2)(B). See *Jackson v. Selig*, 2010 WL 5346198 (E.D. Ark. Dec. 22, 2010) (holding annuity purchase was not an improper transfer of assets; declining to follow *Morris* because the Medicaid statute prohibits attributing income of the community spouse to the institutionalized spouse).

2. What are the policy implications of resolving this case in favor of the plaintiff or the State?

This case implicates two broad policies effectuated by the Medicaid statute: (1) to provide health care for the indigent; and (2) "to protect community spouses from pauperization while preventing financially, secure couples from obtaining Medicaid assistance." *Wisconsin Dep't of Health and Family Services v. Blumer*, 534 U.S. 472, 480 (2002) (internal quotation marks and citation omitted). To the extent that the Medicaid provisions are read to treat an irrevocable and non-assignable annuity as the community spouse's income rather than the couples' joint resource, that is the balance struck by Congress. See 42 U.S.C. 1396r-5. As the Third Circuit correctly noted in *James v. Richman*, "Congress provided a detailed set of rules governing transactions that it considered suspicious, and the

purchase of an annuity is not among them. 42 U.S.C. § 1396p(c)." 547 F.3d at 219. In addition, as long as the other program requirements are met (such as naming the State DSS as a remainder beneficiary), there is nothing on its face suspicious, illegal, or otherwise contrary to the policy expressed in the Medicaid provisions of the Social Security Act in treating an irrevocable and non-assignable annuity as the community spouse's income rather than a resource attributable to the couple. As the Third Circuit correctly emphasized, the court "cannot allow a denial of eligibility if there is no statutory justification for that denial." *Ibid.*

It is true that pursuant to the government's views, Medicaid would pay more than under the contrary determination. But this result is not inconsistent with the purposes of the Medicaid statute, in particular those provisions of the statute designed to protect community spouses from impoverishment. The Medicaid statute clearly permits spouses who still reside in the community to retain some resources and income of their own in order to avoid impoverishment once their spouses are institutionalized.

The facts of this case also suggest that this outcome would not be contrary to the Medicaid statute's objective of providing health care for the indigent. At the time of Mr. Lopes' Medicaid application, Mrs. Lopes' monthly income, aside from The Hartford Annuity, was $1167 per month ($917 from Social Security and

$250 from an investment). JA 10. By purchasing The Hartford Annuity, she increased her monthly income to a modest $3500.[6] (Mr. Lopes' monthly income at the time of the application was $1983, $1396 from Social Security and $587 from a pension at his job at Pratt & Whitney. JA 10.). Moreover, by purchasing The Hartford Annuity, she lost all control over the $166,000 of her assets used to purchase that annuity. In a sense, she took the risk that she would live long enough to receive all of the proceeds of the annuity (as opposed to the State). And, if she requires institutionalization during the period of the annuity, the income of that annuity will be used to calculate *her* eligibility for Medicaid benefits.

Furthermore, a contrary conclusion would likely result in uncertainty for future Medicaid recipients because any annuity that a potential recipient or the community spouse would purchase could theoretically be liquidated at a future date if the State were to locate a possible secondary purchaser. Moreover, under a contrary ruling, "there is no clear limit on the hypothetical transaction proceeds that could be treated as assets, whether based on the sale of a future stream of payments tied to a fixed income retirement account, social security, or even a

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[6] For purposes of this discussion, the government assumes that Mrs. Lopes does not have the legal right to assign the right to receive payments under The Hartford Annuity.

regular paycheck." *James v. Richman*, 547 F.3d at 219.[7] Thus, policy considerations weigh in favor treating Mrs. Lopes' annuity as *her income*, and no such considerations outweigh that conclusion or warrant treating Mrs. Lopes' annuity as a resource.

In addition, the DRA amendments require that annuity issuers disclose changes in annuity arrangements to States listed as remainder beneficiaries. 42 U.S.C. 1396p(e)(2)(B). If, after Mr. Lopes was determined eligible for Medicaid, Mrs. Lopes were to sell her payment stream to a purchaser, such as Peachtree, the annuity issuer would be required to disclose this transaction to the State Medicaid agency. While this resource would not be considered available to Mr. Lopes if he remained institutionalized continuously, it could affect any future eligibility determinations. In short, following the DRA of 2005, the government does not believe there is a necessity for States to look to the market value of irrevocable and non-assignable annuities to uncover practices that, in the past, were suspected to have been designed to circumvent Medicaid eligibility standards.

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[7] For example, a person with a "401(k)"-type account who used those funds to purchase an annuity might have to sell the income stream in order to qualify his or her spouse for Medicaid.

Conclusion

For the foregoing reasons, if the Court determines that Mrs. Lopes' annuity is non-assignable, the district court's decision should be affirmed.

Respectfully submitted,

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DECEMBER 2011

Certificate of Compliance With Rule 32(a)(7)(C)
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I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief satisfies the Court's order of October 17, 2011: the type face is Times New Roman, proportionally spaced, fourteen-point font, and does not exceed 20 (twenty) pages.

s/ *Howard S. Scher*
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Certificate of Service

I certify that on this **19th day of December, 2011**, I caused the foregoing Brief For The Amicus Curiae to be filed with the Court in hard copy via Overnight Delivery and through the Court's CM/ECF system. Counsel of record are registered ECF users and were also served via **Overnight Delivery** with the appropriate number of hard copies as follows:

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