

## ELDER LAW

BY DANIEL G. FISH

### *Legislative Discrepancy Brings Challenge to Deficit Reduction Act*

**T**he legislative history of the Deficit Reduction Act (DRA) has been filled with high drama: a razor-thin vote in the House, a tie vote in the Senate broken by the vice president of the United States, and a parliamentary maneuver causing a second vote in the House that was even closer than the original vote.

When President George W. Bush signed the bill,<sup>1</sup> it appeared that the fundamental rules of elder law had changed, until it was disclosed that the House and the Senate had not passed identical bills. The House version and the Senate version of the DRA have different provisions regarding the number of months that Medicare will pay for the rental of durable medical equipment.<sup>2</sup>

As a result, a lawsuit has been filed challenging the constitutionality of the act. The suit raises what may be considered a high school civics question: Does the bicameral provision of the U.S. Constitution require the passage of identical bills?

#### **Background**

In the past, Medicare had paid the rental cost of medical equipment for as long as the patient needed it. In a cost savings measure under the DRA, it was suggested that there should be a cap on the



length of time that Medicare would make rental payments for medical equipment.

The bill that the senate passed on Dec. 21, 2005 capped the rental period for oxygen equipment at 36 months and capped the rental period for other durable medical equipment, such as wheelchairs, at 13 months. After the vote it is reported that a Senate clerk changed the number of months for other durable medical equipment from 13 months to 36 months and sent that version to the House.<sup>3</sup>

The bill that the House passed on Feb. 1, 2006 capped the rental period at 36 months for other durable medical equipment. After the House vote, a clerk changed the number of months for other durable medical equipment from 36 months back to 13 months, and that bill was sent to the president. The bill that the president signed capped oxygen rentals at 36 months and other durable medical equipment at 13 months. The bill that the president signed is not the bill that the House passed.

Recognizing the gravity of the discrepancy, the Senate passed a nunc pro tunc resolution that the bill signed by the president reflected the intent of Congress.<sup>4</sup> But such a resolution has not passed the House. The obvious remedy, to have the House vote again on a bill that conforms to the Senate version, has been rejected.

#### **Lawsuit**

As a result of the discrepancy between the two legislative bills, a lawsuit has been filed in the U.S. District Court for the Southern District of Alabama, challenging the constitutionality of the DRA.<sup>5</sup>

The suit was initiated by elder law attorney Jim Zeigler, in his individual capacity. The suit is brought in the attorney's name alone. There are no seniors as co-plaintiffs arguing that they are harmed by their inability to plan. It was filed only five days after the president signed the bill and is the very model of brevity. The complaint is four pages long. The suit is based upon Article One of the U.S. Constitution that establishes the procedure by which a bill becomes a law. "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States..."

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The complaint avers that the version of the DRA that was signed by the president never passed the House of Representatives and therefore the act was never constitutionally enacted. It seeks a declaratory judgment that the DRA is unconstitutional, unenforceable and null.

The standing issue is addressed in the following paragraphs of the complaint:

15. Zeigler is personally and substantially hindered in his legal practice because he is uncertain as to whether to proceed under the previous law, which is constitutional, or the Deficit Reduction Act of 2005, which he alleges is unconstitutional, unenforceable and null.

16. Zeigler is unable to counsel his clients as to whether they should comply with the law prior to Feb. 8, 2006 or the law after Feb. 8, 2006.

17. Zeigler actively opposed S. 1932 because it penalizes senior citizens who are faithful givers to their churches. It makes them ineligible for Medicaid nursing home coverage until a 'penalty' is paid for every dollar gifted during the five years prior to nursing home admission.

## 1892 Supreme Court Decision

The 1892 Supreme Court case of *Field v. Clark*<sup>6</sup> has been cited in opposition to the claim that the discrepancy renders the DRA null and void. Marshall Field & Co. initiated suit against a tax collector for duties paid upon imported silk and cotton laces, alleging that the bill that authorized the tax was defective since it omitted a section that the records show was included in the House and Senate versions.

The Supreme Court ruled that the law was valid: The signing by the Speaker of the House of Representatives, and by the President of the Senate, in

open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.

However the same opinion holds that "There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress."

## Typo or Deliberate Act?

The resolution of the lawsuit may be determined by the exact sequence of events resulting in the changes in the number of months of rental payment. The facts are not clear or precise. The events surrounding the disparity in language have been described as "clerical errors"<sup>7</sup> and "Congress's \$2 Billion Typo,"<sup>8</sup> explaining the change as a mere slip of a pen. But, there are also charges that the change was intentionally misleading and that the discrepancy was known by congressional leaders but not acted upon. House Democratic leader Nancy Pelosi [D-Calif.] is quoted as claiming Speaker Dennis Hastert, R-Ill., "knew full well that this was an invalid bill."<sup>9</sup>

The issue of capping payment for rental of medical equipment was certainly a highly visible one and a highly valuable one. The

Associated Press reported that a major provider of oxygen notified its senator of the impending restriction: "Senator George Voinovich, R-Ohio, normally an immovable budget hawk, threatened to derail a \$40 billion deficit-cutting budget bill in the Senate if the House slashed federal payments to oxygen and oxygen-tank suppliers."<sup>10</sup> The financial stakes in this controversy are high. They have been estimated at \$2 billion dollars.

## Conclusion

Given the lack of clarity about the exact manner in which the error occurred, the case of *Zeigler v. Gonzalez* may, through discovery, establish whether this was a scrivener's error or a purposeful deception. Much like a silent-movie plot, the latest twist in the DRA story requires the continued attention of the elder law bar to find out its ultimate fate. For elder law attorneys the consequence of these events results in great uncertainty and requires caution when advising clients.

1. Public Law 109-171.
2. The text of the bills can be seen at [www.thomas.loc.gov](http://www.thomas.loc.gov), an official source of United States federal legislative information. The discrepancy can be found in S5101 (a)(1) is the section that is not identical.
3. New York Times Feb. 17, 2006 p. A19 "House Republicans Reject Call to Study Budget Bill Disparities."
4. S. Con. Res. 80
5. *Zeigler v. Gonzales*, Civil Action No. 06-80-CG-M. The text of the complaint can be seen at [www.jimzeigler.com](http://www.jimzeigler.com).
6. *Field v. Clark*, 143 US 649 (1892)
7. The Hill, Feb. 9, 2006, "House Democrats favor new budget vote".
8. New York Times Editorial "Congress's \$2 Billion Typo" Feb 23, 2006, page A26
9. Las Vegas Sun, Feb. 17, 2006, "Pelosi Wants Ethics Probe of Deficit Bill."
10. FoxNews.com, Dec. 20, 2005, "Congress Tries to Keep Medicare Coverage for Oxygen Tank Users."