

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 235—NO. 8

THURSDAY, JANUARY 12, 2006

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ELDER LAW

BY DANIEL G. FISH

Deficit Reduction Act: Pending Laws Could Have Dramatic Effect

Congress is considering, but has not enacted, the Deficit Reduction Act of 2005.¹ It would be the most dramatic overhaul of Medicaid eligibility rules in 12 years. The three most restrictive provisions would extend the look-back period to 60 months, change the start date of the penalty period and deny benefits if the home equity is \$500,000.



Status of Legislation

The proposed restrictions on Medicaid eligibility originated in the budget bill of the United States House of Representatives.² The Senate version contained none of the provisions.³ The conference committee to reconcile the conflicting versions adopted all of the restrictive House provisions. This bill passed the House 212-206 in an unusual Sunday night session.

More unusual was the Senate vote on the conference committee bill, 51-50, with the vice president flying in from the Middle East to cast the deciding vote. However, the Senate struck three provisions from the bill.⁴ Since the bills passed by the House and Senate are not identical, the budget bill may not be presented to the president for signature. The budget bill must now be voted on

again by the House. The House of Representatives is currently in recess and not expected to reconvene until Jan. 31, 2006. There is an effort under way to persuade Congress to reject the Medicaid proposals.

The effective date of most of the proposed provisions would be the date of enactment. Since the proposed changes have not been enacted at this time, and may not be enacted, most of the current rules are still in effect and it may be appropriate for some clients to take action under the existing rules.

• **Extend the Look-Back Period From 36 Months to 60 Months.** The present look-back period is a two-tiered system. The look-back period for transfers to or from certain trusts is 60 months. The look-back period for all other transfers is 36 months. The proposal would create a unitary system of a 60-month look-back period for all transfers.

This would increase by 24 months the

period of time within which Medicaid could examine financial records. Currently, transfers (other than trust-related) made more than 36 months before the filing of the Medicaid application cannot be the basis for a denial of benefits. As a practical matter, elderly and disabled applicants would be required to produce 60 months of statements from each financial institution where they held an account. Medicaid caseworkers would have to review the additional records and this could lead to delays in processing applications.

• **Change the Beginning Date of the Penalty Period.** Under current law in New York, the penalty period starts to run the month after a transfer is made. The proposal is drafted in language that is far from clear. The penalty period would start to run on the later of the month after the transfer or "...the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty-period..."

Commentators believe that this language means that the penalty period would start to run when the individual is in a nursing home, has \$4,150 or less in savings and has filed a Medicaid application that has been rejected on the sole basis of a transfer of assets. If this interpretation is correct, the applicant will be in a nursing home and by definition

Daniel G. Fish, a member of Freedman Fish & Grimaldi, is a certified elder law attorney.

will have no funds to pay for care. The proposal contains a procedure for hardship waivers, but there is great doubt that they will be effective.

The unclear language will lead to confusion. There is no bright-line test to guide an applicant as to when the penalty period will begin to run. Consequently, the date of eligibility will be in question. Uncertainty will make it difficult for nursing homes to determine which potential residents will actually qualify for Medicaid. There is a provision to allow the nursing home to file an application on behalf of a resident for undue hardship, but observers have dubbed the legislation the "Nursing Home Bankruptcy Act."

Home Equity of \$500,000

- **Applicant With Home Equity of \$500,000 Ineligible.** Under current law, the homestead is exempt from consideration when applying for Medicaid. The proposed legislation would make homeowners with equity of \$500,000 or more, ineligible.⁵ The states would have the option to increase the equity to a maximum of \$750,000. There would be an exemption if the applicant has home equity above the proscribed level but has a spouse or a minor, blind or disabled child residing in the home. Homeowners would be forced to seek home equity loans or reverse mortgages to bring the equity down. Note that by the terms of the effective date, this provision would apply to applications filed on or after Jan. 1, 2006.

- **Annuities, Life Estates, Continuing Care Retirement Communities, Notes and Loans.** In addition to the three major proposals, there are proposals that would impact annuities, life estates, continuing care retirement communities and notes and loans.

The proposal would require the disclosure of any interest in an annuity

and the naming of the state as a remainder beneficiary for the amount of medical assistance paid. The purchase of an annuity with a balloon payment would be considered a transfer of assets.

A life estate would be a countable asset if the applicant did not live in the subject property for at least one year after the date of purchase. This would apply to the situation where an applicant purchased a life estate in another person's property. The entrance fee held by a continuing care retirement community (in New York, see Public Health Law §4601, et seq.) would be considered an available asset under certain conditions. Assets disclosed at the time of application could not be transferred. The disclosed assets would have to be spent on care before applying for Medicaid. Notes and loans would have to be actuarially sound, could not contain balloon payments and could not be forgiven on the death of the lender.

- **Provisions That Would Not Change New York State Law.** There are some proposals that would not affect planning in New York State.

- **Rounding Down of Penalty Period.** The proposal would forbid rounding down and would require the imposition of a fractional period of ineligibility. For example, if the amount transferred would result in a 2.9 month penalty period, the state may not round down and impose a two-month penalty period. Under *Brown v. Wing*,⁶ New York already requires the imposition of a partial month of ineligibility and does not permit rounding down.

'Income First' Rule

When one spouse is in the nursing home, the spouse at home is permitted to receive a minimum amount of income. If the spouse at home has less than the minimum amount of income, the shortfall must be made up first from

the income of the nursing home spouse. The *Matter of Golf*⁷ decision has already imposed the "income first" rule in New York.

- **Expansion of Long-Term Care Insurance and Medicaid "Partnership."**

New York is one of four states (along with Connecticut, Indiana and California) that have been permitted to offer an incentive for the purchase of private long-term care insurance. They have offered Medicaid benefits that disregard assets after the long-term care insurance policy provided coverage. The 46 other states would have the option to offer the "partnership" plan.

Conclusion

Despite reliable research finding that the transfer of assets has an insignificant effect upon Medicaid financing,⁸ Congress continues to focus attention on this topic. Elder law practitioners need to be aware of the changes being suggested and the progress of the legislation.

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1. To review the specific language of the bill check the following link. The Medicaid provisions begin at §6011. <http://thomas.loc.gov/cgi-bin/query/z?c109:S:1932:EAS>:

2. Hearings were held by the United States House of Representatives, The Committee on Energy and Commerce, Subcommittee on Health, entitled "Long-Term Care and Medicaid: Spiraling Cost and the Need for Reform," April 27, 2005.

3. U.S. Senate Special Committee on Aging held hearings on this issue on July 20, 2005.

4. Senator Kent Conrad, D-N.D., invoked the "Byrd Rule" that prohibits non-budgetary items in a reconciliation bill. The Senator stated "The 774-page bill was written behind closed doors, with no input from the Minority. It was filed in the dead of night and voted on in the House at the crack of dawn."

5. An Aug. 24, 2004 report from the National Association of Home Builders of those aged 55-74 found the average home value in Manhattan to be \$829,631.

6. *Brown v. Wing*, 93 NY2d 517, 693 NYS2d 475 (1999).

7. *Matter of Golf v. New York State Department of Social Services*, 91 NY2d 656, 674 NYS2d 600 (1998).

8. Kaiser Commission on Medicaid and the Uninsured "Asset Transfer and Nursing Home Use," (Nov. 11, 2005) and Georgetown University Long-Term Care Financing Project, "Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?," May 2005.