

MEDICAID LAW CHANGES

By Sanford J. Mall and Patricia E. Kefalas Dudek

The Deficit Reduction Act of 2005 (DRA), signed into law by President Bush on February 8, 2006, makes it harder for elders and persons with disabilities to qualify for Medicaid long-term care services. Although the DRA gives us guidance, Michigan has not yet enacted the new law. We nonetheless caution our clients that the State could retroactively adopt the DRA changes so any planning must now be done very carefully. Here is an outline of changes to be aware of:

1. Most significantly, the DRA changes the “transfers of assets” rules. First, the look-back period for disclosing transfers and computing penalties has been extended from 36 months (3 years) to 60 months (5 years). Second, states will no longer be able to round down the penalty period – resulting in partial month penalties in Michigan.

Effective January 1, 2006, the Department of Human Services (DHS) has set the average monthly nursing home cost at \$5,549.00 per month. This number is also used by Medicaid as the divestment penalty divisor. Prior to the DRA a Medicaid applicant was penalized for transfers of assets in a given month, greater than the “divisor.” If any such transfer occurred within the 36 months prior to the date of application for Medicaid, DHS computed the penalty period for the transfer. The penalty is expressed as a period of ineligibility (for Medicaid) for a certain number of months. The actual penalty is determined by dividing the amount transferred by the divisor.

For gifts made prior to February 8, 2006, DHS rounds down the result to the next whole number to determine the number of months of ineligibility. For gifts made on or after February 8, 2006, DHS may not round down the result, and a partial month eligibility period may result. Gifts with overlapping periods of ineligibility are aggregated (combined) for the calculation of ineligibility. Keep in mind that the penalty is imposed without regard for the reason for the gift (i.e., a gift to your church, or place of worship to an equity value of \$500,000.00).

2. The DRA changes the beginning date for penalty periods for transfers of assets. For transfers made prior to February 8, 2006, the penalty period began on the date of the transfer. Using that method, transfers of relatively small amounts often resulted in the penalty period expiring before the Medicaid applicant ever entered a nursing home. For transfers occurring on or after February 8, 2006, the penalty period begins when the applicant is “otherwise eligible for Medicaid, but for the penalty period.” This would normally occur when an applicant is in a nursing home and meets both the income and asset tests, but is ineligible for Medicaid because of the penalty period for the transfer.

For example, if an applicant gifted \$60,000 on January 1, 2006, the applicant would be eligible for Medicaid in November 1, 2006 after a 10 month penalty period ($\$60,000 \div \$5549 = 10.81$, rounded down to 10). If the gift were made on February 10, 2006, the penalty period would be 10.81 months. However, if an application was filed within 5 years of the gift, the 10.81 month penalty would begin in the month of application. If the application was filed on November 1, 2006, the 10.81 month penalty would begin on that date and the applicant would be ineligible for Medicaid until September 25, 2007. In this example, the 10.81 month period of ineligibility would not begin until the applicant is in the nursing home, with no funds remaining to pay for the applicant’s care.

3. Today a Medicaid beneficiary can exclude the entire value of their homestead (including the family farm), the DRA limits the homestead to an equity value of \$500,000.

4. The DRA now requires proof of citizenship by showing birth certificates, passports or other documents, effective July 1, 2006. However, According to the The New York Times, Dr. Mark B. McClellan, administrator of the Centers for Medicare and Medicaid Services, said that more than 8 million of the 55 million Medicaid recipients would be "exempt from the new documentation requirement "because they had established their citizenship when they applied for Medicare or Supplemental Security Income. Medicaid, financed jointly by the federal government and the states, provides health insurance for low-income people, including many in nursing homes. Medicare provides health insurance for people who are 65 and older or disabled. Supplemental Security Income is a cash assistance program for people with very low incomes who are elderly, blind or disabled. About six million people receive Medicare and Medicaid. In most states, people receiving Supplemental Security Income are entitled to Medicaid. Dr. McClellan said the exemption would apply, for example, to "people with mental retardation who have never worked and to many nursing home residents." Critics of the new law had said it would be difficult for many people with mental retardation, disease and other mental impairments to produce the documents needed to comply.

Under the law, anyone who has Medicaid coverage or applies for it must present "documentary evidence of citizenship." Previously, more than 40 states had accepted the applicants' written statements as proof of citizenship unless the claims seemed questionable. "Self-attestation of citizenship and identity is no longer an acceptable practice," the administration said Thursday. The new documentation requirement is part of the Deficit Reduction Act, signed by President Bush on Feb. 8. It is meant to stop the "theft of Medicaid benefits by illegal aliens," said Representative Charlie Norwood, Republican of Georgia, a principal author of the provision. In an unusual preamble to the new rule, the Bush administration said it believed that Congress had intended to exempt Medicaid beneficiaries who were also receiving Medicare or Supplemental Security Income. The law says the documentation requirement "shall not apply to an alien who is eligible for medical assistance" if the person is also enrolled in one of the other two programs. The administration said this was "clearly a drafting error." Congress intended an exemption for citizens, "but accidentally used the term 'alien,' " the preamble says.

A literal reading of the statute would lead to an absurd result - "an exemption applying only to aliens who declare themselves citizens" – and would be of no help to the intended beneficiaries, those citizens who would have the most difficulty proving their citizenship, the administration said. The agency said it was merely correcting "a scrivener's error," one of several it found. John E. Stone, a spokesman for Representative Norwood, said the final rule "appears to provide an appropriate degree of flexibility" to Medicaid beneficiaries and to states.

Ronald F. Pollack, the executive director of Families U.S.A., a consumer group working with plaintiffs in the court case, said: "The exemption of seniors and people with severe disabilities from the citizenship verification requirement is a commendable development. But many other people who need health care the most and can't come up with the required documentation - such as foster

children and homeless people - may still lose Medicaid coverage and join the ranks of the uninsured. This should be corrected."

Keep in mind, that the applicant, their spouse or the nursing home may request a hardship waiver. It is unknown how many hardship waivers will actually be granted under the new law; very few waivers were granted under the prior law. Applicants and nursing homes are likely to apply for hardship waivers not only for cases like the preceding example, but also for cases in which applicants are unable to provide sufficient documentation for transfers.

What is the impact of these changes? Although the Michigan Medicaid Manual and Medicaid application have not yet been updated to reflect the changes in the law, it is likely that applicants may be required to disclose all transfers made during the extended look-back period, and produce all financial records over 5 years. Transfers of any amount will be required to be reported including gifts to charities, gifts to grandchildren for their education, and gifts to children and grandchildren for birthdays and holidays, for the 60 months preceding the application date.

These reporting requirements result in extensive record-keeping for all transfers (gifts) and sadly, may result in "guaranteed ineligibility" for Medicaid for many seniors, particularly those suffering from dementia or Alzheimer's disease, who will be unable to produce the documentation required.

DRA Lawsuit Filed

Jim Zeigler the elder law attorney who filed suit Feb. 13 to declare the Deficit Reduction Act unconstitutional made this response March 21 to another such lawsuit filed by Public Citizen, quoting: "I expect dozens of lawsuits against the DRA, because its constitutional flaw is clear and obvious. Millions of citizens and thousands of businesses are adversely affected by the DRA. "There has been no one yet who has argued that it is okay for the senate to pass one version of a bill and house another, then to have the president sign the senate version. This is Constitutional Law 101 -- the same bill must pass both houses and be signed by the President.

Otherwise the bill is not law. Case over." "Public Citizen is affected only by the change in court filing fees. What I expect to see soon is senior citizens dependent on oxygen joining us as plaintiffs. They are clearly affected. Under the old law, they could receive Medicare oxygen for life. Under the new law, they are literally cut off after 13 months. "Because of the posture of the cases, the case in Mobile, Alabama will go forward first. No response has yet been filed by the government."