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Restrictive New Medicaid Transfer Rules on the Brink of Becoming Law

Vice President Dick Cheney cast the deciding vote in the Senate in the week before Christmas to pass budget legislation cutting the federal deficit by $39.7. Among other provisions in a bill that cuts back federal entitlement programs for the first time in a decade, the legislation would impose punitive new restrictions on the ability of the elderly to transfer assets before qualifying for Medicaid coverage of nursing home care.

The pending asset transfer changes mean planning should not be delayed. If you have considered protecting some assets for your loved ones in case you later require long-term care, you should seriously consider making the transfers as soon as possible rather than waiting any longer.

However, because Democrats succeeded in forcing minor changes to the bill before the vote, the House must vote again on the measure after having passed it earlier in the same week by a 212-206 margin. The timing is in doubt because most House members have returned home for the holidays and are not expected to return until sometime in January 2006.

Summary of the New Restrictions

The legislation, passed by a 51-50 vote, would extend Medicaid's "lookback" period for all asset transfers from three to five years and change the start of the penalty period for transferred assets from the date of transfer to the date when the individual transferring the assets enters a nursing home and would otherwise be eligible for Medicaid coverage. In other words, the penalty period does not begin until the nursing home resident is out of funds, meaning she cannot afford to pay the nursing home. The bill also would make any individual with home equity above $500,000 ineligible for Medicaid nursing home care, although states may raise this threshold as high as $750,000.

The legislation also would:

* Establish new rules for the treatment of annuities, including a requirement that the state be named as the remainder beneficiary.
* Allow Continuing Care Retirement Communities (CCRCs) to require residents to spend down their declared resources before applying for medical assistance.
* Set forth rules under which an individual's CCRC entrance fee is considered an available resource.
* Require all states to apply the so-called "income-first" rule to community spouses who appeal for an increased resource allowance based on their need for more funds invested to meet their minimum income requirements.
* Extend long-term care partnership programs to any state.

In addition, the legislation incorporates provisions in the original budget bill passed by the Senate closing certain asset transfer

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"loopholes," among them:

* The purchase of a life estate would be included in the definition of "assets" unless the purchaser resides in the home for at least one year after the date of purchase.

* Funds to purchase a promissory note, loan or mortgage would be included among assets unless the repayment terms are actuarially sound, provide for equal payments and prohibit the cancellation of the balance upon the death of the lender.

* States would be barred from "rounding down" fractional periods of ineligibility when determining ineligibility periods resulting from asset transfers.

* States would be permitted to treat multiple transfers of assets as a single transfer and begin any penalty period on the earliest date that would apply to such transfers.

A Detailed Look at the Significant Changes in the New Medicaid Law.

The changes being proposed will punish unwitting elders who have given their families modest gifts, and force many middle-income elderly to sell their homes and spend down the proceeds.

Increases the Lookback Period

Now all transfers, whether to individuals or to trusts will be subject to a five-year lookback period rather than the prior three-year lookback period for individuals and five years for transfers to trusts. This will make the application process more difficult and could result in more applicants being denied for lack of documentation, given that they will need to produce five years instead of three years worth of records.

Postpones the Penalty Start Date

The new law shifts the start of the period of ineligibility for a transfer of assets from the first day of the month of the transfer to the later of that date or the date on which the individual moves to the nursing home and is eligible for Medicaid, meaning until they have spent down to $2,000. In other words, the penalty period does not begin until the nursing home resident is out of funds, meaning she cannot afford to pay the nursing home. This, of course, raises the question of how the nursing home will be paid if the resident has no funds, since the facility cannot evict the resident without a safe place to transfer her.

Under the first rule change, the penalty for transferring assets will begin on the later of the date of the transfer or the date the individual would qualify for Medicaid coverage of nursing home care if not for the transfer. An example will explain the problem with this proposal. If a grandmother gives each of her four grandchildren $10,000 on December 1st of this year, in a state with an average monthly nursing home expense of $5,000, this will cause eight months of ineligibility. Under current law, the penalty period begins on the date of transfer, so it will commence on December 1st and expire after eight months.

Let's assume that in one year, in December 2006, the grandmother has a stroke and moves to a nursing home and that she spends down her savings paying for her care over the following year. This would mean that under current law, she would be eligible for Medicaid on December 1, 2007. But under the new legislation, if she applied for Medicaid on that date, her eight-month penalty period would not begin until then, leaving her ineligible for benefits for eight months. Who would pay for her care during that time? Probably not the grandchildren, who may have used thefunds for their college tuition or for other purposes. The answer is likely that it will be the nursing home that will have to front the cost.

The Effective Date of the New Law

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The new transfer rules apply to all transfers occurring on or after the date of enactment of the budget.

However, the states have a grace period during which they need not apply the new rules if new legislation is necessary to bring their state Medicaid plans into compliance. In that case, the effective date of the new rules will be the first day of the first calendar quarter beginning after the close of the next regular session of the state legislature (unless it's a two-year session, in which case the end of the next year of the session is what counts).

Hardship Waivers

To ameliorate the effect of these new rules, Congress is mandating that each state institute a process for seeking a hardship waiver where the application of the transfer penalty would result in deprivation of medical care that would endanger the applicant's health or life, or of "food, clothing, shelter, or other necessities of life." The process must include notice to applicants (though the law switches from using the word "individual" to the word "recipient" here for reasons that are not apparent), a timely process for ruling on the application, and an appeal process.

The asset transfer changes, along with others in the bill, cut programs for the poor and elderly for the first time in a decade. People who are concerned about the impact of this bill on them or their loved ones may want to make their concerns known to their congressional representative.

The new law also permits the nursing home to apply on behalf of the individual for such a waiver upon receipt of consent from the resident or his or her personal representative. Finally, the states are given the option of covering the cost of care for up to 30 days while the application for a hardship waiver is pending.

While it appears that one purpose of the hardship waiver is to protect nursing homes from being left "holding the bag" if a transfer penalty is applied and the resident has no means of paying the nursing home, the waiver is only for hardship to the resident, not to the facility. If a facility cannot evict a non-paying resident without providing alternative care, and no alternative care exists, is there really any hardship to the resident?

Annuities

The new annuity provision still permits the use of non-balloon annuities, but requires that the state be "named the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant." This language raises a couple of questions. First, it appears that the state can demand the entire annuity even if the recipient ends up paying for only a month of care. Second, it speaks only of medical assistance paid on behalf of the annuitant. If the annuitant is the community spouse, does that mean there is no repayment obligation?

The provision also provides that the state be the secondary beneficiary where a community spouse or minor or disabled child is the primary beneficiary.

Income-First Rule

The new law requires all states to apply the so-called "income-first" rule to community spouses who appeal for an increased resource allowance based on their need for more funds invested to meet their minimum income requirements. Increased resources may only be granted to those who still have income shortfall after first receiving the income of the nursing home spouse.

The Valuable House Rule

Under the new law, equity in homes of

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nursing home residents exceeding $500,000 shall be countable unless the nursing home resident's spouse, child under age 21, or blind or disabled child is living in the house. States may, however, elect to raise this threshold up to $750,000. Those with homes of greater value would be ineligible for Medicaid coverage of long-term care. The problem with this proposal is that it is inequitable. In some parts of the country a $500,000 (or $750,000) home is a mansion. In others, very modest homes have market values exceeding this amount.

What Should You Do Now? The Pending Asset Transfer Changes Mean Planning Should Not Be Delayed.

What does this mean for you? If you have considered protecting some assets for your loved ones in case you later require long-term care, you should seriously consider many the transfers as soon as possible rather than waiting any longer. Until the new proposals become law, the current rules apply. That is, the new law will effect all asset transfers which occur on or after the date of enactment. Transfers made before the law is enacted will not be subject to the new penalty period rules and other new provisions.

You May Also Contact Your Representatives To Let Them Know That You Oppose The New Medicaid Law.

These provisions, along with others in the bill, cut programs for the poor and elderly for the first time in a decade. The new law will be enacted only if the House of Representatives votes for the law a second time. The House narrowly passed the bill the first time around in the early hours of the morning with some members not present and with only four hours to review a complex, 774-page package of provisions. Many representatives may not have realized what they were voting for. People who are concerned about the impact of this bill, S. 1932, on them or their loved ones may want to make their concerns known to their congressional representative.

Meanwhile, the AARP, which strongly opposed the transfer restrictions and other cuts to Medicaid and Medicare, vowed to make lawmakers who voted to support them pay a political price. "This budget represents bad policy and AARP will now work to explain the full impact of this vote to its more than 36 million members," said AARP's CEO William D. Novelli. The National Academy of Elder Law Attorneys (NAELA) has also strongly opposed the bill. NAELA's president, Lawrence Davidow, said there is "some credible hope that we and our colleagues may have some time to push back on Members of the House of Representatives." ✪

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