2006 MEDICAID ARTICLE

by Harley Gordon

Though the mill grind slowly, yet it grinds exceedingly small. Friedrich Von Logau

Commentary by Harley Gordon: Harley Gordon is an attorney in Boston and President of the Corporation for Long Term Care Certification (CLTC).

> "The committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce federal and state resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee."

This statement, issued in a report by the House Committee on Energy and Commerce in 1985 was the beginning of the end for Medicaid planning. It took 20 years but it appears that it has finally happened. The Deficit Reduction Act of 2005 has made radical changes to Medicaid law. Here is the legislation accompanied by an analysis of who the winners and losers are if it remains intact:

Change in the Start of the Penalty Period

This changes the start of the penalty period for someone who has transferred assets from the date of when the transfer was made (current law) to the date when one applies for Medicaid. This effectively kills the "half-a-loaf" process.

Winners:

- The state. Date money gifted within the look-back period is brought forward to the date the applicant requests benefits.
- Long-term care insurance. Lawyers will have little choice but to start taking the product seriously.
- Nursing homes. They are both winners and losers. They win because all the money has to be spent on the patient's care not just half. This only works if they carefully screen the individual. See below if they don't.

Losers:

- Nursing homes. In reality the gifted funds will have been spent or the children will simply tell the facility they don't have them. Medicaid will not pay during the ineligibility period leaving the facility the option of discharging the patient. This may be impossible if the family will not take him home. They are left with either suing the patient or writing off the gifted funds.
- Elder law attorneys: Half-a-loaf was one of the most effective procedures to protect assets in a crisis.
- Families: Nursing facilities will figure out how to screen the individual for asset transfers before a commitment for a bed is made. The individual will have to remain at home. In addition the facility may decide to file a petition for conservatorship for the patient with the goal of suing the children for transfers.

Increasing the look-back period

The period of time the state can "look-back" from the date of application is increased to five years.

Winners:

- The state: It's difficult currently for families to find and organize a parent's finances to comply with the three-year look-back rule. It will now become next to impossible. The result? It gives Medicaid intake offices more opportunities to legitimately delay approval.
- Long-term care insurance: Imagine an attorney telling seminar participants that the look-back period is so long they should start considering giving away their retirement portfolio while they are healthy. Smart lawyers will start hosting seminars that focus on long-term care planning and by definition recommending long-term care insurance.
- Nursing homes. Again they both win and lose with this legislation. Increasing the look-back exposes more funds for private pay. It may however create incentives to keep people home longer or in alternative facilities.
- Home-care and assisted living facilities. It is less expensive to keep a patient here than in a nursing home. The question becomes whether the diagnosis or the money drives the decision.

Losers:

- Nursing homes: It could be very difficult to comply with the three-year look-back because of poor record keeping. It now becomes a nightmare. The result? Eligibility may be delayed.
- Elder law attorneys: Medicaid planning had the biggest impact on nursing homes. Since placement is usually a last option, a three-year look-back made it possible to do significant planning if families contacted an attorney at the beginning of an illness. That's becomes very difficult with a five-year requirement.

Annuities

The applicant is required to disclose and produce any interest in annuities, all transfers within the past 5 years, and a statement as to the remainder beneficiary status.

Winners:

- The state: Annuities still work but the state must be designated as the remainder beneficiary. There is now zero incentive to purchase them.
- Long-term care insurance: So called "Medicaid friendly" annuities were marketed as an alternative to LTCi.
- Nursing homes: With the elimination of this whole class of planning families either have to pay privately or purchase LTCi.

Losers:

- Nursing homes: If a family tries to annuitize an annuity it triggers an ineligibility based on its size. The facility is left with the monthly payment and no Medicaid.
- Annuity salespeople: Their business is now obsolete.
- Elder-law attorneys: Annuities were an effective tool to qualify applicants for Benefits.

Law Mandates the Income First Rule

States were given the option in 1993 of determining how a community spouse (the person at home) is allowed to be brought up to a federal monthly stipend. The spouse at home could keep either her spouse's monthly income or set aside assets to generate the difference between her monthly income and the federal minimum. The first option referred to as the *income first* rule was potentially devastating because it called for spending down assets. The second, referred to as the *resource first* rule could potentially protect hundreds of thousands of dollars to be used to generate the income.

The new law mandates the *income first* approach.

Winners:

- Nursing homes: The new law means more private pay patients.
- Long-term care insurance: The new law acts as a strong incentive to purchase the product.
- Home health care providers: See below.
- Assisted living: see below.
- Elder law attorneys: This is likely one area where the need for their services will increase. Faced with spending funds on nursing home care, families will be looking for a series of alternatives (see above).

Losers:

- Nursing homes: It is possible that elder law attorneys will now encourage people to keep their homes longer. This increases the need for home care services. Assisted living facilities may see an increase in census but only if they increase staffing qualified to handle residents who previously would have been transferred to a nursing home. The law will also likely cause the states to re-visit the issue of licensing these facilities.
- Community spouses: This rule is devastating to community spouses with little income and modest assets. The latter will have to be spent down to a maximum of $95,100 before she gets any of her spouse's monthly income. When he dies she may lose (a) his pension if he did not take a survivorship option; and or (b) her social security if it is less than his. She is now faced with limited income and few assets.

Primary residences

The new law mandates that Medicaid deny benefits for applicants with homes that have greater than $500,000 in equity. The measure was aimed at individuals that sought Medicaid benefits by sheltering assets in expensive homes.

Winners:

- Long-term care insurance: Elder law attorneys once again will start looking at LTCi as an available option to help protect wealthier clients.
- Nursing homes: It appears that residents will have to take out home equity loans to pay for private care.
- Mortgage brokers: See above.
- Home-care and assisted living: Attorneys may recommend that families consider these options rather than pay for skilled nursing home care. The funds are generated from the equity in a patient's home.

Losers:

- Nursing homes: Families may opt to keep the individual home longer or use assisted living.
- Children: There are two problems: First, equity in excess of $500,000 will have to be used thereby diminishing their inheritance. Second, even if the amount is less, the state will place a lien on the home for recovery of benefits. What remains to be seen is whether a lien will be placed if there is a community spouse.
- Elder law attorneys: Those who encouraged healthy clients to forego LTCi in favor of placing assets in an expensive home.

Deposits in Continuing Care Retirement Communities (CCRC)

Previously exempt, the new law requires that applicants for Medicaid benefits use the entrance fees paid for a CCRC. It is too early to determine whom the winners and losers are because there is sure to be litigation regarding who actually owns the fee and other difficult issues.

Hardship waivers

The states are required to put together rules that will waive any of the new provisions should they pose an undue hardship. It is difficult to determine whom the winners and losers will be because each state can set the criteria.

Long-term care partnership program

Congress has given states the right to create partnership programs.

Winners:

- The LTCi industry.
- Nursing homes.
- Home care agencies.
- Assisted living facilities.

Losers:

- No one loses.

Final thoughts

The majority of attorneys who understand how long-term care is financed have used Medicaid responsibly to help families in a crisis. In an informal survey they generally agree that with few exceptions clients come to see them because their families never had a discussion of the consequences needing care would have on caregivers and retirement portfolios.

The above provisions of the Deficit Reduction Act should give lawyers who specialize in Medicaid planning a strong incentive to proactively discuss a plan for long-term care with their clients, not wait for the event to happen. For those who do not understand the consequences it presents an opportunity for insurance professionals to educate them. This in turn should lead to a full partnership; lawyers engage their clients about the need for a plan, insurance producers help the lawyer execute that plan and help protect it with long-term care insurance.