By Michael Gilfix & Bernard A. Krooks

The Good and the Very Bad

A few benefits are being extended, but mostly it's hard times for those counting on long-term care insurance, Medicaid and Medicare

Elder law experienced no cataclysms in 2008. But significant trends emerged and public benefits planning continued to mature.

First, the good news: Medicaid asset protection is being extended, state by state, to same sex couples. Also, all states should soon be honoring the protective aspects of long-term care (LTC) insurance partnership plans that its Medicaid recipients may have purchased in other states.

Now, the bad news: LTC insurance is getting so expensive as to be unaffordable for many. People over age 65 will have more trouble using pooled trusts. And reimbursement rates for medical and other services under both Medicare and Medicaid are being reduced—leaving many elderly worried, particularly in these economic hard times.

Same Sex Couples

It's great to have some happy news to report: Washington state has extended Medicaid asset protection to same sex couples and other states are expected to do the same.

When a Medicaid recipient dies, federal law requires state Medicaid programs to seek recovery of Medicaid benefits from the individual's estate. The claim cannot be asserted in most situations when there is a surviving spouse. But surviving partners in same sex couples are not similarly shielded.

The state of Washington has taken protective action. House Bill 3104 became law in March of 2008. It extended 170 rights and responsibilities to same sex couples. It specifically mandates that the state treat the survivor in a domestic partnership just as it would treat a surviving spouse in the context of Medicaid estate recovery. If the state could not pursue a recovery action against a surviving spouse in a particular situation, it's also prohibited from doing so against the survivor of a same sex relationship.

This issue typically arises when a Medicaid recipient is in a skilled nursing facility and owns a residence or an interest in a residence. Retained ownership of the residence is typically not a barrier to Medicaid eligibility. But the residence is typically unprotected after the individual's death when the state asserts its reimbursement claim—unless there is a surviving spouse, a child with disabilities or other individuals who fit very narrow exceptions.

Other states are expected to follow Washington's example. There is no movement at the federal level to amend federal Medicaid law to provide this protection across the nation.

DRA and LTC Insurance

The Deficit Reduction Act of 2005 (DRA) continues to make news as states implement it. Indeed, even the traditionally tardy state of California has taken steps to implement the DRA. Governor Arnold Schwarzenegger signed Senate Bill 483 into law on Sept. 26, 2008. Much attention has been given to the unfortunate ways in which DRA changes the rules about asset transfers and resulting periods of ineligibility, annuities, the protected, exempt status of the residence, and with regard to continuing care retirement communities.[1]

But relatively little attention has been paid to positive

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DRA-mandated changes to LTC insurance "partnership" policies.

The Robert Wood Johnson Foundation developed the idea of partnership policies to stimulate interest in LTC insurance. Although there are different variations of these policies, the basic concept is that if you agreed to purchase an LTC insurance policy for a certain period of time at a certain daily benefit, you would qualify for Medicaid to pay for your long-term care after the policy benefits were exhausted.

Some states, such as New York, offer total asset protection, while the others offer dollar-for-dollar asset protection: The more insurance you buy, the more assets you get to protect. While the insurance component of the policies is portable, the Medicaid benefits are not. This lack of portability was a major deterrent to buying LTC insurance. There was no reciprocity among the states with respect to the Medicaid component. For example, if an individual purchased a policy in California, New York, Indiana or Connecticut, where such policies have long been available, the protection is lost if the individual moves to another state and applies for Medicaid in that state.

In response to the DRA, the U.S. Department of Health and Human Services (which administers the Medicaid program) issued a notice that sets forth standards for states choosing to enter into a reciprocity agreement. In it, the state agrees to provide the same disregards and offsets for qualified partnership policies that a Medicaid applicant purchased in another state that participates in the reciprocity program.

Effective Jan. 1, 2009, every state Medicaid program will be deemed to be participating in the reciprocity program unless it elects to be exempt. Thus, the state Medicaid programs will be required to honor the protective aspects of LTC insurance partnership plans that its Medicaid recipients may have purchased in other states.

What does this mean for clients? Consider this example: Marjorie Jones purchases a partnership policy in California that provides $100,000 worth of coverage for nursing home bills. Marjorie enters a skilled nursing facility and the policy is exhausted, paying $100,000 towards the cost of care. When the policy is exhausted, Marjorie either must pay privately for the cost of care or rely on Medicaid. As a single person, she can typically have no more than $2,000 in her name, other than exempt assets. In light of the fact that she had a partnership policy, Marjorie will be allowed to retain $100,000 while qualifying for Medicaid. This is a dollar-for-dollar reward for purchasing the insurance policy. Once the new guidelines go into effect, Marjorie will be able to move to Arizona, apply for Medicaid, and retain $100,000 while still qualifying in that state.[2]

The higher LTC insurance premiums go, the more lawyers will need to know Medicaid planning strategies.

LTC Insurance

As positive as that portability is, there's a larger, troubling trend in LTC insurance: Rates have been increasing, making premiums increasingly difficult to bear.

MetLife, for example, is one of the three largest LTC insurers in the nation. Most individuals who purchased policies from 1998 through 2005 experienced an average of an 18 percent increase in annual premiums.

We've always urged our clients to consider LTC insurance. It can absorb the cost of care, potentially allowing an elder to preserve his estate, perhaps avoiding reliance on the Medicaid program. But the higher LTC insurance premiums go, the more America's elders will have to look to the Medicaid program. That means more estate-planning attorneys need to be aware of planning strategies that allow individuals to protect the bulk of their assets while qualifying for Medicaid. Medicaid is the only government program that can pay the ongoing cost of nursing home care.

It's our hope that LTC insurance providers now have sufficient experience to more appropriately establish real costs. Premium increases of 18 percent or far less will cause many to abandon their policies. In the short term, the companies win, as benefits will never be paid

and previous premium payments are retained as pure profit. In the long run, we all lose.

More Bad News

There's also a cold wind blowing on transfers of assets to pooled trusts by individuals who're over age 65.

Transfers of assets either outright or to a trust are subject to the Medicaid five-year look-back and penalty period provisions. But, under federal law, Medicaid exception trusts are generally exempt from the Medicaid asset and income limitations. Moreover, transfers of assets to exception trusts may be exempt from the Medicaid penalty period and look-back rules.

One such exception allows individuals with disabilities to transfer assets into a pooled special needs trust, which is managed by a not-for-profit organization. The pooled trust is managed by the not-for-profit and each beneficiary has a sub-account within the trust representing his share of the overall trust funds. When the individual with disabilities dies, the balance remaining in the account is paid back to the state Medicaid agency to the extent that Medicaid paid for the cost of that individual's care. Alternatively, the pooled trust is permitted to retain some portion of the balance remaining after the individual's death and use those monies to further the general purposes of the trust.

On May 12, 2008, the Centers for Medicare and Medicaid Services (CMS) issued a "State Agency Regional Bulletin" (No. 2008-05) informing state Medicaid programs that transfers to such trusts by individuals over the age of 65 shall generate a period of ineligibility for nursing home Medicaid. If a person transferring funds into such a trust is under age 65 and is disabled, there continues to be no period of ineligibility.

Before this CMS bulletin, some states penalized individuals over age 65 who transferred assets into pooled trusts while other states did not penalize such transfers. While the pronouncement from CMS does not have the force of a regulation, it certainly is having a chilling effect on the use of pooled trusts by people over age 65. The bulletin reasons that, because the individual generally does not receive anything of value in return, placing the funds in a pooled trust is a transfer for less than fair market value and subject to the penalty period rules. We are talking about the Medicaid penalty period rules that make a person ineligible for nursing home Medicaid if he transfers his assets during the look-back period. People under 65 are protected, because federal law 42 U.S.C. 1396p(d)(4)(c) says that there is no penalty on transfers into a pooled trust for those under 65. The rub here is that before this year, many states had interpreted that statute to allow for penalty-free transfers by those 65 and over. No more.

However, in the typical pooled trust the individual's contributions to the trust are spent by the trustee on the individual's needs, whether they are medical or otherwise. Thus, an argument can certainly be made that value is being received in return. Stay tuned for how this issue will be addressed by the states, or, perhaps the courts.

Cutbacks in Medicare, Medicaid

As a cost-cutting measure, rates of reimbursement are being reduced for medical and other services under both Medicare and Medicaid. Inevitably, this causes some providers to abandon the system. In many states, budget realities have generated a slash-and-burn approach that threatens the viability of many community clinics, hospitals and other sources of essential medical support. This, together with our struggling economy, has older Americans worried—very worried. We offer no grand solutions, except to say that all estate-planning lawyers can be a source of consistent, sober and creative solutions to help our clients protect their resources to the greatest extent provided by law.

Endnotes

1. Michael Gilfix and Bernard A. Krooks, "Throw Momma From the Train: The Deficit Reduction Act of 2005 Abandons Our Nation's Elders," *Trusts and Estates*, March 2006 at p. 36.
2. *See* 73 Federal Register 51302-51305 (Sept. 2, 2008), issued by the U.S. Department of Health and Human Services.

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