Deficit Reduction Act of 2005: Changes to the Medicaid look-back and commencement of the penalty period

By Michael J. Amoruso

On Feb. 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005[1] (DRA) into law. Portions of the DRA provide for the first monumental changes to Medicaid eligibility rules since OBRA 1993. Of the many changes wrought by the DRA, perhaps the most significant include the changes to the look-back period and the commencement of the penalty period for institutional Medicaid due to an uncompensated transfer of assets. This article will briefly explore these changes.

Medicaid Look-Back Period

I. Pre-DRA

Prior to the DRA, there were two separate look-back periods to determine whether an individual disposed of assets for less than fair market value namely: (1.) 36 months (or three years) for direct transfers of assets; and (2.) 60 months (or five years) for transfers made to or from a trust.[2] The purpose of the look-back is to see if the Medicaid applicant (A/R) divested himself of otherwise available assets to pay for his care in order to qualify for Medicaid. The trigger date for the look-back, unaffected by the DRA, is the first date the individual is receiving institutional services (at home or in a facility) and applies for Medicaid under a state plan.[3]

II. Post-DRA

The DRA increases the look-back period for any post-Feb. 8, 2006 transfer to five years.[4] Confusion may exist, however, regarding when the five-year look-back period will truly be five years.

Practically, the look-back period will remain at three years until February 2009.[5] Beginning in March 2009, the five-year look-back will be "phased-in" on a month-by-month basis until February 2011 – five years after the DRA's effective date.[6] Thus, it is not until February 2011, and beyond, that the look-back period will officially be five years.

Example 1: *Ned applies for institutional Medicaid on May 1, 2009. The local Medicaid administering agency should require Ned to disclose all transfers for the past three years and three months (three years from February 2006 to February 2009 plus three months to May 2009).*

Commencement of the Penalty Period

I. Pre-DRA

Generally, if an A/R makes an uncompensated transfer of property (a gift or donation), then a time period of ineligibility ("Penalty Period") for Medicaid institutional coverage (i.e., nursing home or Lombardi Program coverage) is created.[7] Prior to the DRA, the Penalty Period started on the first day of the month following the month of transfer.[8]

By way of background, the Penalty Period, unaffected by the DRA, is calculated by dividing the value of the transferred property by the average monthly costs of nursing home care in the A/R's geographic region ("regional rate").[9]

Example 2: *Ned gifts real property in Albany County (regional rate = $6,872) to his nephew Bill that has a fair market value of $150,000. Ned cannot apply for institutional Medicaid for 21.83 months ($150,000/$6,872 = 21.83).*

II. Post-DRA

Perhaps the most profound and devastating effect of the DRA to seniors and disabled persons is the change in the Penalty Period start date. The pre-DRA Penalty Period start date required our clients immediately to be accountable to the state for any uncompensated transfers of assets. Under the DRA, however, this fundamentally fair start date is flipped on its head and, instead, penalizes seniors when they are most frail and vulnerable – only when they are receiving institutional-level care and have only $4,150 to their name.

Specifically, the DRA amends 42 U.S.C. 1396p(c)(1)(D) by tolling the start date of the Penalty Period until

> *. . . the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care. . . based on an approved application for such care but for the application of the penalty period. . .*[10]

While poorly drafted, the DRA mandates that the Penalty Period does not start until the A/R *files* an application for institutional Medicaid and would be eligible for such coverage except for the resulting Penalty Period.[11] This is the point in time that the individual is receiving (a.) nursing home services; (b.) a level of care in any institution equivalent to nursing home services; or (c.) home- or community-based services under a waiver program (i.e., the Lombardi Program)[12], and, Penalty Period aside, the A/R is otherwise financially eligible for institutional Medicaid (i.e., non-exempt assets < $4,150 and available monthly income < medical expenses).[13]

Such a harsh provision has a profound and detrimental impact on the safety and well-being of an individual requiring immediate nursing home care under the Medicaid program that unwittingly made an uncompensated transfer of assets within the last five years. Consider the following two examples to illustrate the dramatic difference between the pre-DRA and post-DRA penalty start date:

Example 3 (Pre-DRA Penalty Start Date): *Mary Senior is 76 years old. In August 2005, Mary makes a one-time donation to the Alzheimer's Association in the amount of $10,000 and gave her granddaughter $20,000 to use for college tuition. Mary has a stroke in January 2006 and she now requires 24-hour custodial care in a nursing home. Mary resides in Westchester County. The gift to the Alzheimer's Association and to her granddaughter would cause a 3.4-month Penalty Period,* ***which commences on Sept. 1, 2005 and ends in December 2005.*** *Assuming other factors for eligibility, Mary is eligible for institutional Medicaid in January 2006 when she needs care.*

Example 4 (Post-DRA Penalty Start Date): *Mary Senior is now 80 years old. In August 2006, Mary makes a one-time $10,000 donation to the Alzheimer's Association and gives her granddaughter $20,000 to use for college tuition. Mary has a stroke Oct. 1, 2010 and she now requires 24-hour custodial care in a nursing home. Mary resides in Westchester County and has $2,000 in her name. The gift to the Alzheimer's Association and to her granddaughter would cause a 3.4-month Penalty Period,* ***which does not commence until Mary files an application for Medicaid in October 2010 and would not end until January 2011.*** *Assuming other factors for eligibility, Mary would not be eligible for institutional Medicaid until January 2011 based upon the two transfers made approximately 4 fi years earlier. With only $2,000 to her name, how can she pay for her care during the 3.4-month penalty caused at such late date?*

III. New York State Enabling Legislation

On June 23, 2006, the final New York State Budget Bill, S.-8471, ("Budget Bill") provided enabling legislation for the DRA changes in New York that were effective Aug. 1, 2006.[14] The Budget Bill adopted, *inter alia*, the DRA's five-year "phased-in" look-back period and the DRA's cruel and harsh Penalty Period start date for all transfers on or after Feb. 8, 2006.[15] Fortunately, however, the enabling legislation, preserves the exempt transfers to certain "qualified individuals" that existed for pre-DRA transfers.[16]

III. Conclusion.

There can be no doubt that in a post-DRA environment, the ones who will suffer are the chronically ill and medical providers. One can only hope, for the sake of our chronically ill citizens, that either a constitutional challenge to the DRA will prevail or that repeal legislation, once the impact of the DRA is truly understood, will march through the halls of Congress and the White House.

Thanks to the tireless efforts of the New York State Bar Association, the Elder Law Section's Officers and Executive Committee, the Budget Bill includes language that provides for New York's Medicaid eligibility laws to retreat to pre-DRA rules if either event occurs.

With the devastating change in the Penalty Period start date, asset preservation planning is no longer an area where the generalist can "dabble" in Elder Law. Given the intricacies of the DRA and the level of sophisticated planning needed in a post-DRA world, clients will require advice from Elder Law attorneys who thoroughly understand the Medicaid rules to safely navigate them through the uncharted waters of the DRA. ♦

Notes:

1. Public Law 109-171 (2006).
2. 42 U.S.C.A. § 1396p(c)(1)(B)(i).
3. 42 U.S.C.A. § 1396p(c)(1)(B)(ii)(I) and 42 U.S.C.A. § 1396p(c)(1)(C)(i).
4. Public Law 109-171 § 6011(a).
5. 06 OMM/ADM-5 (July 20, 2006).
6. 06 OMM/ADM-5.
7. Social Services Law § 366[5](d)(3).
8. Social Services Law § 366[5](d)(4).
9. Social Services Law § 366[5](d)(4); 18 NYCRR 360-4.4(c)(2)(iv); OMM GIS 04 MA/033.
10. Public Law 109-171 § 6011(b).
11. *Id.*; 06 OMM/ADM-5.
12. 42 U.S.C.A. § 1396p(c)(1)(C)(i).
13. Social Services Law § 366; 06 OMM/ADM-5.
14. S. 8471 (June 23, 2006); 06 OMM/ADM-5.
15. *Id.*
16. Social Services Law § 366[5](d)(3)(i)(A)-(D); Social Services Law § 366[5](d)(3)(ii);.18 NYCRR 360-4.4(C)(2)(iii)(8)(1)-(4); 06 OMM/ADM-5.

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