

Elder Law Attorney

A publication of the Elder Law Section
of the New York State Bar Association

Message from the Chair

I have only recently returned from the Elder Law Section’s Fall Meeting held in Rochester, New York, on October 21–23. I would like to take this opportunity to highlight two aspects of the Fall Meeting, each of great importance to the Section. The first and the more sobering aspect of the two matters



concerns new federal interpretations of long-standing Medicaid eligibility provisions. When the Section opposed many of the proposed restrictive eligibility provisions contained in Governor Pataki’s budget bill, our position was based in large part on the inability of the state of New York to obtain a Section 1115 waiver for such changes (only the proposal to extend a penalty period to community Medicaid would not have required such a waiver). We based our conclusions on the fact that 1115 waivers could only be granted by the Department of Health and Human Services for provisions found in Section 1902(c) of the Social Security Act. The transfer of asset rules (i.e., the lookback period and commencement date of the penalty period) are contained in Section 1917(c) of the Act. Furthermore, the proposals did not further the objectives of the Medicaid program, but rather imposed additional restrictions on eligibility. Finally, the waiver proposals were not budget-neutral, as is required by federal law.

The Centers for Medicare and Medicaid Services (“CMS”) takes a different view of Section 1115 waivers. Under the CMS interpretation, a state could request a waiver to effectuate a change in the transfer of asset rules. Although Connecticut, Minnesota and Massachusetts currently have waivers pending before CMS, which have not been acted upon since February 2002 in the case of Connecticut’s waiver

request, CMS could take action on these waivers at any time. If any of these waivers are granted, two things are sure to happen. There will be extensive litigation surrounding the constitutionality of the granting of such a waiver, and Governor Pataki will likely find it easier to propose many of the same provisions as he did last year in his 2005–2006 budget bill, due in January 2005.

Other new interpretations that were discussed at the Fall Meeting pertain to annuities and post-eligibility transfers. In the case of annuities, the emergence of a secondary market for annuities in CMS’s view means that an irrevocable annuity that is actuarially sound may have a market value and be counted as a resource for Medicaid eligibility purposes. All that is required is a sale of the annuity income stream in the secondary market for whatever price the mar-

Inside this Issue

Editor to Editor	3
MEDICARE PRESCRIPTION DRUG COVERAGE	
Prescription Drugs and Medicare: What the Medicare Act of 2003 Provides for Your Clients	6 (Vicki Gottlich and Patricia Nemore)
Medicare’s New Drug Benefit	10 (Dee Mahan and Marc Steinberg)
The Medicare Prescription Drug Card: Impact on Low-Income Beneficiaries Who Have EPIC or Medicaid	16 (Valerie Bogart and Diane Archer)
ELDER LAW NEWS	23
November 2004 Seniors’ Housing Alert	45 (Wayne Kaplan)
Quotes to Remember	48 (Natalie J. Kaplan)

ket will bear. In fact, the North Dakota Supreme Court recently ruled that an annuity is a countable resource for Medicaid eligibility purposes because the income stream was said to be marketable in the secondary “factors” market. See: <http://www.court.state.nd.us/court/opinions/20040071.htm> (N.D., No. 20040071, Oct. 12, 2004). Another CMS interpretation would permit states to *not* count an annuity as an available resource provided that it meets certain guidelines. One such guideline would be to allow the state to require that the named beneficiary be the county Department of Social Services up to the amount of Medicaid benefits paid. It would seem that a state could easily adopt the secondary market approach to treating annuities as available resources, although a change in the state Medicaid plan would be required for the latter approach of requiring the county DSS to be named as a beneficiary.

With respect to post-eligibility transfers by a community spouse, it has long been CMS policy (and that of its predecessor, the Health Care Financing Administration, or “HCFA”) that once eligibility has been established for an institutionalized spouse, assets of the community spouse are no longer available to the institutionalized spouse. Therefore, the community spouse could transfer such assets with no resulting impact on the continued eligibility of the institutionalized spouse.¹ Upon a re-examination of this issue, CMS now believes that there is another interpretation that can be supported. Under the new interpretation, although the “assets” of a community spouse cannot be deemed available to the institutionalized spouse, a “transfers of assets” by a community spouse can result in a penalty period for the institutionalized spouse. Under the new CMS interpretation, each state has the option of deciding which of the two alternatives the state wishes to adopt. This should sound familiar to most of you who will recall the *Wisconsin v. Blumer* Supreme Court decision, wherein the Supreme Court determined that federal law permits states to decide whether to use the resources-first or income-first approach to allocating income of the institutionalized spouse to the community spouse. In fact, CMS got the “idea” to create a second interpretation with respect to post-eligibility transfers from the *Blumer* case, which is premised on CMS being permitted to leave to the states to decide amongst two policy interpretations where federal law is ambiguous. With states and the federal government struggling to address rising Medicaid costs and other budget shortfalls, containment of those costs appears to have a greater impact on policy. Now, the federal statute that supported only one policy from CMS for many years is somehow ambiguous and subject to two equally supportable interpretations. Not surprisingly, this new interpretation is more

restrictive than the long-standing post-eligibility rule previously espoused by CMS.

Of great concern to me is the apparent shift regarding the interpretation of the federal Medicaid Act and that a new direction in the formation of federal policy will have a devastating impact on the elderly and disabled people the law was intended to help. We all agree that there are serious concerns with the Medicaid program and the current status of the way in which we deliver health care to our state’s most vulnerable citizens. But we think there is a better way to address these issues. Making long-term care insurance more accessible, as the legislature did in enacting the 2004–2005 budget, is a good start. Another focus should be to keep more people at home, where they prefer to be and where the costs of delivering services tend to be less expensive. I will, of course, keep the Section apprised of any future developments in this area.

The second aspect of the Fall Meeting, and the more uplifting of the two, is the high quality of the programming. René Reixach, Program Chair, put together a program that received rave reviews from its attendees, and for good reason. I wish to congratulate René for doing such an exceptional job in chairing this program. I also want to thank Kathy Heider, Meetings Director at NYSBA, who did such a wonderful job planning this event. Attendees particularly enjoyed the Friday evening dinner reception held at the George Eastman House, the world’s preeminent museum of photography and former home to George Eastman, founder of the Eastman Kodak Company.

We were fortunate to have A. Vincent Buzard, President-Elect of the New York State Bar Association, meet with the officers of the Section and join us at our Executive Committee Meeting on October 21. Mr. Buzard returned on October 22 to address all conference attendees, having just driven to Rochester from Albany in order to be with our Section for the second time in two days. Our attendees learned of the various issues confronting the Bar Association for the upcoming year, including tort reform, issues affecting same-sex couples, diversity of membership, improving the quality of life of lawyers, improving public understanding of the legal system, and strengthening our legislative advocacy efforts. Harold Iselin of Greenberg Traurig also joined us at the Officer’s Meeting and Executive Committee Meeting. Mr. Iselin served ably as the lobbyist for the Association in its efforts to oppose the restrictive Medicaid eligibility provisions contained in Governor Pataki’s 2004–2005 budget bill. As we know, none of these provisions were included in the final budget signed by the Governor on August 11, 2004.

(Continued on page 4)

Another positive note is that our forum for this event was Rochester, and more than half of the 135 attendees were from an upstate venue (we won't debate here what constitutes "upstate," but I will say that I have excluded Westchester County from this analysis). The Section leadership has attempted to reach out to all of its members by holding programs throughout the state. The Fall Meeting has been designated as the program to achieve this objective and I was delighted to see so many upstaters at this event. Next year's Fall Program is scheduled to be held in Saratoga Springs.

The Fall Meeting itself consisted of two days of presentations followed by the Section's Advanced Institute, a roundtable forum held on October 23 allowing Section members to address practice management and substantive legal issues with an expert in each of nine areas (Discharge Planning and Nursing Home Admission Agreements, Estate Planning and Tax Issues, Fair Hearings, Guardianship, Medicaid, Practice Management Issues, Real Estate, Retirement Plans, Spousal Issues and Supplemental Needs Trusts). Many thanks to T. David Stapleton, Jr. and Richard A. Weinblatt, who served as co-chairs of the Advanced Institute, and to our "experts," who devoted significant time preparing material and leading discussions throughout the day. On the programming side, we were treated to excellent presentations from speakers with diverse backgrounds. Of particular note were presentations by the Honorable Richard C. Wesley, Judge, United States Court of Appeals for the Second Circuit; Section member Aytan Y. Bellin, who spoke about the use of pooled trusts; Joseph F. Hurley, Founder and CEO of Savingforcollege.com, who spoke about the use of Section 529 Plans; Richard A. Marchese, Jr., Senior Deputy County Attorney for Monroe County; the Honorable George D. Maziarz, New York State Senator from Lockport, who sponsored the recently enacted Assisted Living Bill; Gail Holubinka of MedAmerica Insurance Company of New York, who spoke about the current status of long-term care insurance as a tool to address long-term care needs; David Leven, Executive Director of Compassion in Dying of New York, who spoke about issues encountered in the treatment of pain in New York; and Barbara J. Collins, Centers for Medicare and Medicaid Services, who spoke about a variety of federal policy interpretations related to Medicaid financial eligibility issues.

I will keep the Section posted on any future developments in these areas, and certainly expect to be able to provide an update at the Section's Annual Meeting (Valerie Bogart, Chair), which will be held

on Tuesday, January 25, 2005 at the Marriott Marquis in New York City. Also, we will be holding our Spring Advanced Institute at the Radisson Hotel at JFK Airport on April 28, 2005. The Advanced Institute is being co-chaired by Stephen J. Silverberg and Elizabeth Clark.

I look forward to seeing many of you at the Annual Meeting. I wish you all the best.

Howard S. Krooks

Endnote

1. See Letter dated November 22, 1994 from A.W. Schnellbacher, Chief of the Medicaid Operations Branch of the Division of Medicaid, Region VIII; see also Letter dated February 17, 1995 from Gary Wilks, Associate Regional Administrator, Division of Medicaid, for HCFA Region VIII; see also Letter dated April 5, 2000 from Ronald Preston, Associate Regional Administrator, Division of Medicaid and State Operations, Region 1.