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1001 Craig Road, Suite 224, St. Louis, Missouri 63146
314-567-9292

107 Southpointe Drive, Suite 2, Edwardsville, Illinois 62025
618-659-9292

A MANDATE AND A REPRIEVE: A TALE OF TWO STATES

The Medicaid program is somewhat unusual, in that it is governed and funded on both the federal and state levels.

There is a federal Medicaid statute, and the Center for Medicare and Medicaid Services ("CMS") issues regulations and advisory memoranda to interpret that law. The federal government provides part of the funds for the Medicaid program, about 50% in Illinois and 60% in Missouri.

Each state provides the rest of the funds, and each is free to adopt its own laws, regulations and policies, so long as they are not contrary to the federal rules. In the event of any conflict between federal and state rules or policies, by law the federal ones control – at least in theory. The federal government is disinclined to micromanage fifty state Medicaid programs, and so, as a practical matter, states are given considerable latitude in interpreting and applying the Medicaid rules.

In fact, there is even a provision in the federal Medicaid rules that allow states to develop and implement programs that would otherwise be contrary to the federal rules. These "waiver programs" are allowed based on the idea that allowing states to experiment with new and different ways of administering the Medicaid program can enable them to develop efficient and cost-effective alternatives for delivering Medicaid services that can then be implemented at a national level.

At least that's the idea "on paper." In practice, states

facing budget crunches, particularly those wanting to "cut welfare", have proposed "waiver programs" that have sought to reduce the cost of the program by simply imposing roadblocks that make it more difficult to qualify for benefits.

Thus, Connecticut proposed a "waiver program" that would increase the look-back period for transfer penalties from three years to five and have those penalties start to run when the person applied for benefits, rather than from the time of the transfers. Those were

very substantial departures from the federal rules, and for several years, opponents – particularly AARP, which has lobbied tirelessly and effectively to preserve the rights of seniors – were successful in blocking Connecticut's proposal.

But then proponents of the "Connecticut plan" developed a

different, and ultimately successful, political strategy: they went over the head of CMS and took their case directly to the Bush administration and the Republican Congress. The result was that changes clearly directed toward making it more difficult for seniors to qualify for Medicaid nursing home benefits became part of the federal Medicaid laws with the passage, on February 8, 2006, of the Deficit Reduction Act of 2005 ("DRA 05").

Then it became the duty of the states to amend their laws and regulations to bring them into compliance with the new federal law. Everyone realized that process would take some time. State regulations, policies, and in some cases laws would need to be changed. The states would also need to amend the policy manuals and action guides used by local case-workers in processing applications, in order to ensure

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the consistency necessary to afford everyone their constitutional right to the equal protection of the laws.

A comparison of what has happened to date in Missouri and Illinois illustrates how political considerations not only can, but in fact have, impacted the process.

Missouri has a Republican governor, and both its senate and its house of representatives have Republican majorities. Just the August before, they had successfully pushed through legislation that made substantial cuts in Missouri's Medicaid program. They cut Missouri's Medicaid spending by \$300 million per year, even knowing that their decision to do so would cost the state \$450 million in federal matching funds.

Not surprisingly, Missouri saw the new Medicaid rules as a mandate that it was eager to implement. By the end of July, Missouri had adopted its new regulations. It then immediately started applying the harsh new Medicaid rules.

Illinois, on the other hand, has a Democratic governor who has proposed legislation to make health care coverage universal for all children in the state. Both of Illinois' legislative bodies have a Democratic majority. Moreover, Illinois by statute requires the enactment of "enabling legislation" before a new federal law can be applied.

Illinois has found the process of implementing the new laws a far more formidable process than has Missouri. To date, Illinois is still operating under the "old rules." Its seniors, and others who rely on Medicaid for assistance in meeting their health care needs, have been granted a reprieve from the harsh new rules.

How long will the reprieve last? It's hard to say. Ultimately, the federal government could compel Illinois to implement the new rules by threatening to cut off federal Medicaid funding. But it may be reluctant to utilize a weapon that would have the immediate impact of throwing the Illinois health care delivery system into chaos. Such an action could have substantial political consequences if taken prior to the November elections, and if the Democrats were to take control of the federal House and Senate in the mid-term elections, it's very possible that the changes in the Medicaid laws (which passed by a very slim majority) would be revisited. On the other hand, Illinois recognizes its legal obligation to implement the new federal rules, like them or not, and

is working, albeit slower than Missouri, toward getting that done.

So what does this mean for people who might benefit from Medicaid eligibility planning?

What it means is that anyone who is in a nursing home in Illinois and might benefit from Medicaid planning should call an elder law attorney and get the process started now – today if possible, or if not, tomorrow. Being able to plan under the old rules could save tens of thousands of dollars. It's worth dropping other things, even missing a day or two of work if that's what it takes, and making this a priority.

What it does not mean is that anyone who is in a nursing home in Missouri now, or may need to go into a nursing home in either state later, should assume that it's "too late." It is not too late. Even under the "new rules," substantial assets can still be protected through wise planning.

In Service Training Available:

The Coulson Law Group offers in-service training on topics related to:

- * Medicaid Eligibility and the Deficit Reduction Act of 2005
- * An Introduction to Medicaid Planning and Division of Assets
- * Guardianship/Conservatorship and Powers of Attorney
- * Other Elder Law Issues

We can cater presentations to meet your time requirements. For more information contact our Director of Community Education and Outreach, Beth Frame, at (314) 567-9292 or (618) 659-9292.

Medicaid Planning Today is written by the attorneys of The Coulson Law Group, Wesley J. Coulson and Joseph Ilges, and is published as a service of The Coulson Law Group, 1001 Craig Road, Suite 224, St. Louis, Missouri 63146; 107 Southpointe Drive, Suite 2, Edwardsville, Illinois 62025. This is for general informational purposes only and does not constitute legal advice. For specific questions, you should consult a qualified attorney.

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