

# SPECIAL REPORT

## Resolving Your Nursing Home's Medicaid Challenges

### CASE STUDY 1: Private funds exhausted - Medicaid denied

Bill has been a resident at the Forget-Me-Not nursing home for 18 months. After 12 months, Bill's private pay funds were exhausted and the Medicaid coordinator at the nursing home filed an application on his behalf. Bill's wife, Linda, was not cooperative in providing the required financial information. Medicaid eventually dismissed the application because it was incomplete. By the time all the necessary information was finally obtained and the application was re-filed, the nursing home had lost six months of revenue, totaling \$60,000, and its cash flow had been interrupted for 12 months.

### CASE STUDY 2: Private funds exhausted - Medicaid funding secured

Harry is incapacitated and resides at the Leisure Acres nursing home. The Social Security Administration designated Harry's closest relative, his nephew Peter, as "representative payee." Peter paid Harry's nursing home bill for six months, but then virtually disappeared. At that time, the nursing home retained the services of an experienced Elder Law firm, which was able to gain immediate access to Harry's financial records and complete a Medicaid application that included a request for retroactive benefits. The nursing home was paid in a timely manner and experienced no interruption in cash flow. The nursing home's Medicaid coordinator was able to remain focused on other responsibilities.

### CASE STUDY 3: Private funds exhausted - hardship waiver approved

As the result of a stroke, Mary has lived at the Happy Trails nursing home for five months. Initially, Mary's care was paid for privately. Once her assets dwindled to less than the Medicaid allowable amount, however, the nursing home filed a Medicaid application on her behalf. During the application process, it was discovered that Mary had made prior gifts consisting of monthly donations to her church, birthday and Christmas gifts to her children and grandchildren, and college tuition assistance for her eldest granddaughter. The total amount of gifts made after the Deficit Reduction Act (DRA) of 2005 became law was \$18,300. The gifts were properly reported on Mary's Medicaid application. Because of the gifts, the application was denied and a two-month penalty period was imposed.

Mary and her family do not have the funds to continue paying for her care privately. Consequently, the nursing home retained the services of an experienced Elder Law firm, which filed a Hardship Waiver application on Mary's behalf. The application stated that imposing the "transfer of assets penalty" would deprive Mary of medical care, endangering her health, and also deprive her of food, clothing, shelter and other necessities. The Hardship Waiver was approved and Medicaid paid for Mary's care retroactive to the date she otherwise would have been eligible for Medicaid. If the nursing home had not retained the Elder Law firm to assist with the Hardship Waiver process, it would have had to absorb the full cost of Mary's care for the two-month penalty period.

## WHAT SHOULD NURSING HOMES KNOW ABOUT THE MEDICAID APPLICATION PROCESS?

Nursing homes have always had involvement with the Medicaid application process and have experienced difficulty with a certain percentage of applications. The Deficit Reduction Act of 2005 (the DRA) changes the application process in two significant ways. First, the extension of the lookback period from three years to five complicates the process by requiring applicants to provide financial records from a substantially longer period of time. Second, the change in the "transfer of assets penalty" start date from the date of transfer to the date of the applicant's institutionalization will leave care facilities with residents who can no longer pay privately but are ineligible for Medicaid. Unless properly addressed, these challenges will lead care facilities to experience a significant loss of revenue and a disruption in cash flow.

The Hardship Waiver provisions of the DRA offer some relief. Care facilities can obtain assistance with Hardship Waiver applications and other Medicaid application issues by retaining an experienced Elder Law firm.

## WHAT IS REQUIRED FOR MEDICAID APPLICATIONS?

Medicaid applications must be filed at county or regional Medicaid offices. An application can be filed by the individual requiring Medicaid funding or by his or her representative. The representative may be an authorized staff member of an institution or nursing home at which the person is receiving care or an attorney representing that institution or nursing home. An application must be made in writing on a form provided by Medicaid and must be signed under penalty of perjury. Applications for retroactive eligibility can be made for periods of up to three months prior to the month of application, provided the individual otherwise would have been eligible for Medicaid at that time.

Medicaid applicants must meet financial and other eligibility requirements. An applicant must be age 65 or older, blind or disabled, and must be able to prove to Medicaid that he or she is a U.S. citizen or an alien meeting certain qualifications.

A Medicaid applicant must prove his or her status by submitting one of the following forms of identification along with the application:

1. A U.S. passport.
2. Form N-550 or N-570 (Certificate of Naturalization).
3. Form N-560 or N-561 (Certificate of U.S. Citizenship).
4. A valid, state-issued driver's license or other identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act, but only if the state issuing the license or other document requires proof of U.S. citizenship before issuing the license or document or obtains a Social Security number from the applicant and verifies, before certification, that the number is valid and assigned to an applicant who is a citizen.
5. Other documents that the Medicaid agency may specify, by regulation, that provide proof of U.S. citizenship or nationality and a reliable means of documenting personal identity.

Or one of the following:

1. A certificate of birth in the United States.
2. Form FS-545 or Form DS-1350 (Certification of Birth Abroad).
3. Form I-97 (U.S. Citizen Identification Card).
4. Form FS-240 (Report of Birth Abroad of a Citizen of the United States).
5. Another document (not described in #4 of the first list) specified by the Medicaid agency that provides proof of U.S. citizenship or nationality.

And one of the following:

1. Any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act.
2. Any other type of personal identity documentation that the Medicaid agency finds, by regulation, provides a reliable means of identification.

## WHAT SPECIFIC CHALLENGES DO MEDICAID APPLICANTS FACE?

Medicaid applicants face a number of challenges. One significant challenge is that the burden of proof in the application process rests on the applicant, not the

Medicaid agency. Problems can arise for numerous reasons. A Medicaid applicant may simply be a poor record keeper and not have the financial records required for the application process. Spouses or other family members may be uncooperative in providing state Medicaid agencies with the necessary information. Medicaid intake workers may not understand an applicant's financial records. Or, there may be a failure of communication between the Medicaid applicant and/or the applicant's family and the Medicaid agency.

Two new challenges are presented by the DRA. The first is the extension of the lookback period from three years to five. Historically, Medicaid offices have not always insisted on applicants producing financial records for the required three-year period. Passage of the DRA suggests that Congress will now expect greater compliance by Medicaid, requiring the agency to obtain detailed financial records for five years. In particular, the focus is likely to be on any transfer of assets or purchase of annuities during the lookback period.

The second challenge created by the DRA is that the transfer of assets penalty does not begin until the individual is institutionalized. Prior to the DRA, if a Medicaid applicant had transferred assets and been deemed ineligible for Medicaid for eight months, the penalty would expire on the first day of the ninth month. If the applicant did not enter a nursing home for 10 months, he or she would be eligible for Medicaid right away. Under the DRA, the penalty does not begin until the individual has entered a nursing home. Based on the previous example, the penalty period would not begin until the individual had spent eight months in the nursing home. This is likely to impact many nursing home residents, who may transfer assets without understanding the law and be unable to reverse the transfers.

Given these challenges, nursing homes may increasingly face the need to threaten to discharge patients who are unable to pay. Such threats are difficult to enforce because there must be a safe discharge plan, which cannot readily be devised when there is no source of payment, either private or public.

## WHAT SOLUTIONS ARE AVAILABLE TO NURSING HOMES?

Nursing homes can obtain the assistance they need to successfully address Medicaid application challenges by retaining the services of an experienced Elder Law firm. Law firms specializing in Elder Law can offer a range of appropriate solutions, including assistance with the Hardship Waiver applications permitted in certain instances under the DRA. Payment to nursing homes may be permitted for 30 days while such applications are pending.

## WHAT BENEFITS CAN NURSING HOMES OBTAIN BY HIRING ELDER LAW FIRMS?

By helping to resolve Medicaid application challenges, an experienced Elder Law firm can enable a nursing home to realize several important benefits:

- ◆ A reduction of write offs for periods of time not covered by Medicaid.
- ◆ Acceleration of cash flow.
- ◆ Devotion of staff time to other important projects and responsibilities.

## WHAT VALUE CAN ELDER LAW FIRMS PROVIDE?

Experienced Elder Law firms offer the expertise and capabilities nursing homes need to successfully resolve Medicaid application issues. Elder Law firms have expertise in all aspects of the Medicaid application process, including the:

- ◆ Eligibility process.
- ◆ Application process.
- ◆ Hardship Waiver Program.

Additionally, Elder Law firms offer a number of important capabilities.

- ◆ Independent contractor status. As an independent contractor, an Elder Law firm can deal firmly with the Medicaid applicant and/or the applicant's family without undermining the relationship between the nursing home and the resident.
- ◆ Collection threat. An Elder Law firm can threaten collection action against the nursing home resident and/or uncooperative family members.

- ◆ Collection action. As a last resort, an Elder Law firm can institute collection action against the resident for any unpaid balance.
- ◆ Fair Hearing. If the Medicaid agency denies an application that should be approved, an Elder Law firm can file for a Fair Hearing and (with proper authorization from the nursing home resident or the resident's representative) represent the resident at that hearing, including oral argument and the filing of any necessary briefs.

### WHAT RELATED SERVICES CAN ELDER LAW FIRMS PROVIDE?

Establishing a relationship with an experienced Elder Law firm allows a nursing home to obtain a range of estate planning and Elder Law services in a timely manner. These services include assistance with:

- ◆ Guardianship cases. Nursing homes often need to have guardians appointed for residents. Elder Law firms can provide assistance with guardianship cases.
- ◆ Advance Medical Directives. Many nursing home residents do not have Advance Medical Directives. It is important for residents to have someone of their choosing authorized to make health care decisions on their behalf in the event that they become unable to make such decisions on their own. It is equally important for the nursing home to know whom the resident has authorized to make such decisions. Elder Law firms can assist in drafting Advance Medical Directives that meet current law.
- ◆ Living Wills. Many nursing home residents lack Living Wills. A Living Will is important for both the

resident and the nursing home in clarifying the resident's wishes with respect to end-of-life treatment. Elder Law firms can assist in drafting Living Wills that meet current law.

- ◆ Powers of Attorney. In many cases, a nursing home resident either has no Power of Attorney or has an inadequate Power of Attorney. It is important for both the resident and the nursing home to be certain that the resident has appointed someone to act on his or her behalf in the event that he or she can no longer do so. Power of Attorney documents must contain specific, appropriate powers. An Elder Law firm can assist in drafting appropriate Powers of Attorney.
- ◆ Last Will and Testament ("Will"). A Will is a document that passes financial assets from an individual to his or her loved ones. It also appoints an executor to act on behalf of the estate upon the individual's death. It is important that nursing home residents have Wills. It also is important for the nursing home to know what to do with the resident's personal property and personal needs account upon the individual's death. An Elder Law firm can assist in drafting a Last Will and Testament.

### WHAT IS YOUR NEXT STEP?

If you believe your nursing home could benefit from a relationship with an experienced Elder Law firm, please contact **Littman Krooks LLP** at **(212) 490-2020** or **(914) 684-2100** to set up a meeting at your facility. We will meet with your financial and Medicaid team to determine how we may assist you in reducing your receivables.

## LITTMAN KROOKS LLP

[www.elderlawnewyork.com](http://www.elderlawnewyork.com)

655 Third Avenue  
New York, NY 10017  
(212) 490-2020  
Fax: (212) 490-2990

399 Knollwood Road  
White Plains, NY 10603  
(914) 684-2100  
Fax: (914) 684-9865