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## Deficit Reduction Act Forces Major Revisions to Medicaid Eligibility Rules

On February 8, 2006, President Bush signed into law the Deficit Reduction Act of 2005 which revises, among other things, the rules for Medicaid eligibility for long term care coverage. The Act narrowly passed in the House of Representatives by a 216 to 214 vote and in the Senate by a vote of 51-50. This is the first major revision of the Medicaid program since the Omnibus Budget Reconciliation Act of 1993. The revisions became effective on February 8, 2006, the day the Act was signed by the President.

### 5 Year Look-Back Period

Under the new Act, all transfers will be subject to a 5 year look-back period, rather than the former 3 year look-back period for individuals and 5 year look-back period for trusts. This will certainly make the application process more difficult, since applicants will be required to supply 5 years of records. Any transfers made prior to the enactment will still be subject to a 3 year look-back.

### Penalty Period Start Date

Under the previous law, the penalty period commenced on the first day of the month following the month in which an asset transfer was made. The new law shifts the start date, so that the penalty period does not begin until the person is receiving institutional care and is eligible for Medicaid. In other words, the penalty period does not begin until the resident is out of funds and is unable pay the nursing home. This raises serious concerns for nursing homes, which will have residents on extended penalty periods that cannot qualify for Medicaid coverage and have already exhausted their own resources.

### Hardship Waivers

To offset the severity of the new revisions, Congress is requiring that each state establish a process for seeking a hardship waiver when the application of the transfer penalty period would result in deprivation of "food, clothing, shelter or other necessities of life," or deprivation of medical care that would endanger the applicant's health or life. The new law permits nursing homes to apply on behalf of an individual for a waiver upon receipt of consent from the resident or his or her personal representative. States have the option of covering the cost of care for up to 30 days while the application for a hardship waiver is pending. Although one purpose for the waiver is to protect nursing homes if a transfer penalty is applied and the resident has no means of paying the nursing home, the hardship must be that of the resident, not the facility.

### Additional Changes

**Valuable House Rule:** Applicants who own homesteads with equity above \$500,000 are ineligible. This provision does not apply if a spouse or child under 21 or child who is blind or disabled resides in the home. States have the authority to increase the home equity amount up to \$750,000. It will be up to the New York State legislature to increase the homestead value.

**Annuities:** The new law does not consider non-balloon annuities a countable asset, but the Medicaid recipient must name the state as the primary beneficiary for at least the total amount of medical assistance paid on behalf of the annuitant. Balloon payment annuities remain a countable asset.

## Court of Appeals Declines to Extend Recovery for Emotional Distress to Mother Whose Infant was Born Alive

A unanimous Court of Appeals held in May, 2005 that a woman has no claim for her own emotional injuries following delivery of a baby with severe deformities as a result of *in utero* malpractice. In *Sheppard-Mobley v. King*, the plaintiff was told that she was pregnant but that large fibroids in her uterus made it highly unlikely that she would carry to term. A chemical abortion with methotrexate was performed and she was advised that her fetus was dead. Four months later, in her 28th week of pregnancy, she learned that the fetus was alive. She delivered a daughter with severe physical and mental defects caused by fetal methotrexate syndrome.

In rejecting the mother's claim, the Court of Appeals further defined the narrow bounds of the recovery it had permitted in the landmark 2004 decision of *Broadnax v. Gonzalez*. In *Broadnax*, the Court had held for the first time that a mother may recover for her own emotional harm if she suffers a miscarriage or stillbirth because of malpractice, overturning 19 years of precedent set by *Tebbutt v. Virostek*. *Tebbutt* had denied recovery unless the mother suffered an independent physical injury.

In *Sheppard-Mobley*, the Court held that the lower court had improperly extended *Broadnax*, which had been intended to fill a gap in the law immunizing medical professionals from liability for malpractice causing a miscarriage or stillbirth, since a fetus could not bring suit. Because the child in *Sheppard-Mobley* was born alive and could bring a malpractice action in her own right for physical injuries inflicted in the womb, there was no need to apply *Broadnax*.

## Federal Court Holds That Release in Severance Agreement Bars Certain Qui Tam Claims

A Federal District Court in Georgia has dismissed a private qui tam action brought by a former hospital executive, holding that allowing a standard claims release to bar certain qui tam actions under the Federal False Claims Act is not against public policy. When Ted Whitten, former compliance officer at Glynn Brunswick Memorial Hospital Authority, left his position, his severance agreement included a standard "all claims" release in favor of the Authority and its agents. In return, Mr. Whitten was given a sizable severance package. Subsequently, he filed a qui tam action against the Authority's agent, Quorum Health Group, alleging Medicare, CHAMPUS, and Tricare billing fraud. The United States declined to intervene, so Mr. Whitten pursued the action on his own. The Court granted Quorum's motion to dismiss the action, holding that Mr. Whitten should be precluded from renegeing on the severance agreement. While the court limited its decision to cases in which the United States declines to intervene, the holding suggests that at least one federal court finds that some level of protection against qui tam relators can be achieved by including carefully drafted release language in severance agreements.

*U.S. ex rel. Whitten v. Triad Hospitals, Inc., United States District Court, Southern District of Georgia, No. Civ.A. CV202-189.*

In November, a judge in St. Lawrence County reluctantly applied the holding in *Sheppard-Mobley* to dismiss the malpractice claim of a woman whose son was injured *in utero* and died two hours after birth. Judge David Demarest held that he was constrained by *Sheppard-Mobley* to dismiss the mother's claim because the baby was born alive. He noted, however, that the case presented a "troublesome" anomaly, and asked for additional guidance from the appellate courts on this issue. The plaintiff has filed a notice of appeal.



### Health Care Practice Group Attorneys:

Raymond R. D'Agostino, Catherine A. Diviney, Peter V. White, Marguerite A. Massett, Laurel E. Baum, Nancy M. Belkowitz, Jennifer M. Reschke, Cora A. Alsante, Michael J. Sciotti, Mark J. Schulte & Wendy A. Marsh

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