



12-1-2016

Doctor's Orders: The Third Circuit Approves Short-Term Annuities as a Viable Planning Tool in *Zahner v. Secretary Pennsylvania Department of Human Services*

Jennifer A. Ward

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Elder Law Commons](#)

Recommended Citation

Jennifer A. Ward, *Doctor's Orders: The Third Circuit Approves Short-Term Annuities as a Viable Planning Tool in Zahner v. Secretary Pennsylvania Department of Human Services*, 61 Vill. L. Rev. 729 (2016).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol61/iss4/5>

This Issue in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2016]

DOCTOR'S ORDERS: THE THIRD CIRCUIT APPROVES SHORT-TERM ANNUITIES AS A VIABLE PLANNING TOOL IN *ZAHNER v. SECRETARY PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES*

JENNIFER A. WARD*

“Financial planning is inherent in the Medicaid scheme”¹

I. SIGNS AND SYMPTOMS: AN INTRODUCTION TO LONG-TERM CARE AND MEDICAID PLANNING

Meet Roy.² Suffering from “Crohn’s disease, diabetes, and dementia,” he first entered a nursing home in 2001 and quickly depleted his resources to pay for his care.³ Roy applied for Medicaid assistance, but his application was denied because he transferred his home to his family a

* J.D. Candidate, 2017, Villanova University Charles Widger School of Law; B.A., 2014, Mount St. Mary’s University. I would like to thank my family and friends for their support. I would also like to thank Professor Michael Campbell for providing me with the idea for this Casebrief. Finally, I would like to thank the members of the *Villanova Law Review* for their help throughout this entire process. The title of this Casebrief was inspired by Jerold E. Rothkoff, *The Zahner Decision—Court Approves Use of Medicaid Compliant Annuities*, ROTHKOFF L. GRP. (Oct. 18, 2015), [http://rothkofflaw.com/the-zahner-decision-court-approves-use-of-medi-aid-compliant-annuities/](http://rothkofflaw.com/the-zahner-decision-court-approves-use-of-medic-aid-compliant-annuities/) [<https://perma.cc/ZQ3G-234U>], *Court Approves Use of Short-Term Annuities for Medicaid Planning*, ELDER L. ANSWERS (Nov. 24, 2015), <http://www.elderlawanswers.com/court-approves-use-of-short-term-annuities-for-medic-aid-planning—15317> [<https://perma.cc/TY8V-2SEV>], and David Zumpano, *Analyzing the Zahner Holding: Moving Forward Using Short-Term Annuities As Successful Planning Tools*, LAW. WITH PURPOSE (Oct. 1, 2015, 5:11 PM), <http://blog.lawyerswithpurpose.com/2015/10/analyzing-the-zahner-holding-moving-forward-us-ing-short-term-annuities-as-successful-planning-tools.html> [<https://perma.cc/DYW9-GNWK>].

1. *Zahner v. Sec’y Pa. Dep’t of Human Servs.*, 802 F.3d 497, 509 (3d Cir. 2015) (stating intrinsic nature of financial planning found in Medicaid).

2. See Claudia Williams, James Rosen & Molly O’Malley, *Profiles of Nursing Home Residents on Medicaid*, HENRY J. KAISER FAMILY FOUND. 14 (July 2006), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7510.pdf> [<https://perma.cc/WHB6-KWBQ>] (discussing background of nursing home resident on Medicaid). In 2006, the Henry J. Kaiser Family Foundation’s Commission on Medicaid and the Uninsured profiled seven nursing home residents whose care is covered by Medicaid. See *id.* at 9–15 (profiling seven Americans residing in nursing homes). Although this Casebrief mentions only one nursing home resident, the study provides great insight into a challenge faced by many Americans and their families: the inability to pay for long-term care. See *id.* at 3–6 (discussing growing demand for long-term care and increased concern about financing it); see also Caitlin Kelly, *Covering the Rising Cost of Long-Term Care*, N.Y. TIMES, May 15, 2013, at F3, *available at* <http://www.nytimes.com/2013/05/15/business/retirementspecial/covering-the-rising-cost-of-long-term-care.html> [<https://perma.cc/RT5F-U3XM>] (“Preparing for the cost of long-term care is now a concern for many aging Americans.”).

3. See Williams et al., *supra* note 2, at 14 (describing nursing home resident’s illnesses and stay in nursing home facility).

year earlier.⁴ Because this transfer “occurred within [Medicaid’s] look-back period,” Roy became ineligible for Medicaid assistance, even though he had no other assets to pay for his care.⁵

The experience described above is not unusual.⁶ As the U.S. population ages at a high rate, the demand for long-term care has become a very real problem.⁷ As a result, some Americans turn to Medicaid to cover the costs of long-term care.⁸ To qualify for Medicaid, individuals must meet specific requirements, essentially “exhaust[ing]” their assets in the process.⁹ Many spend all of their assets either before entering a nursing

4. *See id.* (discussing reasons for denial of Medicaid application).

5. *See id.* (explaining impact of “asset transfer” on Medicaid application). Following his denial, Roy and his niece sought legal advice. *See id.* Roy’s niece sold the home and used the funds to pay for Roy’s nursing home bills and other fees until he was finally eligible for Medicaid. *See id.* For an explanation of Medicaid’s look-back period, see *infra* notes 58–62, 67–68 and accompanying text.

6. *See id.* at 12 (discussing other resident’s loss of Medicaid eligibility after selling home). As previously noted, *Profiles of Nursing Home Residents on Medicaid* discusses several nursing home residents whose Medicaid eligibility was affected by the presence or absence of assets. *See id.* at 9–11, 13, 15.

7. *See* Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUS. J. HEALTH L. & POL’Y 265, 280 (2003) (“[T]he prospect of the numbers of aging baby boomers in the next twenty years causes concern about an absolute increase in the numbers of nursing home residents.” (citing CITIZENS FOR LONG TERM CARE, *Defining Common Ground: Long Term Care Financing Reform in 2001*, 2 J. POST-ACUTE & LONG-TERM CARE MED. 187, 187 (2001))); Karla Levinson, Comment, *Long-Term Care Alert: An Analysis of Delaware’s Approach to Medicaid Planning Techniques and Why Curbing Medicaid Planning Will Not Solve the Nation’s Long-Term Care Problem*, 13 WIDENER L. REV. 223, 223–24, 239–41 (2006) (discussing United States’ aging population); *see also* Kelly, *supra* note 2 (questioning how long-term care for retiring baby boomers will be paid); Rick Jurgens, *Despite Offerings, Nursing Home Beds and Funds Still Lacking*, VALLEY NEWS, <http://www.vnews.com/news/20415849-95/caring-for-critical-needs> [<https://perma.cc/P6DS-DA34>] (last updated Feb. 1, 2016) (“About 12 million Americans receive long-term care—services that extend for at least nine months and help individuals with serious physical or cognitive limitations cope with health-related and other challenges of daily life—in communities or in nursing homes or other institutions . . .”).

8. *See* Ellen O’Brien, *Medicaid’s Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?*, GEORGETOWN UNIV. LONG-TERM CARE FIN. PROJECT 1 (May 2005), <http://www.canhr.org/reports/2005/nursinghomecosts.pdf> [<https://perma.cc/2LQZ-WSK5>] (reporting Medicaid paid for “[n]early half of the nation’s nursing home bill . . . in 2003”); *see also* Levinson, *supra* note 7, at 224 (discussing prevalence of Medicaid in providing funding for “long-term care services”); Williams et al., *supra* note 2, at 1 (acknowledging Medicaid contributed to forty-six percent of nursing home costs in 2003). In 2003, nursing home costs exceeded \$100 billion. *See id.*

9. *See* Timothy Waidmann & Korbin Liu, *Asset Transfer and Nursing Home Use: Empirical Evidence and Policy Significance*, HENRY J. KAISER FAMILY FOUND. 1 (Apr. 2006), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7487.pdf> [<https://perma.cc/7MWP-799Y>] (illustrating Medicaid eligibility requirements). For further discussion of the requirements of Medicaid eligibility, including the specific requirements for individuals in Pennsylvania, see *infra* notes 34–52 and accompanying text.

home or during their stay on the care itself.¹⁰ For individuals who wish to leave something behind for their loved ones, Medicaid planning is an attractive option.¹¹ With help from elder law attorneys, individuals can strategically give away and shield their assets from consideration as “available resources” when applying for Medicaid.¹²

Fearing abuse of the Medicaid system, federal and state legislatures began to restrict how much Medicaid planning individuals could actually do.¹³ In 2005, Congress passed the Deficit Reduction Act (DRA) with the goal of closing loopholes in the Medicaid statute that had allowed for financial planning.¹⁴ The DRA also provided a safe harbor provision for

10. See Catherine M. Reif, *A Penny Saved Can Be a Penalty Earned: Nursing Homes, Medicaid Planning, The Deficit Reduction Act of 2005, and the Problem of Transferring Assets*, 34 N.Y.U. REV. L. & SOC. CHANGE 339, 340–43 (2010) (explaining how individuals exhaust assets before qualifying for Medicaid); see also Williams et al., *supra* note 2, at 9 (recounting how married couple spent \$165,409 on long-term care before becoming eligible for Medicaid assistance).

11. See, e.g., Barnes, *supra* note 7, at 267 (explaining Medicaid planning); Levinson, *supra* note 7, at 227 (“[S]ome people are employing attorneys to help them plan ahead and transfer their assets properly so that they can qualify for Medicaid benefits without losing their life savings. Many techniques exist for people to protect their assets and still receive Medicaid benefits.”(footnote omitted)); Waidmann & Liu, *supra* note 9, at 1 (indicating individuals will “find ways to shelter any assets [to qualify for Medicaid]”).

12. See Barnes, *supra* note 7, at 267 (noting frequent use of assets to become eligible for Medicaid); Milan Markovic, *Lawyers and the Welfare State*, 84 FORDHAM L. REV. 1845, 1854 (2016) (“Lawyers have nevertheless devised numerous financial impoverishment techniques to allow clients to preserve wealth and qualify for Medicaid.”); Levinson, *supra* note 7, at 227 (discussing how individuals employ attorneys to help with Medicaid planning); see also *Guide to Long-Term Care Planning: Medicaid Planning*, NAT’L CARE PLANNING COUNCIL, http://www.longtermcarelink.net/eldercare/medicaid_planning.htm [<https://perma.cc/CU68-V7Z9>] (last visited Oct. 18, 2016) [hereinafter *Medicaid Planning Guide*] (providing guide to Medicaid planning). When applying for Medicaid, individuals must report all available resources in order for their eligibility to be determined. See Levinson, *supra* note 7, at 225 (explaining Medicaid application process). Not all assets “count” as being available. See *id.* (internal quotation marks omitted) (listing exempt assets for Medicaid eligibility determination). Assets like a person’s “primary residence [and] personal possessions” do not count in determining Medicaid eligibility. See *id.* (reporting which resources do not count for determining eligibility). For further discussion of the Medicaid application and which assets figure in Medicaid eligibility determinations, see *infra* notes 34–52 and accompanying text.

13. See Reif, *supra* note 10, at 347 (stating Congress acted to “address[] Medicaid abuses”); Levinson, *supra* note 7, at 227 (detailing efforts by government to decrease use of Medicaid planning); Michelle Higgins, *States Crack down on Families That Shed Assets to Get Benefits*, WALL ST. J. (Feb. 25, 2003, 12:01 AM), <http://www.wsj.com/articles/SB1046113343874461543> [<https://perma.cc/A7C8-C8L8>] (“States and counties have begun to crack down on people who purposely make themselves poor so the government will pay for their nursing-home care.”).

14. See generally Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4; see also Reif, *supra* note 10, at 347 (discussing purpose and effect of DRA); Levinson, *supra* note 7, at 227 (“[The DRA] has a huge impact on Medicaid qualification rules.”).

annuities, shielding qualified annuities from being counted as available resources.¹⁵

Recently, in *Zahner v. Secretary Pennsylvania Department of Human Services*,¹⁶ the Third Circuit examined whether short-term annuities, a specific instrument used in Medicaid planning, qualified for the DRA's safe harbor provision.¹⁷ If so, assets used to purchase short-term annuities would be sheltered from factoring into individuals' eligibility for Medicaid.¹⁸ Holding that short-term annuities can qualify for protection, the Third Circuit's decision signifies that the DRA did not completely foreclose the "use of short-term annuities in Medicaid planning."¹⁹

This Casebrief argues that the Third Circuit's *Zahner* decision is a win for elder law attorneys and their clients, as it solidifies the viability of the

15. See 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (2012); *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497, 501 (3d Cir. 2015) (mentioning DRA's safe harbor provision); see also Matthew J. Marcus, *Many Effective Medicaid Planning Strategies Still Exist After the DRA*, 35 EST. PLAN. 24, 26–28 (2008) (explaining how individuals may use annuities in Medicaid planning); Renee Carlson, Comment, *Protecting the Nursing Home Industry and the Elderly Following the Deficit Reduction Act of 2005*, 82 TEMP. L. REV. 1303, 1332 (2010) ("In order to minimize the likelihood of incurring a penalty period and resultant eviction for nonpayment, individuals and their attorneys need to make use of more advisable planning techniques, such as use of annuities" (citing STEPHEN A. FELDMAN, STEVE FELDMAN ON LONG-TERM CARE PLANNING 257–58 (2006))); ETTINGER LAW FIRM, *More on Short Term Annuities and Medicaid Planning*, N.Y. ELDER L. ATT'Y BLOG (Dec. 23, 2015), <http://www.newyorkelderlawattorneyblog.com/2015/12/short-term-annuities-medicaid-planning.html> [<https://perma.cc/7ZBK-627C>] [hereinafter *More on Short Term Annuities*] (discussing how short-term annuities may be used in Medicaid planning); *The Appropriate Use of Short-Term Medicaid Compliant Annuities*, KRAUSE FIN. SERVICES BLOG, <https://www.medicaidannuity.com/the-appropriate-use-of-short-term-medicaid-compliant-annuities-3/> [<https://perma.cc/5P5P-CQWP>] (last visited Oct. 18, 2016) (noting when use of short-term annuities is appropriate).

16. 802 F.3d 497 (3d Cir. 2015).

17. See *id.* at 499 (stating reason for appeal). An annuity is a financial tool that can be used in Medicaid planning. See Barnes, *supra* note 7, at 292–93 (discussing how annuities are used in Medicaid planning). The Supreme Court has defined annuity as a "contract[] under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary." See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995) (defining "annuity"); Barnes, *supra* note 7, at 292 ("An annuity is established by a contract in which the buyer pays a sum of money in exchange for a promise that payments will be made to the buyer on an agreed upon schedule and rate." (citing BLACK'S LAW DICTIONARY 88 (7th ed. 1999))). For further discussion of how annuities can be used in Medicaid planning, see *infra* notes 75–91 and accompanying text.

18. See *Zahner*, 802 F.3d at 509 (determining annuities fall under DRA's safe harbor provision).

19. See David Zumpano, *Analyzing the Zahner Holding: Moving Forward Using Short-Term Annuities As Successful Planning Tools*, LAW WITH PURPOSE (Oct. 1, 2015, 5:11 PM), <http://blog.lawyerswithpurpose.com/2015/10/analyzing-the-zahner-holding-moving-forward-using-short-term-annuities-as-successful-planning-tools.html> [<https://perma.cc/DYW9-GNWK>] (examining meaning of *Zahner* for elder law practitioners).

use of short-term annuities in Medicaid planning.²⁰ Part II examines how individuals take part in Medicaid planning, including a discussion of the DRA and the use of annuities in planning.²¹ Part III presents the facts of *Zahner* and reviews the Third Circuit's analysis.²² Part IV analyzes the Third Circuit's decision to approve the use of short-term annuities.²³ Part V advises elder law practitioners on the use of short-term annuities going forward.²⁴ Part VI concludes by discussing the long-term viability of short-term annuities.²⁵

II. FILLING OUT PATIENT HISTORY: A BRIEF OVERVIEW OF MEDICAID PLANNING, THE DEFICIT REDUCTION ACT, AND THE USE OF ANNUITIES IN MEDICAID PLANNING

One year in a nursing home will cost a Pennsylvania resident over \$100,000.²⁶ Even for an individual who saved for retirement, a few years in a nursing home could quickly exhaust savings and leave nothing behind for that individual's family.²⁷ This is where Medicaid and Medicaid plan-

20. For an analysis of *Zahner's* impact on Medicaid planning and its role in solidifying short-term annuities as a viable planning tool, see *infra* notes 156–95 and accompanying text.

21. For a discussion of Medicaid planning, specifically the Deficit Reduction Act's impact and the use of annuities in planning, see *infra* notes 26–91 and accompanying text.

22. For discussion of the facts of *Zahner* and the Third Circuit's analysis, see *infra* notes 92–155 and accompanying text.

23. For an analysis of the Third Circuit's holding in *Zahner*, see *infra* notes 156–90 and accompanying text.

24. For discussion of what *Zahner* means for practitioners wishing to use short-term annuities in planning, see *infra* notes 184–90 and accompanying text.

25. For discussion of the future of annuities and Medicaid planning, see *infra* notes 191–95 and accompanying text.

26. See *2015 Cost of Care Survey Pennsylvania*, GENWORTH (Apr. 1, 2015), https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928PA_040115_gnw.pdf [<https://perma.cc/DE9E-HN8L>] (reporting annual median cost of semi-private nursing home room in Pennsylvania in 2015). For those in the Philadelphia–Camden–Wilmington area, the rate reached \$114,610. See *id.* (listing median annual rate in Philadelphia metropolitan area). Both rates were higher than the U.S. median annual rate, which was \$80,300. See *id.* (reporting annual median rate for United States). Although Pennsylvania's median annual rate topped that of the United States, it was the lowest in the tri-state area (which includes Pennsylvania, Delaware, and New Jersey). Compare *id.*, with *2015 Cost of Care Survey Delaware*, GENWORTH (Apr. 1, 2015), https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928DE_040115_gnw.pdf [<https://perma.cc/BUV7-AUDM>] (reporting annual median rate for semi-private nursing home room in Delaware of \$109,500), and *2015 Cost of Care Survey New Jersey*, GENWORTH (Apr. 1, 2015), https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928NJ_040115_gnw.pdf [<https://perma.cc/2KVH-9VJZ>] (reporting annual median rate for semi-private nursing home room in New Jersey of \$116,800).

27. See Sean R. Bleck, Barbara Isenhour & John A. Miller, *Preserving Wealth and Inheritance Through Medicaid Planning for Long-Term Care*, 17 MICH. ST. U. J. MED. & L. 153, 154–55 (2013) (“[T]he costs of long term health care represent one of the greatest financial risks of old age. Indeed, for most people a period of extended

ning become factors.²⁸ Medicaid planning helps individuals qualify for Medicaid without completely depleting their assets.²⁹ Both federal and state governments disfavor Medicaid planning and require elder law practitioners and their clients either to comply with restrictions on transfers or face penalties.³⁰

A. *Name and Date of Birth: An Introduction to the Basics of Medicaid and Medicaid Planning*

Established in 1965, Medicaid is the largest provider of health services in the United States.³¹ Medicare, while designated as the health care op-

disability leads to impoverishment . . . deeply degrad[ing] or even eliminat[ing] the prospects for inheritance by the disabled person's family." (footnote omitted)); *see also* Levinson, *supra* note 7, at 223 (theorizing how quickly one can spend \$100,000 in savings on nursing home care); Kelly, *supra* 2 ("F[ew] sticker shocks are as bracing as the price of hiring someone to help with the simplest activities—bathing, toilet use, dressing, eating and moving. Whether recovering from surgery or a stroke or suffering a chronic illness like arthritis, those needing skilled help need deep pockets indeed.").

28. *See* Waidmann & Liu, *supra* note 9, at 1–2 (discussing Medicaid eligibility and practice of Medicaid planning); *see also* Barnes, *supra* note 7, at 267 (defining Medicaid planning); Reif, *supra* note 10, at 348 (discussing criticism of those who engage in Medicaid planning); Levinson, *supra* note 7, at 227–28 (explaining Medicaid planning); Higgins, *supra* note 13 ("For years, thousands of middle-class and even affluent retirees—terrified that long-term health-care costs could wipe out their savings—have transferred their assets to relatives in order to qualify for Medicaid, the government health plan for the poor."). Although there are those who engage in Medicaid planning, it is important to note that it may not be as prevalent as believed. *See* O'Brien, *supra* note 8, at 3 ("There is little evidence that large numbers of the elderly are planning their estates for the purpose of gaining easy access to Medicaid in the event they need nursing home care."). In a 2005 study, Professor Ellen O'Brien found that empirical data did not support the notion that large numbers of elderly Americans transfer assets in order to qualify for Medicaid. *See id.* at 5 (noting "research studies confirm that Medicaid-induced transfers are not widespread among current or likely nursing home residents").

29. *See* Barnes, *supra* note 7, at 267 ("[A]rranging assets and income for an individual or couple in order to achieve earlier Medicaid eligibility . . . is an important legal service that is identified with the broader field of elder law."); Bleck et al., *supra* note 27, at 155 (defining Medicaid planning).

30. *See* Cori Nichols, *The Impact of the DRA on Estate and Long-Term Care Planning*, 49-NOV ORANGE COUNTY LAW. 46, 47–48 (2007) (illustrating different aspects of DRA with which individuals must comply when transferring assets); *see also* Waidmann & Liu, *supra* note 9, at 1 ("Because Medicaid was designed to be a safety net only for the poor, asset transfer practices are thought to distort the intent of the Medicaid program and unnecessarily inflate public spending.").

31. *See Medicaid Reform: A Preliminary Report*, NAT'L GOVERNORS ASSOC. 1 (June 15, 2005), <http://www.nga.org/files/live/sites/NGA/files/pdf/0506medicaid.pdf> [<https://perma.cc/8X9Q-EAY7>] (acknowledging Medicaid's role in providing health care); Levinson, *supra* note 7, at 224 ("Medicaid is the nation's largest health care program." (quoting *Medicaid Reform, A Preliminary Report*, *supra* note 31, at 1) (internal quotation marks omitted)); *see also* Barnes, *supra* note 7, at 269 (noting creation of Medicaid in 1965).

tion for older Americans, does not cover the cost of long-term care.³² Medicaid, however, does cover long-term care.³³

1. *Qualifying for Medicaid in Pennsylvania*

Medicaid is jointly run by the federal government and the states.³⁴ Although states can create their own requirements for Medicaid eligibility, their regulations must comply with federal guidelines.³⁵ In addition, state Medicaid regulations cannot be more restrictive than federal standards.³⁶ The Centers for Medicare and Medicaid Services provide states with a *State Medicaid Manual* to “assist[] states in interpreting the complex labyrinth of statutory and regulatory requirements that govern receipt of Medicare and Medicaid benefits.”³⁷

32. See Reif, *supra* note 10, at 344 (“Medicaid is the only federal government program that pays for long-term nursing home care.”); see also Barnes, *supra* note 7, at 269 (describing Medicare as “a program of health care services for elderly and long-term disabled people”). Although this Casebrief focuses on long-term care in nursing homes, individuals can also receive care in the community, meaning the home, either from health care professionals or family members. See Bleck, et al., *supra* note 27, at 159–60 (discussing long-term care found in individuals’ homes); see also Williams, Rosen & O’Malley, *supra* note 2, at 12 (recounting how nursing home resident received care at home prior to stay in nursing home).

33. See Barnes, *supra* note 7, at 266 (“The basic federal rules of the program require the states to cover institutional care, such as long-term care nursing home services for a restricted group of eligible people.”); see also Stephen A. Moses, *The Brave New World of Long-Term Care*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 561, 562 (2007) (describing federal government’s involvement in paying for long-term care through Medicaid).

34. See Levinson, *supra* note 7, at 225 (noting Medicaid’s status as jointly run).

35. See *id.* (“The federal government provides general guidelines for the states to follow, but actual requirements vary from state to state.” (citing U.S. DEP’T OF HEALTH & HUMAN SERVS. ET AL., MEDICAID AT-A-GLANCE 2005: A MEDICAID INFORMATION SOURCE 1, <http://www.cms.hhs.gov/MedicaidGenInfo/Downloads/MedicaidAtAGlance2005.pdf> [<https://perma.cc/B2UW-JHYP>])); see also Reif, *supra* note 10, at 344 (“The federal government shares the cost of the Medicaid program with the states, who must ensure their programs comply with federal Medicaid requirements and regulations.” (footnote omitted) (citing 42 U.S.C.A. § 1396a (West 2009); *Atkins v. Rivera*, 477 U.S. 154, 157 (1986))).

36. See *Zahner v. Sec’y Pa. Dep’t of Human Servs.*, 802 F.3d 497, 512 (3d Cir. 2015) (citing 42 U.S.C. § 1396a(a)(10)(C)(i)(III) (2012)) (stating “states may not create more restrictive requirements”); see also *Geston v. Anderson*, 729 F.3d 1077, 1085–86 (8th Cir. 2013) (“If the State’s public policy requires it to count as resources certain annuities that federal law excludes from the scope of resources that may be considered in making eligibility determinations, then the State’s methodology is more restrictive than the federal methodology.” (citing 42 U.S.C. §§ 1396a(a)(10)(C)(i), (r)(2)(B)) (2012))).

37. See *Zahner*, 802 F.3d at 501 (noting states receive guidance from federal government); see also generally CTRS. FOR MEDICARE AND MEDICAID SERVS., *The State Medicaid Manual*, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=ascending> [<https://perma.cc/Q3ZS-T2GB>] (last visited Oct. 18, 2016) [hereinafter *State Medicaid Manual*].

To qualify for Medicaid, individuals and, if married, their spouses, must meet certain income and resource thresholds.³⁸ Individuals may be “categorically needy” or “medically needy.”³⁹ “Categorically needy persons [are] defined as those with incomes low enough to qualify them for government income assistance . . . [while] [m]edically needy people [are those] who would be eligible for Medicaid but for the fact that their income or property exceeds financial guidelines.”⁴⁰ For the medically needy, health care costs are counted against their excess income.⁴¹

In Pennsylvania, individuals must meet both “financial and non-financial eligibility requirements.”⁴² The Pennsylvania Department of Human Services (DHS), the agency responsible for running Pennsylvania’s Medicaid program, asks whether an individual (1) is “a U.S. citizen or a qualified non-citizen” and “a resident of Pennsylvania,” (2) “ha[s] a Social Security number,” and (3) is “medically need[y].”⁴³

38. See Levinson, *supra* note 7, at 225–28 (discussing Medicaid requirements); see also Barnes, *supra* note 7, at 266 (“[T]he general policy of the United States continues to be: Government funds will not be expended for long-term care costs for those who do not meet poverty eligibility limits.”).

39. See Barnes, *supra* note 7, at 270 (establishing two types of need requirements); see also Spero, *Asset Protection: Legal Planning, Strategies, and Forms* ¶ 14.03 (2d ed. Westlaw 2016) (“Two categories of individuals generally are eligible to receive Medicaid: the categorically needy and the medically needy.”).

40. See 42 U.S.C. § 1396a(a)(10)(A) (describing who qualifies for Medicaid because of their financial situations); Barnes, *supra* note 7, at 270 (footnotes omitted) (explaining who is categorically eligible for Medicaid); see also 1 Joan M. Krauskopf, et al., *ELDERLAW ADVOC. AGING* § 11.14 (2d ed. Westlaw 2015) (database updated Nov. 2015) (“The medically needy are those individuals whose income exceeds the levels allowed for the cash assistance programs (SSI or AFDC), but is insufficient to meet the cost of necessary medical services.”); Spero, *supra* note 39, at 1 (defining “categorically needy” and “medically needy”).

41. See Barnes, *supra* note 7, at 270 (explaining that eligibility results from “incurring health and long-term care costs”); see also Krauskopf, *supra* note 40 (discussing how “individuals are allowed to ‘spend-down’ their excess income to the level at which they qualify for Medicaid benefits”).

42. See *Medical Assistance and Payment of Long Term Care Services*, PA. DEP’T OF HUMAN SERVS., <http://www.dhs.pa.gov/citizens/longtermcareservices/medicalassistanceandpaymentoflongtermcareservices/#.Vp1UIK88KK0> [<https://perma.cc/QTQ9-TPYM>] (last visited Oct. 8, 2016) [hereinafter *Long-Term Care Requirements*] (listing Medicaid requirements for Pennsylvania residents). The Pennsylvania Department of Human Services (DHS) publishes Medicaid eligibility requirements in their *Long-Term Care Handbook*. See generally PA. DEP’T OF HUMAN SERVS., *Long-Term Care Handbook*, available at http://services.dpw.state.pa.us/oimpolicymanuals/ltc/Long-Term_Care_Handbook.htm [<https://perma.cc/2Z79-E38V>] [hereinafter *Long-Term Care Handbook*].

43. See *Long-Term Care Requirements*, *supra* note 42 (listing non-financial eligibility requirements). To be considered medically needy, an individual must have a doctor “complete a form telling [DHS] of the medical need.” See *id.* (detailing medically-needy requirement). The DHS will then review the individual’s need to determine eligibility for long-term care. See *id.* (describing DHS’s process for determining medical need).

Pennsylvania's financial eligibility requirements focus on an individual's income and other resources.⁴⁴ Income can be calculated from various sources, such as Social Security or "withdrawals" from an Individual Retirement Account (IRA).⁴⁵ An individual's income cannot exceed "300% of the Federal Benefit Rate," which is currently \$733.00 per month.⁴⁶ If a medically-needy individual's income exceeds the income limit, he or she can still qualify for assistance by deducting the cost of long-term care "to reduce [his or her] monthly income."⁴⁷ Aside from a government-specified monthly personal allowance, all of an individual's income must go toward paying for nursing home care, with Medicaid picking up the residual cost.⁴⁸

Pennsylvania also considers an individual's other resources to determine Medicaid eligibility, including "[b]ank accounts[,] [s]tocks," and "IRA [] accounts."⁴⁹ Individuals with income below 300% of the Federal Benefit Rate cannot have more than \$2,000 in resources.⁵⁰ For those with income above 300% of the Federal Benefit Rate, the resource limit is \$2,400.⁵¹ Additionally, Pennsylvania has special rules for married individuals seeking Medicaid assistance in order to avoid impoverishing the "community spouse"—the spouse not seeking nursing home care and thereby remaining in the community.⁵²

44. *See id.* (listing Pennsylvania's financial eligibility factors).

45. *See id.* (listing what DHS considers income for determining Medicaid eligibility). Pennsylvania also considers "[p]ensions[,] [i]nterest and dividends from savings and investments," and "[r]ental [i]ncome." *See id.*

46. *See id.* (declaring Pennsylvania's income limit). For 2016, the Federal Benefit Rate is \$733 per month, meaning individuals in Pennsylvania can have an income as high as \$2,199 per month to be considered financially eligible for Medicaid. *See SSI Federal Payment Amounts for 2016*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/CB6B-63RB>] (last visited Oct. 8, 2016) (stating Federal Benefit Rate for 2016).

47. *See Long-Term Care Requirements*, *supra* note 42 (detailing income requirements for medically needy).

48. *See Reif*, *supra* note 10, at 345 (discussing senior citizen's contribution to nursing home costs).

49. *See Long-Term Care Requirements*, *supra* note 42 (listing what Pennsylvania considers resources). Pennsylvania also counts "bonds and mutual funds," "Keogh accounts," "non-resident[ial] property," and the "cash value of life insurance [policies]" that exceed \$1,500. *See id.* An individual's home does not count as a resource if it is "less than or equal to \$525,000." *See id.* (stating exclusion of home as resource if valued at \$525,000 or less). For a home to be excluded, Pennsylvania also requires that the individual plans "to return to the home or [is] residing in the home," or that the individual's "spouse or dependent resides in the home." *See id.* Additionally, an individual's motor vehicle, burial space, and burial funds are also excluded. *See id.* (listing what is not counted as resource).

50. *See id.* (stating resource limit).

51. *See id.* (stating resource limit).

52. *See id.* (stating requirements for married persons seeking long-term assistance). In Pennsylvania, there is no limit on community spouses' income because they are "not required to pay for the institutionalized spouse's long term care services." *See id.* (reciting income rule for community spouses). Additionally, the state considers the spouse using long-term care and the community spouse's re-

2. Medicaid Planning

For individuals whose financial situation does not automatically qualify them for Medicaid, becoming eligible requires planning and depleting resources.⁵³ To become eligible, individuals can take multiple steps.⁵⁴ They can spend all of their resources, whether on home improvements or a luxury vehicle.⁵⁵ If individuals do not want to spend all of their resources, they can also transfer them away by undertaking Medicaid planning.⁵⁶

Medicaid planning is a skill, which is why individuals often seek the help of attorneys.⁵⁷ Although individuals can transfer resources away, through either gifts or financial instruments, the government imposes lim-

resources together. *See id.* (discussing resource limit for married individuals). Pennsylvania also allows the community spouse to keep one-half of the couple's resources, so long as the amount does not exceed that maximum amount set by the state. *See id.* (discussing resource limit for married individuals). Pennsylvania allowed community spouses to keep up to \$119,200 in resources in 2016. *See Long-Term Care Handbook, supra* note 42, at ch. 440, app. A (listing Pennsylvania's allowance for community spouses); *see also 2016 SSI and Spousal Impoverishment Standards, MEDICAID*, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/downloads/2016-ssi-and-spousal-impoverishment-standards.pdf> [<https://perma.cc/3FN9-6MFY>] (listing federal spousal impoverishment limits for 2016).

53. *See, e.g., Barnes, supra* note 7, at 267 (describing Medicaid planning); Levinson, *supra* note 7, at 227 (“[S]ome people are employing attorneys to help them plan ahead and transfer their assets properly so that they can qualify for Medicaid benefits without losing their life savings. Many techniques exist for people to protect their assets and still receive Medicaid benefits.” (footnotes omitted)); Waidmann & Liu, *supra* note 9, at 1 (implying that individuals “find ways to shelter any assets” to qualify for Medicaid).

54. *See Higgins, supra* note 13 (explaining “[h]ow to [i]mpoverish [y]ourself”); *see also Barnes, supra* note 7, at 283–89 (discussing ways individuals can transfer assets); Reif, *supra* note 10, at 340–42 (providing examples of how individuals may shed resources).

55. *See Higgins, supra* note 13 (“[T]he strategy is to spend on assets that generally aren’t counted . . . in determining eligibility. So people buy a new car. They pay down their home mortgage or they remodel their home.”); *see also Barnes, supra* note 7, at 288 (commenting that people will spend money to “acquire or improve an exempt asset”); Reif, *supra* note 10, at 341 (hypothesizing about senior citizen who purchased luxury vehicle and renovated kitchen to become eligible for Medicaid).

56. *See Barnes, supra* note 7, at 292–93 (describing use of annuities in Medicaid planning); Levinson, *supra* note 7, at 228 (“While there are many Medicaid planning techniques available, one of the most common asset-protection techniques is purchasing certain types of annuities to convert otherwise countable resources into income.” (internal quotation marks omitted) (citing Higgins, *supra* note 13, at D2)).

57. *See Barnes, supra* note 7, at 267 (stating how Medicaid planning is subset of elder law practice); *see also* Jeffrey Marshall, *Three Ways to Protect Your Assets from Nursing Home Costs*, MARSHALL, PARKER & WEBER, LLC (July 17, 2013), <http://www.paelderlaw.com/three-ways-to-protect-your-assets-from-nursing-home-costs/> [<https://perma.cc/4KRP-YWVX>] (explaining how elder law attorney can help with Medicaid planning).

its on how much individuals can transfer without facing penalties.⁵⁸ In Pennsylvania, the DHS reviews all assets transferred within the *look-back period*, the sixty months prior to an individual qualifying for Medicaid.⁵⁹ If a transaction is found to be less than fair market value (FMV), the DHS will levy a penalty on the individual.⁶⁰ To determine the penalty, the DHS divides the asset's uncompensated value (FMV minus the amount received) by the "average daily [cost] for [long-term] care services."⁶¹ The DHS then imposes the penalty on an individual's first day of eligibility and "will not pay for long-term care services [during the penalty period]."⁶²

B. *Past Treatment: Congress Tries to Limit Medicaid Eligibility with the Deficit Reduction Act of 2005*

Congress passed the DRA in 2005.⁶³ Aimed at closing "loopholes" in the Medicaid statute, the DRA had a significant impact on Medicaid planning.⁶⁴ First, the DRA instituted fractional periods of ineligibility for indi-

58. See Barnes, *supra* note 7, at 284 (discussing ineligibility when transfers are "less than fair market value"); see also 42 U.S.C. § 1396p(c) (2012) (outlining which transfers of assets affect eligibility and which transfers do not); Marcus, *supra* note 15, at 24–26 (explaining exceptions to Medicaid's rules on transfers of assets); Levinson, *supra* note 7, at 227 (summarizing Medicaid penalty rules).

59. See *Long-Term Care Requirements*, *supra* note 42 (requiring look-back period for asset transfers); see also Barnes, *supra* note 7, at 284–85 (discussing look-back period); Bleck, Isenhour & Miller, *supra* note 27, at 170 (discussing imposition of penalty as result of transfers made during look-back period); Levinson, *supra* note 7, at 227–28 (discussing look back-period and penalties created by DRA). As of 2005, a look back period of sixty months is required. See Levinson, *supra* note 7, at 228 (noting DRA increased look-back period to five years). Gifts made before the look-back period are not subject to penalty. See Bleck, Isenhour & Miller, *supra* note 27, at 172 (explaining how gifts made before look back period are not penalized); Levinson, *supra* note 7, at 228 (stating penalty period will apply to transfers made within look-back period).

60. See *Long-Term Care Requirements*, *supra* note 42 ("If FMV is not received, a period of ineligibility, known as a penalty period, is established."); see also Levinson, *supra* note 7, at 227 (noting imposition of penalties for transfers of resources "at less than fair market value").

61. See *Long-Term Care Requirements*, *supra* note 42 (reciting calculation of penalty period); see also Levinson, *supra* note 7, at 227 (discussing how penalty is determined).

62. See *Long-Term Care Requirements*, *supra* note 42 (announcing imposition of penalty on individual).

63. See generally Deficit Reduction Act of 2005, Pub. L. No. 109-71, 120 Stat. 4; see also Moses, *supra* note 33, at 565 (referencing passage of DRA); Nichols, *supra* note 30, at 46 (referencing DRA); Reif, *supra* note 10, at 347 (examining passage of DRA).

64. See Nichols, *supra* note 30, at 46 ("The DRA aims to reduce government spending by cutting federal funding of the Medicaid program and tighten Medicaid's long-term care eligibility requirements."). When President George W. Bush signed the DRA into law, he mentioned how the bill was a reaction to people abusing Medicaid. See Reif, *supra* note 10, at 347 ("The bill tightens the loopholes that allowed people to game the system by transferring assets to their children so they can qualify for Medicaid benefits." (quoting President George W. Bush, Remarks on Signing the Deficit Reduction Act of 2005 (Feb. 8, 2006), available at

viduals who made small transfers of assets.⁶⁵ Under the DRA, each small transfer is combined to create a larger, cumulative penalty.⁶⁶ It also expanded the look-back period from “three years to five years,” making the timing of asset transfers even more important.⁶⁷ Transfers made during the look-back period for less than FMV are assessed for a penalty.⁶⁸ In addition, the DRA changed the time at which a penalty period begins, “mak[ing] it harder for a Medicaid applicant to transfer assets and qualify for Medicaid.”⁶⁹ Rather than running the penalty clock as soon as a transfer is made, the penalty period begins when an individual, after depleting all of his or her assets first, applies for Medicaid.⁷⁰ Therefore, individuals may find themselves unable to pay for care during a penalty period.⁷¹

Regarding resources, homes remain an exempt asset in determining Medicaid eligibility, but the exemption is not limitless.⁷² Individuals with “homes with more than \$500,000 . . . in equity” cannot receive Medicaid benefits, but “[s]tates can elect to increase that amount up to \$750,000.”⁷³

<http://www.presidency.ucsb.edu/ws/?pid=65171> [<https://perma.cc/PN2Y-RN7H>]).

65. See Nichols, *supra* note 30, at 47 (stating states “must [] apply partial months of ineligibility”); Reif, *supra* note 10, at 357–58 (describing “fractional” penalty periods).

66. See 42 U.S.C. §§ 1396p(c)(1)(E)(i)–(iv) (2012); see also Nichols, *supra* note 30, at 47 (explaining how fractional penalty periods are applied); Reif, *supra* note 10, at 358 (illustrating how penalty periods are combined into single period).

67. See Nichols, *supra* note 30, at 47 (discussing extension of look-back period under DRA).

68. See *id.* at 47 (“Medicaid reviews any asset transfers at less than fair market value (divesting assets, giving cash gifts or transferring mortgage titles to family) prior to application for Medicaid benefits in order to determine eligibility.”); see also Reif, *supra* note 10, at 355 (discussing how penalty period is determined). For discussion of how Pennsylvania uses the look-back period and determines the penalty period, see *supra* notes 59–62 and accompanying text.

69. See Reif, *supra* note 10, at 352 (citing Jason Frank, *The Case for Asset Protection*, 205 ELDER L. ADVISORY 1, 3–4 (2008)) (discussing impact of new start date for penalty periods); see also Nichols, *supra* note 30, at 47 (discussing new start date of penalty).

70. See Reif, *supra* note 10, at 352 (examining change in imposition of penalty period); see also Nichols, *supra* note 30, at 47 (noting when penalty period begins for Medicaid applicants); Carlson, *supra* 15, at 1308 (“Formerly, the penalty period began to run when the transfer was made, but the new provisions dictate that the penalty period in most cases will not begin until the individual would otherwise be eligible for Medicaid.” (footnote omitted) (citing 42 U.S.C. § 1396p(c)(1)(D))).

71. See Nichols, *supra* note 30, at 47 (stating new look-back period “may cause individuals to be in a penalty period without benefits or money to pay for their care”); see also Carlson, *supra* note 15, at 1311 (noting how individuals who cannot pay for their long-term care “may face eviction”); *Medicaid Planning Guide*, *supra* note 12 (discussing how individuals must be wary of gifting assets during look-back period).

72. See Nichols, *supra* note 30, at 47 (discussing limit on protection of home equity); see also Levinson, *supra* note 7, at 225 (noting how individual’s house does not count when determining Medicaid eligibility).

73. Nichols, *supra* note 30, at 47 (discussing home equity limit); *Transfers of Assets in Medicaid Program*, CTRS. FOR MEDICARE AND MEDICAID SERVS. (Jan. 8, 2008),

The DRA also limited the use of annuities in Medicaid planning, allowing only qualified annuities to receive protection under a safe harbor provision.⁷⁴

C. *Reason for Appointment: The Use of Annuities in Medicaid Planning*

Although individuals have various options when it comes to planning, annuities are a popular tool used by practitioners and their clients.⁷⁵ Annuities rose in popularity after Congress “curtailed the use of trusts in Medicaid planning.”⁷⁶ When individuals purchase annuities, they “pay[] a sum of money in exchange for a promise that payments will be made to [them] on an agreed upon schedule and rate.”⁷⁷

In order for individuals to use annuities in Medicaid planning, they must be DRA-compliant.⁷⁸ For an annuity to be exempt from counting as

<https://www.cms.gov/regulations-and-guidance/legislation/deficitreductionact/downloads/toabackgrounder.pdf> [<https://perma.cc/T7ZZ-UXRR>] [hereinafter *CMS Transfer of Assets*] (discussing DRA exception for homes). In Pennsylvania, the limit is \$525,000. See *Long-Term Care Requirements*, *supra* note 42 (declaring home equity limit for Pennsylvania applicants).

74. See Nichols, *supra* note 30, at 47 (“Prior to the DRA, individuals were able to ‘protect assets’ via commercial annuities.”).

75. See Barnes, *supra* note 7, at 292 (asserting “sale[s] of annuities [have] increased” since trusts became harder to use in Medicaid planning); see also Marshall, *supra* note 57 (illustrating how annuities are used in planning).

76. See Barnes, *supra* note 7, at 285–86, 292 (citing John M. Broderick, Note, *To Transfer or Not to Transfer: Congress Failed to Stiffen Penalties for Medicaid Estate Planning, but Should the Practice Continue?*, 6 *ELDER L.J.* 257, 265 (1998)) (comparing congressional action against use of trusts and rise in popularity of annuities). *Black’s Law Dictionary* defines “trust” as the following:

1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). For a trust to be valid, it must involve specific property, reflect the settlor’s intent, and be created for a lawful purpose
2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another’s benefit; the confidence placed in a trustee, together with the trustee’s obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it.

BLACK’S LAW DICTIONARY 1740 (10th ed. 2014). Congress first restricted the use of trusts with respect to Medicaid planning in 1985 with the Consolidated Omnibus Budget Reconciliation Act (COBRA). See Barnes, *supra* note 7, at 285 (summarizing changes in trust policy). Previously, assets held in a trust did not impact an individual’s Medicaid eligibility. See *id.* (considering use of trusts in Medicaid planning prior to 1985). In 1993, Congress further restricted the use of trusts by exempting only “irrevocable trust[s] from which the applicant cannot benefit” from counting as an available resource for purposes of Medicaid eligibility. See *id.* (citing 42 U.S.C. § 1396p(d)(3)(A)-(B) (2012)) (reporting 1993 changes to using trusts in Medicaid planning).

77. See Barnes, *supra* note 7, at 292 (defining annuity). See *supra* note 19 for the Supreme Court’s definition of annuities.

78. See 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (outlining requirements for annuities); see also *Zahner v. Sec’y Pa. Dep’t of Human Servs.*, 802 F.3d 497, 501 (3d

a resource, it must: (1) be “irrevocable and non-assignable,” (2) be “actuarially sound,” (3) name the state as the “remainder beneficiary,” and (4) be dispersed in equal payments.⁷⁹ Transmittal 64 of the *State Medicaid Manual* provides guidance regarding annuities, noting that annuities are considered actuarially sound when “the expected return on the annuity is commensurate with a reasonable estimate for the life expectancy of the beneficiary.”⁸⁰ Annuities are not protected under the DRA’s safe harbor provision if they are “trust-like.”⁸¹

Annuities can be particularly “useful for married couples” seeking Medicaid assistance for the spouse using long-term care services.⁸² Because the community spouse’s income has no effect on the other spouse’s eligibility, the community spouse can purchase an annuity using the couple’s “excess funds.”⁸³ The annuity payments then count as the community spouse’s income.⁸⁴

Some individuals may also use annuities to take part in “half-a-loaf planning.”⁸⁵ In half-a-loaf planning, individuals gift half of their assets and “us[e] the remaining one-half to purchase a DRA compliant annuity.”⁸⁶ Individuals can then use the annuity payments “to pay for . . . nursing home care” during the penalty period caused by the gifts.⁸⁷

Cir. 2015) (“The DRA establishes a four-part test for determining whether an annuity is included within the safe harbor and thus not counted as a resource.”).

79. See 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (outlining requirements for annuities); see also *Zahner*, 802 F.3d at 501 (3d Cir. 2015) (acknowledging DRA requirements).

80. See Jeffrey A. Marshall & Matthew J. Parker, *A Guide to Medicaid Annuities for Pennsylvania Lawyers*, PAANNUITY.COM 5, http://www.paannuity.com/pdf/guide_to_dra_annuities.pdf [https://perma.cc/CY2W-6XSC] (last updated Nov. 19, 2009) (quoting *State Medicaid Manual*, *supra* note 37, pt. III, § 3258.9B); see generally *State Medicaid Manual* §§ 3257–59, LAW OFFICES OF JOHN W. CALLINAN, www.eldercarelawyer.com/docs/transmittal64.docx [https://perma.cc/SM8R-Y87E] (last visited Oct. 25, 2016) [hereinafter Transmittal 64] (discussing use of annuities and trusts in regards to qualifying for Medicaid).

81. See *Zahner*, 802 F.3d at 510 (noting how Transmittal 64 disallows trust-like “annuit[ies] from protection in the [DRA’s] safe harbor”); see also Transmittal 64, *supra* note 80, at § 3258.9B (“[T]he term ‘trust’ includes an annuity to the extent and in such manner as the Secretary specifies.”).

82. See Marshall & Parker, *supra* note 80, at 10–11 (discussing planning options for married couples).

83. See Marshall, *supra* note 57 (presenting how community spouse can purchase annuity); see also Marshall & Parker, *supra* note 80, at 10 (“The purchase of a DRA annuity by a community spouse does [not] trigger a transfer penalty.”).

84. See Marshall, *supra* note 57 (presenting purchase of annuity by community spouse).

85. See Jerold E. Rothkoff, *The Zahner Decision—Court Approves Use of Medicaid Compliant Annuities*, ROTHKOFF L. GRP. (Oct. 18, 2015), <http://rothkofflaw.com/the-zahner-decision-court-approves-use-of-medicaid-compliant-annuities/> [https://perma.cc/ZQ3G-234U] (discussing “use of annuities” to engage in half-a-loaf planning); see also Barnes, *supra* note 7, at 286–87 (explaining half-a-loaf planning).

86. See Rothkoff, *supra* note 85 (describing half-a-loaf planning technique).

87. See *id.* (explaining annuities are used in half-a-loaf planning).

Like Medicaid planning in general, states, including Pennsylvania, disfavor the use of annuities to prevent assets from factoring into an individual's eligibility for Medicaid.⁸⁸ The Third Circuit, along with other circuits, has found that annuities are protected and thus exempt under the DRA so long as they meet the applicable statutory requirements.⁸⁹ Further, although the Third Circuit has acknowledged loopholes in the Medicaid statute, the court has refused to bar the use of annuities in Medicaid planning, stating that Congress would have to make any changes to the law.⁹⁰ The Third Circuit's position concerning whether to close Medicaid loopholes judicially is similar to that of the Eighth and Tenth Circuits, the only other circuit courts to consider the issue, which have also stated that Congress is responsible for closing loopholes regarding annuities in the Medicaid statute.⁹¹

III. THE EXAMINATION: THE THIRD CIRCUIT ACCEPTS THE USE OF SHORT-TERM ANNUITIES IN *ZAHNER*

In *Zahner*, the Third Circuit examined the use of annuities to prevent assets from factoring into Medicaid eligibility determinations.⁹² The court

88. See *Marshall & Parker*, *supra* note 80, at 10 (explaining DHS's plan "to treat community spouse annuities . . . as a resource"); *Rothkoff*, *supra* note 85 (noting DHS argued that half-a-loaf annuities were not DRA-compliant in *Zahner*).

89. See *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497, 509 (3d Cir. 2015) (stating "annuities are not barred from the safe harbor"); *Weatherbee ex rel. Vecchio v. Richman*, 351 F. App'x 786, 788 (3d Cir. 2009) (affirming district court's decision that state "improperly denied eligibility for Medicaid benefits" after factoring community spouse's annuity into eligibility decision); *James v. Richman*, 547 F.3d 214, 219 (3d Cir. 2008) ("We simply cannot allow a denial of eligibility if there is no statutory justification for that denial."); see also *Geston v. Anderson*, 729 F.3d 1077, 1085 (8th Cir. 2013) (holding that community spouse's "annuity [is] an uncountable stream of unearned income" and cannot be considered as resource in determining institutionalized spouse's Medicaid eligibility); *Lopes v. Dep't of Soc. Servs.*, 696 F.3d 180, 188 (2d Cir. 2012) ("We therefore hold that the payment stream from a non-assignable annuity is not a resource for purposes of determining Medicaid eligibility."); *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925, 932–34 (10th Cir. 2012) (stating Congress has not closed loophole allowing for asset protection using annuities that may provide income to spouse).

90. See *Zahner*, 802 F.3d at 509 ("Although we are sympathetic to the concerns the dissent and DHS outline, Congress must resolve them."); *James*, 547 F.3d at 219 ("[W]e do not create rules based on our own sense of the ultimate purpose of the law being interpreted, but rather seek to implement the purpose of Congress as expressed in the text of the statutes it passed." (citing *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2011))).

91. See *Geston*, 729 F.3d at 1086 ("We see no warrant, however, to implement any of these measures through judicial decision under the current law and believe that the suggestions must be directed to the policymaking branches."); *Morris*, 685 F.3d at 928 ("Although we understand the district court's concerns regarding the exploitation of what can only be described as a loophole in the Medicaid statutes, we conclude that the problem can only be addressed by Congress.").

92. See *Zahner*, 802 F.3d at 499 (noting district court's holding and subsequent appeal).

determined that Pennsylvania could not bar the use of annuities and established that the short length of an annuity's term does not matter, approving the use of short-term annuities in Medicaid planning.⁹³

A. *Taking Height and Weight: Background Facts and Procedure of Zahner*

Plaintiffs Donna Claypoole and Connie Sanner both took part in Medicaid planning to help pay for their long-term care.⁹⁴ In 2010, Mrs. Claypoole entered a nursing home while her husband “remained in their [shared] home.”⁹⁵ Over a two-year span, the Claypooles made various gifts to their family members, which “total[ed] over \$100,000” and “result[ed] a period of Medicaid ineligibility” for Mrs. Claypoole.⁹⁶

The Claypooles purchased two annuities, as well.⁹⁷ Mrs. Claypoole bought an annuity from ELCO Mutual Life & Annuity (ELCO) for “\$84,874.08 in return for monthly payments of \$6,100.22 for [fourteen] months.”⁹⁸ She purchased the annuity “to pay for [her] nursing home care” while she was ineligible for Medicaid due to her previous asset transfers.⁹⁹ Her husband also purchased an annuity “for which he paid Met-Life \$45,000.00 in return for monthly payments of \$760.20 for five years.”¹⁰⁰ Further, “both [annuity] contracts contained anti-assignment provisions.”¹⁰¹

93. For further discussion on the Third Circuit's analysis in *Zahner*, see *infra* notes 120–55 and accompanying text.

94. See *Zahner*, 802 F.3d at 499–500 (summarizing plaintiffs' need for long-term care). When the U.S. District Court for the Western District of Pennsylvania first heard the case, it discussed a third plaintiff, Anabel Zahner. See *Zahner ex rel. Zahner v. Mackereth (Zahner I)*, Civil No. 11-306 Erie, 2014 WL 198526, at *2–3 (W.D. Pa. Jan. 16, 2014) (referring to Anabel Zahner), *aff'd in part, rev'd in part sub nom. Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497 (3d Cir. 2015). The Third Circuit, however, did not discuss Ms. Zahner, aside from mentioning her in the first sentence of the opinion and the accompanying footnote. See *Zahner*, 802 F.3d at 499 (“Anabel Zahner, Donna Claypoole, and Connie Sanner each applied for Medicaid institutional care coverage shortly after purchasing a short-term annuity.”). Because Ms. Zahner died, the Third Circuit found “her claim [to be] moot and she [was] no longer a party[]” to the suit. See *id.* at 499 n.1 (discussing Anabel Zahner's role in case).

95. See *Zahner*, 802 F.3d at 499 (discussing Claypoole's entry into nursing home). Because Mrs. Claypoole's husband remained in the home they shared, he is known as a community spouse. See *id.* (acknowledging Mr. Claypoole's status as community spouse).

96. See *Zahner*, 802 F.3d at 499 (explaining effect of gifts on Mrs. Claypoole's eligibility for Medicaid).

97. See *id.* (identifying Claypooles' purchase of annuities).

98. See *id.* (providing details of Mrs. Claypoole's annuity).

99. See *id.* (explaining Mrs. Claypoole's reasoning for purchasing ELCO annuity and planned use of monthly payments).

100. See *id.* (detailing Mr. Claypoole's annuity).

101. See *id.* (discussing specific provisions in annuities contracts).

Like Ms. Claypoole, Connie Sanner also “entered a nursing home.”¹⁰² She purchased an annuity from ELCO for \$53,700.00 shortly after entering the nursing home.¹⁰³ Ms. Sanner then received monthly payments of \$4,499.17 for a year.¹⁰⁴ Like Ms. Claypoole, Ms. Sanner purchased an annuity to pay for her care during “a period of Medicaid ineligibility.”¹⁰⁵ Because Ms. Sanner had previously made “large financial gift[s]” to her family, she was penalized and deemed ineligible for a certain time period.¹⁰⁶

In calculating both Mrs. Claypoole’s and Ms. Sanner’s eligibility for Medicaid, the DHS viewed the various annuities as available resources for each of them.¹⁰⁷ Because DHS included the annuities, both plaintiffs received new penalty periods, which extended their period of Medicaid ineligibility.¹⁰⁸ Mrs. Claypoole and Ms. Sanner filed suit against DHS, “arguing that DHS acted illegally by counting the amount of their respective annuities as an available resource for purpose of Medicaid eligibility.”¹⁰⁹

The district court consolidated Mrs. Claypoole’s and Ms. Sanner’s suits against DHS.¹¹⁰ Both parties subsequently moved for summary judgment.¹¹¹ “[T]he [d]istrict [c]ourt partially granted each party’s motion” for summary judgment.¹¹² The trial court determined that “the plaintiffs’ . . . annuities were sham transactions intended only to shield resources from the calculation of Medicaid eligibility.”¹¹³ The court further

102. *See id.* at 500 (reporting Ms. Sanner was admitted to nursing home in 2011). Unlike Mrs. Claypool, Ms. Sanner did not have a community spouse. *See id.* (noting Ms. Sanner “entered a nursing home . . . without a community spouse”).

103. *See id.* (listing Ms. Sanner’s purchase of annuity from ELCO).

104. *See id.* (examining details of Ms. Sanner’s annuity).

105. *See id.* (stating Ms. Sanner’s purpose in purchasing annuity from ELCO).

106. *See id.* (describing Ms. Sanner’s monetary gifts to children). Ms. Sanner “transferred \$92,000 to her two children for no consideration.” *See Zahner ex rel. Zahner v. Mackereth (Zahner I)*, Civil No. 11-306 Erie, 2014 WL 198526, at *4 (W.D. Pa. Jan. 16, 2014) (noting amount transferred to children and subsequent penalty), *aff’d in part, rev’d in part sub nom. Zahner v. Sec’y Pa. Dep’t of Human Servs.*, 802 F.3d 497 (3d Cir. 2015).

107. *See Zahner*, 802 F.3d at 499–500 (discussing how DHS categorized plaintiffs’ annuities in determining plaintiffs’ Medicaid eligibility).

108. *See id.* (recounting how plaintiffs were penalized for purchase of annuities).

109. *See id.* at 500 (internal quotation marks omitted) (detailing actions brought against DHS pursuant to 42 U.S.C. § 1983 (2012)).

110. *See id.* (noting consolidation of plaintiffs’ suits).

111. *See id.* (noting “cross motions for summary judgment”).

112. *See id.* (summarizing district court’s rulings on cross motions).

113. *See id.* (citing *Zahner ex rel. Zahner v. Mackereth*, Civil No. 11–306 Erie, 2014 WL 198526, at *12–13 (W.D. Pa. Jan. 16, 2014) (agreeing with Pennsylvania Department of Public Welfare that annuities at issue in *Zahner I* were “sham products”), *aff’d in part, rev’d in part sub nom. Zahner v. Sec’y Pa. Dep’t of Human Servs.*, 802 F.3d 497 (3d Cir. 2015)).

considered the annuities to be “trust-like,” giving DHS the ability to count them as available resources.¹¹⁴

The district court also discussed Pennsylvania’s assignment statute.¹¹⁵ Pennsylvania law made “all annuities assignable,” allowing DHS to count annuities as available resources, even those held by community spouses.¹¹⁶ Because certain annuities are exempt under the DRA, the district court found that the Pennsylvania statute “was preempted by the federal Medicaid law.”¹¹⁷ Therefore, the district court “held that the nonassignability clause in [Mr. Claypoole’s], annuity” prevented DHS from counting his annuity as an available resource, as it conformed to the DRA’s safe harbor provision.¹¹⁸ The parties cross-appealed to the Third Circuit.¹¹⁹

B. *Diagnosis and Treatment: Short-Term Annuities Are a Viable Planning Tool in the Third Circuit*

The *Zahner* court determined that short-term annuities could qualify for the DRA’s safe harbor provision, making them a feasible planning option for those looking to qualify for Medicaid.¹²⁰ First, the Third Circuit evaluated whether the plaintiffs’ annuities should be counted as resources in determining the plaintiffs’ Medicaid eligibility.¹²¹ Second, the Third Circuit examined whether the plaintiffs’ annuities could be considered trust-like.¹²² Finally, the Third Circuit undertook a discussion of whether federal law preempted the Pennsylvania law that made all annuities assignable.¹²³

114. *See id.* (citing *Zahner I*, 2014 WL 198526, at *14) (discussing district court’s view of plaintiffs’ annuities as “trust-like”).

115. *See id.* (providing district court’s determination that federal Medicaid law preempted Pennsylvania’s assignment statute); *see also generally* 62 PA. STAT. ANN. § 441.6(b) (West 2016) (making all annuities assignable).

116. *See id.* at 511 (discussing Pennsylvania’s assignment statute).

117. *See id.* at 500 (acknowledging conflict between federal law and Pennsylvania law).

118. *See id.* (explaining district court’s holding regarding Mr. Claypoole’s annuity).

119. *See id.* (noting appeals filed by parties).

120. *See id.* at 509 (holding that short-term annuities can be protected under DRA’s safe harbor provision).

121. *See id.* at 500–09 (examining whether plaintiffs’ annuities are available resources).

122. *See id.* at 510–11 (analyzing whether plaintiffs’ annuities are trust-like).

123. *See id.* at 511–15 (considering whether federal law preempts Pennsylvania law).

1. *Annuities Do Not Always Count As Resources in Determining Medicaid Eligibility*

The Third Circuit first analyzed whether the annuities fell under the DRA's safe harbor provision.¹²⁴ For the plaintiffs' annuities to be protected, the court acknowledged "the annuit[ies] [had to] (1) name the State as the remainder beneficiary, (2) be irrevocable and nonassignable, (3) be actuarially sound, and (4) provide for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments."¹²⁵

First, DHS argued that the plaintiffs' contracts could not be considered annuities because they cost more than what the plaintiffs' eventually received, asserting the contracts were "not investment products" and, therefore, were not annuities.¹²⁶ The Third Circuit disagreed.¹²⁷ Relying on the Supreme Court's definition of "annuity," the Third Circuit stated that "[i]t is not disputed that each of the annuities here is a transfer of a sum of money in exchange for a series of payments, continuing for a fixed period."¹²⁸ Further, the court found that annuities are not required to "provide a certain rate of return."¹²⁹

The Third Circuit then tackled DHS's argument that the "relatively short terms of [the plaintiffs'] contracts disqualif[ied] them from being annuities" within the scope of the DRA.¹³⁰ DHS argued for the Third Circuit to require all annuities to have a term of at least two years in order to fall under the safe harbor provision.¹³¹ DHS feared that any annuity

124. *See id.* at 501 ("We must determine if the disputed annuities here are within this safe harbor and therefore sheltered from inclusion in the plaintiffs' assets.").

125. *Id.* (citing 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (2012)) (referencing requirements for DRA's safe harbor provision).

126. *See id.* at 503 (describing DHS's argument regarding whether plaintiffs' annuities can be considered investments); *see also* Brief of Defendant-Appellee/Cross-Appellant at 34–38, *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497 (3d Cir. 2015) (No 14-1328), 2014 WL 2921383 [hereinafter Brief of Appellee] (arguing plaintiffs' annuities should not be considered investments).

127. *See Zahner*, 802 F.3d at 503 ("[W]e see no reason why the relatively short-term of these instruments necessarily precludes viewing them as investments . . .").

128. *See id.* (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995)) (referring to Supreme Court's definition of annuity). For further discussion of the Supreme Court's definition of "annuity," *see supra* note 17.

129. *See Zahner*, 802 F.3d at 503 (explaining how neither Supreme Court decisions nor statutes require specific return rates for annuities).

130. *See id.* at 502 (internal quotation marks omitted) (referencing DHS's argument); *see also* Brief of Appellee, *supra* note 126, at 21, 34–38 (arguing plaintiffs' annuities are not "bona fide annuities").

131. *See Zahner*, 802 F.3d at 503 ("DHS next asks us to disallow any annuity that does not have a term of two years or more because Transmittal 64 uses the plural of 'years' in its definition of an annuity."); *see also* Brief of Appellee, *supra* note 126, at 36 (discussing use of "'term of years' (plural)").

could qualify for the safe harbor, even those lasting only “two seconds,” if the court did not establish a “floor” on the length of annuities.¹³² Although the court acknowledged that DHS correctly stated that Transmittal 64 used “term of years,” the court called it a “term of art.”¹³³ Rather than requiring multiple years, the court concluded the term simply requires the annuity’s term to be “for some definite period of time.”¹³⁴ Further, the Third Circuit felt that imposing a minimum term length would be “an improper judicial amendment.”¹³⁵ Because the plaintiffs’ annuities were of a definite length, the court found that they qualified as terms of years.¹³⁶

The Third Circuit also dealt with DHS’s argument that the plaintiffs’ annuities were not “actuarially sound.”¹³⁷ An annuity is actuarially sound “if the expected return on the annuity is *commensurate with* a reasonable estimate of the life expectancy of the beneficiary.”¹³⁸ The Third Circuit stated that annuities met the definition if their terms were for “less than the annuitant’s reasonable life expectancy.”¹³⁹ The annuities at issue were

132. See *Zahner*, 802 F.3d at 503–04 (citing Brief of Appellee, *supra* note 126, at 36) (discussing DHS’s concerns regarding lack of floor for length of annuities); see also Brief of Appellee, *supra* note 126, at 36 (“If there is no floor on the payback period timeframe then the company could write contracts of two days, two hours, or even two seconds, and call that contract an ‘annuity.’”). In Pennsylvania, the Commissioner of Insurance must approve all annuities before they can be sold in the state, leading the court to believe it would be hard for annuities of a very short length (i.e. “lasting only for hours or a few days”) to “win approval” and to reject the DHS’s argument that failing to impose a minimum would lead to “sham transactions.” See *Zahner*, 802 F.3d at 504 (citing *Herman v. Mut. Life Ins. Co. of N.Y.*, 108 F.2d 678, 682 (3d Cir. 1939)) (explaining why it would be difficult for very short annuities to exist).

133. See *Zahner*, 802 F.3d at 505 (“We agree that a term of years is merely a term of art[.]” (alteration in original) (internal quotation marks omitted) (citing Brief of Appellee, *supra* note 126, at 18)).

134. See *id.* (internal quotation marks omitted) (quoting Brief of Appellee, *supra* note 126, at 18) (discussing what “term of years” means).

135. See *id.* at 506 (asserting court would not impose “some minimum ratio between duration of an annuity and life expectancy”).

136. See *id.* at 505 (“The contracts here, lasting [twelve] and [fourteen] months, fall within the legal meaning of a ‘term of years’ as each contract permits multiple, periodic payments, over time, though not indefinitely, and not for a period that is coterminous with the annuitant’s actual life.” (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254, 259–60 (1995))). The Third Circuit also noted that “if Congress intended to limit the safe harbor to annuities lasting two or more years, it would have been the height of simplicity to say so.” See *id.*

137. See *id.* (discussing DHS’s argument regarding “actuarial sound[ness]” of plaintiffs’ annuities); see also Brief of Appellee, *supra* note 126, at 40 (arguing plaintiffs’ annuities were not actuarially sound because length of annuities “ha[d] no relationship to the plaintiffs’ life expectancies”).

138. See *Zahner*, 802 F.3d at 505 (quoting Transmittal 64, *supra* note 80, at § 3258.9(B)) (internal quotation marks omitted) (defining “actuarially sound”).

139. See *id.* at 508 (discussing “actuarially sound” annuities).

deemed actuarially sound because their terms were less than the plaintiffs' life expectancies.¹⁴⁰

Further, the Third Circuit held that an "annuitant's motive" in purchasing an annuity is not "determinative" of whether the instrument is protected.¹⁴¹ Although the court understood that this application of the Medicaid rules might allow people to take advantage of loopholes, the court opined that Congress must make efforts to close them.¹⁴²

2. *Annuities Are Not Always Trusts*

The Third Circuit next analyzed whether the plaintiffs' annuities were "trust-like."¹⁴³ If annuities are trust-like, they cannot fall under the DRA's safe harbor.¹⁴⁴ The Third Circuit determined that "Transmittal 64 [did] not present any support for treating [the] annuities as trust-like devices."¹⁴⁵ Rather, Transmittal 64 simply requires that an annuity be actuarially sound, and the court determined that the plaintiffs' annuities met this requirement.¹⁴⁶ Further, the Third Circuit held that the annuities were not trusts, rejecting the argument that ELCO owed the plaintiffs any fiduciary duties.¹⁴⁷

3. *Federal Law Preempts Pennsylvania's Assignment Statute*

Finally, the Third Circuit examined whether the DRA preempted Pennsylvania's assignment statute.¹⁴⁸ First, the Third Circuit noted that Pennsylvania law made all annuities assignable "regardless of who purchase[d] them, either the Medicaid applicant . . . or the community

140. *See id.* at 507 ("[Mrs. Claypoole's] [fourteen month] annuity was, in fact, far more commensurate with her actual life expectancy than the actuarial predictions . . ."). Judge Rendell dissented from the court's decision. *See id.* at 515 (Rendell, J., dissenting) (stating she would affirm district court's ruling). Unlike the court, Judge Rendell found the plaintiffs' annuities "were not actuarially sound" because their terms did not "coincide[] with [nor] were [they] commensurate with [the plaintiffs'] life expectancies." *Id.* at 516. (explaining why plaintiffs' annuities were not actuarially sound). Judge Rendell also disagreed with the court's definition of actuarially sound, stating that "[i]f Congress simply wanted to require the annuity terms to be shorter than life expectancy, it could have expressly stated that." *See id.*

141. *See id.* at 509 (citing *James v. Richman*, 547 F.3d 214, 219 (3d Cir. 2008)).

142. *See id.* (rejecting judicial attempt to close loopholes).

143. *See id.* at 510 (questioning whether plaintiffs' annuities could be considered "trust-like").

144. *See id.* (discussing Transmittal 64's restriction on trust-like annuities).

145. *See id.* at 510–11 (discussing Transmittal 64 and relevance to DHS's argument that plaintiffs' annuities were trust-like).

146. *See id.* at 511 (determining plaintiffs' annuities satisfied requirements under Transmittal 64).

147. *See id.* ("Moreover, these annuities cannot be equated with trusts because there is nothing akin to a fiduciary relationship between the annuitants and ELCO." (citing Transmittal 64, *supra* note 80, at §§ 3258.9(B), 3259.1(A)(1))).

148. *See id.* at 511–15 (questioning whether federal law preempted Pennsylvania law).

spouse.”¹⁴⁹ Because annuities must be non-assignable to fall under the DRA’s safe harbor provision, Pennsylvania’s assignability statute automatically barred all annuities from protection.¹⁵⁰

The Third Circuit stated that Pennsylvania, as a participant in the Medicaid program, must follow federal guidelines and may not enact “more restrictive requirements,” as compared to the federal government’s guidelines.¹⁵¹ Regarding annuities, the Third Circuit found Congress’s policy unambiguous: “annuities with certain characteristics, including nonassignability clauses, are *not* assets to be counted as resources for their Medicaid eligibility.”¹⁵² According to the court, by enacting the assignability statute, Pennsylvania impermissibly limited this federal protection.¹⁵³

Additionally, the Third Circuit found nothing to support DHS’s position that Congress gave states the option to choose to exclude annuities as resources.¹⁵⁴ Therefore, the Third Circuit upheld the portion of the district court’s holding stating that federal law preempted Pennsylvania’s assignment statute.¹⁵⁵

149. *See id.* at 511 (citing 62 PA. STAT. ANN. § 441.6(b) (West 2016)) (discussing Pennsylvania assignability statute). The statute reads as follows:

Any provision in any annuity or other contract for the payment of money owned by an applicant or recipient of medical assistance, or owned by a spouse or other legally responsible relative of such applicant or recipient, that has the effect of limiting the right of such owner to sell, transfer or assign the right to receive payments thereunder or restricts the right to change the designated beneficiary thereunder is void.

62 PA. STAT. ANN. § 441.6(b).

150. *See Zahner*, 802 F.3d at 511 (“Thus, if § 441.6(b) controls, no Medicaid applicant or his or her spouse can exclude an annuity from being considered a resource for purposes of Medicaid eligibility because Pennsylvania makes all annuities assignable.” (citing 62 PA. STAT. ANN. § 441.6(b))).

151. *See id.* at 512, 515 (citing 42 U.S.C. § 1396a(a)(10)(C)(i)(III) (2012)) (discussing requirements of states in Medicaid program).

152. *See id.* at 514 (explaining Congressional intent behind 42 U.S.C. §§ 1396p(c)(1)(F)–(G)).

153. *See id.* at 515 (declaring Pennsylvania’s statute to be invalid). In *Zahner*, the Third Circuit employed the Eighth Circuit’s reasoning from *Geston* to show when a state’s law is more restrictive than the federal government’s: “[i]f the State’s public policy requires it to count as resources certain annuities that federal law excludes from the scope of resources that may be considered in making eligibility determinations, then the State’s methodology is more restrictive than the federal methodology.” *See id.* at 514 (alteration in original) (quoting *Geston v. Anderson*, 729 F.3d 1077, 1085–86 (8th Cir. 2013) (internal quotation marks omitted)).

154. *See Zahner*, 802 F.3d at 514 (“The Medicaid Act cannot reasonably be read to support DHS’s contention that Congress intended to make protection of annuities optional.” (citing *United States v. Voight*, 89 F.3d 1050, 1087 (3d Cir. 1996))). DHS argued federal law “[did] not create an impermeable safe harbor.” *See id.* at 512 (citing Brief of Appellee, *supra* note 126, at 31–33). Instead, Pennsylvania had “the option of allowing annuities to be excluded” as available resources, which it did “not exercise.” *See id.* (providing DHS’s position).

155. *See id.* at 515 (“Pennsylvania may not create more restrictive requirements.” (citing 42 U.S.C. § 1396a(a)(10)(C)(i)(III))).

IV. ASKING FOR A CONSULT: ANALYZING THE THIRD CIRCUIT'S APPROVAL OF SHORT-TERM ANNUITIES

Zahner is a win for elder law practitioners and their clients in the Third Circuit.¹⁵⁶ By holding that federal law preempts Pennsylvania law, the Third Circuit solidified DRA-compliant annuities as viable Medicaid planning tools in Pennsylvania.¹⁵⁷ Further, the Third Circuit broke new ground by determining annuities cannot be barred from the DRA's safe harbor because of the shortness of their terms.¹⁵⁸

A. *The Third Circuit Observes Federal Preemption in Holding Pennsylvania Cannot Bar Use of Annuities*

In *Zahner*, the Third Circuit preserved federal law's place in the administration of Medicaid.¹⁵⁹ The Third Circuit accurately recognized that states "must . . . comply with federal [standards]," such as the DRA, in creating rules for their respective programs.¹⁶⁰ As the court correctly determined, states are not free to disregard federal law, even if it conflicts with their desire to toughen eligibility requirements for Medicaid.¹⁶¹

Although Congress intended to close loopholes in the Medicaid statute by enacting the DRA, it nonetheless created a safe harbor provision for annuities.¹⁶² As the Third Circuit correctly noted, Pennsylvania's assign-

156. See Zumpano, *supra* note 19 ("It is exciting knowing that short-term annuities are a valid planning tool, in accordance with the Third Circuit's decision."); see also *infra* notes 184–95 (discussing how elder law attorneys may use short-term annuities in planning and *Zahner's* effect on Medicaid planning).

157. For an examination of the Third Circuit's observation of federal preemption, see *infra* notes 159–71 and accompanying text.

158. For an analysis of the Third Circuit's decision to allow short-term annuities, see *infra* notes 172–83 and accompanying text.

159. See Levinson, *supra* note 7, at 225 (discussing joint involvement of federal and state governments in Medicaid); see also Reif, *supra* note 10, at 344 ("The federal government shares the cost of the Medicaid program with the states, who must ensure their programs comply with federal Medicaid requirements and regulations." (footnote omitted)).

160. See 42 U.S.C. § 1396a(a)(10)(C)(i)(III) (stating that state eligibility requirements cannot be "more restrictive" than those for determining eligibility for supplementary security income); *id.* § 1396a(r)(2)(B) ("For purposes of this subsection and subsection (a)(10) of this section, methodology is considered to be 'no more restrictive' if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance."); see also *CMS Transfer of Assets*, *supra* note 73 (stating states must update their Medicaid regulations to comply with DRA); Reif, *supra* note 10, at 344 (discussing how states must follow federal regulations).

161. See Reif, *supra* note 10, at 344 (noting states must comply with federal rules); see also Higgins, *supra* note 13 (noting that "[s]tates and counties have begun to crack down on people" taking part in Medicaid planning).

162. See 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (2012) (creating safe harbor for annuities); *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497, 501–02 (3d Cir. 2015) (citing 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii)) (explaining DRA's safe harbor provision for annuities); see also Nichols, *supra* note 30, at 46 (commenting on Congress's purpose in enacting DRA).

ment statute directly conflicted with the DRA's safe harbor provision.¹⁶³ Application of Pennsylvania's assignability statute would have barred otherwise qualified annuities from receiving protection, regardless of whether the annuities included anti-assignment clauses.¹⁶⁴ Consequently, using annuities in Medicaid planning would have been futile in Pennsylvania because DHS would have had the ability to count them as available resources.¹⁶⁵

The *Zahner* court properly safeguarded the use of annuities by holding that the DRA's safe harbor preempted Pennsylvania's assignment statute.¹⁶⁶ In creating the DRA's safe harbor provision, Congress intended for certain annuities to be protected, such as those with anti-assignment provisions.¹⁶⁷ Pennsylvania's statute frustrated congressional intent.¹⁶⁸ The *Zahner* court's decision to recognize preemption falls in line with Third Circuit precedent, which also found that federal law preempted Pennsylvania's assignment statute.¹⁶⁹ Although other circuits have not dealt specifically with preemption, they have generally recognized statutory-compliant annuities as protected.¹⁷⁰ Therefore, the *Zahner*

163. See *Zahner*, 802 F.3d at 513 (“Congress did not intend that all annuities be considered [available resources].”).

164. See *Zahner*, 802 F.3d at 511 (noting Pennsylvania statute made “all annuities” assignable). The Third Circuit noted that “no Medicaid applicant [could] exclude an annuity from being considered [an available] resource” because of the Pennsylvania assignability statute. See *id.* Compare 42 U.S.C. § 1396p(c)(1)(G)(ii) (requiring annuities to be assignable), with 62 PA. STAT. ANN. § 441.6(b) (West 2016) (rendering all annuities assignable).

165. See 62 PA. STAT. ANN. § 441.6(b) (requiring all annuities be available as resources regardless of who holds them).

166. See *Zahner*, 802 F.3d at 515 (citing 42 U.S.C. § 1396a(a)(10)(C)(i)(III)) (holding “Pennsylvania may not create more restrictive requirements”); see also Zumpano, *supra* note 19 (“[T]he state must acknowledge the assignability of an annuity in accordance with the intent of Congress.”).

167. See *Zahner*, 802 F.3d at 513 (“Congress clearly intended for some annuities to be considered [available] resources for the purposes of Medicaid eligibility. However, it is equally clear that Congress did not intend that all annuities be considered.”).

168. See *id.* at 513–15 (discussing congressional intent regarding annuities and how Pennsylvania law cannot be valid).

169. See *Weatherbee ex rel. Vecchio v. Richman*, 351 F. App'x 786, 788 (3d Cir. 2009) (holding federal law preempted Pennsylvania's assignment statute because it “narrow[ed] the annuity exemption”).

170. See *Geston v. Anderson*, 729 F.3d 1077, 1085 (8th Cir. 2013) (holding community spouse's annuity is “unearned income, not a resource” in determining Medicaid eligibility of spouse receiving care); *Lopes v. Dep't of Soc. Servs.*, 696 F.3d 180, 188 (2d Cir. 2012) (“We therefore hold that the payment stream from a non-assignable annuity is not a resource for purposes of determining Medicaid eligibility.”); *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925, 933–34 (10th Cir. 2012) (citing Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, 120 Stat. 2922, 2998; Deficit Reduction Act of 2005, Pub. L. 109–171, §§ 6011–6012, 120 Stat. 4, 62–64) (determining Congress has not closed loophole allowing for individuals to protect assets in annuities “capable of producing uncountable spousal income”).

court properly solidified DRA-compliant annuities as viable planning tools.¹⁷¹

B. *The Third Circuit Breaks New Ground by Approving Short-Term Annuities*

However, the *Zahner* decision raises several concerns.¹⁷² The court's holding seems to conflict with the goal of restricting Medicaid eligibility.¹⁷³ Allowing short-term annuities expands the type of financial tools available to individuals interested in Medicaid planning.¹⁷⁴ Individuals may try to push the limit on acceptable term lengths, going even shorter than the annuities at issue in *Zahner*, because no minimum term is re-

171. See *Zahner*, 802 F.3d at 514 (stating “Pennsylvania cannot enact legislation that changes federal law (or binding judicial interpretation of federal law) with respect to annuities” (citing *Marbury v. Madison*, 5 U.S. 137 (1803))); see also Zumpano, *supra* note 19 (“Pennsylvania DHS argued that this law caused all annuities purchased by Medicaid applicants in Pennsylvania to fail the safe harbor test. The District Court and Third Circuit held that this is untrue.”).

172. See Brief of Appellee, *supra* note 126, at 36 (“If there is no floor on the payback period timeframe then the company could write contracts of two days, two hours, or even two seconds, and call that contract an ‘annuity.’”); Moses, *supra* note 33, at 565 (stating DRA is intended to limit Medicaid eligibility); Nichols, *supra* note 30, at 46 (noting Congressional intent to close loopholes with DRA); LATSHA DAVIS & MCKENNA, P.C., *Third Circuit Greenlights Short-Term Medicaid Annuities* (Jan. 13, 2016), <http://www.ldylaw.com/blog/2016/01/third-circuit-greenlights-short-term-medicaid-annuities.shtml> [<https://perma.cc/ZQ3D-Y26S>] (“Congress intended the passage of the DRA to curb certain Medicaid planning strategies such as ‘half-a-loaf’ gifting . . . *Zahner* explicitly allows short-term annuities to be used in this manner.”); see also *Court Approves Use of Short-Term Annuities for Medicaid Planning*, ELDER L. ANSWERS (Nov. 24, 2015), <http://www.elderlawanswers.com/court-approves-use-of-short-term-annuities-for-medicaid-planning—15317> [hereinafter *Court Approves*] (“Although the Third Circuit is only one of 13 federal appeals courts, the court noted its opinion is ‘precedential’ federal law for Medicaid-compliant annuities.”). For further discussion of case law involving the use of annuities in Medicaid planning, see *supra* notes 88–91 and accompanying text.

173. See Higgins, *supra* note 13 (finding governments are working on restricting Medicaid eligibility); Levinson, *supra* note 7, at 227 (discussing efforts to limit use of Medicaid planning).

174. See Brief of Appellee, *supra* note 126, at 36–38 (arguing safe harbor protection for plaintiffs’ will lead to more “sham” annuities). Allowing short-term annuities may have negative consequences for those truly who need Medicaid to pay for long-term care because it could lead to an expansion in eligibility. See Markovic, *supra* note 12, at 1857 (asserting “Medicaid claimants who do meet eligibility criteria are harmed when individuals who are not medically impaired or financially impoverished receive benefits” because “funding for . . . Medicaid is limited” (citing Jason J. Fichtner, *Social Security Disability Fund Will Run Empty Next Year*, MARKETWATCH (Apr. 3, 2015, 10:43 AM), <http://www.marketwatch.com/story/social-security-disability-fund-will-run-empty-next-year-2015-04-03> [<https://perma.cc/GL46-S55D>])); see also Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 132–35 (2002) (discussing common objections to Medicaid planning).

quired.¹⁷⁵ The decision also permits half-a-loaf planning, which Congress sought to proscribe with the DRA.¹⁷⁶

Additionally, the court's reliance on plain readings of the DRA and Transmittal 64 unquestionably allows individuals to take advantage of a loophole and shield their assets.¹⁷⁷ Expanding the use of a Medicaid loophole directly undercuts the federal and state governments' goal of narrowing Medicaid eligibility.¹⁷⁸ Nevertheless, neither the DRA nor Transmittal 64 imposes a minimum term length for annuities, leaving the Third Circuit entirely free to reject DHS's request for a judicially-imposed minimum term length, rightly allowing people to shelter assets in a safe harbor Congress created.¹⁷⁹ Although potentially expanding eligibility seems to conflict directly with Congress's goal, the Third Circuit justifiably worked within the framework Congress itself provided to find the use of short-term annuities viable, following Eighth and Tenth Circuit prece-

175. See Brief of Appellee, *supra* note 126, at 36–38 (“ELCO is already writing contracts as short as two months.”); cf. Markovic, *supra* note 12, at 1854 (discussing how some Medicaid planning strategies violate ethical boundaries and are harmful to those who *actually* need help in paying for long-term care).

176. See Brief of Appellee, *supra* note 126, at 38 (discussing Congress's addition of “half-a-loaf gifting prohibition” through DRA); LATSHA DAVIS & MCKENNA, P.C., *supra* note 172 (commenting that *Zahner* allows for “half-a-loaf” planning); see also Rothkoff, *supra* note 85 (“Since 2005, [DHS's] position was that the annuities used in half-a-loaf gifting were not DRA-compliant.”). For an explanation of “half-a-loaf planning,” see *supra* notes 85–87 and accompanying text.

177. See *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497, 509 (3d Cir. 2015) (discussing Transmittal 64 and use of annuities to “shelter assets”); see also *id.* at 516 (Rendell, J., dissenting) (“If Congress simply wanted to require the annuity terms to be shorter than life expectancy, it could have expressly stated that. Instead, Congress said that annuities must be actuarially sound . . . meaning that annuities must be commensurate with or coincide with life expectancy.”). In her dissent, Judge Rendell argued that there was no basis for the court to determine “that an annuity with a term that is less than the annuitant's life expectancy passes the actuarial soundness test.” See *id.* Judge Rendell opined that this definition would allow for annuities that “[have] no investment purpose and operate[] only to shield assets.” See *id.*

178. See *id.* at 509 (noting DHS's concerns in allowing short-term annuities). In addition to undercutting the federal and state governments' goal of narrowing Medicaid eligibility, expanding eligibility also raises questions about the ethics of Medicaid planning. See Takacs & McGuffey, *supra* note 174, at 132–35 (outlining common objections to Medicaid planning, including ideas that “Medicaid planning will lead to a deprivation of health care from the truly needy, those who are really poor, not those who have artificially impoverished themselves in order to qualify for Medicaid,” and that “Medicaid planning may be legal, but it is against public policy”); see also Patricia F. Sitchler, *Cutting Edge vs. over the Edge: Ethics and Malpractice Issues for Medicaid Planning*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 175, 183–86 (2009) (describing why some individuals see Medicaid planning as unethical).

179. See *Zahner*, 802 F.3d at 506 (“[W]e conclude that any attempt to fashion a rule that would create some minimum ratio between duration of an annuity and life expectancy would constitute an improper judicial amendment of the applicable statutes and regulations.”); see also *supra* notes 78–81 and accompanying text (discussing DRA's safe harbor provision for annuities).

dents by choosing to leave the responsibility of closing any loopholes to Congress.¹⁸⁰

The Third Circuit's opinion also alleviates DHS's fear that individuals will be able to protect assets through annuities lasting for very short durations.¹⁸¹ Pennsylvania's Commissioner of Insurance must approve all annuities, making it "doubt[ful] that an annuity lasting two seconds, two hours, or [even] two days would win approval."¹⁸² Further, the Third Circuit's refined definition of "actuarially sound" still achieves a key objective of federal and state governments—by requiring an annuity's term to be less than an individual's life expectancy, it allows states to recover a portion of the money spent on long-term care.¹⁸³

V. DOSAGE INSTRUCTIONS: GUIDANCE FOR ELDER LAW PRACTITIONERS USING SHORT-TERM ANNUITIES

Following *Zahner*, Third Circuit elder law practitioners have a clearer picture of the requirements for DRA-compliant annuities.¹⁸⁴ To serve their clients best, elder law attorneys must ensure that annuities comply with all four elements of the DRA's safe harbor provision.¹⁸⁵ Although three of the four elements were easily established before *Zahner*, the Third

180. See *Zahner*, 802 F.3d at 509 ("Although we are sympathetic to the concerns the dissent and DHS outline, Congress must resolve them."). The *Zahner* holding was consistent with the holdings of other circuit courts. See *Geston v. Anderson*, 729 F.3d 1077, 1086 (8th Cir. 2013) ("We see no warrant . . . to implement any of these measures through judicial decision . . . and believe that the suggestions must be directed to the policymaking branches."); *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925, 928 (10th Cir. 2012) ("Although we understand the district court's concerns regarding the exploitation of what can only be described as a loophole in the Medicaid statutes, we conclude that the problem can only be addressed by Congress.").

181. See *Zahner*, 802 F.3d at 504 (noting Commissioner of Insurance must approve annuities before they can be purchased in Pennsylvania).

182. See *id.* (citing *Herman v. Mut. Life Ins. Co. of N.Y.*, 108 F.2d 678, 682 (3d Cir. 1939)) (rejecting DHS's argument that sham transactions would "gain[] a foothold in the marketplace").

183. See *id.* at 508 ("[I]t discourages the purchase of annuities for terms that are so long that assets would pass to heirs and not be available to reimburse the State for the Medicaid assistance the annuitant received while alive." (citing Brief for National Academy of Elder Law Attorneys, Inc., and Its Pennsylvania and New Jersey Chapters as Amici Curiae Supporting Appellants at 4, 30–31, *Zahner v. Sec'y Pa. Dep't of Human Servs.*, 802 F.3d 497 (3d Cir. 2015) (No. 14-1328))).

184. See Zumpano, *supra* note 19 ("The Third Circuit's decision sets a precedent [that] is important for [e]lder [l]aw practitioners, not only in Pennsylvania, but potentially in our field at large."); see also *Zahner Follow-Up: Medicaid Annuities in Practice*, KRAUSE AGENCY, INC. (Oct. 1, 2015), <http://thekrauseagency.com/2015/10/01/zahner-followup-2/> [<https://perma.cc/DYG7-RMVB>] (discussing *Zahner* decision and noting "[t]he clarity with which each issue was addressed makes it a valuable model for other states, and other courts, as they consider similar situations").

185. See 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii) (2012) (listing requirements for DRA's safe harbor provision).

Circuit provided clarity regarding the meaning of “actuarially sound,” delivering essential guidance to those seeking to use annuities in planning.¹⁸⁶ When determining the length of an annuity, elder law attorneys must ensure the annuity’s term does not “exceed [the purchaser’s] reasonable life expectancy.”¹⁸⁷

Further, elder law attorneys within the Third Circuit should not feel uneasy about whether their clients’ annuities will be deemed “too short” to qualify for protection under the DRA’s safe harbor.¹⁸⁸ Because Congress has not set a minimum term length for annuities, attorneys whose clients need annuities only for as little as twelve or fourteen months, like the plaintiffs in *Zahner*, should feel confident in their ability to find protection in the DRA’s safe harbor.¹⁸⁹ Additionally, for practitioners with less affluent clients, short-term annuities are a great planning option because they require a lower, “upfront cost.”¹⁹⁰

VI. PROGNOSIS: THE FUTURE OF SHORT-TERM ANNUITIES IN MEDICAID PLANNING

After *Zahner*, elder law practitioners are free to use short-term annuities while guiding their clients through the Medicaid planning process.¹⁹¹

186. See *Zahner*, 802 F.3d at 508 (discussing “actuarially sound” element); Zumpano, *supra* note 19 (“The Third Circuit also offers a more clear definition of what a period of time is for purchases of Medicaid Qualified Annuities, allowing purchases for less than a term of years if the time period of payout is in proportion to the annuitant’s life expectancy.”).

187. See *Zahner*, 802 F.3d at 508 (determining appropriate length of annuity to be considered “actuarially sound”).

188. See *id.* at 505 (“Congress did not require any minimum term for an annuity to qualify under the safe harbor.” (citing 42 U.S.C. §§ 1396p(c)(1)(F), (G)(ii))).

189. See *Zahner*, 802 F.3d at 503 (“[W]e see no reason why the relatively short-term of these instruments necessarily precludes viewing them as investments, and Congress has not foreclosed that possibility.”); see also Linda Ershow-Levenberg, *Third Circuit Rejects State’s Claim That Short-Term Annuities Can’t Meet Medicaid Requirements*, FINK ROSNER ERSHOW-LEVENBERG LLC (Sept. 2, 2015), <http://blog.finkrosnerershow-levenberg.com/elder-law-news/third-circuit-rejects-states-claim-that-short-term-annuities-cant-meet-medicaid-requirements/> [https://perma.cc/WF6D-PE6Y] (discussing how Third Circuit found “no lawful basis to impose any additional criteria concerning the length of [an] annuity contract”); *Zahner Follow-Up*, *supra* note 184 (stating elder law practitioners should feel “comfortable in recommending [short-term annuities]”); Zumpano, *supra* note 19 (stating how *Zahner* is “solid legal precedent” regarding short-term annuities).

190. See *Zahner*, 802 F.3d at 508 n.14 (describing benefits of short-term annuities).

191. See Zumpano, *supra* note 19 (discussing what *Zahner* holding means for elder law practitioners); see also Kemp Scales, *Third Circuit Court of Appeals Approves Use of Short-Term Annuities in Medicaid Planning*, SCALES L. OFFICES, <http://www.scaleslawoffices.com/11-2015%203rd%20Circuit%20Approves%20Short-Term%20Annuities.pdf> [https://perma.cc/77ZE-XNFG] (last visited Oct. 18, 2016) (explaining how *Zahner* decision “is a major victory for seniors in the Third Circuit”); Cyril Tuohy, *Federal Court: Short-Term Annuities Do Not Count Toward Medicaid*, INS. NEWS NET (Sept. 10, 2015), <http://insurancenewsnet.com/inarticle/>

The Third Circuit will not bar the use of qualified short-term annuities in Medicaid planning, instead leaving any change in policy to Congress.¹⁹² Therefore, until Congress acts, short-term annuities are a viable planning tool in the Third Circuit for the foreseeable future.¹⁹³ For people who wish to leave assets to loved ones, *Zahner* presents good news.¹⁹⁴ Rather than causing people to exhaust their savings on long-term care, *Zahner* provides individuals greater ability to protect resources through Medicaid planning.¹⁹⁵

federal-court-short-term-annuities-dont-count-towards-medicaid [https://perma.cc/S9TT-NC5X] (“Certainly it is favorable for elderly families, particularly if they are not of great means.” (quoting *Zahner* plaintiffs’ attorney)).

192. See *Zahner*, 802 F.3d at 509 (“[T]he definition of protected annuities is one best left to the policymakers in the legislative branch.”).

193. See *id.* (stating Congress must make any changes regarding annuities); see also LATSHA DAVIS & MCKENNA, P.C., *supra* note 172 (stating “*Zahner* explicitly allows short-term annuities to be used” in half-a-loaf planning).

194. See Rothkoff, *supra* note 85 (“Persons requiring nursing facility care will have an additional planning technique available to them that potentially can preserve a large portion of their assets to their family.”); Scales, *supra* note 191 (discussing how *Zahner* decision will benefit single applicants and married applicants when applying for Medicaid).

195. See Rothkoff, *supra* note 85 (noting how *Zahner* allows for people to protect assets for their families); see also *More on Short Term Annuities*, *supra* note 15 (“[*Zahner*] helps to clarify for the elder law client what financial products will not disqualify a Medicaid applicant from applying for benefits.”).