By Stephen J. Silverberg, CELA, CAP

The Day an Elder Law Attorney Walked Into a Room of Retirement Experts

Stephen J. Silverberg, CELA, CAP, testified at a recent DOL ERISA Advisory Council hearing on "de-risking" transactions of employer-sponsored defined benefit plans.

Encouraging savings and engineering lifetime income has recently dominated the thinking of retirement experts. Running out of savings in old age is an issue for many. Unfortunately, these discussions often lack the analysis of what happens to your hard-earned money when a catastrophic illness strikes you or a loved one.

Congress designed the Employee Retirement Income Security Act of 1974 (ERISA) and portions of the Internal Revenue Code to protect (the former) and increase (the latter) savings for retirement. However, Congress took the opposite approach with the Social Security Act; should you require long-term services and supports, you must become impoverished to enjoy the protections afforded by Medicaid.

This issue came up recently when I testified at a Department of Labor (DOL) ERISA Advisory Council hearing on "de-risking" transactions of employer-sponsored defined benefit (DB) plans. Many companies no longer wish to have the liabilities or risks associated with a DB plan. In a DB plan, the company holds the risk, such as investment and longevity risk; in a defined contribution (DC) plan, the employee holds that risk. These "de-risking" transactions seek to offer employees the option of taking the present value of their vested defined benefits as a "lump-sum" distribution or transferring the benefit payments to an annuity underwritten by an insurance company.

The ERISA Advisory Council contacted NAELA because the DOL had tasked the Council with creating a standard form for beneficiaries who've been given the option to take a lump-sum or an insurance annuity. They wanted to speak with someone who had experience dealing with persons with diminished capacity to understand what issues arise during these transactions.

The framing of these inquiries came largely from behavioral economics: how to ensure someone understands the trade-offs between a DB plan and managing their money. It is an important question, but it is the wrong one for this population.

Catastrophic illnesses such as Alzheimer's disease can require substantial long-term services and supports often for many years. That risk does not fit the standard risk/return trade-off model, which factors in quantifiable metrics like investment return, inflation, and longevity. These models leave out the reality of living with these diseases, the costs associated with caring for it, and the complex, contradictory legal structures in place for protecting retirement assets and covering long-term care costs.

Asset Treatment by Medicaid

At the most basic, Medicaid treats assets differently for qualifying purposes. Own a $500,000 home? You can keep it, and Medicaid will cover you. Own a $300,000 condo and have $200,000 in cash? Then you must spend down the cash if you want any government assistance.

For retirement plans, the rules get even more complex. Every state has their rules often in contradiction with federal law and regulation. At the federal level, ERISA contains "anti-alienation" protections against creditors. This means that someone with a DB plan, for instance, can't be forced to liquidate the present value of their current benefits and turn it over to their nursing home or state Medicaid agency.

However, IRAs are not ERISA plans, so they are not subject to these protections. In the majority of states, those suffering from a catastrophic illness must spend their entire IRA before receiving Medicaid benefits. In

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many states, the community spouse must also exhaust the funds in an IRA before their spouse can qualify for benefits. A simple solution is to extend the "anti-alienation" provision of ERISA to the IRA account, much the same way the ERISA minimum distribution rules currently apply to IRA accounts.

Complications

State Medicaid agencies complicate matters as they often lack the expertise in retirement policy creating a hodgepodge of confusing, inconsistent administrative rules. This is further confused by the legislative efforts in many states to protect retirement plans and particularly IRAs from creditors. These efforts have led to policies where government pension plans, including state deferred compensation plans, enjoy protections greater than any other retirement plans. Employees at large corporations are more likely to be protected than those employed by small companies, or who are self-employed, rollovers or rollouts from existing 401(k) and other ERISA plans may have disastrous consequences.

The ERISA Advisory Council finds itself in the impossible position of having to create an easy-to-understand form that communicates a nearly impenetrable set of rules that vary from state to state. The only way to standardize is to simplify to the extreme by warning participants they risk losing protections afforded to them under ERISA should they accept the de-risking transaction.

So much for making retirement planning decisions easy for the public. For Elder Law attorneys, it is important to understand the disparate treatment between these accounts in your state to help your clients properly plan for the economic consequences of a catastrophic illness. ■

The Special Needs Trust Fairness Act

In Advocacy, Two Is Greater Than One Plus One

By David Goldfarb, Esq.

One plus one does not equal two in politics. No, I'm not talking about the "fuzzy math" that candidates accuse each other of using to support their policies. I'm talking about the fact that people advocating together under the same banner is greater than those voices speaking out separately.

Members of Congress care what voters have to say, but they are inundated with emails, faxes, letters, phone calls, in-person visits, town hall meetings, Facebook comments, and even tweets. Literally hundreds of millions of communications flood Congress each session. It's no surprise then that we often get no response or a form letter at best from our requests.

That's why political organizing is so important. When you reach out as both a constituent and as a member of an association, it signals that you are representing not just yourself, rather, you're representing the priorities of a national collective while at the same time showing how it impacts your community.

NAELA Members Making a Difference

Case in point: The Special Needs Trust Fairness Act. This legislation would not be where it is today without NAELA member support.

Consider that: It was a NAELA member who brought this issue to the Academy's attention. It was a NAELA member in Rep. Thompson's district who lobbied to have him introduce the legislation. It was a NAELA member who testified before Congress. It was NAELA members who helped secure many congressional co-sponsorships. And, it was NAELA members who helped ensure that every single senator from Sen. Sanders to Sen. Cruz approve this legislation through unanimous consent.

The Special Needs Trust Fairness Act Still Needs Your Support

But, the work on the Special Needs Trust Fairness Act is not yet done. It still needs to pass the House of Representatives, and we can't do it without member support. Will you be our next addition? Please contact me to find out how you can support the Special Needs Fairness Act (dgoldfarb@naela.org).

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