

MEMORANDUM

To: Drafting Committee for a Uniform Transfer on Death for Real Property Act

From: Ellen M. Klem, Observer

Date: December 1, 2007

Re: Research Report on Medicaid Estate Recovery

The Medicaid estate recovery research report I mentioned yesterday, *Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices*, can be found online at http://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf.

I have also attached an In-Brief from AARP summarizing the findings and recommendations of the research report.

Please feel free to contact me at (202) 662-8689 if you have any questions.

IN BRIEF

Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices

This In Brief summarizes the findings and recommendations of the AARP Public Policy Institute (PPI) issue paper, *Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices*.

Fifty of the 51 states (including the District of Columbia) have a Medicaid estate recovery program. In 1993, Congress mandated states to recover the costs of long-term care and other related Medicaid expenses. When low-income Medicaid beneficiaries enroll in the program, they are agreeing that their estates will pay the government back for services received, to the extent that funds are in their estates. Estate recovery makes the Medicaid program very different from the vast majority of federal programs, which do not require repayment.

The American Bar Association (ABA) Commission on Law and Aging investigated protections currently used, which revealed wide variations among states in public information, notice, hardship waiver procedures, direct collections, and maintenance of data for program evaluation. The study, which stands as a resource for states, identifies the variations, highlights some promising practices, and develops model notices and a model brochure that can be replicated.

Key Findings

- 1. While increases in amounts collected through estate recovery are modest, they may cause hardship and thus signal the need for solid protections.** In the last two years, the average state recovery increased by 24% (totaling \$411.1 million in FY 2005) but remained steady at a very small proportion of annual Medicaid long-term care expenses, a mere 0.61%, compared with 0.63% two years earlier.
- 2. Early information and notice can best protect beneficiaries and heirs and facilitate the smooth operation of state recovery programs.** Clearly written brochures that are distributed routinely and consistently, in English and other languages, as well as user-friendly Web sites, clear application notices, explanations of recovery at the point of eligibility, and training eligibility and other staff can help to avoid misperceptions and encourage informed Medicaid decisions.
- 3. Public information, pre-death lien notices, and claim notices vary widely in content and clarity. The promising practices identified in this study could improve public understanding and safeguard rights.**
- 4. States give claim notices at different points, which bears directly on the protections required.** Some states wait for the formal court probate process to give notice of recovery, when judicial protections are in place and the vast majority of those affected are represented by attorneys. Others give notice as soon as they learn of the death of the Medicaid recipient, before probate begins. In the latter case, individuals may not have legal representation and may not be fully informed about exemptions and waivers, making clear and understandable

information especially critical. Identifying and informing “individuals affected” is problematic for Medicaid agencies.

5. Direct recovery of funds from banks through small estates affidavit and similar procedures are subject to the same protections as other estate recovery. This precludes recovery when there is a known surviving spouse and others who are exempt. However, it may be difficult to identify exempt individuals and other “individuals affected” to give notice of an opportunity to contest the recovery. If such individuals are not known, state agencies and banks can provide a period for exempt individuals to collect the funds before proceeding with recovery.

6. The number of undue hardship waiver requests submitted has decreased markedly in the last two years. Hardship waivers are a safeguard and a bulwark against impoverishment of the decedent’s heirs. Thus, for the estate recovery program to work as intended, balancing the need to replenish state funds with adversity in individual situations, the waiver process must be clear and readily available in appropriate circumstances.

7. The lack of basic data collection impairs assessment of recovery efforts, including use of protections. Collecting data on most elements of estate recovery, including basic elements of protection such as deferrals and exemptions, as well as hardship waivers, is inconsistent across states and, in fact, largely lacking in many. This makes it difficult to discern patterns of implementation, and it was a substantial barrier for the study.

Recommendations

To protect beneficiaries and their survivors affected by estate recovery, the study urges that:

- 1. States review and consider the promising practices identified in this report.**
- 2. States emphasize early notice of recovery.**
- 3. States that send notice of recovery directly following the death of Medicaid recipients reexamine this approach.**
- 4. States that recover directly from banks recognize exemptions and build in key protections.**
- 5. The Centers for Medicare and Medicaid Services (CMS) review the report’s description of promising practices and the model notice forms and consider offering guidance to states.**
- 6. CMS consider setting out basic data elements for estate recovery, recommending formats for reporting them consistently, and making the results publicly available.**