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

by

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The AARP Public Policy Institute, formed in 1985, is part of the Policy and Strategy Group at AARP. One of the missions of the Institute is to foster research and analysis on public policy issues of importance to mid-life and older Americans. This publication represents part of that effort.

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Foreword

Although no one should be taken by surprise by Medicaid estate recovery, all too often, that is exactly what happens.

Federal law requires states to recoup the amount of money that Medicaid spent on senior and institutional care if it is available from the estates of these Medicaid beneficiaries. By law, states can collect funds from estates after institutionalized or older Medicaid beneficiaries die by recovering against their homes and bank accounts to repay the government for services received.

Estate recovery makes the Medicaid program very different from the vast majority of federal programs, which do not require such repayment. This requirement for low-income Medicaid beneficiaries to pay the government back for services received is what often stuns surviving spouses and family members of deceased Medicaid recipients.

Meaningful notice and other protections are vital. Safeguards such as reasonable hardship waivers and adequate and timely notices help to ensure that Medicaid enrollees, surviving spouses, and other dependents, as well as potential heirs, are informed and treated fairly.

AARP's Public Policy Institute (PPI) asked the American Bar Association Commission on Law and Aging to research public information, notices, hardship waiver procedures, direct collections, and data for program evaluation of state estate recovery programs. This report includes promising practices, model claim notices, and a model brochure that Medicaid estate recovery programs can use as a guide and valuable resource.

AARP is publishing this research to clarify the protections in Medicaid estate recovery programs, to encourage strong and effective protections, and to put forth promising practices and model notifications that can be replicated throughout the country.

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Executive Summary

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

Background and Status of Estate Recovery

Purpose and Overview

More than 55 million Americans rely on the joint federal-state Medicaid program for their health care and long-term care. Medicaid, the nation's largest public health insurance program, pays for almost half of all spending on long-term care. An indigent nursing home resident with dementia, a young person with mental retardation in an intermediate care facility, an older, middle-income nursing home resident who has "spent down" private resources, or a couple receiving home and community-based care—all may be beneficiaries of the Medicaid program. Medicaid enrollment and spending spiraled sharply during the 2001 recession and thereafter, and while it has slowed somewhat, state and federal pressure to limit Medicaid spending remains high.

In light of these pressures, estate recovery is one approach to replenish state funds. Estate recovery has been a federal mandate for 14 years. In 1993, Congress sought to recoup the costs of long-term care and other related Medicaid services by requiring that states implement estate recovery programs. The Centers for Medicare and Medicaid Services (CMS) have issued guidelines in the *State Medicaid Manual* that afford states considerable flexibility in implementation. In response, states have initiated laws, regulations, and programs to recover funds from the estates of institutionalized Medicaid recipients and those who were age 55 or older when they received Medicaid, as well as certain additional recipients designated by law. Estate recovery makes Medicaid for institutionalized and older people very different from most federal benefit programs.

In 2005, the ABA Commission on Law and Aging completed a nationwide survey for the AARP Public Policy Institute assessing the status of state estate recovery programs (referred to as the 2005 study). The survey concluded by asking "whether more rigorous and uniform notice and other procedural protections, as well as broader outreach, could check misperceptions about estate recovery and ensure the effectiveness of hardship waiver requirements." Thus, in 2006, the Institute asked the ABA Commission to conduct a more limited follow-up study focusing on such protections and identifying effective practices for replication.

The aim of this follow-up study was to: (1) provide CMS, state estate recovery officials, policy makers, advocates, and the legal community with information about current state practices concerning public information and procedural protections; and (2) assist states in developing procedures that give Medicaid beneficiaries and survivors timely, clear, and accurate information and that include necessary safeguards. This report represents the study findings and serves as a resource for states, highlighting readily usable practices that could benefit both the programs and the affected populations.

Study Methodology

The study examined state approaches to: (1) public information; (2) notice; (3) procedures for waiving estate recovery because of undue hardship on the survivors; (4) procedures that states use to make collections directly from banks and nursing homes rather than relying solely on the judicial claim process; and (5) state data collection on estate recovery, as solid statistics are needed to fully evaluate the impact on beneficiaries and survivors and the effectiveness of the state programs.

The study had five components: (a) a brief e-mail survey of Medicaid officials; (b) identification of amounts collected; (c) collection and review of claim and lien notices, brochures, and Web sites; (d) telephone discussions with Medicaid officials from selected states; and (e) identification of practices for replication and development of model notice forms.

Thirty-five states (including the District of Columbia) responded to the e-mail survey; two states did not have a program in operation, one state's program was an inactive, one state declined to participate, and 12 states did not respond.

Status of Programs

Fifty of the 51 states (including the District of Columbia) have a Medicaid estate recovery program. As of this writing, Michigan had no program, and Georgia was in the process of implementing one. New Mexico reported an inactive program.

Amounts Collected

Recovery amounts are increasing at a modest rate, and the financial impact of estate recovery on state budgets remains slight but not insignificant. Amounts collected through estate recovery represent between 0.01% and 2.09% of total state long-term care Medicaid expenditures, with only six states above 1%. The average proportion has remained constant at 0.61% (FY 2005), compared with 0.63% (FY 2003) two years earlier, as reported in the 2005 study.

The amount recovered nationally in FY 2005 was \$411,133,981—almost \$81 million more than in FY 2003. The average state recovery was \$8,061,451, compared with \$6,477,206 in FY 2003.

Protections for Beneficiaries and Survivors

Estate recovery makes the Medicaid program very different from most federal benefit programs; to the extent possible, the amount of the benefits is eventually returned to the government. This fact is critical for applicants, beneficiaries, and survivors to understand, and is important to communicate to them clearly at multiple points and through multiple channels, from consideration of an initial application to the actual collection of funds.

Public Information

Public information on estate recovery is essential to Medicaid applicants, enrollees, and their families. Effective information and outreach can heighten public awareness about recovery. Older and institutionalized enrollees need to know that Medicaid funds spent on their care eventually create a debt against which recovery can be sought to replenish state budgets (either state general funds or Medicaid funds specifically) for public purposes. Conveying clear information at the outset about the recovery program, how it affects individual estates, and procedures for review can minimize stress, decrease misperceptions, and help to ensure smooth operation of the recovery program, as well as foster public confidence. States have developed and disseminated information, through brochures, Web sites, toll-free telephone numbers, and trained staff, to help the public understand Medicaid estate recovery.

Twenty-one states have estate recovery brochures, all of which differ in use and distribution and in key information included, such as services for which recovery is sought, exemptions or deferrals, hardship waiver criteria, use of liens, and contacts for questions.

Twenty-three states have Web sites on estate recovery, all of which differ with regard to target audiences (many are aimed at the public, but at least two are directed to attorneys), presentation, and information included.

Twenty-three states have training sessions on estate recovery for Medicaid eligibility staff and others who may encounter Medicaid applicants and enrollees. There is considerable variation in the level of resources each state commits to training Medicaid eligibility staff and others who may come into contact with Medicaid applicants and enrollees, especially at the time of Medicaid application.

At least 35 states have toll-free telephone numbers, 12 of which focus specifically on estate recovery and the remainder generally on Medicaid. At least seven states have no toll-free number.

Forty-seven million people in the United States speak a language other than English at home, yet only a few states convey information on estate recovery in languages other than English. Seven states have brochures and three have Web sites in languages other than English.

The project developed a *model brochure* and listed replicable practices on format, content, and distribution.

Notice at Application and Additional Key Points

Meaningful notice is a fundamental responsibility of states in implementing estate recovery. Moreover, such notice benefits Medicaid agencies, promoting all parties' understanding of the state's action and procedures for challenging the action. Such notice also enhances efficiency and public trust.

CMS guidance indicates that states should provide a general notice of estate recovery at the time of Medicaid application. This is a cornerstone of fairness. Applicants need to be aware that by enrolling in the program, they are agreeing to give back at a later time the value of the care received, that is, the care comes with the caveat that the estate eventually will pay the state back.

All responding states give notice of estate recovery at application. However, this notice is generally a one-line or brief paragraph reference in the lengthy Medicaid application form. It often is included in a long list of many competing and important beneficiary “rights and responsibilities” and the enrollee frequently must sign to indicate that he or she has reviewed and understands the list. Because it is difficult to absorb all of this information during the eligibility process, some states give the applicant a brochure, but this practice is not uniform across and within states.

Some states give notice of estate recovery at additional points as well as at application: 14 give notice at redetermination of eligibility, and 13 at admission to a certified facility.

Whether a better understanding of estate recovery at application (and following points) would deter a significant number of older people and others, who could qualify for Medicaid long-term care services (including home and community-based waiver services), from applying is not known.

The study identified approaches to highlight information about recovery at application and other key points.

Pre-Death Lien Notice

Federal Medicaid law allows states to impose pre-death or “TEFRA” liens on the homes of living Medicaid recipients determined to be “permanently institutionalized” and not likely to return home. Both federal law and CMS guidelines require notice and opportunity for a hearing on determination of permanent institutionalization for placement of a TEFRA lien.

A TEFRA lien notice is addressed to a living Medicaid recipient whose property interests are at stake. Moreover, the property generally is a home, often a lifetime one. By definition the institutionalized recipient is frail and frequently is cognitively impaired, and he or she may or may not have a legally authorized surrogate acting on his or her behalf.

Currently 22 states report having authority to place pre-death TEFRA liens on the homes of living Medicaid recipients determined to be permanently institutionalized. However, not all of these states actually impose such liens. Twelve of the 22 states with TEFRA lien authority have notices of permanent institutionalization and intent to place a lien, as required by federal law and CMS guidelines; eight did not respond; one has no written notice but uses an alternative procedure; and one did not know.

Lien notices vary significantly in the key information they include, such as how permanent institutionalization is determined (included by nine of the 12 examined); a

requirement to dissolve the lien if the enrollee returns home (eight of 12); explanation of exemptions (eight of 12); and explanation of the effect of the lien on property ownership (seven of 12). The notices also differ widely in readability factors such as print size, format, and wording.

All of the lien notices include appeal information, although appeal procedures vary markedly in levels of review, time frame, scope of review, procedure for requesting a hearing, and availability of legal assistance.

The study identified effective content and format of pre-death lien notices. The resulting report's *model pre-death lien notice* includes all key information in readily understandable language and format.

Claim notice

Unlike a lien notice, a claim notice is not directed to the Medicaid recipient. Rather, it is sent after the recipient has died and has left an estate. CMS guidance says that states “should give a specific notice to individuals affected by the proposed recovery. . . .” The notice is to be served on the executor or legally authorized representative of the person’s estate or, if none is known, the family or the heirs. The notice should include “at a minimum, the action the State intends to take, reason for the action, individual’s right to a hearing. . . , methods by which he/she may obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered.”

The study examined two types of claim notices. Most commonly, the notice is a letter from the Medicaid agency following the opening of probate in court, attaching a copy of the judicial claim statement that is part of the probate process. This allows for a reliable method of identifying and reaching heirs, but estates frequently are not probated or probate is not begun for an extended period following death. Thus, the other type of claim notice is a letter sent by the Medicaid agency directly following the recipient’s death, before a probate process begins, to the best contact available. The letter may reach an uncertain audience: contacts listed in the Medicaid file, family members who may have contacted the agency, or simply the decedent’s last known address. The notice may reach potential heirs who do not understand the document, as they do not yet have an attorney to help interpret it, or it may not reach heirs at all. There appears to be no sound method by which an agency can identify and inform “individuals affected,” short of through the probate process. In addition, confidentiality may be an issue; that is, the letter may be opened by a family member who did not know the deceased was on Medicaid.

For either kind of claim notice, a potential inheritance is at stake. While the heirs may have no immediate legal right to the property and will receive inherited assets only after debts are paid, including the Medicaid claim, they may have an expectation that the inheritance could be reduced, so they are directly affected. Some may be low- and moderate-income individuals who are depending on the property they expect to receive. Some may regard the property, frequently a home, as a family legacy of inherent personal value. For all of these reasons, it behooves a state agency to make the notices as clear as possible.

The claim notices vary significantly in the key elements they include, such as hardship waiver information (reported by 27 of 35 responding states); exemption or deferral information (23 states); and instructions for contesting the recovery (12 states).

Beyond these basics, the notices also differ considerably in additional content, including statements about the notice recipient's responsibility to notify others affected, the fact that the claim is not against the notice recipient personally, the availability of an itemized list of expenditures for which recovery is sought, limitation of the claim to the asset value, and references to a Web site or brochure. The notices also vary widely in readability factors such as print size, format, and wording.

The report identifies effective practices in claim notice content and format, and the resulting report's *model claim notice* includes all key information in readily understandable language and format.

Safeguards in Direct Collections from Banks and Nursing Homes

In addition to recovery of property through or preceding the court probate process as described above, some states have procedures to recover funds—generally very modest amounts—directly from banks (in individual and joint accounts) and from nursing homes. (The 2005 study found that 16 states have such procedures.)

States that recover funds directly from bank accounts of the decedent use state law provisions generally derived from the “small estates probate” section of the Uniform Probate Code. Under these procedures, Medicaid agencies can use affidavits to collect bank account funds. These procedures are efficient, but they pose a challenge in notification of “individuals affected” to allow for an opportunity to object, make a case for a hardship waiver, or request an exemption. Indeed, the Medicaid agency may be unable to identify such individuals.

Protection of surviving spouses and other dependents is a key consideration in federal estate recovery law. While this requirement generally is viewed in the context of homes or other real property, the law appears to apply equally to direct recovery from banks. Thus, if the Medicaid agency knows of a surviving spouse or dependent child, there should be no recovery. However, if there is no information about such exempt individuals, states at least need to allow sufficient time (for example, 60 days) following death for possible collection by such individuals.

Many states have expanded their definition of “estate” to include recovery from joint bank accounts with right of survivorship, thus recouping commingled funds. A joint account with right of survivorship is a bank account in which more than one party has an ownership interest. When one of the account holders dies, the remaining joint account holder(s) receive the funds. However, creditors view a joint account as they would an individual account and can claim a debt even if only the decedent actually owed the debt. If the joint account is with a surviving spouse or other exempt individual, there should be no collection. However, if it is with

others, the account is subject to estate recovery, and it is important for Medicaid recipients to understand this in advance.

States also may recover funds directly from nursing homes in which the decedent lived. This may include any personal needs allowance funds as well as other funds the facility held for the resident. Some state laws provide that facilities must notify the Medicaid agency of the recipient's death and report any remaining funds.

Hardship Waivers

Hardship waivers are a safeguard and bulwark against impoverishment of the decedent's heirs. Federal law requires states to waive recovery in situations where it would cause undue hardship. CMS has not established mandatory criteria for states, but CMS guidance provides examples and suggests that states give special consideration to cases in which the estate subject to recovery is "(1) the sole income producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; or (3) other compelling circumstances."

As described in the 2005 study, states use a range of factors, and often many factors, in determining undue hardship. The most common factor is whether the estate consists of an income-producing asset recovery of which would cause loss of livelihood for survivors. All responding states except one (Alabama) reported specific criteria for determining undue hardship. Several states indicated overlap of the hardship waiver with estate recovery exemptions and deferral as well as homestead exemptions.

Many states do not track the number of hardship waiver applications submitted, granted, and denied. For those states reporting waiver data, the average number of applications submitted has decreased by 32% since the 2005 study. The average proportion of waivers granted and denied remained stable. The decrease in applications may be attributed to better public information about waiver criteria (decreasing misguided applications), narrower waiver criteria, or both.

States vary in how they implement their waiver procedures. Several of them rely on the attorney for the estate to provide the heir(s) with waiver information. Of the responding states, 14 have a standard waiver application form, and 13 simply ask applicants to submit a letter to the appropriate state agency. At least 21 states have a formal written appeal process for waiver denial.

This report lists hardship waiver practices for replication and notes that several states offer options for deferral, negotiated partial compromises, or payment schedules short of a full waiver.

Data Collection

The lack of basic data collection and research hampers assessment of estate recovery efforts. Better data collection is needed to fully evaluate the impact and effectiveness of estate

recovery. Indeed, in analyzing responses to the survey questionnaire, project staff encountered numerous inconsistencies, serious gaps, and possible data errors that required further checking and hindered evaluation of the results.

While most responding states (23) have a computerized system to collect basic estate recovery statistics, many track only the number of estates against which recovery was completed. The specific data elements collected vary considerably, with only some states able to report the number of exemptions and deferrals (17 of the responding states), number of hardship waivers requested (21) and granted (24), number of recoveries contested (12), number of recovery settlements (18), sources of property (real versus personal) from which recovery was made (13), and the number of pre-death liens (nine).

Only 20 states reported tracking total administrative costs of their estate recovery efforts (such as staff, facilities and support, information systems, and legal costs), and only three states (Alabama, District of Columbia, and Nevada) publish estate recovery data regularly. This report lists elements for effective data collection.

Conclusions and Recommendations

Estate recovery and accompanying lien policies directly affect specific individuals—frail residents of long-term care facilities whose homes are subject to liens, surviving spouses, and other family members or potential heirs of deceased Medicaid recipients. States may face a challenge in balancing the competing social goals of protecting these populations and maximizing collections to replenish state budgets. This study investigated protections currently used, revealing wide variations among states in public information, notice, hardship waiver procedures, direct collections, and maintenance of data for program evaluation. The study stands as a resource for states by identifying the variations and highlighting some readily usable practices that could benefit both the state recovery programs and the populations affected.

Conclusions

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% 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. While estate recovery is making only very modest contributions to state budgets, it affects family members and other heirs, some of whom require protection through exemptions, deferral, and hardship waivers, and all of whom are entitled to meaningful notice.

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. Meaningful notice is the foundation of procedural due process. Notice of a state’s intent to place a pre-death lien is particularly critical for vulnerable residents of long-term care institutions. Notice is also crucial for surviving spouses, who may depend on financial transactions involving the property. A claim notice needs to clearly inform potential heirs, who may have low or moderate incomes and may be depending on the property, of the pending recovery and opportunities for exemption or waiver. Notices that these individuals can understand also saves scarce staff time and helps to inspire public trust.

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. 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 at least 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. In the last two years, the number of waiver applications submitted has decreased substantially, possibly due to an increase in public information (which may, in turn, result in fewer waiver submissions that are not responsive to the criteria), tightened waiver eligibility standards, or both. At least one state has no specific criteria for hardship waivers.

7. As in 2005, 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 other affected populations affected by estate recovery, the study urges that:

1. States review and consider the promising practices identified in this report. These practices include user-friendly brochures, Web sites, information in languages other than English, clear notice at the point of Medicaid application, basic training of eligibility staff, understandable notice about pre-death liens and claims, use of hardship waiver forms, and development of clear appeal procedures, along with routine collection of basic recovery data. These practices all offer low-cost, high-impact opportunities for estate recovery programs to enhance efficiency and further the understanding of beneficiaries, families, and the public.

2. States emphasize early notice of recovery. Government recoupment of funds makes Medicaid long-term care different from most public benefit programs. States need to alert beneficiaries and families to this fact by bolstering public information and ensuring their understanding through oral explanation and clear written notice at the point of application.

3. States that send notice of recovery directly following the death of Medicaid recipients reexamine this approach. Initiating recovery at death instead of waiting for probate targets an uncertain audience that frequently lacks legal representation or other sources of assistance. This practice bears careful scrutiny and at a minimum requires attention to ensure that the claim notice is easy to understand, includes all key information, and is accompanied by a fact sheet or brochure with full contact information.

4. States that recover directly from banks recognize exemptions and build in key protections. First, states need to recognize that spouses and other exempt populations are excluded from direct recovery of bank accounts, to the extent they can be identified. Banks need to recognize these exempt populations as well. Second, states need to alert Medicaid recipients at the time of application and through public information channels that monies may be subject to recovery through commingling of funds in joint accounts with nonexempt populations.

5. CMS review the report's description of promising practices and the model notice forms and consider offering guidance to states. A wide range of reviewers have agreed that the promising practices highlighted in the report would enhance the state programs, and that the model claim notice and lien notice forms include all key information presented in language and format best understood by those who may be affected. CMS could urge states to adapt the practices and forms, thus encouraging uniformity and consistency among the states, yet allowing for needed flexibility.

6. CMS consider setting out basic data elements for estate recovery and recommending formats for reporting them consistently and making the results publicly available. Such consistent collection of data across states would help CMS, state agencies, and the public to identify trends and better assess recovery efforts. Important elements might include at least the number of estates against which recovery was completed, exemptions or deferrals, hardship waivers (submitted, granted, denied), and pre-death liens. In addition, more consistent state reporting practices to CMS concerning amounts collected would provide a more precise picture of estate recovery nationally and how states compare to one another.

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

I. Background and Status of Estate Recovery

A. Purpose

More than 55 million Americans rely on the joint federal-state Medicaid program for their health care and long-term care. Medicaid is the nation's largest public health insurance program, accounting for almost half of all spending on long-term care.¹ An indigent nursing home resident with dementia, a young person with mental retardation in an intermediate care facility, an older middle-income nursing home resident who has "spent down" private resources, or a couple receiving home and community-based care—all may be beneficiaries of the Medicaid program.² Older persons and persons with disabilities represent one-quarter of all Medicaid enrollees, but account for 70% of Medicaid spending.³

The need for acute and long-term care services for these growing populations will intensify. Medicaid enrollment and spending spiraled sharply upward during the 2001 recession and thereafter. While it has slowed recently,⁴ "state and federal pressure to limit and/or increase the predictability of Medicaid spending remains high,"⁵ as evidenced by the Deficit Reduction Act of 2005, which seeks to reduce Medicaid expenditures.

In light of these pressures, estate recovery is one approach to replenish state funds. Estate recovery has been a federal mandate for 14 years. In 1993, Congress sought to recoup the costs of long-term care and other related Medicaid services by requiring that states implement estate recovery programs. The Centers for Medicare and Medicaid Services (CMS) have issued guidelines in the *State Medicaid Manual* that afford states considerable flexibility in implementation. In response, states have initiated laws, regulations, and programs to recover funds from the estates of institutionalized Medicaid recipients and those who were age 55 or older when they received Medicaid, as well as certain additional recipients designated by law.⁶

In 2005, the ABA Commission on Law and Aging completed a nationwide survey for the AARP Public Policy Institute assessing the status of estate recovery programs. The survey findings offered a snapshot of estate recovery program and practices at a time when states were struggling to balance Medicaid coverage with dramatically increasing costs, declining revenues, and budget shortfalls. The survey (referred to as the 2005 study) resulted in a comprehensive report analyzing the scope, variation, and operation of the state programs.⁷

The 2005 study concluded by asking "whether more rigorous and uniform notice and other procedural protections, as well as broader outreach, could check misperceptions about estate recovery and ensure the effectiveness of hardship waiver requirements" and whether additional protections should apply to protect beneficiaries and survivors. Thus, in 2006, the AARP Public Policy Institute asked the ABA Commission to conduct a more limited follow-up study focusing on such protections and identifying promising practices that might be replicated.

The aim of the study was: (1) to provide CMS, state Medicaid estate recovery officials, policy makers, advocates, and the legal community with information about current state practices concerning public information and procedural protections; and (2) to assist states in developing

procedures that give Medicaid beneficiaries and survivors timely, clear, and accurate information on estate recovery and that include necessary safeguards. This report presents the study findings and serves as a resource for states, highlighting readily usable practices that could benefit both the programs and the affected populations.

B. Legislative Overview

1. Estate Recovery. Before 1993, Medicaid law also allowed, *but did not require*, a state agency to make a claim against the estate of individuals who were 65 years of age or older. Payments could be recouped only after the death of a surviving spouse and only when the beneficiary was not survived by a minor child or a blind or disabled child.⁸ As of October 1, 1993, 28 states had Medicaid estate recovery laws. In FY 1992, approximately \$63 million was recovered under these programs in 26 states.

In 1993, in the Omnibus Budget Reconciliation Act (OBRA), Congress mandated that *states must seek recovery* from estates of: (1) institutionalized Medicaid recipients who could not be expected to return home; (2) individuals who were age 55 or over when they received Medicaid; and (3) certain additional recipients designated by law.⁹ States must recover for payments made for nursing facility services, home- and community-based services, and “related hospital and prescription drug services.” OBRA ’93 requires states to exempt or defer recovery when there is a surviving spouse; or when there is a surviving child under age 21, blind, or disabled.¹⁰

The OBRA amendments also included the following key provisions:

- allowed states to recover from individuals 55 or older payments for *any* items or services covered under the state Medicaid plan and received after age 55¹¹;
- required states to establish procedures for waiver of recovery due to “undue hardship”¹²; and
- provided a specific definition of the term “estate,” according to state probate law, and giving the option to expand this definition beyond the traditional probate estate to include assets conveyed “through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”¹³

The Centers for Medicare and Medicaid Services (CMS) have not promulgated any estate recovery regulations as of this writing. However, CMS (formerly the Health Care Financing Administration) issued implementing guidelines in 1994¹⁴ and made several important changes in updated guidelines in the *State Medicaid Manual* in 2001.¹⁵

2. Pre-Death TEFRA Liens. Federal law also provides for claims based on liens on the homes of living Medicaid beneficiaries,¹⁶ as permitted by the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982.¹⁷ TEFRA rules permit a lien on the home of a nursing home resident when, after notice and an opportunity for a hearing, the state determines the resident is not reasonably expected to return home.¹⁸ However, the law prohibits imposition of such a lien if any of the following individuals live in the home: the recipient’s spouse, minor child, blind or disabled child, or sibling who has an equity interest in the home and has lived there lawfully for a year or more¹⁹ and prohibits recovery based on such a lien when a qualifying sibling or adult child caregiver lives in the home.²⁰ TEFRA liens must be dissolved if the recipient is discharged from the facility and returns home.²¹ TEFRA lien rules apply only to liens

imposed on real property during the lifetime of a beneficiary and to the enforcement of those liens.²²

C. Study Methodology

With the support of the AARP Public Policy Institute, the ABA Commission on Law and Aging examined five areas of state practices protecting individuals affected by estate recovery:

- Public information, including brochures, Web sites and phone lines, as well as training sessions for Medicaid eligibility and other agency staff
- Notice, including notice at application, pre-death lien notices, and claim notices at recovery²³
- Undue hardship waivers
- Procedures for direct collection of funds from banks and nursing homes
- Data collection, enabling state agencies and the public to assess the status of recovery programs

The ABA Commission and the AARP Public Policy Institute received assistance from an advisory panel that included two state Medicaid officials, a state AARP volunteer, a Medicaid expert, an advocate for Medicaid recipients, a consumer law expert, and an elder law attorney, as well as several knowledgeable AARP staff. The project also benefited from the comments of several members of an informal listserv of state Medicaid estate recovery officials. The project had five components.

1. Brief E-mail Survey of Medicaid Officials. For its 2005 study, the ABA Commission had identified an official responsible for Medicaid estate recovery or third-party liability in each state. This list provided the basis for contacts for the current study, updated to reflect changes.

The project staff recognized that state Medicaid staff frequently are overburdened and that it had been only a short time since the Commission's comprehensive telephone survey. Thus, with input from the advisory committee, the project developed a brief, two-page e-mail profile that could be filled out easily and returned electronically (see Appendix C). Staff preliminarily filled in any information already uncovered in the 2005 study, asking state officials to confirm, update, and add to these responses. The project e-mailed the profile to the state contacts and followed up by e-mail and telephone over several months.

A total of 35 states (including the District of Columbia) responded to the survey between March and July 2006. Two states, Georgia and Michigan, did not have estate recovery programs at the time of the survey. One state, New Mexico, reported an "inactive program," and one state, Colorado, declined to participate. Twelve states did not respond despite repeated requests.

2. Identification of Amounts Collected. As background for the study, the e-mail profile asked state officials the amount of recovery for FY 2005. The project also obtained data on amounts collected by each state from the most recent Quarterly Expense Reports (Form CMS-64), as extracted and presented by Burwell et al. of Medstat.²⁴ For greatest consistency across states and over time, the project used Form CMS-64 data in listing the amounts recovered and in calculating these amounts as a percentage of Medicaid long-term care expenditures. Form CMS-64 is the accounting statement states must submit quarterly under Title XIX of the Social Security Act. On the form, states report the disposition of Medicaid dollars, including the

amount of recovery. States use the form to claim Federal Financial Participation for state Medicaid outlays, and the federal government audits these reports, so the forms are considered a solid source of information on state Medicaid accounting.

3. Collection of Claim and Lien Notices and Brochures; Identification of Web sites.

The project asked each state to send a copy of the claim notice it sends to individuals affected by estate recovery, and received 26 notices. In addition, the project requested a copy of the pre-death lien notice from each state using TEFRA liens and obtained 12 such notices.²⁵ The project also collected a number of notices at Medicaid application and 13 estate recovery brochures and located 20 Web sites (Table 5). In addition, the project engaged a readability expert, who reviewed eight claim notices and eight lien notices.²⁶

4. Telephone Discussions with Selected States. To supplement the survey profile, identify promising practices, and better understand differences among the states, the project conducted telephone discussions with Medicaid officials in nine states. These nine states were selected to allow a more in-depth examination of a diversity of recovery practices. Specifically, project staff sought to learn more about differences in points at which recovery is initiated and use of notices preceding the formal court probate process. Thus, the project selected six states that begin recovery immediately following death and three that make no claim for recovery until a formal court probate process is underway. These nine states were California, Illinois, Iowa, Massachusetts, Minnesota, Nevada, North Dakota, Ohio, and Oregon.²⁷

5. Identification of Practices for Replication and Development of Model Notices.

Based on the survey, the notices collected, and the interviews, the project culled lists of “promising practices” that could benefit state recovery programs. These were practices that could best inform affected populations that the amount of Medicaid funds spent on care for older and institutionalized enrollees must be paid back, and practices that built in basic standards of fairness in the recovery process. The aim was not to define these “promising practices” strictly but rather to come up with a menu of ideas for states to use. The project also developed a model brochure and three model notices—a lien notice and two versions of a claim notice. The readability expert and the advisory panel reviewed all three model notices.

D. Status of Programs

Fifty of the 51 states (including the District of Columbia) have a Medicaid estate recovery program. At the time of the 2005 study, Texas, Georgia, and Michigan had no program. Texas implemented its program on March 1, 2005, after passing legislation and undergoing an extensive period of statewide public outreach and information. The Georgia program became effective in May 2006.²⁸ As of this writing, Michigan still has no program, and New Mexico reported an “inactive program.”²⁹

E. Amounts Collected

Federal data (reported in CMS-64) show estate recovery amounts are increasing at a modest rate. The amount recovered nationally in FY 2005 was \$411,133,981, almost \$81 million more than in FY 2003. The average amount recovered in FY 2005 (\$8,061,451) is 24% higher than the average amount recovered in FY 2003 (\$6,477,206).³⁰ Thirty-two states

recovered, on average, \$3,506,463 more in FY 2005 than they did in FY 2003. The highest percent increases were Tennessee (447%), Mississippi (250%)³¹, and Kentucky (182%).

While the amounts recovered from more than half of the states increased, according to the CMS data, 15 states recovered less in FY 2005 than they did in FY 2003. For these states, the amounts recovered decreased by an average of \$2,092,337. The highest percent decreases were in Delaware (-100%), Washington (-95%), and Oregon (-92%)³² (Table 1).

Gross recovery amounts for FY 2005 differed markedly among the states, likely stemming from differences in collections procedures, definition of “estate,” and other factors. State recovery amounts ranged from a low of \$169,473 in Louisiana to a high of \$56,290,075 in California (Table 1).

The average amount recovered as a percent of long-term care expenditures³³ remained stable at 0.61% in FY 2005, compared with 0.63% in FY 2003³⁴ (Table 2). The proportion ranged from 0.01% of long-term care expenditures in Louisiana to 2.09% in Idaho, with only six states (Iowa, Minnesota, New Hampshire, Massachusetts, Idaho, and Arizona³⁵) above 1% (Table 2).

While the estate recovery revenues represent only small percentages of increasingly large long-term care budgets, they nonetheless can amount to significant dollars, as shown by California’s \$56 million total (Table 1). The modest increase in estate recovery revenues, substantial increase in the average amount recovered, and potential for recovery of significant dollars indicates the continuing need for the protections described in this paper.

II. Protections for Beneficiaries and Survivors

Estate recovery makes the Medicaid program very different from most federal benefit programs; to the extent possible, the amount of the benefits is returned eventually to the government (if there are any estate assets to recover). This fact, which applicants, beneficiaries, and survivors must understand, needs to be communicated to them clearly at multiple points and through multiple channels, from consideration of an initial application to the point when funds are actually collected.

This study examined state approaches to public information and notice, highlighting specific promising practices that could be of benefit to all states in alerting those affected. It also investigated procedures for waiving estate recovery because of undue hardship on the survivors. It explored procedures that states use to make collections directly from banks and nursing homes rather than relying solely on the judicial claims process. Finally, the study explored state data collection on estate recovery, because solid statistics are needed to fully evaluate the impact on beneficiaries and survivors and the effectiveness of the state programs.

A. Public Information

Public information on Medicaid estate recovery is essential to Medicaid applicants, enrollees, and their families. Effective information and outreach can heighten public awareness about recovery: that for certain older and institutionalized enrollees, the amount of Medicaid funds spent on care eventually must be returned to replenish state budgets (state general funds or

Medicaid funds specifically) for public purposes. Conveying clear information at the outset about the recovery program, how it affects individual estates, and procedures for review can minimize stress and decrease misperceptions. Clarity and readability of the information is particularly essential because Medicaid enrollees and survivors may have modest education, lack legal representation, have poor vision, or be under severe stress, any of which may affect their ability to read and understand the information presented. Public information also can help to ensure smooth operation of the recovery program and foster public confidence.

CMS guidance provides that states should give a general notice explaining the state’s estate recovery program to applicants during the eligibility determination process.³⁶ States typically include a general notice about recovery in the Medicaid application (as described in Section B below). However, beyond this, many states have developed and disseminated information to help the public understand Medicaid estate recovery, including the rights of the state and the recipient. States use brochures, Web sites, toll-free telephone numbers, and trained staff to convey the message about estate recovery.

1. Findings About Public Information. Since the 2005 study, public information on estate recovery has increased. The number of responding states reporting the existence of brochures increased from 14 to 21, and the number of toll-free telephone numbers in responding states increased from 32 to 35 (Table 4).

While more public information is available, the manner in which it is used and distributed remains unclear. For example, some states give brochures on estate recovery to Medicaid applicants when they apply, while others wait until they have initiated estate recovery. Several state recovery units did not know when or how their brochure was distributed, as this may be the responsibility of the eligibility office.³⁷ Little is known about the information provided on state toll-free telephone lines either. The survey did not ask states about the amount or kind of information available, or how many calls the toll-free telephone line receives. Also, little is known about Web site visitors and whether the Web site was targeted to a particular kind of visitor, that is, families and/or attorneys.³⁸

The brochures and Web sites of some states lacked information on several key aspects of estate recovery, including services for which recovery is sought (e.g., nursing facility services, home and community-based services), hardship waiver criteria, exemption and deferral, minimum claim value, and limitation of claim to estate value, as shown below and set out in greater detail in tables 6 and 7.

Content of Public Information Channels on Estate Recovery		
Includes Information on:	Web Sites (23)	Brochures (21)
Services for which recovery is sought	14	14
Exemption/deferral	18	19
Hardship waiver criteria	13	17
Minimum claim value	5	3
Limitation on state’s claim to value of the estate	6	8
Use of liens	5	9

Information on estate recovery in most states is not available in languages other than English. Forty-seven million people speak a language other than English at home,³⁹ yet only a few states convey information on estate recovery in languages other than English. Seven states have brochures and three have Web sites in languages other than English. The most common non-English language used to convey information is Spanish (Tables 6 and 7).

There is considerable variation in the level of resources each state commits to training Medicaid eligibility staff and others who may come into contact with Medicaid applicants and enrollees or their families. Twenty-three states do have training sessions on estate recovery for Medicaid eligibility staff and others (Table 4); however, the training varies in depth and frequency. Several states expressed interest in conducting training sessions but indicated that state funds to do so were unavailable. Moreover, while the survey revealed considerable variation in the level of resources each state devotes to training, it did not indicate whether trainees actually *conveyed information* on estate recovery to Medicaid applicants and enrollees or their families—especially at the time of application, when understanding the program is critical.

2. Promising Practices Concerning Public Information

- ✓ Provide information on estate recovery to applicants as early as possible in the application process.
- ✓ Produce and disseminate estate recovery brochures similar to the sample brochure in Appendix B. This sample was created with all of the promising practices that follow in mind to help states create their own brochure.⁴⁰
- ✓ Include information on all key points of estate recovery in brochures, Web sites, and toll-free telephone numbers. Key points include information on services for which recovery is sought, hardship waiver criteria, exemption and deferral, minimum claim value, and limitation of claim to estate value.
- ✓ Use a 12-point or larger typeface and a boldface font for emphasis. Avoid ALL CAPITAL LETTERS and *italics*, as these are difficult to read. Adding more space between the lines on the page to emphasize a critical item is also useful. Wisconsin uses a larger typeface and boldface font to emphasize critical information. For example, “**Medicaid recipients of any age who live in nursing homes** may have the cost of **all** benefits recovered that were received while they lived in a nursing home on or after October 1, 1991.”⁴¹
- ✓ Avoid using acronyms for government offices, such as “DHS” for Department of Health Services. Also, avoid referring to specific state funding sources, for instance, “AABD Medical Assistance,” “AABD cash,” or “AABD client,” and use the more common “Medicaid” instead.
- ✓ Ask and answer questions to convey important information on Web sites and in brochures, for example: “What is a lien, and how does it affect your ownership in property?” The Arizona brochure poses questions such as, “What is a TEFRA lien?” and “Who do TEFRA liens apply to?”⁴²

- ✓ Distribute brochures widely, frequently, and by varied means. In Texas, at least some county probate courthouses display the brochure. Twice a year, California sends a one-page general notice similar to a brochure, printed in Spanish as well, to all Medi-Cal enrollees.
- ✓ Create an estate recovery Web site designed for easy understanding, and have an expert in public information and readability review the Web site.
- ✓ Publicize a phone number for questions and/or a Web site for more information.
- ✓ Provide information in languages other than English. Texas' Web site conveys information in Spanish by including a link to a "versión en español" of the entire site, including brochures. Texas also has a dual-sided brochure with information in English on one side and Spanish on the other. Wisconsin offers brochures in Spanish, Russian, and Hmong. Oregon prints brochures in Spanish, Russian, and, on request, converts the brochure into large print, Braille, audiotapes, or other languages.⁴³ Montana, North Dakota, and Utah do not have brochures in languages other than English, but they do offer language services for all Medicaid enrollees.
- ✓ Include brochures and reference to the toll-free telephone number and Web site in claim and lien notices.
- ✓ Collect information on the use and distribution of the public information, including the number of people who call the toll-free telephone number and visit the Web site.
- ✓ Consider the level of detail beneficiaries and families can absorb. Medicaid enrollees and survivors may have modest education, lack legal representation, have poor vision, or be under severe stress, any of which can affect their ability to read and understand the information presented. Make the content clear and readable and ensure that it conveys all pertinent information and accommodates a variety of circumstances. In Texas, before the estate recovery program began, Medicaid officials worked closely with consumer advocacy groups to create a consumer-friendly brochure and Web site.⁴⁴ South Dakota has two Medicaid brochures: a general Medicaid brochure and a brochure specifically on liens.
- ✓ Create and staff Medicaid hotlines and include information on estate recovery; or develop a hotline specifically to address questions about estate recovery. For general Medicaid hotlines, ensure that staff are trained and have access to accurate and up-to-date information on recovery.
- ✓ Train Medicaid eligibility staff on all key points of estate recovery. Strengthen regular linkage between eligibility staff and estate recovery staff to ensure the eligibility unit is conveying recovery information routinely in client interviews and in outreach.
- ✓ Educate the legal community by speaking at legal conventions or conducting continuing legal education courses for attorneys on the subject of estate recovery.⁴⁵ In Ohio, a Medicaid official speaks regularly at conventions and conferences of attorneys, probate judges, and magistrates.⁴⁶ In Illinois, the Bureau Chief of the estate recovery unit has

conducted workshops for the Illinois Institute for Continuing Legal Education on Department policy.⁴⁷

B. Notice at Application and Additional Key Points

A key obligation of states is to ensure adequate notice to Medicaid applicants, recipients, and survivors. Notices ideally convey information clearly about the concept of recovery, the scope of the program, how it affects individual estates, and procedures for review.

Meaningful notice is a fundamental responsibility of states in implementing estate recovery. Moreover, such notice will benefit Medicaid agencies by promoting all parties' understanding of the state's action and procedures for challenging the action and will contribute to efficiency and public trust.

The 2005 study concluded that "state estate recovery notices vary widely in timing, frequency, and clarity."⁴⁸ It is difficult to assess and compare recovery notices because they come at various points in the process, there may be different iterations or follow-up versions of the same notice, and the intended audience may be unclear. However, the current survey examined notice at application and additional points, pre-death TEFRA lien notices⁴⁹, and claim notices at recovery.⁵⁰

1. Findings on Notice at Application and Additional Key Points. In the *State Medicaid Manual*, CMS indicates that states should provide a general notice of estate recovery when individuals apply for assistance.⁵¹ This is a cornerstone of fairness. Applicants need to be aware that by enrolling in the program, they are agreeing to give back at a later point the value of the care received, that is, the care comes with the caveat that the estate eventually will pay the state back.

All responding states give notice of estate recovery at application. However, this notice is generally a one-line or brief paragraph reference in the lengthy Medicaid application form. It often is included in a long list of many competing and important beneficiary "rights and responsibilities," and the enrollee frequently must sign to indicate that he or she has reviewed and understands the list. For example, in one state, estate recovery is listed as one of 38 "rights and responsibilities" in the Medicaid application. The prospective enrollee is informed by item #22, "Any Medicaid benefits paid on your behalf after you become fifty-five (55) years of age become a preferred claim against your estate which shall have priority in order of payment over all claims except prior recorded claims and taxes." The client must sign the form to indicate that he or she has received a copy of the notice and that he or she "understand[s] all information included on this form."⁵²

Because it is difficult to absorb all of this information during the eligibility process, some states give the client a brochure at the time of application, but this practice appears uneven across states and even within states that have such a brochure. Several survey respondents and interviewees did not know whether or to what extent a brochure was provided or whether a caseworker explained the recovery program at the time of application, because eligibility is in a different unit and not connected with estate recovery.

Some states give notice of estate recovery at additional points as well as at application. Fourteen states give notice at redetermination of eligibility, and 13 give notice at admission to a certified facility.

Whether greater understanding of estate recovery at application (and following points) would deter significant numbers of elders and others who could qualify for Medicaid long-term care services, including home and community-based waiver services, is not known. The 2005 study concluded by asking, “whether recovery is, in fact, a barrier to receipt of home- and community-based care and other benefits . . . and the extent to which this may drive up costs in the long run by discouraging early treatment and increasing the need for more expensive care later.”⁵³

2. Promising Practices on Notice at Application and Additional Key Points

- ✓ Make the estate recovery notice language more visible in the Medicaid application. Oregon made its information about estate recovery on the Medicaid application more prominent by moving it to just above the client’s signature block.
- ✓ Provide an estate recovery brochure to all new Medicaid applicants. A trained caseworker should explain the program and note in the database that the brochure was provided and recovery was discussed.
- ✓ Develop a system of regular consultation between the estate recovery unit and the eligibility unit concerning training caseworkers, providing brochures, and responding to client questions.
- ✓ Inform enrollees about estate recovery not only at application but at other key points, such as redetermination of eligibility or admission to a certified facility. California sends a one-page notice twice a year to all Medi-Cal enrollees.

C. Pre-Death Lien Notice

A lien is “a security device that binds property to a debt and puts a party on notice that someone besides the owner has an interest in that property.”⁵⁴ It is important to distinguish between the concept of a “lien” and a “claim.” A claim triggers the process for taking possession of property or satisfaction of a debt, often through a court proceeding. A lien is a notice of the claim, generally filed in the county recorder’s office. In reality, liens are often “enforced” when the property is sold without going to court. Since one cannot convey clear title to property if a lien is attached, the seller must either satisfy the lien as part of the sale or go to court to have the lien removed. Thus, estate recovery may occur through a lien without a claim, through a claim without a lien, or through a lien that is then enforced by a claim.

Federal Medicaid law provides that states may impose pre-death or “TEFRA” (Tax Equity and Fiscal Responsibility Act) liens on the homes of living Medicaid recipients determined to be “permanently institutionalized” and unlikely to return home. Both federal law and CMS guidelines require notice and opportunity for a hearing on determination of permanent institutionalization⁵⁵ for placement of a TEFRA lien. CMS requires that state Medicaid plans

specify how permanent institutionalization is determined, the notice to be given, the process by which the person will be given the opportunity for a hearing, and the hearing procedures.⁵⁶

A TEFRA lien notice is addressed to a living Medicaid recipient whose property interests are at stake. Moreover, the property generally is a home, often a lifetime home. Indeed, “the family home is the most significant asset a person can own and still qualify for Medicaid, and one that recipients and their families prize for intrinsic reasons unrelated to fair market value.”⁵⁷ Moreover, the institutionalized recipient is by definition frail and frequently is cognitively impaired. The recipient may or may not have a legally authorized surrogate acting on his or her behalf.

Pre-death lien notices concern a potential taking of property and must abide by procedural due process standards. The U.S. Supreme Court has established the principle that the type of notice adequate to meet Constitutional due process requirements can only be determined by the individual circumstances of the proceeding. It must be “notice . . . appropriate to the nature of the case,” and “the means employed must be such as one desirous of actually informing the [person] might reasonably adopt . . .”⁵⁸ A significant federal estate recovery case, *DeMille v. Belshé*⁵⁹, while it concerns a post-death lien and not a pre-death TEFRA lien, emphasizes the importance of the due process right to receive notice in the recovery context. Also, it is notable that the individuals receiving notice of a TEFRA lien have similar characteristics and often are part of the same population that typically receives notices of guardianship proceedings, and the need for timeliness, clarity, and readability in this setting has been well recognized legally.⁶⁰

Finally, it should be recognized that pre-death TEFRA liens are very different from the post-death liens used by some states (13 in the 2005 study). Post-death liens generally seek to secure the state’s interest in a decedent’s estate in the event of a deferral of recovery because a qualifying family member remains in the home (most commonly used when siblings or adult child caregivers live in the home).⁶¹ This study did not collect or examine notices of post-death lien placement. Court cases have affirmed the importance of adequate notice to the surviving spouse for a post-death lien, as the lien could hinder the spouse’s transactions involving the property.⁶²

1. Findings on Pre-Death Lien Notices. Currently, 22 states report having authority to place TEFRA liens, although not all of these states actually place such liens, and some place very few such liens.⁶³ The study revealed that TEFRA lien states generally have combined their notice of determination of permanent institutionalization with notice of intent to place the pre-death lien. Twelve of the 22 states using TEFRA liens reported having such notices and sent copies of these to the project. Eight states did not respond. Alabama has no written notice, but the enrollee or the enrollee’s representative signs the lien and gets a copy, along with an oral explanation. The New York program is county by county, so the state did not know about county TEFRA lien notices.⁶⁴ The 12 notices examined varied significantly in key aspects:

- Does the notice give the criteria for “permanent institutionalization”? Nine of the 12 lien notices examined provided information on the basis of the “permanent institutionalization” determination, and three stated only that the agency has made or intends to make a determination that the Medicaid recipient cannot reasonably be expected to return home.⁶⁵ Without the criteria, the individual or authorized representative cannot challenge the finding effectively.

- Does the notice explain the effect of the lien? Six of the 12 notices examined define a lien, for example, as “a way to bind the State’s claim for Medicaid to the recipient’s real estate.” Seven notices explain the effect of the lien on ownership of the property. For instance, Arizona provides that “the existence of the TEFRA lien may impact the [recipient’s] ability to sell, transfer or exchange the . . . interest in the property prior to satisfying the claim.” The Kansas notice says that the lien “does not change the individual’s ownership interest in the property nor cause the recipient to lose eligibility for Medicaid benefits.”⁶⁶ Notices in five states do not explain the effect of the lien, making it difficult to understand what is at stake.
- Does the notice say the lien will be dissolved upon return home? Federal law requires that TEFRA liens be dissolved if the enrollee returns home.⁶⁷ Eight of the 12 notices examined include a statement about dissolution of the lien.
- Does the notice say there are exemptions in some circumstances? Federal law specifies that a TEFRA lien may not be imposed on an individual’s home if the spouse or other designated relatives live there.⁶⁸ Eight of the 12 notices examined inform the recipient of the exemptions. Four states⁶⁹ do not include an explanation of exemptions/deferral in the notice, but they may send accompanying information.
- Does the notice explain how to appeal? Federal law provides that a state may impose a TEFRA lien only after notice and an opportunity for a hearing.⁷⁰ All of the lien notices examined included appeal information, which varied in several respects. First, notices in four states indicated a preliminary stage of review before the fair hearing.⁷¹ Second, the notices differed significantly in the time frame for appeal. Eight of the notices say that the Medicaid recipient must request appeal within 30 days, but four states have other time frames, ranging from 28 to 90 days.⁷² Third, the scope of review is variable. In most of the lien notices collected, the purpose of the fair hearing is to allow the recipient to disagree with the state’s intended action to impose a lien, but in two states, the hearing is specifically to appeal the determination of permanent institutionalization.⁷³

Finally, the notices describe different procedures for requesting a hearing. They generally direct the Medicaid recipient to file a written request for a hearing with a designated office. Notices in at least five states include or refer to a specific form for requesting a hearing; and in at least one state, an individual can call a toll-free number. Some notices mention assistance from an agency caseworker or social services staff in filing a hearing request.

- Does the notice list any resources for legal assistance? Access to legal counsel or other representation is critical in challenging imposition of a TEFRA lien. Four of the 12 notices examined⁷⁴ mention assistance by legal counsel or others such as friends or relatives at the individual’s own expense, and two⁷⁵ reference legal aid.
- Is the notice readily understandable? The lien notices varied widely in ease of reading.⁷⁶ While the majority used 12-point type, some used smaller print. The notices also differed in their use of white space, paragraph size, and of boldface and underlining to emphasize key points.

Although legal citations and some degree of “legalese” may be necessary, the notices were variable with regard to clarity and simplicity of phrasing. Some use acronyms to refer to the state agency or the Medicaid program, which may be a barrier (particularly if the individual or authorized representative does not have an attorney or other resource for assistance). Most of the notices have variations on the title, “Notice of Intent to File a Lien.” Some lack titles, and some have titles that are unlikely to alert a reader to the state action underway, for example, “Notice of Intent and Opportunity for Appeal” does not indicate the subject at hand, a Medicaid lien on the person’s property.

Presentation of information about how to file an appeal is critical. A few states put information on fair hearings and appeals on a separate page, and several states use a separate heading for emphasis.

The lien notices varied in addressee. They generally are addressed either to the Medicaid recipient or the person’s authorized representative, or they have no salutation but refer to the individual as “the above mentioned client” or “the recipient.” In two states, the notice begins in the third person but switches to “you” in the middle.

2. Promising Practices for Pre-Death TEFRA Lien Notices

- ✓ Make the title specific and visible, for instance, “Notice of Intent to File a Medicaid Lien Against Your Real Property.”
- ✓ Address the letter to the Medicaid enrollee directly. Do not write in the third person (i.e., “the client”). If an authorized surrogate is receiving the letter, he or she will read it on behalf of the enrollee.
- ✓ Use a street address to describe the real property instead of or in addition to the legal address with lot numbers. Clarify that the real property against which the lien is filed includes only the home and does not include other property owned by the enrollee, such as jewelry, cars, or other personal property.
- ✓ Use at least 12-point type and consider wider spacing (1.3 or 1.5), and using boldface and underlining to make key points stand out. Avoid use of acronyms for government offices and Medicaid funding and avoid using all CAPITAL LETTERS and *italics*, since these are more difficult to decipher.
- ✓ Send a brochure or fact sheet explaining TEFRA liens along with the notice.
- ✓ Explain the term “lien” in the notice in simple language.
- ✓ Explain how the state has determined that the enrollee is permanently institutionalized; what are the criteria?
- ✓ Make the notice available in Spanish or other common language. The Arizona lien notice includes a sentence in Spanish directly below the name and address and gives a phone number to call if the person does not understand English.

- ✓ State the purpose of the lien and ultimate recovery—to replenish state funds for public purposes.
- ✓ State plainly that the lien does not immediately affect ownership and that it will not be enforced during the enrollee’s lifetime. Indiana explains simply that “when the state places a lien on property it does not mean that the owner will lose ownership of the property,” and Illinois notes that “this does not mean any action to sell your property will occur” during your lifetime. The Wisconsin notice assures the recipient that “the lien will not be enforced during your lifetime unless the property is sold.”
- ✓ Set out the exemptions clearly and include a questionnaire for reporting information on exemptions. Alaska has a lien questionnaire for information on any surviving spouse, child who is under age 21 or blind or disabled, and sibling living in the home, as well as whether the enrollee requests a fair hearing.
- ✓ Set off information about the right to a fair hearing and how to request a hearing on a separate page or with a separate heading or box. The Kansas lien notice has a separate page on “Fair Hearing” and “Waiver.”
- ✓ Include a form for requesting a fair hearing. Notice in five states (Alaska, Illinois, Kansas, Massachusetts, and Montana) includes or refers to a form. Provide for hearing requests through a toll-free telephone line, as is done in Illinois. Kansas includes a Web site to visit for requesting a hearing.
- ✓ Provide a sufficient period for requesting a hearing, at least 30 days, with possible extension. The Minnesota notice states that “the agency can accept your appeal for up to 90 days after the date of this notice if you show good cause for not appealing within the 30-day limit.”
- ✓ Include accommodation information for the fair hearing session. The Wisconsin notice includes a telephone number for information about accommodations for the hearing. If necessary, consider holding hearings at the institution where the individual lives.
- ✓ Give information about legal assistance. Check with legal aid, state health insurance assistance program (“SHIP” programs), and senior legal hotlines to determine whether they provide such assistance. List these resources, with phone numbers, as well as the bar association lawyer referral number. The Illinois notice lists legal aid offices by regions of the state.
- ✓ Suggest that the enrollee seek help if he or she does not understand the notice. For instance, the Illinois letter states, “If you do not understand this notice, talk to your caseworker or a person who can explain it to you. Your local Department of Human Services office telephone number is...”
- ✓ State the right of the enrollee or representative to review his or her files before the hearing.

Using or adapting the model lien notice below may help states to incorporate the key features described above and to convey clear information.

Model Pre-death Lien Notice

Notice Date: _____

Name
Address
Address

SI USTED NO PUEDE LEER INGLES, Y NECESITA AYUDA, POR FAVOR LLAME AL _____ . [The state should also have this statement in any other languages commonly used in the area.]

Notice of Intent to File a Medicaid Lien on Real Property

Dear M. _____:

This notice is to advise you that the State of _____ intends to file a **Medicaid lien** on your real property at [street address]_____. The purpose of the lien is to guarantee repayment to the state of the money the Medicaid program has paid for your care. This is required by federal law.

A lien is notice of a claim on your home for the payment of a debt. The notice will be filed with the local land records office. **A lien does not mean that you will lose ownership of the property.** It means that when you die or when the property is sold, the state will recover amounts paid in Medicaid funds for your care. The amount will not be greater than the value of the property. If it is less, you or yours heirs will receive what is left.

Under federal and state law, the state **may not place a lien** on your property if it is your home and any of the following relatives live there:

- Your spouse; or
- Your child who is under age 21, or who is blind or disabled; or
- Your sibling who has an ownership interest in the home and who has lived there for at least one year before you went into the medical institution.

Under federal and [state] law, the state may file a lien only when you live in a medical institution (such as a nursing home) and **cannot reasonably be expected to be discharged and return to your home.** The state has decided to file this lien now because [insert criteria: you have lived at the facility for six months or more; we have

information from your doctor that you are not expected to return home; you have indicated no intent to return home].

Even if a lien is placed on your home, [state] Medicaid is required to **remove the lien if you are discharged** from the medical institution and return to your home to live.

If you do not understand this notice, talk to a family member, your caseworker at [social services], or a nursing home social worker. You may also contact _____ at [Medicaid agency] toll-free at [phone number]. The phone number for [local social services agency] is: _____.

How to Request a Fair Hearing

You may appeal the proposed Medicaid lien by filing a written request for a fair hearing on the attached form and mailing it to: _____. You may also request a hearing by telephone by calling _____. A family member or representative may request a hearing on your behalf.

You must request the hearing within **45 days** from the date of this notice (but the agency can accept your request after 45 days if you show good cause for not making the request sooner). [Office] will send you a letter stating the date, time, and place of the hearing. If you will need assistance at the hearing, call _____ at least **10 days** before the date of the hearing. You have the right to review your Medicaid files before the hearing. Contact _____ to review your files.

At the hearing, you may represent yourself or be represented by anyone else such as a lawyer, relative, or friend. To apply for free legal help, contact a legal aid office:

[List key contact information for legal aid]

For questions about estate recovery in [state], please see the enclosed brochure and our web site on estate recovery at _____. The [state] Medicaid toll-free telephone number is _____.

D. Claim Notice

Unlike a lien notice, a claim notice is not sent to the Medicaid recipient; it is sent after the recipient has died and has left an estate. CMS guidance indicates that states “should give a specific notice to individuals affected by the proposed recovery. . . .” The notice is to be served on the executor or legally authorized representative of the person’s estate, who “should be required to notify individuals who would be affected by the proposed recovery.” If the executor or legally authorized representative has not been identified, or where there is none, the state “should notify the family or the heirs.” Also, “the notice should include, at a minimum, the action the State intends to take, reason for the action, individual’s right to a hearing. . . , methods by which he/she may obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered.”⁷⁷

1. Points at Which States Give Claim notice. The study revealed that states use two very distinct paths to give notice of a claim to initiate recovery: (a) through the probate process, and (b) through notices sent out at earlier preceding probate and directly following the beneficiary’s death.

Recovery is an integral part of the probate process in all states. Probate is the legal procedure courts use to determine the validity of the will of a person who has died, and the process by which the person’s assets are gathered, applied to pay debts, and distributed to beneficiaries.⁷⁸ Once probate with the court begins, creditors may file their claims. The court then notifies the heirs of the claims filed.⁷⁹ The heirs receive their distributions after the claims are paid. In many states, there is no Medicaid estate recovery notice until a probate estate is opened with the court, and the recovery claim is filed.⁸⁰

In other states, however, the Medicaid agency sends out notices as soon after the death of the Medicaid recipient as possible, seeking to identify the heirs and confirm information about the assets of the deceased. If there is eventually a probate filing, the agency continues to seek recovery through the court but does not wait for the filing. Estates frequently are not probated, or probate is not begun, for a significant period. Of the project’s nine in-depth interview states, three (Massachusetts, Minnesota, and North Dakota) give no claim notice for recovery, at least for a home, until probate is underway; six (California, Iowa, Illinois, Nevada, Ohio, and Oregon) send out recovery notices immediately following death. While it appears that a minority of states use the latter procedure, their number is not known.⁸¹ (For recovery directly from bank accounts, where assets often are very modest and no home is involved, see Section E below.)

The difference in when notice is given is significant. If recovery awaits the formal probate process, it is under the aegis of the court and follows pre-set rules for debt collection. The notice is a court document, generally with a cover letter from the Medicaid agency with further explanation. The notice and letter are sent to a court-appointed executor or administrator, who virtually always has an attorney. On the other hand, if recovery begins directly following death, the intended audience for the notice is more ambiguous, the process more variable, and the approach more aggressive. It is important to recognize this difference when examining notice and other protections in the recovery process.

2. Findings on Claim Notices. The study examined two types of claim notices, in accordance with the two notification paths described above. Most often, the notice is a letter from the Medicaid agency attaching a copy of the judicial claim statement that is *part of the probate process*. The other type of claim notice is an earlier letter following the recipient's death, but *before probate*, aimed at the best contact available. The latter especially bears examination. It is sent to an uncertain audience—contacts listed in the Medicaid file (who may or may not have been a representative authorized to make decisions about Medicaid benefits when the recipient was alive),⁸² family members who may have contacted the agency, or simply the last known address of the decedent. A notice sent to such a file contact may reach potential heirs who do not yet have an attorney to help interpret the document, or it may not reach heirs at all.

While several of the pre-probate notices asked the recipient to list heirs—or additional heirs—there appears to be no sound method by which an agency can identify heirs accurately for notification, know whether the beneficiary had a will, or whether a probate will be filed eventually. At least one interviewee in the study suggested that, in addition to these difficulties, confidentiality may be an issue, that is, the letter may be opened by a family member who did not know the deceased was on Medicaid. Indeed, reaching “individuals affected” by the proposed recovery, as provided in CMS guidance, appears problematic if not impossible outside of the formal court probate process, which incorporates heir notification.

If in fact a Medicaid agency reaches heirs under either of the two notification scenarios described above, what is the heir's interest in the property? While the heirs may have no immediate right to the property and will receive inherited assets only after payment of debts, including the Medicaid claim, they nonetheless have an expectation that their inheritance could be reduced. Thus, they are directly affected. Some may be low- and moderate-income individuals who depend on the property they will receive. Some may regard the property, frequently a home, as a family legacy of inherent personal value and lifelong attachment. For all of these reasons, it behooves a state agency to make the notices as clear as possible. The 26 claim notices examined (and in some cases information about notices culled from the survey responses) vary considerably in key aspects.

- Responsibility of Notice Recipient to Notify Others Affected. CMS specifies that notice should be served on the executor or legally authorized representative or, if not known, on heirs or survivors. The executor or representative “should be required to notify individuals who would be affected by the proposed recovery.” About a third of the notices examined included such a directive seeking to ensure that all stakeholders are informed. For example, the California notice says, “It is the responsibility of the person handling the estate of the decedent to notify all heirs, dependents, or survivors, of their right to seek a waiver.”⁸³ However, more than two-thirds of the notices did not have such a statement.
- Claim Not Against Notice Recipient Personally; Limited to Asset Value. The notice should say clearly that the claim is not against the person who receives the letter, and that the claim is limited to the value of the estate. Even though notice letters commonly state that the debt is against *the estate*, about 10 of the 26 notices examined go further to underscore that the

recipient is not personally liable, and 11 explain the limitation of the claim to the value of the property.⁸⁴

- Amount Due; Itemized Expenditures. All states inform the notice recipient of the amount due, either in the initial letter or in a subsequent communication. Some indicate that this amount may change as reports of additional Medicaid expenditures come in. More than half of the responding states indicate that an itemized list of Medicaid expenditures for which they seek recovery is available on request. An itemized list allows those affected to check the accuracy of the claim.
- Exemptions/Deferral Information. Federal law requires states either to exempt or to defer estate recovery in certain situations: (a) when there is a surviving spouse; (b) when there is a surviving child who is under age 21, blind, or disabled; or (c) when a qualifying sibling or caretaker adult child lives in the home.⁸⁵ Twenty-three of the 26 responding states reported including information about exemptions or deferrals in the notice letter.
- Hardship Waiver Options and Procedures. Information about the availability of a hardship waiver and how to apply for one is a fundamental part of the estate recovery notice and directly affects individuals under financial duress. Twenty-seven of the 35 states responding to this question reported giving hardship waiver information on or along with the notice form. Some state notices indicate that a waiver may be available but do not include the criteria.⁸⁶
- Payment Over Time. Some states negotiate deferrals or settlements for recovery and may make agreements with survivors for paying the claim on a set schedule over a specified period. Two states include reference to this option in their notice form.⁸⁷
- Explanation of Appeal Rights/Procedures. The 2005 study found that states vary widely in how they address contested cases of recovery, with some states using a court process and others using a formal or informal administrative process or a combination of these approaches. The current study found that only about one-third of the responding states include information in their notice letter about how to contest the recovery.⁸⁸ In some cases, this focuses narrowly on applying for a hardship waiver. Timelines range from 15 days to four months from the date of notice (with many states giving either 30 or 60 days).

Presentation of information about how to contest a recovery or file an appeal is critical. Claim notices that included information about contesting recovery or appealing a hardship waiver decision generally explained it in a sentence or paragraph toward the end of the letter. At least two states put the information in a separate section, called “Grievance and Hearing Rights.”

- Reference to Web site. While 23 states reported having estate recovery Web sites (see Section A on public information), only four include the Web site address in the claims letter, yet these Web sites can substantially enhance understanding of the recovery rules and process.
- Readability. As with the lien notices, the claim notices varied considerably in factors that might affect ease of understanding, including font size, amount of white space, use of boldface and underlining to highlight important information, and use of legal phrases and bureaucratic

references and acronyms. Most of the notices have titles with variations on “Notice of Intent to File a Claim,” but some have no title or have a title that does not reference the subject of Medicaid estate recovery, such as “Reason for Filing Creditor’s Claim.”

- **Addressee.** Claim notices showed some ambiguity about addressee. In states that initiate recovery only after a probate proceeding is opened, the claim notice generally is sent to executors or administrators and/or their attorneys. In this case, the addressee is clear. However, in states that initiate recovery directly following the enrollee’s death, the notice may be sent to a contact listed in the file, a relative who has contacted the office, a personal representative (if known to the agency), or to the last known address of the individual. The letter may be seeking information about whether probate administration has been initiated and what assets remain. It may be sent to a contact by name, simply addressed to “sir or madam” or “to whom it may concern,” or have no salutation at all. Some of these letters begin with a condolence, such as, “Please accept our condolences on the recent loss to your family,” before stating the claim.

3. Promising Practices Concerning Claim Notices

- ✓ Include key information about estate recovery, set out succinctly and formatted for ease of reading: (1) responsibility of notice recipient to notify others affected; (2) claim is not against notice recipient personally; (3) identification of legal authority; (4) amount due; (5) how to obtain itemized list of Medicaid expenditures on which the recovery is based; (6) limitation of the claim to the asset value of the estate; (7) exemptions/deferrals; (8) hardship waiver criteria and procedures; and (9) contact for questions.
- ✓ Set off information about how to challenge the state’s recovery action with a separate heading or a box. The Mississippi claim notice includes a separate page, titled “Request for Fair Hearing/Hardship Waiver, Estate Recovery.”
- ✓ Allow sufficient time for contesting the recovery action. For example, Arizona allows 60 days. Make the time for contesting the recovery begin with the final accounting, because the amount may change significantly from the time of the original notice, as additional bills come in.
- ✓ Make the notice available in Spanish or other languages common in the area.
- ✓ Use at least 12-point type. Consider inserting more spacing between lines (1.3 or 1.5), and use of boldface and underlining to make key points stand out. Avoid use of acronyms for government offices and Medicaid funding, and avoid using all CAPITAL LETTERS and *italics*, since these are more difficult to decipher.
- ✓ Send a brochure or fact sheet on the estate recovery program along with the notice. For example, Iowa includes an “Information Sheet on Estate Recovery.” Refer to a Web site if one exists.

Using or adapting the above practices and the model claim notice form below may help states to develop clear and informative letters. The first model form is a claim letter that precedes the filing of the probate estate; the second is a letter conveying a court claim as part of the probate process.

Model Claim Notice Preceding Probate

Notice Date: _____

Name
Address
Address

SI USTED NO PUEDE LEER INGLES, Y NECESITA AYUDA, POR FAVOR LLAME AL _____ . [The state should also have this statement in any other languages commonly used in the area.]

Notice of Intent to File a Medicaid Claim Against Estate

Dear M. _____:

The [Medicaid agency] has recently learned of the death of _____. Please accept our sympathy for your loss.

As you may know, _____ received benefits from [state's] Medicaid program for long-term care services (such as nursing home services, home health aide services, or personal care services). We understand that you were the authorized representative for Medicaid purposes, or that you may be handling _____'s estate. Therefore, we are notifying you that the [Medicaid agency] **intends to file a claim against the estate** to repay the [Medicaid agency] for the long-term care services, as required by federal and state law (Sec. _____). **This does not mean that you are personally responsible for this debt.** However, you are responsible for notifying the heirs or others who may be affected by the claim.

The estimated claim is at least \$_____. This is only a preliminary estimate. The amount of the claim may increase based on bills we have not yet received. We will notify you of additional amounts owed by [date]. You may contact _____ for an itemized account of all the Medicaid long-term care costs.

The claim will not be greater than the value of the estate. If it is less, the heirs will receive what is left. State law requires that the claim be paid [after payment for funeral expenses and expenses of the last illness]. To help us determine the value of the assets in the estate, please complete and return the enclosed questionnaire.

Examples of assets include, but are not limited to, homes, cars, bank accounts, and money held at long-term care facilities.

Under state law, [state] **will not ask for money back** [or, will delay its claim] if:

- There is a spouse who is still alive.
- There is a child under the age of 21.
- There is a child of any age who is blind or disabled.
- In some cases, when a sibling or adult child lives in the home.
- The value of the estate [or the amount of the claim] is \$_____ or less.

If any of these factors exist, please notify _____ at _____ .

Also, under state law, [state] will not make a claim if it would cause **undue hardship for an heir**. Hardship is defined as a situation in which [list criteria, as in example below]:

- Payment of the claim would seriously affect any heir's health, shelter, food, medical needs, or finances.
- The assets in the estate provide the major source of income for the heir.
- Collection of the claim would cause the heir to become eligible for public assistance.

In appropriate instances, [Medicaid agency] may reduce the amount of recovery, arrange a payment schedule, or delay recovery. If necessary, the [Medicaid agency] may place a lien against the estate to secure the claim if recovery is deferred.

If you disagree with the state's collection of this claim because of hardship or for any of the reasons stated in this letter, **you may file a request for an exemption** with _____. Please fill out the attached form or send a letter to _____. You must send the request no later than **60 days** from the date of receipt of the final accounting of the claim amount.

If you have any **questions concerning the estate recovery claim**, please see the enclosed brochure or contact _____ in our office, toll-free, at _____. Also see our Web site on estate recovery at http://www._____.

Sincerely,

XXXX

Estate Recovery Unit

Model Claim Notice in Probate

Notice Date: _____

Name
Address
Address

Notice of a Medicaid Claim Against Estate

Dear [Executor/Administrator]

This letter is to notify you as executor or administrator for the estate of _____ that the **[Medicaid agency] has filed an estate recovery claim** pursuant to [federal and state legal provisions] with the [Probate Court]. A copy of the Statement of Claim is attached. The claim is to repay the state for the long-term care services (such as nursing home services, home health aide services, or personal care services) received by _____.

The estimated claim is at least \$_____. This is only a preliminary estimate. The amount of the claim may increase based on bills we have not yet received. We will notify you of additional amounts owed by [date]. You may contact _____ for an itemized account of all the Medicaid long-term care costs.

The claim will not be greater than the value of the estate. If it is less, the heirs will receive what is left. State law requires that the claim be paid [after payment for funeral expenses and expenses of the last illness]. To help us determine the value of the assets in the estate, please complete and return the enclosed questionnaire. Examples of assets include, but are not limited to, homes, cars, bank accounts, and money held at long-term care facilities.

Under state law, [state] **will not seek recovery** [or, will delay its claim] if:

- There is a spouse who is still alive.
- There is a child under the age of 21.
- There is a child of any age who is blind or disabled.
- In some cases, when a sibling or adult child lives in the home.
- The value of the estate [or the amount of the claim] is \$_____ or less.

Please notify _____ at _____ if any of these factors exist.

Also, under state law, [state] will not make a claim if it would cause **undue hardship for an heir**. Hardship is defined as a situation in which [list criteria, as in example below]:

- Payment of the claim would seriously affect any heir's health, shelter, food, medical needs, or finances.
- The assets in the estate provide the major source of income for the heir.
- Collection of the claim would cause the heir to become eligible for public assistance.

To request undue hardship exemption, please fill out the attached application or contact _____.

In appropriate instances, [Medicaid agency] may reduce the amount of recovery, arrange a payment schedule, or delay the recovery. If necessary, the [Medicaid agency] may place a lien against the estate to secure the claim if recovery is deferred.

If you disagree with the state's collection of a claim because of hardship or for any of the reasons stated in this letter, **you may request an exemption**. Please fill out the attached form or send a letter to _____. You must send the request no later than **60 days** from the date of the final accounting of the claim amount.

If you have any **questions concerning the estate recovery claim**, please see the enclosed brochure or contact _____ in our office, toll-free, at _____. Also see our web site on estate recovery at http://www._____.

Sincerely,

XXXX
Estate Recovery Unit

E. Safeguards in Direct Collections from Banks and Nursing Homes

In addition to recovery of property through or preceding the court probate process as described above, some states also use procedures to recover funds—generally very modest amounts—directly from banks (in individual and joint accounts) and from nursing homes. State recovery offices may feel pressure to recover from these sources quickly to prevent an heir from emptying a joint account or securing monies left with a nursing home, or they may simply view this approach as straightforward and cost effective.

The 2005 study found that 16 states have procedures for direct recovery from bank accounts, nursing homes, and, in some instances, trusts approved by Medicaid at eligibility that provide for remaining funds to go to the state. The current study examined the procedures for such direct recovery, relying on information gathered primarily through telephone interviews with selected states.⁸⁹ Direct recovery procedures are based on multiple aspects of state law, including statutory provisions on Medicaid, probate, nursing home standards, and banking.

1. Findings About Direct Collections

a. Direct Collections from Banks. State approaches to recover directly from bank accounts generally are based on provisions derived from the Uniform Probate Code (UPC), which sets out model probate procedures for state legislatures.⁹⁰ Under the UPC, there are two ways to administer the inheritance of personal property and small estates without going through the time-consuming probate process: by affidavit and by summary administration. Most jurisdictions have enacted one or the other or a variation.⁹¹ State Medicaid agencies have used these procedures for recovery from bank accounts, standing as a “successor in interest,” that is, someone who is entitled to the property or to whom the estate owes a debt.

The first procedure is “collection of personal property by affidavit.”⁹² On the death of the property owner, the “person claiming to be the successor of the decedent” completes an affidavit stating that the value of the estate does not exceed a designated amount set by state law (\$5,000 in the UPC), that a designated time period has passed since the death (30 days under the UPC), that no probate petition is pending, and that the successor is entitled to payment of the property. The “successor in interest” (to whom the funds are due), in this case, the state Medicaid agency, takes the affidavit to the bank and claims the estate recovery debt from the account.

The second procedure is “summary administration.”⁹³ On the death of the property owner of a small estate, variously defined by state law, a judge opens the estate and appoints a personal representative, who then immediately distributes the assets without giving notice to creditors, files a statement for closing, and, if there are no objections after a given period (one year after the closing statement in the UPC), the appointment terminates. Under this scenario, the state Medicaid agency could stand as the personal representative—if no one else with a higher preference is willing to be representative—and could claim the recovery debt.

Under both methods,⁹⁴ recovery from banks is affected by the priority list of preferred creditor claims in state probate law. In the 2005 study, 35 states reported that they have priority over general creditors in recovery claims, but may or may not be behind certain other higher-

designated creditor classes such as taxes, expenses of last illness, or funeral expenses.⁹⁵ In some cases, the Medicaid agency may collect from the bank and then pay other creditors.

Direct recovery of funds from banks through small estates affidavit and similar procedures allows a more efficient mechanism than opening a probate estate, which can be lengthy and expensive. Additionally, heirs may not begin probate at all or may wait months or even years before doing so. Thus, direct collections are useful for state agencies. However, direct recovery from banks raises three specific issues: (1) exemptions; (2) notification of heirs; and (3) recovery from joint accounts.

(1) Exemptions. Protecting surviving spouses and other dependents is a key consideration in federal estate recovery law. Recovery can only take place after the death of a surviving spouse and only when the beneficiary was not survived by a minor child or a blind or disabled child.⁹⁶ While this requirement generally is viewed in the context of homes or other real property, the law makes no distinction about kinds of property, and the prohibition appears to apply equally to direct recovery from banks. Thus, if the Medicaid agency knows of a surviving spouse or dependent child, there should be no recovery. Indeed several Medicaid officials interviewed indicated that they do not attempt to use the small estates affidavit procedure if there is a surviving spouse.

Implementation of the exemption may be difficult. For example, the Oregon bank collection law provides a preference for the surviving spouse, and only if there is no surviving spouse may the Estate Recovery Unit collect the claim within 60 days of the date of death. Banks also need to recognize the spousal preference in practice. While the Oregon statute shows a clear public policy position preferring the surviving spouse,⁹⁷ the Elder Law Section of the Oregon State Bar notes, “many banks will not allow a surviving spouse to access the account with an affidavit of heirship until the Estate Recovery Unit has had an opportunity to make a claim on the funds.” A State Bar proposal thus sought to clarify existing procedure and define a timeline allowing first collection on demand by the spouse.⁹⁸ (The proposal did not reference other exempt populations.)

(2) Notification of Heirs. Direct collections from banks pose a procedural challenge: how can Medicaid agencies identify and notify “individuals affected” (including both exempt and nonexempt populations), as provided by CMS guidance, thereby allowing the opportunity to contest the recovery? Affidavit and summary administration procedures for small estates generally include no procedures for notification of heirs, and the Medicaid agency—while it may or may not have contacts shown in the beneficiary’s file—frequently is at a loss to identify such heirs. Thus, it would be difficult or impossible for an heir to make a case for a hardship waiver.

(3) Joint Accounts. A joint account with right of survivorship is a bank account in which more than one party has an ownership interest. When one of the account holders dies, the remaining joint account holder(s) receive the funds. However, creditors view a joint account as they would an individual account and can claim a debt even if only the decedent actually owed the debt. Some estate recovery is directly from joint accounts.⁹⁹

As noted in the 2005 study, many states have expanded their definition of “estate” to include recovery from joint bank accounts with right of survivorship, recouping commingled funds.¹⁰⁰ The decedent may have established such an account with family members or others for convenience or to avoid probate (or family members or others may have convinced the decedent to establish the account through undue influence). Of course, if the joint account is with a surviving spouse or other exempt individual, there should be no collection. However, if the joint account is with others, it is subject to estate recovery, and it is important for Medicaid recipients to understand this in advance.

b. Direct Collection from Nursing Homes. States also may recover funds directly from nursing homes in which the decedent lived. This may include any personal needs allowance funds¹⁰¹ as well as other funds held by the facility for the resident. Some state laws mandate that facilities must notify the Medicaid agency of the recipient’s death and report any remaining funds.¹⁰² At least one state, South Dakota, has a statutory provision specifically setting out the right of the Medicaid agency to claim any of the resident’s funds maintained by the facility and stating that the facility may not release the funds until the agency has sought recovery.¹⁰³

2. Promising Practices Concerning Direct Collections

- ✓ Clarify collection policies to prohibit recovery from banks if there is a known individual in an exempt category, that is, a surviving spouse or dependent child.
- ✓ Include a clear statutory requirement that allows for surviving spouses to collect from bank account funds before any estate recovery. Oregon’s law specifies such a spousal preference.
- ✓ If there is no information about exempt survivors, allow sufficient time following death (at least 60 days) to allow any exempt individuals to collect.
- ✓ Educate banks about the statutory exemptions.
- ✓ Educate Medicaid enrollees and families about the dangers of joint accounts. For instance, the Oregon Department of Human Services recommends that “case managers and eligibility intake workers should . . . caution clients and/or joint account holders not to co-mingle their funds, because the estate recovery program will pursue such funds upon the death of [the] client.”¹⁰⁴ (Although some families that have had joint accounts for many years and value the convenience may not favor separate accounts, they should be alerted to the estate recovery aspect.)
- ✓ Explain recovery from banks and nursing homes clearly in brochures and on Web sites.

F. Hardship Waivers

Waivers granted by the state based on undue hardship prevent impoverishment of the deceased recipient’s family that might result if the state were to pursue recovery.¹⁰⁵ Federal law requires states to waive recovery in situations where it would cause undue hardship.¹⁰⁶ The

statute requires the states to have hardship procedures and requires the federal government to specify standards for procedures and criteria to determine hardship. CMS has not established mandatory criteria for states, but CMS guidance provides examples and suggests that states give special consideration to cases in which the estate subject to recovery is “(1) the sole income producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; or (3) other compelling circumstances.” CMS states that the policy for granting hardship waivers must be described in the state plan¹⁰⁷ and indicates states “have flexibility in implementing an undue hardship provision.”¹⁰⁸

All but one responding state (Alabama) had criteria for determining undue hardship.¹⁰⁹ In Alabama, if requested, the state considers all factors listed, but it reported that no waiver had ever been requested. The state negotiates recovery terms, but not on the basis of hardship.

According to the 2005 study, states use a range of factors, and often many factors, in determining undue hardship. The most common factor is whether the estate consists of an income-producing asset for which recovery would cause survivors to lose their livelihood. The second most common factor is whether recovery would deprive the survivors of the necessities of life, with great variability in defining “necessities of life.”

1. Findings About Hardship Waivers. Most responding states do not track the number of undue hardship waivers submitted, granted, or denied. In response to this study, only 16 states were able to provide this information.

The survey showed a 32% decrease in the number of undue hardship waiver requests *submitted* over a two-year period. In this study, the average number submitted was 41, a significant decrease from the average of 61, as reported in the 2005 study. The number of applications submitted differed markedly among the states, from one each in Alaska and New Hampshire to 250 in Louisiana.

States cited various reasons for decreases in the number of hardship waiver applications submitted, including the increase in public information on estate recovery, as described above.¹¹⁰ Heirs and survivors of Medicaid recipients may be finding the information conveyed by brochures, Web sites, and staff helpful, so fewer of them may be submitting applications that do not respond to the criteria. An Illinois official reported a marked decrease since 2003, citing the estate recovery unit’s focus on public education.¹¹¹ Additionally, changes in waiver criteria, narrowing eligibility, or other changes in law or policy may be a factor. For example, in Massachusetts, the number of applications for undue hardship decreased because of a 2004 change in the hardship waiver criteria.¹¹²

Despite the decrease in the number of hardship waiver requests submitted, the average proportion of hardship waiver requests *granted* remained constant at 58% over the two-year period since the 2005 study (between FY 2003 and FY 2005).¹¹³ Similarly, the average proportion of hardship waiver requests *denied* remained constant at 37% (Table 8).¹¹⁴

States vary in the implementation of waiver procedures. Several rely on the attorney for the estate to provide the heir(s) with information about the availability and criteria for a

waiver.¹¹⁵ To convey this information, attorneys must be well versed in undue hardship waivers, exemptions, deferrals, and the affected populations.¹¹⁶ Other states provide a form to request a hardship waiver decision. Of the responding states, 14 have a standard application form, and 13 simply ask applicants to submit a letter to the appropriate state agency. At least 21 states reported having a formal written appeal process for waiver denial (Table 9). The process can be resolved through informal agency actions, court processes, administrative procedures, or a combination of these.¹¹⁷

2. Promising Practices Concerning Hardship Waivers

- ✓ Develop an easy-to-read and informative hardship waiver application form. Ensure that the form is understandable and includes specific criteria and information about the appeal process.
- ✓ Disseminate hardship waiver application forms widely. Mississippi, Texas, and a number of other states include the hardship waiver application form along with the claim notice.
- ✓ Allow notice recipients to request an undue hardship waiver application by telephone or e-mail. Kansas allows beneficiaries to request a waiver by calling, writing, or sending an e-mail to the estate recovery office¹¹⁸, and applicants in Texas can download the application form in both English and Spanish on the estate recovery Web site.¹¹⁹
- ✓ Develop and clearly convey waiver administrative appeal procedures.
- ✓ Offer options for negotiated partial compromises or payment schedules if a full waiver is not granted and tell notice recipients about these options. As mentioned above (see Section D), at least two states (California and Nevada) include the option of a payment schedule in their notice letters, and other states may negotiate such payment schedules according to state law or in practice. Arizona includes in its notice the option of “partial recovery” based on financial or medical hardship, income, resources, amount of claim, whether other creditors have filed claims, and other factors.¹²⁰ Oregon “will consider taking a mortgage on the property that allows the family to pay back the public assistance debt in installments over time.”¹²¹ Similarly, Texas “may compromise, settle or waive any claim that does not qualify for an undue hardship upon good cause shown.”¹²²

G. Data Collection

The lack of basic data collection and research impairs assessment of estate recovery efforts. Better data collection is needed to evaluate the impact and effectiveness of estate recovery fully. Indeed, in analyzing the responses to the survey questionnaire, the project encountered numerous inconsistencies, serious gaps, and possible data errors that required further checking and hindered evaluation.

The CMS-64 form requires states to report the amount “collected from the estates of the deceased Title XIX recipients.”¹²³ CMS does not require states to report the number of estates against which recovery was completed; administrative costs of recovery; nature of the property

from which recovery was made (e.g., real or personal); number of exemptions or deferrals granted; number of hardship waivers requested, denied, or granted; number of recovery settlements or contests; or number of TEFRA liens imposed.

1. Findings About Data Collection. While most responding states have a computerized system to collect basic estate recovery statistics¹²⁴, many track only the number of estates against which recovery was completed.¹²⁵ Several states cannot break down the sources of property (e.g., real versus personal) from which recovery was made. A total of 13 states reported tracking such information (Table 10), and at least one state encountered difficulty discerning whether real or personal property was recovered.¹²⁶

Data on the number of exemptions and deferrals of recovery, hardship waivers, contested recoveries, and their outcomes often are soft or nonexistent. Seventeen of the responding states track the number of exemptions or deferrals granted; 21 track the number of hardship waivers requested, and 24 track the number of hardship waivers granted (Table 10). Twelve states track the number of recoveries contested, and 18 track the number of recovery settlements.

Frequency and patterns of lien imposition are difficult, at best, to discern from state data. Of the 21 states that impose TEFRA liens, nine of the responding states track the number imposed. Of the 13 states that impose post-death liens (as of the 2005 study), seven of the responding states track the number imposed (Table 10).

Finally, several states cannot quantify the total administrative costs of their estate recovery efforts (such as staff, facilities and support, information systems, and legal costs). A total of 20 states reported tracking such costs, although their cost figures may not be entirely comparable.

Variable accounting practices also impair assessment of estate recovery efforts. While only one data element of estate recovery—the total amount of recovery—is reported annually to CMS, even this basic figure may be incorrect. For example, CMS-64 data for Washington and Oregon showed that both states had decreases of more than 90% in amounts recovered since FY 2003. However, further investigation revealed the decreases were incorrect. A reporting error in Washington and changes in reporting methodology in Oregon were responsible for the incorrect information. According to Medicaid officials in Washington and Oregon, amounts recovered actually *increased* between FY 2003 and FY 2005.¹²⁷ Improved accounting practices will ensure that accurate information on estate recovery efforts is reported to CMS and available for analysis.

Assessment of estate recovery is also hampered because only three states regularly publish estate recovery data (Table 10). Several states expressed difficulty querying data collection systems to obtain accurate results for publication. For example, Illinois, which has a bifurcated system of estate recovery, has two computerized systems to collect basic statistics. The systems are very different, so they produce very different results, making analysis of estate recovery problematic. Several states also mentioned the overlap of the hardship waiver with exemptions and deferrals for designated survivors under federal law, as well as homestead and other exemptions provided under state law, making it difficult to query data.

2. Promising Practices Concerning Data Collection

- ✓ Use a computerized system to track data elements. Important elements might include at least the number of estates against which recovery was completed, exemptions or deferrals, hardship waivers (submitted, granted, and denied), and pre-death liens. Provided they are not cost prohibitive, additional data elements might include administrative costs, nature of property from which recovery was made, number of recoveries contested and settled, and number of post-death liens imposed.
- ✓ Analyze and publish estate recovery data regularly.

III. Conclusions and Recommendations

Estate recovery and accompanying lien policies directly affect specific individuals, including frail residents of long-term care facilities whose homes are subject to liens, surviving spouses, and other family members or potential heirs of deceased Medicaid recipients. States may find it difficult to balance the competing social goals of protecting these populations and maximizing collections to replenish state budgets.

The 2005 study concluded by asking whether more rigorous procedural protections for Medicaid beneficiaries and families are needed. The current study investigated protections used by states, revealing wide variations in public information, notice, hardship waiver procedures, direct collections, and data maintenance for program evaluation. The study stands as a resource for states; it identifies the variations and it highlights some readily usable practices that could benefit both the state recovery programs and the populations affected.

A. Conclusions

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% 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. While estate recovery is making only very modest contributions to state budgets, it affects family members and other heirs, some of whom require protection through exemptions, deferral, and hardship waivers, and all of whom are entitled to meaningful notice.

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. Meaningful notice is the foundation of procedural due process. Notice of a state’s intent to place a pre-death lien is particularly critical for vulnerable residents of long-term care institutions. Notice is also crucial for surviving spouses, who may depend on financial transactions involving the property. A claim notice needs to clearly inform potential heirs, who may have low or moderate incomes and may be depending on the property, of the pending recovery and opportunities for exemption or waiver. Notices that these individuals can understand also saves scarce staff time and helps to inspire public trust.

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. 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 at least 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. In the last two years, the number of waiver applications submitted has decreased substantially, possibly due to an increase in public information (which may, in turn, result in fewer waiver submissions that are not responsive to the criteria), tightened waiver eligibility standards, or both. At least one state has no specific criteria for hardship waivers.

7. As in 2005, 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.

B. Recommendations

To protect beneficiaries and other affected populations affected by estate recovery, the study urges that:

1. States review and consider the promising practices identified in this report. These practices include user-friendly brochures, Web sites, information in languages other than English, clear notice at the point of Medicaid application, basic training of eligibility staff, understandable notice about pre-death liens and claims, use of hardship waiver forms, and development of clear appeal procedures, along with routine collection of basic recovery data. These practices all offer low-cost, high-impact opportunities for estate recovery programs to enhance efficiency and further the understanding of beneficiaries, families, and the public.

2. States emphasize early notice of recovery. Government recoupment of funds makes Medicaid long-term care different from most public benefit programs. States need to alert beneficiaries and families to this fact by bolstering public information and ensuring their understanding through oral explanation and clear written notice at the point of application.

3. States that send notice of recovery directly following the death of Medicaid recipients reexamine this approach. Initiating recovery at death instead of waiting for probate targets an uncertain audience that frequently lacks legal representation or other sources of assistance. This practice bears careful scrutiny and at a minimum requires attention to ensure that the claim notice is easy to understand, includes all key information, and is accompanied by a fact sheet or brochure with full contact information.

4. States that recover directly from banks recognize exemptions and build in key protections. First, states need to recognize that spouses and other exempt populations are excluded from direct recovery of bank accounts, to the extent they can be identified. Banks need to recognize these exempt populations as well. Second, states need to alert Medicaid recipients at the time of application and through public information channels that monies may be subject to recovery through commingling of funds in joint accounts with nonexempt populations.

5. CMS review the report's description of promising practices and the model notice forms and consider offering guidance to states. A wide range of reviewers have agreed that the promising practices highlighted in the report would enhance the state programs, and that the model claim notice and lien notice forms include all key information presented in language and format best understood by those who may be affected. CMS could urge states to adapt the practices and forms, thus encouraging uniformity and consistency among the states, yet allowing for needed flexibility.

6. CMS consider setting out basic data elements for estate recovery and recommending formats for reporting them consistently and making the results publicly available. Such consistent collection of data across states would help CMS, state agencies, and the public to identify trends and better assess recovery efforts. Important elements might include at least the number of estates against which recovery was completed, exemptions or deferrals, hardship waivers (submitted, granted, denied), and pre-death liens. In addition, more consistent state reporting practices to CMS concerning amounts collected would provide a more precise picture of estate recovery nationally and how states compare to one another.

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A. Tables

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TABLE 1: Total Amounts Recovered

State	Total Amount Recovered FY 2003¹²⁸	Total Amount Recovered FY 2005¹²⁹	Difference Between FY 2003 & FY 2005	Percent Change Between FY 2003 & FY 2005
AL	\$4,222,784	\$5,807,632	\$1,584,848	37.53%
AK	\$0	\$0	\$0	
AZ	\$2,150,260	\$2,438,881	\$288,621	13.42%
AR	\$1,730,100	\$1,597,779	-\$132,321	-7.65%
CA	\$44,024,077	\$56,290,075	\$12,265,998	27.86%
CO	\$4,649,920	\$7,380,270	\$2,730,350	58.72%
CT	\$10,884,820	\$7,297,972	-\$3,586,848	-32.95%
DE	\$1,108,545	\$0	-\$1,108,545	-100.00%
DC	\$1,658,606	\$2,400,890	\$742,284	44.75%
FL	\$11,474,485	\$17,235,856	\$5,761,371	50.21%
GA	\$0	\$0	\$0	
HI	\$2,255,074	\$2,519,084	\$264,010	11.71%
ID	\$5,357,412	\$6,715,946	\$1,358,534	25.36%
IL	\$16,993,946	\$19,669,790	\$2,675,844	15.75%
IN	\$7,366,747	\$7,755,792	\$389,045	5.28%
IA	\$10,977,823	\$10,327,615	-\$650,208	-5.92%
KS	\$6,193,161	\$6,060,480	-\$132,681	-2.14%
KY	\$2,961,800	\$8,344,891	\$5,383,091	181.75%
LA	\$104,755	\$169,437	\$64,682	61.75%
ME	\$5,934,701	\$968,420	-\$4,966,281	-83.68%
MD	\$6,919,915	\$8,220,795	\$1,300,880	18.80%
MA	\$28,524,313	\$37,919,215	\$9,394,902	32.94%
MI	\$0	\$0	\$0	
MN	\$12,899,750	\$26,139,105	\$13,239,355	102.63%
MS	\$168,735	\$591,339	\$422,604	250.45%
MO	\$7,480,548	\$10,357,535	\$2,876,987	38.46%
MT	\$1,982,288	\$1,673,637	-\$308,651	-15.57%
NE	\$1,409,277	\$906,863	-\$502,414	-35.65%
NV	\$1,366,359	\$1,030,472	-\$335,887	-24.58%
NH	\$3,554,466	\$5,891,315	\$2,336,849	65.74%
NJ	\$6,031,496	\$10,237,331	\$4,205,835	69.73%
NM	\$0	\$1,005,208	\$1,005,208	100.00%
NY	\$27,244,711	\$34,351,987	\$7,107,276	26.09%
NC	\$4,053,121	\$7,417,825	\$3,364,704	83.02%
ND	\$1,684,666	\$1,577,722	-\$106,944	-6.35%
OH	\$12,382,674	\$14,841,666	\$2,458,992	19.86%
OK	\$1,873,304	\$2,385,270	\$511,966	27.33%
OR	\$13,996,362	\$1,161,185	-\$12,835,177	-91.70%
PA	\$23,149,026	\$35,097,958	\$11,948,932	51.62%
RI	\$3,559,076	\$4,196,366	\$637,290	17.91%
SC	\$5,150,428	\$5,486,769	\$336,341	6.53%
SD	\$1,293,813	\$1,261,184	-\$32,629	-2.52%
TN	\$2,754,258	\$15,070,853	\$12,316,595	447.18%
TX	\$0	\$0	\$0	
UT	\$459,400	\$471,655	\$12,255	2.67%
VT	\$487,029	\$872,387	\$385,358	79.12%
VA	\$953,406	\$793,892	-\$159,514	-16.73%
WA	\$5,816,188	\$282,893	-\$5,533,295	-95.14%
WV	\$1,183,754	\$190,100	-\$993,654	-83.94%
WI	\$12,812,864	\$17,423,400	\$4,610,536	35.98%
WY	\$1,097,240	\$1,297,244	\$200,004	18.23%
Average	\$6,477,206	\$8,061,451	\$1,584,245	30.29%
Median	\$3,554,466	\$2,519,084	\$385,358	18.80%
Total	\$330,337,483	\$411,133,981	\$80,796,498	24.46%

TABLE 2: Revenue as a Percentage of Long-Term Care¹³⁰

State	Total Amount Recovered FY 2005 ¹³¹	Total LTC Expenditures FY 2005 ¹³²	Amount Recovered as % of LTC Expenditures FY 2005
AL	\$5,807,632	\$1,169,887,974	0.50%
AK	\$0	\$321,523,853	0.00%
AZ	\$2,438,881	\$35,345,211	6.90%
AR	\$1,597,779	\$893,265,282	0.18%
CA	\$56,290,075	\$7,781,078,748	0.72%
CO	\$7,380,270	\$898,631,322	0.82%
CT	\$7,297,972	\$2,007,111,071	0.36%
DE	\$0	\$258,300,392	0.00%
DC	\$2,400,890	\$304,731,820	0.79%
FL	\$17,235,856	\$3,469,003,870	0.50%
GA	\$0	\$1,992,872,651	0.00%
HI	\$2,519,084	\$327,866,242	0.77%
ID	\$6,715,946	\$320,572,420	2.09%
IL	\$19,669,790	\$2,997,715,869	0.66%
IN	\$7,755,792	\$2,075,862,152	0.37%
IA	\$10,327,615	\$1,011,138,080	1.02%
KS	\$6,060,480	\$817,690,207	0.74%
KY	\$8,344,891	\$1,151,180,270	0.72%
LA	\$169,437	\$1,441,743,609	0.01%
ME	\$968,420	\$508,759,237	0.19%
MD	\$8,220,795	\$1,505,450,846	0.55%
MA	\$37,919,215	\$3,058,667,950	1.24%
MI	\$0	\$2,313,491,556	0.00%
MN	\$26,139,105	\$2,520,818,065	1.04%
MS	\$591,339	\$941,167,655	0.06%
MO	\$10,357,535	\$1,671,868,931	0.62%
MT	\$1,673,637	\$266,666,235	0.63%
NE	\$906,863	\$619,839,774	0.15%
NV	\$1,030,472	\$284,334,000	0.36%
NH	\$5,891,315	\$530,743,156	1.11%
NJ	\$10,237,331	\$3,205,189,842	0.32%
NM	\$1,005,208	\$670,606,741	0.15%
NY	\$34,351,987	\$16,780,165,890	0.20%
NC	\$7,417,825	\$2,723,714,332	0.27%
ND	\$1,577,722	\$293,382,716	0.54%
OH	\$14,841,666	\$4,836,761,272	0.31%
OK	\$2,385,270	\$933,076,642	0.26%
OR	\$1,161,185	\$856,186,027	0.14%
PA	\$35,097,958	\$6,428,198,019	0.55%
RI	\$4,196,366	\$528,967,074	0.79%
SC	\$5,486,769	\$968,149,044	0.57%
SD	\$1,261,184	\$237,763,496	0.53%
TN	\$15,070,853	\$1,586,956,776	0.95%
TX	\$0	\$4,407,474,084	0.00%
UT	\$471,655	\$330,686,491	0.14%
VT	\$872,387	\$260,660,066	0.33%
VA	\$793,892	\$1,414,954,805	0.06%
WA	\$282,893	\$1,671,643,607	0.02%
WV	\$190,100	\$755,210,074	0.03%
WI	\$17,423,400	\$1,935,184,950	0.90%
WY	\$1,297,244	\$177,353,356	0.73%
Average	\$8,061,451	\$1,852,933,603	0.61%
Median	\$2,519,084	\$968,149,044	0.50%

TABLE 3: Information in Claim Notice to Estate of Deceased (at Time Claim Enforcement Begins)

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
Responsibility of notice recipient to notify others affected	DK ₁₃₃	N	Y	N	Y		Y ₁₃₄		N	N				N	N	N	Y	N	Y	Y		N			N	
Statement that claim is not against notice recipient personally	DK	N	N	N	Y		N		N	N				Y	N	Y	N	Y	Y	Y		N			N	
Identification of legal authority authorizing ER*	DK	Y	Y	Y	Y		Y		Y	Y				Y	Y	Y	Y	Y	Y	Y		Y			Y	
Amount due	DK	Y	Y	Y	Y		Y		Y	Y				Y ₁₃₅	Y		Y	Y	Y	Y		Y			Y	
Itemized Medicaid expenditures or information on how to obtain	DK	N	Y	Y	Y		Y ₁₃₆		Y	Y ₁₃₇				N	Y	Y	N ₁₃₈	N	Y	Y		N			Y	
Limitation of state's claim to value of assets	DK	Y	N	Y	Y		N		N	N				N	N	Y	N	N	Y	Y		N			N	
Circumstances supporting claim for exemption or deferral	DK	Y	Y	Y	Y		N ₁₃₉		N	Y				N	Y	Y	Y	Y	Y	Y		Y ₁₄₀			N	
Option of paying over time	DK	N	N	N	Y		N		N	N				N	N	N	N	N	N	N		N			N	
Hardship waiver option and procedures	DK	Y	Y	Y	Y		Y		N	Y				Y	Y	Y	Y	Y	Y	Y		Y ₁₄₁			Y	
Individual to contact for further information	DK	Y	Y	Y	Y		Y		Y	Y				Y	Y	Y	Y	Y	Y	Y		Y			Y	
Reference to state Web site, if any	DK	NA	NA	N	N ₁₄₂		N		N	Y				NA	NA	Y	N	N	NA	NA		NA			N	
Explanation of appeal rights/procedures	DK	Y	Y	Y	Y		Y		N	N				N	N	N	N	Y	Y	Y		Y ₁₄₃			Y	

	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	Yes
Responsibility of notice recipient to notify others affected	N		N	N				Y	N	N		N	Y	N	N		NA	Y	Y	N ₁₄₄	N			Y		11
Statement that claim is not against notice recipient personally	N		N	Y ₁₄₅				Y	N	N		N	Y	Y	N		NA	Y	N	N	Y			N		10
Identification of legal authority authorizing ER	Y		Y	Y				Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			Y		33
Amount due	Y		Y	Y				Y	Y	Y		Y	Y	Y	Y		Y	N ₁₄₆	Y		Y			Y		29
Itemized Medicaid expenditures or information on how to obtain	N		N	N				Y	N	N		Y	Y	Y	Y		Y	N ₁₄₈	N	Y	Y			N		19
Limitation of state's claim to value of assets	N		Y	N				Y	N	N		N	N	N	N		Y	Y		N	N			Y		11
Circumstances supporting claim for exemption or deferral	Y		Y	Y				Y	N	N		Y	N	N ₁₅₁	Y		Y	Y	Y	Y	N			Y		23
Option of paying over time	N		Y	N				N	N	N		N	N	N ₁₅₂	N		N	NA ₁₅₃	N	N	N			N		2
Hardship waiver option and procedures	Y		Y	Y				Y	NA ₁₅₄	Y		Y	N	N ₁₅₅	Y		NA	Y	Y	Y	Y			Y		27
Individual to contact for further information	Y		Y	Y				Y	N ₁₅₆	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			Y		32
Reference to state Web site, if any	N		NA	NA ₁₅₇				N	N	N		N	N	N			Y	Y		NA	NA			N		4
Explanation of appeal rights/procedures	N		Y	NA ₁₅₈				N	N	N		N	N	NA	N		N	N ₁₅₉	N	N ₁₆₀	N ₁₆₁			Y		12

*ER is estate recovery.

TABLE 4: Public Information

	Training Session(s)	Toll-Free Phone Line	Brochure	Web site
AL	Y	Y-General ¹⁶³	N	Y
AK	N	Y-Specific ¹⁶⁴	Y	N
AZ	Y	Y-Specific	Y	N
AR	Y	Y	N	Y
CA	N	N	Y	Y
CO				
CT	N	N	N ¹⁶⁵	Y
DE		Y-General		
DC	N	Y	N	Y
FL	Y	Y-Specific	N	Y
GA				
HI				
ID		Y-Specific		Y
IL	Y	Y-General	Y	N
IN	Y	Y-General	N	N
IA	Y	Y	Y	Y
KS	Y	N	Y	Y
KY	Y	Y-General	Y	Y
LA	Y	N	N	N
ME	Y ¹⁶⁶	Y-Specific	Y	N
MD		Y-General		
MA	N	Y-Specific	Y	Y
MI				
MN	Y	Y-Specific		
MS	Y	Y-General	N	Y
MO				
MT	Y	Y-General	Y	N
NE				
NV	Y	N	Y	N
NH	Y	Y-General	Y	N
NJ		Y-General		
NY		Y		
NM				
NC	N	Y	N	Y
ND	Y	Y	Y	Y
OH		Y-General		Y
OK		Y-General		
OR	Y	Y-Specific	Y	Y
PA	Y	Y-Specific	Y	Y
RI	Y	N	N	Y
SC		Y-General	Y	
SD		Y-Specific	Y	Y
TN	Y	Y-Specific		Y
TX	Y	Y	Y	Y
UT		Y-General	Y	Y
VT	Y	Y-General	N	N
VA	N	N		N
WA		Y-Specific		
WV				
WI	Y	Y-General	Y	Y
WY			Y	
Yes	22	35	21	23
No	7	7	11	11

TABLE 5: Web Sites

	Web Address(s)
AL	http://www.medicaid.alabama.gov/billing/estate_recovery.aspx?tab=6&sub=1
AR	http://www.arkansas.gov/dhhs/webpolicy/Medical%20Services/MS%20Table%20Of%20Contents.htm
CA	www.dhs.ca.gov/mcs/psd/TPL
CT	http://www.das.state.ct.us/Business_Svs/Collections.asp
DC	Web address not provided
FL	www.flmedicaidrecovery.com
ID	http://www.idahocareline.org/eLibrary/Medicaid%20Estate%20Recovery.html
IA	www.iowa-estates.com
KS	http://www.srskansas.org/ISD/ees/estate_recovery.htm
KY	http://www.lrc.ky.gov/kar/907/001/585.htm
MA	http://tinyurl.com/hwdt8
MS	http://www.dom.state.ms.us/
NC	Web address not provided
ND	http://www.nd.gov/humanservices/services/medicalserv/medicaid/recovery.html
OH	http://jfs.ohio.gov/Ohp/bcps/FactSheets/EstateRecovery.pdf http://www.ag.state.oh.us/business/estate_recovery.asp
OR	http://egov.oregon.gov/DHS/admin/accounting/receiving.shtml#ea
PA	http://www.dpw.state.pa.us/general/formspub/adminpublications/003670690.htm
RI	http://www.dhs.state.ri.us/dhs/reports/MAProbate.htm
SD	http://dss.sd.gov/benefitfraud/estate/index.asp
TN	http://www.tennessee.gov/tenncare/members/estaterecoveryFAQ.pdf
TX	http://www.dads.state.tx.us/services/estate_recovery/index.html
UT	http://www.health.utah.gov/medicaid/provhtml/estate_recovery.html
WI	http://dhfs.wisconsin.gov/medicaid1/recpubs/erp/phc13032.htm

TABLE 6: Web Site Content Information

	In Language(s) Other than English	Includes Information on Services for Which ER is Sought	Includes Exemption and Deferral Information	Includes Hardship Waiver Criteria Information	Includes Minimum Claim Value, If Any	Notes Limitation of State's Claim to Estate Value	Includes Information on the Use of Liens
AL	N	N	N	N		N	N
AR	N	Y	Y	Y		Y	NA
CA	Y	Y	Y	N	NA	Y	N
CT	N	N	N	N	N	N	N
DC	N		N	N	N	N	N
FL	N	Y	Y	Y		N	NA
ID	N	N	Y	N	N	N	Y
IA	N	Y	Y	Y		Y	NA
KS	N	Y	Y	N		N	Y
KY	N	Y	Y	Y	Y	Y	NA
MA	N	N	Y	Y	N	N	N
MS	N	Y	Y	Y ¹⁶⁷	Y	N	NA
NC	N	Y	Y	Y	Y	N	NA
ND	N	N	N	Y	NA	N	NA
OH	N	Y	Y	Y		N	N
OR	N	N	N	N	NA	N	NA
PA	N	Y	Y	Y	Y	N	NA
RI	N	Y	Y	Y		Y	Y
SD	N	Y	Y	N	N	N	NA
TN	N ¹⁶⁸	N	Y	N	N	N	NA
TX	Y	Y	Y	Y	Y	N	NA
UT	N	N	Y	N	N		Y
WI	Y	Y	Y	Y	N	Y	Y
Yes	3	14	18	13	5	6	5
No	21	8	4	10	8	16	6

TABLE 7: Brochure Content Information

	In Language(s) Other than English	Includes Information on Services for Which ER is Sought	Includes Exemption and Deferral Information	Includes Hardship Waiver Criteria Information	Includes Minimum Claim Value, If Any	Notes Limitation of State's Claim to Estate Value	Includes Information on the Use of Liens
AK	N		Y	N	N	N	Y
AZ	Y	Y	Y	Y		N	Y
CA	Y	N	Y	Y	NA	Y	Y
IL	Y	Y	Y	Y		N	Y
IA	N	Y	Y	Y		Y	NA
KS	N	Y	Y	Y		N	Y
KY	N	Y	Y ¹⁶⁹	Y	Y	Y	NA
ME	N	N	Y	Y	N	N	NA
MA							
MT	N ¹⁷⁰	Y	Y	Y		N	N
NV	N	N	Y	Y	N	Y	Y
NH		Y	Y	Y		N	Y
ND	N ¹⁷¹	N	Y	Y	NA	N	NA
OR	Y ¹⁷²	N	Y	Y	NA	Y	NA
PA	Y	Y	Y	Y	Y	N	NA
SC		Y	Y	Y	N	Y	NA
SD		Y	Y				N ¹⁷³
TX	Y	Y ¹⁷⁴	Y	Y	Y	Y	NA
UT	¹⁷⁵	Y	Y	Y			NA
WI	Y ¹⁷⁶	Y	Y	Y	N	Y	Y
WY	N	N	Y	N	N	N	Y
Yes	7	14	19	17	3	8	9
No	9	5	0	2	6	10	2

TABLE 8: Undue Hardship Waiver

State	Submitted FY 2003	Submitted FY 2005	Granted FY 2003	Granted FY 2005	Percent Granted FY 2003	Percent Granted FY 2005	Denied FY 2003	Denied FY 2005	Percent Denied FY 2003	Percent Granted FY 2005
AL	NA	NA	NA	NA	NA	NA	NA	NA		
AK		1		0		0.00%		1		100.00%
AZ ¹⁷⁷	28	3	19	2	67.86%	66.67%	9	0	32.14%	0.00%
AR	37	32	21		56.76%	0.00%	16	14	43.24%	43.75%
CA	451	*	140	18	31.04%		312		69.18%	
CO										
CT		10		6		60.00%		2		20.00%
DE										
DC										
FL	19	25	10	11	52.63%	44.00%	9	14	47.37%	56.00%
GA										
HI	2		0		0.00%		2		100.00%	
ID	30		10		33.33%		20		66.67%	
IL	39	8	13	2	33.33%	25.00%	7	3	17.95%	37.50%
IN	8	5	6	4	75.00%	80.00%	2	1	25.00%	20.00%
IA	21	36	19	36	90.48%	100.00%	2	0	9.52%	0.00%
KS										
KY										
LA	0	250		145		58.00%		105		42.00%
ME	24	*	16	*	66.67%		8		33.33%	
MD										
MA ¹⁷⁸	70	29	41	8	58.57%	100.00%	29	21	41.43%	72.41%
MI										
MN	20		10		50.00%		10		50.00%	
MS										
MO										
MT										
NE	11		8		72.73%		3		27.27%	
NV			26	*						
NH		1		0		0.00%		1		100.00%
NJ	55		0		0.00%					
NM										
NY										
NC										
ND	NA	NA	NA	NA	NA	NA	NA	NA		
OH	100	100	90	90	90.00%	90.00%	10	10	10.00%	10.00%
OK	0		0				0			
OR	49	46	38	33	77.55%	71.74%	11	13	22.45%	28.26%
PA	89	90	78	83	87.64%	92.22%	11	7	12.36%	7.78%
RI										
SC	380	*	352	*	92.63%		28		7.37%	

State	Submitted FY 2003	Submitted FY 2005	Granted FY 2003	Granted FY 2005	Percent Granted FY 2003	Percent Granted FY 2005	Denied FY 2003	Denied FY 2005	Percent Denied FY 2003	Percent Granted FY 2005
SD	5	*	5	*	100.00%		0		0.00%	
TN	NA	NA	NA	NA	NA	NA	NA	NA		
TX	No ER Program	0	No ER Program	0			No ER Program	0		
UT	7	*	4	*	57.14%		3		42.86%	
VT										
VA		2		2		100.00%		0		0.00%
WA			10							
WV	5		3		60.00%		2		40.00%	
WI	66	58	9	24	13.64%	41.38%	52	30	78.79%	51.72%
WY	0		0				0			
Average	61	41	36	27	58%	58%	24	13	37.00%	36.84%
Median	24	25	10	8	59%	63%	9	3	33.33%	32.88%

* State reported it does keep track of number of estates against which estate recovery made.

TABLE 9: Hardship Waiver Procedures

	Standard Application Form	Formal Written Appeal Process for Waiver Denial
AL	NA	NA
AK	Y	Y
AZ	Y	Y
AR	N	Y
CA	Y	Y
CO		
CT	Y	Y
DE		
DC		
FL	Y	N
GA		
HI		
ID		
IL	Y	Y
IN	Y	Y
IA	N	Y
KS	N	NA
KY	N	Y
LA	Y	N
ME	N	Y
MD		
MA	N	Y
MI		
MN		
MS	N	Y
MO		
MT	Y	Y
NE		
NV	Y	Y
NH	N	Y
NJ		
NM		
NY		
NC	N	Y
ND	N	N
OH	N	
OK		
OR	Y	Y
PA	Y	Y
RI	NA	Y
SC		
SD		
TN	N	N
TX	Y	N
UT		
VT	Y	Y
VA	N	N
WA		
WV		
WI	NA	Y
WY		
Yes	14	21
No	13	6

TABLE 10: Data Collection

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	
Computerized System to Collect Basic Statistics on ER	Y	Y	Y	N	Y		Y		Y	Y				Y ¹⁷⁹	N	Y	Y	Y	Y	N		N				Y	
Publishes ER Experience Data Regularly	Y	N	N	N	N		N		Y	N				N	N	N	N	N	N	N		N				N	
Tracks the following:																											
# of Estates Against Which ER Completed	Y	Y	Y	Y	Y		Y		Y	Y				N	Y	Y	Y	Y	Y	Y		N				N	
All Administrative Costs of ER	N	N	Y	N	Y		Y		Y	Y				N	N	Y	Y	N	Y	Y		N				N	
Nature of Property From Which ER Made	N	N	Y	Y	N		N		Y	N				N	N	N	Y	N	Y	N		Y				Y	
# of Exemptions or Deferrals Granted	N	Y	Y	Y	Y		Y		N	N				N	N	Y	Y	N	Y	Y		Y				N	
# of Hardship Waivers Requested	N	Y	Y	Y	Y		Y		N	Y				Y	Y	Y	N	N	Y	Y		N				N	
# of Hardship Waivers Granted		Y	Y	Y	Y		Y		N	Y				Y	Y	Y	Y	N	Y	Y		Y				N	
# of Recovery Settlements	N	Y	Y	Y	N		N		N	N				N	Y	N	Y	Y	Y	N		Y				N	
# of Recoveries Contested	N	Y	Y	N	Y		N		N	N					N	Y	N	N	N	N		Y				N	
# of TEFRA Liens Imposed	Y	Y	Y	NA	Y		Y		NA	NA				Y	NA ¹⁸⁰	NA	Y	NA	NA	NA		Y				NA	
# of Post-Death Liens Imposed	NA	NA	NA	NA	Y		NA		Y	NA				NA	NA	NA	NA	NA	NA	NA		NA				NA	

	MT	NE	NV	NH	NJ	NM	NY ¹⁸¹	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	Yes	
Computerized System to Collect Basic Statistics on ER	Y		Y	N			DK	Y	N			Y	Y	Y			Y	Y		Y	Y						23
Publishes ER Experience Data Regularly	N		Y	N			DK	N	N			N	N	N				N			N			N			3
Tracks the following:																											
# of Estates Against Which ER Completed	Y		Y	Y			DK	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			Y			32
All Administrative Costs of ER	Y		Y	N			DK	N	Y	Y		Y	Y	N	Y	Y	N	Y	Y	N	Y			N			20
Nature of Property From Which ER Made	N		Y	Y			DK	N	N	N		N	Y	N	Y	Y	N	N	Y	N	N			N			13
# of Exemptions or Deferrals Granted	N		Y	N			DK	N	N	Y		N	N	Y	Y	N	Y	Y	N	N				Y			17
# of Hardship Waivers Requested	N		N	N			DK	N	Y	Y		Y	Y	N	Y	Y	N	Y	Y	N	Y			Y			21
# of Hardship Waivers Granted	N		Y	N			DK	N	Y	Y		Y	Y	N	Y	Y	N	Y	Y	N	Y			Y			24
# of Recovery Settlements	Y		Y	N			DK	NA	Y	Y		N	Y	Y	Y	Y	N	Y	Y	NA	N						18
# of Recoveries Contested	N		N	N			DK	N	N	Y		Y	N	Y	Y	Y	N	Y	Y	N	N						12
# of TEFRA Liens Imposed	Y		NA	Y			DK	NA	NA	NA		NA	NA	NA	NA	NA ¹⁸²	NA	NA	NA	NA	NA			Y			10
# of Post-Death Liens Imposed	NA		Y	NA			DK	NA	NA	Y		NA	NA	Y	NA	NA	NA	NA	Y	NA	NA			Y			7

Your Guide to the Medicaid Estate Recovery Program

English—For help to translate or understand this please call [Phone number] (TTY)

Spanish—Si necesita ayuda para traducir o entender este texto, por favor llame al teléfono [Phone number] (TTY)

[Insert additional foreign language widely spoken in your state]

Questions?

Call [Phone number]

What is the Estate Recovery Program?

Medicaid is a government program that pays for health care for people with limited incomes. Some of these services are provided to people as they grow older. Medicaid pays for services that help people stay in their own home. It also pays for people to move to a nursing home, if that is what they need.

To help pay for these long-term care services, every state must have a Medicaid Estate Recovery Program. If you received Medicaid long-term care services, [state] has the right to ask for money back from your estate after you die.

In some cases, the state may not ask for anything back, and the state will never ask for more money back than it paid for your services. Regardless of what is owed, [state] will never collect more than the value of what you own at the time of your death.

How does the program work?

When you apply for Medicaid, [state] provides a notice that explains the Estate Recovery Program.

If you have received Medicaid long-term care services, after your death, the state gives specific notice to the person handling your estate, or to survivors or heirs. The notice explains what amount is to be recovered, what action the state will take, and opportunities to contest the state's action.

The state will then make a claim [through the court] to recover the property. [insert state specific recovery procedures]

What is an estate?

An estate is property, such as money, a house, or other things of value that a person leaves to family members or others (heirs) when he or she dies.

The Medicaid Estate Recovery Program does not apply to all property that a person may own. Here are some examples of property from which the state will not collect:

- [Insert state specific examples]
- Life insurance policies that name a person to receive the payment
- Bank accounts that are paid on death to another person

Which Medicaid recipients are affected by the Medicaid Estate Recovery Program?

- Those who were age 55 or older when they received the Medicaid services
- Those who were in nursing homes or other facilities, for which Medicaid paid
- Certain other Medicaid recipients with long-term care insurance policies

What Medicaid services are covered by the Medicaid Estate Recovery Program?

- Nursing home services
- Home and community-based care

- Hospital and prescription drug services
- [Insert additional services]

Are there situations when the state will not recover or recovery will be delayed?

Yes, the state will not recover if

- There is a spouse who is still alive
- There is a child under 21 years of age
- There is a child of any age who is blind or disabled
- There is a sibling or adult child living in the home who has lived there for [period of time] and who took care of the Medicaid recipient
- [if applicable, insert minimum claim or estate value]

However, the state may place a lien on the home. A lien is notice of the state’s right to make a claim against the property at a later time. It does not affect immediate ownership of the property.

Are there exemptions if recovery would cause a hardship to an heir?

Yes, [state] will not recover if it causes undue hardship to your heirs. Undue hardship means:

[Insert state criteria for hardship waiver]

An heir can apply for a hardship waiver by [insert procedure, timeframe, appeal].

[Insert, if applicable, options for negotiated partial recovery or payment schedules if a full waiver is not granted.]

How can I get more information on the Medicaid Estate Recovery Program?

For more detailed information on the Medicaid Estate Recovery Program, call the [department] toll-free number at [**department phone number**]. This line is answered [beginning time]–[ending time], [days of the week]. Voicemail is available 24 hours a day.

You may also visit the [department] Web site at:

[**Web address**].

And you may e-mail questions to:

[**e-mail address**].

C. Survey Profile

State: _____

Consumer Protection Elements in Medicaid Estate Recovery (ER)

Contact Person:

ELEMENTS	Yes	No	N/A	NOTES
I. Notice Timing – State Gives Notice of ER:				
a. At application				
b. At re-determination of eligibility				
c. At admission to certified facility				
d. Upon determination of permanent institutionalization				
e. Upon placement of a lien on property				
f. At time claim enforcement begins				
II. Information in Claim Notice to Estate of Deceased (at time claim enforcement begins)				
a. Responsibility of notice recipient to notify others affected				
b. Statement that claim is not against the notice recipient personally				
c. Identification of legal authority authorizing ER				
d. Amount due				
e. Itemized Medicaid expenditures or information on how to obtain				
f. Limitation of state's claim to value of estate				
g. Circumstances supporting claim for exemption or deferral				
h. Option of paying over time				
i. Hardship waiver option and procedures				
j. Individual to contact for further information				
k. Reference to state Web site, if any				
l. Explanation of appeal rights/procedures				
III. Clarity/Readability of Claim Notice				
a. 12 point or larger type?	State respondents need not complete. Will be completed by outside evaluator.			
b. Flesch-Kincaid Grade Level				
c. Clarity assessment				
1. Text				
2. Format				
IV. Public Information				
a. State has ER training session(s) for eligibility staff				
b. State has toll-free phone line with information about ER				
c. State has a brochure on ER				
d. State has a Web site with ER information				
e. Brochure or Web site Information Content	Indicate B for brochure or W for Web site			
1. In language(s) other than English				
2. Includes information on services for which ER sought				
3. Includes exemption and deferral information				

ELEMENTS	Yes	No	N/A	NOTES
4. Includes hardship waiver criteria information				
5. Includes minimum claim value, if any				
6. Includes information on option to pay over time				
7. Notes limitation of state's claim to estate value				
8. Includes information on use of liens				
9. Includes information on use of direct collection outside court process, if any				
V. Hardship Waivers				
a. Standard application form				
b. Formal written appeal process for waiver denial				
c. Number of Hardship Waivers:	Submitted		Granted	
1. Survey data reported for FY 2003				Denied
2. New data (if available) for FY 2005				
VI. Collection Outside Court Proceedings (i.e., from bank accounts, nursing home personal funds, balance of certain trust funds)				
a. Notice of direct collection process at application				
b. Notice to survivors before specific collection				
c. Notice to survivors after specific collection				
d. Formal written process to appeal direct collection				
VII. Data Collection				
a. State has computerized system to collect basic statistics on ER				
b. State tracks the following data elements:				
1. Number estates against which ER completed				
2. All administrative costs of estate recovery				
3. Nature of property from which ER made (e.g. real vs. personal property)				
4. Number of exemptions or deferrals granted				
5. Number of hardship waivers requested				
6. Number of hardship waivers granted				
7. Number of recovery settlements				
8. Number of recoveries contested				
9. Number of TEFRA liens imposed				
10. Number of post-death liens imposed				
c. State publishes ER experience data regularly				
VIII. Dollar Amounts Collected		FY 2003		FY 2005
a. Total dollar amount of ER				
b. Number of estates from which recovery attempted				
IX. Future Plans				
a. Is state is planning to make changes in above items? If so, indicate nature of plans:				
X. Please attach or send claim notice to estate of deceased to:				
ABA Commission on Law and Aging, 740 15 th Street NW, Washington DC 20005; Fax: 202-662-8698; email to Erica Wood at ericawood@staff.abanet.org; or Ellen Klem at kleme@staff.abanet.org.				

Endnotes

I. Background and Status of Estate Recovery

¹ The Kaiser Family Foundation, “Medicaid/SCHIP,” <http://www.kff.org/medicaid/index.cfm>, accessed February 2007.

² Medicaid eligibility varies widely among the states, based on different state income and asset requirements. Most older people who are eligible for Supplemental Security Income (SSI) are also eligible for Medicaid. To become eligible for Medicaid under SSI in 2006, an individual can have no more than \$603 in monthly income and \$2,000 in countable assets. For a couple, the figures are \$904 per month and \$3,000 in assets, respectively. Most states have more liberal income requirements for people needing nursing home care and for certain home and community-based services, with some allowing coverage for those with incomes up to 300% of the SSI level. Also, many states chose to cover people with high medical costs who need long-term care—the “medically needy” (Centers for Medicare and Medicaid Services, *2006 SSI FBR, Resource Limits, 300% Cap, Break-Even Points, Spousal Impoverishment Standards*, January 1, 2006, <http://www.cms.hhs.gov/MedicaidEligibility/downloads/1998-2006SSIFBR70106.pdf>).

³ Kaiser Commission on Medicaid and the Uninsured, *Medicaid Facts: The Medicaid Program at a Glance*, May 2006.

⁴ Medicaid spending in FY 2006 increased across all states by the lowest percentage (2.8%) since 1996, and state revenue growth exceeded Medicaid growth for the first time since 1998 (Kaiser Commission on Medicaid and the Uninsured, *Low Medicaid Spending Growth Amid Rebounding State Revenues*, 2006; see www.kff.org).

⁵ Kaiser Commission on Medicaid and the Uninsured, *Medicaid Facts: The Medicaid Program at a Glance*, May 2006.

⁶ The additional recipients are individuals who receive Medicaid by having resources disregarded in connection with receipt of benefits under a long-term care insurance policy. The Long-Term Care Partnership Program began in 1987 as a demonstration project, with four states (California, Connecticut, Indiana, and New York) developing partnership programs. These programs were designed to encourage the purchase of private long-term care insurance, thereby potentially reducing reliance on Medicaid. Under the Deficit Reduction Act of 2005 (DRA), all states may now amend their state plans to provide for a partnership program. The OBRA '93 estate recovery provisions specified that states should recover from individuals participating in a partnership-type program, but it exempted beneficiaries in the original four demonstration states. Sec. 6021 of DRA allows states with approved state plan amendments providing for a partnership program to exclude from estate recovery the amount of long-term care benefits paid under a qualified long-term care insurance policy. This amends 42 U.S.C. 1396p(b)(1)(C)(ii). For background on the Partnership Program, see U.S. Governmental Accountability Office, *Overview of the Long-Term Care Partnership Program*, GAO-05-1021R, 2005, <http://www.gao.gov/new.items/d051021r.pdf>.

⁷ Naomi Karp, Charles P. Sabatino, & Erica F. Wood, *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices*, AARP Public Policy Institute, June 2005 (this report was preceded by a study, also conducted by the ABA Commission); Charles P. Sabatino & Erica F. Wood, *Medicaid Estate Recovery: A Survey of State Programs and Practices*, AARP Public Policy Institute, September 1996. Comparing the two reports highlights trends over the nine-year intervening period.

⁸ 42 U.S.C. § 1396p(b)(2).

⁹ 42 U.S.C. § 1396p(b)(1). The change in the law from age 65 to age 55 (42 U.S.C. § 1396p(b)(1)(B)) did not appear in either the House or Senate versions of P.L. 103-66 and was not discussed in the Conference Report. Thus, there has been some speculation that this age change in the law was in error. As for the additional beneficiaries in § 1396p(b)(1)(C)—individuals who purchased long-term care insurance policies—see note 6 above.

¹⁰ 42 U.S.C. § 1396p(b)(2).

¹¹ 42 U.S.C. § 1396p(b)(1)(B)(ii).

¹² 42 U.S.C. § 1396p(b)(3). The waiver procedures should be “in accordance with standards specified by the Secretary” of Health and Human Services. The House of Representatives report accompanying the estate recovery amendments specified that in developing hardship standards, HHS must address: (1) the adequacy of notice to, and representation of, affected parties; (2) the timeliness of the process; and (3) the availability of appeals (H. Rep. No. 111, 103rd Cong, 1st Sess. (1993), at 209; found in 1993 U.S.C.C.A.N. 536).

¹³ 42 U.S.C. § 1396p(b)(4)(B).

¹⁴ *State Medicaid Manual* Transmittal No. 63, “New Implementing Instruction on Estate Recovery,” September 1994. These CMS guidelines include provisions on recovery, the definition of estate, undue hardship waivers, collection procedures, waiver of recovery that is not cost effective, placement of TEFRA liens, and notice.

¹⁵ The instructions made six important changes: they (1) discussed estate recovery in cost-sharing programs in which Medicaid pays a portion of the cost for Medicare coverage for designated individuals; (2) addressed recovery of premium payments made to a managed care organization on behalf of a Medicaid beneficiary; (3) outlined recovery and exemptions from recovery of assets and resources of Native Americans; (4) excluded from estate recovery government reparation payments to special populations; (5) addressed collection against an annuity; and (6) defined a home of modest value (Centers for Medicare and Medicaid Services, *State Medicaid Manual* §3810, Part 3 [CMS-Pub. 45-3], Transmittal No. 75, January 11, 2001).

¹⁶ It is important to distinguish between the concepts of “lien” and “claim” to understand the law’s limitations. In its simplest form, a “lien” merely secures a right to enforce a charge against specific property. All that may be required is filing a lien notice in the county recorder’s office. In itself, a lien does not trigger any process for seeking actual recovery of the charge or debt. A “claim” actually triggers the process of seeking possession of the property or satisfaction of a debt. The process usually involves filing a judicial action or submitting a claim as part of probate proceedings. A claim is not always required to enforce a lien; the lien may be satisfied voluntarily or by necessity. For example, it may be impossible to transfer title to a home unless a lien is satisfied.

¹⁷ The TEFRA lien provisions were codified in the first iteration of 42 U.S.C. § 1396p, entitled “Liens, Adjustments and Recoveries and Transfers of Assets.”

¹⁸ 42 U.S.C. § 1396p(a)(1); 42 C.F.R. 433.36(g)(3).

¹⁹ 42 U.S.C. § 1396p(a)(2); 42 C.F.R. 433.36(g)(3).

²⁰ 42 U.S.C. § 1396p(b)(2)(B); 42 C.F.R. 433.36(h)(2).

²¹ 42 U.S.C. § 1396p(a)(3); 42 C.F.R. 433.36(g)(4).

²² The Deficit Reduction Act of 2005, Pub. L. No. 109-171, imposes a \$500,000 cap on the value of an exempt residence when the owner is institutionalized and living in a nursing home, and states have the option of increasing the cap to \$750,000. The home equity cap may be waived in case of a hardship, under §6014(a)(4). This could reduce the number of cases in which a TEFRA lien is placed on a home, as the home would no longer be exempt; however, the effect should be limited. It is estimated that “fewer than one-half of one percent of the unmarried applicants for Medicaid nursing home benefits have home equity greater than [the \$750,000 cap]. (The policy would have a negligible effect on the treatment of the homes of married individuals.) That figure translates to about 2,000 affected individuals annually by 2010” (Congressional Budget Office, Letter from Acting Director Donald Barron to Hon. John M. Spratt, U.S. House Committee on the Budget, January 27, 2006, with attachment on “Additional Information on CBO’s Estimate for the Medicaid Provisions in the Conference Agreement for S. 1932, the Deficit Reduction Act of 2005).

²³ The study did not focus specifically on post-death lien notices, but at least two states sent such notices.

²⁴ Brian Burwell, Kate Sredl, & Steve Eiken, “Medicaid Long-term Care Expenditures in FY 2005, Medstat, July 2006. The project used the CMS data instead of the amounts reported on the profile form by state officials, as not all states reported amounts recovered, and in several cases there were inconsistencies with the CMS amounts.

²⁵ The project did not collect post-death liens, which are used, at least sporadically, by about 13 states. See note 49.

²⁶ While the project originally considered use of the Flesch-Kincaid grade-level reading test, this proved to be neither workable nor appropriate; see Flesch-Kincaid Readability Test, http://en.wikipedia.org/wiki/Flesch-Kincaid_Readability_Test.

²⁷ Four of the state contacts were members of a listserve of Medicaid estate recovery officials, and two were members of the project’s advisory council.

²⁸ The Georgia legislature passed S.B. 572 in 2006, which increased the asset threshold from \$25,000 to the first \$100,000 of an estate and removed the retroactive provision from the program. The Department of Community Health submitted an amendment to the Georgia Medicaid plan incorporating the legislative changes to CMS. CMS did not approve the proposal, so the legislative changes had no effect on the estate recovery program. At the direction of the governor, the department sought to modify the effective date of the estate recovery program from August 2001, to May 3, 2006, through a rule-making process. Thus, only Medicaid members with expenditures on and after May 3, 2006, are subject to estate recovery, upon approval of the proposed rules (Georgia Department of Community Health, *Medicaid Estate Recovery Program*, http://dch.georgia.gov/vgn/images/portal/cit_1210/39/35/53166441Estate_Recovery_FAQ.pdf).

²⁹ CMS-64 data show a total of \$1,005,208 recovered in FY 2005 for New Mexico. However, according to the New Mexico Medicaid official, this was a reporting error (telephone conversation with Anna Bransford, Financial Manager, Human Services Department, August 18, 2006).

³⁰ While the estate recovery amounts increased between 2003 and 2005, the median decreased by \$1,035,382.

³¹ According to a Medicaid official in Mississippi, the amounts recovered did increase between FY 2003 and FY 2005, but not by 250%. A 2003 change in the computer program used to track estate recovery data is responsible for the incorrect information (telephone conversation with Shirlean Smith, Director, Third Party Recovery, Mississippi Division of Medicaid, November 9, 2006).

³² According to Medicaid officials in Washington and Oregon, amounts recovered actually increased between FY 2003 and FY 2005. A reporting error in Washington and changes in reporting methodology in Oregon are responsible for the incorrect information (telephone conversation with Shawn Hoage, Estate Recovery Supervisor, Washington Department of Social and Health Services, Financial Services Administration, Office of Financial Recovery, September 1, 2006; e-mail from Roy Fredericks, Manager, Oregon Estate Administration Unit to Erica F. Wood, Associate Director, American Bar Association Commission on Law and Aging, August 25, 2006; on file with author).

³³ Long-term expenditures include nursing home, intermediate care facility for people with mental retardation, and total home care expenditures (memorandum from Brian Burwell, Vice-President, Chronic Care and Disability, July 5, 2006).

³⁴ Note that while the average amount recovered increased at a higher proportion (24%) than did the average amount of state long-term care expenditures (11%), the average amount recovered as a percent of long-term care expenditures remained about the same (0.61%). The reasons for this are unknown.

³⁵ Arizona, at 6.90% of total long-term care expenditures, actually tops the list, but it is an outlier because, under its Section 1115 waiver, the state provides all long-term care services through managed care contracts. Therefore, long-term care expenditures are reported under the “managed care premiums” cost category on CMS-64 reports to the federal government, rather than under the fee-for-service categories used by this survey to calculate total state long-term care costs.

II. Protections for Beneficiaries and Survivors

³⁶ Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(G).

- ³⁷ Unfortunately, the survey did not ask states about the manner in which the brochure is used and distributed.
- ³⁸ Target audiences for Web sites differ from state to state. Twenty-one Web sites appear to target the public, but at least two states (Kentucky and Mississippi) target attorneys by featuring estate recovery statutes.
- ³⁹ U.S. Department of Commerce, Language Use and English-Speaking Ability: 2000, Census 2000 Brief, 2003.
- ⁴⁰ The brochures from California, Texas, and Wisconsin were used to create the model brochure. The model does not include TEFRA lien information, but states could modify it to include lien information and protections.
- ⁴¹ Wisconsin Department of Health and Family Services, Division of Health Care Financing, Wisconsin Medicaid Estate Recovery Program: Most Commonly Asked Questions & Answers, October 2002, 4.
- ⁴² Arizona Health Care Cost Containment System (AHCCCS), State of Arizona: Medicaid Assistance Estate Recovery Program, September 2004, 6.
- ⁴³ E-mail from Roy Fredericks, Manager, Oregon Estate Administration Unit to Ellen M. Klem, Researcher, American Bar Association Commission on Law and Aging, September 28, 2006; on file with author.
- ⁴⁴ Telephone interview with Stephanie Ryan, Medicaid Estate Recovery, Program Specialist, Texas Department of Aging and Disability Services, November 9, 2006.
- ⁴⁵ Private attorneys can also educate the legal community about estate recovery. For example, a group of private attorneys in Texas has written a reference guide for attorneys, Medicaid beneficiaries, and their families on how to protect estates from recovery (Molly Dear Abshire et al., *Save My Home!*, Bellaire, Texas: Elder Law Trio Press, 2005).
- ⁴⁶ Telephone Interview with Robert J. Byrne, Senior Assistant Attorney General, June 14, 2006.
- ⁴⁷ E-mail from Johnetta Jordan, Manager, Technical Recovery Section, to Ellen M. Klem, Researcher, American Bar Association Commission on Law and Aging, September 28, 2006; on file with author.
- ⁴⁸ Karp et al., 45.
- ⁴⁹ In the 2005 study, 13 states reported using post-death liens in the event of a deferral of recovery. This study did not collect or examine notices of post-death lien placement. Court cases have affirmed the importance of adequate notice to the surviving spouse for a post-death lien, as it could affect the spouse's transactions involving the property; see *DeMille v. Belshe*, 1994 WL 519457 (N.D. Cal. 1994); *State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer*, 87 P. 3d 1045 (Nev. 2004); *Ohio Dept. of Job & Family Serv. v. Tultz*, 152 Ohio App. 3d 405, 787 N.E. 2d 1262 (Ohio App. 9 Dist. 2003).
- ⁵⁰ Some states also give notice of a post-death lien. In the 2005 study, 13 states reported using post-death liens in the event of a deferral of recovery, at least in circumstances in which such security was considered necessary. This study did not collect or examine notices of post-death lien placement. Court cases have affirmed the importance of adequate notice to the surviving spouse for a post-death lien, as it could affect the spouse's transactions involving the property; see *DeMille v. Belshe*, 1994 WL 519457 (N.D. Cal. 1994); *State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer*, 87 P. 3d 1045 (Nev. 2004); *Ohio Dept. of Job & Family Serv. v. Tultz*, 152 Ohio App. 3d 405, 787 N.E. 2d 1262 (Ohio App. 9 Dist. 2003).
- ⁵¹ Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(G)(1).
- ⁵² Indiana State Form 47990, "Notice Regarding Rights and Responsibilities."
- ⁵³ In the 2005 study, legal practitioners reviewed the state survey responses. Reviewers in three states observed that estate recovery acts as a significant deterrent to elders who could qualify for Medicaid long-term care services. According to one source, "fear that Medicaid or the nursing home will take my house" is often cited by elders who may need long-term care services. An additional reviewer noted that estate recovery "has caused some persons to engage in estate planning and gifting of assets" (Karp et al., 40). A 2003 Pennsylvania study included a telephone survey of seniors (or their caregivers) who had declined home- and community-based Medicaid waiver services during a two-month period. The study found that 54% of the 73 interviewees turned down services because of estate recovery. It also found that only one-third of survey participants had received written information on estate recovery (Karp et al, 17, citing Carolyn Ellison, Amy Godfrey, & Rachel Rose, *Medicaid Estate Recovery Study*, conducted September 2002–May 2003 for the Pennsylvania Intra-Governmental Council on Long Term Care, unpublished report).
- ⁵⁴ *State Department of Human Resources v. Ullmer*, 87 P. 2d 1045 (Nev. S.Ct. 2004).
- ⁵⁵ 42 U.S.C. §1396p(a)(1)(B)(ii); Centers for Medicare and Medicaid Services, §3810(A)(1).
- ⁵⁶ Centers for Medicare and Medicaid Services, §3810(A)(1).
- ⁵⁷ Thompson/MEDSTAT, *Medicaid Liens*, U.S. Department of Health and Human Services, April 2005, <http://aspe.hhs.gov/daltcp/Reports/liens.htm>.
- ⁵⁸ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 1950.
- ⁵⁹ *DeMille v. Belshe*, 1994 WL 519457 (N.D. Cal. 1994).
- ⁶⁰ National Conference of Commissioners on Uniform State Laws, *Uniform Guardianship and Protective Proceedings Act*, § 113; Commission on National Probate Court Standards, *National Probate Court Standards*, Std. 3.3.7 (1993, 1999); American Bar Association Commission on Law and Aging & The National Judicial College, *Statement of Recommended Judicial Practices*, 1986, Rec. I(A), 14–15.
- ⁶¹ Karp et al., 30.
- ⁶² See *supra* note 49.
- ⁶³ These states are Alabama, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming. In the 2005 study, Indiana, South Dakota, and Wyoming noted that they had not placed any TEFRA liens the previous

year. Kansas did not institute its TEFRA lien program until July 2004, and Missouri instituted its program in September 2005. In the current study, California officials reported that placement of a TEFRA lien results from a “Notice of Action” from an eligibility worker identifying that a Medi-Cal beneficiary has no intent to return home, and that there are “only one or two” such notices a year.

⁶⁴ Fifteen of the 35 responding states reported giving notice on placement of a lien, but this included three states using post-death liens only, as well as states using either pre-death TEFRA liens or both.

⁶⁵ Four states refer to the resident’s length of stay in the institution (Arizona, 90 days; Delaware, two years; Illinois, 120 days; and Kansas, six months). Other states refer to medical documentation, for instance, the Alaska notice says the state agency “has reviewed your medical records and has concluded that your current level of nursing facility care will continue into the foreseeable future.” The Minnesota notice says that the determination is based on “medical verification from your attending physician that you are not reasonably expected to be discharged from the medical institution.” The California notice refers solely to the recipient’s intent: “[Y]ou do not intend to return to your home.”

⁶⁶ Several of the notices include the objective of the lien: “to recover medical assistance expenditures paid on behalf of the recipient while the recipient [was institutionalized]” (South Dakota).

⁶⁷ 42 U.S.C. § 1396p(a)(3); Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(f)(4).

⁶⁸ 42 U.S.C. § 1396p(a)(2); 42 C.F.R. § 433.36(g); Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(F)(3).

⁶⁹ California, Indiana, Illinois, and Minnesota.

⁷⁰ 42 U.S.C. § 1396p(a)(1); 42 C.F.R. § 433.36(g); Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(A)(1).

⁷¹ In Alaska a pre-hearing conference may be scheduled before a hearing. In Arizona, in addition to a fair hearing, a Medicaid recipient may apply for an exemption from the lien, and the agency must respond in writing. In California, the individual has a right to request a county review by submitting additional information, and if this is unsuccessful, may appeal the review at a local county welfare department; in addition, the individual has a right to a state hearing. In Illinois, a Medicaid recipient may meet with a representative from a local Department of Human Services office to present information or evidence informally, and the individual still has the right to a fair hearing. The Kansas lien notice includes criteria and procedures for an estate recovery hardship waiver request “if the imposition of a lien will cause an undue hardship for the family.”

⁷² Alaska allows 28 days, Wisconsin 45 days, Illinois 60 days, and Delaware 90 days. Minnesota provides that the 30 days can be extended to 90 for good cause.

⁷³ The notice in both Alaska and Kansas indicates that the hearing is to appeal the determination of permanent institutionalization, and the California notice specifies that, at the hearing, “you may introduce facts concerning exemptions.” The Wisconsin notice says, “the only issue at the hearing will be whether the statutory requirements for the imposition of a lien are satisfied,” and lists the statutory conditions for exemption and the requirement that the agency must have made a determination about permanent institutionalization (but not the basis of the determination).

⁷⁴ Kansas, Indiana, Illinois, and Massachusetts.

⁷⁵ Illinois and Massachusetts.

⁷⁶ While CMS requires *Medicare* carriers to maintain a correspondence Quality Control Program to promote beneficiary understanding, there appears to be no such requirement for *Medicaid* notices, including estate recovery notices. The Medicare program requires good grammatical construction, sentences of varying length, paragraphs of no more than five sentences, a font size of 12 points, a font style of Universal or Times Roman or similar style for ease of reading by a beneficiary, and language below the eighth-grade reading level (*CMS Medicare Contractor Benef. and Provider Comm. Man. Pub. 100-9*, July 15, 2005, chap. 2, § 20.2.1[4]).

⁷⁷ Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810(G)(2).

⁷⁸ American Bar Association, “Estate Planning and Probate,” *Legal Guide for Americans Over 50*, New York: Random House, 2006, 71.

⁷⁹ In the 2005 study, 35 states reported that the state has priority over general creditors. However, states frequently have several levels of creditors, and estate recovery claims may have priority over general creditors yet still be behind certain higher-designated creditor classes, such as funeral expenses or costs of estate administration.

⁸⁰ In many states, executors, administrators, or their attorneys are required to send notice to the Medicaid agency when a probate is begun (or Medicaid recovery staff may review probate filings).

⁸¹ This question was not included in the survey profile, as two differing procedures were clarified once the project was underway.

⁸² Not all state Medicaid applications include a “contact person.” In 1991, the Secretary of Health and Human Services (now known as the Centers for Medicare and Medicaid Services) developed a model application form for use in applying for Medicaid; the federal model application form did not ask applicants for a contact (Health Care Financing Administration, Medicaid Program; Model Medicaid Application Form, 56 FR 65490, December 17, 1991).

⁸³ A 2002 Colorado Court of Appeals case held that notice to the personal representative was insufficient because the Medicaid estate recovery program did not identify who should receive the notice, nor did it include specific directions for the personal representative to notify those persons (*Estate of Schiola v. Colorado Department of Health Care Policy and Financing*, 51 P. 3d 1080 [Colo.App. 2002]).

⁸⁴ For instance, the Illinois notice says, “This does not mean that you are personally responsible for this debt.” California’s notice states, “The claim is limited to either the amount of the health care services paid by the Medi-Cal Program on behalf of this recipient or the value of the assets, whichever is less.”

- ⁸⁵ The 2005 study examined state practices concerning exemptions, deferral, and settlements; see Karp et al., 26–29.
- ⁸⁶ For instance, Maine provides that “A claim will not be made if enforcement of the claim creates an undue hardship.” In the 2005 study, three states (Alabama, North Dakota, and Tennessee) indicated they have no specific written hardship waiver procedure in place.
- ⁸⁷ The California notice provides that “If you cannot pay the claim within 60 days, you must contact the Department to discuss payment arrangements.” The Nevada notice says that if recovery is temporarily waived or modified, “a reasonable payment schedule, based on the asset to be recovered, may be arranged.” (One Medicaid official interviewed commented that while his state may sometimes reach such an agreement, it is not a formal option that merits mention in the notice form.)
- ⁸⁸ For instance, Alaska provides, “If you disagree with the action specified in this letter, you may file a grievance with the DHCS Administration. The grievance must be in writing and must be received by [contact] no later than 30 days from the date of this notice.
- ⁸⁹ While the e-mail survey included questions about notice in direct recovery, these did not yield useful information.
- ⁹⁰ National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code*, <http://www.law.cornell.edu/uniform/probate.html>.
- ⁹¹ For a listing of state small estates probate provisions, see http://www.halt.org/legal_information_clearinghouse/small_estates/.
- ⁹² National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code*, Part 12, § 3-1201.
- ⁹³ *Ibid.*, § 3-1203.
- ⁹⁴ For examples of provisions used by Medicaid agencies for recovery, see South Dakota, *S.D. Codified Laws* § 29A-3-1201 & § 29A-3-817; Illinois, 755 *ILCS* 5/25-1 & 2; Oregon, *Or. Rev. Stat.* § 708A.430 (special legislation in the banking provisions). Oregon considers that its recovery from banks is a significant part of its overall record of recovery of Medicaid funds (personal communication, Roy Fredericks, Oregon Estate Recovery Unit, August 2006; Roy Fredericks, *Oregon’s Experience with Asset Transfers and Estate Recovery: Successes and Impediments*, Oregon Department of Human Services, [insert date].
- ⁹⁵ Karp et al., 38.
- ⁹⁶ 42 U.S.C. § 1396p(b)(2).
- ⁹⁷ Oregon law provides that on the death of a depositor, if the deposit is \$25,000 or less, “the financial institution may, upon receipt of an affidavit . . . [pay the monies] to (a) the surviving spouse; (b) if there is no surviving spouse, to the Department of Human Services, on demand of the Department within 60 days from the death of the depositor. . . .” (*Or. Rev. Stat.* §708A.430).
- ⁹⁸ Oregon State Bar, Legislative Proposal, “Affidavit of Claiming Successors, to amend ORS 708A.430.
- ⁹⁹ For example, a South Dakota claim notice includes a note that “under South Dakota law . . . the surviving joint owner of a joint account shall be liable for the debts and obligations of the deceased joint owner. The balance of that account after funeral expenses is subject to recovery.”
- ¹⁰⁰ Karp et al., 38.
- ¹⁰¹ Personal needs allowance funds are the funds nursing home residents receiving assistance from Medicaid can keep of their monthly income to cover “personal needs.” The Medicaid program requires that nursing facility residents have a personal needs allowance of at least \$30 per month. However, many states allow for more than this minimum amount. The U.S. average was about \$45 per month in 2004 (AARP Public Policy Institute, *Across the States: Profiles of Independent Living and Long-Term Care*, 2006).
- ¹⁰² Kentucky, West Virginia, and Wyoming indicated such a requirement in the 2005 study.
- ¹⁰³ *S.D. Codified Laws* § 34-12-38.
- ¹⁰⁴ Oregon Department of Human Services, Seniors & People with Disabilities, Executive Letter SPD-EL-02-019, “Estate Recovery—Client Bank Accounts,” November 13, 2002.
- ¹⁰⁵ Information on operation of the estate recovery undue hardship waiver standards and procedures may be useful and timely as states begin to implement similar undue hardship waiver provisions under the Deficit Reduction Act of 2005, Pub. L. No. 109-171. Under the Act, §6011(d) provides for hardship waivers to the application of a penalty period for individuals who make a transfer of assets for less than fair market value during an applicable lookback period, and §6014(a)(4) provides for hardship waivers for the Act’s home equity cap on an exempt residence.
- ¹⁰⁶ 42 U.S.C § 1396p(b)(3).
- ¹⁰⁷ Project staff attempted to review state Medicaid plans but were unable to locate them on either the Centers for Medicare and Medicaid Services Web site or individual state Web sites.
- ¹⁰⁸ CMS also precludes states from granting waivers in cases in which the state has disregarded assets because the beneficiary had long-term care insurance (except in the long-term care insurance demonstration states [California, Connecticut, Indiana, Iowa, and New York] grandfathered in by OBRA ’93) (Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3810[C]).
- ¹⁰⁹ In the 2005 study, all responding states except three (Alabama, North Dakota, and Tennessee) had criteria for determining undue hardship. In this study, North Dakota reported that criteria for determining undue hardship exist in its Medicaid state plan. In North Dakota, hardship in a homestead and \$10,000 in additional property is established if there is a surviving spouse, minor child, or child who was being supported by the decedent. The same individuals are entitled to a family allowance providing for their support during the pendency of estate proceedings at the expense of the estate (memorandum from Blaine L. Nordwall, Director of Economic Assistance Policy Division, North Dakota Department of Human Services, to Wendy Fox-Grage, Senior Policy Advisor, AARP Public Policy, January 4, 2007; on file with the American Bar Association Commission on Law and Aging). Tennessee did not respond to

this study, but the 2005 study reported, “In Tennessee, hardship is considered on a case-by-case basis, and the Office of General Counsel may negotiate a compromise.”

¹¹⁰ While the number of brochures and Web sites has increased since 2003, it is unclear whether the amount of information on hardships waivers in the brochures and on the Web sites has increased. It is clear, however, that 13 Web sites and 17 brochures contained this information in 2006.

¹¹¹ In addition to encouraging family members to call an estate recovery field consultant or the office and conducting workshops for the Illinois Institute for Continuing Legal Education, portions of the notice sent to the heirs were changed to include the following statement in boldface: “This does not mean that you are personally responsible for this debt” (e-mail from Johnetta Jordan, Manager, Technical Recovery Section, to Ellen M. Klem, Researcher, American Bar Association Commission on Law and Aging, September 28, 2006; on file with author).

¹¹² In 2004, Massachusetts regulations were amended, and the hardship waiver applicant’s annual gross countable income was reduced from 200% to 133% of the applicable federal-poverty-level income standard. The amendments also eliminated unconditional waivers, by requiring applicants for waivers to “meet *all* of these requirements for a 2-year period after the member’s death” before recovery will be permanently waived (Mass. Regs. Code tit. 130, § 515.011[D][2006]).

¹¹³ The number of hardship applications *granted* ranged from a high of 145 in Louisiana to zero in Alaska and New Hampshire. The proportion of hardship waiver applications granted ranged from 100% in Iowa (with 36 applications granted and submitted), Massachusetts (with eight applications granted and submitted), and Virginia (with two applications granted and submitted) to a low of 25% in Illinois (with only two of eight applications granted). The average percent granted (58%) and denied (37%) do not equal 100%. The number of applications submitted, granted, and denied may represent cases from different fiscal years, so they do not necessarily add up to 100.

¹¹⁴ The number of waiver applications *denied* ranged from a high of 105 in Louisiana to zero in Arizona, Iowa, and Virginia. The average number denied was 13 in 2005 and 24 in 2003. The average percent granted (58%) and denied (37%) do not equal 100%. The number of applications submitted, granted, and denied may represent cases from different fiscal years and thus do not necessarily add up to 100.

¹¹⁵ For example, Arkansas, North Dakota, and Ohio.

¹¹⁶ An attorney erred in one state where a probate proceeding filed by a law firm listed a surviving child, but failed to recognize that the child met the criteria for a waiver. The estate recovery unit recognized the individual’s address as a group home, contacted the law firm, and confirmed that the surviving child was developmentally disabled. The money was refunded and placed in trust for the surviving child.

¹¹⁷ According to the 2005 study, the states varied greatly in the form used most frequently for case resolution, which may include resolution of hardship waiver challenges. Court was the venue for 100% of case resolutions in Iowa, Kansas, and Oklahoma. In contrast, all contested cases were resolved via administrative procedure in Arizona, Pennsylvania, South Dakota, and West Virginia. The state agency acted informally to resolve all contested cases in North Dakota and Virginia. Other states, such as Oregon, use a combination of these processes.

¹¹⁸ Kansas Division of Health Policy and Finance, *Kansas Estate Recovery*, 5, n.d..

¹¹⁹ Texas Department of Aging and Disability Services, *Medicaid Estate Recovery Program*, August 22, 2006, http://www.dads.state.tx.us/services/estate_recovery/index.html.

¹²⁰ The devisees or heirs who do not meet the state’s undue hardship waiver criteria may be considered for partial (reduction) recovery of the claim against the estate of the decedent. The facts the state considers on a case-by-case basis when reviewing application requests and supporting documentation for a partial recovery include financial and medical hardship to the heir(s), income of the heir(s) and whether the household income is within 100% of the federal poverty guidelines, resources of the heir(s), value and type of assets in the estate (real and personal), amount of the state’s claim against the Medicaid beneficiary’s estate, whether other creditors have filed claims against the Medicaid beneficiary’s estate or have foreclosed on the property, or any other facts relevant for a fair and equitable determination under the circumstances of a particular case (e-mail from Tunde Adebule, Program Manager, Third Party Liability, Division of Business and Finance, to Ellen M. Klem, Researcher, American Bar Association Commission on Law and Aging, August 7, 2006; on file with the author).

¹²¹ Roy Fredericks, *Oregon’s Experience with Asset Transfers and Estate Recovery: Successes and Impediments*, Oregon Department of Human Services, n.d., <http://familyimpactseminars.org/reports/fis23fredericks.pdf>.

¹²² 1 Tex. Admin. Code § 373.219(b).

¹²³ Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 2500.1(B).

¹²⁴ Twenty-three states reported they have a computerized system to collect basic statistics on estate recovery (Table 10).

¹²⁵ Thirty-two of the 35 responding states track the number of estates against which recovery was completed (Table 10).

¹²⁶ In Texas, where estates comprise both real and personal property, and especially where there are other creditors, assets from which collection is made may be unidentifiable.

¹²⁷ Telephone conversation with Shawn Hoage, Estate Recovery Supervisor, Washington Department of Social and Health Services, Financial Services Administration, Office of Financial Recovery, September 1, 2006; e-mail from Roy Fredericks, Manager, Oregon Estate Administration Unit, to Erica F. Wood, Assistant Director, ABA Commission on Law and Aging, August 25, 2006; on file with author.

V. Tables

¹²⁸ E-mail from Brian Burwell, Vice President, Chronic Care and Disability, to Wendy Fox-Grage, Senior Policy Analyst, AARP Public Policy Institute, August 8, 2006.

¹²⁹ Ibid.

¹³⁰ Long-term care expenditures include nursing home, intermediate care facilities for the mentally retarded (ICF/MR) facility, and total home care expenditures.

¹³¹ E-mail from Brian Burwell, Vice President, Chronic Care and Disability, to Wendy Fox-Grage, Senior Policy Analyst, AARP Public Policy Institute, August 8, 2006.

¹³² Memorandum from Brian Burwell, Vice-President, Chronic Care and Disability July 5, 2006.

¹³³ Notices through local probate courts vary.

¹³⁴ Notice sent to fiduciary to advise of undue hardship application

¹³⁵ In nonprobated cases, an approximate amount of the claim is sent in a letter to a responsible party.

¹³⁶ Statement sent only to fiduciary due to Health Insurance Portability and Accountability Act (HIPAA).

¹³⁷ Claim to court explains requirement to submit a HIPAA-compliant medical release.

¹³⁸ Itemized filed in court case with claim petition.

¹³⁹ Does include hardship waiver information.

¹⁴⁰ In cover letter, but not claim notice.

¹⁴¹ In cover letter, but not claim notice

¹⁴² Plan to add at future date.

¹⁴³ In cover letter, but not claim notice.

¹⁴⁴ Believes probate court gives executor this information.

¹⁴⁵ Not necessary in probate claims; but for nonprobate claims, letters make clear the claim extends only to deceased's interests.

¹⁴⁶ Subsequent communication.

¹⁴⁷ In court proceedings, claim amount is always included. If not probated through courts, (assets <\$20,000) and claim generally exceeds assets, claim amount and itemization is provided upon request.

¹⁴⁸ Subsequent communication.

¹⁴⁹ Provided upon request.

¹⁵⁰ Provided to persons closing estates using the noncourt procedure.

¹⁵¹ Information given if circumstances are known or suspected.

¹⁵² Given if requested.

¹⁵³ To date, no decision made to allow payments over time.

¹⁵⁴ No specific hardship waiver procedure. Hardship is established if survivors are entitled to family allowance or household allowance or if entitled to estate recovery deferral.

¹⁵⁵ Given if requested.

¹⁵⁶ Notice is court claim document.

¹⁵⁷ Web site in development.

¹⁵⁸ Appeal rights in probate estate claim are limited to denied hardship requests; otherwise, probate court retains jurisdiction over matter.

¹⁵⁹ Subsequent communication, if no exemptions apply.

¹⁶⁰ This is given at time of hardship denial.

¹⁶¹ In the process of updating notices to include the appeal rights.

¹⁶² For hardships; otherwise, use court appeal/process procedures for resolution of estate claims.

¹⁶³ General Medicaid Toll-Free Phone Line.

¹⁶⁴ Specific Estate Recovery Toll-Free Phone Line.

¹⁶⁵ Department of Administrative Services does not, DSS may.

¹⁶⁶ Only supervisors.

¹⁶⁷ Includes part of the hardship waiver criteria information.

¹⁶⁸ Option for Spanish on Request for Release form.

¹⁶⁹ Includes exemption, but not deferral information.

¹⁷⁰ Alternative accessible formats available on request.

¹⁷¹ Language services available to all Medicare beneficiaries.

¹⁷² Available in Spanish, Russian, large print, Braille, audiotapes, or other languages on request.

¹⁷³ Separate brochure, titled "What You Should Know about Medicaid Liens," includes this information.

¹⁷⁴ Brochure does not itemize all programs subject to estate recovery, but provides examples (e.g., nursing care and some in-home care).

¹⁷⁵ Language services available to all Medicare beneficiaries.

¹⁷⁶ Available in Spanish, Russian, and Hmong.

¹⁷⁷ Arizona also allows for partial recovery. In FY 2003, four partial waivers were submitted and three were granted. In FY 2005, one partial waiver was submitted.

¹⁷⁸ As of November 1, 2004, hardship waivers are conditional for two years.

¹⁷⁹ System is bifurcated' as a result, the state has two computerized systems.

¹⁸⁰ State has authority to place TEFRA liens but has not placed one in several years.

¹⁸¹ All data are at the county level.

¹⁸² State has authority to place TEFRA liens but has not placed one in 10 years.

Appendices

¹⁸³ This model brochure does not include pre-death lien information. States using TEFRA liens could add information or create a separate brochure. For the formatting purposes of this report, the sample brochure is presented in the same format as the rest of the report. States can create their brochures in a book-fold or tri-fold format to make them easier for Medicaid beneficiaries and their families to read.