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**Medicaid Estate Recovery:  
A 2004 Survey of State Programs and  
Practices**

by

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## Foreword

Medicaid is experiencing a financial crisis. Given the economic downturn from 2001 to 2004, double-digit rate increases in private health insurance costs, the growing numbers of people with disabilities who need acute and long-term care services, and the escalation in Medicaid enrollment and costs, states are caught in a squeeze. State policymakers increasingly are concerned about the portion of their budgets devoted to Medicaid. To reduce costs in their Medicaid programs, several states are considering expansions of estate recovery.

As part of the 1993 Omnibus Budget Reconciliation Act (OBRA '93), Congress mandated that states implement estate recovery programs to recoup the costs of long-term care and related Medicaid services. However, the federal law allows states considerable discretion in how they design their estate recovery programs. The AARP through its Public Policy Institute contracted with the Commission on Legal Problems of the Elderly (currently the Commission on Law and Aging) of the American Bar Association (ABA) in 1996 for a national survey of state Medicaid estate recovery programs and practices. At that time, the ABA Commission found that most of the state programs were still in their operational infancy.

As a follow-up more than a decade after the passage of OBRA '93, the AARP Public Policy Institute has once again asked the ABA Commission to conduct a nationwide study on current estate recovery practices and to highlight the trends over time by comparing the earlier survey results with the updated research. A Technical Expert Panel—organized by the U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation, AARP, and the ABA Commission—provided valuable input and guidance.

Because policymakers are looking for ways to reduce the costs of Medicaid, estate recovery has received considerable attention. AARP is publishing this report to develop a clear picture of how states are implementing their estate recovery programs with the hope that this information will lead to informed decision making and recognition of the program's impact on low income Medicaid beneficiaries and their families.

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## *Executive Summary*

### **Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices**

**Background, Law, and Purpose** (pp. 8-11). Close to 53 million Americans—about one in every nine—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 and pays for nearly half of all nursing home care in the country. Today, state Medicaid programs are caught in the grip of intense economic pressures set against a growing need for coverage for low-income people, including elders and those with disabilities. Since the beginning of 2001, Medicaid enrollment has grown by close to one-third. Increasingly, states are retooling their Medicaid programs, seeking cost control strategies, and, in some cases, cutting the rolls or reducing benefits. At the same time, debates are under way at the federal level about tightening the federal Medicaid contribution and loosening restrictions on how states operate their programs. Against this backdrop, estate recovery is seen as one approach for fiscal relief, bolstering distressed state Medicaid budgets.

To recoup costs of long-term care and other related Medicaid services, Congress in the Omnibus Budget Reconciliation Act of 1993 (OBRA ‘93) mandated that states implement estate recovery programs. The Centers for Medicare and Medicaid Services (CMS) have issued guidelines in the *State Medicaid Manual* that afford considerable flexibility. In response, states have initiated legislative, regulatory, and programmatic efforts to recover funds from the estates of certain beneficiaries. In 1996, the American Bar Association (ABA) Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) conducted a survey of state Medicaid estate recovery programs on behalf of the AARP Public Policy Institute to examine their scope, variations, and operation. Nearly nine years later, the ABA Commission has conducted an updated and expanded study to assess the current state of estate recovery programs. This report presents the study findings.

**Methodology** (pp. 11–12). The 2004 study had four components: (1) a telephone interview survey of key state Medicaid officials, using a 53-question instrument; (2) identification of all state estate recovery statutes and regulations; (3) a review of all reported federal and state court cases regarding estate recovery after the enactment of OBRA ‘93; and (4) review by legal practitioners in 10 states for further analysis of law, policy, and practice. The project received input from a Technical Expert Panel organized jointly by the ABA Commission, AARP, and the U.S. Department of Health and Human Services (HHS) Office of the Assistant Secretary for Planning and Evaluation. Forty-nine states (including the District of Columbia) responded to the survey. Two states (Colorado and Missouri) declined to participate.

**Overview of Findings.** Study results include the following highlights:

#### Status of Estate Recovery Programs (pp. 13–14)

- Three states (Georgia, Michigan, and Texas) did not have estate recovery programs at the time the survey was conducted (although Georgia and Texas were implementing programs).

- Forty-four states have legislative authority for their estate recovery program; 36 have regulations; and 31 have other forms of guidance, such as program manuals.
- Thirteen states were proposing changes to their estate recovery programs at the time of the survey, generally to expand or facilitate recovery.
- Three states use a contractor for their entire estate recovery program, and nine states use a contractor for part of their program.

#### Impact of Estate Recovery (pp. 14–19)

- The states recovered a total of \$347.4 million for the most recent state fiscal year (2003). The amounts differed markedly among the states, ranging from about \$86,000 (Louisiana) to close to \$54 million (California). These revenues are significantly higher than in 1996, when the range was from \$19,000 to \$28 million, and the total reported to the ABA survey was almost \$72 million (with \$99.6 million as the Health Care Financing Administration's official national total).
- Revenues as a percentage of state long-term care Medicaid expenses ranged from .01% (Louisiana) to 2.2% (Oregon), with only eight states (Arizona, California, Hawaii, Idaho, Iowa, Massachusetts, New Hampshire, and Oregon) above 1%.
- Many states did not give information on costs of operating the program; of those that did, the data were not easily comparable. In the nine states that provided a basis for comparison, the costs as a percentage of total recoveries varied from 1.5% (North Carolina) to 11.77% (Tennessee), with an average of 6.84%.
- Thirty-three of the responding states return the recovery funds directly to their Medicaid program; seven states return the funds to general funds; and in five states funds are divided between the Medicaid program and state general revenues.
- Officials in most states maintained that estate recovery has a positive impact on the recipient population in allowing individuals to receive long-term care services at the time they are needed and repay the costs later. Some officials noted a possible chilling effect on applications for Medicaid benefits and access to care that may in some cases stem from misunderstandings about the program.

#### The Recoverable Estate (pp. 19–23)

- A probate estate is the property administered by the probate court after a person's death, such as an individually owned bank account or a home owned solely by the beneficiary. Twenty-six states reported limiting recovery to the probate estate, and 20 indicated that they go beyond the probate estate, recovering for assets such as some types of trusts or jointly owned properties, annuities, life insurance policies, or life estates. However, state definitions of probate versus non-probate assets are not always consistent. To make the data comparable, criteria were applied based on criteria in the Uniform Probate Code for distinguishing probate and non-probate assets. This application resulted in 13 states being reclassified in the direction of going beyond the probate estate. Thus, the resulting adjusted



total found 33 states going beyond the probate estate and 13 states limited to the probate estate.

- Recovery is sought against jointly owned homes (with right of survivorship) and joint bank accounts in less than half the states (22 states and 21 states, respectively).
- A “life estate” is an asset a person has the right to possess and use only for as long as the person lives, after which it passes directly to the remainder owner. For example, an individual could deed a house to someone else but retain a life estate interest, allowing the person to live there until he or she dies. Today, 12 states seek recovery against property in which the beneficiary had a life estate, compared with 9 states in 1996.
- The number of states that seek recovery against trusts and annuities is difficult to determine because states reported a multitude of qualifiers and conditions or indicated that it depends on the terms of the document.
- Most states rely on multiple methods for tracking the death of Medicaid recipients; many use some type of automated Medicaid management information database.

#### Services Recoverable (pp. 23–26)

- As in 1996, more than half of the responding states (25) reported that they recover for all Medicaid services for recipients who were 55 years or older when they received the services, and all of the remaining states recover for at least one or more services for which recovery is optional under federal law.
- Forty-five states reported recovery for nursing facility services; 40 for services in intermediate care facilities for people with mental retardation (ICF/MR); 44 for home- and community-based services (37 for services in the state Medicaid plan and 39 for waiver services outside the state Medicaid plan); 41 for hospital services; 41 for prescription drugs; 36 for hospice care; 37 for physicians’ services; 26 for premium or capitation payments for managed care; and 23 for Medicare Savings Programs (cost-sharing programs in which Medicaid pays a portion of the cost of Medicare coverage for the enrollee).
- Twenty-four states seek recovery for services provided to permanently institutionalized individuals under age 55.

#### Exemptions and Deferrals (pp. 26–29)

- OBRA '93 requires states to either exempt or 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; and (c) when a qualifying sibling or caretaker adult child lives in the home. The law also sets out safeguards for survivors. Because these deferrals could be lengthy, some states exempt the estate from recovery altogether in certain circumstances. Some states also negotiate settlements or use a combination of these responses.

- Exemptions of estate recovery were most common when an individual is survived by a minor or disabled child (26 states); less common for surviving spouses (19 states); and least common for caretaker children (15 states) and siblings (10 states).
- A total of 16 states use deferrals for spouses; 11 for a minor child or sibling; 10 for a disabled child; and 8 for a caretaker adult child.
- Negotiated settlements or payment schedules occur in only one state when there is a surviving spouse or child, and in five and four states, respectively, for siblings and caretaker children.
- A number of states (22) use a combination of exemption, deferral, and negotiated settlement for one or more of these survivors; this is most frequently done with siblings and caregiver children, and often on a case-by-case basis.
- Contrary to federal law, 13 states indicated that they require residency in the home as a prerequisite to deferral or exemption when there is a spouse or a minor or disabled child.
- State recordkeeping on the actual number of exemptions, deferrals, and settlements is extremely variable; 19 states had no available statistics.

#### Use of Liens (pp. 29–31)

- A lien puts parties on notice of an encumbrance against specific property and secures a right to enforce a claim against the property. A creditor can enforce a lien by filing a judicial action to create a claim or can satisfy the lien when the property is sold. Estate recovery programs use two types of liens: pre-death liens on the homes of living institutionalized beneficiaries (known as TEFRA [Tax Equity and Financial Responsibility Act] liens) and post-death liens, which may be part of the probate process. The use of both kinds of liens varies significantly among the states.
- Nineteen states provide for pre-death TEFRA liens, up from 15 in 1996. However, in three of the states with authority to use such liens, none have been imposed. The number of TEFRA liens imposed in the remaining states that collected such data for the last fiscal year showed great variability, ranging from 14 (Delaware) to approximately 800 (Minnesota).
- If a state uses TEFRA liens, federal rules require a determination that the individual is permanently institutionalized. Almost all states use multiple criteria for this determination, with 10 including the individual's subjective response stating whether he or she has an "intent to return home."
- Almost all states that use TEFRA liens reported that they have a process to remove the lien if the beneficiary returns home.
- Thirteen states use post-death liens. Twelve and 11 states, respectively, use such liens when a qualifying sibling or caregiver child resides in the home; 6 states use them when a

surviving spouse resides in the home; 4 when a minor child resides in the home; and 6 when a disabled child resides in the home.

- The number of post-death liens states imposed ranged from 25 (Oklahoma) to 1,500 (Minnesota's estimate) in the most recent fiscal year among the states that supplied that information.

#### Hardship Waivers (pp. 31–35)

- All responding states except three (Alabama, North Dakota, and Tennessee) have criteria for determining undue hardship.
- States use a range of factors, and often multiple factors, in determining undue hardship; the most common (used by 35 states) is whether the estate consists of an income-producing asset for which recovery would cause loss of livelihood for survivors. The second most common factor (28 states) is whether recovery would deprive the survivors of the necessities of life, with great variability in the definition of “necessities of life.”
- Upon a finding of undue hardship, the vast majority of the responding states either waive recovery or use a combination of waiver, deferral, and negotiated settlement, with four using only deferral and one using only negotiation.
- Many states do not track hardship waiver information. Of those that reported data, a wide variation exists in the number of waivers granted, ranging from zero in five states to more than 450 in one state (California) in the last fiscal year.

#### Minimum Estate and Claim Thresholds (p. 35)

- Twenty-one states have an estate value threshold, ranging from \$50 (Wisconsin) to a high of \$75,000 (Alaska); 22 states use a minimum claim threshold, ranging from a low of \$50 (Wisconsin) to a high of \$3,000 (North Carolina). States frequently use a cost-effectiveness analysis on a case-by-case basis to determine whether to seek recovery.

#### Notice Provisions (pp. 35–38)

- While states generally give some form of notice, both up front at application for Medicaid and at the end as part of the judicial claim process upon the death of the beneficiary, they vary greatly in the intervening points at which beneficiaries or survivors are notified about estate recovery. Some states give notice at nursing home admission, at determination of permanent institutionalization, and at placement or enforcement of a lien.
- Contrary to federal law and CMS guidelines, only 6 of the 19 states using TEFRA liens reported giving notice upon a determination of permanent institutionalization.
- Forty-three states give notice of hardship waivers, and three states (Alabama, the District of Columbia, and Tennessee) did not report giving such notice.
- Notices vary tremendously in readability, print size, and the extent to which they are readily understandable, as well as the inclusion of vital information.

### Operational Issues (pp. 38–39)

- In 35 states, the state has priority over general creditors in estate recovery claims. However, there are frequently several levels of creditors, and state recovery claims may be behind certain higher designated creditor classes, such as taxes or funeral expenses.
- Sixteen states have procedures for direct recovery outside probate from the balance of a deceased beneficiary's bank account.
- Nine states add interest to the amount recoverable if payment is overdue.
- Nineteen states have a toll-free number for general questions about Medicaid, and 14 states have a toll-free number specifically for questions about estate recovery.

### Practice versus Policy: Legal Practitioner Comments (pp. 39–43)

- The comments of the 10 participating legal reviewers demonstrate the complexity of the estate recovery programs. Generally, they confirmed the states' responses but highlighted nuances in how the programs operate in practice.
- In a few cases, legal reviewers noted discrepancies between their interpretation of federal law and a state's policies and practices. Some reviewers also made observations about the need for or accuracy of public information about estate recovery.
- Some reviewers stated their belief that estate recovery operates as a deterrent to elders who could qualify for Medicaid long-term care services.

**Discussion of Findings** (pp. 43–47). This study provides a snapshot of current estate recovery law and practices, set against a larger picture of rising Medicaid costs and financially strapped states. Taken as a whole, state programs generally appear more well-established than they did in 1996. In reviewing the overall findings, seven salient features and recurring themes merit highlighting:

1. The financial impact of estate recovery on state budgets is modest but not insignificant. The median recovery, expressed as a percentage of annual Medicaid long-term care expenses, is just over 0.5% of total long-term care costs, a relatively small recovery rate but, in total dollar amounts, not insignificant. Oregon reported the highest recovery rate at 2.2%. Administrative costs in the few states reporting such costs were modest, reinforcing the cost-effectiveness of the programs, however small in size. However, the significant absence of data on the full administrative costs of operating estate recovery programs raises uncertainty about the programs' financial impact.

2. Estate recovery amounts, measured per estate, are modest but not insignificant. The average and median recovery per estate amounted to \$8,116 and \$5,081, respectively. However, the tremendous variation among states in average recovery and other factors makes firm conclusions difficult. The average ranged from \$93 per estate in Kentucky to \$25,139 in Hawaii.

3. The scope of estate recovery efforts is expanding. The findings indicate a trend toward expansion of the scope of the recoverable estate, as well as a broader variety of ownership types subject to recovery. At the time of the current survey, several states reported pending changes to state law or regulations on estate recovery or use of liens. However, the maximum potential for growth in estate recovery efforts is unknown.

4. Estate recovery policies and practices vary significantly among the states. The states show tremendous variation in every aspect of estate recovery, including definitions of the scope of estates and services recoverable, and policies and procedures on exemptions, deferrals, use of liens, and notice.

5. State estate recovery notices vary widely in timing, frequency, and clarity. Notices also vary in the extent to which they include vital information, such as a contact for further information, exceptions to recovery, the opportunity to request an itemized accounting, procedures for applying for a hardship waiver, or the fact that a claim will not exceed the value of the estate.

6. The lack of basic data collection and research impairs assessment of estate recovery efforts. The only data element that all states report annually to CMS is the total amount of Medicaid recovery from estates. Other data elements are reported inconsistently across the states, especially with regard to the number of estates against which recovery is made, the total administrative costs of estate recovery efforts, the sources of property from which recovery is made, the number of exemptions and deferrals, the number of hardship waivers, the number of contested recoveries and their outcomes, and the frequency and patterns of lien impositions and dispositions.

7. Policymakers generally have not examined the broader public policy issues raised by estate recovery. There has been practically no study of the impact of estate recovery on state budgets or on recipients and their families. Fully evaluating estate recovery requires taking into account a multitude of competing societal values: public versus private responsibility for long-term care, the fair distribution of public burdens, the importance of inheritance, the promotion of programs to enhance the independence of elders, the pros and cons of estate planning, and the protection of vulnerable populations. Moreover, estate recovery is part of a much larger Medicaid picture involving the related issues of eligibility, transfer of asset rules, and the purchase of long-term care insurance as part of the Long-Term Care Partnership program.

Critical questions about estate recovery remain, such as whether recovery is an equitable mechanism for ensuring that Medicaid recipients pay a fair share of the cost of their long-term care compared with other financing options; whether it is a barrier to receipt of Medicaid services; whether it contravenes social policy on prevention of spousal impoverishment; and whether the costs justify the financial benefit to the states.

# Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices

## I. Background

### A. Purpose

Close to 53 million Americans—about one in every nine—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 and pays for nearly half of all nursing home care in the country. Today, state Medicaid programs are caught in the grip of intense economic pressures set against a growing need for coverage for low-income people, including elders and those with disabilities. Since the beginning of 2001, Medicaid enrollment has grown by close to one-third.<sup>1</sup> Increasingly, states are retooling their Medicaid programs, seeking cost-control strategies and, in some cases, cutting the rolls or reducing benefits. At the same time, debates are under way at the federal level about tightening the federal Medicaid contribution and loosening restrictions on how states operate their programs. Against this backdrop, estate recovery is seen as one approach for fiscal relief, bolstering distressed state Medicaid budgets.

While currently of high interest, Medicaid estate recovery is not a new idea; it has been a federal mandate for over a decade. In 1993, Congress sought to recoup some of the costs of long-term care and related Medicaid services by requiring that states implement estate recovery programs. In response, states have initiated legislative, regulatory, and programmatic efforts to recover funds from the estates of certain beneficiaries.

In 1996, the American Bar Association (ABA) Commission on Legal Problems of the Elderly (now the ABA Commission on Law and Aging) conducted a survey of state Medicaid estate recovery programs on behalf of the AARP Public Policy Institute to examine program efficiency, cost-effectiveness, fair implementation, and impact on particular populations.<sup>2</sup> Now, almost a decade later, as states grapple with rising Medicaid costs and budget shortfalls, it is important to review Medicaid estate recovery programs to assess whether they are equitable and are accomplishing the intended ends. In 2004, the AARP Public Policy Institute asked the ABA Commission to conduct an updated and expanded survey to examine the current state of estate recovery programs. This report presents the survey findings.

### B. Legislative Overview

**Federal Law.** Medicaid law has always provided limited authority for states to recoup the cost of Medicaid benefits paid to beneficiaries. The original Medicaid act in 1965 permitted recovery of benefits only in the case of individuals who were 65 years or older when they

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<sup>1</sup> Vernon Smith, Robin Rudowitz, and Molly O'Malley, Kaiser Commission on Medicaid and the Uninsured, *The Continuing Medicaid Budget Challenge: State Medicaid Spending Growth and Cost Containment in Fiscal Years 2004 and 2005*, p.1, October 2004.

<sup>2</sup> Charles P. Sabatino and Erica Wood, *Medicaid Estate Recovery: A Survey of State Programs and Practices* (AARP Public Policy Institute, September 1996).

received benefits, and then only after the death of any surviving spouse and when there were no dependent or disabled children.<sup>3</sup> The act prohibited the placement of liens during the life of the Medicaid beneficiary, except in the case of benefits incorrectly paid, for which a court judgment was obtained.

Substantial changes to the rules were made by the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, codified in the first iteration of 42 U.S.C. §1396p, entitled "Liens, Adjustments and Recoveries and Transfers of Assets." The TEFRA rules permit imposition of a lien for benefits paid on behalf of a person in a medical institution who is required to spend all but a minimum amount of his or her income for the cost of care. If, after notice and an opportunity for a hearing, the state determines that the resident is not reasonably expected to return home, the home may be attached.<sup>4</sup> However, such a lien may not be imposed on an individual's home if any of the following individuals reside in the home: the Medicaid enrollee's spouse, minor child, blind or disabled child, or sibling who has an equity interest in the home and has resided there lawfully for a year or more.<sup>5</sup> Even these liens must be dissolved if the enrollee returns home.<sup>6</sup> The TEFRA lien rules remain in effect; however, it is important to understand that these rules apply only to liens imposed on real property during the lifetime of a beneficiary and to the enforcement of those liens.

Before 1993, Medicaid law also allowed, *but did not require*, a state agency to make a claim against the estate of individuals if they were 65 years or older *or* if their property was subject to a lien as described in the previous paragraph.<sup>7</sup> Payments could only be recouped 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.<sup>8</sup> In addition, a lien on a home could not be enforced as long as the home was occupied by a sibling or an adult child who established that he or she resided in the home for a period before the enrollee's admission to the nursing home and that he or she provided care that allowed the person to remain at home longer.<sup>9</sup> As of October 1, 1993, 28 states had Medicaid estate recovery laws. In fiscal year 1992, approximately \$63 million was recovered under these programs in 26 states.

In the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Congress mandated that states *must* seek recovery from estates of the following individuals:<sup>10</sup>

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<sup>3</sup> 42 U.S.C. §1396a(a)(18), included in Pub. L. 89-97 (1965).

<sup>4</sup>42 U.S.C. §1396p(a)(1)(A) and (B). 42 C.F.R. 433.36(g).

<sup>5</sup>42 U.S.C. §1396(p)(a)(2); 42 C.F.R. 433.36(g)(3).

<sup>6</sup>42 U.S.C. §1396p(a)(3).

<sup>7</sup>42 U.S.C. §1396p(b)(1); 42 C.F.R. 433.36(h)(1). It is important to distinguish between the concepts of "lien" and "claim." A lien merely secures a right to enforce a charge against specific property. All that may be required is the filing of 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. A claim triggers the process of seeking possession of the property or satisfaction of a debt. Usually, the process involves filing of 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.

<sup>8</sup>42 U.S.C. §1396p(b)(2).

<sup>9</sup>42 U.S.C. §1396p(b)(2)(B); 42 C.F.R. 433.36(h)(2).

<sup>10</sup>P.L. No. 103-66, §13612, amending 42 U.S.C. §1396p(b).

1. Individuals in nursing facilities, intermediate care facilities for the mentally retarded, or other medical institutions who, as a condition of receiving Medicaid, are required “to spend for costs of medical care all but a minimal amount of [their] income required for personal needs” and who “cannot reasonably be expected to be discharged and return home.” This provision references the nonmandatory lien provision (42 U.S. §1396p) and requires that the state determine, after notice and opportunity for a hearing, that the individual cannot reasonably be expected to return home.
2. Individuals who were 55 years or older when they received Medicaid. The state must recover only for payments made for nursing facility services, home- and community-based services, and "related hospital and prescription drug services."<sup>11</sup>
3. Individuals who received Medicaid by having additional resources disregarded in connection with receipt of benefits under a long-term care insurance policy. The state must seek recovery for benefits paid for nursing facility and "other long-term care services." Exempted from this category are those who received Medicaid services under a state plan amendment approved as of May 14, 1993. (They are residents of California, New York, Indiana, Iowa, and Connecticut, which have Long-Term Care Partnership programs.)<sup>12</sup>

The amendments also included the following key provisions:

- Allowing states to recover from individuals 55 years or older payments for *any* items or services covered under the state Medicaid plan and received after age 55.<sup>13</sup>
- Requiring states to establish procedures for determining when to waive recovery because of hardship, "in accordance with standards specified by the Secretary" of the U.S. Department of Health and Human Services (HHS); the criteria upon which hardship would be determined are also to be established by HHS.<sup>14</sup> 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.<sup>15</sup>
- Providing a specific definition of the term “estate” to include “all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law.” However, the amendments give states the option to expand this definition to include “any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such

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<sup>11</sup>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 version of P.L. 103-66 and was not discussed in the Conference Report.

<sup>12</sup> Information on these exempted programs, called Partnership for Long-Term Care Programs, is available at: [www.hhp.umd.edu/AGING/PLTC/index.html](http://www.hhp.umd.edu/AGING/PLTC/index.html).

<sup>13</sup>42 U.S.C. §1396p(b)(1)(B)(ii).

<sup>14</sup>42 U.S.C. §1396p(b)(3).

<sup>15</sup>H. Rep. No. 111, 103rd Cong, 1st Sess. (1993), at 209; found in 1993 U.S.C.C.A.N. 536.



assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”<sup>16</sup>

**Federal Administrative Guidance.** The Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration [HCFA]) has not promulgated any estate recovery regulations as of this writing. However, CMS issued implementing guidelines through its *State Medicaid Manual* Transmittal No. 63, "New Implementing Instruction on Estate Recovery" of September 1994. In January 2001, CMS issued new instructions in Transmittal No. 75, replacing Transmittal No. 63 with a revised §3810 effective February 15, 2001. The new instructions made six important changes: (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.<sup>17</sup>

## C. Study Methodology

With the support of the AARP Public Policy Institute, the ABA Commission on Law and Aging conducted a nationwide study of state Medicaid estate recovery programs and practices. The study was conducted in 2004, almost nine years after the ABA Commission's previous study for the Institute. The new study aimed to examine the scope, variations, and operation of state Medicaid estate recovery programs more than 10 years after the OBRA '93 estate recovery mandate. It also aimed to highlight trends over time by comparing the earlier survey results with the updated research. The ABA Commission and AARP received input and advice from a Technical Expert Panel organized jointly by the ABA Commission, AARP, and the U.S. Department of Health and Human Services (HHS) Office of the Assistant Secretary for Planning and Evaluation. The 2004 study had four components:

**1. Survey of Medicaid Officials.** The ABA Commission designed a 53-question survey instrument for state Medicaid officials (Appendix A). This questionnaire is an expanded version of the instrument used in the 1996 survey, seeking more detail on most aspects of the programs and requesting additional quantitative data.

A letter from the HHS Office of the Assistant Secretary for Planning and Evaluation alerted state Medicaid directors that the survey was coming and urged them to participate. The ABA Commission identified a Medicaid official responsible for the estate recovery program or third party liability program in each state, and sent the survey instrument by email to all state Medicaid directors and to each identified official. Telephone interviews based on the survey with one or more officials in each state lasted approximately one hour, and the ABA Commission recorded responses on a customized Access database.

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<sup>16</sup>42 U.S.C. §1396p(b)(4)(B).

<sup>17</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, Part 3 (CMS-Pub. 45-3), Transmittal No. 75, January 11, 2001.

Forty-nine states (including the District of Columbia) responded to the survey between April and August 2004. Of these 49 states, Michigan, Georgia, and Texas did not have estate recovery programs at the time the survey was conducted. New Mexico answered only a few of the survey questions and did not respond to the rest (causing investigators to label those questions “did not respond”). Missouri and Colorado declined to participate in the survey.

**2. Statutes and Regulations.** The ABA Commission identified and reviewed all state estate recovery statutes and relevant regulations for the states with operational programs during the survey time frame. Citations (including those for statutes and regulations enacted in Georgia and Texas after the survey was completed) are shown in Appendix B.

**3. Case Law.** The ABA Commission reviewed 53 reported federal and state court cases regarding Medicaid estate recovery after the enactment of OBRA '93, from November 1993 to December 2004. They are summarized in Appendix C.

**4. Ten-State Practitioner Review.** The ABA Commission chose 10 states for further analysis of law, policy, and practice by an elder law practitioner with Medicaid expertise in each state. This methodology differed from the 1996 survey, in which a legal practitioner in each state was given the same questionnaire as the state. To select 10 states, the investigators rank-ordered all states by total long-term care expenditures and by the percentage of long-term care expenditures recovered through estate recovery, using data from CMS. Ten states were in the upper 55% of both lists: Oregon, Iowa, Massachusetts, Illinois, Connecticut, Wisconsin, Minnesota, Indiana, Maryland, and Pennsylvania. These 10 states had sizeable Medicaid long-term care costs as well as active estate recovery programs; they varied in the key characteristics of their estate recovery programs, including use of private contractors, TEFRA liens, and definition of “estate.”

On the basis of the ABA Commission’s contact with the elder law bar, project staff selected a practitioner with expertise in elder law generally and Medicaid specifically in each of the 10 states. These attorneys agreed to review and comment on the survey results for their particular states.

## II. Survey Findings

This section presents the findings from the responses of officials in the states that participated in the survey.<sup>18</sup> Except for four states,<sup>19</sup> the findings reference the state’s fiscal year 2003. Not all states responded to all questions. The text below uses “DK/NR” to indicate that a state answered “don’t know” or did not respond to the question. This section also includes comments from legal experts in the 10 selected states.

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<sup>18</sup> Throughout the text, the District of Columbia is counted as a participating state.

<sup>19</sup> Alaska had no fiscal year data because its program began in 2004. California reported data for FY 2003–2004. The District of Columbia’s data are for FY 2004. Illinois’ data are for the nine-month period from July 1, 2003, through March 31, 2004 (not a full fiscal year).

## A. Status of Estate Recovery Programs

**Programs in Existence.** Medicaid officials from 46 of the 49 responding states reported having a Medicaid estate recovery program in operation. Three of the 49 states (Georgia, Michigan, and Texas) reported no program in operation at the time of the survey in mid-2004.<sup>20</sup> (While Colorado and Missouri declined to participate in the survey, their officials verified that they operate estate recovery programs.)<sup>21</sup> Since the 1996 survey, three states (Alaska, North Carolina, and Tennessee) have implemented programs.

**Estate Recovery Legislation, Regulation, and Other Guidance.** Of the 46 responding states with estate recovery programs, 44 have state legislative authority; only 2 (Alabama and Kentucky) have no legislative authority. Thirty-six states have regulations governing estate recovery, while 10 have none. Thirty-one states have other forms of guidance, such as program manuals or directives; 13 states have no such guidance; and 2 were DK/NR. (See Appendix B for a state-by-state list of statutes and regulations.)

At the time of the survey, 13 of the 46 responding states had changes pending to state law or regulations on estate recovery or use of liens proposed by the state Medicaid agency. Thirty-one states did not have proposed changes, and two states were DK/NR. The majority of the proposals aimed to expand recovery as authorized by OBRA '93 or to facilitate the recovery process; they included the following topics:

- Expansion of the definition of estate (Kansas and Massachusetts) or repeal of an expanded definition previously implemented (Massachusetts and Minnesota)
- Recovery against annuities (California)
- Hardship waiver definition (District of Columbia) or administrative procedure (Arizona)
- Authority for liens on, or recovery from, spouse's estate (Maryland and Nebraska) and release of lien on bona fide transaction by spouse (Nevada)
- Authority for or implementation of TEFRA liens (Arizona and Kansas)
- Direct collection from bank account of deceased (Iowa)
- Duty to notify agency of death of Medicaid enrollee (Utah)
- Notice of estate recovery (Washington)
- Addition of interest on debt past due (Washington)
- Range of issues (Montana).

**Use of Contractor.** Some states enter into contractual arrangements with private entities to perform third party liability recovery activities. Three states use a contractor for the entire estate recovery program; nine states use a contractor for part of the program; and one state was DK/NR (see table 1). Of the 12 states that use contractors, five (Alaska, Arizona, Kentucky,

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<sup>20</sup> Georgia and Texas were implementing estate recovery programs in 2004. In 2004, the Georgia legislature implemented estate recovery as part of its FY 2005 budget. Final Rules were adopted by the Georgia Department of Community Health in July 2004 (Ga. ADC, Chap. III-3-8). Texas implemented its program on March 1, 2005, after almost 18 months of statewide public debate and hearings. See Texas Administrative Code, Title I, Part 15, Chap. 373.

<sup>21</sup> Telephone conversation with Mark Seevers, Colorado Department of Health Care Policy and Financing, April 20, 2004; letter from Christine Rackers, director, Division of Medical Services, Missouri Department of Social Services, May 6, 2004.

Montana, and West Virginia) use or have used the same corporate entity, Public Consulting Group, Inc.

In several states that do not use outside contractors, some estate recovery functions may be assigned to various state agencies. For example, the Massachusetts Office of Medicaid has an Intrastate Agency Agreement with the University of Massachusetts Medical School under which the medical school provides the staffing for estate recovery. In Ohio, the Department of Job and Family Services is responsible for the estate recovery program, but the attorney general's office carries it out pursuant to statutory authority for collections.

In the nine states that retain some but not all in-house estate recovery functions, the division of responsibility is sometimes determined by task and sometimes by geography. For example, in a task-oriented division of labor, the state agency may retain decision-making authority on hardship waivers and settlement offers (Florida); retain recovery responsibility for estates up to a specified dollar limit (West Virginia); or act as a liaison between contractors and as a point of contact for Medicaid beneficiaries (Wyoming). In Indiana, the state contracts with private attorneys in each county to operate part of its program, although it did not specify the tasks. In New York, counties administer the program under state supervision; some counties are considering the use of a contractor.

Eight states pay contractors a percentage of recovery; three states use another payment methodology; and one state was DK/NR. Of states that pay a percentage of recovery, the percentage varied widely, from 5.75% (Kentucky) to 19.4% (recently terminated contract in Montana). Hawaii pays 10% of collections up to \$1.6 million and 16% thereafter. Two states described other payment arrangements: West Virginia pays a management fee of \$126,000 per year and a percentage of collections exceeding \$1.6 million; in Wisconsin, where the contractor supplies clerical and data support, it is paid an hourly fee.

Five of the states that employ contractors reported the amount they paid the contractor in the most recent fiscal year, ranging from \$105,703 (West Virginia) to \$1,028,639 (Indiana). (See Section J for more on administrative costs of estate recovery programs.)

## **B. Impact of Program**

**Total Dollar Amount of Recovery.** The survey elicited total dollar amounts recovered through the program in all but four states (see table 2). Alaska's program was initiated in March of 2004, so it had no data on a full fiscal year. New Mexico did not respond to most survey questions. New York does not have statewide data because its program is county-based. Data were unavailable in Rhode Island.

The amount recovered nationally totaled \$347.4 million for the most recent state fiscal year (2003). State recovery amounts varied tremendously, from a low of \$85,907 in Louisiana to a high of \$53,929,926 in California. The median amount was \$3,562,363, and the average amount was \$7,600,680 (see table 2).<sup>22</sup> These estate recovery revenue figures are significantly

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<sup>22</sup> The amounts of recovery reported include both the state and federal share. A Federal Medical Assistance Percentage (FMAP) is calculated for each state each year according to a formula using Department of Commerce

higher than those found in the 1996 survey, when a national total of \$99.6 million was reported for FY 1994; at that time, the median was \$651,658; the average was \$2,989,486; and the range was from \$19,000 (Nebraska) to \$28 million (California).

As a proportion of the states' total Medicaid long-term care expenditures (using FY 2003 CMS figures for total long-term care expenses), estate recovery revenues ranged from 0.01% in Louisiana to 2.2% in Oregon,<sup>23</sup> with only eight states (Arizona, California, Hawaii, Idaho, Iowa, Massachusetts, New Hampshire, and Oregon) above 1% (see table 3). The median rate of recovery was 0.57%.

In the 1996 survey, the estate recovery revenues were calculated as a proportion of the state's *total* Medicaid expenditures rather than as a proportion of only the state's *total Medicaid long-term care* expenditures. While the current percentage is not comparable, Oregon had the highest yield then (0.57%) and the highest now (2.22%), except for Arizona, whose Medicaid program is atypical.

**Administrative Cost.** Thirty states provided dollar figures for the annual administrative cost of running the estate recovery program (table 4). Many of the remaining states did not have those data, could not separate the data from other third party liability program costs, or noted that funding is at the county level. Administrative costs ranged from a low of \$30,000 (Oklahoma) to a high of \$1,645,868 (California), with a median of \$176,00 (Nevada). The annual administrative cost components are not uniform across the states, making comparisons difficult. Moreover, states may have additional unspecified administrative costs that are not identifiable (e.g., information system costs attributable to estate recovery not separable from total Medicaid information system expenses), and thus their administrative cost figures may be incomplete.

Two state officials commented on the ratio of administrative cost to amount collected through estate recovery. The Ohio official said that the state spent 9% to 10% of the amount recovered. Oregon's official commented that for every dollar they spent, they got back \$14. While administrative cost figures may not be entirely comparable, a general sense of the efficiency of a state recovery program can be obtained by comparing those states that used the same four basic data components in their administrative cost data: staff, facilities and support, information systems, and legal costs. Only nine states included all four of these components, as shown in table 5. Their administrative cost, as a percentage of total collections, ranged from a low of 1.5% in North Carolina to a high of 11.77% in Tennessee. The average administrative cost for these nine states was 6.84% of collections.

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statistics on the average income per person for the state and for the nation as a whole. The FMAP determines the federal government's share of Medicaid payments to each of the states. The state must return this same percentage of estate recovery funds to the federal government (a "reverse FMAP"). In reality, this percentage becomes an offset against the next cycle's FMAP funds. For a list of the FMAPs for each state for FY 2006, go to <http://aspe.hhs.gov/health/fmap06.htm>.

<sup>23</sup> Arizona actually tops the list at 5.78% of total long-term care expenditures, but it is an outlier because, under its Section 1115 waiver, the state provides all long-term care services through managed care contracts. Long-term care expenditures are therefore reported under the "managed care premiums" cost category on CMS 64 reports to the federal government, rather than under the fee-for-service categories that are used by this survey to calculate total state long-term care costs.

**Number of Estate Recoveries and Average Recovery.** The number of estates against which recovery was attempted was reported by 37 states and varies widely, ranging from 19 (Louisiana) to 30,000 (Ohio), with a median of 525 (table 2). While the survey yielded information on thresholds below which the states would not attempt recovery (see Section H below), it did not collect data on the size of estates generally targeted. However, dividing the total amount recovered by the number of estates from which states attempted recovery yields a rough idea of the average recovery amount per estate. This average varied dramatically, from \$93 (Kentucky) to \$25,139 (Hawaii), with a national average of \$8,116 and median of \$5,081.<sup>24</sup>

**Contested Estate Recoveries.** The number of attempted recoveries contested (table 6) ranged from zero (Delaware, Hawaii, and Louisiana) to a high of 600 in Oregon.<sup>25</sup> The percentage of attempted recoveries contested, excluding those three states, ranged from 0.02% in Pennsylvania to 37.5% in New Hampshire.

Of the seven states with more than 50 contested cases, few contestants were fully successful. The best success rate was in New Hampshire, where 10 of 150 contestants fully achieved their goals. Kansas had the highest proportion of contested cases resulting in partial success or negotiation for the contestants (97 of 99). Oregon had the lowest proportion of successful contestants, with 580 of 600 contestants failing in their efforts.

The states varied greatly in terms of the most frequently used forum for case resolution. 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 use a combination of these processes. For example, Oregon resolved 75% of cases through informal agency actions, 20% through court processes, and 5% through administrative procedures.

**Recovery from Real Estate.** Only 20 states could provide data on the amount of recoveries from real property (table 7). The number of estates with recovery from real property varied from a low of 2 in Louisiana to 1,000 in Ohio. Louisiana's two real property recoveries totaled \$85,907, the lowest amount, compared with \$26 million in Massachusetts (out of total estate recoveries of \$28 million). The proportion of total recovery represented by real property was consistently high, with only three states reporting less than 50%. The median was 82% in the reporting states. California, the state with the highest total recovery, did not have data on recovery from real estate.<sup>26</sup> Percentages supplied by the 21 responding states showed that the great majority of real property recoveries involved Medicaid beneficiaries' homes. These percentages ranged from 71% in Idaho to 100% in 13 of the states, with a median of virtually 100%.

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<sup>24</sup> The amounts recovered may not be against the same estates from which recovery was attempted, because the cases may flow from one year into the next.

<sup>25</sup> Kentucky responded that 9,600 of its cases were contested but explained that they were identifying as contested all cases in which people responded in some fashion to the notice of estate recovery.

<sup>26</sup> Only 21 states were able to report any figures for recovery against real property.

One might hypothesize that as the proportion of recoveries from real estate increases, so does the average recovery amount per estate, since real estate generally is the most valuable asset of Medicaid beneficiaries. However, because of the limited reporting of these data by states, this correlation could not be tested. And, indeed, the experience of Oregon would cast some doubt on such a hypothesis. Oregon achieved the second highest total amount recovered from real property (\$15 million), yet fell well below the average recovery per estate (\$15,287) with its average recovery of \$2,778. Its record suggests a high rate of recovery against both large assets (such as real estate) and small assets (such as personal accounts).

**Disposition of Funds Collected.** In 33 states, funds collected through estate recovery are directed to the Medicaid program. In seven states, the funds go to state general revenues. The Ohio statute allows the estate recovery program to use 9% of collections for administration, and in Minnesota the county keeps 25% (half of the state's share). In five states, funds are divided between the Medicaid program and state general revenues.

**Impact on Participation of Medicaid Enrollees.** Medicaid estate recovery could be seen as helping low and moderate income people by recouping funds to enhance the solvency of the state Medicaid program or to expand Medicaid services. This aspect may be particularly critical in a time of extremely tight state budgets. Yet, at the same time, estate recovery may adversely affect people of modest means. Three states (Maine,<sup>27</sup> Ohio, and Pennsylvania) reported studies on the impact of estate recovery on the Medicaid enrollee population. Thirty-six respondents stated that no studies on this topic had been conducted in their states, and 7 states were DK/NR.

In Pennsylvania, a 2002 report noted an unresolved issue as to whether estate recovery is perceived as a barrier to application or receipt of waiver services.<sup>28</sup> A follow-up 2003 study<sup>29</sup> included a telephone survey of seniors (or their caregivers) who had declined home- and community-based 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 determined that family members and Area Agencies on Aging were helping waiver applicants make decisions about services; that only one-third of survey participants had received written information on estate recovery; and that 77% of waiver applicants were not aware of the undue hardship waiver. In Ohio, a 1999 study on Medicaid estate recovery prepared for the governor and the legislature includes little information on the impact of recovery on enrollee participation but notes that Medicaid eligibility workers stated that family members attempt "to prevent their parents from accessing necessary services in light of Medicaid estate recovery provisions."<sup>30</sup>

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<sup>27</sup> While Maine Medicaid officials reported that studies on the impact of estate recovery on recipient participation had been conducted in their state, they did not supply copies of any studies.

<sup>28</sup> "Medicaid Estate Recovery Work Group Report to the Pennsylvania Intra-Governmental Council on Long Term Care," unpublished report, March 2002, p. 6.

<sup>29</sup> Carolyn Ellison, Amy Godfrey, and Rachel Rose, "Medicaid Estate Recovery Study," Conducted September 2002 to May 2003 for the Pennsylvania Intra-Governmental Council on Long Term Care, unpublished report.

<sup>30</sup> "Medicaid Estate Planning and Estate Recovery in Ohio," Bureau of Long Term Care Facilities, Office of Medicaid, August 1999, p. vi.

**Impact on State Budget.** Only one state, Ohio, reported any studies to assess the impact of estate recovery on the state budget. The Ohio study, cited above, stated, “[F]or the scoffers who did not think estate recovery could recoup enough money to make it worth the effort, the data indicates otherwise.”<sup>31</sup> From December 1995 through June 1999, despite the “minimal resources” devoted by the state to operate the program, Ohio collected \$17.6 million—enough money to completely fund the full-year stay in an Ohio nursing home for 405 people.

**Projections for the Next Two Years.** Medicaid officials in 10 states predicted that their estate recovery program would expand over the next two years; 1 state expected it to contract; 26 states forecast that it would stay the same; 8 states responded “other”; and 1 state was DK/NR. Reasons for projected expansion included “expect definition of estate to expand” (Massachusetts); “department engaged in Medicaid redesign process” (Montana); “new law was passed in 2003 legislative session” (Louisiana); and “hopeful that legislation expanding program will pass” (Oklahoma). Vermont predicted that the program would contract because more individuals will qualify for hardship waivers under new rules.

**State Officials’ Views on Impact of Estate Recovery Program.** The only two opinion questions in the survey asked state officials whether they had observed any positive or negative impacts from estate recovery.

Thirty-eight officials noted *positive effects* of the program:

- **Benefits to the state.** Almost all remarked that generating revenue for the state is a positive impact of the program. Some view estate recovery as an effective (in terms of operating costs) way to bring in revenue, often directly into the Medicaid budget. Some officials mentioned that estate recovery allows the state to spend more on other programs. Some noted that recovery helps the state avoid cutting services during an economic downturn or reduces the need for tax revenues.
- **Benefits to Medicaid enrollees.** Some state officials said that the program allows Medicaid enrollees to receive Medicaid long-term care services when those services are needed without having to sell property. Some officials observed that estate recovery can increase the use of home- and community-based services, and can provide an incentive to plan through the purchase of long-term care insurance. One official described estate recovery as “a loan program to assist living clients.” Others characterized it as helping Medicaid enrollees “pay their own way” and noted that heirs “mostly understand that the program has enabled their loved ones to have services.”
- **Underlying social value.** One state official commented that estate recovery keeps Medicaid from being “an inheritance insurance program for heirs.” Similarly, another said that it ensures fairness and is “the final backstop on trying to beat the system.”

Twenty-two state officials perceived *negative impacts* of the program:

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<sup>31</sup> Ibid., p. iii.



- Effect on people who need services (or family members). Some officials observed that estate recovery, or misperceptions about the program, may discourage people from applying for Medicaid or Medicaid-covered services (echoing similar comments in the 1996 survey). One official noted that each year several people withdraw from the Specified Low-Income Medicare Beneficiaries (SLMB) program when they learn about estate recovery.<sup>32</sup> Even if they don't withdraw, Medicaid enrollees and families initially may receive inadequate notice of the estate recovery program, which causes stress or anger later. "States need to do a better job of letting people know in advance," one respondent said. One official regretted that estate recovery disproportionately hits unsophisticated persons who do not engage in Medicaid planning. Finally, an official observed that some people may not qualify for hardship waivers, although they are on the borderline of eligibility for such waivers.
- Impact on state officials. The most commonly cited negative effect on government officials was negative public perceptions and complaints. Some family members become "irate," and public protest may be a "big PR issue, especially when trying to tighten the program." Officials also noted inadequate staffing to handle the program and a lack of cooperation from nursing homes, funeral homes, conservators, and guardians.
- Policy objections. Several officials complained that estate recovery promotes the sheltering of assets. One referred to the "cat and mouse game with elder law attorneys" and said that there are too many ways to shelter assets.

### C. Definition of Estate

The OBRA '93 estate recovery amendments present states with a clear threshold for recovery. States must recover from the "probate estate" as defined by state law, but they have the option of expanding recovery far beyond this.

OBRA '93 specifically defines the term "estate" as "all real and personal property and other assets included within an individual's estate, as defined for purposes of state probate law."<sup>33</sup> A probate estate is the property that is administered by the probate court after a person's death. Assets constituting the probate estate are listed in an inventory filed with the court. Assets that are considered part of the probate estate may differ somewhat by state; but generally, if the deceased person is the sole owner of an asset and title is vested completely in the person's name, the asset is subject to probate. Consistent with the Uniform Probate Code adopted by many states, property that generally is considered *outside* the probate estate and that does not pass by will or by the laws of intestacy includes the following:

- Property held in joint tenancy with right of survivorship;
- Life insurance payable to a named beneficiary;
- Property held in a trust;

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<sup>32</sup> In a 2003 study for CMS, 19% of eligible nonenrollees in the Qualified Medicare Beneficiary (QMB) and SLMB programs interviewed cited concern about estate recovery as a reason for not enrolling. RTI International, *Evaluation of Qualified Medicare Beneficiary (QMB) and Specified Low-Income Medicare Beneficiary (SLMB) Programs: Final Report*, prepared for CMS (2003), [www.cms.hhs.gov/researchers/reports/2003/haber.pdf](http://www.cms.hhs.gov/researchers/reports/2003/haber.pdf).

<sup>33</sup> 42 U.S.C. §1396p(b)(4).

- Retirement plans payable to a named beneficiary;
- Pay-on-death bank accounts and trust arrangements on bank accounts payable to a named beneficiary at death; and
- Property in which the deceased held only a life estate, with the property going after death to a named beneficiary who holds the remainder interest in the property.

According to this definition, 26 states limit the scope of their estate recovery program to the probate estate and do not attempt to recover funds from the categories listed above. Twenty states answered that estate recovery is *not* limited to the probate estate (see table 8). However, the property-specific discussion of findings below shows that there is no consistent perception of what is meant by the “probate estate” when compared to the single standard represented by the Uniform Probate Code. Thus, a modified conclusion is that only 13 states actually limit recovery to the probate estate, while 33 go beyond the probate estate in seeking recovery.

The survey presented selected items of property to respondents to clarify the scope of estate—both probate and non-probate—against which states seek recovery. The survey items *within* the traditional notion of probate estate are listed below, each preceded by the number of states that indicated recovery against such property:

<u># States</u>	<u>Type of Property</u>
43	- Individually owned bank accounts
40	- Other financial accounts (including personal needs accounts managed by nursing homes for residents)
42	- Cash
31	- Tangible possessions owned solely by the Medicaid enrollee
44	- Home owned solely by the Medicaid enrollee
41	- Real property other than the home <sup>34</sup>
38	- Potential recoveries from pending lawsuits

Clearly, most states recover against most of these probate estate items. Table 8 shows the state-specific responses to each of these items, along with the total affirmative responses for recovery of these items. Probate items are shown in the unshaded portion of the table.

**Beyond the Probate Estate.** Considerable variation is evident in recovery practices for non-probate items. The survey items that are outside the traditional notion of probate estate are listed below, each preceded by the number of states that recover against such property. The state-specific breakdown of these responses is shown in the shaded portion of table 8.

<u># States</u>	<u>Type of Property</u>
12	- Home owned jointly by the Medicaid enrollee and spouse with right of survivorship

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<sup>34</sup> This item combined both solely owned and jointly owned real property, other than the home, and therefore could be within or outside the probate estate. Not surprisingly, many states that responded affirmatively to recovery of real property other than the home qualified their response by noting that they sought recovery if the real property was solely owned but not if it was jointly owned.

- 19 - Home owned jointly by the Medicaid enrollee and someone other than the spouse with right of survivorship
- 18 - Home owned by a trust that benefits the enrollee and/or spouse
  - 6 - Home owned by a trust that benefits someone other than the Medicaid enrollee and/or spouse
- 21 - Joint bank accounts with right of survivorship
- 19 - Pay-on-death accounts
- 12 - Life estate in real property
  - 3 - Insurance policies on the life of the Medicaid enrollee with a third party named as beneficiary
- 23 - Trust property
- 17 - Remainder benefit of an immediate annuity purchased by the Medicaid enrollee or spouse

Joint Ownership. Joint ownership is addressed both in home ownership and in the ownership of bank accounts, because these tend to be the most common forms of joint ownership. The term “joint ownership” in this survey is specifically defined as joint tenancy *with right of survivorship*, in which each party has an undivided equal interest in the whole and a right to use and manage the whole jointly. When one joint owner dies, ownership immediately passes to the remaining individual(s). Thus, title passes outside the probate process rather than through the will or through intestacy. This form of joint ownership is different from “tenancy in common,” in which property is held in the name of two or more individuals, and each party has a fractional share (not necessarily equal) of ownership in the whole; for example, a half interest or a two-thirds interest. The survey does not specifically inquire into treatment of tenancies in common. However, since the interest of a deceased tenant in common passes by will or by intestacy, the interest is typically subject to probate and, thus, to recovery.

Because the home is likely to be the most valuable asset of a Medicaid enrollee, it is noteworthy that recovery is sought against jointly owned homes (with right of survivorship) in less than half the states (22). Fewer than half the states (21) target joint bank accounts—another very common form of ownership. This total is down from 24 in the 1996 survey.

Life Estates. A “life estate” is an asset a person has the right to possess and use only for as long as he or she lives. It passes directly to the remainder owner after the user dies. It is not, therefore, an outright transfer of ownership. For example, an individual could deed a house to someone else but retain a life estate interest that would allow him or her to live there until death. Under common law, a life estate owner has no interest “at the time of death,” because that interest is extinguished at the moment of death.<sup>35</sup> Under OBRA '93, a life estate in which the deceased Medicaid enrollee had an interest at the time of death can be subject to recovery. This authorization has been used by states to modify the common law rules of life estates to capture the interest the life estate holder had in the moment *just before death*. Twelve states seek recovery against property in which the beneficiary had a life estate, compared with nine states in the 1996 survey.

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<sup>35</sup> 34A *Am. Jur.* 2d Federal Taxation ¶ 143162: “The essential characteristic of a life estate is that it terminates with the death of the measuring life.”

Trusts. The results for recovery against any form of trust property must be read with substantial caveats. Many states impose qualifiers that dictate differential treatment for recovery. For example, some states noted that supplemental needs trusts, recognized by the federal statute,<sup>36</sup> are recoverable because the trust must name the state as the final beneficiary. This rule applies in all states. However, three states (North Carolina, Oklahoma, and Vermont) noted the qualification that if the trust benefits a spouse, there is no recovery; but otherwise, recovery is sought. Other states qualified their answers by stating simply that recovery of trust property depends on the actual terms of the instrument. The simple yes/no dichotomy does not truly reflect the complexity of recovery decisions.

Annuities. Results for recovery against annuities are also complex. For example, Nevada noted that if the Medicaid enrollee purchased the annuity for him- or herself, the state would recover any remaining value upon the enrollee's death. But if the enrollee's spouse purchased the annuity from the spouse's funds, the state would not recover. In addition, if the enrollee purchased the annuity with the spouse as beneficiary or for the spouse's benefit, the state would not recover. Some states noted that annuities pose upfront eligibility questions rather than recovery issues. For example, Washington explained that the state must be named as the testamentary beneficiary of an annuity in order for it to be treated as an exempt asset for eligibility purposes.

Pending Lawsuits. Many states distinguished third party liability (TPL) recoveries (such as personal injury settlements made while the Medicaid enrollee is alive) from estate recovery. Typically, respondents noted that a separate office handles TPL claims, and these claims are not governed by the rules of estate recovery under federal law. The estate recovery program may be involved in such claims only where the recovered damages are received by the probate estate. Nebraska made an additional distinction between wrongful death claims, which would be a target of estate recovery, and other personal injury claims, which would be handled by the TPL division. Because most of these recoveries are TPL claims, they are not included in table 8.

Considering the array of answers to the itemized property list, the number of states that limit recovery to the probate estate can be recalibrated as follows: All states that recover against one or more non-probate items identified in table 8 are deemed to go beyond the probate estate, except that "yes" answers to questions about any form of trust property are discounted because the nuances of trusts are so complex. Review of the responses shown in table 8 results in the finding that 13 states limit recovery to the probate estate (Arizona, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, and West Virginia),<sup>37</sup> and 33 states go beyond the probate estate. The lack of consistency in defining the probate estate was also a clear theme in the 1996 survey and may be unavoidable, given the idiosyncratic nature of state laws.

**Procedure for Tracking Death of Medicaid Enrollees.** To initiate the estate recovery process, state agencies must receive notice that a Medicaid beneficiary has died and must then access information on beneficiary assets and Medicaid payment data. The 46 state respondents

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<sup>36</sup> 42 U.S.C §1396p(d)(4)(A).

<sup>37</sup> Arizona and New Mexico answered only the general question about limiting recovery to the probate estate and not the itemized questions, so their answers cannot be fully confirmed.

listed a variety of methods through which the estate recovery unit learns of the death of beneficiaries or their survivors. Most states rely on multiple systems to identify or track deaths. In some states (e.g., Minnesota and New York), the methods vary by county. Procedures, identified by order of frequency, include the following:

<u># States</u>	<u>Procedure</u>
40	<u>Caseworker referral.</u> Communication from frontline workers who have contacts with Medicaid enrollees is the most common approach to identifying enrollee deaths. Caseworkers also may have the primary responsibility of entering such information into state data-tracking systems.
37	<u>Nursing homes.</u> Facilities typically notify the agency of resident deaths.
31	<u>Review of probate filings.</u> In Oregon, a probate specialist reviews all probate filings. In other states, these reviews may overlap with mandatory reporting.
28	<u>Review of guardian or conservator final accountings.</u>
27	<u>Automated data tracking.</u> A number of states rely on information from the Medicaid Management Information System (MMIS), although data system acronyms may vary. In other states, county death reports go to the state's office of vital statistics and then are matched with Medicaid records. Massachusetts relies on the Social Security Verification Eligibility System that lists deceased persons for Social Security purposes.
27	<u>Mandatory reporters.</u> These reporters are commonly personal representatives of estates or attorneys representing estates in states that require notice of probate filings to be given to the Medicaid office (Alabama, Alaska, Connecticut, Florida, Kansas, Massachusetts, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Washington, and Wisconsin). In Vermont, the probate court itself reports all estate openings to the Medicaid office. In some states, such as Wisconsin, reporting is mandatory even if the estate is too small to require formal probate (under \$20,000 in Wisconsin). Even if reporting is not mandatory, some respondents observed that personal representatives or their attorneys often inform Medicaid, as they would any other creditor. In a few states (Kentucky, West Virginia, and Wyoming), nursing homes and certain other facilities are required to report deaths.
24	<u>Review of death records in the vital statistics bureau.</u>
17	<u>Other.</u> News clippings from the obituary pages; notice by funeral homes; notice by family members, heirs, beneficiaries, or other. Typically, the family has heard something about estate recovery and inquires.

#### **D. Services for Which Recovery Is Sought**

**Scope of Services.** The OBRA '93 recovery provisions mandate states to seek recovery for payments made for nursing facility services, home- and community-based services, and related hospital and prescription drug services. States must recover from the estates of individuals who are age 55 years or older when they receive these services. In addition, at their option, states may choose to recover for *any other* items or services under the state Medicaid

plan, as long as the services are received at age 55 years or thereafter. Findings on the scope of services recoverable are shown in table 9.

Nursing Facility Services. Forty-five states seek recovery for nursing facility services up to the total amount spent for care, as required by federal law; one state (New Mexico) was DK/NR.

Services in Intermediate Care Facilities for People with Mental Retardation (ICF/MR). Recovery for ICF/MR services is not required by OBRA '93. Although wording in CMS Transmittal No. 75 defines nursing facility services as including ICF/MR facilities,<sup>38</sup> the statutory definition of "nursing facility" in the Medicaid law does not.<sup>39</sup> Forty states seek recovery for ICF/MR services; 6 states were DK/NR.

Home- and Community-Based Services. OBRA '93 mandates estate recovery for home- and community-based services, although these services are not defined in the act.<sup>40</sup> These services include a complex matrix that may be provided either under the state Medicaid plan or outside the state plan as "waivered services" under §1115 or §1915(c) of the Social Security Act. Waivered services include a variety of community services for individuals who otherwise would qualify for Medicaid coverage for institutional care.<sup>41</sup> Thirty-seven states reported recovery for home- and community-based services under the state plan; eight states do not recover for these services; and one state was DK/NR. The breakdown is as follows, with a few states noting specific limitations on recovery:

<u># States</u>	<u>State Plan Services Recoverable</u>
37	Community-supported living arrangements
35	Optional personal care
40 <sup>42</sup>	Home health care services
38	Skilled therapy
26	Services for functionally disabled older individuals <sup>43</sup>

In addition, 39 states recover for home- and community-based services under a waiver, while 3 (the District of Columbia, Vermont, and Washington) do not, and 4 were DK/NR. A few states noted specific limitations on recovery of waived services. The District of Columbia reported recovery for neither home- and community-based services in the state Medicaid plan nor waived services outside the plan.

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<sup>38</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, §3810(A)(2).

<sup>39</sup> 42 U.S.C. §1396d(f).

<sup>40</sup> 42 U.S.C.A. §1396p(b)(1)(B).

<sup>41</sup> The CMS *State Medicaid Manual* at §3810(A)(2) specifically includes mandatory recovery for home- and community-based waived services as defined in §1915(c), but it does not mention waivers under §1115, which may also include home- and community-based services. Thus, mandatory recovery may not apply to services under the latter. The survey methodology did not distinguish between the two waiver sections.

<sup>42</sup> Three states apparently interpreted this category to include waived services outside the state Medicaid plan.

<sup>43</sup> This category refers to §1929 of the Social Security Act 42 U.S.C. §1396t ; 42 C.F.R. §440.181. These services include a variety of optional home and community support services provided in accordance with an individual community care plan to persons 65 years or older who meet specified criteria.

Hospital and Prescription Drug Services. OBRA '93 requires that states recover for related hospital and prescription drug services for which Medicaid pays. The CMS *State Medicaid Manual* §3810 defines "related" services as any services "provided to an individual while receiving nursing facility and home- and community-based services." The manual does not indicate a necessary connection between these kinds of services, only a concurrence in time. The survey results show a very broad interpretation of "related": 41 states recover for hospital services while 2 (the District of Columbia and Tennessee) do not and 3 were DK/NR; 41 states recover for prescription drugs while 3 (the District of Columbia, Tennessee, and Vermont) do not and 2 (New Mexico, Wisconsin) were DK/NR.

Hospice Care. Neither OBRA '93 nor the CMS *State Medicaid Manual* §3810 includes hospice services. However, OBRA '93 permits recovery for "any items or services under the state plan."<sup>44</sup> According to the survey, 36 states seek recovery for hospice services; 7 (Arkansas, the District of Columbia, Louisiana, Mississippi, Tennessee, Washington, and West Virginia) do not; and 3 were DK/NR.

Physicians' Services. Physicians' services are not mentioned in OBRA '93 or in the CMS *State Medicaid Manual* §3810 and, thus, are optional for recovery. Thirty-seven states reported recovering for physicians' services; seven do not; and two (New Mexico and Wisconsin) were DK/NR.

Managed Care Payments. The CMS *State Medicaid Manual* §3810 provides that "when a Medicaid beneficiary age 55 years or older is enrolled in a managed care organization and services are provided by the managed care organization that are included under the state's plan for estate recovery [the state] must seek adjustment or recovery from the individual's estate for the premium payments" made by the state to the managed care organization.<sup>45</sup> Twenty-six states recover for premium or capitation payments for managed care; 18 states do not; and 2 (Arkansas and New Mexico) were DK/NR (see table 9).

Other Medicaid Services. OBRA '93 allows recovery for "any items or services under the state plan," going beyond what is required by federal law (nursing facility services, home- and community-based services, and related hospital and prescription drug services). Twenty-five states reported recovery of "all other items under the state plan"; 10 states recover "some other items"; 10 states do not recover for any other services beyond what is required; and 1 state was DK/NR. A few states reported specific additional items for recovery as follows: ambulance, funeral, and burial costs (Illinois); costs of technological assistance such as motorized wheelchairs and readers for eye gestures (Kansas); transportation, dental services, and other services (Minnesota, New Jersey); physical therapy (Nevada); durable medical equipment, dental and vision services (Ohio); and PACE (Program of All-Inclusive Care for the Elderly) (Tennessee).

**Medicare Savings Programs.** The CMS *State Medicaid Manual* §3810 addresses estate recovery for cost-sharing programs, known as Medicare Savings Programs (MSPs), in which Medicaid pays a portion of the cost of Medicare coverage for the enrollee. The *Manual* provides

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<sup>44</sup> 42 U.S.C. §1396p(b)(1)(B).

<sup>45</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, §3810(A)(6).

that states must recover MSP benefits for the mandatory long-term care services (nursing facility, home- and community-based services, and related prescription and hospital services) received by these beneficiaries, but states have the option to exempt these beneficiaries from estate recovery if “they are not entitled to, or receiving, any Medicaid mandatory services which are subject to recovery.”<sup>46</sup>

There are several kinds of Medicare cost savings programs for Medicaid enrollees at different income levels. A Qualified Medicare Beneficiary (QMB) has an income below the federal poverty level and is entitled to state Medicaid payment of Medicare premiums, deductibles, and co-payments. Specified Low-Income Medicare Beneficiaries (SLMBs) and Qualified Individuals (QIs) have higher incomes and receive payment of Medicare Part B premiums only.<sup>47</sup>

As shown in table 9, 23 states recover for MSP benefits, 20 states do not, and 3 were DK/NR. Some states specified that they recover only in certain instances. For example, New York recovers only from QMB and SLMB-Plus beneficiaries (those QMB and SLMB beneficiaries who also receive full Medicaid benefits). Virginia recovers co-payments but not premiums. Ohio and Nebraska recover from QMBs only, and Ohio limits recovery to deductibles. Alabama does not notify MSP beneficiaries about estate recovery.

**Services for Permanently Institutionalized Individuals Under Age 55.** OBRA'93 addresses recovery from permanently institutionalized individuals and references the TEFRA lien provisions but does not specify the services recoverable from this group. As shown in table 9, a total of 24 states recover expenses for permanently institutionalized individuals under age 55 years for services provided in a nursing facility, ICF/MR or other medical institution, while 21 do not, and 1 was DK/NR.<sup>48</sup> Of these 24 states, 19 also recover for medical assistance beyond services provided in an institution.

## E. Exemptions and Deferrals

Federal law under OBRA '93 requires states to exempt or defer estate recovery in certain situations. These situations include (a) when there is a surviving spouse; (b) when there is a surviving child who is under age 21, blind, or disabled; and (c) when a qualifying sibling or adult child lives in the home. To qualify, a sibling must have been residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution. A qualifying adult child must be a caregiver son or daughter who has resided in the home continuously for at least two years immediately before the date of the individual's admission to the institution and can establish to the agency's satisfaction that he or she has been providing care that permitted the individual to reside at home rather than in an institution.<sup>49</sup> This section of the findings addresses how states have implemented such exemptions and deferrals.

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<sup>46</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, §3810(A)(3).

<sup>47</sup> For more information about QMB and SLMB programs, see RTI International, *Evaluation of Qualified Medicare Beneficiary (QMB) and Specified Low-Income Medicare Beneficiary (SLMB) Programs: Final Report*, prepared for CMS (2003), [www.cms.hhs.gov/researchers/reports/2003/haber.pdf](http://www.cms.hhs.gov/researchers/reports/2003/haber.pdf).

<sup>48</sup> As a result of ambiguity in the way this question was phrased, some states may have misinterpreted the question.

<sup>49</sup> These definitions are set forth at 42 U.S.C.A. § 1396p(b)(2) and 42 C.F.R. §433.36(h)(2) (2004).



Because these deferrals could last for a long time, some states choose to waive recovery altogether when the beneficiary is survived by a spouse or by a minor or disabled child. In other instances, states attempt a negotiated settlement or payment schedule.

**Exemptions.** Exemptions or waivers of estate recovery were most common when an individual is survived by a minor or disabled child (26 states); less common for surviving spouses (19 states); and least common for caretaker children (15 states) and siblings (10 states).

**Deferrals.** The deferral of estate recovery represents the minimum requirement under the law. A total of 16 states used deferrals for spouses; 11 for a minor child or sibling; 10 for a disabled child; and 8 for a caregiver child.

**Settlements.** Use of negotiated settlements or payment schedules was rare for a surviving spouse or child (one state), and only occasional for siblings and caregiver children (five states each).

**Other response.** A combination of responses (exemption/deferral/settlement), usually applied in a case-by-case fashion, was used in a few states for spouses and for minor and disabled children (8, 7, and 8 states, respectively), but was much more common for sibling and caregiver children (16 states each).

Table 10 provides state-specific exemption and deferral data. It is noteworthy that several states qualified their answers, demonstrating a great deal of variation and nuance in the details of state procedures. For example, deferrals sometimes operate more like exemptions, as illustrated by the policy in Indiana. Indiana technically defers recovery against surviving spouses, yet the state law limits recovery to assets of the surviving spouse that were probate assets of the Medicaid enrollee. Since almost all the assets in these cases are jointly held, they pass to spouses outside probate; thus, recovery against spouses seldom occurs. Similarly, New Jersey defers recovery against surviving spouses but, in practice, seeks recovery only if the state receives notice that the spouse has died. Since such notice is neither required nor common, the deferral operates more like an exemption.

Exemptions or waivers of recovery sometimes come with limitations unique to particular states. For example, Tennessee recognizes a waiver of recovery for a disabled child who becomes disabled as a minor but not necessarily for a child whose onset of disability occurred during adulthood. Florida, in applying an exemption for recovery against caregiver children, exercises discretion in whether to grant a full or partial waiver. Delaware grants exemptions from recovery for all five categories of survivors, unless the survivor dies within eight months of the Medicaid enrollee's death, in which case the state seeks recovery. The states that had a combination of responses showed much greater variation:

- New Hampshire waives or negotiates a settlement on a case-by-case basis for all five survivor categories.

- North Dakota defers recovery for all survivors, but when a survivor seeks to settle the claim so that the estate can be closed, the state offers to negotiate a settlement.
- South Carolina waives recovery for all survivors if the assets are less than \$100,000; if assets are more than that amount, the state defers recovery or offers a discounted voluntary payment plan.
- South Dakota defers recovery for surviving spouses, but state law (SDCL §28-6-23.1) gives surviving spouses the right to petition the court to limit liability of the estate. The financial responsibility of the estate of the surviving spouse may not exceed the value of that estate as of the date of death of the Medicaid enrollee.
- Wisconsin defers recovery if there is a home in the Medicaid enrollee’s estate and there is a surviving spouse or a minor or disabled child. In these instances, a lien is placed on the home. However, if the home is sold for fair market value while the survivor is still alive, the state releases the lien and makes no recovery. For siblings and caregiver children, the lien is not released.
- For siblings, two states (Illinois and Kentucky) do not provide any deferral or limitation on recovery. Several others indicated that they look at these situations on a case-by-case basis or evaluate them under hardship exemption criteria. Because there was no survey answer option for these responses, they are listed as “C” (combination of responses) in table 10.
- For siblings, Nebraska waives recovery if the sibling lived in the home for two years or longer; if less than two years, an exemption or negotiated arrangement is considered, depending on the circumstances. Pennsylvania and Rhode Island require a two-year residency for the sibling to be eligible for deferral.

As to recovery against a homestead, the mandatory deferral under OBRA ‘93 does not require that the surviving spouse or minor or disabled child live in the home. It requires only that they be alive.<sup>50</sup> Contrary to this requirement, however, 13 states indicated that they do require the survivor to live in the home, while 29 states do not. The former response may indicate a lack of understanding of the question or of federal law, as residence in the home is not a prerequisite for relief for these groups. Hawaii answered neither “yes” nor “no,” explaining that if the spouse or child does not live in the home, the state places a lien on the property and defers recovery; but if the spouse or child does live in the home, there is no lien and the claim is waived. Delaware distinguished between spouses, who are not required to live in the home, and minor or disabled children, who are required to live in the home.

State data on the number of exemptions, deferrals, and settlements of estate recovery in the presence of survivors is spotty and extremely variable, as shown in table 11. In 19 states, including the bigger states such as California and New York, no statistics were available.<sup>51</sup> In

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<sup>50</sup> 42 U.S.C.A. § 1396p(b)(2). However, the law clearly requires siblings or caretaker children to live in the home in order to qualify for a deferral.

<sup>51</sup> However, California officials estimated that waivers were granted in about 10% of cases and deferrals in about 15%.

the 27 responding states, the exemption/waiver numbers ranged from zero to 352 (South Carolina); deferral numbers ranged from zero to 2,100 (Idaho); and negotiated arrangements ranged from zero to 300 (Ohio). No discernable pattern of reported numbers exists. The high number of 2,100 in Idaho was reported to include only cases of spouse survivors.

## F. Use of Liens

States may choose whether to use liens to protect the state's interest in the property of Medicaid beneficiaries. A lien is "a security device that binds property to a debt and puts a party on notice that someone besides the owner of the property has an interest in that property."<sup>52</sup> The lien itself is not a claim; the lien is the notice, and the claim is the demand through which the state triggers action. To make a formal claim against the property, the state or other creditor usually must take further action, such as filing a judicial action to create a claim that may then be granted or denied by a court. This process may occur as part of probate proceedings or as a separate collection proceeding. In reality, though, liens against real property are often "enforced" at the time 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 seeking removal of the lien. 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 using a claim.

Estate recovery programs use two types of liens. Pre-death liens are imposed on the homes of living enrollees determined to be "permanently institutionalized" and not likely to return home. These pre-death liens are called TEFRA liens, since they must follow rules set out in the Tax Equity and Fiscal Responsibility Act of 1982.<sup>53</sup> Post-death liens often are part of the probate process and follow state law, although federal law dictates certain notice requirements.

**TEFRA Liens.** Officials in 19 states responded that they use TEFRA liens; 26 said they do not use TEFRA liens; and 1 state (New Mexico) was DK/NR (see table 12). Because of the increase in the use of waivers for home- and community-based services, the survey asked whether states place TEFRA liens on the homes of any noninstitutionalized Medicaid enrollees under a waiver while they are still alive. Forty-five states reported that they do not (but not all of these use TEFRA liens), and one state (New Mexico) was DK/NR.

**Criteria for Permanent Institutionalization.** If a state uses TEFRA liens, federal rules require that the state determine, after notice and an opportunity for a hearing, that the individual is permanently institutionalized. Criteria used by states for permanent institutionalization (states may use multiple criteria) are summarized in table 13. The most commonly used criteria are enrollee's intent to return home (10); length of stay (10); physician's declaration (9); and evaluation by a third party (7). Eight states use other criteria; 10 states do not use other criteria; and 1 state (New Mexico) was DK/NR for all options.<sup>54</sup> Other criteria include the following:

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<sup>52</sup> *State Department of Human Resources v. Ullmer*, 87 P. 2d 1045 (Nev. S.Ct. 2004).

<sup>53</sup> 42 U.S.C. §1396(a)(1)(A) and (B); 42 C.F.R. 433.36(g). Also see the Centers for Medicare and Medicaid Services *State Medicaid Manual*, §3810(A)(1).

<sup>54</sup> Wyoming officials did not specify any criteria for permanent institutionalization. They indicated that they have statutory authority to use TEFRA liens but have not done so. They have placed liens on property of institutionalized beneficiaries while the beneficiaries are trying to sell the property, but these are not considered to be TEFRA liens.

- No qualifying dependents living in the home (Indiana).
- Presumption of permanent institutionalization unless individual provides physician statement that placement is temporary (New Hampshire).
- Item #9 on Minimum Data Set (data supplied to CMS by nursing home) specifying whether resident can return home (South Dakota).
- Factors chosen independently by each county (Wisconsin).
- Intent to return home confirmation signed by physician, stating that individual will return home within six months (Montana).

**Frequency of TEFRA Liens.** State officials provided data on the number of TEFRA liens imposed, removed when the Medicaid enrollee returned home, and collected on during the most recent fiscal year for which they had data (see table 12). The number of TEFRA liens imposed ranged from zero (Indiana, South Dakota, and Wyoming) to an estimated 800 (Minnesota). Alaska has authority to use TEFRA liens but had not yet imposed any because it had just implemented its recovery program. Among states reporting on lien collections, the range was from zero (South Dakota and Wyoming) to 786 (Illinois)<sup>55</sup>

**Process for Removal of TEFRA Liens.** Federal law requires that a TEFRA lien must terminate if the beneficiary returns home.<sup>56</sup> Of the 19 states that reported using TEFRA liens, 18 specified a process used to remove a lien when the enrollee returns home; 1 state (Wyoming) was DK/NR. Five states remove liens “at the request of the enrollee” (Alaska, California, Connecticut, Minnesota, and Montana). Three states remove liens “automatically through state administrative processes” (Idaho, New Hampshire, and South Dakota). The remaining 10 states use another process or a combination of options, including the following:

- Notification by the Medicaid eligibility staff (Delaware).
- Notice from nursing home, local department of social services, or family (Maryland).
- Nursing home fills out a form and sends to eligibility unit (Massachusetts).
- State gets notification from county income maintenance workers (Wisconsin).

**Post-Death Liens.** Thirteen states use post-death liens in the event of a deferral of recovery (see table 14).<sup>57</sup> Twelve impose such liens in at least one circumstance in which recovery is delayed because a family member resides in the home. These states more commonly use post-death liens when siblings or adult child caregivers remain in the home than in cases involving spouses or minor/disabled children. The liens are imposed in 12 states when a sibling remains in the home after having resided there for at least a year before the Medicaid enrollee’s institutionalization. In 11 states, the agency uses liens when an adult child remains in the home, resided in the home for at least two years before institutionalization, and provided care to delay

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<sup>55</sup>States noted that number of liens removed and collected on during a given fiscal year may have been imposed during an earlier fiscal year. Among states reporting the number of TEFRA liens removed, the largest was in Alabama (20). Three states did not remove any TEFRA liens (California, South Dakota, and Wyoming).

<sup>56</sup> 42 U.S.C. §1396p(a)(3).

<sup>57</sup> In addition, South Dakota files claims when a sibling resides in the home or an adult child who provided care remains in the home. The Medicaid agency does not call these liens, but attorneys in that state use the terms “lien” and “claim” interchangeably. North Carolina officials said they have legal authority to place post-death liens but have not done so.

institutionalization of the individual.<sup>58</sup> The numbers are lower for post-death liens when the surviving spouse resides in the home (6), when a minor child resides in the home (4), and when a disabled child remains in the home (6). The number of post-death liens imposed in the most recent fiscal year ranged from a low of 25 (Oklahoma) to a high of 1,500 (Minnesota's estimate).

## G. Hardship Waivers

**Hardship Waiver Criteria.** OBRA '93 requires states to waive recovery in situations where it would cause undue hardship.<sup>59</sup> The statute requires the states to have hardship procedures and requires the federal government to specify standards for the procedures and criteria for the determination of hardship. CMS has not established mandatory criteria for states, but the *State Medicaid Manual* §3810 provides examples that states may consider in establishing criteria. Echoing the legislative history of OBRA '93, CMS 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." Section 3810 states that the policy for granting hardship waivers must be described in the state plan; indicates that states "have flexibility in implementing an undue hardship provision"; and 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.<sup>60</sup>

Three states indicated that they have no specific hardship waiver procedure in place. In Alabama, if requested, the state would consider all factors listed, but it reports that no waiver has ever been requested. The state negotiates recovery terms but not on the basis of hardship. In North Dakota, hardship is established if the survivors are entitled to a family allowance or household allowance under probate law or if the family is entitled to a deferral under federal estate recovery law. In Tennessee, hardship is considered on a case-by-case basis, and the Office of General Counsel may negotiate a compromise.

Several states 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.<sup>61</sup> Finally, a number of states noted that if a hardship waiver is granted, it applies only to the applicant's portion of the estate (in cases of multiple heirs), and recovery may proceed with other portions. State methods for defining and evaluating undue hardship are shown in table 15 and summarized as follows:

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<sup>58</sup> However, Rhode Island and California officials state that they do not impose these liens when there is a basis for a hardship determination. Oklahoma imposes post-death liens, but these liens are not linked to certain surviving family members residing in the home. They are "to protect the state's interest while probate is under way or until it occurs."

<sup>59</sup> 42 U.S.C §1396p(b)(3).

<sup>60</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual* §3810(C).

<sup>61</sup> In states that waive recovery if a spouse or a minor or disabled child survives the beneficiary, the hardship waiver would not come up. In Florida, a survivor may be eligible for homestead protection; therefore, in such cases, the question of hardship would not arise. Instead of a hardship waiver, Kentucky grants an exemption on a case-by-case basis if the anticipated cost of the continuing education and health care needs of the heir would make recovery counterproductive. However, there is no appeal for denial.

- Income-Producing Asset. Thirty-five states reported that one factor in the decision to grant a hardship waiver is that the estate consists of an income-producing asset (business, including farm or ranch) and recovery would cause loss of livelihood for survivors; 10 states said they do not use this factor; and 1 state (Alabama) was DK/NR.
- Property as Primary Residence. Twenty-one states consider whether the property is the primary residence of the survivors; 20 states do not; and 5 states were DK/NR.
- Homestead of Modest Value. Only 10 states reported using a determination of whether the property is a homestead of modest value in decisions about hardship waivers; 33 states said they do not use this factor; and 3 states were DK/NR. In 2001, CMS revisions to §3810 provided guidance for states in defining “homestead of modest value.” It can be defined as 50% or less of the average price of homes in the county where the property is located as of the date of the beneficiary’s death.<sup>62</sup> The CMS language was adopted from the definition used in New Mexico’s policy. Four states indicated use of specific dollar amounts: \$250,000 in Vermont (considered along with all the other criteria); \$75,000 in Alaska; \$10,000 in Kansas; and \$5,000 in Mississippi. In Hawaii, the determination is based on the median sale price of homes as determined by the Board of Realtors. In South Dakota, “homestead” has the same definition as under probate law, and in Virginia the determination of modest value is on a case-by-case basis.
- Survivor Eligibility for Public Assistance. In the decision about hardship waivers, 21 states consider whether, without receipt of estate proceeds, the survivor would become eligible for public and/or medical assistance; 21 states said they do not consider such an element; and 4 states were DK/NR.
- Discontinuance of Eligibility for Public Assistance. In 15 states, one factor is whether allowing the survivor to receive the estate proceeds would enable the survivor to discontinue eligibility for public and/or medical assistance; 25 states said they do not use this factor; and 6 states were DK/NR.

Deprive Survivor of Necessities of Life. Twenty-eight states consider whether recovery would deprive the survivor of the necessities of life; 16 states do not consider this factor; and 2 states were DK/NR. States’ criteria for determining whether recovery would deprive survivors of the necessities of life vary. Nine states consider the income—and, in some cases, the assets—of the survivor, frequently along with other factors. For example, Alaska considers whether the survivor’s income is less than the federal poverty level, and Iowa considers whether it is less than twice the federal poverty level. Eleven states mentioned the specific need for shelter, sometimes as part of “food, clothing and shelter.” Iowa considers whether recovery would deprive the survivor of food, clothing, or medical care to the extent that life or health would be in danger. Oklahoma noted that recovery can’t be merely an inconvenience or the cause of the survivor(s) having a more restrictive

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<sup>62</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual* §3810 (C)(1). The CMS guidance for defining a homestead of modest value was prospective, applying only to state provisions adopted after the date the manual was issued, January 22, 2001.

lifestyle. Several states indicated that their definitions of “necessities of life” are on a case-by-case basis.

- Survivor Contributions to Medicaid Enrollee’s Care/Property. Twenty-two states consider whether the survivor made substantial personal or financial contributions to the care of the enrollee so the enrollee could remain at home; 21 states do not consider this factor; and 3 states were DK/NR. Some states, such as West Virginia and Louisiana, make a dollar-for-dollar reduction in the amount recovered against the amount the survivor contributed to upkeep of the property or care of the enrollee.
- Other Criteria. Fourteen states reported using additional factors to determine whether to grant a hardship waiver; in most cases, these additional factors are related to those described above. Some states cited “other compelling circumstances.” Minnesota noted that counties have a great deal of discretion in applying the hardship waiver criteria.
- Presumption of No Undue Hardship. In §3810, CMS indicates that states may impose a rebuttable presumption that undue hardship does not exist if the beneficiary used “estate planning methods under which the individual illegally divested assets to avoid estate recovery.”<sup>63</sup> Fourteen states specify circumstances that would create a presumption, but officials in only eight of these (Kentucky, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, and New York) actually referred to estate planning or divestiture of assets.<sup>64</sup> Presumptions in other states referred to cases in which recovery would only cause an inconvenience or the survivor would not receive an anticipated inheritance.
- Native Americans. In the 2001 changes to §3810, CMS referred to the OBRA ‘93 language concerning undue hardship and noted the federal government’s “unique trust responsibility for American Indian Tribes and Alaska Native Villages and their members.” The new provisions identified assets and resources of Native Americans that are exempt from estate recovery. Sixteen states reported that they include special provisions for Native Americans, although not all phrased this as a “hardship waiver”; 28 states do not include such provisions; and 2 states were DK/NR.

**Hardship Waiver Notice.** State practices vary regarding the timing for providing notice of the availability of undue hardship waivers. Twenty-five states provide such notice “prior to recovery efforts”; 18 do not do so; and 3 were DK/NR. These notices usually are given at the time of Medicaid application, frequently as part of an estate recovery brochure or fact sheet, or on the Medicaid agency’s website. Pennsylvania reported that notice of hardship waivers is included in the nursing home application, and West Virginia said notice is in the nursing home admissions packet. Some states give notice of availability of a hardship waiver in what might be termed the initial stages of estate recovery: Oklahoma gives notice when a pre-death TEFRA lien is placed, and Washington gives hardship notice as part of the notice of intent to file a lien.

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<sup>63</sup> Ibid.

<sup>64</sup> Idaho did not respond to this question, but the Idaho rules indicate that no hardship exists if action was taken to divert assets from the estate.

Thirty-five states give notice of hardship waivers “at the time recovery is under way”; nine do not; and two were DK/NR. These notices generally are included in the standard letter sent to survivors after the beneficiary’s death. (See examples in Appendix D.) Twelve states reported that notice of hardship waivers is given in other contexts—when someone asks, when a lien is filed, during probate of the estate, at deferral of estate recovery, and when staff conduct training sessions and workshops. While 43 states reported giving notice of hardship waiver availability at some point in the process, 3 states (Alabama, the District of Columbia, and Tennessee) did not report giving hardship waiver notice either before recovery efforts or when recovery is under way.

A number of states have standard application forms; however, at least 13 states indicated that they have no standard form, and applicants simply submit a letter to the appropriate state agency. In North Carolina, the counties are required to make hardship waiver applications available, and the state provides a sample. In Pennsylvania and Vermont, the hardship waiver application is also the homestead exemption form.

**State Responses to Finding Undue Hardship.** OBRA '93 directs that where states find undue hardship, the state agency "shall waive the application of" estate recovery.<sup>65</sup> “Waiver” implies a relinquishment of a right; however, CMS §3810 seems to interpret the term also as a deferral, as it permits states to "limit the waiver to the period during which the undue hardship circumstances continue to exist."<sup>66</sup> Interpreting even more flexibly, CMS allows states to negotiate partial compromises or payment schedules,<sup>67</sup> and some states have done so.

As shown in table 16, 22 states waive recovery upon a finding of undue hardship; 4 states defer recovery; and 3 states negotiate a modified recovery. Fifteen states use a combination of these approaches, and two (Kansas and New Mexico) were DK/NR.

**Frequency of Undue Hardship Waivers.** Many states do not track the number of applications for undue hardship waivers submitted, granted, or denied in the past fiscal year. Alaska noted that its hardship waiver process is not yet operational. As shown in table 17, the number of applications submitted ranged from zero in five states (Alabama, Louisiana, North Dakota, Oklahoma, and Wyoming) to a high of 452 in California.

The number of hardship applications actually granted ranged from a high of 352 in South Carolina to zero in Hawaii and New Jersey. The number denied ranged from a high of 312 in California to zero in several states.<sup>68</sup> The percentage of hardship waiver applications granted ranged from 100% in South Dakota (with only 5 applications submitted and granted) and 99% in South Carolina (with 352 of 380 granted) to a low of 14% in Wisconsin (with only 9 of 66 granted). Several states noted that numerous denials resulted from applicants’ failure to complete their applications. North Dakota stated that 225 deferrals were granted and that the deferral process is the same as the process for undue hardship, although there is no specific undue

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<sup>65</sup> 42 U.S.C. §1396p(b)(3).

<sup>66</sup>Centers for Medicare and Medicaid Services, *State Medicaid Manual* §3810(C).

<sup>67</sup>*Ibid.*, §3810(D).

<sup>68</sup> Note that the number of applications submitted, granted, and denied may represent cases from different fiscal years and thus don’t necessarily add up.



hardship application process. Tennessee said there is no formal waiver process and each case is negotiated.

## H. Minimum Estate and Claim Thresholds for Recovery

As shown in table 18, 21 states have an estate value threshold below which recovery will not be attempted; 24 states do not have such a threshold; and 1 state (New Mexico) was DK/NR. The reported thresholds ranged from nominal figures as low as \$50 (Wisconsin) to a high of \$75,000 (Alaska). Several states noted that they use a cost-effectiveness analysis on a case-by-case basis. One state (Delaware) explained that its threshold is not written policy.

As shown in table 18, 22 states have a minimum claim threshold below which recovery will not be attempted; 23 states said they do not use a claim threshold; and 1 state (New Mexico) was DK/NR. The reported claim thresholds ranged from a low of \$50 (Wisconsin) to a high of \$3,000 (North Carolina). Again, states explained that they use a case-by-case cost-effectiveness analysis to decide whether to pursue a claim. Two states (Minnesota and New York) noted that it is up to counties to determine cost-effectiveness. One state (Florida) explained that below \$100 the contractor is not required to seek recovery but sometimes does. Other states referred to the hardship waiver and stated that recovery of anything from a small estate is rare if there is a survivor. One state (North Dakota) added that if there is no survivor, the state is very efficient in collecting even very small amounts, such as \$25.

## I. Notice of Estate Recovery

A key obligation of states is to ensure adequate notice to beneficiaries and survivors. Notices ideally convey clear information about the scope of the program, how it affects individual estates, and procedures for review. A significant federal case, *DeMille v. Belshe*,<sup>69</sup> emphasizes the importance of due process right to receive notice. It holds that if a state files a post-death lien against property in the hands of the surviving spouse, the state must give the survivor preattachment notice and an opportunity to be heard. In §3810 of the *State Medicaid Manual*, CMS requires that states provide both a general notice of estate recovery at the time of application and a notice of specific recovery.<sup>70</sup>

### General Notice

Upon Application. As shown in table 19, 43 states give such a notice in writing at the time of Medicaid application; 2 states (Arkansas and Hawaii) did not report giving a notice at application; and 1 state (Virginia) was DK/NR. In some states, this notice is a one-line or brief paragraph reference to estate recovery in the application form. It may be included in a list of many beneficiary “rights and responsibilities”; frequently the enrollee must sign to indicate that he or she has reviewed the list.

At least 14 states have booklets or brochures on estate recovery that are given to all Medicaid applicants, or at least to those age 55 years and older or in institutional care. The states

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<sup>69</sup> *De Mille v. Belshe*, 1994 WL 519457 (N.D. Cal. 1994). See Case Law Review, Appendix C.

<sup>70</sup> The Centers for Medicare and Medicaid Services, *State Medicaid Manual* §3810(G)(1).

sent their brochures in response to the survey. The California brochure is available in Spanish as well as English. Other states have brochures on Medicaid or other benefits or website questions and answers that address estate recovery. At least six states also give notice at the time of redetermination of eligibility. Ten states give notice at the time of approval of the Medicaid application.

Upon Long-Term Care Admission. Sixteen states give notice of recovery at the time of nursing home admission; 27 states do not give such notice; and 3 states were DK/NR. In 1996, only 11 states reported providing such notice, and only 3 were among the same states. In some states the notice is part of the application for Medicaid long-term care, a brochure about estate recovery, or a booklet about social services programs. In West Virginia and Montana, at least some of the nursing homes give out the estate recovery brochure at admission.

Nine states give notice upon admission into noninstitutional long-term care programs. In 1996, eight states provided such notice (only two of these states reported giving such notice in the current survey). For example, in West Virginia and Wyoming, the long-term care waived service providers give out a brochure upon admission. Several states noted that since estate recovery notice is part of the Medicaid application, it serves as notice to enrollees of home- and community-based services as well as institutional services.

Other General Notice. Twice a year, California sends out a one-page notice about the estate recovery program (“Important Notice Regarding the Medi-Cal Estate Recovery Program,” shown in Appendix D) to all Medi-Cal enrollees; the notice is also printed in Spanish. Iowa has a notice form for new approvals with a six-month follow-up form.

**Specific Notice of Recovery Claim.** CMS requires states to give “a specific notice to individuals affected” before they seek recovery. The notice must be served on the executor or legally authorized representative of the estate. This person is required to notify others who would be affected. If there is no executor or authorized representative, the state should notify the family or heir.<sup>71</sup> Table 19 shows whether Medicaid beneficiaries and families are given notice at various points in the recovery process.

Upon Deferral. Six states give some form of written notice concerning their decision to defer recovery. For instance, in Pennsylvania, upon a deferral decision, the attorney representing the estate draws up a letter to attach to the deed allowing the survivor(s) to reside in the home.

Upon Placement or Enforcement of Lien. Twenty states give notice upon placement of a lien (either a TEFRA lien or post-death lien). The survey did not ask specifically whether notice is given *before* the filing of the lien, which would be in accordance with the *DeMille* case requiring California to provide preattachment notice for a post-death lien. However, at least nine states (Illinois, Indiana, Minnesota, Montana, New Jersey, New Hampshire, South Dakota, Washington, and Wisconsin) have form letters giving notice of intent to place a lien. A few states, such as Illinois, have a separate notification of placement of a lien. Twelve states reported giving notice upon enforcement of a lien.

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<sup>71</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, §3810(G)(2).

Upon Death or Judicial Claim. Notice is part of the judicial claim procedure in all states. Thirty-six states reported giving notice upon the death of the Medicaid enrollee, and all the remaining states except Massachusetts indicated that they give notice in a claim letter to the executor, authorized representative, family, or heir (shown on table 19 as “other”).

Upon Permanent Institutionalization. Both federal law and CMS in §3810 require notice upon determination of “permanent institutionalization.”<sup>72</sup> (This affects only states using TEFRA liens, as they are the only ones that make determinations of permanent institutionalization.) Despite this requirement, only 6 states (California, Hawaii, Illinois, Maryland, Massachusetts, and Minnesota) reported giving notice upon determination that the enrollee is considered permanently institutionalized; 11 states that use TEFRA liens did not report giving such notice; and 2 (Idaho and New Hampshire) were DK/NR.

**Content and Clarity of Notice.** CMS in §3810 requires that the notice include the action the state intends to take, the reason for the action, the individual’s right to a hearing, the method by which he or she can obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered.<sup>73</sup> In addition, federal Medicaid regulations include requirements on the content of the notice if the state Medicaid agency takes action to suspend, terminate, or reduce services.<sup>74</sup> In response to the survey, about half the states sent examples of claim letters providing notice of estate recovery. All the letters indicated the amount due, and most gave a contact for further information. The letters varied considerably in detail, print size, and readability. They also differed in the following aspects (states listed are examples only):

- Providing assurance to families that the claim would not exceed the value of the estate (California, New Jersey, Nevada).
- Including—or informing families that they may request—an itemized accounting (California, South Carolina).
- Explaining exemptions or deferrals (California, Montana, Nebraska, Nevada, North Carolina, Oregon, Virginia).
- Assuring the authorized representative that the claim is not against him or her personally but against the estate of the Medicaid enrollee (Illinois).
- Clarifying that the authorized representative is responsible for notifying other individuals affected (New Jersey, Wisconsin).

In many cases, the claim letter included the notice of availability of hardship waiver, describing the criteria and telling how to apply, attaching a hardship waiver application, or giving a contact for further information (see Section G above). In some states, the hardship waiver notice included information on the right to appeal; in other states, the right to appeal is stated in the notice of decision on the hardship waiver.

None of the notice forms provided all of this information, but some were clearer and more informative than others, including the two examples of claim letters with notice shown in Appendix D. The South Carolina notice letter refers to the authorizing state legislation, explains the hardship waiver and procedure for requesting a waiver, attaches a waiver request form,

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<sup>72</sup> 42 U.S.C §1396p(a)(1)(B)(ii); Centers for Medicare and Medicaid Services, §3810(A) (1).

<sup>73</sup> Centers for Medicare and Medicaid Services, *State Medicaid Manual*, §3810(G)(2).

<sup>74</sup>42 C.F.R. §431.210.

attaches an itemized list of expenditures for which recovery is sought, and gives contact information, but it does not include the other elements listed above. The New Jersey notice letter cites both federal and state laws, specifies that the recovery is limited to the value of the estate, directs the representative receiving the letter to notify all individuals affected, gives notice that a lien may be filed and explains what a lien is, advises about the availability of a hardship waiver, encloses procedures for requesting a waiver, and gives a contact, but it does not include the other elements listed above.

## J. Operational Issues

Exactly how states operate their Medicaid estate recovery programs is generally a matter of state policy and procedure not dictated by federal law or CMS guidelines. Thus, there is potential for wide variability among the states.

**Creditor Priority.** Thirty-five states reported that the state has priority over general creditors in estate recovery claims; 10 states said the state does not have priority; and 1 state was DK/NR. However, the comments and clarifications by state officials reveal more complexity. States frequently have several levels of creditors, and estate recovery claims may have priority over general creditors yet be behind certain higher designated creditor classes, as in the following examples:

- Illinois—The hierarchy of claims has seven classes, and the state is in the sixth class, with priority over unsecured creditors, heirs, and beneficiaries but behind taxes, expenses of last illness, expenses of spouse and child, and funeral expenses.
- Kansas—The only superior creditor is a claimant for funeral expenses.
- Kentucky—Estate recovery has priority over all creditors except secured creditors, costs of estate administration, and funeral expenses.

**Recovery from Bank Accounts and Other Funds.** As shown in table 20, 16 states have procedures for direct recovery outside the probate process; 29 states said they do not have such procedures; and 1 state (New Mexico) was DK/NR. States described three sources of direct recovery:

- States may recover from bank accounts owned solely by the beneficiary through an affidavit presented to the bank. This recovery may be through a small estates claim process that does not require filing with the probate court; or it may be through special legislation, such as in Oregon, where banks are required to pay account balances directly to the state agency without going through probate. Once a state agency has the assets, it must pay any other creditors with priority claims.
- States may recover from nursing home accounts of residents' personal funds. For example, in North Dakota, nursing homes are required to send any funds remaining after the resident's death to the attorney general's office.
- If the beneficiary had a trust approved by Medicaid at eligibility that includes a provision that remaining funds go to the state, the state may collect the funds through affidavit without a probate filing, as in Alabama and South Dakota.

**Recovery through Probate versus Outside Probate.** The means employed by states to reach assets may blur the distinction between the probate and non-probate estate. As shown in

table 20, seven states reported that 100% of recovery is through probate court. The range in the remaining states was from 99% (North Carolina) to 1% (Wyoming), with eight states DK/NR. Many states do not track this information, and the figures given were estimates only. Some of the states explained the non-probate sources of their recovery: (1) through small estates not required to go through probate, as in Illinois and Wyoming; (2) through direct recovery from bank accounts and nursing home funds, as in North Dakota and South Dakota; and (3) through TEFRA liens when the property is sold, as in Oklahoma.<sup>75</sup>

**Interest on Recoverable Amount.** Nine states reported that they charge Medicaid enrollees or survivors interest on the amount recoverable during the time before payment is received.. Four of these states add interest if payment is not received within six months, although the trigger for the six-month period differed (date claim filed, date of death, date of claim notification); one state adds interest only on mortgages and judgment liens; two add interest if the state has negotiated a payment schedule with the survivor; and one adds interest only if the state does not hear from the estate for a very long time.

**Public Information Phone Lines.** One way of informing Medicaid enrollees or their families about estate recovery is through toll-free numbers. Nineteen states have a toll-free number for general questions about Medicaid; 14 states have a toll-free number specifically for questions about estate recovery; and 11 states have no toll-free Medicaid or specific estate recovery line, although some have a general department of human services toll-free line (see table 21).

## **K. Practice versus Policy: Legal Practitioner Comments**

Legal practitioner comments offered an additional perspective on estate recovery, showing an array of nuances in the implementation of the law. The “view from the field” helped fill in the picture of the actual operation of the states’ programs. All 10 selected legal practitioners reviewed the survey responses from Medicaid officials in their states and submitted statements. Taken as a whole, the practitioners’ comments demonstrate the complexity of the estate recovery programs. Most of the comments were extremely specific, targeting fine points of the programs peculiar to the state rather than disagreeing with fundamental aspects. Practitioners also highlighted effects of aspects of the program on participants. The observations below are examples.

**Status of Estate Recovery Programs.** The legal reviewers recounted frequent changes in the legislative and regulatory landscape. For example, the Massachusetts reviewer summarized a flurry of recent legislative activity. The state amended its law to expand claims beyond the probate estate; had second thoughts and postponed collections under the new law;

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<sup>75</sup> A few states may have interpreted the question to mean percentage of cases in which the state appears in a formal probate court proceeding rather than all cases in which recovery is under the aegis of the probate process. For instance, Louisiana said that only about 20% of cases require a court appearance because the recovery usually is worked out with an estate attorney; New Jersey also noted that only about 20% of cases require that the attorney general’s office represent the state in probate court.

and finally (after the survey was conducted) repealed the expanded law. After a “tumultuous year,” the law returned to its earlier state. The Minnesota expert reported that while recent legislation expanded recovery, several unsuccessful bills sought repeal, and these may be introduced again. In Indiana, the state worked to expand recovery starting in early 2002, resulting in “a break from the good communication and collegial relationship . . . between the organized bar and the administration.”

**Impact of Recovery.** Reviewers in Pennsylvania, Indiana, and Wisconsin observed that estate recovery operates as a significant deterrent to elders who could qualify for Medicaid long-term care services. One stated that “fear that Medicaid or the nursing home will take my house” is often cited by elders who may need long-term care services and that expanded recovery would exacerbate the pressure on seniors to give their homes to their children, even when it is not in their best interest. The Iowa reviewer noted that estate recovery “has caused some persons to engage in estate planning and gifting of assets.” Six reviewers (Illinois, Connecticut, Oregon, Maryland, Minnesota, and Wisconsin) predicted expansion of recovery in the next two years. The Pennsylvania reviewer found expansion unlikely, given the current consumer-oriented administration. The Indiana reviewer said it is unclear whether the state will step up recovery or begin imposing liens. The Iowa reviewer expects no change. The Massachusetts reviewer described the demise of the state’s efforts to expand the program, stemming from complaints from the elderly and people with disabilities.

Reviewers had several other comments on the impact of recovery. The Maryland reviewer described the state’s willingness to negotiate and to address the specifics of individual cases. The Minnesota reviewer explained that the counties get 25% of the amount recovered, thus pressuring them to pursue aggressive estate recovery. Finally, while Indiana reported few data on its recoveries, the reviewer speculated that a majority of recoveries are from relatively few cases, including tort recoveries against nursing homes after the recipient’s death and from small estates that do not require probate.

**Definition of Estate.** Reviewer comments regarding the scope of the estate generally confirmed the state’s responses but with particular differences as to how specific property is treated in practice. For example,

Pennsylvania. While the state considers its program limited to the probate estate, some recovery goes beyond this. The state has sought recovery against property transferred within one year of death, although the authority for such action is based on the state’s fraudulent conveyance laws. Other targets include small accounts held by banks, nursing homes, and annuity companies where state statute would otherwise provide for distribution directly to designated family members. These circumstances illustrate the gray areas of the probate estate, especially for small estates.

Iowa. Authority to recover against life estates was a contentious issue, with recent legislation enabling the state to recover against “retained” life estates in real property—those created by the beneficiary or his or her spouse. Similar controversy surrounds the recovery against trusts under which the beneficiary had only a lifetime income interest.

Oregon. In practice, recovery does not go as far as the state indicated, particularly concerning the home after the surviving spouse dies. Also, the state seeks recovery from revocable trusts only if the surviving spouse also became a Medicaid enrollee.

Indiana. Recovery is decentralized and county practices are inconsistent.

Maryland. Case workers often do not understand the estate recovery rules and may seek to initiate recovery where there is no recoverable estate.

**Recoverable Services.** Reviewers were in general agreement with state answers but indicated several differences. For instance, the Oregon reviewer pointed out that the state plan lists only intermediate care services as subject to recovery, whereas the state respondent listed many additional services. The Maryland reviewer noted that the state responded “don’t know” concerning recovery for home- and community-based waived services, yet individuals are being subjected to such recoveries. The Wisconsin reviewer noted that prescription drugs and physician services are recoverable only if the enrollee is permanently institutionalized or receiving community-based waived services. The Massachusetts reviewer indicated that the state recovers for all items under the state plan rather than merely some additional items beyond those mandated. In addition, reviewers in two states observed that seeking recovery on home- and community-based services (Pennsylvania and Wisconsin) and QMB/SLMB services (Wisconsin) has a chilling effect on applications.

**Exemptions/Deferrals.** Legal reviewers generally affirmed state answers concerning exemptions and deferrals but noted certain discrepancies between the state answers and the reviewer’s interpretation of federal or state law:

- The Illinois reviewer observed that the lack of a deferral for siblings or caretaker children varies from federal law.
- The Wisconsin reviewer noted that Wisconsin case law precludes recovery from the spouse,<sup>76</sup> yet the state response showed a combination of approaches to recover from the spouse.

The Pennsylvania reviewer noted problems in the public information about deferrals in the state’s consumer materials. The Maryland reviewer asserted that in practice it is almost impossible to establish a basis for the caretaker child exemption. The Massachusetts reviewer observed that deferrals of recovery for siblings and caretaker children occur only during the lifetime of the Medicaid enrollee but not after the enrollee dies. This reviewer further noted that filing a claim on the home creates significant problems for the survivors because it clouds the title to the real estate, preventing the survivors from selling, mortgaging, or otherwise conveyancing it, and resulting in pressure to negotiate a deal with the state during the survivors’ lifetime, before the state satisfies the claim on their death.

The Massachusetts reviewer reported that residency of the spouse or child in the home is a practical but not a technical requirement. If a survivor wants to sell the property, the state requires steps to secure the state’s eventual repayment—posting a bond, segregating the proceeds from the sale, or agreeing to a “mortgage” against any new property into which the proceeds are

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<sup>76</sup> Citing *Matter of Estate of Budney*, 197 Wis.2d 948, 541 N.W.2d 245 (Wis. App. 1995).

invested. Since this may not be feasible, if the survivor wants to sell the family home but not buy another property in Massachusetts, the only realistic option is a settlement with the state for discounted payment. Thus, despite the protections in the law, the practical pressure to settle the claim early appears significant.

**Use of Liens.** Several reviewers commented on lien issues. The Illinois expert maintained that there are no TEFRA liens against life estates in real property because the interest terminates at the death of the recipient.<sup>77</sup> The Massachusetts reviewer emphasized that a TEFRA lien “does not give the state the right to force the sale of the property, only to enforce its claim during the lifetime of the Medicaid enrollee if the enrollee decides, voluntarily, to sell the home.” This reviewer also disagreed with the Medicaid official’s statement that Massachusetts uses a subjective “intent to return home” test among others, noting that the state agency instead uses the physician’s judgment about the permanence of nursing home placement. The Wisconsin reviewer remarked that liens are handled on a county-by-county basis and there is no uniformity.

**Hardship Waivers.** There was little discrepancy between the state responses and the reviewer comments on hardship waivers. Reviewers in Oregon and Maryland said they did not know of any undue hardship waivers granted; yet Oregon reported 38 waivers approved in the past fiscal year and the state official in Maryland did not know. The Pennsylvania practitioner expressed concern that the consumer booklet on estate recovery is misleading in listing only certain types of waivers and neglecting others. The Pennsylvania and Minnesota reviewers commented that the waiver decisions are made on an ad hoc basis rather than strictly according to written criteria. Finally, the Massachusetts reviewer observed that the state defines undue hardship very narrowly, and a waiver is extremely difficult to obtain.

**Minimum Thresholds for Recovery.** Reviewers in two states commented on thresholds for recovery. The Pennsylvania reviewer explained that in 2003 Pennsylvania raised the asset disregard for Medicaid eligibility to \$8,000 for categorically needy applicants. Therefore, many more Medicaid beneficiaries may own probate assets over the estate value threshold of \$2,400, which would be subject to recovery; thus, the threshold should be raised to \$8,000. The Massachusetts reviewer disagreed with the state’s assertion that it has no minimum thresholds, noting a legislative amendment that provided for recovery from small estates under \$15,000. The Minnesota reviewer was surprised at the state’s survey response that counties have discretion to determine whether to pursue a claim.

**Notice of Recovery.** In 1996, many of the responding practitioners stated that notices were not understandable or accurate; in 2004, the reviewers had few comments on notice provisions. One (Maryland) indicated that claim notices fail to adequately lay out exemptions from recovery. Another (Minnesota) said notice often is given shortly after the recipient’s death and before the personal representative of the estate has had an opportunity to identify heirs and devisees, yet counties and the state do not attempt to identify heirs and devisees as required under state law.

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<sup>77</sup> This issue is currently in litigation in Minnesota, where a case raises a constitutional challenge to the department’s claims and liens against life estate interests after the death of the life tenant.



**Operational Issues.** Reviewers commented on several operational aspects of recovery. In Connecticut, while the state indicated that interest is added in certain cases, the reviewer did not find this in day-to-day practice. The Pennsylvania reviewer clarified that while recovery claims have priority over general creditors under state law, this applies only for services within six months prior to death. The Massachusetts reviewer noted that while recovery claims have priority over general creditors, they are behind other designated groups.

The Minnesota reviewer took issue with the statement that approximately 70% of recovery occurs through probate, noting that a substantial portion of recovery occurs through state statutory “affidavits of collection,” through which the county may collect directly from financial institutions holding multiple-party accounts if the value of the estate does not exceed \$20,000. The reviewer stated that this procedure may deny procedural due process to claimants with superior claims. The Indiana reviewer was surprised at the state’s estimate that only 5% of recovery occurs through probate, explaining that the process for recovery from non-probate assets actually requires a probate proceeding. It appears that the state is not using these procedures for estate recovery.

### III. Discussion of Findings

The current survey findings offer a snapshot of Medicaid estate recovery programs and practices almost nine years after the 1996 survey, at a time when states are struggling to balance Medicaid coverage with increasing costs, declining revenues, and budget shortfalls. In 1996, estate recovery programs were in great flux, with many programs operating at a rudimentary level. At that time, 5 states had no program and 19 had no regulations in effect. Today, taken as a whole, state programs generally appear more well-established. At the time of the 2004 survey, three states had no program in operation, but two of these were implementing programs. Thirty-six states now have regulations and 31 have program manuals or other forms of guidance.

In the overall findings, seven salient features and recurring themes merit highlighting:

**1. The financial impact of estate recovery on state budgets remains modest but not insignificant.** The median recovery, expressed as a percentage of annual Medicaid long-term expenses, is just over 0.05%, a relatively tiny recovery rate. Gross recovery amounts for the last fiscal year reported (FY 2003 in most cases) differed markedly among the states, ranging from about \$86,000 to close to \$54 million, and from 0.01% to 2.2% of state long-term care Medicaid expenses (table 3). Only eight states recovered more than 1% of their Medicaid long-term care expenditures. The high-end recovery experience of the states currently caps out at around 2%. These small percentages in very large long-term care budgets amount to significant dollars, as shown by California’s \$54 million total recovery; at the same time, they do not represent a magic bullet for maintaining program solvency in most states, as suggested by the fact that the median recovery was \$3.8 million and the average was \$7.6 million. The unknown in this analysis is the maximum potential for estate recovery rates. If Oregon were taken as a benchmark for maximum recovery potential, and all states yielded the same 2.2% rate as Oregon, the national recovery amount (using FY 2003 data) would be approximately \$1.8 billion, more than five times the current national total.

The significant absence of data on the full administrative costs of operating estate recovery programs raises uncertainty about their financial impact. Only nine states could provide fairly complete figures on administrative costs. Those nine states averaged administrative costs of 6.84% of collections, a very positive cost-benefit rate. However, the lack of data in the majority of states undermines the ability to test the cost-effectiveness of estate recovery.

**2. Estate recovery amounts, measured per estate, are modest but not insignificant.**

The average and median recoveries per estate were \$8,116 and \$5,081, respectively. While not insignificant, especially for family members who may be responsible for settling the estate of a parent, the amounts do not suggest on their face that Medicaid enrollees frequently die with high levels of equity in protected homesteads. The low values are particularly noteworthy as respondents reported that the bulk of estate recoveries derive from real property (table 7). The average and median percentages of estate recoveries derived from real property were 75% and 82%, respectively, although these data are limited by the fact that only 20 states were able to report this information.

The tremendous variation in average recoveries also makes firm conclusions difficult. The average ranged from \$93 per estate in Kentucky to \$25,139 in Hawaii. Another variable may be the fact that some states have developed automatic recovery mechanisms for small asset holdings, such as the bank account of a deceased Medicaid enrollee. Sixteen states reported direct recovery outside probate proceedings (table 20). One might expect such recovery methods to net greater total recoveries but small per-estate recoveries on average; however, the data are insufficient to test any relationship between direct recovery and the average size of recoveries per estate or in total.

While some states (21) have minimum estate value thresholds and some (22) have minimum claim thresholds, there are no such thresholds in federal law. It would be interesting to speculate on the costs and benefits of excluding small probate estates (e.g., with less than \$25,000) from recovery entirely and focusing efforts on larger estates.

**3. The scope of estate recovery efforts is expanding.** The findings indicate a trend toward expansion of the scope of estate recovery, as well as a broader variety of ownership types subject to recovery (such as annuities, trusts, and life estates). Thirty-three states appear to seek recovery beyond the probate estate, compared with 20 in 1996. However, not all targets of estate recovery have expanded. For example, the number of states targeting joint bank accounts today is lower than in 1996 (21 compared with 24), although this could be due to better implementation of the surviving spouse deferral/exemption.

Thirteen states reported pending changes to state law or regulations on estate recovery or use of liens. The majority of these changes were aimed at expansion of recovery within the framework of OBRA '93 or at facilitating the recovery process. Given the economic downturn facing a majority of states since 2001, coupled with rising Medicaid costs, it is likely that estate recovery expansion will be at least one of the cost-containment options states consider with

respect to Medicaid. These survey results suggest that the likely net gain in enhancing state recovery efforts is modest or at least uncertain, given the gap in cost-benefit data.

**4. Estate recovery policies and practices vary significantly among the states.** The states show tremendous variation in every aspect of estate recovery, including definitions of the scope of estates and services recoverable, and policies and procedures on exemptions, deferrals, use of liens, and notice.

Significantly, the survey found that less than half the states (22) seek recovery against homes jointly owned with right of survivorship. Because the home is normally the most substantial asset owned by a beneficiary, the finding is significant. It may represent an implicit acknowledgment by many states that the home possesses a special emotional, cultural, and financial significance for families across generations; alternatively, it may reflect the administrative cost and burden of collecting against such property when it is jointly owned, especially if title held by survivors must be tracked for long deferral periods.

Even in some matters in which federal law appears clear and specific, significant variation exists. For example, mandatory deferral of recovery against the homestead under OBRA '93 does not require that a surviving spouse or a minor or disabled child live in the home as a prerequisite for deferral of recovery, yet 13 states indicated that they require the survivor to live in the home, while 29 states do not.

Other variations that raised possible compliance questions included whether states seek mandatory recovery for home- and community-based services; whether they provide notice upon a determination of permanent institutionalization; and whether they give undue hardship waiver notices. While these survey results raise questions about selective compliance with federal law, they cannot be relied on for firm conclusions in this regard. The survey interview process, as well as the feedback received from the legal practitioners, highlighted the fact that the nuances of state policies and practices often exceeded the capacity of a standardized survey instrument to capture their real-world functioning.

In a positive light, flexibility may enable states to implement estate recovery in the way that blends best into overall program operations. Variation in estate recovery policies and practices is really no different from the variation of virtually every other aspect of the Medicaid program. Further, state discretion and differentiation is partly necessitated by the complex interaction of Medicaid estate recovery law with state property, probate, homestead, and creditor laws. In a negative light, estate recovery rights and obligations are quite complicated for Medicaid enrollees and family members to understand, yet the consequences can be substantial. Having 50 variations of estate recovery across the land makes the already difficult task of public education even more difficult. Public understanding of program criteria and of practices relating to exemptions, deferrals, and notice may especially benefit from greater uniformity.

**5. State estate recovery notices vary widely in timing, frequency, and clarity; and the procedures and content of hardship waiver notices are uneven.** Meaningful notice is the backbone of procedural due process, and notice is a critical responsibility of states in implementing estate recovery. While states generally give some form of notice both up front at

application for Medicaid and at the end as part of the judicial claim process, they vary greatly in the intervening points at which Medicaid enrollees or survivors are notified about recovery. Some give notice at nursing home admission, some at determination of permanent institutionalization, some at placement and enforcement of a lien, and some at a combination of these. In particular, while both federal law and CMS guidelines require notice upon a determination of permanent institutionalization, only 6 of the 19 states using TEFRA liens reported giving such notice.

CMS requires states to give notice specifying the method for applying for a hardship waiver. The survey found waiver notice procedures and content uneven. Twenty-five states give notice of the availability of the waiver before recovery efforts, and 35 give notice when recovery is under way. Frequently, hardship waiver notices are part of the claim letter sent to survivors. Three states did not indicate giving undue hardship waiver notices, raising concerns about compliance with the federal requirement as well as due process.

State estate recovery notices vary exceedingly in readability, print size, and the extent to which they are readily understandable. Medicaid enrollees and survivors may have only modest education, have poor vision, lack legal representation, or be under severe stress, any of which may affect their ability to read and respond to recovery notices. Many states include a brief notice about recovery in a lengthy laundry list of items in small print on the Medicaid application. This type of notice may not be effective in informing individuals of their rights. Attention is needed to develop creative ways to inform affected parties about estate recovery. Some states make efforts at better outreach by training eligibility workers, providing special telephone lines on estate recovery, or sending notices such as the “Special Notice of Estate Recovery” that goes out to all Medi-Cal beneficiaries in California every six months.

Finally, notices vary in the extent to which they include vital information such as a contact for further information, exceptions to recovery, the right to request an itemized accounting, or the fact that the claim will not exceed the value of the estate.

**6. The lack of basic data collection and research impairs assessment of estate recovery efforts.** The one data element that all states report annually to CMS is the total amount of Medicaid recovery from estates. Beyond that, data elements are spotty and inconsistent across the states. At least nine states could not report the number of estates against which recovery was made in the past fiscal year. Most states cannot quantify the total administrative costs of their estate recovery efforts. Most cannot break down the sources of property (e.g., real versus personal) from which recovery was made. Data on the number of exemptions and deferrals of recovery, hardship waivers, and contested recoveries and their outcomes are soft or nonexistent. Frequency and patterns of lien imposition are difficult, at best, to discern from state data. Better data collection is needed to evaluate fully the impact and effectiveness of estate recovery.

**7. Policymakers have generally not examined the broader public policy issues posed by estate recovery.** The purpose of this survey was to provide a necessary baseline of information that describes current estate recovery practices. While the survey looked at the dollars and cents public policy impact, it did not seek to answer the human impact questions that arise in connection with estate recovery. These are questions that must be answered to determine

more realistically whether any of these practices are beneficial, harmful, equitable, good policy, or bad policy on a human scale.

The current survey did seek to uncover state efforts to evaluate any aspects of estate recovery programs. Only two state studies were identified, in Ohio and Pennsylvania (see pp. 17–18). Both studies suggest that the existence of estate recovery may lead eligible individuals to decline services, but these are by no means firm conclusions.

Fully evaluating estate recovery requires taking into account a multitude of competing societal values: public versus private responsibility for long-term care, the fair distribution of public burdens, the importance of inheritance, the promotion of programs to enhance the independence of elders, the pros and cons of estate planning, and the protection of especially vulnerable populations. Moreover, estate recovery is part of a much larger Medicaid picture involving the related issues of eligibility rules, transfer of asset rules, and the purchase of long-term care insurance as part of the Long-Term Care Partnership program. The current survey provides only a bare-bones description of estate recovery practices. The need remains not only to fill in the many gaps identified above but also to examine the troubling social impact questions that invariably arise in the imposition of estate recovery. These questions include the following:

- Whether estate recovery represents an equitable mechanism for ensuring that Medicaid enrollees pay a fair share of the cost of their long-term care costs, compared with other financing options.
- Whether recovery is, in fact, a barrier to receipt of home- and community-based care and other benefits (as some respondents and practitioners suggested), 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.
- Whether estate recovery may contravene social policy on the prevention of spousal impoverishment by unfairly encumbering the property of surviving spouses and foreclosing options to use their equity to care for themselves.
- 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 the hardship waiver requirements.
- Whether any additional consumer protections should apply if Medicaid is to be treated as a “loan program” rather than an entitlement program.
- Whether the real costs of operating estate recovery programs—taking into account administrative costs as well as the potential long-range cost of deterring individuals from obtaining early care—justify the financial benefit to the state.

The answers to these and other questions will require regular state collection of the kinds of data currently lacking, as well as careful evaluation of the ways in which estate recovery balances competing social goals.

## **IV. TABLES**

**TABLE 1: Use of Contractor**

	Contract Out All	Contract Out Part	Functions Retained by State	Pay Percentage of Recovery	Other Payment Arrangement	Amount Paid in Past Fiscal Year
AK	•			13%		Not operational
AZ	•			12%		\$216,519
FL		•	Determinations on hardship waivers; approval or rejection of written settlement offers	Yes, none specified		\$552,000
HI		•	Referral of cases to contractor after notice from caseworker	10% of \$1.6 million, 16% thereafter		
IN		•	Recovery is by counties. 15–20 of 92 counties retain estate recovery functions.	Yes, none specified		\$1,028,639
IA	•			7.5%		\$787,500
KS		•	All functions, except when caseload exceeds abilities of staff attorneys		Yes, not specified	
KY		•	Monitoring contract; trouble-shooting	5.75%		
MT		•	State resumed all functions in July 2003, except contractor retained open cases until July 2004	19.4%		
WV		•	Estates up to \$50,000		\$126,000/year management fee, no percentage until collections exceed \$1.6 million	\$105,703
WI		•	All but clerical and data support		Hourly fee	
WY		•	Liaison between contract attorneys handling lien filings and actual recoveries, and other contractor running data system; response to enrollee questions; coordination			

**TABLE 2: Number of Estates and Amount Recovered\***

	<b>Estates From Which Recovery Attempted</b>	<b>Notes on Recovery Attempts</b>	<b>Total Amount Recovered</b>	<b>Notes on Amounts Recovered</b>	<b>Average Recovery per Estate</b>
AL	20	Excludes liens program	\$334,084	Plus liens \$3,792,587	\$16,704
AK		Program initiated March 2004		Program initiated March 2004	
AZ	116		\$1,602,333		\$13,813
AR	183		\$1,557,311		\$8,510
CA	20,000	Estimate	\$53,929,926		\$2,696
CT	1,477		\$10,770,000	Reimbursement from heirs adds \$760,000	\$7,292
DE	114		\$500,797		\$4,393
DC	75		\$1,676,527		\$22,354
FL	869		\$9,300,000		\$10,702
HI	101		\$2,539,013		\$25,139
ID	2,400	Estimate	\$5,580,000		\$2,325
IL		Data unavailable	\$23,300,583	7/1/03–3/31/04	
IN	4,610	County-based recovery	\$7,494,945		\$1,626
IA	6,200		\$10,822,753		\$1,746
KS	525		\$5,765,000		\$10,981
KY	27,891		\$2,584,263		\$93
LA	19		\$85,907		\$4,521
ME	362		\$5,000,000		\$13,812
MD		Did not supply data	\$5,000,000	Includes estates and liens	
MA	1,703		\$28,000,000		\$16,442
MN		Don't know	\$16,600,000	Includes probate and liens	
MS	962		\$1,720,000		\$1,788
MT	101		\$2,024,523		\$20,045
NE	228		\$1,200,000		\$5,263
NV	1,165		\$1,181,203		\$1,014
NH	400	Estimate	\$4,024,726		\$10,062
NJ	363		\$5,560,000		\$15,317
NM		Did not supply data		Data unavailable	
NY		No data; county-based recovery		No data; county-based recovery	
NC	1,000		\$5,000,000		\$5,000
ND	1,400		\$1,774,867		\$1,268
OH	30,000		\$13,856,425		\$462
OK	150		\$1,750,000		\$11,667
OR	7,200		\$20,000,000		\$2,778
PA	4,802		\$24,400,000		\$5,081
RI		Data unavailable		Data unavailable	
SC	1,225		\$4,920,315		\$4,017
SD	1,307		\$1,200,000		\$918
TN		Data unavailable	\$3,100,000		
UT	144		\$2,278,590		\$15,824
VT	122		\$984,929		\$8,073
VA	208		\$874,958		\$4,207
WA	647		\$11,600,000		\$17,929
WV	325		\$393,254		\$1,210
WI	5,800		\$17,600,000		\$3,034
WY	350		\$1,341,309		\$3,832
Avg.	3,242		\$7,600,680		\$8,116
Median	525		\$3,562,363		\$5,081

\* Data reported for state's most recent fiscal year, which in most cases was FY 2003.



**TABLE 3: Revenue as Percentage of Medicaid Long-Term Care Expenses**

	Total Amount Recovered (\$ millions)	Total LTC Expenditures* (\$ millions)	Amount Recovered as % of LTC Expenditures
Alabama	4.0	1,072.4	0.37%
Alaska	0.0	255.0	0.00%
Arizona	1.6	27.7	5.78%
Arkansas	1.6	750.4	0.21%
California	53.9	4,141.4	1.30%
Connecticut	10.7	1,869.2	0.57%
Delaware	0.5	249.7	0.20%
Dist. of Columbia	1.7	293.5	0.57%
Florida	9.3	3,345.4	0.28%
Hawaii	2.5	211.8	1.18%
Idaho	5.6	306.1	1.83%
Illinois	17.0	2,728.3	0.62%
Indiana	7.5	1,448.9	0.52%
Iowa	10.8	996.7	1.08%
Kansas	5.8	775.7	0.75%
Kentucky	2.6	1,021.6	0.25%
Louisiana	0.1	1,187.3	0.01%
Maine	5.0	550.3	0.91%
Maryland	5.0	1,486.1	0.34%
Massachusetts	28.0	2,740.8	1.02%
Minnesota	16.6	2,383.1	0.70%
Mississippi	1.7	789.0	0.22%
Montana	2.0	241.8	0.82%
Nebraska	1.2	584.7	0.21%
Nevada	1.2	202.6	0.59%
New Hampshire	4.0	317.1	1.26%
New Jersey	5.6	3,311.1	0.17%
New Mexico	0.0	531.3	0.00%
New York	27.2	15,944.7	0.17%
North Carolina	5.0	2,171.8	0.23%
North Dakota	1.8	281.8	0.64%
Ohio	13.9	4,511.2	0.31%
Oklahoma	1.8	877.0	0.21%
Oregon	20.0	899.1	2.22%
Pennsylvania	24.4	5,729.9	0.43%
Rhode Island	3.6	433.0	0.82%
South Carolina	4.9	873.0	0.56%
South Dakota	1.2	223.8	0.54%
Tennessee	3.1	1,354.8	0.23%
Utah	2.3	279.8	0.82%
Vermont	1.0	196.3	0.51%
Virginia	0.9	1,185.1	0.08%
Washington	11.6	1,555.6	0.75%
West Virginia	0.4	633.2	0.06%
Wisconsin	17.6	2,211.4	0.80%
Wyoming	1.3	156.1	0.83%
Total	347.4	84,034.0	
Avg. (Median)	7.6 (3.8)	1,594.3 (875.0)	0.69% (0.57%)

\*Source: Medicaid Financial Management Reports (CMS-64): Combined costs for nursing facilities, public and private intermediate care facilities for people with mental retardation, and home and community-based services for FY 2003. Total amount recovered includes both state and federal shares.

**TABLE 4: Administrative Cost and Components**

	Annual Administrative Cost	Includes Staff	Includes Facilities and Support	Includes Information Systems	Includes Legal Costs	Includes Contractor	Includes Other
AZ	\$293,600	•	?	?	?	•	?
CA	\$1,645,868	•					
CT	\$706,665	•					
DE	\$50,000	•	•	•	•		
DC	\$155,000	•					
FL	\$614,000	•	•	•	•	•	?
ID	\$300,000	•	•	•	•		
KS	\$400,000	?	•	•	•	•	•
LA	\$59,820	•	•	•	•		?
ME	\$150,000	•	•	•	?	?	?
MA	\$1,000,000	•	•	•	•		
MS	\$110,000	•			•		
NE	\$70,000	•	•		•		
NV	\$176,000	•	•				
NH	\$165,984	•			•		
NC	\$75,000	•	•	•	•		
ND	\$70,000	•	•	•	•		
OH	\$1,300,000	•	•	•	•		
OK	\$30,000	•	•	•			
OR	\$1,000,000	•	•		•		
PA	\$1,100,000	•	•	•			
SC	\$260,229	•	•		•		
SD	\$60,000	•	•	•			
TN	\$365,000	•	•	•	•		
UT	\$110,000	•	•	•	•		
VA	\$50,000	•	•	•			
WA	\$1,300,000	•	•	•	•		
WV	\$126,000		•	•		•	
WI	\$950,000	•	•	•		•	
WY	\$250,000				•	•	

? = don't know/no response

A blank cell indicates that a given expense is not included in the total administrative cost figure.

**TABLE 5: Administrative Cost as Percentage of Amount Recovered—Nine States**

	Total Amount Recovered	Administrative Cost*	Admin. Cost as % of Total Recovered
DE	\$500,797	\$50,000	9.98%
ID	\$5,580,000	\$300,000	5.38%
MA	\$28,000,000	\$1,000,000	3.57%
NC	\$5,000,000	\$75,000	1.50%
ND	\$1,774,867	\$70,000	3.94%
OH	\$13,856,425	\$1,300,000	9.38%
TN	\$3,100,000	\$365,000	11.77%
UT	\$2,278,590	\$110,000	4.83%
WA	\$11,600,000	\$1,300,000	11.21%
Average	\$7,965,631	\$507,778	6.84%

\* Administrative cost includes staff, facilities and support, information systems, and legal costs.

**TABLE 6: Contested Estate Recoveries**

	Number of Recoveries Contested	Contestants Fully Successful	Contestants Unsuccessful	Contestants Partially Successful/ Negotiated	% Contested Cases Resolved via Court Process	% Contested Cases Resolved via Admin. Procedure	% Contested Cases Resolved via Informal Agency Action
AL	most	0			20%	0%	80%
AZ	3	2	1	0		100%	
AR	37	21	16	0	0%	15%	85%
CA	240(E)				50%	50%	
CT	*	0			1%		
DE	0	0	0	0	0%	0%	0%
DC	14	3	8	3	99%	1%	0%
HI	0						
IA	40	2	32	6	100%	0%	0%
KS	99	2		97	100%	0%	0%
KY	9600**						
LA	0						
ME	38	0	38	0	1%	0%	99%
MA	170(E)	0	140	30			
NE	12	7	2	3			
NH	150	10	120	20	30%	10%	60%
NC	20(E)	2	18	0	75%	25%	0%
ND	5	0	2	3	0%	0%	100%
OH	150	0	20	130	1%	0%	99%
OK	10	0	0	10	100%	0%	0%
OR	600	10	580	10	20%	5%	75%
PA	1	0	1	0	0%	100%	0%
SC	15	0	15	0	99%	0%	0%
SD	3	0	3	0	0%	100%	0%
TN					17%	16%	67%
UT	18	3	13	2	5%	0%	95%
VA					0%	0%	100%
WV	5	0	0	5	0%	100%	0%
WY	1	0	0	0	0%	0%	0%

\* CT states that about 3% of cases (44) were contested.

\*\* KY states that these are people who responded to notice, not contested in court.

E = estimate

**TABLE 7: Recoveries from Real Property—Most Recent Fiscal Year**

	<b>No. of Estates w/ Recovery from Real Property</b>	<b>% of Real Property Recoveries Involving Enrollees' Homes</b>	<b>Total Amount Recovered from Real Property (% of Total Estate Recovery)</b>
AL			
AK			
AZ			
AR	60	100%	\$1,344,194 (84%)
CA			
CT			
DE	20	100%	\$422,848 (85%)
DC	48	100%	\$1,323,456 (78%)
FL			
HI	33	100%	\$2,297,873 (92%)
ID	360	71%	\$4,100,000 (73%)
IL	909		\$7,142,110 (42%)
IN			
IA	450	100%	\$8,658,202 (80%)
KS	524	100%	\$2,178,000 (38%)
KY			
LA	2	100%	\$85,907 (86%)
ME		92%	
MD			
MA	703	90%	\$26,000,000 (93%)
MN			
MS			
MT			
NE			
NV	26	100%	\$162,443 (14%)
NH			
NJ			
NM			
NY			
NC			
ND			
OH	1000	100%	
OK	150	100%	\$1,750,000 (97%)
OR	720	95%	\$15,000,000 (75%)
PA	620	100%	\$13,167,338 (54%)
RI			
SC	355	99%	\$4,884,126 (100%)
SD	12	80%	\$325,000 (27%)
TN		100%	\$3,100,000 (100%)
UT	140	100%	\$2,255,000 (98%)
VT			
VA			
WA	518		\$9,300,000 (80%)
WV	58	95%	\$373,591 (94%)
WI			
WY	175	95%	
Avg.	328	96%	\$4,946,195 (74%)
Median	175	100%	\$2,276,000 (82%)

**TABLE 8: Definition of Estate**

Recoverable Property	AL	AK	AZ	AR	CA	CT	DE	DC	FL	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MN	MS	MT	NE
Limited to probate estate	Y*	N	Y	Y*	N	Y*	Y*	N	Y*	N	N	Y*	N	N	Y*	N	N	N	Y	Y*	N	Y	Y*	Y
Individually owned bank accounts	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Other financial accounts	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
Cash	Y	Y		Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Tangible possessions	Y	Y		N	Y	Y	N	N	Y	Y	Y	N	Y	Y	Y	N	Y	N	Y	Y	Y	Y	N	Y
Real property (not home)	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			Y	Y	N	Y	Y	Y	Y	Y	Y
Home owned – Solely by enrollee	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
• Jointly w/spouse WROS	N	N		N	Y	N	N	Y	N	N	Y	Y	N	Y	N	N	N	N	N	N	Y	N	N	N
• Jointly w/other WROS	N	Y		N	Y	N	N	Y	Y	Y	Y	N	Y	Y	N	Y	Y	N	N	N	Y	N	N	N
• By trust for enrollee/spouse	Y			N	Y	Y	Y	N	Y	Y	Y	N		Y	N	N	Y	N	N	Y	N	N	N	N
• By trust for other	N	N		N	Y	N	N	N	N	N	Y	N		Y	N	Y	N	Y	N	N	N	N	N	N
Joint bank accounts WROS	N	N		N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	N	Y	Y	N	N	N	Y	N	Y	N
Pay-on-death accounts	N	Y		N	Y		Y	Y	Y	Y	Y	N	Y	Y	Y	Y	N	Y	N	N	Y	N	N	N
Life estate in real property	N	Y		N	N	N	N	N	N	Y	Y	Y	N	Y	N	Y	N	N	N	N	Y	N	N	N
Insurance on enrollee w/ 3 <sup>rd</sup> party ben.	N	N		N	N	N	N	Y	N	Y	N	N	N			Y	N	N	N	N	N	N	N	N
Remainder benefit of immed. annuity	N	Y		Y	Y	Y		N	Y	Y	Y	N	N	Y	Y		Y	N	N	N	N	N	N	N
Trust property	Y	Y		Y	Y	Y		N	Y	Y	Y	Y	Y	Y	N	Y	Y	N	N	Y	N	N	N	N
Other	N	N		N		Y	N	Y	Y	N	Y	N	Y	Y	Y	N	N	N	N	N	N	N	Y	N

Recoverable Property	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	UT	VT	VA	WA	WV	WI	WY	Total Yes
Limited to probate estate	N	Y	N	Y	Y	Y*	N	Y	Y*	N	Y	Y	Y	N	Y*	N	Y	Y*	N	Y	N	N	26
Individually owned bank accounts	Y	Y	Y		Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	43
Other financial accounts		Y	Y		Y	Y	Y	Y	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	40
Cash	Y	Y	Y		Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	42
Tangible possessions	N	Y	Y		Y	Y	Y	Y	N	N	Y	Y		Y	Y	Y	Y	Y	Y	Y	N	N	31
Real property (not home)	Y	Y	Y		Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	41
Home owned – Solely by enrollee	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	44
• Jointly w/spouse WROS	N	N	Y		N	N	Y	N	Y	Y	N	N	N	N	Y	N	N	N	N	N	N	Y	12
• Jointly w/other WROS	Y	N	Y		N	N	N	N	Y	Y	N	N	N	Y	N	N	N	N	Y	N	N	Y	19
• By trust for recipient/spouse	Y	N	Y		N		Y	Y	Y	Y	N		N	N		Y	N	Y		N	N		18
• By trust for other		N	Y		N		N	N	N	N	N		N	N	N	N	N	N		N	N	N	6
Joint bank accounts WROS	Y	N	Y		N	Y	Y	N	N	Y	N	N	N	Y	N	N	N	N	Y	N	Y	N	21
Pay-on-death accounts	Y	N	Y		N		Y	N	N	Y	N	N		N	N	N	N	N	Y	N	Y	N	19
Life estate in real property	Y	N	N		N	N	N	N	Y	Y	N	N	N	Y	N	N	N	N	Y		N	N	12
Insurance on enrollee w/ 3 <sup>rd</sup> party ben.	N	N	N		N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	3
Remainder benefit of immed. annuity	Y	N	N		N	Y	N	N		N	N	N		Y	Y	Y	N	Y	Y	N			17
Trust property	Y	N	Y		N		Y	N	N	Y	N	Y	N	Y	Y	Y	N	Y		N	N	N	23
Other	N	N	Y		N		Y	Y	N	N		Y	N	N	N	N				N			12

Shaded rows = non-probate property items. Blank cells = don't know/no answer. WROS = with right of survivorship

\* Yes responses (Y\*) recategorized as No in report findings, based on answers to non-probate property items.

TABLE 9: Services Recoverable

Services Recoverable	AL	AK	AZ	AR	CA	CT	DE	DC	FL	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MN	MS	MT	NE
Nursing facility	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
ICF/MR	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
HCBS – state plan services	•	•		•	•	•			•	•	•	•	•	•	•	•	•	•	•	•	•		•	•
HCBS – waiver services	•	•	?	•	•	•	•		•	•	•	•	?	•	•	•	•	•	•	•	•	•	•	•
Hospice	•	?	•		•	•	•		•	•	•	•	•	•	•	•		•	•	•	•		•	•
Hospital	•	•	•	•	•	•	•		•	•	?	•	•	•	•	•	•	•	•	•	•	•	•	•
Prescription drugs	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Physician services	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•		•	•	•	•		•	•
Managed care	•		•	?	•				•	•		•	•	•	•	•			•	•	•		•	•
Medicare Savings Program (MSP)		?				•		•	•	•	•			•	•					•	•	•	•	•
Perm. institutionalization <age 55	•	•				•				•		•		•	•	•			•	•	•		•	•
<b>All</b> other items under state plan	•		•		•		•		•	•		•	•	•		•		•	•		•		•	•
<b>Some</b> other items under state plan						•		•			•									•		•		

Services Recoverable	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	UT	VT	VA	W A	W V	WI	W Y	Total Yes	
Nursing facility	•	•	•	?	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	45
ICF/MR	•	•	•	?	•		•	•	•	•	•	•	•	•	?	•		•		•	•	•	•	40
HCBS – state plan services	•	•	•	?	•	•	•	•	•		•	•		•		•	•	•	•		•	•	•	37
HCBS – waiver services	•	•	•	?	•	•	•	•	•	•	•	•	•	•	•	•		•		•	•	•	•	39
Hospice	•	•	•	?	•	•	•	•	•	•	•	•	•	•		•	•	•			•	?	•	36
Hospital	•	•	•	?	•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	•	?	•	41
Prescription drugs	•	•	•	?	•	•	•	•	•	•	•		•	•		•		•	•	•	•	?	•	41
Physician services	•	•	•	?	•	•	•	•	•	•	•	•	•			•		•		•	•	?	•	37
Managed care		•	•	?	•		•	•	•	•	•	•				•		•						26
Medicare Savings Program (MSP)	•		•	?			•	•		•	•			•		•		•			•	?	?	23
Perm. institutionalization <age 55		•		?	•	•				•		•	•	•					•	•	•	•	•	24
<b>All</b> other items under state plan		•	•	?	•		•	•	•	•		•			•	•		•						25
<b>Some</b> other items under state plan	•			?		•					•								•		•			10

ICF/MR = intermediate care facility for people with mental retardation  
 HCBS = home and community –based care  
 ? = don't know/no response

**TABLE 10: Exemption and Deferral of Estate Recovery by Survivor and State**

	Spouse	Minor Child	Disabled Child	Live-in Req'd?*	Sibling	Caretaker Child
AL		C	C	Yes		C
AK	E	E	E	No	C	C
AZ	E	E	E			
AR	E	E	E	No	E	E
CA	C	E	E	No	C	C
CT	E	E	E	No		N
DE	E	E	E		E	E
DC	C	E	E	Yes	E	E
FL	E	E	E	No	C	E
HI	E	E	E		D	D
ID	D	E	C	Yes	D	E
IL	D	D	D	Yes	C	C
IN	D	D	E	No	E	E
IA	D	D	D	No	C	C
KS	D	E	E	Yes	D	C
KY	E	E	E	No	C	C
LA	E	E	E	Yes	N	N
ME	E	E	E	No	N	E
MD	E	E	E	No	E	E
MA	D	D	D	No	C	C
MN	D	D	D	Yes	D	D
MS	E	E	E	No	E	E
MT	E	E	E	No	E	E
NE	E	E	E	No	C	E
NV	D	E	D	No	D	C
NH	C	C	C	No	C	C
NJ	D	D	D	No	D	D
NM						
NY	D	D	D	No	D	D
NC	E	E	E	No	C	C
ND	C	C	C	Yes	C	C
OH	C	C	C	No	C	C
OK	N	N	N	Yes	N	N
OR	D	E	E	No	C	N
PA	E	D	E	Yes	E	E
RI	E	E	E	No	D	E
SC	C	C	C	Yes	C	C
SD	C	C	C	No	C	C
TN	D	E	E	Yes	N	N
UT	E	E	E	No	D	D
VT	D	E	E	No	E	E
VA	E	E	E	No	E	E
WA	D	D	D	No	C	C
WV	D	D	D	Yes	D	D
WI	C	C	C	No	D	D
WY	D	D	D	No	N	D

**E = exempt or waive recovery      N = negotiate a settlement and/or payment schedule**

**D = defer recovery                      C = combination of responses**

\* Live-in question asked only for spouses or minor or disabled children, as it is always required of siblings and caretaker children.

**TABLE 11: Number of Exemptions, Deferrals, and Negotiated Settlements**

State	Exemptions/ Waivers	Deferrals	Negotiate Settlement
AL			
AK			
AZ			
AR	25	0	0
CA			
CT			29
DE	300	0	0
DC	3	0	23
FL		0	18
HI	0	0	0
ID	6	2100	6
IL			
IN	20		15
IA	0	786	0
KS	12	6	4
KY		0	
LA	0	0	0
ME	16	0	3
MD			
MA	41	20	30
MN			
MS			
MT			
NE	8	0	3
NV	26	179	64
NH	35	0	100
NJ			
NM			
NY			
NC			
ND	0	225	2
OH	20	1000	300
OK		50	35
OR			
PA	86	11	99
RI			
SC	352	0	0
SD	5	30	6
TN			
UT	0	9	2
VT			
VA			
WA	0	10	
WV	3	0	0
WI	344	30	0
WY			

Note: Blank cells indicate no response/don't know.



**TABLE 12: Use of TEFRA Liens**

	Number Imposed in Last Fiscal Year	Number Removed in Last Fiscal Year	Number Collected on in Last Fiscal Year
AL	628	20	373
AK			
CA	20	0	
CT			
DE	14	2	4
HI	89	8	23
ID	120	5	20
IL	691		
IN	0		
MD			
MA	716	2	80
MN	800*	6	250*
MT	178		
NH	150	5	50
NY			
OK	150	10	125
SD	0	0	0
WI	200	5	122
WY	0	0	0

\* Estimate

**TABLE 13: Institutionalization—States Using TEFRA Liens**

	Length of Stay Presumption	Number of Months Triggering Presumption	Intent to Return Home	Physician's Declaration	Other Third Party Evaluation	Other
AL	•	3	•	•		
AK	•	4	•	•	•	
CA			•			
CT	•	6		•	•	•
DE	•	24			•	
HI	•	6	•	•		
ID			•		•	
IL	•	4				•
IN	?		•	•	•	•
MD	•	?		•	•	
MA	•	6	•	•	•	
MN	•	6		•		
MT			•			•
NH						•
NY						•
OK	•	6	•	•		
SD			•			•
WI			?		?	•
WY	?		?	?	?	?

? = don't know/no response

A blank cell indicates that the criterion for permanent institutionalization is not used.

**TABLE 14: Use of Post-Death Liens**

	Surviving Spouse in Home	Minor Child in Home	Disabled Child in Home	Sibling with Specified Conditions*	Child Caregiver with Specified Conditions**	Number Imposed in Past Fiscal Year
CA				•	•	
DC	•			•	•	31
ID			•	•		275
MN	•	•	•	•	•	1500***
NV	•		•	•	•	46***
NJ				•	•	102
OH	•	•	•	•	•	500
OK						25
RI				•	•	
UT				•	•	108
WA				•	•	
WI	•	•	•	•	•	30
WY	•	•	•	•	•	
<b>Total</b>	6	4	6	12	11	

\*Resided in home for at least one year before date of Medicaid enrollee's admission to institution and continuously since.

\*\*Resided in home for at least two years before date of enrollee's admission to institution, continuously since, and provided care permitting enrollee to reside at home rather than institution.

\*\*\* Estimate.

TABLE 15: Hardship Waiver Criteria

	Income-Producing Asset	Survivor Primary Resident	Modest Value	Eligibility for Public Assistance	Eligibility Discontinued	Deprived of Life Necess.	Contribute Care/Prop	Other
AL	?	?	?	?	?	?	?	?
AK	•	•	•	•	•	•	•	?
AZ	•	•	?	?	?	•	?	
AR	•	•		•	•	•	•	
CA	•			•	•	•	•	
CT	•	•		•	•	•		?
DE	•	•			•	•	•	
DC								
FL	•	?	?	•		•	•	•
HI	•	•	•			•		
ID	•			•		•	•	
IL				•	•			
IN	•	•		•	•	•	•	?
IA						•		
KS	•	•	•	•	?	•	•	•
KY	•							
LA	•			•		•		
ME	•			•	•		•	
MD		•				•		•
MA		•				•		
MN	•	•		•	•	•	•	•
MS	•	•	•					
MT	•	•		•	•	•	•	•
NE				•	•		•	•
NV	•			•	•	•	•	•
NH	•	?					•	
NJ	•			•				
NM	•	?	•	•	•	•	?	?
NY	•	•	•					•
NC	•							•
ND								•
OH	•	?		•	?	•	•	
OK						•		
OR				•	•	•	•	
PA	•	•					•	
RI	•							•
SC	•	•				•		
SD			•			•		
TN	•							•
UT	•					•	•	•
VT	•	•	•	•			•	•
VA	•	•	•		?	•	•	
WA	•	•		?		•		
WV	•	•				•	•	
WI	•			•	•			
WY	•	•	•	?	?	?	•	?
<b>Total</b>	<b>35</b>	<b>21</b>	<b>10</b>	<b>21</b>	<b>15</b>	<b>28</b>	<b>22</b>	<b>14</b>

? = don't know/no response

**TABLE 16: State Responses to Finding Undue Hardship**

	Waive / Defer / Negotiate	Other
AL	Defer	
AK	Waive	
AZ	Waive	
AR	Waive	
CA	Waive	
CT	Defer	
DE	Waive	
DC		All options; depends on case.
FL	Waive	
HI	Waive	
ID	Waive	
IL	Waive	
IN		Generally waive, sometimes partially waive.
IA	Defer	
KS	?	
KY	Waive	
LA	Waive	
ME	Negotiate	
MD	Waive	
MA		Two-year conditional waiver, may continue.
MN	Waive	
MS	Waive	
MT	Waive	
NE		Waive, reduce, or any of the options.
NV	Waive	
NH		Waive or negotiate.
NJ		Waive or negotiate.
NM	?	
NY	Negotiate	
NC	Waive	
ND		Defer or negotiate.
OH		Case-by-case; could be consensual lien, waiver.
OK	Waive	
OR		All options.
PA	Waive	
RI		Defer or negotiate.
SC		Case-by-case.
SD	Waive	
TN	Negotiate	
UT		Waive if income-producing; defer with consensual lien.
VT		Waive, except defer for surviving spouse.
VA		Waive or negotiate.
WA	Defer	
WV		Waive or defer.
WI	Waive	
WY	Waive	
<b>Total</b>	22 waive; 4 defer; 3 negotiate	15 use combination

? = don't know/no response

**TABLE 17: Number of Undue Hardship Waivers\***

	Submitted	Granted	Denied
AL	0	0	0
AK			
AZ	28	19 (68%)	9
AR	37	21(57%)	16
CA	452	140 (31%)	312
CT			
DE			
DC			
FL	19	10 (53%)	9
HI	2	0	2
ID	30	10(33%)	20
IL	121	21 (17%)	17
IN	8	6 (75%)	2
IA	21	19 (90%)	2
KS			
KY			
LA	0	0	0
ME	24	16 (67%)	8
MD			
MA	70	41 (59%)	29
MN	20	10 (50%)	10
MS		129	
MT			
NE	11	8 (73%)	3
NV		26	
NH			
NJ	55	0 (0%)	
NM			
NY			
NC			
ND	0	0	0
OH	100	90 (90%)	10
OK	0	0	0
OR	49	38 (78%)	11
PA	89	78 (88%)	11
RI			
SC	380	352 (93%)	28
SD	5	5 (100%)	0
TN			
UT	7	4 (57%)	3
VT			
VA			
WA		10	
WV	5	3 (60%)	2
WI	66	9 (14%)	52
WY	0	0	0

\*The number of applications submitted, granted, and denied may be from different fiscal years and thus don't necessarily add up.

**TABLE 18: Minimum Estate and Claim Thresholds**

	<b>Minimum Estate Value Threshold (\$)</b>	<b>Minimum Claim Threshold (\$)</b>
AK	75,000	Yes (no amount given)
CA	500	500
CT	100	100
DE	5,000	500
DC	100	50
KS	2,000 personal property 10,000 real property	Yes (no amount given)
KY	10,000	100
LA	15,000	500
ME	2,000	2,000
MD	300	100
MS	5,000	Yes (no amount given)
NV	100	100
NC	5,000	3,000
PA	2,400	Yes (no amount given)
RI	499	Yes (no amount given)
SC	10,000	500
UT	500	500
VT	2,000	Yes (no amount given)
VA		1,000
WV	5,000	Yes (no amount given)
WI	50	50
WY	500	500

**TABLE 19: Points at Which Notice Given**

	Applic.	Applic. Apprv.	NH Admis.	Perm. Inst'l Det.	Deferral	Non-Instit. Care	Lien Place.	Lien Enforc.	Death	Other
AL	•							•	•	
AK	•						•	•	•	
AZ	•			NA		?			•	
AR				NA				?	•	•
CA	•	•	•	•			•	•	•	•
CT	•						?	?	•	
DE	•		•			•			•	
DC	•	?	•	NA		•	•	•	•	
FL	•			NA	?		?	?		•
HI			•	•					•	
ID	•		•	?		?	•	•	•	
IL	•	?		•			•		•	
IN	•	•					•	•	•	?
IA	•	•	•	NA					•	•
KS	•	?	?	NA					•	
KY	•			NA					•	
LA	•		•	NA					•	
ME	•	?		NA					•	
MD	•			•	?		•			•
MA	•	•	•	•			•			•
MN	•			•	•		•		•	
MS	•			NA					•	
MT	•				?		•		•	
NE	•			NA			?	?	•	?
NV	•			NA					•	•
NH	•			?			•	•	•	
NJ	•	•		NA			•	•	•	?
NM	•	?	?	NA	?	?	?	?	?	•
NY	•		•			•	•	•	•	
NC	•	?	•	NA		?			•	?
ND	•			NA					•	•
OH	•			NA					•	•
OK	•		•				•			•
OR	•			NA					•	•
PA	•	•	•	NA	•	•			•	
RI	•	•		NA		•	•	•	•	
SC	•		•	NA		•			•	
SD	•		•				•		•	•
TN	•			NA						•
UT	•			NA	•	?	•	•	•	
VT	•	•		NA	•					•
VA	?	•	?	NA		?				•
WA	•			NA			•			•
WV	•		•	NA	•	•			•	
WI	•	•	•			•	•			•
WY	•	?			•	•	•	•	•	
<b>Total</b>	<b>43</b>	<b>10</b>	<b>16</b>	<b>6</b>	<b>6</b>	<b>9</b>	<b>20</b>	<b>12</b>	<b>36</b>	<b>18</b>

? = don't know/no response

NA = Determinations of permanent institutionalization are not applicable in these states because they do not use TEFRA liens.

**TABLE 20: Recovery Inside/Outside Probate**

	Direct Recovery Outside Probate	Percentage Recovery Through Probate
AL		50%
AK		
AZ		50%
AR	•	50%
CA	•	50%
CT		98%
DE		30%
DC		100%
FL		100%
HI	•	4%
ID		71%
IL	•	
IN	•	5%
IA	•	8%
KS	•	32%
KY		
LA		20%
ME		90%
MD		
MA		100%
MN	•	70%
MS		25%
MT		
NE		75%
NV	•	33%
NH		95%
NJ		20%
NM	?	
NY		
NC		99%
ND	•	55%
OH	•	75%
OK		25%
OR	•	60%
PA		100%
RI	•	
SC		99%
SD	•	30%
TN		100%
UT		31%
VT		100%
VA		100%
WA	•	48%
WV		100%
WI	•	60%
WY		1%
<b>Total</b>	16	

? = no response



**TABLE 21: Toll-Free Telephone Lines**

AL	Medicaid Line	800-362-1504
AK	Estate Recovery Line	866-251-4861
AZ	Estate Recovery Line	800-654-8713
DE	Medicaid Line	800-372-2022
DC	Estate Recovery Line	202-442-5824
FL	Estate Recovery Line	877-446-7868
ID	Estate Recovery Line	
IN	Medicaid Line	
IA	Estate Recovery Line	888-513-5186
KY	Medicaid Line	
ME	Estate Recovery Line	800-321-5557
MD	Medicaid Line	800-492-5231
MA	Estate Recovery Line	800-754-1864
MN	Estate Recovery Line	800-657-3963
MS	Medicaid Line	800-421-2408
MT	Medicaid Line	800-694-3084
NE	Medicaid Line	800-430-0427
NV	Medicaid Line	800-992-0900
NH	Medicaid Line	800-852-3345
NJ	Medicaid Line	800-356-1561
NY	Medicaid Line	800-541-2831
OH	Medicaid Line	800-384-8680
OK	Medicaid Line	800-522-0310
OR	Estate Recovery Line	800-826-5675
PA	Estate Recovery Line	800-528-3708
SC	Medicaid Line	888-549-0820
SD	Estate Recovery Line	605-773-3653
TN	Estate Recovery Line	866-389-8444
UT	Medicaid Line	800-821-2237
VT	Medicaid Line	800-250-8427
WA	Estate Recovery Line	800-562-6114
WI	Medicaid Line	800-362-3002

## **APPENDICES**

**A -- Survey Instrument**

**B -- Table of Statutory and Regulatory Authorities**

**C -- Case Law Review**

**D -- Examples of Estate Recovery Notices**

# APPENDIX A

## Survey Instrument

### AARP MEDICAID ESTATE RECOVERY PRACTICES SURVEY Commission on Law and Aging American Bar Association

#### INTRODUCTION

The American Bar Association's Commission on Law and Aging is conducting a survey of state Medicaid recovery practices on behalf of AARP's Public Policy Institute. In an effort to make the data collection process the most efficient and the least demanding, we are asking you to review this questionnaire and gather any information that will help you answer the questions during a *telephone interview* with one of our research attorneys.

One of our staff will be calling you soon to make an interview appointment that is convenient for you. Thank you for helping us with this important study.

State: \_\_\_\_\_ Date: \_\_\_\_\_

Interviewees: \_\_\_\_\_

#### BACKGROUND QUESTIONS

1. Some of our questions ask for information about the most recent fiscal year for which you have data. Which fiscal year will you refer to when answering these questions?
2. Does your state have a Medicaid estate recovery program?
  - a. Is your state planning to create a Medicaid estate recovery program?
  - b. When do you expect to implement the program?
3. Does your Medicaid estate recovery program (including use of liens) have legislative authority?
4. Does your Medicaid estate recovery program (including use of liens) have regulations that guide the program?
5. Does your Medicaid estate recovery program have other forms of guidance such as program manuals or directives?
6. Has your state agency proposed any changes in the law or regulations regarding estate recovery or use of liens that are currently pending?
7. Who is the state official responsible for estate recovery operations?
8. Do you use a contractor for all or part of your estate recovery program?
  - a. Who do you contract with to work on your estate recovery program?
  - b. What are the contractor's responsibilities?
  - c. How do you pay the contractor?
  - d. How much money did you pay the contractor during the most recent fiscal year?

#### DEFINITION OF ESTATE

We define estate to include:

*"all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law." A probate estate is property passing from a decedent's estate by his or her will or by operation of state intestate succession law. This narrow definition generally does not include*

*things such as property that passes to persons by right of survivorship (as joint bank accounts) or by the terms of a contract (as life insurance) or terms of a preexisting trust.*

9. Is the estate recovery program in your state limited to the “probate estate”?
10. Does your state try to recover assets from any of the following?
  - a. Individually owned bank accounts
  - b. Other financial accounts
  - c. Cash
  - d. Jointly owned bank accounts or other financial accounts with right of survivorship
  - e. Payable-on-death accounts
  - f. Tangible possessions owned solely by the recipient
  - g. A home owned:
    - i. Solely by recipient
    - ii. Jointly by recipient and spouse with right of survivorship
    - iii. Jointly by recipient and someone other than the spouse with right of survivorship
    - iv. By a trust that benefits the Medicaid recipient and/or spouse
    - v. By a trust that benefits someone other than the Medicaid recipient and/or spouse
  - h. Real property in which the recipient had a life estate
    - i. Other real property owned solely or jointly by recipient
    - j. Insurance policies on life of recipient (owned by recipient) with third party named beneficiary
  - k. Remainder benefit of an immediate annuity purchased by the recipient or spouse
    - i. Does it make any difference whether the recipient or the spouse purchased the annuity?
    - ii. Does it matter who is named as the beneficiary?
  - l. Trust property
  - m. Potential recoveries from pending lawsuits
  - n. Other
11. How does the estate recovery program receive information that a recipient has died?
  - a. Automated data or case-tracking system (federal, state, or county).
  - b. Caseworker referrals
  - c. Review of probate filings
  - d. Review of death records in the vital statistics bureau
  - e. News clippings from obituary pages
  - f. Final accountings by guardians and conservators
  - g. Information from nursing homes
  - h. Mandatory reporters
  - i. Other

#### **SERVICES FOR WHICH RECOVERY IS SOUGHT**

12. OBRA '93 requires states to recover for payments made for nursing facility services, home- and community-based care, and “related hospital and prescription drug services.” In addition to this, does your state opt to recover for other items and services covered under the state plan?
13. Does your state currently try to recover payment for any of the following services for Medicaid beneficiaries age 55 or over?
  - a. Nursing facility services
  - b. ICF/MR facility services
  - c. Home- and community-based care under the state plan (non-waivered)
  - d. Home- and community-based care provided under a waiver
  - e. Hospice care
  - f. Hospital services
  - g. Prescription drug services
  - h. Physician’s services
  - i. Premium or capitation payments for managed care

- j. Other Medicaid services
14. Does your state recover for home- and community-based services under the state Medicaid plan for
    - a. Community-supported living arrangements
    - b. Optional personal care
    - c. Home health care services
    - d. Skilled therapy
    - e. Services for functionally disabled older individuals under Sec. 1929
  15. Does your state try to recover the following expenses for permanently institutionalized individuals under age 55?
    - a. Only services provided in a nursing facility, ICF/MR, or other medical institution
    - b. For medical assistance beyond that described above in (a)
  16. Does your state recover from the estates of low-income Medicare beneficiaries who are only receiving assistance from Medicaid in the payment of their Medicare premiums, co-payments, and/or deductibles? (i.e., QMBs, SLMBs, QIs)

### EXEMPTIONS AND DEFERRALS

17. Please describe your state's exemption or deferral policy with respect to the following groups:
  - a. When a Medicaid recipient is survived by a spouse, does your state:
    - i. Exempt or waive recovery against the estate
    - ii. Defer recovery
    - iii. Offer to negotiate a settlement of the claim and/or a payment schedule
    - iv. Other (combination of i – iii)
    - v. Don't know
  - b. When a Medicaid recipient is survived by a minor child, does your state
    - i. Exempt or waive recovery against the estate
    - ii. Defer recovery
    - iii. Offer to negotiate a settlement of the claim and/or a payment schedule
    - iv. Other (combination of i – iii)
    - v. Don't know
  - c. When a Medicaid recipient is survived by a disabled child, does your state
    - i. Exempt or waive recovery against the estate
    - ii. Defer recovery
    - iii. Offer to negotiate a settlement of the claim and/or a payment schedule
    - iv. Other (combination of i – iii)
    - v. Don't know
  - d. When a Medicaid recipient is survived by a sibling residing in the home who resided there for at least one year immediately before the date of the recipient's admission to an institution and has resided there on a continuous basis since that time, does your state
    - i. Exempt or waive recovery against the estate
    - ii. Defer recovery
    - iii. Offer to negotiate a settlement of the claim and/or a payment schedule
    - iv. Other (combination of i – iii)
    - v. Don't know
  - e. When a Medicaid recipient is survived by a son or daughter residing in the home who resided there for at least two years immediately before the date of the recipient's admission to an institution, has resided there on a continuous basis since that time, and can establish to the agency's satisfaction that he/she has been providing care which permitted the recipient to reside at home rather than in an institution, does your state
    - i. Exempt or waive recovery against the estate
    - ii. Defer recovery

- iii. Offer to negotiate a settlement of the claim and/or a payment schedule
  - iv. Other (combination of i – iii)
  - v. Don't know
- f. With respect to an exemption or deferral of recovery against a home, does your state require that the surviving spouse or minor or disabled child live in the home?

18. In your last fiscal year, how many cases did your state exempt, defer, or negotiate a settlement on recovery because of any of the survivors described above:
- a. Exempt or waive recovery \_\_\_\_\_?
  - b. Defer recovery \_\_\_\_\_?
  - c. Negotiate a settlement and/or a payment schedule \_\_\_\_\_?

**PRE-DEATH (TEFRA) LIENS**

19. Does your state place liens on the homes of institutionalized recipients while they are still alive, (i.e., TEFRA liens)?
20. When placing a pre-death (TEFRA) lien, which of the following criteria does your state use for determining whether a nursing home resident is permanently institutionalized?
- a. Length of stay presumption --- How long?
  - b. Recipient's intent to return home test
  - c. Physician's declaration that recipient is considered permanently institutionalized
  - d. Evaluation by third party or entity other than a physician
  - e. Other
21. Within your last fiscal year, how many pre-death (TEFRA) liens have been
- a. Imposed?
  - b. Removed when a recipient returns home?
  - c. Collected upon?
22. For pre-death liens placed on the home of an institutionalized recipient, how is removal of a lien initiated when the recipient returns home?
- a. At the request of the recipient
  - b. Automatically through state administrative processes
  - c. Other
23. Does your state place liens on the homes of any noninstitutionalized recipients while they are still alive?

**POST-DEATH LIENS**

24. Does your state place a lien on the home of a deceased recipient in any of the following circumstances?
- a. A surviving spouse lives in the home
  - b. A minor child lives in the home
  - c. A disabled child lives in the home
  - d. There is a sibling of the individual residing in the home who resided there for at least one year immediately before the date of the individual's admission to an institution and has resided there on a continuous basis since that time.
  - e. There is a son or daughter of the individual residing in the home who resided there for at least two years immediately before the date of the individual's admission to an institution, has resided there on a continuous basis since that time, and has established to the agency's satisfaction that he/she has been providing care which permitted the individual to reside at home rather than in an institution.
25. In how many cases have post-death liens been imposed within your past fiscal year? \_\_\_\_\_ (specify best numerical estimate)

## **HARDSHIP WAIVERS**

26. How does your state define and evaluate undue hardship for estate recovery waiver purposes? Is undue hardship when
- The estate consists of an income-producing asset (business, including farm or ranch), and recovery would cause loss of livelihood?
  - Property is the primary residence of the survivors?
  - Only asset is “homestead of modest value”?  
How do you define “modest value?” \_\_\_\_\_
  - Without receipt of estate proceeds, the survivor would become eligible for public and/or medical assistance?
  - Allowing the survivor to receive the estate would enable him/her to discontinue eligibility for public and/or medical assistance?
  - Recovery would deprive the survivor of necessities of life, such as food, shelter, clothing?  
What are your state’s criteria for determining whether recovery deprives the survivor of necessities? \_\_\_\_\_
  - The survivor made substantial personal contributions to the property or to the care of the recipient so the recipient could remain at home?
  - Other
27. In your hardship waiver procedures or standards, are any special considerations given to Native Americans?
28. Do your procedures specify any facts or circumstances that create a presumption that no undue hardship exists?
29. When does your state provide written notice of the availability of undue hardship waivers?
- Prior to recovery efforts
  - At the time recovery is under way
  - Other
30. How can we obtain a copy of the notices? (website, email, mail hard copy)
31. What happens when undue hardship is established? Does your state
- Waive estate recovery
  - Defer estate recovery
  - Negotiate a modified estate recovery
  - Other
32. About how many applications for hardship waivers were submitted, granted, or denied in your state in the last fiscal year?
- Submitted \_\_\_\_\_
  - Granted \_\_\_\_\_
  - Denied \_\_\_\_\_
33. How can we obtain a copy of the notices? (website, email, mail hard copy)

## **THRESHOLDS FOR RECOVERY**

34. Is there an established total estate value below which recovery will not be attempted?  
If yes, what is that estate value?
35. Is there an established claim level below which recovery will not be attempted?  
If yes, what is that claim level?

## **NOTICE OF ESTATE RECOVERY**

36. Does your state give notice of estate recovery
- At the time of application for Medicaid
  - At the time the Medicaid application is approved
  - Upon admission to a nursing home as a Medicaid recipient
  - Upon determination that the recipient is considered permanently institutionalized
  - Upon a decision to defer recovery
  - Upon receipt of noninstitutional long-term care
  - Upon placement of a lien
  - Upon enforcement of a lien
  - Upon death of recipient
  - Other
37. How can we obtain a copy of the notices? (website, email, mail hard copy)

### OPERATIONAL ISSUES

38. In estate recovery claims, is the state given priority over general creditors?
39. Does your state provide for direct recovery outside probate from the balance of a deceased beneficiary's bank account?
40. Approximately what percentage of estate recovery occurs through probate court procedures? \_\_\_\_\_%
41. Does your state add interest to the amount recoverable from some or all recipients under your estate recovery program?  
If yes, under what circumstances? \_\_\_\_\_
42. What kind of toll-free number is available for Medicaid recipients or their representatives to have their questions about estate recovery answered? (Check the response that most accurately reflects the state's system.)
- A general toll-free Medicaid number
  - A number dedicated specifically to questions about Medicaid estate recovery
  - No toll-free number available
  - Do not know / refused

### IMPACT OF PROGRAM

43. Have any studies been conducted in your state to assess the impact of estate recovery on recipient participation?
44. How can we obtain a copy of this (these) study (ies)?
45. Have any studies been conducted in your state to assess the impact of estate recovery on the state budget?
46. How can we obtain a copy of this (these) study (ies)? (website, email, hard copy)
47. In the next two years, do you expect your state's estate recovery program to change in any of the following ways?
- Expand in scope
  - Contract in scope
  - Stay about the same
  - Other
48. What was the annual administrative cost of operating your estate recovery program in your most recent fiscal year? \_\_\_\_\_(dollars)



49. Which of the following items are included in your annual administrative cost?
- a. Staff
  - b. Facilities and support
  - c. Information systems
  - d. Legal costs
  - e. Contractor
  - f. Other
50. Where are the funds collected through the estate recovery program directed?
- a. Medicaid program
  - b. State general revenues
  - c. Other (combination of a and b)
51. Please provide the following data about your estate recovery program for the most recent fiscal year for which data are available.
- a. From how many estates did you try to recover?
  - b. How many estate recoveries were contested?
    - i. In how many of these cases were contestants fully successful?
    - ii. In how many of these cases were contestants unsuccessful?
    - iii. In how many cases were contestants partially successful or the case was negotiated?
    - iv. *Approximately* what percentage of these contested cases were resolved through
      - a. Court processes \_\_\_\_\_(%)
      - b. Administrative procedures \_\_\_\_\_(%)
      - c. Informal agency actions \_\_\_\_\_(%)
  - c. What was the total dollar amount of estate recovery?
  - d. What was the number of estates against which there was a recovery from real property?
  - e. What proportion of the recoveries from real property involved recipients' homes?
  - f. What was the total dollar amount recovered from real property?
52. Have you observed any positive impacts from the estate recovery program?
53. Have you observed any negative impacts from the estate recovery program?

**APPENDIX B**  
**Table of Statutory and Regulatory Authorities**  
**for Estate Recovery**

<b>State</b>	<b>Statute</b>	<b>Regulations</b>
AL	None	None
AK	Alaska Stat. §47.07.055	Alaska Admin. Code tit. 7, §43.1850
AZ	Ariz. Rev. Stat. §36-2935	AZ ADC R9-28-906
AR	Ark. Code Ann. §§20-76-436; 28-40-111; 28-41-101	Code Ark. R. 016 20 001 Section 21700 Estate Recovery
CA	Cal. [Welf. & Inst.] Code §14009.5; Cal. [Probate] Code §§215, 9202, 9203	Cal. Admin. Code tit. 22, s 50960 to 50963
CO	Colo. Rev. Stat. §26-4-403.3	
CT	Conn. Gen. Stat. §§17b-95; 4a-16; 4a-15	None
DE	Del. Code Ann. tit. 25, §§5001 to 5006	Code Del. Regs. 40 800 006, Section 20500
DC	D.C. Code Ann. §4-214.01	None
FL	Fla. Stat. Ann. §409.9101	None
GA	Ga. Code Ann. §49-4-147.1	GA ADC 111-3-8-.01 to .08*
HI	Haw. Rev. Stat. §§346-29.5; 346-37	Haw. Admin. Rules (HAR) §17-1705-56
ID	Idaho Code §§56-218; 56-218A	ID ADC 16.03.09.025
IL	305 ILCS 5/3-09; 5/3-10; 5/3-10.1 to 10.3; 5/3-10.5 to 10.10; 5/5-13; 5/5-13.5	Ill. Admin. Code tit. 35, §102.200 to -.250
IN	Ind. Code Ann. §§12-15-9; 12-15-8.5	Ind. Admin. Code tit. 405, r.2-8-1 to 2-8-2; and 2-10-1 to 2-10-11
IA	Iowa Code §249A-5.2	Iowa Admin. Code 441-76.12(249A)
KS	Kan. Stat. Ann. §39-709(g)(2)	Kan. Admin. Regs. 30-6-150
KY	None	907 Ky. Admin. Regs. 1:585
LA	La. Rev. Stat. Ann. §46:153.4	30:4 La.Reg. 801(April 2004); 27:10 La.Reg. 1696 (Oct. 2001)
ME	Me. Rev. Stat. Ann. tit. 22, §14	Code Me. R. 10-144 Ch. 101, §5
MD	Md. Code Ann. [Health-Gen.] §15-121	COMAR 10.09.24.15
MA	Mass. Gen. Laws Ann. ch. 118E, §§31 to 34	130 CMR 515.011 to .013
MN	Minn. Stat. Ann. §256B.15; and §§514.981 to -.985	None
MS	Miss. Code Ann. §43-13-317	State plan
MO	Mo. Ann. Stat. §§473.398 and 473.399	None
MT	Mont. Code Ann. §53-6-143; and §§53-6-167 to 53-6-189	Mont. Admin.R. 37.82.431 to -.438 (3/31/00)

State	Statute	Regulations
NE	Neb. Rev. Stat. §68-1036.02	Neb. HHS Finance & Support Manual, Manual Letter # 20-2002, 471 NAC 38-000
NV	Nev. Rev. Stat. §§422.054, 422.29302 to -.29306; and §§108.850 to -.889	None
NH	N.H. Rev. Stat. Ann. §§167:13 to 167:16a	N.H. Code Admin. R. He-W 695.01 to -.07
NJ	N.J. Stat. Ann. §§30:4D-7.j; 30:4D-7.2.a. & d.; 30:4D-7.2a.a.	N.J. Admin. Code tit. 10, §49-14.1
NM	N.M. Stat. Ann. §§27-2A-1 to 27-2A-9	N.M. Admin. Code 8.200.420.12(J)
NY	N.Y. Soc. Serv. Law §369	N.Y. Comp. Codes R. & Regs. tit. 18, §360-7.11
NC	N.C. Gen. Stat. §108A-70.5	N.C. Admin. Code tit. 10A, r. 21D.0101 to 21D.0503
ND	N.D. Cent. Code §50-24.1-07	None
OH	Ohio. Rev. Code Ann. §§5111.11 to -.112; 2113.06; 2113.041; 2117.061; 2117.25	Ohio Admin. Code §§5101:1-38-10; 5101:3-3-60; 5101:3-3-93
OK	Okla. Stat. Ann. tit. 63, §5051.3	Okla. Admin. Code 317:35-9-15
OR	Or. Rev Stat. §414.105	Or. Admin. r. 461-135-0832 to -0837
PA	Pa. Stat. Ann. tit. 62, §§201(2); 1410; 1412	55 PA Code 258.1 to 258.14
RI	R.I. Gen. Laws §40-8-15	R.I. Code R. 15 020 006, Section 0312
SC	S.C. Code §43-7-460	None
SD	S.D. Codified Laws §§28-6-23 & 28-6-25	S.D. Admin. R. 67:48:02:01 to :08
TN	Tenn. Code Ann. §71-5-116	None
UT	Utah Code Ann. §26-19-13.5	None
VT	Vt. Stat. Ann. tit. 14, §1204	Vt. Code R. 13 170 008 Section M159
VA	Va. Code Ann. §§32.1-326.1 & 32.1-327	12 VAC 30-20-140;12 VAC 30-10-560
WA	Wash. Rev. Code Ann. §43.20B.080	Wash. Admin. Code 388-527-2700 to -2795
WV	W.Va. Code §9-5-11c	None
WI	Wis. Stat. 49.496; & 867.035(1)(a)	Wis. Admin Code HFS 108.02(10) to (12) & 108.02(15); 152.065(7); 153.07(5)
WY	Wyo. Stat. §42-4-206	WY Rules and Regulations HLTH MDCD Ch 35

\* Became effective after completion of estate recovery survey.

## APPENDIX C Case Law Review

The case review examined all reported litigation addressing Medicaid estate recovery after the passage of OBRA '93. The cases cover the period from November 1993 through December 2004. Fifty-three cases arising in 22 states were identified, primarily through case law searches using the Westlaw database:

- Two federal appeals court cases, one from the Fourth Circuit and one from the Ninth Circuit<sup>1</sup>
- Two federal district court cases, both from the Northern District of California<sup>2</sup>
- Nine cases from New York<sup>3</sup>
- Five cases each from Missouri<sup>4</sup> and North Dakota<sup>5</sup>
- Four cases each from Colorado<sup>6</sup> and Minnesota<sup>7</sup>
- Four cases from California (in addition to the three federal court cases from California)<sup>8</sup>
- Two each from Arkansas,<sup>9</sup> Iowa,<sup>10</sup> and Wisconsin<sup>11</sup>

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<sup>1</sup> West Virginia v. U.S. Dept. of Health & Human Services, 289 F.3d 281 (4<sup>th</sup> Cir. 2002); Bucholtz v. Belshe, 114 F.3d 923 (9<sup>th</sup> Cir.1997).

<sup>2</sup> Dalzin v. Belshe, 993 F.Supp.732 (N.D. Cal. 1997); DeMille v. Belshe, 1994 WL 519457 (N.D. Cal. 1994).

<sup>3</sup> Matter of Estate of Craig, 82 N.Y.2d 388 (N.Y. 1993); In re Estate of Vivas, 702 N.Y.S. 2d 31 (N.Y.A.D. 1 Dept. 2000); Commissioner of Dept. of Social Services of City of New York v. Fishman, 275 A.D.2d 599, 713 N.Y.S.2d 152 (N.Y.A.D. 1 Dist. 2000); In re Estate of Cox, 687 N.Y.S.2d 594 (N.Y.Sur. 1999); Matter of Estate of Andrews, 234 A.D.2d 692, 650 N.Y.S.2d 470 (N.Y.A.D. 3 Dept. 1996); Matter of Thomma, 648 N.Y.S.2d 453 (N.Y.A.D. 2 Dept. 1996); Rocanova v. The Commissioner of the Department of Social Services, 2004 WL 2380972 (N.Y.Sup.), 2004 N.Y. Slip Op. 24402; In re Robinson ex rel. Snell, 194 Misc.2d 695, 754 N.Y.S.2d 525 (N.Y. Sur. 2003); Commissioner of Dept. of Social Services of City of New York v. Spellman, 173 Misc2d 979, 661 N.Y.S.2d 895 (N. Y. Sup. 1997).

<sup>4</sup> In re Estate of Cahill, 2004 WL 833671 (Mo. App. W. Dist. 2004); In re Estate of Newman, 58 S.W.3d 640 (Mo. App. W. Dist. 2001); In re Estate of Graham, 59 S.W.3d 15 (Mo. App. W. Dist. 2001); In re Estate of Vickers, 35 S.W.3d 851 (Mo. App. S. Dist. 2001); Department of Social Services v. Ragsdale, 934 S.W.2d 322 (Mo. App. E. Dist. 1996).

<sup>5</sup> Estate of Bergman v. North Dakota Dept. of Human Services, 688 N.W.2d 187, 2004 ND 196 (2004); Redfield v. Bitterman, 620 N.W.2d 570 (N.D. 2000); Matter of Estate of Wirtz, 607 N.W. 2d 882 (N.D. 2000); Matter of Estate of Thompson, 586 N.W. 2d 847 (N.D. 1998); Matter of Estate of Hooey, 521 N.W.2d 85 (N.D. 1994).

<sup>6</sup> Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004); Estate of Schiola v. Colorado Dept. of Health Care Policy and Financing, 51 P.3d 1080 (Colo. App. 2002); Alberico v. Health Management Systems, Inc., 5 P.3d 967 (Colo. App. 2000); Estate of Nagel v. Ramser, 950 P.2d 693 (Colo. App. 1997).

<sup>7</sup> In re Estate of Handy, 672 N.W.2d 214, 2003 WL 22889712 (Minn. App. 2004); In re Estate of Gullberg, 652 N.W.2d 709 (Minn. App. 2002); In re Estate of Brandt, 1999 WL 319180 (Minn. App. 1999); In re Estate of Jobe, 590 N.W.2d 162 (Minn. App. 1999).

<sup>8</sup> Shewry v. Arnold, 125 Cal.App.4th 186, 22 Cal.Rptr.3d 488 (Cal.App. 2 Dist., Dec 22, 2004); California Advocates for Nursing Home Reform v. Bonta, 106 Cal.App.4th 498, 130 Cal. Rptr.2d 823 (Cal. App. 1 Dist. 2003); Bonta v. Burke, 98 Cal.App.4th 788, 120 Cal. Rptr.2d 72 (Cal. App. 3 Dist. 2002); Belshe v. Hope, 33 Cal.App.4th 161, 38 Cal.Rptr.2d 917 (Cal. App. 5 Dist. 1995).

<sup>9</sup> Arkansas Dept. of Human Services v. Estate of Lewis, 325 Ark. 20, 922 S.W.2d 712 (Ark.1996); Estate of Wood v. Arkansas Dept. of Human Services, 319 Ark. 697, 894 S.W.2d 573 (Ark. 1995).

<sup>10</sup> In re Barkema Trust, 690 N.W.2d 50 (Iowa Dec 10, 2004); Estate of Kirk, 591 N.W.2d 630 (Iowa 1999).

<sup>11</sup> Gorchals v. Wisconsin Dept. of Health and Family Services, 224 Wis.2d 541, 591 N.W.2d 615 (Wis. App. 1999); Matter of Estate of Budney, 197 Wis.2d 948, 541 N.W.2d 245 (Wis. App. 1995).

- One case each from Connecticut,<sup>12</sup> Florida,<sup>13</sup> Idaho,<sup>14</sup> Illinois,<sup>15</sup> Indiana,<sup>16</sup> Maine,<sup>17</sup> Massachusetts,<sup>18</sup> Nebraska,<sup>19</sup> Nevada,<sup>20</sup> New Jersey,<sup>21</sup> Ohio,<sup>22</sup> and Washington<sup>23</sup>

The summary below highlights six overall issues and trends evident from the case review.

### **Issue 1. Extent to Which the Expanded Definition of Estate Is Used to Trace and Recover Assets**

This issue appears as the most litigated controversy in the field, with 15 cases reviewed. State courts in California,<sup>24</sup> Iowa,<sup>25</sup> Minnesota,<sup>26</sup> New Jersey,<sup>27</sup> North Dakota,<sup>28</sup> and Ohio<sup>29</sup> have upheld the state's use of the expanded definition of estate to support tracing and recovery of assets conveyed by medical assistance enrollees to surviving spouses and other beneficiaries. These assets include the following:

- Joint tenancy interests
- Homestead interests
- Revocable remainder interests
- Discretionary trust remainders
- Annuities
- Enrollee's share of community property

Other than in the state of Wisconsin,<sup>30</sup> courts have generally allowed recovery against the estate of the surviving spouse after the death of the surviving spouse, as long as the assets can be traced to an interest that the medical assistance enrollee had in the property at the time of death.

<sup>12</sup> State v. Marks, 239 Conn. 471, 686 A.2d 969 (Conn. 1996).

<sup>13</sup> Estate of Shearer ex rel. Shearer v. Agency for Health Care Admin. 737 So.2d 1229 (Fla. App. 5 Dist. 1999).

<sup>14</sup> Idaho Dept. of Health and Welfare v. Jackman, 132 Idaho 213, 970 P.2d 6 (Idaho 1998).

<sup>15</sup> Estate of Castro, 289 Ill.App.3d 1071, 683 N.E.2d 1255, 225 Ill.Dec. 592 (Ill. App. 2 Dist. 1997).

<sup>16</sup> In re Estate of Cripe, 660 N.E.2d 1062 (Ind. App. 1996).

<sup>17</sup> Estate of Whittier, 681 A.2d 1 (Me. 1996).

<sup>18</sup> Lopes v. Commonwealth, 442 Mass. 170, 811 N.E.2d 501 (2004).

<sup>19</sup> In re Estate of Tvrtz, 260 Neb. 991, 620 N.W.2d 757 (Neb. 2001).

<sup>20</sup> State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 87 P.3d 1045 (Nev. 2004).

<sup>21</sup> Estate of DeMartino v. Division of Medical Assistance and Health Services, 373 N.J.Super. 210, 861 A.2d 138 (N.J. Super. Ct. App. Div. 2004).

<sup>22</sup> Ohio Dept. of Job & Family Serv. v. Tultz, 152 Ohio App.3d 405, 787 N.E.2d 1262 (Ohio App. 9 Dist. 2003).

<sup>23</sup> Matter of Estate of Burns, 131 Wash.2d 104, 928 P.2d 1094 (Wash. 1997).

<sup>24</sup> Bucholtz v. Belshe, 114 F.3d 923 (9<sup>th</sup> Cir.1997); California Advocates for Nursing Home Reform v. Bonta, 106 Cal.App.4<sup>th</sup> 498, 130 Cal. Rptr.2d 823 (Cal. App. 1 Dist. 2003); Bonta v. Burke, 98 Cal.App.4<sup>th</sup> 788, 120 Cal. Rptr.2d 72 (Cal. App. 3 Dist. 2002); Belshe v. Hope, 33 Cal.App.4<sup>th</sup> 161, 38 Cal.Rptr.2d 917 (Cal. App. 5 Dist. 1995).

<sup>25</sup> In re Barkema Trust, 690 N.W.2d 50 (Iowa Dec 10, 2004).

<sup>26</sup> In re Estate of Gullberg, 652 N.W.2d 709 (Minn. App. 2002); In re Estate of Brandt, 1999 WL 319180 (Minn. App. 1999); In re Estate of Jobe, 590 N.W.2d 162 (Minn. App. 1999).

<sup>27</sup> Estate of DeMartino v. Division of Medical Assistance and Health Services, 373 N.J.Super. 210, 861 A.2d 138 (N.J. Super. Ct. App. Div. 2004).

<sup>28</sup> Estate of Bergman v. North Dakota Dept. of Human Services, 688 N.W.2d 187, 2004 ND 196 (2004); Redfield v. Bitterman, 620 N.W.2d 570 (N.D. 2000); Matter of Estate of Wirtz, 607 N.W. 2d 882 (N.D. 2000); Matter of Estate of Thompson, 586 N.W. 2d 847 (N.D. 1998).

<sup>29</sup> Ohio Dept. of Job & Family Serv. v. Tultz, 152 Ohio App.3d 405, 787 N.E.2d 1262 (Ohio App. 9 Dist. 2003).

<sup>30</sup> Matter of Estate of Budney, 197 Wis.2d 948, 541 N.W.2d 245 (Wis. App. 1995).

The determination point “at the time of death” has effectively been stretched to mean the moment before the time of death, in order to capture interests that otherwise cease at death.

## Issue 2. Use of TEFRA and Postmortem Liens

Two reported case involved TEFRA liens. One held that a six-year statute of limitations for recovery ran from the date of the Medicaid enrollee’s death, not from the date the lien was imposed.<sup>31</sup> The other upheld the validity of the state’s TEFRA lien filed against an institutionalized Medicaid enrollee’s home after she was determined to be permanently institutionalized.<sup>32</sup> However, the outcome rested not on the state or federal Medicaid statute but on the state’s fraudulent conveyance statute as applied to the disposition of the individual’s home into a revocable trust.

With respect to postmortem liens, a federal district court opinion from Northern California<sup>33</sup> and cases in state courts in Nevada<sup>34</sup> and Ohio<sup>35</sup> were reviewed. They may be summarized as follows:

- Placement of liens on property of a surviving spouse for Medicaid services provided to the deceased spouse does not amount to an impermissible recovery against the surviving spouse if the state provides proper notice and follows guidelines for removing liens.
- Lien notice to a surviving spouse is important but varies by state.
- One state (Nevada) that has affirmed the necessity of notice to the surviving spouse of the lien also has affirmed a right to have the lien released by any bona fide sale or financial transaction involving the property by the surviving spouse. This includes reverse mortgages, refinancing, and sale of property, but it would not necessarily be limited to these arrangements. This holding decreases the burden of the lien against surviving spouses as well as the effectiveness of asset recovery.

## Issue 3. Retroactivity Issues in the Application of Estate Recovery

Four cases<sup>36</sup> reviewed address how federal and state courts allowed or restricted efforts by states to apply OBRA ’93 recovery authority or newly enacted state recovery statutes to circumstances that predate enactment. In summary,

- The courts have generally limited application of estate recovery statutes to estates of Medicaid enrollees who died *after* the effective date of the authorizing statute.
- The extent of recovery has generally been limited to benefits received *after* the date of the enactment.

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<sup>31</sup> Rocanova v. The Commissioner of the Department of Social Services, 2004 WL 2380972 (N.Y.Sup.), 2004 N.Y. Slip Op. 24402.

<sup>32</sup> Alberico v. Health Management Systems, Inc., 5 P.3d 967 (Colo. App. 2000).

<sup>33</sup> DeMille v. Belshe, 1994 WL 519457 (N.D. Cal. 1994).

<sup>34</sup> State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 87 P.3d 1045 (Nev. 2004).

<sup>35</sup> Ohio Dept. of Job & Family Serv. v. Tultz, 152 Ohio App.3d 405, 787 N.E.2d 1262 (Ohio App. 9 Dist. 2003).

<sup>36</sup> Estate of Wood v. Arkansas Dept. of Human Services, 319 Ark. 697, 894 S.W.2d 573 (Ark. 1995); Matter of Estate of Burns, 131 Wash.2d 104, 928 P.2d 1094 (Wash. 1997); Matter of Estate of Thompson, 586 N.W. 2d 847 (N.D. 1998).

- However, in North Dakota, courts have found an underlying obligation under state law to repay Medicaid whenever benefits are received. A subsequently enacted estate recovery provision that gave the state status as a priority creditor merely modified the mechanism for recovery; thus, its application to services received before its enactment was not deemed retroactive.

#### **Issue 4. Interaction Between Other State Laws and Estate Recovery**

More than a dozen cases have examined particular interactions of estate recovery laws with other state statutes, such as statutes of limitations,<sup>37</sup> spousal support obligations,<sup>38</sup> the application of state homestead exemptions,<sup>39</sup> state inheritance laws and disclaimers of inheritances or devises,<sup>40</sup> and fraudulent conveyance laws.<sup>41</sup>

The intricacies and variations of state law make generalizations particularly difficult, but the following conclusions find support:

- Estate recovery claims are limited by statutes of limitation, which vary by state.
- New York State has affirmed a statutory provision to enforce support obligations to recover costs of Medicaid.
- State homestead and other exemptions exist and may limit estate recovery, but they are very state-specific.
- Inheritance and disclaimer laws can affect estate recovery; again, generalizations are elusive.
- Fraudulent conveyance laws may be used to void certain gift transfers of assets that would otherwise be recoverable and traceable to a beneficiary's estate.

#### **Issue 5. Interpretation of Federally Defined Limitations on Estate Recovery**

Three cases reviewed discuss the disabled child limitations on estate recovery,<sup>42</sup> while four discuss undue hardship waivers.<sup>43</sup> These cases suggest the following propositions:

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<sup>37</sup> Matter of Estate of Hooey, 521 N.W.2d 85 (N.D. 1994); In re Estate of Tvrz, 260 Neb. 991, 620 N.W.2d 757 (Neb. 2001); In re Estate of Cahill, 2004 WL 833671 (Mo. App. W. Dist. 2004); Estate of Shearer ex rel. Shearer v. Agency for Health Care Admin. 737 So.2d 1229 (Fla. App. 5 Dist. 1999).

<sup>38</sup> Matter of Estate of Craig, 82 N.Y.2d 388 (N.Y. 1993); Commissioner of Dept. of Social Services of City of New York v. Fishman, 275 A.D.2d 599, 713 N.Y.S.2d 152 (N.Y.A.D. 1 Dist. 2000); Commissioner of Dept. of Social Services of City of New York v. Spellman, 173 Misc2d 979, 661 N.Y.S.2d 895 (N. Y. Sup. 1997); In re Estate of Vivas, 702 N.Y.S. 2d 31 (N.Y.A.D. 1 Dept. 2000); Matter of Thomma, 648 N.Y.S.2d 453 (N.Y.A.D. 2 Dept. 1996).

<sup>39</sup> Estate of Whittier, 681 A.2d 1 (Me. 1996); In re Estate of Handy, 672 N.W.2d 214, 2003 WL 22889712 (Minn. App. 2004); Estate of Castro, 289 Ill.App.3d 1071, 683 N.E.2d 1255, 225 Ill.Dec. 592 (Ill. App. 2 Dist. 1997).

<sup>40</sup> State v. Marks, 239 Conn. 471, 686 A.2d 969 (Conn. 1996); In re Estate of Cripe, 660 N.E.2d 1062 (Ind. App. 1996); Estate of Kirk, 591 N.W.2d 630 (Iowa 1999).

<sup>41</sup> Estate of Bergman v. North Dakota Dept. of Human Services, 688 N.W.2d 187, 2004 ND 196 (2004); Alberico v. Health Management Systems, Inc., 5 P.3d 967 (Colo. App. 2000).

<sup>42</sup> Shewry v. Arnold, 125 Cal.App.4th 186, 22 Cal.Rptr.3d 488 (Cal.App. 2 Dist., Dec 22, 2004); Matter of Estate of Andrews, 234 A.D.2d 692, 650 N.Y.S.2d 470 (N.Y.A.D. 3 Dept. 1996); Dalzin v. Belshe, 993 F.Supp.732 (N.D. Cal. 1997).

<sup>43</sup> Gorchals v. Wisconsin Dept. of Health and Family Services, 224 Wis.2d 541, 591 N.W.2d 615 (Wis. App. 1999); In re Estate of Cox, 687 N.Y.S.2d 594 (N.Y.Sur. 1999); Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004); Estate of Schiola v. Colorado Dept. of Health Care Policy and Financing, 51 P.3d 1080 (Colo. App. 2002).

- Where both disabled and nondisabled children survive the Medicaid enrollee, the state may recover from neither the disabled nor nondisabled children for the cost of medical assistance benefits received by the parent. Only after the death of the disabled child may recovery be initiated.
- Upon the death of a special needs trust beneficiary, the state may not recover the remaining trust assets where the designated distributee of the trust is the deceased's adult disabled child.
- Implementation, application, notice requirements, and interpretation of undue hardship waiver provisions vary materially by state.

## **Issue 6. Constitutional and Procedural Challenges to Estate Recovery**

Five cases have implicated constitutional issues, raising Tenth Amendment issues regarding the power of the federal government versus state authority,<sup>44</sup> due process inadequacies,<sup>45</sup> issues of failure to give notice of estate recovery and theories of estoppel,<sup>46</sup> applicability of a state's administrative procedure act,<sup>47</sup> and the impact of state tobacco lawsuit settlements on estate recovery. The holdings arising from these cases include the following:

- Implementation, application, and interpretation of undue hardship waiver provisions vary materially by state.
- The Tenth Amendment does not bar the federal government from using its spending power to coerce a state (in this case, West Virginia) to implement an estate recovery program or risk losing federal Medicaid funding.
- States must give preattachment notice and opportunity for a hearing before imposing liens on the property of survivors.
- The common law defense of estoppel has been unsuccessfully asserted as a bar to estate recovery where notice of estate recovery is lacking.
- State administrative procedures acts must be complied with in establishing estate recovery policies and practices.
- State tobacco lawsuit settlements do not affect estate recovery against beneficiaries who may have had tobacco-related illnesses.

Overall, the cases reviewed in these six areas reflect the strains caused by estate recovery implementation; primarily, the efforts of state governments to use the expanded definition of estate contained in the amendments to OBRA '93. Recent cases have focused on the interpretation by states of 42 U.S.C. §1396p(b)(4)—especially its catchall inclusion of “other arrangements” in the expanded definition of estate—to reach more of the assets in which a medical assistance beneficiary had a legal interest at the time of death or, as a practical matter, in the moment just before death. Although the phrase “other arrangements” is ambiguous, most courts have used this terminology to support state claims with regard to recovery from community property, annuities, homestead interests, and revocable remainder interests.

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<sup>44</sup> West Virginia v. U.S. Dept. of Health & Human Services, 289 F.3d 281 (4<sup>th</sup> Cir. 2002).

<sup>45</sup> DeMille v. Belshe, 1994 WL 519457 (N.D. Cal. 1994).

<sup>46</sup> Arkansas Dept. of Human Services v. Estate of Lewis, 325 Ark. 20, 922 S.W.2d 712 (Ark.1996).

<sup>47</sup> California Advocates for Nursing Home Reform v. Bonta, 106 Cal.App.4<sup>th</sup> 498, 130 Cal. Rptr.2d 823 (Cal. App. 1 Dist. 2003).



Furthermore, courts have used this catchall phrase to find a legal interest when there is no longer any common law legal title to property. Thus, the effect of 1396p(b)(4) has been to create a significant change in common law notions of property interests.

Courts have used the expanded definition of estate to support tracing of assets through a surviving spouse's estate. However, tracing is limited to property in which the Medicaid enrollee is shown to have held an interest at the time of death. Again, that legal interest tends to be quite broadly interpreted and frequently open to dispute. Many cases express the view that allowing tracing but delaying recovery until the death of a surviving spouse serves the public policies of prevention of spousal impoverishment while replenishing Medicaid funds for the needy.

There is agreement by state and federal courts on the interpretation of the disability provisions of federal and state estate recovery laws as applied to disabled and nondisabled children. However, since undue hardship waiver rules are promulgated by states, the case law varies on issues of notice and application of waivers. In addition, the specifics of state laws dealing with statute of limitations for claims, enforcement of support obligations, homestead and other exemptions, inheritance, and disclaimers are reflected in the cases but do not represent any generalized trends in estate recovery law.

Courts have held that a lien is not an impermissible recovery that violates federal Medicaid law, but that preattachment notice and a right to a hearing is required when a lien is imposed for the purpose of estate recovery. Significantly, in April 2004, the Supreme Court of Nevada held that a lien on the home of a deceased Medicaid enrollee must be accompanied by "clear and unequivocal notice that the government will release the lien upon the surviving spouse's demand for any bona fide transaction, and accurately reflect the government's interest in the property."<sup>48</sup> This ruling, instead of merely delaying the ability of the state to recover assets from the estate of a surviving spouse, in effect permits the surviving spouse's legitimate financial decisions to trump the state's interest in recovery. However, it remains to be seen whether the Nevada holding will be emulated by other state courts in setting the balance between respecting the property interests of surviving spouses and state fiscal realities.

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<sup>48</sup> State Dept. of Human Resources, Welfare Div. v. Estate of Ullmer, 87 P.3d 1045 (Nev. 2004).

**APPENDIX D**  
**Examples of Estate Recovery Notices**

- **South Carolina Claim Letter with Hardship Waiver Notice and Application**

April 19, 2004

CERTIFIED MAIL

<addressto>

Re: Estate of: <fname> <mi> <lname>  
Case No: <caseno>  
Claim Amount: <eligpaid>

Dear <greeting>:

As required by federal law, the State of South Carolina enacted legislation to implement the Medicaid Estate Recovery Program. This legislation was effective July 1, 1994, and it states that at the time of a Medicaid recipient's death, a claim will be filed against the estate to recover Medicaid expenditures. Only expenditures from July 1, 1994, until the time of the recipient's death will be included in Medicaid's claim.

Estate recovery may be waived in its entirety if the recovery would create an undue hardship for a family member: a wife, husband, brother, sister, son, daughter, or dependent, disabled, blind or minor child.

Hardship Provisions are found in the enclosed copy of the law (C)(1). If you wish to request a waiver of the Medicaid claim under any of the categories in the law, please provide the name of the family member who is residing in the home and their relationship to the deceased Medicaid recipient. All criteria under the category must be met in order to qualify for a waiver. Further instructions on how to request a waiver are attached to the law.

Your request for an undue hardship waiver must be submitted to our office, in writing, within 45 days of the date of this notice. In the event your request for a waiver is denied, you will be advised of your right to appeal our decision. Your written request should be mailed to Estate Recovery Waiver Request, Third Party Liability, Post Office Box 100127, Columbia, South Carolina 29202-9146.

Enclosed is a Creditor's Claim for the amount due to the Department of Health and Human Services for medical expenditures beginning July 1, 1994. Also enclosed is an itemized listing of those medical expenditures. To date, the claim amount is <eligpaid>. Please be advised that medical providers have one year from the date of service to bill Medicaid; therefore, the claim amount is subject to increase as more claims are filed by medical providers and subsequently paid by Medicaid. This amount may also decrease if there is private health insurance which will cover any of these claims.

<prfullname>  
April 19, 2004  
Page 2 of 2

Upon completion of the Inventory and Appraisal Form (this form is obtained from the Probate Court), please forward a copy to our office, unless you are satisfying our claim in full upon receipt of this letter.

If you are not requesting an undue hardship waiver, please remit your payment, in accordance with probate law, and return one copy of this letter with your payment, using the enclosed postage free envelope. Please make your check payable to the Department of Health and Human Services in the amount of <eligpaid>.

If you have any questions, you may contact my assistant, <analystname>, at (803) 898-2932 or me.

Sincerely,

Melinda J. Clark  
Program Coordinator II  
Estate Recovery Department

MJC/<analystinitials>  
<cc>  
Enclosure(s)

**APPENDIX D**  
**Examples of Estate Recovery Notices**

- **New Jersey Estate Recovery Claim Letter with Hardship Waiver Notice**

The Department of Health and Human Services  
Post Office Box 100127  
Columbia, South Carolina 29202  
(803) 898-2932

## Hardship Waiver Request Form

My name is \_\_\_\_\_ . I have been living at

\_\_\_\_\_, \_\_\_\_\_, SC \_\_\_\_\_  
*(Street Address) (City) (Zip)*

for \_\_\_\_\_ years.  
*(Number)*

What was your relationship to the decedent? \_\_\_\_\_  
*Husband, wife, sister, brother, mother, father, son, daughter*

*Check box and send documents requested:*

The home is valued at \$ \_\_\_\_\_ . *(Value must be documented)*

- I have attached the tax receipt from the tax assessor's office showing this value.

**OR**

- I have attached a letter from a local real estate agent stating what the fair market value of the home is as of today's date.

### Probate Court Information

The **total** estate value is \$ \_\_\_\_\_ . *(Includes all assets - checking and savings accounts, insurance, etc.)*

- I have attached a copy of the Inventory and Appraisal to document the entire estate value. *(This form is obtained from your county Probate Court.)*

**I swear or affirm that the information provided on this form is true. I request the Medicaid Estate Recovery Department to grant me an undue hardship waiver.**

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*



State of New Jersey  
DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES  
PO Box 712  
Trenton, NJ 08625-0712  
1-800-356-1561 FAX (609) 588-3046

JAMES E. MCGREEVEY  
Governor

GWENDOLYN L. HARRIS  
Commissioner

ANN CLEMENCY KOHLER  
Director

(Date)

(send to)  
(AZ)  
(AZ)

**RE: Estate of (NAME)**  
**HSP #(HSP)**  
**OUR FILE: (FILE)**

Dear

The New Jersey Division of Medical Assistance and Health Services has recently been informed of the death of (Name). In accord with federal (42 U.S.C. 1396p) and State (N.J.S.A. 30:4D-7.2 and 7.2a) laws the Division is obligated to notify you of the fact that it must assert a claim against the above-referenced estate. The amount sought represents funds expended by the New Jersey Medicaid program for medical and health-related services and supplies received by the deceased on or after age 55. This claim against the estate, which has a priority equivalent to debts and taxes with preference under federal law or the laws of this State, is in the amount of **\$( \$ )**, subject to change. However, please note that the Division's ultimate recovery is limited to the value of the estate. Please insure that all individuals affected by this claim are notified.

Please be further advised that the Division may be filing a lien upon the estate pursuant to N.J.S.A. 30:4D-7.2. A lien is a claim on the property in the estate as security for the payment of a debt. The filing of a lien does not mean that ownership of property automatically reverts to the State, but rather means that any disposal of real property cannot occur without the consent or cooperation of the State. The estate's legal recourse to the lien filing is described at N.J.S.A. 30:4D-7.8.

In order to satisfy the State's claim, a check made payable to the "Treasurer, State of New Jersey," should be forwarded to my attention.

Also, the estate may wish to seek a waiver or compromise of the State's claim for undue hardship reasons. For your convenience, we have enclosed a copy of the Division's procedures regarding hardship waiver/compromise. The estate is eligible to apply for a waiver/compromise if it came into being on or after October 1, 1993. Please note, however, that the waiver/compromise can only apply to Medicaid recovery claims pending on or initiated after March 1, 1995.

If you believe that pursuit of recovery of this amount would result in undue hardship after having carefully reviewed the enclosed procedures, you may apply for a waiver or compromise. If you do, you must include evidence that you believe supports your qualification for such a waiver or compromise within twenty (20) days of your receipt of this letter. Please submit the request and supporting evidence to the undersigned at the above address. The process is explained in detail in the enclosed procedures.

Please contact the undersigned upon completion of your review of the enclosed.

Sincerely,

(MRA)  
Medical Review Analyst

\_\_\_\_\_  
Enclosures

**CERTIFIED MAIL – R.R.R.**



## **PROCEDURES REGARDING HARDSHIP WAIVER/COMPROMISE**

1. Undue hardship will be recognized to exist where the estate subject to recovery is or would become the sole income-producing asset of the survivors, and where the State determines that pursuit of recovery is likely to result in one or more of those survivors becoming eligible for public assistance and/or Medicaid benefits.
2. There shall be a rebuttable presumption that no undue hardship exists if the hardship resulted from estate planning methods under which assets were divested in order to avoid estate recovery.
3. Upon receipt of written notice that the estate is subject to a recovery by the Division, the estate representative shall have 20 days from the date of receipt of the notice to file a request for hardship waiver or compromise of the Division's claim together with evidence in support of the request. If that request is not received by the Division within the time limit specified, the Division will not grant a waiver or compromise based upon undue hardship.
4. Upon receipt of a timely request, the Division will evaluate the request and the evidence submitted, and will notify the applicant in writing of its decision within 45 days from the date the request was received. If the estate representatives wish to contest the Division's decision, a written request for a hearing must be submitted within 20 days from the date of receipt of that decision. This request for a hearing will be forwarded by the Division to the Office of Administrative Law (OAL) which will notify the parties of the hearing date and venue, and will provide a description of the hearing process. Subsequent to the hearing, the formal decisions of the OAL will include a description of the process leading to the final agency decision as well as the appeal rights available to both parties.