Maximizing NonTax Revenue from MaineCare Estate Recoveries

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Maximizing Nontax Revenue from MaineCare Estate Recoveries

Preface

The Maine Heritage Policy Center (MHPC)[1] is a research and educational organization dedicated to promoting free enterprise; limited, constitutional government; individual freedom; traditional American values and public policy solutions that benefit the people of Maine. The Maine Health Care Association (MHCA)[2] is a trade and professional organization for long-term care providers. MHPC and MEHCA contracted with the Center for Long-Term Care Reform (CLTCR)[3]--an independent, non-partisan research institute--to conduct a study of the MaineCare estate recovery program aimed at maximizing the program's generation of nontax revenues for the state. Work on the project began April 1, 2013 with a final report due May 15, 2013.

Center president Stephen Moses interviewed staff of the Maine Department of Health and Human Services (DHHS) and the Iowa Estate Recovery Program during a field visit to Augusta, Maine and Des Moines, Iowa the week of April 15-19, 2013. He also conducted telephone interviews with representatives of seven additional leading estate recovery programs: Idaho, Illinois, Minnesota, New Hampshire, Ohio, Oregon, and Wisconsin. All interviewees are listed in the Appendix. Each study participant will receive an electronic copy of this report. Anyone else may obtain a copy by request to info@centerltc.com or by downloading it from http://www.centerltc.com/reports.htm.

Additional research conducted for this study by Mr. Moses included (1) a review of federal regulations and statutes governing Medicaid estate recoveries; (2) review of the documentary and legislative history of Medicaid estate recoveries since their authorization in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA '82); (3) analysis of findings and development of cost-effectiveness measures to compare the various state programs; (4) estimation of the potential extra state and federal revenue that could accrue to the MaineCare (Maine's name for Medicaid) program if specific legislative and administrative authorities are sought, obtained, and implemented with sufficient staff and training to maximize the program's effectiveness; and (5) development of an "annotated bibliography," provided at the end of this report which gives an overview of the main studies, reports and articles published about Medicaid estate recoveries over the years.

Acknowledgements

We want to thank MaineCare staff who took time away from their heavy workloads to be interviewed for this study. Special appreciation is due the representatives of estate recovery programs in other states whom we interviewed at considerable length by telephone. All are named in the "List of Interviewees" at the end of this report. Ben Chatman, Operations Manager of the Iowa Estate Recovery Program and Bob Fleming, president of the company

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1 The Maine Heritage Policy Center's website is www.mainepolicy.org.

2 The Maine Health Care Association's website is www.mehca.org.

3 The Center for Long-Term Care Reform's website is www.centerltc.com.

that operates the program, gave generously of their time in person, providing information that was invaluable to the conduct and completion of this report.

Executive Summary

MaineCare is Medicaid in Maine, a means-tested public assistance program, partially funded by the state and federal governments. It is the dominant payer for institutional and home and community-based long-term care in the state.

MaineCare, especially its long-term care component, is a huge expense to the state budget, at risk of crowding out expenditures for other critical state programs, facts explained and documented in our earlier report titled "The Maine Thing About Long-Term Care Is that Federal Rules Preclude a High-Quality, Cost-Effective Safety Net."[4]

Federal law exempts substantial assets from Medicaid's resource limits, such as for example, home equity up to a minimum of $536,000. But federal law also mandates that state Medicaid programs recover the cost of care provided from the estates of deceased recipients or from the estates of their surviving exempt relatives.

Thus, although Medicaid is intended as a health and long-term care safety net for the poor, it has also become the predominant funder of most expensive long-term care for the middle class and often for the affluent as well. Without strong estate recovery, state Medicaid programs become free inheritance insurance for baby-boomer heirs.

MaineCare operates an inexpensive and quite effective estate recovery program that returns an average of $6.7 million per year in state and federal funds to the state which can be re-invested in the program to benefit citizens who need help with the catastrophic cost of long-term care in the future.

By interviewing experts in eight of the leading Medicaid estate recovery states, we identified numerous ways in which MaineCare might increase its estate recoveries by as much as double or triple the amount of current recoveries to a total of $13.4 million or $20.1 million, respectively.

To achieve such dramatic results, MaineCare would need to seek new state statutory authorities such as an expanded definition of "estate," the ability to place liens on real property during a recipient's lifetime, and elimination of the current "family allowance" which prevents recovery from estates with less than $10,000 in most cases.

Operationally, MaineCare would need to invest more in its estate recovery unit to reduce its cost-effectiveness ratio from $25 in recoveries for each dollar of cost to something more closely approaching a ratio that maximizes total recoveries, perhaps $10 to $15 in recoveries per dollar of cost. With additional staff resources, the MaineCare estate recovery unit could pursue all of the best practices listed in the "Recommendations" section below.

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4 Stephen A. Moses, "The Maine Thing About Long-Term Care Is that Federal Rules Preclude a High-Quality, Cost-Effective Safety Net," Center for Long-Term Care Reform, Seattle, Washington, November 2012; http://www.centerltc.com/pubs/Maine.pdf.

MaineCare's long-term care program performs a valuable service for Mainers, enabling them to obtain expensive long-term care when they need it without financial devastation. The program's federally mandated *quid pro quo* is that beneficiaries of the state's and federal government's largesse repay the program from their estates.

That is the moral high ground MaineCare's estate recovery program occupies. Citizens, policy makers and law makers who support and encourage the program help to ensure that MaineCare will continue to provide a long-term care safety net for Mainers without busting the state's budget.

Introduction

Medicaid is a means-tested public assistance program established in 1965 by Title XIX of the Social Security Act. According to a 1988 report of the Inspector General of the U.S. Department of Health and Human Services, Medicaid's original authorizing legislation:

> severely limited State authority to restrict asset transfers, impose liens, or recover the cost of care from recipients. For many years, anyone in need of long-term care could give away everything and qualify for nursing home institutionalization paid for by Medicaid without any concern for repayment.[5]

Unsurprisingly, that policy resulted in rapidly increasing costs for Medicaid's long-term care component. Congress and President Reagan responded in 1982 by enacting a three-pronged plan intended, according to official legislative history, to

> assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the cost of supporting the individual in the institution.[6]

This legislation, TEFRA '82,[7] authorized states to (1) penalize asset transfers done for the purpose of qualifying for Medicaid; (2) place liens on real property to secure its value in a recipient's estate; and (3) recover the cost of benefits correctly paid from the estates of deceased recipients and from the estates of their surviving spouses or other exempt relatives. The Inspector General's 1988 report, cited above, explains this legislation in detail including the statutory restrictions, which are many, on its application in practice.

Over the next 25 years, Congress and three Presidents strengthened the Medicaid program's ability (1) to discourage asset transfers and other forms of artificial self-impoverishment; (2) to secure property for later recovery of program costs; and (3) to recover from estates. In

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5 Office of Inspector General, US Department of Health and Human Services, "Medicaid Estate Recoveries: National Program Inspection," June 1988: https://oig.hhs.gov/oei/reports/oai-09-86-00078.pdf.

6 United States Code, Congressional and Administrative News, 97th Congress—Second Session— 1982, Legislative History (Public Laws 97-146 to 97-248), vol. 2 (St. Paul, MN:, West Publishing), p. 814, cited in U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy, "Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care," Policy Brief no. 2, April 2005, p. 10.

7 The Tax Equity and Fiscal Responsibility Act of 1982.

brief, President Reagan signed legislation in 1988 that made asset transfer penalties mandatory, while at the same time preventing "spousal impoverishment" by protecting sizeable amounts of income and assets for community spouses of institutionalized Medicaid recipients. In 1993, President Clinton signed legislation making estate recovery mandatory and asset transfer penalties longer and stronger. In 2005, President George W. Bush signed legislation further strengthening asset transfer penalties and placing the first cap ever on Medicaid's home equity exemption. These laws and regulations have been sustained repeatedly by state and federal judiciaries.

We describe this series of laws and their impact in more detail below. The point here is to indicate that all three branches of government have for decades agreed upon and repeatedly supported the fundamental purpose of Medicaid's long-term care program, *i.e.*, to provide a safety net for people in need. They have gradually strengthened Medicaid's authority to prevent intentional self-impoverishment to qualify for the program, to hold exempt property in the recipient's possession during Medicaid eligibility, and to recover the cost of care from recipients' and surviving relatives' estates for the purpose of reimbursing the program and taxpayers for the cost of their care.

Despite these clear government intentions and actions, however, Medicaid long-term care eligibility remains very generous for everyone and is vulnerable to abusive, though legal, techniques that expand coverage even to people with substantial wealth. We described the impact of federal rules and restrictions governing MaineCare's long-term care eligibility standards in our report last Fall titled "The Maine Thing About Long-Term Care Is that Federal Rules Preclude a High-Quality, Cost-Effective Safety Net."[8] This report concluded that because of federal limits on MaineCare's ability to target the program's scarce resources to needy people, especially the federal "maintenance of effort" requirement,[9] the best way Maine can protect and sustain its long-term care safety net for people in need is to enhance its estate recovery program which is less constricted by federal rules than is general program eligibility.

Background

When Congress and President Johnson established Medicaid in 1965, no one expected long-term care to consume a large portion of the program's resources. Initially, Medicaid had no federal limits on transferring assets to qualify for assistance nor any explicit authority to recover benefits from deceased recipients' estates. From the beginning, Medicaid benefits were limited mostly to nursing home care, which had the effect of controlling costs by discouraging utilization.

Before long, however, families realized that instead of taking care of infirm elders at home or paying privately for home care or assisted living, they could place their loved ones in the security of a nursing home at public expense. More and more people did so. Medicaid nursing home costs skyrocketed. Early attempts to provide private home and community-

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8 *Op. cit.*

9 The "Maintenance of Effort" rule refers to the fact that the Patient Protection and Affordable Care Act of 2010 (PPACA, AKA health reform or "ObamaCare") prohibits state Medicaid programs from making their eligibility rules more restrictive than they were at the date of the law's enactment on March 23, 2010.

based care and long-term care insurance languished, because no one had an incentive to plan ahead or pay privately for long-term care. By the mid-1970's, Medicaid nursing home costs were spinning out of control. The federal and state governments implemented Certificate of Need (CON) programs to restrict bed availability on the principle that "we cannot pay for a bed that does not exist."

With bed supply limited, however, price shot up to compensate. So the government also implemented price controls thus giving rise to the differential between Medicaid and private-pay nursing home rates. With private pay rates high and getting higher, however, the public put pressure on Congress and state legislatures to ease Medicaid eligibility standards. Consequently, more and more people with higher and higher incomes and assets were able to qualify for Medicaid benefits. A growing cottage industry of Medicaid estate planners came into being to assist them with artificial self-impoverishment. Medicaid program costs continued to increase rapidly.

TEFRA '82

In 1982, Congress stepped in to rectify the situation with the Tax Equity and Fiscal Responsibility Act. TEFRA '82 authorized states to control asset transfers, to place liens on sheltered property, and to recover from recipients' estates. The idea was to ensure that seniors could obtain necessary care despite their low cash flow and without forcing them to liquidate their home equity while simultaneously improving Medicaid's fiscal crisis by requiring them to repay benefits from their estates. Numerous studies in the late 1980's demonstrated, however, that TEFRA's voluntary approach was failing. Medicaid nursing home census and program costs continued to increase unabated.

Gradually, as Medicaid expenditures spiraled upward, Congress took action to strengthen the original TEFRA authorities. In 1985, the Consolidated Budget Reconciliation Act (COBRA '85) tightened eligibility policy to discourage "Medicaid qualifying trusts." In 1988, the Medicare Catastrophic Coverage Act (MCCA '88) made transfer of assets restrictions mandatory and extended the "look back" period[10] from 24 to 30 months. Ironically, however, MCCA '88 opened as many "loopholes" as it closed and therefore contributed to the growth of Medicaid estate planning techniques which led directly to explosive new increases in program costs. The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) was President Clinton's and Congress' attempt to get these problems under control once and for all.

OBRA '93

The Omnibus Budget Reconciliation Act of 1993 closed some eligibility loopholes and required states to pursue recovery from recipients' estates. Specifically, OBRA '93 extended the transfer of assets look-back period from 30 to 36 months (60 months for trusts), eliminated the 2.5-year cap on ineligibility penalties for uncompensated asset transfers, ended multiple or pyramid divestment, plugged the joint account divestiture loophole, further constricted the use of certain trusts to qualify for Medicaid nursing home benefits, and

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10 "Look back" refers to the period of time before someone applies for Medicaid that the state is required to consider whether property transfers were made for the purpose of qualifying for assistance which would make them subject to a "transfer of assets" eligibility penalty..

extended the divestiture penalty to transfers of income (as well as assets) and to noninstitutionalized recipients.

OBRA '93 not only required all Medicaid programs to pursue estate recoveries, but it also empowered states to define "estate" more broadly than before in order to encompass assets such as life estates, joint tenancies, and living trusts that previously evaded recovery. On the other hand, the law set no standards with regard to estate recovery and left states wide latitude in how aggressively to pursue this new revenue source.

With the passage of OBRA '93, states finally had the authority and the mandate to resolve the key problems which have plagued Medicaid long-term care financing since the program's founding. By discouraging asset divestiture and strongly enforcing liens and estate recoveries, states could stem the growth in long-term care costs while saving or expanding relatively generous eligibility criteria. The risk of liens and estate recoveries should encourage seniors and their heirs to plan ahead by purchasing private insurance and paying privately for home, community-based, and nursing home care. Gradually, states could return Medicaid to the poor people whom the program was originally intended to serve as more and more people paid privately for their own care and relied less on public assistance. Such were the goals articulated in the 1988 report cited earlier by the Inspector General of the U.S. Department of Health and Human Services, titled *Medicaid Estate Recoveries*,[11] which contained the recommendations that became law in OBRA '93.

After OBRA '93

Unfortunately, OBRA '93's requirements with regard to tightening long-term care eligibility and requiring estate recovery were not fully implemented by the states, enforced by the federal government, nor publicized by the media. The public continued to ignore long-term care risks and costs until they needed care at which point qualifying for Medicaid remained easy due to the program's generous income and asset limits. The Medicaid planning bar found creative ways to circumvent Medicaid estate recovery. Medicaid's long-term care costs continued their relentless ascent.

So, Congress and President Clinton stepped in again with legislative fixes. The Health Insurance Portability and Accountability Act of 1996 (HIPAA '96) made it a crime to transfer assets for the purpose of qualifying for Medicaid long-term care benefits. Senior advocates dubbed that statute the "throw Granny in jail law." They prevailed. Congress repealed that part of HIPAA '96 in the Balanced Budget Act of 1997 (BBA '97) and replaced it with the "throw Granny's lawyer in jail" mandate, which made it a crime for financial advisers to recommend asset transfers in exchange for a fee as a means to qualify for Medicaid. This rule had a severe dampening effect on Medicaid planning until it was adjudged unenforceable and presumably unconstitutional because it held attorneys and other financial advisers legally culpable for recommending the practice of asset transfers to qualify for Medicaid, which were legal again after the "throw Granny in jail law" was repealed.

So Medicaid costs continued to rise. The public remained complacent about long-term care risks and costs. And Medicaid stayed the dominant payer for most long-term care. As the

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11 *Op. cit.*

post-Internet-bubble recession plunged state and federal budgets into the red in the early 2000s, Congress and President George W. Bush made yet another attempt at taming Medicaid long-term care expenses legislatively. The Deficit Reduction Act of 2005 (DRA '05) extended the Medicaid transfer of assets look-back period to a full five years, further constricted eligibility loopholes and put the first cap ever on exempt home equity, starting at $500,000 or $750,000 at state legislatures' discretion and rising annually with inflation.

Although Medicaid long-term care expenditure increases have moderated somewhat in the years since passage of DRA '05, analysts and policy makers remain seriously concerned that the on-coming demographic wave of aging baby-boomers will overwhelm the poverty program's ability to fund most expensive long-term care in the United States. Statutory and regulatory tools are in place to encourage early and responsible long-term care planning which could lead most Americans to prepare to pay privately for such care and avoid dependency on Medicaid. The challenge has become implementing those tools in such a way as to encourage private long-term care planning. Medicaid estate recoveries, as the remainder of this report explains and elaborates, is a key to achieving that objective. Estate recoveries are more important than ever now because of the Patient Protection and Affordable Care Act's (PPACA '10) maintenance of effort rule which prevents state Medicaid programs from tightening long-term care eligibility rules within otherwise allowable federal limits.

Moral Authority

The moral authority behind the Medicaid program incentives created by TEFRA '82, COBRA '85, MCCA '88, OBRA '93, and DRA "05 is the following:

> We have very limited dollars available for public assistance. We must take care of the truly poor and disadvantaged first. The middle class and well-to-do should pay privately for long-term care to the extent they are able without suffering financial devastation. Prosperous people who rely on Medicaid for long-term care should reimburse the taxpayers from their estates before giving away their wealth to heirs. Seniors and their heirs who wish to avoid such recovery from the estate should plan ahead, use their own financial resources first (including home equity by means of reverse mortgages) to pay for home and community-based services and/or purchase quality private long-term care insurance to finance their care.

The challenge of diverting middle class and affluent people away from Medicaid dependency and toward personal responsibility, early planning and private payment for long-term care is a topic for another paper. We focus here on estate recovery: what it is, how to do it, and best practices in the leading estate recovery states.

Unfortunately, not everyone accepts the need for and the morality of Medicaid estate recovery. Medicaid planning attorneys, who are compensated for helping affluent people protect their wealth from the program's income and asset spend down requirements, often oppose recovery from estates and help their clients legally avoid it. They voice vehement opposition. For example:

> Estate recovery is a Medicaid 'death tax' imposed only on the elderly. The program has been referred to as 'picking the bones of the poor,' and 'sucking the last ounce of blood from the corpse.'[12]

Senior advocates, especially the AARP's Public Policy Institute, have criticized the estate recovery mandate and program less crudely, but often. AARP's position is fully covered in the reports and articles cited in the "Annotated Bibliography" below. Critics' main concerns are that states fully and fairly implement the mandatory notice and hardship waivers provided for in the authorizing legislation so that Medicaid applicants, recipients, and families are made aware of this liability and treated equitably at every step of the process. All Medicaid estate recovery staff we've interviewed over the years strongly agree.

Over time, the vehemence of estate recovery critics has moderated as fiscal problems have increasingly plagued Medicaid's ability to fund access to quality long-term care services in the most appropriate settings. Most accept the basic moral principle that Medicaid should protect the neediest first and that others, whose home equity and other exempt assets are protected while they receive long-term care assistance from Medicaid, should repay the program after they no longer need the previously exempted assets. Once that principle is accepted, the moral high ground of Medicaid estate recoveries is solidly established and unassailable.

Medicaid Estate Recoveries in General

The key to successful estate recoveries is KISS: "Keep it simple, stupid." The idea is to find estates to recover and to recover them as inexpensively and efficiently as possible. (Liens are merely a sub-category of recovery to which the same principles apply.) The first step is to find out quickly when a Medicaid nursing home recipient dies. Years of practical experience have shown that the best source of this information is the local eligibility worker and/or the personal representative of the recipient. The next step is to ascertain whether Medicaid has made sufficient payments on a case to warrant recovery efforts. If not, no further effort is necessary. If so, the final step is to contact the personal representative of the deceased recipient, determine whether or not a recoverable estate exists, and initiate the recovery process.

In other words, one begins with a manageable amount of information--approximately one-third of all elderly Medicaid nursing home recipients die each year--and proceeds by an orderly process of elimination and prioritization to target staff efforts onto the most recoverable cases. Once this process has been refined and perfected manually, certain elements of it can be automated cost-effectively. The secret, however, is to start small, experiment, adopt procedures that work, drop those that do not, work the best and easiest cases first, measure progress in actual dollars recovered, and add staff and budget proportionately to the program's actual success.

Research

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12 Jeffrey A. Marshall, CELA, "Medicaid Estate Recovery - A Medicaid Death Tax," September 17, 2010: http://marshallelder.blogspot.com/2010/09/medicaid-death-tax.html.

The first step to initiate a successful lien and estate recovery program is to capture the latest experience and best practices of successful recovery programs around the country. Visit Oregon, California, Iowa and Wisconsin, for example, to analyze and compare their latest programs, state statutory authorities, forms, procedures, automation approaches and controls. Contact other successful state programs by telephone to glean every possible advantage in the rapidly evolving estate recovery technology. We examine best practices in eight leading estate recovery states and compare them to MaineCare estate recovery methods and procedures in the section below titled "Findings."

The second step is to (1) review and analyze the Medicaid eligibility determination and information collection and verification process in your state; (2) examine the availability of vital statistics including death records and property ownership, value, and transfer records; and (3) study the process for filing liens, placing estate claims, and enforcing liabilities.

Design

The next step is to design a program that takes advantage of lessons learned by other states, provides for experimentation with alternative techniques, adapts quickly and effectively to unique circumstances or problems in your state and maximizes early recoveries through prioritization and error-prone profiling. Lien and estate recovery programs must perform three basic functions: (1) identify assets, (2) track and preserve assets, and (3) recover assets when available.

Identify Assets

No one can recover an estate that does not exist. Resources transferred or divested in order to qualify for Medicaid are unavailable to lien or estate recovery. The state must develop a strategy to discourage the use of asset transfers to qualify for public assistance. The state should seek advice and assistance on how to control divestiture in order to assure retention of assets for later recovery. The state should also explore ways to enhance adult protective services, discourage financial exploitation of the elderly, recover expropriated resources for later estate recovery, and protect and preserve perishable assets (such as houses) for later recovery at no additional cost to the state as part of the program.

Assets retained or sheltered upon qualification for Medicaid must be identified. The best source of information on income, assets and resources--exempt and otherwise--is the Medicaid eligibility process. Eligibility workers and case records are most likely to have the necessary information. Unfortunately, however, overwork, complex eligibility rules, and heavy turnover in most states severely limit workers' ability to obtain, record, update, and supply accurate data. The state must develop methods to minimize reliance on case workers for this information by means of error-prone profiling and outside verification. For example, the Health Care Financing Administration's *Medicaid Estate Recoveries Study*[13] found a direct correlation between level of income of Medicaid nursing home recipients and the probability of owning both reported and unreported assets. The state should develop training, including video and audio programs, on ways to improve property identification techniques

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13 Health Care Financing Administration, Region X, "The Medicaid Estate Recoveries Study, Volume 1: Estate Recoveries in the Medicaid Program," draft, November 1985, http://www.centerltc.com/mer_study.pdf.

without increasing workload. Ironically, a strong central estate recovery unit can actually reduce workload for field eligibility staff if they save time by referring complex legal issues related to property identification, tracking and retention to the specialized experts.

The final stage of property identification occurs after a Medicaid nursing home recipient dies. If the state has not expended benefits for the decedent in an amount sufficient to warrant a recovery effort, the case should be dropped. If Medicaid expenditures have been significant, however, but the case record indicates no assets or estate, some further verification is worthwhile. Often, a review of county assessor or recorder information will uncover previously unreported property. It is critical, however, to check records in the county of the recipient's residence prior to institutionalization and not only in the county of the decedent's final residence, *i.e.* the nursing home, assisted living facility or personal home. This will often require out-of-state verifications as when an ailing parent enters a nursing home in a different state to be near an adult child.

Track and Preserve Assets

Whether identified at eligibility determination or not, assets must be retained by the recipient during the period of Medicaid eligibility if they are ever to contribute toward estate recoveries. Any successful estate recovery program must institute effective systems to track and preserve assets. This entails ensuring that improper asset transfers do not occur during the period of eligibility and that real estate or other recoverable assets do not deteriorate while the recipient is on assistance. (The latter problem becomes very serious when lien and estate recovery liability begins to approach and then exceeds the value of an encumbered property. At this point, families have little incentive to continue maintaining the house and paying property taxes.)

The most effective way to track property is through a formal lien. If eligibility information indicates ownership of a home, several verifications must be made before a lien can be placed. For example: (1) no lien is allowed under federal law (Section 1917a of the Social Security Act) except in the case of certain institutionalized individuals who cannot reasonably be expected to return home; (2) nor is any lien allowed if a spouse, minor or disabled child, or sibling with an equity interest remains in the home. Furthermore, any lien placed must dissolve if the recipient is discharged from the nursing home and returns home.

If all of these requirements are met, the recipient must be advised of the intent to file the lien and must be allowed the opportunity to appeal. If no hearing is requested or the state prevails, a lien is filed with the appropriate county registrar of deeds. The value of the encumbrance is equal to the amount of benefits paid by Medicaid for care of the recipient. Once the lien is filed, the encumbered property cannot be sold or transferred without satisfaction of the state's claim. Usually, a title search preliminary to sale discovers the Medicaid lien and leads to notification of the lien holder (the state or contractor representative). Then the state computes the precise value of services rendered to the recipient up to the date of sale, receives a check at closing, and releases the lien.

The best way to preserve and protect real estate assets during a Medicaid recipient's nursing home eligibility is to rely on family members with an interest in the residual value of the estate after Medicaid recovery. If no such value remains, private real estate companies can be retained for a percentage of rental income to maintain the property. If financial abuse by

relatives or others is suspected, the best approach is to petition the court to appoint a conservator to represent the property owner's and the Medicaid program's interest in the property. Private attorneys retained on contingency and appointed as conservators by the court can supervise the management of property. They can also intercede to reverse illegal asset transfers, partition undivided property, invade manipulative trusts, and relitigate abusive divorce decrees.

Recover Assets

Recovering deceased recipients' assets is the final stage in an effective Medicaid recovery program. There are many steps and options in this process. For example, recoveries may occur before (as in the case of liens) or after the recipient's death; they may involve a current or former recipient; they may occur long after a recipient's death from a spouse's estate; they may involve fully liquidated assets or accounts receivable, etc.

TEFRA lien recoveries usually occur while the recipient is still living. The process of placing, tracking and recovering from liens was covered above. One option to liens when estate recovery liability exceeds the property value, is for the recipient to assign title to the state in consideration for past, present and future care. The property is then sold and the proceeds held in trust against the recovery liability.

Estate recoveries occur after--sometimes long after--a recipient's death. Many factors enter into effective recovery from estates. For example: prompt notification of a recipient's death is critical. All states have deadlines, sometimes six months or less, within which probate claims must be filed. State Medicaid programs have experimented with numerous methods of quickly learning about the deaths of current recipients, past recipients, and surviving spouses of recipients. These methods include reporting by field eligibility workers; searching legal notices, court records, vital statistics or other public information sources; computer generated death or probate lists; mandatory notification by personal representatives, attorneys, or nursing homes; clipping services; or consultation and cooperation with probate courts or registers of wills. Whichever method is quickest and most effective after testing all of the alternatives should be used. To delay identification of recoverable estates until after an estate is filed, however, according to one state expert, is like "waiting for the gun to go bang before you duck." It may be too late to protect the state's claim. Speed and timeliness are essential.

The next step in the estate recovery process is to determine whether the state has paid sufficient claims on the decedent to warrant a recovery effort. This is a simple process of reviewing state Medicaid expenditure records on the case. If significant benefits have been paid, the next step is to determine whether the state is eligible to file a claim on the recipient's estate. Under OBRA '93, the state may seek recovery only under certain circumstances. For example, no recovery is allowed until after the death of the recipient's spouse nor while a minor or disabled child still survives. If recovery from the recipient's estate is permissible under law, the next step is to determine whether or not the estate will be probated. This is learned most easily by contacting the personal representative and attorney of the deceased recipient. Failing this, a clipping service for public notices and a data match with the probate courts are valuable back-up systems.

If the estate is to be probated, the state's claim should not be filed with the court until the last possible moment in order to maximize the state's total claim as the costs of the last illness continue to trickle into the Medicaid program. If the estate is not to be probated, recovery is still possible. Most states have special "small estate" procedures that do not require formal probate. One example is an "affidavit of claiming successor." Even if no such informal process applies, heirs of the recipient may be willing to negotiate a settlement. Recovery staff should cultivate a reputation for fairness and reasonability in negotiating with heirs.

Some states have model best practices for recovering small estate accounts. For example, Oregon and Wisconsin require every nursing home and financial institution in the state by law to remit all recipient accounts to the Medicaid program immediately upon a recipient's death. Fifteen to 20 percent of their total recoveries derive from this single source. Average estate recoveries in successful recovery programs are often $5,000 or less per case. Thus, small estates are a very critical resource.

The final step in the recovery process is to file the state's claim with the probate court. This is usually a routine process involving nominal paperwork and fees. Finally, the Medicaid estate recovery program waits for the probate process to run its course. This may take six months to a year.

If recovery cannot be effected upon the death of the recipient because of a surviving spouse, or if the recipient terminates Medicaid eligibility before dying, the state must have a way to learn when the surviving spouse or former recipient dies in order to effectuate recovery at that time. Two procedures are critical in such cases. First, the estate recovery program must have a means to track death records and probate filings and must periodically match lists of surviving spouses and former recipients with those records. This is necessary in order to be able to collect on those estates. Second, the state should adopt a broad definition of "estate" as authorized in OBRA '93 to include "joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." Otherwise, the state may lack authority to collect spousal recoveries or to recover assets held in joint tenancy (due to a Ninth Circuit Court of Appeals decision limiting recoveries to formal probated estates in the absence of a broader definition of "estate" officially established under OBRA '93.)

Special Considerations

(1) Whether, how, and under what circumstances to track and recover from surviving spouses of deceased Medicaid recipients are critical questions. (This is a major recovery source based on Oregon's actual experience and the GAO's projections for California.[14]) Recovery from former recipients is a similar issue.

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14 "Because about one-third of Medicaid nursing home residents who own a home have a spouse living in the community, a significant portion of potential recoveries is lost unless a state authorizes recoveries from the estates of surviving spouses. For example, GAO estimates that California will recover about $15.8 million from the estates of Medicaid recipients admitted to nursing homes in 1985 under its existing recovery program. But it could recover an additional $11 million if the state enacts legislation to authorize recoveries from the estates of the surviving spouse when he or she, in turn, dies." General Accounting Office, "Recoveries from Nursing Home Residents' Estates Could Offset Program Costs," HRD-89-56, March 7, 1989, p. 4; http://www.gao.gov/assets/150/147459.pdf.

(2) How to define estates so that they include more than just formal probates is a critical issue as explained above.

(3) Obtaining special standing for the state in probate proceedings so that the state's claim comes before other creditors can be very important.

(4) Mandating notification of probate by personal representatives and attorneys has proven to be an extremely valuable recovery tool in several states.

(5) Getting the question of whether or not the deceased was ever a Medicaid recipient printed on the formal application to the court for probate enhanced recoveries in Wisconsin.

(6) Most estate recovery programs do not maintain accounts receivable. They require all estate assets to be liquidated during probate. This may cause enormous losses as mortgage contracts and hard assets are sold at deep discount to cash them out. Accepting deeds, contracts and hard goods creates an asset management problem but can be very beneficial to the state financially. For example, in the 1980s Oregon generated over $150,000 per month in recoveries from accounts receivable totaling approximately $7,000,000. With proper controls, an asset retention and management system of this kind could generate comparable financial benefits for any state.

(7) Most Medicaid estate recovery programs do not collect and liquidate hard assets such as automobiles, furniture, fire arms, etc. Such personal belongings are exempt from consideration as resources during a Medicaid recipient's eligibility, but do become available assets for estate recovery. If such property becomes part of the probated estate and is liquidated, estate recovery will occur. It may or may not be cost effective for the state to seek recovery of hard assets otherwise. Storage and sale of such goods is complicated. Ensuring that hard assets of significant value, such as antiques, expensive jewelry (except wedding rings) and other valuables, are identified and recovered is important, however, to ensure that Medicaid is not viewed by heirs as a way to avoid long-term care expenses while protecting significant wealth. One approach is to retain estate sale managers on contingency to liquidate estates and enable recovery to reimburse the state. When conflicts arise between the recovery program and claiming heirs, releasing the state's claim to the value of personal belongings can be a useful bargaining chip.

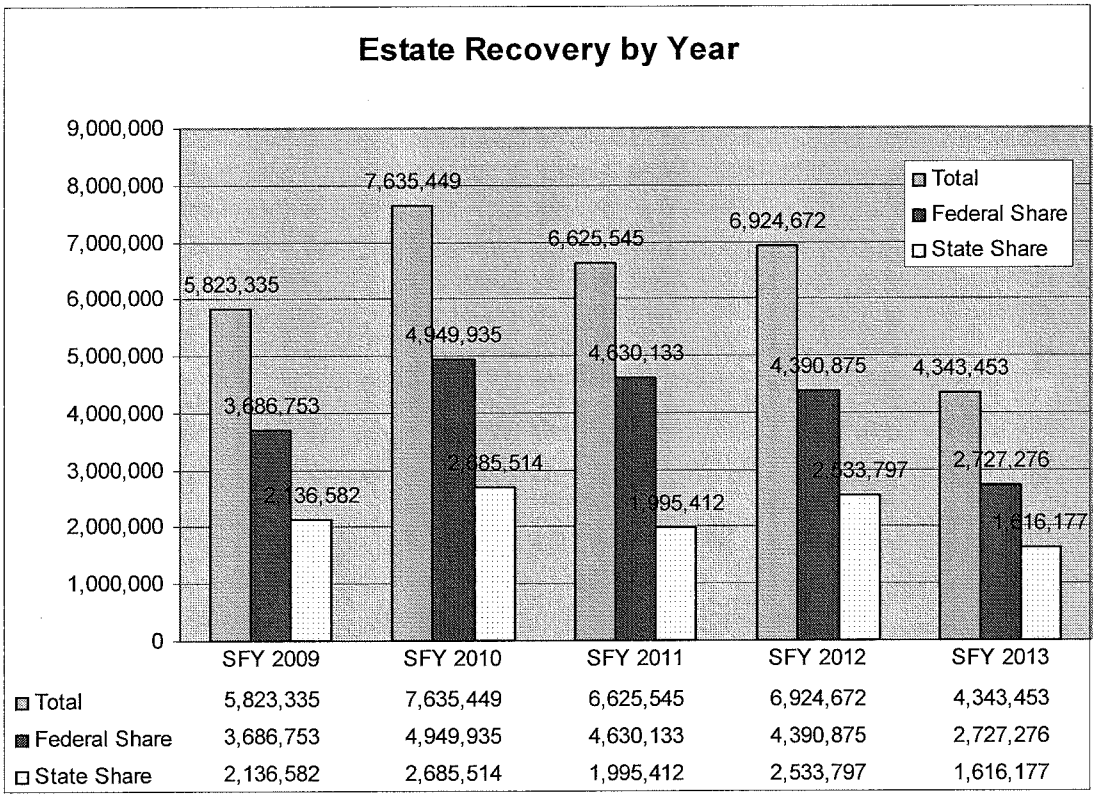
(8) Heir finding services are very expensive, but they operate on contingency and generate recoveries that would otherwise be lost entirely. Heir finders locate missing heirs to substantial bequests. Occasionally, such missing heirs are found among deceased Medicaid long-term care recipients. If the state is willing to give up a substantial percentage of such "found money" in fees to the heir finder, the remainder contributes to estate recoveries.

Accounting and Accountability

Finally, the state must develop an air tight system to keep track of and report all work performed, estates identified, monies collected, other accomplishments, problems encountered and how they were resolved. Full accounting and accountability is critical to demonstrate the estate recovery program's contribution to the funding and operation of the Medicaid program and to justify staffing and program growth in order to maximize this nontax revenue potential.

The MaineCare Estate Recovery Program

Maine already has a lean and effective program to recover from the estates of deceased recipients. The MaineCare estate recovery unit consists of a supervisor, two full time reimbursement specialists, a medical care coordinator as support staff, and occasionally a half-time clerical person. The estimated annual cost of the program is $272,673, including salaries, benefits and a substantial imputed amount to cover the unit's share of the MaineCare program's overhead, such as rent, utilities, and maintenance. Average annual recoveries for the past four state fiscal years (SFY 2009-2012) were $6,725,000. MaineCare's estate recovery cost-effectiveness ratio (recoveries divided by the cost of recovery) is therefore nearly 25 to one. In other words, the State of Maine recovers $24.66 for every one dollar it invests in the cost of recovery. Note that although these total recoveries include state and federal dollars, and the federal portion must be reimbursed to the U.S. Government, Maine can recapture the federal portion by reinvesting the state's share in the MaineCare program and receiving again the appropriate level of federal matching funds. The following chart and table show MaineCare's estate recoveries for the current state fiscal year through the end of the third quarter on March 31, 2013 and for the past four state fiscal years. Given that fourth quarter recoveries are usually high, the estate recovery unit is on a pace to approach or meet average annual recoveries for SFY 2013.



	SFY 2009	SFY 2010	SFY 2011	SFY 2012	SFY 2013
Total	5,823,335	7,635,449	6,625,545	6,924,672	4,343,453
Federal Share	3,686,753	4,949,935	4,630,133	4,390,875	2,727,276
State Share	2,136,582	2,685,514	1,995,412	2,533,797	1,616,177

With such a small staff, the MaineCare estate recovery program prioritizes acutely and works only the most promising cases. For example, by state policy, cases with a surviving child of any age are not referred for estate recovery unless eligibility records indicate they own

property worth at least $10,000. This threshold reflects the state's "family allowance" policy which exempts the first $7,000 of an estate from recovery whenever a deceased MaineCare recipient has a surviving child plus a factor of $3,000 reflecting the likelihood that the cost of recovery would be at least that much. On average, 466 MaineCare recipients die per month. Of these, 375 on average had less than $10,000 so they would not be referred for estate recovery if, as most do, they have a surviving, usually adult, child. Approximately 15% of cases involve a surviving spouse or disabled child, which cases federal law does not allow estate recovery to pursue until after the spouse's or child's own death, which later recoveries the Maine program does not pursue. MaineCare recovers only benefits that were paid to recipients age 55 and older, although federal law allows recovery from recipients of any age if they reside in a nursing home. MaineCare does not recover eligible expenses paid to cover "dual eligibles'" Medicare deductibles and co-insurance. In the end, the MaineCare estate recovery opens approximately 50 new estate recovery cases per month. The unit maintains no backlog so it closes roughly the same number of cases per month.

The MaineCare estate recovery unit is notified almost instantaneously of a recipient's death and potential recovery as there is a report built into the state's computer system. If a decedent has no surviving child or has assets in excess of $10,000 and no other characteristic disqualifying the case for estate recovery, the unit logs in a referral. Then it waits six months to see whether or not the family will probate the estate. If probate is opened, the unit is notified by one or more quite reliable sources including attorneys and courts that are required to make such notification, and the State of Maine files its claim. If no probate is opened after six months, the estate recovery unit sends a letter to the decedent's personal representative asking whether or not the family intends to open probate. Only about 10% of these initial letters receive a reply. The unit follows up with further letters intensifying in urgency. Estate recovery is much less expensive and time consuming if the family probates the estate. But if it doesn't, the estate recovery unit can open probate and make its claim. The unit has one attorney who performs this function on behalf of the state, an arrangement with which both sides are very satisfied. MaineCare pursues very few non-probate claims as the amounts tend to be small and the effort is judged to outweigh the return.

Approximately 90% of MaineCare's estate recovery claims involve real estate. Home ownership is high in Maine. Staff estimated an average value for recipient's homes ranging between $75,000 and $125,000. According to one study, homes of institutionalized MaineCare recipients varied in value from an indeterminate low to a high of $678,530 with average equity equal to $105,114 and median equity $87,200.[15] At the time of that study, 297 institutionalized recipients owned homes sheltered from spend down by their "intent to return"[16] representing over $34 million in potentially recoverable wealth to reimburse MaineCare, offset future expenditures, and relieve tax payers—roughly five times current annual estate recoveries.

One of the challenges of operating an estate recovery program, however, is that real estate, usually the largest asset in an estate, deteriorates rapidly when not maintained. As the potential estate recovery liability in a case begins to approach and then exceed the value of an

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15 This data came from a 2010 study conducted by the University of Southern Maine Muskie School of Public Service as reported to the researcher by Reinhold Bansmer, MaineCare Special Projects Program Manager, DHHS, Augusta.

16 Federal law ensures that recipients' homes remain exempt as long as they express a subjective intent to return to the home.

exempted home, the recipient and more especially the family and heirs may lose interest in maintaining it or paying taxes on it. Some properties may already be in foreclosure when MaineCare receives an estate recovery claim. The state's claim may be preempted by and lost to a tax lien. Estate recovery staff said "We get people saying: why can't we just turn the property over to you and you sell it? The children [heirs] are old themselves; they just don't want to be bothered." If Maine implemented TEFRA liens, thus securing property earlier, this problem could be eliminated or ameliorated.

Asked whether MaineCare estate recovery is politically sensitive, recovery unit staff replied that the

> moral case has been made and accepted. People are notified at eligibility. When family members complain, we say if it were not for this program they would have had to sell the home to pay for their loved ones' care. Now they can stay in their own homes longer. This totally changes their attitude. It calms them right down. We collect the money, put it back into the system, and it pays for the next person who needs help.

Management staff had a different perspective. They reported that they often face political opposition to estate recovery. For example, when MaineCare sought legislative authority to pursue TEFRA liens, the Department of Health and Human Services was accused of being "grave robbers." Estate recovery experts in other states report that overcoming the political sensitivity of this program and winning over lawyers, judges, politicians and the public is a long, slow, and delicate process, but it can be done.

Asked what their biggest challenges are, MaineCare estate recovery staff replied they lack sufficient secretarial staff to pursue all promising cases. The state has nine months from date of death to file a probate claim. Just matching vital statistics reports with MaineCare records is a full time job in itself, they said. "Right now we have the eligibility office sending us files when someone dies with assets. Some fall through the cracks that vital statistics would catch. By the time our research specialist is able to work on some cases, it's too late to pursue them." For want of adequate clerical support, the state and federal Medicaid programs are losing a significant if indeterminate amount of revenue. Another problem is that estate recovery staff are no longer allowed to receive the actual eligibility case notes on cases they are processing. Such notes often provide clues that are helpful in pursuing an estate recovery claim. For example, it the case record contains evidence that an improper asset transfer was attempted previously, that's a clear indication that it may happen or have happened again.

Findings

Based on interviews with MaineCare staff and representatives of Medicaid estate recovery programs in eight of the most successful MER programs in the country, we believe that Maine can increase recoveries substantially by pursuing certain legal authorities and administrative methods that other states are already pursuing productively. The best way to summarize our findings so far is to explain what these authorities and methods are, describe and compare how various states use them, and suggest what Maine might do to implement them and maximize their potential.

1. **Administrative Process**: Iowa's Medicaid estate recovery program is operated by a private contractor with over 15 years of experience and a long record of gradually increasing recoveries. The program's administrators emphasize the importance of collecting information about estate recovery liability quickly when a Medicaid recipient dies, sending letters two or three weeks after the death to responsible relatives announcing a potential liability, and pursuing both probate and non-probate cases systematically.
   Maine: The MaineCare estate recovery unit waits six months after a Medicaid recipient passes away to see whether or not a family representative will open a probate estate. Maine pursues few non-probate claims because such cases tend not to involve real estate and thus usually fall below the state's minimum potential recovery threshold of $10,000 for most cases.
2. **Family Allowances:** None of the other states we interviewed have set a hard and fast dollar limit below which they will not seek Medicaid estate recovery. The other estate recovery units exercise a standard of cost-effectiveness review at every step of the recovery process. They end recovery efforts if and when it becomes evident that the potential recovery will not exceed the cost of recovery and no principle in law or regulation is involved that would warrant further effort in the case.
   Maine: Maine exempts the first $7,000 from recovery of every estate in which the MaineCare recipient is survived by a child of any age, whether disabled or not. A majority of MaineCare long-term care cases approaching 80 percent qualify for this exemption. On the assumption that pursuing recovery costs several thousand dollars, MaineCare cases with less than $10,000 in documented assets are not referred to the MaineCare estate recovery unit. Given that average estate recoveries in other states are often below $5,000 because of their wider pursuit of smaller, non-probate claims, Maine's family allowance policy evidently reduces the state's total recoveries substantially.
3. **TEFRA Liens**: The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA '82) authorized state Medicaid programs to place liens on homes of long-term care recipients who have no exempt dependent relative living in the home and no medical expectation they will be able to return to the home. Roughly half of the states we interviewed pursue TEFRA liens; half do not. Those that do not, cited reasons of administrative complexity or political sensitivity. Those that do pursue TEFRA liens were mildly enthusiastic about their results. Wisconsin, for example, recovers 20% of its total recoveries from TEFRA liens.
   Maine: Does not pursue TEFRA liens. The purpose of TEFRA liens is to secure real property during a Medicaid recipient's lifetime. Thus eligibility staff, rather than estate recovery staff, must identify potential TEFRA lien cases and initiate the process. According to eligibility staff, half of MaineCare long-term care recipients own homes and 90% of those homes are exempt for purposes of determining eligibility. MaineCare estate recovery staff found that seven out of ten cases owned homes in a small sample of cases referred to them for recovery after a recipient dies. By pursuing TEFRA liens, the State of Maine could prevent improper pre-death transfers of real estate by MaineCare recipients and facilitate and expedite recovery of the state's claim at the time of the recipient's death.
4. **Public Opinion and Political Pressure**: Political pressure groups that benefit directly from easy MaineCare eligibility and light estate recovery enforcement, such as senior advocacy organizations and financial advisers who specialize in "MaineCare planning," *i.e.*, artificial impoverishment techniques to qualify people for

public assistance, often take a dim view of the program. They have represented Medicaid estate recoveries as "picking the bones of the poor" or "taking away Grandma's home." The ire of state legislators and newspaper editorialists is sometimes aroused by letters from constituents and subscribers complaining about an estate recovery claim. The state staff we interviewed, both in Maine and the other states, were entirely comfortable making the moral case for estate recovery, which they articulate in the following way. Medicaid is a wonderful program which helps people get the expensive long-term care they need when they need it without financial devastation and at a cost lower than private pay rates, but of course this benefit requires later repayment from the estate as would any other loan so that the creditors, in this case the Medicaid program and state/federal taxpayers, are protected. This is exactly the intent of federal law as expressed in legislative history.

Maine: MaineCare management staff report they "run into problems with legislators buying into [needed statutory] changes." The legislators "have parents with homes," "a sense of entitlement," and an attitude that the Department is "killing granny on the steps of the statehouse." Maine has a strong elder law bar and senior advocacy groups that oppose most restrictions on MaineCare LTC eligibility and most proposals to enhance MaineCare estate recovery. To make progress toward growing Maine's nontax revenue from estate recoveries, effective ways must be found to reduce or eliminate political and pressure-group opposition to estate recoveries.

5. **Painting the Fence**: All of the exemplary estate recovery programs we interviewed have made progress toward enhancing their regulatory and legislative authorities to conduct effective estate recoveries. Several programs are engaged in lengthy litigation and appeals. Iowa in particular has achieved needed Medicaid estate recovery authorities through both persuasion and court victories. Iowa's estate recovery program management call their approach "painting the fence," by which expression they refer to Tom Sawyer's strategy in the Mark Twain novel of getting others to help him with a whitewashing chore. This strategy, as operationalized by the Iowa program, involves actively reaching out to and participating with the probate bar, seeking consensus and cooperation from funeral directors regarding recovery of excess prepaid burial accounts, coordination with long-term care providers to ensure collection of exempted personal needs accounts, and careful outreach to the general public and to families impacted by estate recovery. The secret is to find what each group cares about the most, help them meet their special need, and thus engage their cooperation and assistance. Examples of how this works are provided in the discussion of specific policy issues that follows below.

   Maine: Maine has a small staff that does not include an attorney but has, nevertheless, had some success "painting the fence." Over time, as MaineCare estate recovery staff members have reached out to elder law attorneys and attended administrative and court hearings, they have begun to establish rapport and learn the ins and outs of the regulatory and judicial processes. MaineCare estate recovery now works through one private attorney on contract to handle cases that require special legal attention. There is significant potential for Maine to expand work of this kind particularly in pursuit of objectives in the following areas.

6. **Expanded Definition of Estate**: The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) authorized state legislatures to expand the definition of "estate" for purposes of Medicaid estate recovery to include assets that pass outside of a formally probated estate. Examples include property that transfers from the deceased to an heir through joint tenancy with right of survivorship or by other "transfer at death"

procedures. All but two of the exemplary Medicaid estate recovery states we interviewed for this project have the expanded definition of probate and, without exception, they consider this authority critical to their success.

Maine: Does not have the expanded definition of estate. MaineCare management has requested the state legislature to expand the definition of estate thus giving the estate recovery program authority to pursue this source of recoveries. The proposed legislation failed. In the absence of expanded estate recovery, it is a simple matter for families to reconfigure their wealth so that assets, exempt for purposes of MaineCare eligibility determination, pass unencumbered from a deceased MaineCare recipient to heirs without reimbursement to the state for services rendered and expenses incurred.

7. **Spousal Recoveries**: Section 1917 (b) of the Social Security Act provides that estate recovery may occur only after the death of any surviving spouse and when there is no surviving minor or disabled child. Medicaid LTC recipients often predecease their spouses and children. Some states wait until the surviving spouse and/or disabled child dies or the minor child reaches maturity and recover at that time. Other states do not. Of the eight exemplary states we interviewed, all but two recover from spousal estates. The two that don't used to but lost the authority through litigation. State district, appeals and supreme courts have held differently regarding whether federal law allows spousal recoveries and the United States Supreme Court has so far refused to grant *certiorari* for any of these cases appealed to it. Wherever spousal recoveries are pursued, they represent a very substantial source of funds, constituting 15%, 25%, 35% and up to half of total estate recoveries in the four states that provided an estimate.

   Maine: Does not pursue recoveries from the estates of spouses or disabled children predeceased by MaineCare recipients nor from formerly minor children when they reach majority. Consequently, MaineCare estate recoveries miss a substantial proportion of the potential nontax revenue captured by states that do pursue this source. Review of the litigation surrounding spousal recoveries indicates that the authority to recover from spousal estates is closely linked with the authority to recover from assets that pass outside of a formally probated estate. Thus for Maine to recover from spousal estates it will most probably need to expand the definition of estate as authorized by OBRA '93 and explained above.

8. **Small Estate Affidavits**: Small estates generate a great deal of the total recoveries in most successful estate recovery programs. New Hampshire's average recovery, for example, is only $764. Iowa's is around $4,500. Given that the largest estate recoveries come mostly from home equity, these states recover small, even tiny amounts, from many cases that bring down their average recovery amount. These small recoveries come mostly from bank accounts and "nursing home" or personal needs accounts that Medicaid recipients are permitted to retain within limits set by state policy, usually $2,000. Small estate affidavits allow states that have the authority to use them simply to file a claim and collect such accounts in the absence of a formal probate. The process is routine and very easy. Families have to wait at least 40 days after death to file such an affidavit, but if no affidavit is filed by 90 days, then the estate recovery unit may claim the funds. **Painting the fence example**: Thanks to having worked closely with the probate section of the state bar, members of which like to process estates as quickly as possible and need the estate recovery program's cooperation to do so, when Iowa sought the bar's support for its small estates affidavit authority up to $2,000, the probate bar actually supported their authority up to $25,000 which they successfully obtained from the state legislature.

Now Iowa collects such small estates from bank accounts, nursing home accounts and abandoned funds without having to wait for any beneficiary to sign a form. The affidavit requires the holder of the funds to release them to the state. If another claimant files a higher priority claim within 365 days, then the state must refund the money to the higher priority claimant.

Maine: Does not have authority to use small estate affidavits nor does Maine even consider recoveries from most estates with less than $10,000 in assets. Medicaid recipients in most states are allowed to retain $2,000 in cash or other negotiable assets. Maine is very generous, allowing retention of $10,000 without affecting eligibility. Because of its policy only to refer to estate recovery cases with assets over $10,000, MaineCare is missing the opportunity for substantial recoveries from smaller estates, which recoveries could be made with very little effort if the state had small estate affidavit authority.

9. **Consensual Mortgages**: As explained above, federal law precludes recovery from a deceased recipient's estate if he or she is survived by a spouse, or a disabled or minor child. Following the Medicaid recipient's death and preceding the spouse's or disabled child's death or the minor child's reaching majority, the exempt beneficiary of the recipient's estate has the unlimited right to dispose of the property as he or she sees fit. The exempt dependent relative can sell or otherwise transfer the property to anyone and has a strong incentive to do so in order to remove the property from estate recovery liability when the exempt dependent dies or otherwise loses the exemption. To deal partially with this eventuality, some states have employed legal instruments variously called a "consensual mortgage," a "notice of potential claim," or an "affidavit of facts." These instruments notify property holders and claimants that the state Medicaid program has a claim, that such claim is deferred by law, and that the state requests notification whenever the property is to be sold or transferred. Although the state has no recourse if the deferral is legitimate, such notification at least allows the state to know how much otherwise recoverable money is being lost and to stop tracking its claim. Federal law could someday be amended to prevent the unencumbered transfer of wealth from exempt to non-exempt relatives. In the meantime, savvy heirs who understand how the system works easily avoid estate recovery while, others who do not know any better, pay the legitimate price for their relatives' long-term care through later estate recovery. **Painting the fence example**: This is another example of when a good working relationship with the probate section of the state bar could be beneficial.

   Maine: Does not use consensual mortgages.

10. **Funeral Recoveries**: Federal law exempts prepaid burial plans from Medicaid long-term care eligibility asset limits. Across the country, the vast majority of Medicaid long-term care recipients have protected assets in this form. Funeral homes market prepaid burial funds to families explicitly as a way to shelter assets from Medicaid eligibility limits. One interviewee told us "Most people not on Medicaid don't have prepaid burial funds." This exemption is a massive subsidy to the funeral industry at the expense of Medicaid, taxpayers and long-term care providers, who receive on average only two-thirds of their private pay rates once someone is on Medicaid. Thus, the funeral industry has a stake in preserving the prepaid burial exemption. What sometimes happens, however, is that after the elder on Medicaid dies, the family decides that the parent or grandparent probably would rather have their prepaid burial proceeds go to the surviving family member instead of paying for an expensive casket or funeral. The incentive for the heir is to cremate the deceased at a

fraction of the cost and pocket the difference. That's illegal, but it happens. Iowa works very closely with the state funeral industry to ensure that any excess assets remaining in a prepaid burial account are paid automatically to the Medicaid estate recovery program. **Painting the fence example**: Here is a third example of how a close working relationship between the Medicaid estate recovery program and a group with an interest in preserving a state-supplied benefit can be helpful to the recovery process.

Maine: According to long-term care eligibility workers, between 80% and 90% of all MaineCare long-term care applicant/recipients have prepaid burial funds averaging $7,000 to $8,000 per case. MaineCare's estate recovery unit does not recover excess assets remaining in previously exempt burial accounts. The amounts involved, in the absence of other assets, would not trigger a referral to the MaineCare estate recovery unit in most cases as they usually do not exceed $10,000. It is impossible to say without further study how much money remains in deceased recipients' prepaid burial accounts in Maine or how much of that value could be recovered, but by reaching out to the state's funeral directors it might be possible to find out and recapture some of that money to reimburse the MaineCare program.

11. **Nursing Home Accounts**: MaineCare long-term care recipients are allowed to retain an unusually high $10,000 in cash or negotiable securities. Some or all of this money may reside in personal needs accounts maintained by the nursing homes or assisted living facilities where the recipient resides. The accounts are managed to ensure that expenditures from and deposits to them do not cause recipients to exceed the dollar limit and lose eligibility. When recipients die, families usually collect the remaining balances even when the long-term care provider may still be holding a balance due for services rendered. Under state law, however, Oregon estate recovery captures these accounts automatically unless there is a surviving spouse. **Painting the fence example**: Clearly, long-term care providers have an interest in what happens to the assets in these accounts. Iowa worked closely with providers and created an arrangement whereby such accounts would accrue to the estate recovery program which would ensure that the provider received any amounts due.

    Maine: Does not recover from nursing home accounts and does not generally know how much money is in such accounts. When MaineCare long-term care recipients are at risk of exceeding their $10,000 limit, eligibility caseworkers sometimes send the estate recovery unit a check to prevent the recipient from becoming ineligible based on excess assets. Nursing home accounts might be a rich new source of additional estate recoveries.

12. **Medicare Buy-In Recoveries**: In addition to direct payments to long-term care providers, Medicaid also pays the Medicare co-insurance and deductibles for some "dual eligible" recipients. This is called the Medicare "buy in." Most long-term care recipients are eligible for both programs and dual eligibles tend to be the most expensive of all Medicaid recipients. Iowa recovers state Medicaid expenditures for the buy-in except in the case of payments that were expressly excluded from recovery by the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA '08), *e.g.*, payments to SLMB and QMB eligible recipients. Despite these exclusions, Iowa's buy-in recoveries have remained level due to enrollment increases.

    Maine: Does not pursue recoveries for any Medicare buy-in expenditures made by the MaineCare Program.

Cost-Effectiveness

Obviously, the MaineCare estate recoveries operation lacks many of the legislative and regulatory authorities used by some of the most successful estate recovery programs in the country. Consequently, MaineCare cannot pursue many of the most effective recovery methods that generate strong recoveries in those other states.

Presumably, MaineCare estate recoveries would increase substantially if Maine staffed up the estate recovery unit, eliminated the $7,000 (effectively $10,000) cap on recoveries, pursued TEFRA liens, persuaded state legislators to support the program by authorizing needed authorities, expanded the definition of estate, pursued spousal recoveries, utilized small estate affidavits and consensual mortgages, and sought recoveries from prepaid burial accounts, nursing home accounts and Medicare buy-in expenditures.

The following table shows comparative "cost-effectiveness" ratios for the nine state Medicaid recovery programs reviewed for this study. These figures are very rough because some of the states could not specify with confidence what their total annual recoveries are nor what their cost of recovery is without further research. Maine and Iowa were exceptions.

Extra Revenue Potential from MaineCare Estate Recovery

Based on its cost-effectiveness ratios, MaineCare's estate recoveries unit already ranks high among the leading estate recovery programs in the United States. Pursuit of the needed additional regulations and authorities could propel the state into a top leadership position. It's clear from the following table that substantial upside potential exists.

For example, Oregon has less than half the "recovery ratio" of Maine, which means Oregon spends much more on its recovery unit per dollar of recovery. But it also collects much more in all categories except the HCBS (home and community-based services) ratio, which makes sense because Oregon has more HCBS recipients and fewer nursing home recipients proportionately than Maine. Idaho also, with a lower recovery ratio, has higher ratios in most of the other categories.

Spending more per dollar of recovery does not guarantee that a state will maximize recovery by all measurements. Ohio's recovery ratio, for example, is quite low but its other cost-effectiveness ratios are less than Maine's. It is not possible to say with certainty what Maine's upside potential for MaineCare estate recoveries would be. It is possible to say with confidence that Maine could recover substantially more nontax revenue from this source. But a strong estate recovery program produces more savings to state Medicaid programs than the actual dollars recovered as explained in the next section.

Cost-Effectiveness Ratios[17]	ME	IA	OR	ID	OH	WI	MN	NH	IL
Recovery Ratio	$24.66	$11.76	$10.00	$9.44	$6.95	$24.00	UNK	$13.33	$10.00
Age 65 Ratio	$30.16	$43.20	$35.15	$39.88	$22.45	$29.52	$30.56	$25.38	$29.48
Age 85 Ratio	$203.79	$243.90	$238.10	$284.66	$147.08	$186.05	$189.66	$178.57	$192.31
Nursing Facility Recipient Ratio	$1,048.49	$775.70	$2,643.06	$1,885.99	$480.05	$785.21	$754.12	$722.54	$659.25
Total Payment ratio	0.0026	0.0067	0.0056	0.0064	0.0027	0.0034	0.0030	0.0038	0.0037
LTC Expenditures for Aged and Disabled Ratio	0.0201	0.0303	0.0269	0.0297	0.0113	0.0136	0.0102	0.0131	0.0238
Nursing Facility Expenditures for Aged and Disabled Ratio	0.0267	0.0428	0.0658	0.0526	0.0149	0.0243	0.0253	0.0159	0.0309
Medicaid HCBS spending for Aged and Disabled Ratio	0.082	0.1031	0.0456	0.0688	0.0467	0.0307	0.0170	0.0735	0.0129

Cost Avoidance Potential

Untold assets that could be used to pay privately for long-term care and delay or replace Medicaid dependency for many Mainers are lost because of both legal and illegal divestiture prior to and during MaineCare eligibility. An earlier report by the Center for Long-Term Care Reform, published in November 2012, titled "The Maine Thing About Long-Term Care Is That Federal Rules Preclude a High-Quality, Cost-Effective Safety Net,"[18] explained in detail how these assets are lost and what would need to be done to retain them within Maine's long-term care financing marketplace.

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17 Definition of cost-effectiveness ratios:

Recovery Ratio = Recoveries/Cost of Recovery

Age 65 Ratio = Recoveries/Age 65+ population

Age 85 Ratio = Recoveries/Age 85+ population

Nursing Home Recipient Ratio = Recoveries/Nursing facility recipients

Total Payment Ratio = Recoveries/Total Medicaid payments

LTC Expenditures for Aged and Disabled Ratio = Recoveries/Medicaid LTSS Expenditures for older people and adults with disabilities

Nursing Facility Expenditures for Aged and Disabled Ratio = Recoveries/Nursing Facility Expenditures for Aged and Disabled Ratio

Medicaid HCBS Spending for Aged and Disabled Ratio = Recoveries/ Medicaid HCBS spending for Aged and Disabled Ratio

Data for state population over 65, over 85, total nursing home recipients, total Medicaid payments, total LTC expenditures for aged and disabled recipients, nursing facility expenditures for aged and disabled recipients and Medicaid HCBS spending for aged and disabled recipients were derived from Ari Houser, Wendy Fox-Grage, Kathleen Ujvari, "Across the States: Profiles of Long-Term Services and Supports, Ninth Edition 2012," AARP, Washington, DC, 2012, pps. 156-161; http://www.aarp.org/home-garden/livable-communities/info-09-2012/across-the-states-2012-profiles-of-long-term-services-supports-AARP-ppi-ltc.html.

18 ***Op. cit.***

One critical component to ensure that citizens take the risk of long-term care expenses seriously is a strong estate recovery program. If consumers can ignore the risk of long-term care, avoid the premiums for private insurance, wait and see if they ever need expensive extended care, and if they do, shelter their largest asset (home equity), and eliminate or reduce their long-term care cost by relying on MaineCare while avoiding estate recovery, it's easy to understand why so few of them plan early and save, invest or insure for long-term care.

A strong estate recovery program, backed by enhanced regulatory and legislative authorities, not only brings in desperately needed nontax revenues to the state but it also encourages Mainers to avoid dependency on MaineCare and thus elude estate recovery liability by planning responsibly. So, a substantial factor of cost avoidance should be added to any calculation of the estate recovery upside potential.

Conclusion

Aggressive pursuit in Maine of all the best practices described above might double or triple MaineCare's estate recoveries, especially if implemented in tandem with an aggressive program of cost avoidance as explained in the previous section. Iowa's successful, but gradual, progress toward enhanced regulatory and legislative authorities suggests, however, that it's reasonable to expect Maine will need time to gain the same ground. Combined with measures recommended in our earlier report to discourage divestiture and sheltering of assets from MaineCare spend down requirements, the potential savings to the program are substantial. Potential savings would be dramatically higher, as explained in the earlier report, if the federal government's "maintenance of effort" restriction were removed or circumvented.

MaineCare's Federal Medical Assistance Percentage (FMAP) is 62.57% for 2013. Thus for every $37.43 in state funds Maine invests in Medicaid the federal government provides $62.57, a multiplier of 1.67. Likewise, when MaineCare recovers $100 from estates, the state program must reimburse federal Medicaid $62.57, its share of the recovery, minus a factor reflecting the cost of administering the estate recovery program. Sometimes, critics of estate recovery complain that its value to the state is minimized because of this requirement to reimburse the federal share of all recoveries. But such criticism is unwarranted because whenever the state's share of estate recoveries is reinvested in the Medicaid program they simply re-leverage back up the federal matching funds giving the state the total value of the recovery to expend on Medicaid in the future.

Doubling MaineCare estate recoveries to $13,450,000 per year in total state and federal funds would generate $5,034,335 in state-only funds or $2,517,168 more annually than current average recoveries. Likewise tripling recoveries to $20,175,000 would generate $7,551,503 in state-only funds or $5,034,336 more annually than current recoveries. Such results are ambitious but a highly worthwhile goal achievable over a three to five year period.

Recommendations

MaineCare should pursue the following objectives as described, defined and justified in detail throughout this report:

1. Staff up the estate recovery unit until the next new employee no longer generates an appreciable multiple of recoveries.
2. Retain an attorney to provide needed legal expertise to the MaineCare estate recovery operation.
3. Stop waiting six months to see whether or not a MaineCare decedent's family will probate the estate. After a two or three week grieving period, notify the decedent's personal representative of the state's claim, ask whether the family plans to probate the estate, and follow up continually to ensure the estate is effectively handled either by the family or by the estate recovery unit.
4. Request "consensual mortgages" or "notices of potential claim" in all cases where estate recovery is deferred or delayed by law.
5. Eliminate MaineCare's $7,000 family allowance. Pursue recovery from all estates whenever recovery is cost-effective.
6. Utilize small estate affidavits to capture long-term care facility personal needs accounts and small bank accounts.
7. Pursue TEFRA lien authority. Implement a TEFRA lien program.
8. Pursue authority to recover from the estates of surviving spouses and disabled children, as well as from minor children upon their reaching majority.
9. Expand the definition of "estate" to include assets that pass outside a formal probated estate in joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.
10. Pursue recovery of benefits received before the age of 55 for all institutionalized recipients.
11. Recover MaineCare's expenditures for the Medicare buy-in whenever such recovery is not precluded by the Medicare Improvements for Patients and Providers Act of 2008.
12. Pursue recovery of excess, unexpended funds in prepaid burial accounts.
13. Pursue many more nonprobate claims. In fact, seek recovery in all cases that are reasonably expected to repay the cost of recovery.
14. Expand the use of private attorneys to probate cases that would otherwise go unrecovered.
15. "Paint the fence," *i.e.*, reach out to and assist whenever possible, the estate planning bar, judges, long-term care providers and funeral directors. Gain their trust and their support for MaineCare's estate recovery efforts.
16. Restore and improve access for the estate recovery unit to the case notes in deceased recipients' eligibility records.
17. Refer all cases of MaineCare LTC recipient deaths to the estate recovery unit for whom significant funds have been expended regardless of the eligibility system's evidence of assets. Make at least some minimal effort to find hidden assets, such as checking with local banks and county assessors and recorders.
18. Clearly and proudly articulate the moral high ground of estate recoveries.
19. Seek exemption from the federal "maintenance of effort" requirement.

20. When possible, enhance cost avoidance by reducing MaineCare's home equity exemption to the federal minimum from its current level near the federal maximum and tighten other income and asset eligibility rules as recommended in "The Maine Thing About Long-Term Care Is that Federal Rules Preclude a High-Quality, Cost-Effective Safety Net."

Annotated Bibliography

Office of Inspector General, US Department of Health and Human Services, "Medicaid Estate Recoveries: National Program Inspection," June 1988: https://oig.hhs.gov/oei/reports/oai-09-86-00078.pdf.

This report traced the implementation history and status of Medicaid legislation bearing on transfer of assets, liens and estate recoveries since their initial authorization in the Tax Equity and Fiscal Responsibility Act of 1982. **Quote:** Congress intends "all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the cost of supporting the individual in the institution. . . . A large nontax revenue source generated by Medicaid estate recoveries could be recycled to help the truly destitute." (pps. 1, 47) **Finding**: Only 23 States and the District of Columbia recovered a total of $42 million annually in benefits correctly paid from the estates of deceased Medicaid recipients. Estimated national recovery potential was $589 million if all states recovered at the rate of the most successful state, Oregon. (p. i) **Recommendation**: Make estate recoveries mandatory. (p. 52)

General Accounting Office, "Recoveries from Nursing Home Residents' Estates Could Offset Program Costs," HRD-89-56, March 7, 1989: http://www.gao.gov/assets/150/147459.pdf.

This report reviewed estate recovery programs in eight states with a focus on Oregon's exemplary program. **Quote**: "The Congress intends that all assets, including home equity, available to Medicaid nursing home residents be used to help pay for their care. However, to lessen the hardship on the family, the home - the primary asset of most elderly Americans - is exempt in determining eligibility as long as there is a spouse, dependent child, or certain other relatives living in the home or the nursing home resident expects to return home." (p. 3) **Finding**: "In the eight states studied, as much as two-thirds of the amount spent for nursing home care for Medicaid recipients who owned a home could be recovered from their estates or the estates of their spouses. If implemented carefully, estate recovery programs can achieve savings, while treating the elderly equitably and humanely." (p. 3) **Recommendation**: "GAO believes the Congress should consider making mandatory the establishment of programs to recover the cost of Medicaid assistance provided to nursing home residents of all ages either from their estates or from the estates of their surviving spouses. Establishment of such programs would be a logical extension of the transfer-of-assets provisions recently mandated through the Medicare Catastrophic Coverage Act of 1988. Estate recovery programs would help ensure that the assets preserved through the new transfer-of-assets provisions are eventually used to defray state and federal Medicaid costs." (p. 5)

Roger Schwartz, J.D and Charles P. Sabatino, J.D., "Medicaid Estate Recovery: Picking the Bones of the Poor," American Bar Association Commission on Legal Problems of the Elderly, Washington, DC., November 1994.

Reports views and recommendations based on a June 3, 1994 symposium of the ABA Commission on Legal Problems of the Elderly. **Quote**: "Most state Medicaid staff supported estate recovery efforts to avoid Medicaid dollars going to elderly who are not

needy." (p.5) **Finding**: "Mandatory estate recovery . . . impacts disproportionately the poorest seniors who cannot purchase long-term care insurance and who do little or no estate planning. *Those with substantial assets take advantage of available legal protections before seeking Medicaid coverage.*" (p. 13, italics added.) **Recommendation**: "Congress should repeal mandatory Medicaid estate recovery . . .." (p. 13).

Department of Health and Human Services, Office of Inspector General, "Medicaid Estate Recovery Programs," OEI-07-92-00880, March 1995: https://oig.hhs.gov/oei/reports/oei-07-92-00880.pdf.

This report did not provide dollar amounts of estate recoveries. **Findings**: "Twenty-seven states have estate recovery programs . . . Mature Recovery Programs Are Generally Successful and Cost-Effective . . ." **Recommendations**: "The HCFA should develop performance indicators to track States' progress in implementing the OBRA '93 requirements . . . The HCFA should target mechanisms for recovery that have high dollar payoff and identify strategies to help make necessary information available to State agencies to pursue those mechanisms . . . The HCFA should monitor closely States' progress in obtaining enabling State legislation and pursue legislative authority to impose sanctions or penalties if States do not act within a reasonable period of time to implement OBRA '93 . . ." **Comment**: Neither HCFA nor its successor organization, the Centers for Medicare and Medicaid Services (CMS), took the recommended initiatives to ensure compliance with the requirements of OBRA '93. Some pressure was brought to bear by the federal government in the middle of the first decade of the new millennium to compel implementation of estate recovery by the remaining state hold outs—Texas, Michigan and Georgia—but neither those states nor any of the others were held to any minimal standard of estate recovery results.

Charles P. Sabatino and Erica Wood, "Medicaid Estate Recovery: A Survey of State Programs and Practices," AARP, Public Policy Institute, #9615, Washington, DC, September 1996.

"How states have implemented (or failed to implement) the estate recovery mandate of OBRA '93 is the subject of this report." (Foreword) **Quote**: "Respondents differed as to the impact of recovery specifically on older poor persons, with many perceiving little impact. However, some respondents observed a possible chilling effect on the application for benefits for institutional and home-and community-based services." (p. vii) **Finding**: ". . . Medicaid estate recovery programs remain in a state of great flux as of the beginning of 1996. While only five states have no program operational . . . , many other states have programs operational only at a very rudimentary level." (p. iv) **Recommendation**: This report makes no recommendations as it is ostensibly an objective survey of facts and opinions held by state Medicaid officials and legal practitioners. It is significant to note, however, that the lead author of this study was also a co-author of the preceding report sub-titled "Picking the Bones of the Poor."

Faith Mullen, "Questions and Answers on Medicaid Estate Recovery for Long-Term Care Under OBRA '93," AARP Public Policy Institute, Washington, D.C., September 1996: http://www.aarp.org/health/medicare-insurance/info-1996/aresearch-import-629-D16443.html.

This article presents a reasonably straightforward explanation and analysis of the estate recovery provisions under OBRA '93 and how they apply to nursing home residents. It has the facts mostly correct, but its hypothetical examples of the law's likely effects on individuals and families tend to imply negative outcomes.

Erica F Wood and Charles P. Sabatino, "Medicaid Estate Recovery and the Poor: Restitution or Retribution," *Generations*, Vol. XX, No. 3., Fall 1996, pps. 84-87.

Short article that summarizes the results of the ABA Commission on Legal Problems of the Elderly conference discussed in more detail in the report by the same authors published by the AARP Public Policy Institute and summarized above. Like the longer earlier report, the article is uniformly negative and critical of estate recoveries.

Jon M. Zieger, "The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery," *The Elder Law Journal*, Vol. 5, No. 2, Fall 1997, pps. 359-393.

This "note," *i.e.* an article written by a law student and published in a law journal, explains the potential problems with estate recoveries that were the focus of earlier published work by attorneys cited above. But this author recognizes the need to moderate exploding Medicaid LTC expenditures and defends estate recoveries as a means to do so. He recommends limiting recoveries to larger estates and "embracing the definition of estate as promulgated under state probate codes." (p. 359)

Stephen A. Moses, "LTC Bullet: Idaho Decision Draws Attention to Estate Recovery," September 28, 1998: http://www.centerltc.com/bullets/archives1998/idaho.html

This brief article describes an Idaho Supreme Court ruling "that the state may recover from the estate of a Medicaid recipient's spouse after already receiving the balance of the Medicaid recipient's estate." Spouses may transfer assets between themselves without penalty. If the state Medicaid program cannot pursue "spousal recoveries," couples can easily avoid having to repay the cost of the ill spouse's care simply by transferring all the joint assets into the sole ownership of the well spouse. The issue of spousal recoveries remains hotly debated and litigated to this day.

North Carolina Division of Aging and Adult Services, "Comparing State Medicaid Recovery Efforts," published by the Long-Term Care Policy Office in collaboration with the Division of Medical Assistance of the state Department of Health and Human Services, October 1998: http://www.ncdhhs.gov/aging/estate.htm.

This is an excellent survey of the status of estate recovery implementation as of five years after it was made mandatory by OBRA '93. The report provides a clear and succinct summary of estate recovery and transfer of assets requirements. Major findings: "*In spite of the federal mandate, Alaska, Georgia, Texas, and Michigan indicated that they do not yet have an operational estate recovery program.*" These states did not implement estate recovery programs until well into the 2000s. "*State recovery collections as a percent of total Medicaid expenditures ranged from less than .01% to a high of .83%. Total Medicaid expenditures for all states reporting was $87.6 billion with collections totaling $209.4 million.*" (Italics in the original.) Despite spotty state implementation and lax federal

enforcement, estate recoveries had already reached 36% of the $589 million potential estimated by the 1988 Inspector General report cited above. This report concludes with a summary of common policy trends among the top 10 collection states (*e.g.*, recover and apply transfer of assets penalties for services beyond those federally mandated, use TEFRA liens, do not use private contractors) and among states with the lowest collection rates (*e.g.*, less likely to recover and apply transfer of assets penalties for services beyond those federally mandated, fewer use TEFRA liens, less likely to use an expanded definition of "estate.") Interestingly, the top ten collection states identified in this 1998 report include seven of the nine states identified and reviewed for the current study.

Stephen A. Moses, "LTC Bullet: HCFA OKs Estate Recovery of Annuity Proceeds," April 3, 2000: http://www.centerltc.com/bullets/archives2000/HCFAoksEstate.htm

Quote: "Medicaid planners use annuities to convert a client's 'countable' cash into an 'exempt' asset to help qualify the client for Medicaid's long-term care benefits. The annuity itself is an exempt asset, while annuity payments are includable in the Medicaid recipient's income (which generally must be contributed to the cost of care). Upon the death of the Medicaid recipient, the balance of payments has been allowed to go to a designated beneficiary instead of to the state to repay Medicaid. Now, states have HCFA's approval to recover this money."

Stephen A. Moses, "LTC Bullet: Medicaid Estate Recovery," November 8, 2000: http://www.centerltc.com/bullets/archives2000/mer.htm

This article cites a year 2000 *Sacramento Bee* article that virulently criticizes California's Medi-Cal (*i.e.*, Medicaid) estate recovery program and then turns the criticism around on the critics. **Quote**: "What message does estate recovery send to the general public? Long-term care is your personal and individual responsibility. If you want to protect your estate (or your inheritance), then save or insure. Like the old Fram oil filter commercial, 'It's pay me now or pay me later.' Are the people who recover from estates callous and heartless? To the contrary, they are passionate about and committed to estate recovery because they want scarce public welfare resources to go to the truly destitute for whom these taxpayer-financed funds were intended to go."

Stephen A. Moses, "LTC Bullet: Medicaid Estate Recoveries Clarified by HCFA," March 7, 2001: http://www.centerltc.com/bullets/archives2001/merclarified.htm

Following a clarification by the federal government of mandatory and optional Medicaid estate recoveries, this article explained "why estate recoveries matter." **Quote**: "Congress did not want to devastate families financially who are facing an unplanned for long-term care crisis. That's why the legislators allowed generous eligibility exemptions that permit families to retain large amounts of income and assets while a loved one receives Medicaid-financed care. On the other hand, Congress did not want Medicaid to become an 'entitlement' on which people would rely to indemnify their heirs against the loss of an inheritance to long-term care expenses. The policy makers' 'kinder and gentler' approach was to allow generous eligibility criteria, but to recover benefits paid after recipients' died, from their thus-sheltered estates."

Stephen A. Moses, "LTC Bullet: WV Loses Estate Recovery Challenge," May 29, 2001: http://www.centerltc.com/bullets/archives2001/276.htm

Quote: "The U.S. District Court for the Southern District of West Virginia recently denied West Virginia's bid to eliminate estate recovery as a condition of receiving federal Medicaid funds. In the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Congress amended Medicaid law to require that states recover benefits from the estates of deceased recipients as a condition of receiving federal funds. Congress mandated estate recovery in order to maximize the amount of funds available to help needy Medicaid recipients. The Court's decision in 'State of West Virginia v. U.S. Department of Heath and Human Services' upholds the constitutionality of estate recovery, thereby denying West Virginia's attempt to evade a critical element of the Medicaid program."

Stephen A. Moses, "LTC Bullet: Medicaid Planning and Estate Recovery Issues Are Heating Up," May 12, 2004: http://www.centerltc.com/bullets/archives2004/501.htm

This article provides quotes from and analysis of three articles: one critical of estate recoveries titled "Estate Recovery: States Are Leaving No Gravestone Unturned" and two explaining how state Medicaid officials struggle to prevent wealthy people from taking advantage of the supposedly means-tested program. **Quote**: "Medicaid is supposed to be a safety net ensuring long-term care for the needy, not a substitute for private insurance nor an inheritance guarantee for baby-boomer heirs. Nevertheless, Medicaid planning and estate recovery remain controversial."

Thomson/MEDSTAT, "Medicaid Estate Recovery," U.S. Department of Health and Human Services, April 2005: http://aspe.hhs.gov/daltcp/reports/estaterec.htm

This report criticized estate recovery in the same ways and for the same reasons as earlier reports from the American Bar Association Commission on Legal Problems of the Elderly and from the AARP Public Policy Institute. It then claimed the program's savings are minimal. **Quote**: "Much of the original enthusiasm for mandatory estate recovery was based on the results in Oregon, where estate recovery was implemented in the 1940s as part of a comprehensive program to help senior citizens keep enough money to meet their own needs and protect their assets from unscrupulous uses by others. An extraordinary jump in Medicaid savings was predicted if all states were to follow the Oregon model. A more recent study estimates that one state (Nebraska) could increase Medicaid savings fivefold if it adopted all of Oregon's estate recovery practices. However, it is clear that the much-vaunted savings have not become a reality. In 2003, estate recoveries amounted to $330 million, or 0.13% of total Medicaid spending in all states, with individual state collections ranging from 0.0 - 0.64%." (Footnotes omitted) **Comment**: Actually, only ten years after estate recoveries were made mandatory, and in spite of lax federal enforcement of the mandate, estate recoveries had reached 56% of the $589 million potential estimated by the 1988 Inspector General report cited above.

Naomi Karp, Charles P. Sabatino, and Erica F. Wood, "Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices," American Bar Association Commission on Law and Aging and the AARP Public Policy Institute, #2005-06, June 2005: http://assets.aarp.org/rgcenter/il/2005_06_recovery.pdf

Another factual and somewhat less critical report--as it recognizes the alarming increase in Medicaid expenditures for long-term care as the demographic age wave approaches--by authors representing the elder law profession and AARP. **Quote**: "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)." **Key Findings**: "1. The financial impact of estate recovery on state budgets remains modest but not insignificant. . . . 2. Estate recovery amounts, measured per estate, are modest but not insignificant. . . . 3. The scope of estate recovery efforts is expanding. . . . 4. Estate recovery policies and practices vary significantly among the states. . . . 5. State estate recovery notices vary widely in timing, frequency, and clarity; and the procedures and content of hardship waiver notices are uneven. . . . 6. The lack of basic data collection and research impairs assessment of estate recovery efforts. . . . 7. Policymakers have generally not examined the broader public policy issues posed by estate recovery."

Wendy Fox-Grage, "In Brief: Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices," AARP Public Policy Institute, June 2005: http://www.aarp.org/health/medicare-insurance/info-2005/inb99_recovery.html.

Brief article summarizes findings of the American Bar Association Commission on Law and Aging's 2004 survey of state Medicaid estate recovery cited in detail immediately above.

U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy, "Medicaid Estate Recovery Collections," Policy Brief No. 6, September 2005, p. 8: http://aspe.hhs.gov/daltcp/Reports/estreccol.pdf.

This is the only official federal government accounting of Medicaid estate recovery results published to date. It is based on Fiscal Year 2004 data, so is nearly a decade out of date. This review found that total national estate recoveries were $321,725,993 in FY 2002; $330,337,483 in FY 2003; and $361,766,396 in FY 2004 or 61% of the potential recoveries estimated in the 1988 Inspector General report cited above. **Quote**: "Medicaid estate recovery gets to the heart of the issue of who should pay for long-term care - the public through the tax-supported Medicaid program, or users of long-term care through their personal resources, including those remaining after death. Amounts collected from Medicaid recipients' estates are not insignificant in absolute terms. They do, however, pale next to total Medicaid spending for long-term care. This is not surprising, given that Medicaid is available only to those with very limited resources. Nevertheless, the wide state-to-state variation in recovery rates and estate recovery practices suggests that program efficiency could be improved and greater amounts could be recovered." Congressional staff report that the Office of Inspector General of the U.S. Department of Health and Human Services is compiling a new report on national estate recovery results that will hopefully be published soon.

Stephen A. Moses, "LTC Bullet: The Critical Role of Medicaid Estate Recoveries," September 30, 2005: http://www.centerltc.com/bullets/archives2005/579.htm

This article provides an introduction to Roger A. Van Etten's and Brian M. Vazquez's comprehensive history of Medicaid estate recoveries with a focus on the program in Kansas,[19] plus an op-ed defending the ethics of Medicaid estate recovery.
Quote: "So, here's the bottom line about Medicaid estate recoveries. First: estate recoveries are a fiscal necessity to preserve Medicaid as America's long-term care safety net for the poor. Second: if you want to preserve your own wealth against the cost of long-term care, don't expect a free ride on the public welfare system. Plan to use your home equity or buy private long-term care insurance. Those precepts represent the fiscal necessity and the moral high ground of Medicaid estate recovery."

Press Release, "AARP Opposes Changes in Medicaid that Penalize Older Americans, Critical Vote this Week in the House of Representatives," AARP Press Center, November 8, 2005: http://www.aarp.org/about-aarp/press-center/info-2005/changes_in_medicaid.html.

AARP opposed passage of a proposed cap on Medicaid's home equity exemption which had been unlimited since the program's start in 1965. A cap of $500,000 to $750,000 became law soon thereafter in the Deficit Reduction Act of 2005. AARP had reasoned that such a cap was unnecessary because state Medicaid programs were already mandated to recover home equity from the estates of deceased recipients. Left unmentioned was the fact that Medicaid planners routinely advise LTC recipients and their families on ways to evade the estate recovery mandate legally.

Stephen A. Moses, "LTC Bullet: What Goes Around, Comes Around: The IG and Estate Recoveries," December 1, 2005: http://www.centerltc.com/bullets/archives2005/588.htm

Quote: "The Office of Inspector General of the United States Department of Health and Human Services has announced its intent to study whether states are adequately enforcing Medicaid transfer of assets and estate recovery requirements." **Comment**: The intended study never materialized. Similar intended studies have been in the IG's annual work plans from 2010 to 2013 without a work product so far.

Wendy Fox-Grage, "Medicaid Estate Recovery," AARP Public Policy Institute, Washington, DC, May 2006: http://www.aarp.org/health/medicare-insurance/info-2006/fs127_recovery.html.

This short article is a brief overview of estate recoveries and a review of other material published recently by the AARP Public Policy Institute. **Quote**: "Both the financial impact of estate recovery on state budgets and the estate recovery amounts, measured per estate, are modest but not insignificant. Moreover, states are expanding the scope of estate recovery efforts. Thus, it is critical that estate recovery programs have adequate consumer safeguards, such as reasonable hardship waivers and adequate and timely notices, so Medicaid enrollees and their families are informed and treated fairly."

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19 Roger A. Van Etten & Brian M. Vazquez, 2005. "Kansas Estate Recovery Primer," Flint Hills Center for Public Policy/Kansas Policy Institute, Wichita, KS.

Ben Chatman (IA), Robert Byrne (OH), and Joseph Rubenstein (MN), "Medicaid Estate Recovery: For What? From What? When? How?," 39th Annual National Training and Continuing Education Conference of the American Association of Public Welfare Attorneys, October 2006: http://www.iowa-estates.com/AAPWAConfOutline.pdf.

This presentation summary covers the history of estate recovery, its legislative foundation, important litigation, operational challenges, and best practices. **Quote**: "The success of estate recovery programs nationwide depends upon public awareness, dedicated staff, efficient procedures and appropriate legislation. If the programs are viewed as a tax or an attack against needy persons, then their success may suffer. On the other hand, a Medicaid program that is viewed as a revolving loan fund and a source of assistance for the indigent who then, in turn, must reimburse the program to help others, stands a better chance of success. Health care financing is a difficult and complicated issue in the United States, and estate recovery is merely a small part of a financing mechanism to help those who are in need of assistance." **Comment**: Heretofore most analysts writing about Medicaid estate recoveries were elder law attorneys or senior advocates with a discernible bias against the program. This and another piece by Ben Chatman cited below are among very few sources actually prepared and written by estate recovery practitioners.

Erica F. Wood and Ellen M. Klem, "Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices," ABA Commission on Law and Aging for the AARP Public Policy Institute, #2007-07, May 2007: http://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf.

This report describes the safeguards in place, or that should be in place, to ensure that Medicaid recipients and their families are fully informed about Medicaid estate recovery liability, have hardship waivers available if necessary, and are otherwise treated fairly at all stages of the eligibility and recovery process. **Conclusions**: "1. While increases in amounts collected through estate recovery are modest, they may cause hardship and thus signal the need for solid protections. . . . 2. Early information and notice can best protect beneficiaries and heirs and facilitate the smooth operation of state recovery programs. . . . 3. Public information, pre-death lien notices, and claim notices vary widely in content and clarity. The promising practices identified in this study could improve public understanding and safeguard rights. . . . 4. States give claim notices at different points, which bears directly on the protections required. . . . 5. Direct recovery of funds from banks through small estates affidavit and similar procedures are subject to the same protections as other estate recovery. . . . 6. The number of undue hardship waiver requests submitted has decreased markedly in the last two years. . . . 7. As in 2005, the lack of basic data collection impairs assessment of recovery efforts, including use of protections." (Bolded in the original)

Wendy Fox-Grage, "In Brief: Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices," AARP Public Policy Institute, Washington, DC, May 2007: http://www.aarp.org/health/medicare-insurance/info-2007/inb137_medicaid.html.

This brief article summarizes the report cited immediately above.

Stephen A. Moses, "LTC Bullet: Medicaid Estate Recover. . .up," July 5, 2007: http://www.centerltc.com/bullets/archives2007/701.htm

This short article critiques the report cited in the preceding two items and points out its bias and shortsightedness. For example: "AARP: 'By law, states can collect funds from estates after institutionalized or older Medicaid beneficiaries die by recovering against their homes and bank accounts to repay the government for services received.' (p. ii)

LTC Comment: This quote from the second paragraph of the report's 'Foreword' displays its bias. Medicaid does not recover 'against . . . homes and bank accounts.' It recovers funds from estates to reimburse Medicaid for costs incurred so that the same funds do not pass as 'free,' welfare-financed inheritance insurance to heirs who did not pay for their parents' long-term care." **Quote**: "Medicaid estate recoveries help preserve the LTC safety net for the poor and encourage responsible long-term care planning for everyone else. By discouraging estate recoveries, AARP hurts America's neediest, and ironically, impedes the marketability of the organization's own LTC insurance product."

Stephen A. Moses, "LTC Bullet: How Estate Recovery Protects the Poor AND the Affluent," July 1, 2009: http://www.centerltc.com/bullets/archives2009/824.htm

This article explores the irony that federal law allows families to shelter or divest hundreds of thousands of dollars and still receive Medicaid-financed long-term care, but many states fail to recover fully from deceased recipients estates as required by federal law thus disincentivizing people from planning for long-term care expenses and resulting in their ultimate dependency on Medicaid--a vicious downward cycle. **Quote**: "[T]argeting Medicaid's scarce resources to people truly in need and enforcing strong lien and estate recovery programs ensures better care for the poor and creates a strong incentive for everyone else to plan early and save, invest or insure for long-term care. And the more people plan responsibly to pay privately for long-term care, the fewer people will be dependent on Medicaid in the future, enabling that program to do a better job for a smaller caseload."

Nadia Greenhalgh-Stanley, "Medicaid and the Housing and Asset Decisions of the Elderly: Evidence from Estate Recovery Programs," National Bureau for Economic Research, August, 2009: http://www.nber.org/2009rrc/Full/3.3%20Greenhalgh-Stanley.pdf

Quote: "I find that state adoption of estate recovery programs makes the elderly decrease homeownership at death by 20 percentage points off a base homeownership rate of 60%, making them 33% less likely to own their homes at death and has a small impact on homeownership rates while the recipients are alive. Also, there is evidence that trusts are treated as a substitute to housing in order to preserve assets and carry out bequest motives at death. Adoption of these programs decreased the housing share of the elderly wealth portfolio." **Comment**: A reasonable conclusion from these findings is that longer and stronger transfer of assets restrictions on real property as well as more stringent limits on the use of trusts to hide real estate equity are needed to ensure the intent of Congress is realized: that "all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the cost of supporting the individual in the institution."[20]

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20 US Code, *op. cit.*

Jeffrey A. Marshall, CELA, "Medicaid Estate Recovery - A Medicaid Death Tax," September 17, 2010: http://marshallelder.blogspot.com/2010/09/medicaid-death-tax.html

This "Certified Elder Law Attorney" (CELA) opines that "Estate recovery is a Medicaid 'death tax' imposed only on the elderly. The program has been referred to as 'picking the bones of the poor,' and 'sucking the last ounce of blood from the corpse.'" **Comment**: This Medicaid planning attorney's opinion is typical of the hyperbolic criticism often targeted at the estate recovery program by advisors who make their living helping clients qualify for Medicaid long-term care benefits without spending down their own savings first as intended by state and federal law..

Ben Chatman, "Iowa Medicaid Estate Recovery," Health Management Systems, Des Moines, Iowa, revised May 2012: http://www.iowa-estates.com/estate_recovery.pdf

This 25-page report, updated in May 2012, describes the history of Medicaid estate recoveries in Iowa, details the program's long, slow effort to enhance its effectiveness through legislation and litigation, explains the program's hardship waivers and other legal and regulatory protections for Medicaid recipients and their families, covers the process and operation of Iowa's estate recovery program, and is an excellent source of estate recovery "best practices."

Stephen A. Moses, "The Maine Thing About Long-Term Care Is That Federal Rules Preclude a High-Quality, Cost-Effective Safety Net," Center for Long-Term Care Reform, Seattle, Washington, and the Maine Health Care Association, Augusta, Maine, November 2, 2012: http://www.centerltc.com/pubs/Maine.pdf.

This report contained the following section on the MaineCare estate recovery program:

"**Estate Recovery**: Federal law requires all states to recover the cost of care provided by Medicaid from the estates of deceased recipients. The purpose of this requirement is to restore funds previously sheltered from spend down, especially resources sheltered by means of the home equity exemption, so they are available to help others in need rather than passing as a 'windfall' to heirs.

"MaineCare has a relatively successful estate recovery program. Average recoveries for state fiscal years (SFY) 2009-2012 were $6,725,000 per year. Staff estimate the cost of recovery, including four positions, benefits and other expenses, to be $272,673 per year for a return on investment (ROI) of approximately 25 to one. MaineCare estate recovery staff anticipate that with stronger laws supporting recovery and with additional staff, annual recoveries could realistically increase by $1.5 million to $2.0 million.

"Potential additional revenue from estate recoveries may be even higher, however. Maine's program exempts the first $7,000 of estate value from recovery; does not recover from the estates of spouses predeceased by MaineCare recipients; and does not use TEFRA liens to ensure that real property is retained by recipients until recovery from their estates.

"A small, informal sample of new estate recovery cases showed that seven out of ten owned homes meaning potential recoveries should be substantial. Yet, of MaineCare's 4217 nursing facility recipients, only 297 or 7.1% own homes that are exempt due to 'intent to return.' These homes have an average equity value of $105,114 and a median equity value of $87,200, both far below MaineCare's $750,000 home equity exemption. Because we know a much larger percentage of age-65-plus people own homes, a key question to answer is 'what happened to that home equity before the homeowners ended up on MaineCare?'

"By hiring more staff, seeking stronger legislative authorities, researching and applying best practices from other states, Maine could aspire to achieve estate recoveries comparable to those of the most successful state, Oregon, which brought in recoveries equal to 5.8% of its Medicaid nursing home expenditures. A comparable rate of recovery for Maine would more than double the nontax revenue Maine recovers from estates to $13.8 million per year." (Footnotes omitted)

Appendix: List of Interviewees

Reinhold "Ron" Bansmer, Special Projects Program Manager, DHHS, Augusta, Maine

Robert J. Byrne, Principal Assistant Attorney General, Collections Enforcement Section Office of Attorney General Mike DeWine, Columbus, Ohio

W. Corey Cartwright, Deputy Attorney General, Idaho Attorney General's Office representing the Department of Health and Welfare, Boise, Idaho

Ben Chatman, Operations Manager, Iowa Estate Recovery Program, Des Moines, Iowa

Deen Dunn, Manager, State of Maine Estate Recovery, Department of Health and Human Services, Augusta, Maine

Kathy Emmerton, Chief, Estate and Casualty Recovery Section, Bureau of Fiscal Management, Division of Health Care Access and Accountability, Department of Health Services, Madison, Wisconsin

Bob Fleming, President, Sumo Group, Des Moines, Iowa

Bethany L. Hamm, Division Director for Policy and Programs, Department of Health and Human Services, Augusta, Maine

Dale B. Klitzke, Staff Attorney, Benefit Recovery Section, Members and Provider Services, Special Recovery Unit, Department of Human Services, St. Paul, Minnesota

Janelle Laylagian, Esquire, Administrator, Estate Recovery Unit, Department of Health and Human Services, Concord, New Hampshire

Doreen M. McDaniel, MaineCare Program Manager, Department of Health and Human Services, Augusta, Maine

Richard "Rick" H. Mills, J.D., Operations and Policy Analyst 3, Office of Payment Accuracy and Recovery, Oregon Department of Human Services, Salem, Oregon

Stefanie Nadeau, MaineCare Director, Department of Health and Human Services, Augusta, Maine

Teresa Potter, Reimbursement Specialist, State of Maine Estate Recovery, Department of Health and Human Services, Augusta, Maine

Anthony Weyant, Liens and Estates Supervisor, Bureau of Collections, Liens and Estates Section, Springfield, Illinois