

November 27, 2020

Medicaid and CHIP Payment and Access Commission (MACPAC)
1800 M Street NW
Suite 650 South
Washington, D.C. 20036

Subject: Medicaid Estate Recovery

Dear MACPAC Commissioners:

On behalf of the undersigned organizations, we thank the Commission for examining the effects of Medicaid estate recovery. As we explain below, the relatively minimal revenue generated by estate recovery is far outweighed by the burdens it places on low-income American families. No other public benefit program requires that correctly paid benefits be recouped from deceased beneficiaries' family members. Neither should Medicaid. Thus, we believe Medicaid estate recovery should ultimately be eliminated to better allow low-income families to move out of poverty.

States Have Objected to Medicaid Estate Recovery Because It Places an Undue Burden on Poor Families.

Initially, federal Medicaid law allowed, but did not require, states to obtain repayment from the estates of certain deceased beneficiaries.¹ In 1993 however, Congress amended federal Medicaid law to require states to recoup specified long-term care Medicaid expenses from deceased beneficiaries' assets.²

Notably, some states have objected to this requirement. West Virginia, for example, filed suit against the federal government in 1995, arguing that estate recovery was poor policy.³ West Virginia's objections were succinctly summarized by a subsequent opinion from the Fourth Circuit Court of Appeals:

Simply put, the State of West Virginia believes that the estate recovery program is bad public policy that yields little in terms of dollars actually recovered but creates substantial non-financial problems, such as "widespread clinical depression in aged and disabled nursing home residents." [quotation from West Virginia's appellate brief] The program generally affects the poorest segment of the elderly population, those who cannot afford to buy long-term care insurance and those who cannot afford or do not appreciate the need for the legal advice necessary to engage in the various forms of estate-planning that can protect certain assets while retaining Medicaid eligibility. During oral argument, West Virginia described the program as a "betrayal of the New Deal," in that the federal government promised it would take care of its citizens, yet never suggested that the

¹ Pub. L. 89-97, Title I, Part 2, § 121 (July 30, 1965) (enacting Medicaid Act, including Section 1902(a)(18) of the Social Security Act, which was codified as 42 U.S.C. § 1396a(a)(18)).

² 42 U.S.C. § 1396p(b)(1)(B); Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title XIII, Ch. 2, Subch. B, Part II, § 13612(a)-(c) (Aug. 10, 1993).

³ West Virginia v. United States HHS, 132 F. Supp. 2d 437, 441 (S.D. W. Va. 2001).

elderly and destitute would later be required to forfeit the homes for which they had worked so diligently.⁴

Unfortunately, the Fourth Circuit ruled against West Virginia on constitutional grounds, holding that the estate recovery mandate was not unconstitutionally coercive.⁵

In response, West Virginia tried to moderate its estate recovery program, but found itself barred from even taking that middle-ground step. In order to protect poor families, West Virginia exempted approximately \$50,000 from recovery against a house, arguing “that estate recoveries can lead needy citizens to turn down necessary medical care out of fear that they will lose homes in which they take enormous pride.”⁶ Again, the Fourth Circuit found that the federal estate recovery law prevented West Virginia from following its preferred public policy, and ordered the state to eliminate the exemption.⁷

We agree with West Virginia and other states⁸ that mandatory estate recovery is counterproductive. A humane safety net program would provide assistance while making it more likely that beneficiaries would be able to move out of poverty. By contrast, mandatory estate recovery harkens back to Elizabethan Poor laws, which viewed poverty as a sin to be punished, and held a poor person’s family liable for benefits paid by the state.⁹

The enactment of Social Security, Medicare and Medicaid represent a national consensus that the expense of caring for aging persons should not fall exclusively on their children and grandchildren. Social Security and Medicare are funded through payroll deductions while Medicaid, since it benefits low-income persons, is funded by federal and state taxes. Medicaid beneficiaries and their families have contributed to the program through their tax payments, and should not be expected to shoulder the additional burden of tens, or possibly hundreds of thousands of dollars in Medicaid estate claims. Indeed, it is most appropriate that the Medicaid program’s expenses be apportioned across the taxpayer population – with each taxpayer obligated for a relatively small amount – rather than having beneficiaries’ heirs be held financially responsible for large amounts.

Medicaid Estate Recovery Prevents Families from Escaping Poverty.

Too frequently, Medicaid estate recovery keeps families in poverty. At death, a Medicaid beneficiary generally owns only one thing of any significant value: their home. A 2019 Urban Institute report notes that “[h]omeownership is an important wealth-building source and a

⁴ *West Virginia v. United States HHS*, 289 F.3d 281, 285 (4th Cir. 2002).

⁵ *West Virginia v. United States HHS*, 289 F.3d 281, 297 (4th Cir. 2002).

⁶ *West Virginia v. Thompson*, 475 F.3d 204, 214 (4th Cir. 2007).

⁷ *West Virginia v. Thompson*, 475 F.3d 204, 214 (4th Cir. 2007).

⁸ Michigan, for example, only instituted estate recovery in 2007, after being threatened by the federal government with loss of Medicaid funding. Student Note, Widening the Gap Between Rich and Poor: Issues and Recommendations for the Implementation of Michigan’s Medicaid Estate Recovery Law, 90 U. Det. Mercy L. Rev. 141, 141 (Fall 2012).

⁹ See, e.g., William P. Quigley, Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor, 30 Akron L. Rev. 73 (1996), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506885; Abbott, Edith, Poor Law Provision for Family Responsibility, Social Serv. Rev., vol. 12, no. 4, at 598–618 (1938), available at www.jstor.org/stable/30011141.

foundation for economic stability.”¹⁰ In many cases, owning the home outright has been a long and arduous process for a Medicaid beneficiary, based on making monthly mortgage payments for 20 to 30 years or more.

Ideally, a low-income Medicaid beneficiary would be able to pass their home on to a child, so that later generations would have a stable place in which to live. Medicaid estate recovery, however, often requires that the family home be sold to pay the state for Medicaid nursing facility expenses. Alternatively, the surviving family members may be forced to take out a loan against the home, and once again be saddled with a substantial mortgage.¹¹

Furthermore, these financial burdens can affect not just a family, but the neighborhood in which they live. Low-income families tend to live in specific neighborhoods, so the burden of estate claims can lead to disrepair, abandonment, or homelessness, with multiplying negative consequences. By contrast, without estate claims, low-income neighborhoods are likely to remain more stable, as adult children can remain in their parent’s home after they have passed on.¹²

Medicaid Estate Recovery Likely Exacerbates the Racial Wealth Gap.

Medicaid estate recovery burdens fall especially hard on minority families that live in multigenerational homes. Decades after the Fair Housing Act of 1968 made discriminatory policies illegal, minority households still face additional struggles¹³ to obtain a home, including limited access to credit and mortgages, and frequent lack of a family member to assist with a down payment or co-sign for the home.¹⁴

The reality is that estate recovery exacerbates these inequities and imposes burdens on those who are least able to shoulder them. Authors of a 2018 Urban Institute study summarize the connection between multigenerational homeownership and race:

As the US population becomes more racially and ethnically diverse, it is important to ask how the significant decline and ongoing gaps in homeownership will affect future generations. Historically, homeownership has been an important wealth-building asset.

¹⁰ Alanna McCargo, Jung Hyun Choi, and Edward Golding, Building Black Ownership Bridges, at 1 (May 2019), available at https://www.urban.org/sites/default/files/publication/100204/building_black_ownership_bridges_1.pdf.

¹¹ See, e.g., Rachel Corbett, Medicaid’s Dark Secret, The Atlantic (Oct. 2019), available at <https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671/> (adult daughter who pays \$100,000 to pay off mortgages and make repairs in mother’s home, but then is assessed estate claim of almost \$200,000 after mother’s death).

¹² See, e.g., Housing Alliance of Pennsylvania, Reclaiming Abandoned Pennsylvania, at 16-17 (March 2003), available at https://static1.squarespace.com/static/5342bfabe4b076ea499631f5/t/558c46bbe4b03447dc05d230/1435256507364/Reclaiming+Abandoned+PA_March+2003+%281%29.pdf.

¹³ See Distribution of Household Wealth in the U.S. Since 1989, available at <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:121;series:Net%20worth;demographic:race;population:all;units:levels>

¹⁴ See e.g., Michele Lerner, Blacks in the U.S. Face a Huge Gap in Homeownership Rate, Compared to Whites, Here’s Why. The Washington Post (Oct. 2020), available at <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/?arc404=true>

Wealth accumulation is financially beneficial not only to the homeowners themselves but can also be transferred to their children. This intergenerational homeownership transfer is likely to reinforce and expand the homeownership and wealth gaps across race and ethnicity.¹⁵

Medicaid estate recovery eliminates the major asset—the home—that minority families may use to ensure that future generations do not live in poverty, especially homes where multiple generations live. The loss of the home will frequently be the tipping point that keeps a family in poverty, or pushes the family back into poverty that they had been on the verge of escaping.

The Financial Benefit to States Remains Relatively Minimal.

The primary rationale for estate recovery is financial – that recovered funds will assist the state in funding the Medicaid program. This rationale is belied by the facts. MACPAC’s own research shows that recoveries in most states are insignificant compared to Medicaid budgets, and also when compared to Medicaid expenses for long-term services and supports. In each of the five fiscal years 2015 through 2019, states recovered from 0.53 percent to 0.62 percent of the Medicaid fee-for-service spending on long-term services and supports.¹⁶ Because 24 states provide long-term services and supports through managed care, the actual recovery percentage is even lower than that.¹⁷ These data are consistent with other examinations of estate recovery finances. In a previous study by AARP, for example, estate recoveries amounted on average to 0.69 percent of states’ Medicaid expenses for long-term care, with the median recovery percentage being 0.57 percent.¹⁸

Estate Recovery of Capitated Payments Rates Is Particularly Unjust, Because Recovery May Far Exceed the Expense of Services Actually Received by the Beneficiary.

The United States Department of Health and Human Services’ (HHS) state policy manual for Medicaid requires that states with beneficiaries enrolled in managed care collect the “total capitated rate” from estates.¹⁹ This leads to estate claims that may far exceed the cost of the medical services actually provided to the beneficiary. For example, a young man from New Jersey was born profoundly disabled.²⁰ He received SSI at the age of 18 and died when he was 20 years old. He was enrolled in Medicaid as a result of his SSI eligibility, but never used any Medicaid benefits, because his parents’ health insurance provided adequate coverage. New Jersey sought payment of over \$200,000 after his death, based on monthly capitation fees paid by the state’s Medicaid program to the managed care company. His parents had not known about

¹⁵ Jung Hyun Choi, Laurie Goodman, and Jun Zhu, Intergenerational Homeownership, at 7 (Oct. 2018), *available at* https://www.urban.org/sites/default/files/publication/99251/intergenerational_homeownership.pdf.

¹⁶ Updates on Medicaid Estate Recovery Analyses, September 2020 at slide 9, *available at* <https://www.macpac.gov/wp-content/uploads/2020/09/Updates-on-Medicaid-Estate-Recovery-Analyses.pdf> (recovery ranging from 0.53 percent to 0.62 percent).

¹⁷ Updates on Medicaid Estate Recovery Analyses, September 2020 at slide 9, *available at* <https://www.macpac.gov/wp-content/uploads/2020/09/Updates-on-Medicaid-Estate-Recovery-Analyses.pdf>.

¹⁸ Naomi Karp et al., ABA Commission on Law and Aging, Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices, at 51 (Table 3) (June 2005), *available at* https://assets.aarp.org/rgcenter/il/2005_06_recovery.pdf.

¹⁹ HHS, State Medicaid Manual, Ch. 3, Eligibility, Section 3810(A)(6). Available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP

²⁰ Name not given to protect confidentiality of the individual.

the capitation fee nor, to their knowledge, could they have done anything about it other than stopping him from collecting his SSI payments.

Conclusion.

Thank you again for consideration of our comments. As we explain above, estate recovery places an unfair burden on low-income older Americans and persons with disabilities. Too frequently, estate recovery keeps families from escaping poverty, or pushes on-the-margin persons into poverty or homelessness.

Eliminating Medicaid's estate recovery would correct this inequitable policy while having only a limited impact on the Medicaid financing. Again, thank you for examining these issues. If you have any questions, please contact Eric Carlson at Justice in Aging, (ecarlson@justiceinaging.org/(213) 309-9394).

Sincerely,

Aging Life Care Association
American Network of Community Options and Resources
American Psychological Association
Asian Resources, Inc.
Autistic Self Advocacy Network
Brain Injury Association of America
California Advocates for Nursing Home Reform
California Immigrant Policy Center
Center for Health Care Rights
Center for Medicare Advocacy
Center for Public Representation
Disability Rights California
Disability Rights Education and Defense Fund
Easterseals
Health Access California
Justice in Aging
Maternal and Child Health Access
Mental Health America
National Academy of Elder Law Attorneys
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Association of Social Workers
National Disability Rights Network
National Health Law Program
National Multiple Sclerosis Society
National PACE Association
Public Interest Law Project
San Francisco AIDS Foundation
Special Needs Alliance
Well Spouse Association
Western Center on Law and Poverty