



Written Testimony of
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Before the Committee on Finance

United States Senate

Medicaid Fraud, Waste, and Abuse: Threatening the Health
Care Safety Net

Chairman Grassley, Senator Baucus, and Members of the committee, my name is Paul Pickerell, Financial Recovery Manager, Oregon Department of Human Services (DHS). Thank you for the opportunity to provide testimony on Oregon's estate recovery program.

1. Estate Recovery in Oregon.

Oregon enacted legislation in 1949 authorizing the state to recover the cost of state-provided cash assistance to the elderly. In 1975 legislation was enacted authorizing recovery of the cost of medical assistance provided to persons 65 and older.

The mission of the Estate Administration Unit (EAU) is to recover from the estates of Medicaid recipients the cost of cash and medical benefits provided. Our program aggressively corrects disqualifying transfers of assets, and is active in the preservation of assets so they may be available for the current cost of care as well as the estate. Our goal is to increase estate recoveries while protecting the personal and property rights of the people we serve.

When the Oregon DHS has a claim, it is a priority claim against the property, or any interest therein, belonging to the estate of the deceased person. If there is a surviving spouse, no recovery occurs until the death of the surviving spouse. DHS will have a claim against the estate of the surviving spouse for aid paid to the deceased spouse, but only to the extent that the surviving spouse received property or other assets from the deceased client at

the time of death through probate or through operation of law. In addition, DHS will also have a claim against the estate of the surviving spouse for any aid paid to the surviving spouse.

No claim is asserted when there is a surviving child of the client who is under age 21, or blind, or permanently and totally disabled.

2. In Federal Fiscal Year 2004, the EAU recovered \$18,965,250. During that time period the Medicaid expenditures in recoverable programs totaled \$1,260,418,554. Average number of cases handled: nearly 7,700. It is estimated that over 40% of the deceased Medicaid recipients have either exemptions that waive or defer recovery from their estate.

3. Oregon's estate recovery program has been successful, within the existing legal parameters, because it has developed a number of business practices that have successfully addressed the problems inherent in pursuing estate recovery. The relative success of our program is predicated, first and foremost, on the skills of the employees that implement the program. They are dedicated staff who believe in their job. They represent a diverse mix of experience, in background and education, with legal, paralegal, title experience, Medicaid eligibility experience, collections experience, and experience delivering services directly to clients. This varied staff background compliments and balances our program and ensures that there is sensitivity to families while at the same time we recover resources that can be utilized to help other low-income senior and disabled clients. Some of the practices the Oregon utilizes or recommends are:
- a. Highly recommend that states utilize the "expanded definition of estate", contained in Section 1917(b)(4)(B) of the Social Security Act, which includes language that allows for recovery of assets conveyed through joint tenancy, tenancy in common, survivorship, life estate, living trust or other similar arrangement (e.g., annuity). Using this expanded definition allows for the pursuit of assets that many existing state probate definitions would preclude.
 - b. Implementation of a statewide electronic notification process that alerts the estate recovery unit of the Medicaid client's death. In the estate recovery process, time is of the essence. The sooner the state can take actions to initiate recovery, the greater likelihood that assets will be intact. The electronic notification should also, ideally, allow for a review of the electronic narrative of the case history, because such a review can reveal critical facts or information on estate assets sometimes not disclosed on the "official" notification document.
 - c. Regular on-site training on the estate recovery process at local eligibility/service units around the state, by estate recovery staff who are knowledgeable about the complexity and intricacies of probate, title, and property law. There is no adequate substitute for hands-on training in the field, to explain the process and answer questions. Support of the estate recovery program in the field by case managers and eligibility specialists is critical. They provide the information upon which all subsequent estate recovery activities are based.
 - d. Regular involvement by estate recovery staff in the training component of new field workers who will be implementing the Medicaid program. Training and orienting new staff to the importance of the estate recovery

process provides accuracy, consistency and uniformity to the information disseminated to clients and family members.

- e. It is critical that management and/or professional representatives of the estate recovery unit work closely with state Medicaid eligibility policy staff. Without a good working relationship, estate recovery activities may inadvertently be harmed if eligibility policy staff are not aware of estate recovery issues.
- f. Utilization of a probate specialist within the recovery unit whose primary responsibility is matching the names and social security numbers of all new probates filed in the county courts with the data base of deceased Medicaid recipients/surviving spouses, to ensure that the state is afforded an opportunity to submit its claim in a timely manner. This position can be extremely cost effective relative to the number of claims identified and the revenue subsequently generated.
- g. Development and utilization of a standardized series of letters that are legally defensible and address the most common situations that are encountered by the estate recovery unit. This provides uniformity in correspondence and reflects the state's commitment to pursue recovery.
- h. Secure statutory authority for the state Medicaid agency to be a "priority creditor" under state probate law. There is no reason why general creditors should be in the same position as the state when the recovery of public monies is involved.
- i. Maintain regular contact with your CMS state representative to discuss estate recovery issues. Formally submit written requests to CMS for clarification of Medicaid policy in instances where there is ambiguity.
- j. Maintain regular contact with other estate recovery managers/staff in neighboring states, to identify new estate recovery "avoidance" strategies, trends, and to discuss possible remedial approaches. On topics of estate recovery that apply regionally or nationally, develop regional approaches to securing change by working with your state counterparts in drafting "regional position papers" on estate recovery issues that require CMS evaluation, research, and response.
- k. Introduce legislation to secure statutory authority to receive, as the state Medicaid agency, notification of all probate notices filed within the state. Such notification will allow the state to file a claim in probates where the

death of a former Medicaid client (someone who died off of assistance) would otherwise have been unknown to estate recovery staff, and may also identify property that the estate recovery unit was unaware that the deceased client had an interest in.

- l. Secure statutory authority to place liens on real property of deceased Medicaid recipients. Although they can be somewhat cumbersome administratively, there can be no doubt that such liens insure that the estate interest in the real property, specific to the public assistance provided, will be secured.
- m. Information, information, information. Develop an estate recovery brochure to be included with all Medicaid applications and as handout available at all local Medicaid offices, that clearly and concisely outlines the estate recovery process. Ideally, the brochure should list a 1-800 (toll free) number that individuals may call to receive additional information on the estate recovery program. This brochure can make a significant impact in reducing client and family apprehension if it presents information on estate recovery in a forthright and open manner. No Medicaid client should ever be surprised that there will be an effort, within specific parameters, to recover public assistance that has been provided to them.
- n. Secure subpoena authority to directly access financial records of the Medicaid decedent. This can sometimes identify fraud or possible financial exploitation of vulnerable seniors.
- o. Secure authority to file a “Request for Notice” with the county clerk to notify the state whenever client real property is transferred or encumbered.
- p. Utilization of an asset change specialist position. Researches electronic narratives when assets have dropped off during re-determinations of eligibility. Assures proper accounting of assets.
- q. Secure authority to nominate a personal representative to handle the estate. Allows state to utilize an independent third party to probate estate assets when a family is unwilling or unable to probate estate themselves.

- r. Pursue existing title and real property (assessor) resources to research the title history and valuation of real property in which the deceased Medicaid client may have held an interest.
 - s. Train and reinforce among estate recovery staff the importance of working with family members to resolve issues involving the Medicaid claim, prior to pursuing legal options against the estate.
3. Recommendations on changes to Federal law that would assist in the integrity of the Medicaid program.

Interspousal Transfers – An interspousal transfer is the transfer of assets from the spouse, which is receiving or will receive Medicaid, to the spouse that will not receive Medicaid. Medicaid recipients can transfer an unlimited amount of assets to a spouse. 42 USC 1396p(c)(2)(A)(i).

A person with substantial assets has a number of interspousal transfer techniques that can be used to become eligible for Medicaid. These are some of the many techniques that are commonly known as “artificial impoverishment.” The second phase of

“artificial impoverishment” is avoidance of estate recovery. In short, Medicaid can be used as a technique to protect inheritances for Medicaid recipients’ children.

Estate recovery consists of sending a claim to the estate of a deceased Medicaid recipient’s estate. 42 USC 1396p(b)(1); Oregon Revised Statute (ORS) 414.105. If the Medicaid recipient is survived by a spouse, no claim is submitted to the estate of the deceased Medicaid recipient. 42 USC 1396p(b)(2); ORS 414.105. When the spouse passes away estate recovery is permitted. 42 USC 1396p(b)(2); ORS 414.105.

However, when the surviving spouse passes away, the claim must be submitted to the surviving spouse’s estate. ORS 414.105. The only assets in the surviving spouse’s estate available to satisfy the claim are assets that passed from the Medicaid recipient at death to the surviving spouse. ORS 414.105. Therefore, assets that went from the Medicaid recipient during his lifetime, such as interspousal transfers, are not available in the surviving spouse’s estate to pay an estate recovery claim. See ORS 414.105.

The three most common interspousal transfers that avoid estate recovery are:

- Court Orders – Federal law allows a Medicaid recipient to transfer an unlimited amount of assets to a spouse, and to have those assets be excluded from determining the Medicaid recipient's eligibility, if the transfer is pursuant to a court order. 42 USC 1396r-5(f)(2)(A)(iv); 42 USC 1396-5(f)(3). Oregon law allows for these types of court orders for married couples. ORS 109.110. It is not unusual for married couples in Oregon to shelter up to \$180,000 in assets, not including the family home and automobile. Since these transfers occurred during the lifetime of the Medicaid recipient these assets will not be available to pay an estate recovery claim when the recipient's spouse dies. ORS 414.105.
- Home – The home of a Medicaid recipient is not counted in determining the eligibility of the recipient. In Oregon, frequently, the Medicaid recipient will transfer his or her interest in the home to his or her spouse. Once again since the transfer occurred during the Medicaid recipient's lifetime the equity in the home will not be available to pay an estate recovery claim when the recipient's spouse dies. ORS 414.105.
- Annuities – Certain types of annuities owned by the Medicaid recipient's spouse are not countable in determining the Medicaid recipient's eligibility. See 42 USC 1396p(d)(6); CMS State Medicaid Manual Part 3, Section 3258.9B. Frequently, the Medicaid recipient will transfer most or all of his or her assets to his or her spouse. The spouse then uses those assets to purchase an annuity that is not countable in determining the Medicaid recipient's eligibility. Again, since the asset transfer was during the lifetime of the Medicaid recipient, the annuity is not available to pay an estate recovery claim when the spouse dies. ORS 414.105. Oregon has seen cases where upwards of \$500,000 in assets have been sheltered by this method.

Eliminate restriction that prevents recovery of assistance provided before the age of 55 for non-institutionalized individuals. 42 USC 1396p(b)(1)(B).

Currently estate recovery, in most instances, is restricted to assistance received after the age of 55.

Eliminate restriction from recovery of assistance from a Medicaid recipient's estate when a surviving disabled child is disinherited. 42 USC 1396(b)(2)(A).

When a Medicaid recipient is survived by a permanently and totally disabled child there will be no estate recovery claim. This is true even when the disabled child receives no benefit from the estate of the deceased recipient, and the entire estate passes to the recipient's "healthy" children or anybody else, such as a neighbor.

To summarize, estate recovery and Medicaid eligibility are two sides of the same coin. Whatever criteria is allowable in establishing eligibility under Medicaid has a direct and measurable consequence on the availability of resources upon which to present a claim when the Medicaid recipient passes away. The two are inextricably linked. Assets that may be sheltered, transferred, or in some other manner removed from consideration, mean that at the present time they are not subject to recovery when the Medicaid recipient passes away. Therefore, what is exempted from resource consideration, the Medicaid eligibility "look-back" period for determining whether there has been a disqualifying transfer, when the disqualification begins, allowable transfers of real and personal property, etc., all impact estate recovery.

Thank you for the opportunity to testify. I'd be happy to take your questions.