COMMONWEALTH *of* VIRGINIA

Department of Medical Assistance Services

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MEMORANDUM

TO: The Honorable Walter A. Stosch
Chairman, Senate Finance Committee

The Honorable Lacey E. Putney
Chairman, House Appropriations Committee

FROM: Cynthia B. Jones Cynthia B. Jones

SUBJECT: Report on Medicaid Liens

Item 307(WWW) of the 2012 Appropriations Act directs the Department of Medical Assistance Services to develop a plan to strengthen its authority to recover the cost of providing long-term care services to Medicaid recipients through the use of liens. As part of development of the plan, the Department is required to survey other state Medicaid programs to obtain information on the most effective strategies to use when imposing liens and determine additional resources that might be needed, as well as the potential cost-savings that might be achieved. The report is due to the Chairmen of the Senate Finance and House Appropriations Committees by October 1, 2012.

Should you have any questions or need additional information, please feel free to contact me at (804) 786-8099.

CBJ/

Enclosure

Cc: The Honorable William A. Hazel, Jr., MD, Secretary of Health and Human Resources

Medicaid Liens

Department of Medical Assistance Services

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Introduction

Item #307 WWW of the 2012 Appropriations Act directs the Department of Medical Assistance Services (DMAS) to develop a plan to strengthen its authority to recover the cost of providing long-term care services to Medicaid recipients through the use of liens. As part of development of the plan, the Department is required to survey other state Medicaid programs to obtain information on the most effective strategies to use when imposing liens and determine additional resources that might be needed, as well as the potential cost-savings that might be achieved.

Federal Authority

As Medicaid expenditures for long-term care (LTC) services continue to increase dramatically, federal and state laws have evolved to allow and even require states to recoup these expenditures through estate recovery programs. The original federal Medicaid legislation permitted states to recover benefits only from individuals age 65 or older after the death of any surviving spouse when there were no dependent children, and prohibited placement of liens during the life of the beneficiary unless the benefits were incorrectly paid.

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) permits states to impose a lien on a home for benefits paid on behalf of a person in a medical institution if the state determines that the person is not reasonably expected to return home. Exceptions were granted if certain immediate family members resided in the home:

- The spouse,
- A child under age 21,
- A blind or disabled child,
- A sibling who has an equity interest in the home and has resided there for one year or more, or
- A child who has resided in the home for at least two years and has provided care that permitted the recipient to reside at home rather than in an institution.

The Omnibus Reconciliation Act of 1993 (OBRA 1993), for the first time required states to recover expenditures from the estates of individuals who receive LTC services, and allowed states to recover payments for *any* Medicaid services received by individuals age 55 or older.

Medicaid Liens

A lien confers to the creditor (lien holder) an interest in someone else's property and the right to take that property if an obligation is not satisfied or otherwise released. There are two types of liens that can be used to recover Medicaid costs. Post-death liens are placed against the estate of deceased Medicaid recipients. The lien prevents the estate from being settled and the property distributed to the heirs before all claims against it, including Medicaid's, are satisfied. Given that a post-death lien would not be imposed until after DMAS was made aware of the death of a Medicaid recipient, it does not appear that these liens would offer much of an advantage over the estate recovery process currently used by DMAS.

Pre-death (TEFRA) liens are imposed on the homes of living enrollees determined to be permanently institutionalized in a nursing or medical facility (not likely to return home). Some of the advantages of pre-death liens might include:

1. It would be relatively easy to notify new recipients that DMAS intended to impose a lien on their home since this can be done at the time of application.
2. Lien authority would improve DMAS' ability to recover expenses since it would prevent the sale of a home before Medicaid had a chance to recover expenses.
3. It would allow Virginia to make recoveries of assets not passing through probate.
4. It would establish a consistent method for estate recovery and ensure equal treatment of all LTC recipients.

Some apparent disadvantages include:

1. It could increase the complexity and the cost of the estate recovery program.
2. It could potentially result in negative public perception and complaints to DMAS and elected officials.
3. DMAS currently lacks the resources necessary to pursue recovery through liens and may need to acquire legal assistance or directly involve the Office of the Attorney General.

In 2007, the Joint Legislative Audit and Review Commission (JLARC) was tasked with completing a study on the Medicaid changes authorized by the Deficit Reduction Act of 2005 and how those changes affected asset sheltering for Medicaid long-term care applicants. DMAS worked with JLARC on this report and one of the provisions researched was lien authority. The recommendation of JLARC at that time was that the General Assembly may wish to direct DMAS to investigate the differences between lien authority in an effort to enhance the State's estate recovery program for Medicaid long-term care recipients.

Current DMAS Estate Recovery process

DMAS has the authority to make claims on the estates of recipients for any medical assistance payments made on behalf of the recipient, but does not currently make use of liens for estate recovery. The current process for recovering benefits is described below.

The Third Party Liability (TPL) Unit at DMAS receives information on the death of a recipient from internal sources such as the deceased enrollee report or from external sources such as a nursing home, estate administrator or financial representative of the decedent. DMAS then searches for information on surviving relatives to determine if there is an estate that may have recoverable assets. Any claims for services provided after the recipient's 55th birthday (per federal law) are mailed to the executor of the estate or the circuit court to see if DMAS can recover these expenses.

The amount recovered depends on several factors. The *Code of Virginia* stipulates the order in which an estate must pay debts and Medicaid claims are typically sixth in line behind the estate lawyers, family allowances, funeral expenses, debts and taxes given federal preference, and medical expenses paid to hospitals and nursing homes. In addition, a recipient's survivors may request a hardship waiver when the estate is the sole income producing asset of the survivor, if the home is of modest value, or if other compelling circumstances exist.

Survey Results – Experiences in other states

In order to consider the use of liens under Medicaid, DMAS reviewed a 2004 study and conducted its own survey of state programs in 2012. Specifically, a comprehensive survey on Medicaid estate recovery programs was undertaken by the AARP Public Policy Institute in the report "Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices." The report providers the following discussion on liens:

> A lien is 'a security device that binds property to a debt and puts a party on notice that someone besides the owner of the property has an interest in that property' (State Department of Human Resources v Ulmer; Nevada Supreme Court Decision). The lien itself is not a claim; the lien is a notice, and the claim is the demand through which the state triggers action. To make a formal claim against the property, the state or other creditor usually must take further action, such as filing a judicial action to create a claim that may then be granted or denied by a court. This process may occur as part of probate proceedings or as a separate collection proceeding. In reality though, liens against real property are often "enforced" at the time the property is sold without going to court. Since one cannot convey clear title to property if a lien is attached, the seller must either satisfy the lien as part of the sale or go to court seeking removal of the lien. Thus, estate recovery may occur through a lien without a claim, through a claim without a lien, or through a lien that is then enforced by using a claim.

While the report was fairly comprehensive, it is difficult to generalize from the results since estate recovery programs vary so much from state to state. Highlights of the survey include the following:

- For Fiscal Year 2003, States recovered over $347 million with a low of $86,000 in Louisiana to almost $54 million in California.
- Overall, the proportion of Medicaid expenses recovered from estates is very small compared to the total amount spent on LTC services. Revenues as a percentage of LTC Medicaid expenses ranged from .01% to 2.2% with only eight states above 1%. The national median recovery was 0.5% of total LTC costs.

- Recoveries from each estate are also relatively small. The average recovery per estate was $8,116, and the median recovery per estate was $5,081.
- Information on the cost of operating estate recovery programs is very limited and inconsistent. For the few states that did provide consistent administrative cost estimates, the administrative cost as a percentage of collections ranged from a low of 1.5% in North Carolina to a high of 11.8% in Tennessee.
- Nineteen states used TEFRA or pre-death liens and the number of liens varied from 14 in Delaware to approximately 800 in Minnesota.
- Thirteen states used post-death liens and most of these states do so even when a qualifying relative resides in the home. The number of post-death liens ranged from 25 in Oklahoma to 1,500 in Minnesota.

To summarize the AARP report, the amount recovered through estate recovery is a small percentage of the total LTC expenses, although the amount recovered is not insignificant. However, it may be very difficult to estimate the potential increase in recoveries that lien authority may lead to in Virginia.

The Department undertook a survey of other states in June 2012 in order to obtain current information about lien practices. While all states were surveyed, Virginia received responses from only 30 states. States were asked questions regarding whether or not the state used TEFRA liens, how the liens were placed, savings realized from placement of liens, and the number of staff used to handle the lien process. Highlights of this current survey include the following:

- Of the 30 states responding, 12 use TEFRA liens to recover costs paid on behalf of Medicaid recipients:
    - Alabama
    - Arizona
    - Colorado
    - Indiana
    - Maryland
    - Massachusetts
    - Minnesota
    - New Hampshire
    - Oklahoma
    - South Dakota
    - Washington
    - Wisconsin
- Recoveries based on TEFRA liens range from a low of $1.2 million per year to a high of over $5 million per year.
- Administrative costs were not available; however, states that responded regarding staff needed to handle TEFRA liens indicated that a combination of county staff, state staff or contractors (Maryland) were used.

DMAS Operational Considerations

It appears that the *Code of Virginia* would need to be amended in order to provide DMAS with the authority to impose liens. Language currently in place in §63.2-409 stipulates that no liens can be placed on property of public assistance recipients except after the death of an individual who was receiving long-term care benefits through Medicaid. If authority is granted, DMAS would also need to promulgate regulations and modify the federally-approved State Plan for

Medical Assistance Services (State Plan). Federal approval of a State Plan change may be difficult to obtain at this time. The maintenance of effort requirement imposed by the Patient Protection and Affordable Care Act (PPACA) prohibits states from imposing more restrictive eligibility requirements in their Medicaid programs until January 1, 2014, or when a health benefits exchange (federal or one operated by the state) becomes operational. While DMAS has not consulted with CMS on this specific issue, it is likely that CMS may view the use of liens as a more restrictive eligibility policy change. This means the ability for DMAS to use liens would likely not receive federal approval until at least January 2014, or when a health benefits exchange is operationalized in Virginia.

Lien Implementation Steps and Staffing Requirements

If state and federal authority is granted to impose liens, DMAS will need to work closely with the Virginia Department of Social Services and the Office of the Attorney General to develop a plan for placing liens as well as implementation of the plan. DMAS staff consulted with the Office of the Attorney General to gain additional information regarding types of liens (an administrative process which requires filing a memorandum of lien versus a judgment) and the steps that would need to be followed regarding both placing and releasing liens. Currently, the administrative lien process is used by both the Virginia Department of Taxation and the Virginia Employment Commission.

If an administrative process is followed, a memorandum of lien would be filed with the appropriate circuit court; however, it does not require an attorney to take the action. A judgment would require legal counsel to handle the process. Assuming that administrative lien authority is granted, the following steps would need to be taken:

Current Medicaid members, as well as all new applicants for Medicaid, will need to be notified that a lien will be placed on their property if LTC services are used. This notification will occur at the time of application for Medicaid for all new enrollees and all current enrollees will be notified via a letter from DMAS prior to implementation of the change.

When a determination of eligibility for Medicaid payment of long-term care services is made, the local department of social services eligibility worker will need to collect information on any property the individual may have in his name solely or jointly with another person, as well as information on all other household members in order to determine whether the property can be exempted from the lien requirements. The eligibility worker would then need to forward to DMAS information on individuals who are potentially eligible for a lien to be placed.

DMAS will need to develop criteria to define/determine when a person is considered to be permanently institutionalized and not likely to return home per the requirements in §1917 of the Social Security Act and work with the nursing facilities to have the determination of permanent institutionalization made. Once an individual has been determined to meet the permanently institutionalized criteria, he must be notified of that decision and informed that a lien will be placed on his property. All individuals found to meet the criteria must be given the opportunity to appeal the determination of permanent institutionalization.

DMAS staff will have responsibility for actions related to recording and releasing liens, determining and making hardship determinations and notifying agency counsel when court appearances may be required. If authority is granted to impose liens, DMAS estimates the need for two additional staff members to be responsible for the new functions and associated workload. These two positions are estimated to cost $174,088 (87,044 GF) per year. Additionally, resources from the Attorney General's Office/agency counsel will also be needed if court appearances are required or collection issues arise.

DMAS will also need to set up a separate accounting process to identify monies collected as a result of a lien so that the amount can be deducted from any amount owed as a result of the estate recovery process. Further, DMAS would need to make system changes to account for the new type of recovery of funds received as a result of a property lien and develop new letters related to the recovery.

Potential Cost Savings

As part of the budget language, DMAS was asked to detail what cost savings the agency could expect to receive if authority was granted to impose liens. However, staff is unable to provide an estimate at this time because it is unknown how many Medicaid LTC recipients would be impacted by this provision and would require impositions of liens and subsequent recovery by DMAS. In SFY 2012, DMAS recovered $987,460.58 through the estate recovery process. While it is anticipated that recoveries could increase through the imposition of liens, the exact amount is unknown at this time.

Conclusion

This report was prepared in response to Item #307 WWW of the 2012 Appropriations Act which directed DMAS to develop a plan to strengthen its authority to use liens to recover the cost of providing long-term care services to Medicaid recipients. As part of development of the plan, the Department is required to survey other state Medicaid programs to obtain information on the most effective strategies to use when imposing liens and determine additional resources that might be needed as well as the potential cost-savings that might be achieved.

There are two types of liens that can be used to recover Medicaid costs. Post-death liens are placed against the estate of deceased Medicaid recipients. The lien prevents the estate from being settled and the property distributed to the heirs before all claims against it, including Medicaid's, are satisfied. Given that a post-death lien would not be imposed until after DMAS was made aware of the death of a Medicaid recipient, it does not appear that these liens would offer much of an advantage over the estate recovery process currently used by DMAS. Pre-death (TEFRA) liens are imposed on the homes of living enrollees determined to be permanently institutionalized in a facility (not likely to return home). A pre-death lien would appear to have an advantage to DMAS because it would be relatively easy to notify new recipients that DMAS intended to impose a lien on their home since this can be done at the time of application. Authority to impose pre-death liens would also improve DMAS' ability to recover expenses since it would prevent the sale of a home before Medicaid had a chance to recover expenses.