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LTC Bullet: States Decry Medicaid LTC Loopholes

By Stephen Moses



Stephen Moses is president of the Center for Long-Term Care Reform in Seattle, Wash.

Legislation introduced by Congressman Charles W. Boustany, Jr., M.D., R-La., and others has called for the study and reform of Medicaid long-term care (LTC) eligibility and estate recovery rules. The bill's sponsors sent letters to state governors asking their opinion of the proposed legislation and requesting their replies to four key questions about the appropriate role of Medicaid long-term care financing. Despite prodding from the members of Congress, only 15 states replied to their letter. But in those 15 replies, there is strong evidence that Medicaid eligibility and estate recovery rules are subject to frequent and egregious abuses.

The following are selected replies to each of the four questions:

1. SHOULD THE FEDERAL GOVERNMENT GIVE STATES GREATER FLEXIBILITY TO CONSIDER ASSETS, INCLUDING SUBSTANTIAL HOME EQUITY, WHEN DETERMINING ELIGIBILITY FOR LONG-TERM CARE COVERAGE THROUGH THE MEDICAID PROGRAM? WHY OR WHY NOT?

New Mexico Governor Susana Martinez: "I agree that alternate policy options should be pursued to prevent state Medicaid programs from becoming the default financier of long-term care services for middle-income individuals, and to protect the program as a safety net for those who need it most."

Wisconsin Department of Health Services Secretary Dennis G. Smith [Smith was director of Medicaid at the federal Centers for Medicare and Medicaid Services (CMS) for eight years during the George W. Bush administration]: "Greater flexibility should be provided to states regarding Medicaid eligibility policies, including which assets should be considered for purposes of determining Medicaid eligibility. Increased flexibility will allow states to adopt changes to their

Medicaid programs in order to help ensure the long-term sustainability of such programs for their residents most in need of government assistance."

Maine Governor Paul R. LePage: "Regulations should be simplified so that states can deny Medicaid to all people who have transferred resources to become eligible for Medicaid, not just for institutional level of care."

Tennessee Deputy Director of Policy and Research Beth Tipps—Office of Governor: "Taking substantial home equity and other assets currently exempt under the law into account in determining eligibility for Medicaid reimbursement of LTC would result in fewer people with substantial means qualifying for Medicaid-reimbursed LTC until such time that those assets have been exhausted, and target Medicaid reimbursement to those with the greatest financial need. The effectiveness of any such policy would also likely require adjustments to the look-back period for asset transfer.

"Persons who want to protect assets would still be able to purchase an LTC Partnership policy and protect assets up to the value of private insurance benefits provided. This would encourage those who can afford LTC insurance to purchase it in order to protect assets, and decrease dependency solely on Medicaid for payment of LTC."

Virginia Secretary of Health and Human Resources William A. Hazel, Jr., M.D.: "Giving states flexibility to change eligibility rules and expanding LTC insurance coverage options for middle-income individuals will help to protect Medicaid LTC as a safety net for the low-income Americans who need it most."

Georgia Governor Nathan Deal: "Federal restrictions fail to recognize significant variation across states. Home values, household incomes, cost of living, demographics, and cost of health care are factors that determine eligibility but are widely different from place to place. States are better suited to establish criteria which ensure their safety net programs better serve those for which it is intended."



2. PLEASE PROVIDE EXAMPLES OF BARRIERS TO EFFECTIVE MEDICAID ESTATE RECOVERY PROGRAMS AND TOOLS THAT MIGHT HELP STATES IN THIS AREA.

North Dakota Human Services Department Interim Executive Director: “State Medicaid programs have, by default, become the major form of insurance for long-term care. Medicaid estate planning has increasingly become a way for middle-income Americans to impoverish themselves to the point that they can become eligible for Medicaid. The current system is consuming both state and federal budgets and is unsustainable. It is imperative that states have the flexibility to pursue creative and innovative options for state-appropriate solutions.”

Wisconsin Department of Health Services Secretary Dennis G. Smith: “There has been an increase in the number of beneficiaries age 65 and older seeking disability determinations solely to place excess assets into ... pooled trusts. The trusts are preventing the state from recovering Medicaid costs in certain cases, and the extra requests for disability determinations from persons over age 65 are straining the state’s resources.

“The prohibition against filing a TEFRA lien prior to the outcome of a fair hearing has been increasingly problematic because beneficiaries or their responsible parties postpone hearing dates while attempting to sell the home. When the home eventually sells prior to the hearing, no lien can be placed because the beneficiary is no longer the owner.

Many beneficiaries then seek a determination of disability and, if granted, the sale proceeds are placed into a ... pooled trust and not available to pay for the cost of care which then continues to be borne by Medicaid.”

Pennsylvania Department of Public Welfare Secretary Gary D. Alexander: “The underlying policy debate on estate recovery involves the very character and purpose of Medicaid. Should the Medicaid long-term care program be a strictly needs-based program for individuals who have no ability to pay for their own care? Or should middle class individuals and couples be permitted to qualify for benefits without losing the ability to transfer wealth to their children? When the economy falters, allowing the latter to occur places an increasing amount of stress on limited human services budgets and requires policymakers to consider service reductions.”

Hawaii Governor Neil Abercrombie: “When a Medicaid recipient dies while having only a life estate interest in the property, the lien that was on the property must be released, which results in the loss of revenue. The federal statute should be amended to allow recovery of up to the value of the life estate at the time of the recipient’s admission to the facility.”

Rhode Island Governor Lincoln D. Chaffee: “Medicaid estate recovery programs are problematic because of legal options allowable under current state and federal laws. People are currently able to find refuge for assets in the form of life estates or promissory notes.”

Virginia Secretary of Health and Human Resources William A. Hazel, Jr., M.D.: “In addition to Virginia’s current broad estate recovery authority, we are considering several other measures to increase recovery efforts, but these are currently stalled due to the Affordable Care Act (ACA) maintenance of eligibility (MOE) provision which precludes more restrictive eligibility policy for adults enrolled in Medicaid until at least 2014.”

3. SHOULD STATE AND FEDERAL GOVERNMENTS ENCOURAGE MIDDLE-INCOME AMERICANS TO ANTICIPATE AND PLAN FOR THEIR FUTURE LONG-TERM CARE NEEDS, INSTEAD OF RELYING ON

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MEDICAID, A SAFETY NET FOR THE POOR? WHY OR WHY NOT?

North Dakota Human Services Department Interim Executive Director: “The current lack of limitations on estate planning virtually eliminates incentives for individuals to plan for their own future needs. While the long-term care partnership act was enacted to encourage couples to plan for their long-term care needs, the interpretation of the Medicaid act to allow people to shelter an increasing number of assets makes the allowances found in the long-term care partnership act a less desirable option to assist a couple in retaining their assets.”

Maine Governor Paul R. LePage: “People would be more inclined to purchase LTC plans if there were tighter rules around transfers and greater incentives to purchase such policies.”

Rhode Island Governor Lincoln D. Chaffee: “Yes; using Medicaid as the primary source of funding for long-term care is not sustainable.”

Georgia Governor Nathan Deal: “Encouraging all Americans to plan for their future needs is critical to ensuring our Medicaid program is able to serve the most vulnerable citizens for which it is designed. Personal responsibility is fundamental. ... The Medicaid program is a ‘welfare’ or ‘poverty’ program which was established as a safety net program for the poor.”

4. DO YOU CONSIDER MEDICAID ESTATE PLANNING TO BE A SIGNIFICANT PROBLEM THAT TAKES RESOURCES FROM THE TRULY NEEDY IN YOUR STATE? PLEASE EXPLAIN AND PROVIDE EXAMPLES.

North Dakota Human Services Department Interim Executive Director: “Shortly before going into the nursing home, the couple had liquid assets worth about \$700,000, not including the home or car. They were *over the Medicaid limit by more than half a million dollars*. The community spouse, on advice of an attorney, sold the home the couple had lived in for years and bought one worth twice as much and sold the car they had and bought a brand new one worth three times as much. The car is completely exempt under Medicaid rules. The house also is completely exempt under Medicaid rules, as long as the community spouse lives in the house. After successfully sheltering those assets,

the community spouse took \$400,000 cash, money that was available to be spent on the institutionalized spouse’s care and, instead, bought an annuity from their attorney (an ‘investment’ which essentially returns the premium with a very small return) in an effort to tie up the money to make the couple appear to have fewer resources. The annuity is irrevocable, non-assignable, and non-transferable. ...

The North Dakota Department of Human Services was sued in federal court under a civil rights action for denying Medicaid to this wealthy institutionalized spouse. ... The community spouse has successfully retained nearly all of the wealth the couple had before the institutionalized spouse went into the nursing home and the nursing home has not received one penny. The bill is nearly \$100,000 and the couple wants Medicaid to cover it. The couple receives nearly \$8,000 a month from pensions, social security, the annuity payments, and oil lease money. This couple is not needy and they are simply not who the Medicaid program was or is intended to cover.

“In another case, the day the institutionalized spouse entered the nursing home, the couple had more than \$528,000. At that time, the couple represented to the nursing home that they intended of be ‘self-paying,’ and in fact, paid for two months of care. After learning of ways to exploit Medicaid laws, the community spouse purchased not one, but two annuities from their attorney after realizing the first one did not maximize the assets that could be sheltered. The community spouse bought a new home, a new car, and an annuity for \$220,000 and the next day, a subsequent one for \$20,000, and then applied for Medicaid to pay the institutionalized spouse’s nursing home costs.

“These scenarios are being duplicated around the state, with an increase in the sales of these types of annuities, and around the country in other states. Medicaid is not intended for people who artificially impoverish themselves by sheltering their wealth instead of using it to pay for nursing home care, but these are the people who are fighting for it and winning—at the expense of the taxpayers and those who legitimately need the assistance of the Medicaid program.

“The North Dakota Department of Human Services argues that annuities like these should be treated as an asset available to pay the long-term care costs incurred by either spouse.

“Changing the federal law to clarify that these annuities are assets or to allow states to determine how to treat these annuities as assets would be a significant first step in helping states determine appropriate limits of eligibility for the Medicaid program. This would help ensure that Medicaid funds would be used by states for those who are the intended recipients rather than being diverted to subsidize those who can and should pay for their own care.”

Wisconsin Department of Health Services Secretary Dennis G. Smith: “One example is related to spousal impoverishment laws. More and more, institutionalized spouses are transferring assets to community spouses who refuse to sign the Medicaid application. ... Interspousal transfers are not considered divestment so Fred was able to maintain eligibility while Bonnie was able to keep \$600,000. This is over five times the maximum Community Spousal Resource Allowance of \$113,640. If the department could deny eligibility if a spouse refuses to sign the application, Fred would have been able to cover at least six years of private pay nursing home care using his own resources.”

New York Deputy Secretary for Health James E. Introne: “Promissory notes, even when made after an individual has been admitted to a nursing home, preserve the ‘half-loaf’ strategy. This strategy allows an individual to divest him/herself of assets (say \$50,000 is transferred outright) and pay for nursing home care during a penalty period with monies returned through a promissory note (a second \$50,000 loaned with repayments made at the private pay nursing home rate—which covers the transfer penalty). The same strategy is employed using an immediate annuity. Money is transferred, and an immediate annuity is purchased to pay for nursing home care for the number of months the person is subject to a transfer penalty. With spousal refusal, all assets are put into the name of the community spouse who then refuses to make the resources available for the nursing home spouse. Medicaid must be provided if the institutionalized spouse executes an assignment of support from the community spouse in favor of the Medicaid office or the denial of Medicaid would create an undue hardship. Medicaid does not have sufficient resources to pursue all these cases in court.”

Rhode Island Governor Lincoln D. Chaffee: “Trusts allow the wealthy to shelter assets. The more affluent have access to better estate planning

and thus, are more likely to have properly crafted legal documents (i.e., trusts, promissory notes, life estates with enhanced powers, caregiver contracts, etc.). In addition to the use of annuities for married couples, and promissory notes for those single individuals or married couples, the amount of monies paid for legal advice is sizable.

“Some examples:

“Mr. and Mrs. Smith have \$400,000 in a bond account. Mr. Smith needs to go into a nursing home. After the spousal share has been determined, Mrs. Smith has excess resources transferred to her ‘spouse to spouse’ and purchases a large single premium immediate annuity paying her thousands per month. Mr. Smith has less than \$4,000 and is found eligible for LTC in the next month.

“Mr. Jones is a single individual with \$100,000 in the bank. He goes into a nursing home. He transfers the whole \$100,000 to his son. Applies for LTC/MA, meets a level of care due to his poor health and is ‘otherwise’ eligible for LTC except for the prohibited transfer of \$100,000. His son creates a promissory note for \$50,000 and pays him back monthly. This allows for the father to pay privately for ½ of the time he would have paid privately, except for this ‘Medicaid estate planning’ tool. (Assume the promissory note is created with the correct DRA language.)”

Virginia Secretary of Health and Human Resources William A. Hazel, Jr., M.D.: “The following are examples of loopholes that the Virginia Medicaid program has wanted to close, but has been unable to due to the federal MOE requirement in the Affordable Care Act (ACA):

1. The ability to count the value of life estates as a resource.
2. The ability to shelter assets for one year by purchasing savings bonds.
3. The ability to exclude as a resource the unpaid balance of an annuity.

“Prior to applying for Medicaid LTC services, an individual placed approximately \$900,000 into an annuity and named his wife as the beneficiary of the annuity. The annuity paid his wife \$89,000 per month, but the Virginia Medicaid program could not count this income for purposes of determining the husband’s Medicaid LTC eligibility.” ■