

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Title XIX Medicaid State Plan, Estate Recovery and Managed Care

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Delaware Title XIX Medicaid State Plan regarding *Estate Recovery and Managed Care*. The Department’s proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the April 1, 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 30, 2012 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding *Estate Recovery and Managed Care*. This regulatory action identifies capitation payments to managed care organizations as an additional Delaware Medicaid expenditure to be included in estate recovery.

Statutory Authority

- Section 1917 of the Social Security Act, *Liens, Adjustments and Recoveries, and Transfers of Assets*;
- 42 CFR §433.36, *Liens and Recoveries*;
- State Medicaid Manual, Section 3810, *Medicaid Estate Recoveries*; and,
- Title 25, Delaware Code, Chapter 50, *Liens and Estate Recoveries*.

Background

Under the estate recoveries provisions in the Omnibus Budget Reconciliation Act (OBRA) of 1993 and §1917(b) of the Social Security Act, states must recover certain Medicaid benefits correctly on behalf of an individual. Beneficiaries are notified of the Medicaid estate recovery program during their initial application for Medicaid eligibility and annual redetermination process. Federal law provides protections to ensure adequate notice to clients, prevention of undue hardship, and cost effectiveness under a state’s recovery program.

For individuals age 55 or older, States are required to seek recovery of payments from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services. States have the option of recovering payments for all other Medicaid services provided to these individuals. States are also required to establish procedures, under standards specified by the HHS Secretary for waiving estate recovery when recovery would cause an undue hardship.

State Medicaid Manual

Section 3810(A)(6) of the State Medicaid Manual states that when a Medicaid beneficiary, permanently institutionalized, or age 55 or older, is enrolled (either voluntarily or mandatorily) in a managed care organization and services are provided by the managed care organization that are included under the State’s plan for estate recovery, the Medicaid agency must seek adjustment or recovery from the individual’s estate for the premium payments in its claim against the estate. When the beneficiary enrolls in the managed care organization, the Medicaid agency must provide a separate notice to the beneficiary that explains that the premium payments made to the managed care organization are included either in whole or in part in the claim against the estate.

Summary of Proposal

Delaware Medicaid is moving its Long Term Care program under a Managed Care Organization. Estate Recovery will be required to recover monthly Long Term Care capitated payments made to the Managed Care Organizations as opposed to monthly Nursing Home rates set per facility.

As such, the proposed amendment updates current regulations regarding Medicaid estate recovery carried out by the

Division of Medicaid and Medical Assistance (DMMA). The Medicaid State plan will be amended at Attachment 4.17-A, Page 4, *Liens and Adjustments or Recoveries* to require that the amount subject to recovery shall include a capitation payment made by the Delaware Medical Assistance Program to a managed care organization on behalf of the deceased recipient. This regulatory action is based upon language provided by the federal Medicaid agency, the Centers for Medicare and Medicaid Services (CMS), in its guidance document publication titled "State Medicaid Manual."

When a Medicaid beneficiary is enrolled in a managed care organization and services are provided by the managed care organization that are included under the Medicaid State Plan, the State shall seek adjustment or recovery from the individual's estate for the capitation payments in the State's claim against the estate. When the individual enrolls in the managed care organization, the State shall provide a separate notice to the individual that explains that the capitation payments made to the managed care organization are included in whole in the claim against the estate. The State shall recover from the individual's estate the total capitation rate for the period the individual was enrolled in the managed care organization.

The provisions of this state plan amendment are subject to approval by CMS.

Fiscal Impact Statement

The proposed plan amendment imposes no increase in cost on the General Fund.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following similar observations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered the comments and responds as follows.

The GACEC and the SCPD is aware that federal law requires DMMA to pursue estate recovery for at least some Medicaid expenditures for individuals age 55 or older receiving nursing home services, home and community-based services, and related hospital and prescription drug services. Based on the attached Section 3810(A)(6) of the State Medicaid Manual, when states use a managed care system with a capitation rate, they must pursue recovery of the premium paid to the MCO on behalf of the covered beneficiary. Therefore, DMMA is incorporating the authorization to seek estate recovery of MCO capitation payments in the State Plan.

GACEC and SCPD endorse the proposed regulation since the amendment is ostensibly required to conform to CMS standards.

Agency Response: DMMA thanks the Councils for their endorsement.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the April 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Title XIX Medicaid State Plan regarding *Estate Recovery and Managed Care* is adopted and shall be final effective June 10, 2012.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #12-22

REVISION:

Revision: HCFA-PM-95-3
MAY 1995

(MB)

ATTACHMENT 4.17-A
PAGE 4

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT State/Territory: DELAWARE

Liens and Adjustments or Recoveries Continued

7. The State uses the following collection procedures (include specific elements contained in the advance action notice requirement, the method for applying for a waiver, hearing and appeals procedures, and time frames involved):

The Delaware Health and Social Services (DHSS) notifies the client in advance by distributing a pamphlet to the client, guardian, and/or responsible party, outlining estate recovery procedures, at the time of application to all applicants for long-term care services.

All persons receiving or applying for Long Term Care Medicaid Services are advised in writing about the estate recovery policy of DHSS at the time of application and redetermination, via the ERL1.DOC form titled, "Recovery and Lien Policy". This form outlines the following:

- Explanation of estate recovery, including citations of the federal and state authority;
- Defines long-term care;
- Describes the circumstances under which DHSS will file a claim;
- Describes the circumstances under which DHSS will file a lien;
- Defines what a lien is explains that the lien will not lead to loss of ownership;
- Describes what constitutes undue hardship. Exclusion and hardship waiver conditions are listed on page 2 of this form titled, "Request for Exclusion or Hardship Waiver";
- Specifies which Medicaid payments DHSS will seek to recover; and,
- Notifies the applicant, guardian, and/or responsible party of appeal procedures, specifically stating, "If you are dissatisfied with any decision made by the Division of Medicaid and Medical Assistance (DMMA), you have the right to request an appeal of the decision by requesting a fair hearing. You must submit a written request to the local DHSS office within 90 days of the action".

DHSS exempts from estate recovery all Medicare Savings Program cost sharing benefits with dates of service on or after January 1, 2010 for qualified dual eligibles age 55 and over, but otherwise DHSS shall seek estate recovery after the client's death of the maximum recoverable amount to be defined as the total of funds disbursed or incurred by DHSS (including Federal matching dollars) during the time an individual, age 55 and over, receives long-term care services paid for by DHSS including the total capitation rate for the period the beneficiary was enrolled in the managed care organization (MCO).

Collections efforts will include written notification to the executor, guardian, and/or responsible party of the client's long-term care balance owed via a claim summary report. If a lien was placed on the client's property upon entry to the long-term care institution, DHSS will place a recovery claim against the proceeds from the sale of the property. DHSS will also pursue obtaining any residual funds remaining in a trust to offset any balance owed DHSS. Upon request, DHSS will work with heirs of the estate who voluntarily wish to satisfy the recovery claim on a case-by-case basis offering mutually agreed upon payment schedules if necessary. Additionally, when the maximum recoverable amount cannot be collected DHSS may agree to accept partial recoveries.

15 DE Reg. 1721 (06/01/12) (Final)