

Memorandum in Opposition ELDER LAW AND SPECIAL NEEDS SECTION

February 14, 2019

Elder #2

S. 1507, PART V, § 2
A. 2007, PART V, § 2

By: BUDGET

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Senate Committee: Finance

Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROVISION IN THE 2019-2020 STATE BUDGET TO MAKE ANY PAYMENT MADE PURSUANT TO THE STATE'S MANAGED CARE PROGRAM, INCLUDING PAYMENTS MADE BY MANAGED LONG TERM CARE PLANS, DEEMED A PAYMENT BY THE STATE'S MEDICAL ASSISTANCE PROGRAM.

The proposed Article VII Health and Mental Hygiene Budget in PART V § 2 states:

Section 364-j of the social services law is amended by adding a new subdivision 34 read as follows: 34. Any payment made pursuant to the state's managed care program, including payments made by managed long term care plans, shall be deemed a payment by the state's medical assistance program.

Currently, Medicaid's recovery from a legally responsible relative, from the recipient's estate, from a pay-back Supplemental Needs Trust, or on a lien on a personal injury award or settlement is the amount Medicaid paid to the Managed Long Term Care (MLTC) agency for coverage for services, including home care services. The amount Medicaid pays to the MLTC agency is the monthly premium at negotiated rates which is intended to cover the cost of care when spread out over all the MLTC agency's contracted cases. Certain individuals may receive less in services than the monthly premium covers and others may receive more in services than the monthly premium covers, depending upon the medical need of the individual. When the Department of Health instituted mandatory MLTC for virtually all long-term care cases, it expressed a preference for MLTC over fee-for-service care as a cost-efficient alternative, in part because of the ability to spread high cost outliers over all cases.

Under the current law, recoveries are made based upon the amounts actually paid out – the monthly premium. This allows the state and local agency to be made whole while not penalizing a Medicaid recipient, his or her parent, spouse, estate or remainder beneficiary of a Supplemental Needs Trust by recovering an amount that was never expended by the

Medicaid program. In fact, Medicaid may already be benefitting under the current system by recovering the MLTC capitated rate even from cases that utilized less in services than the monthly premium, making the Governor's proposal a double recovery for Medicaid. It should also be noted that a Medicaid recipient would only have a recoverable estate where there were exempt resources such as a car or a homestead.

Similarly, under the current system, recovery for other Medicaid expenditures is limited to the Medicaid rates for doctors, hospitals, and nursing homes and not the private pay rates. The proposed change would allow the state to recover a windfall amount it never expended in cases involving community based long-term care.

The proposed change also runs afoul of the federal law which only provides for recovery of "medical assistance correctly paid on behalf of an individual under the State plan." 42 USC §1396p(b)(1). If more is being recovered than paid out by the state, then this is no longer a recovery allowed under the federal law and could not be covered under the current State plan. Since the amounts Medicaid is able to recover under the proposal were never expended by the Medicaid program, this would amount to a tax or penalty, rather than a recovery.

Medicaid recipients often receive services where there are exempt resources, including a Supplemental Needs Trust, where there is a legally responsible relative who does not want to become impoverished, or pending a recovery from a personal injury or medical malpractice case. These recipients cannot obtain their own insurance coverage for the long-term care services because of a pre-existing condition. Through the MLTC program, the state can obtain coverage at a capitated rate for all participants. Often the legally responsible relative does not resist repaying the Medicaid program for the capitated amount paid to the MLTC. Likewise, an estate may voluntarily repay the state the capitated amount from assets that were exempt during the recipient's lifetime. And in the case of the remainder of a Supplemental Needs Trust or where there is a lien on a personal injury recovery, the state will receive a pay-back equal to the amount expended. In all these situations, it would be grossly unfair to allow the state to recover amounts it never expended.

The Elder Law and Special Needs Section OPPOSES this amendment as it would greatly increase the recovery against a legally responsible relative, an estate or from the remainder of a Supplemental Needs Trust because the recovery would not be limited to the amount the State pays the MLTC but rather would be the full amount paid by the managed care plan.