RESOLVED, That the American Bar Association supports the repeal of Medicaid estate recovery mandate enacted under the Omnibus Budget Reconciliation Act (OBRA) of 1993 and the reinstatement of the pre-OBRA 1993 state option for Medicaid estate recovery programs.

FURTHER RESOLVED, That in the absence of repeal, the Federal government, states and territories should amend applicable laws and regulations to protect the poorest and most vulnerable recipients of Medicaid from shouldering the burden of estate recovery. Such amendments should include, but are not limited to, the following options:

1. Amend the estate recovery provisions to limit mandatory estate recovery only to expenditures made for institutional care, so that recovery for home and community-based care expenditures becomes optional.

2. Amend the estate recovery provisions to prohibit recovery of benefits received prior to permanent institutionalization.

3. Amend the estate recovery provisions to eliminate beneficiary age criteria as a trigger for estate recovery.

4. Amend the estate recovery provisions to require waivers or exemptions of Medicaid estate recovery and liens for at least the following categories:
   a) Estates consisting of a homestead of modest value (i.e., create a homestead exemption).
   b) Surviving spouses whose residences become encumbered by a lien by the Medicaid program.
   c) Survivors of the deceased for whom the estate subject to recovery is the sole income-producing asset, such as the family farm or other family business.
   d) Persons in the home who have cared for the recipient and who
would be forced to move if recovery is carried out, including adult children, siblings, parents, close friends and other caregivers.

e) Persons who would be impoverished if there is recovery.

f) Qualified Medicare Beneficiaries.

5. Require, through Federal regulation, fair and equitable statewide application of recovery programs and clear standards for notice, appeals, and other due process requirements, consistent with Medicaid due process guidelines.

6. Require, through Federal regulation, state reporting of their recovery practices to the Health Care Financing Administration and monitoring of state efforts by the Federal government to ensure that estate recovery is being implemented fairly and lawfully.
The foregoing recommendation is based directly on recommendations arising out of a June 3, 1994 roundtable, conducted by the American Bar Association’s Commission on Legal Problems of the Elderly, and convened to discuss Medicaid estate recovery law, the amendments to the law contained in the Omnibus Budget Reconciliation Act (OBRA) of 1993, the effect of these amendments on Medicaid beneficiaries, and recommendations to the U.S. Department of Health and Human Services (HHS) on appropriate policies for interpreting and implementing these amendments. These recommendations are directed at inequities in the program that unfairly affect poor persons.

The thirty participants in the roundtable included:

- Representatives from the Medicaid, Health or Aging departments of five states (MD, NJ, MA, WI and VT).
- Attorneys (including both legal aid attorneys and private practitioners) and advocates specializing in Elder law issues from eleven states (WI, OR, NY, OH, CO, MA, NM, CA, IL, MI and FL).
- Representatives from national seniors and poor people’s advocacy groups (National Senior Citizens Law Center, National Health Law Center, American Association of Retired Persons, ABA Commission on Legal Problems of the Elderly, National Association of State Units on Aging, National Association of State Long-Term Care Ombudsman Programs, and Nursing Home Reform groups).
- Six representatives from HHS’ Health Care Financing Administration (HCFA) charged with responsibility of implementing the OBRA ’93 estate recovery amendments.

I. Legislative background

A. Federal Law Prior To OBRA 1993

Medicaid law provides that no lien can be imposed against the property of any
individual prior to death on account of receipt of medical assistance. Exceptions to that rule allow imposition of a lien when benefits are paid incorrectly (in which case, any of the recipient's property can be attached) and when a nursing home resident pays a share of cost and is not reasonably expected to return home (in which case, real property may be attached). A lien may not be imposed on an individual's home, however, for payments correctly made if any of the following individuals reside in the home: the recipient's spouse, minor child, blind or disabled child, or sibling who has an equity interest in the home and has resided there lawfully for a year or more. Even these liens must be dissolved if the recipient returns home.

Prior to 1993, Medicaid law also allowed, but did not require, a state agency to make a claim against the estate of a person if he/she was 65 years of age or over or if his/her property was subject to a lien as described in the previous paragraph. Payments could only be recouped after the death of a surviving spouse and only when the beneficiary was not survived by a minor child or a blind or disabled child. A lien on a home could not be enforced as long as the home was occupied by a sibling or an adult child who established that he or she resided in the home for the period prior to the recipient's admission to the nursing home and that he or she provided care allowing the person to remain at home longer.

As of October 1, 1993, 28 states had Medicaid estate recovery laws. In fiscal 1992, approximately $63 million was recovered under these programs in 26 states.

B. **OBRA 1993**

In the Omnibus Budget Reconciliation Act of 1993 (OBRA), Congress mandated that

2. 42 U.S.C. § 1396p(a)(1)(A) and (B). 42 C.F.R. 433.36(g).
5. 42 U.S.C. § 1396p(b)(1); 42 C.F.R. 433.36(h)(1).
should seek recovery from estates of the following individuals:

1. Individuals in nursing facilities, intermediate care facilities for the mentally retarded, or other medical institutions who pay a share of cost as a condition of receiving Medicaid and who cannot reasonably be expected to be discharged and return home. This provision references the non-mandatory lien provision (42 U.S.C. § 1396p) and requires that the state determine, after notice and hearing, that the individual cannot reasonably be expected to return home.

2. Individuals, who were age 55 or over when they received Medicaid. The state must recover only for payments made for nursing facility services, home- and community-based services, and "related hospital and prescription drug services".

3. Individuals who received Medicaid by having additional resources disregarded in connection with receipt of benefits under a long-term care insurance policy. The state must seek recovery for benefits paid for nursing facility and "other long-term care services". Exempted from this category are those who received Medicaid services under a state plan amendment approved as of May 14, 1993. (They are residents of California, New York, Iowa, Indiana, and Connecticut.)

The amendments also provide that the state may recover from individuals 55 or older

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10 The change in the new law from age 65 to 55 (42 U.S.C. § 1396p(b)(1)(B)) did not appear in either the House or Senate versions of P.L. 103-56, and is not discussed in the Conference Report. Thus, there is some speculation that this age change in the new law is in error.

11 These are the five states identified by HCFA staff as grandfathered/exempted from this section of the law. Nemore, Regan and Perkins, "Just When You Thought You Had Learned The Rules They Went and Changed Them: OBRA-93 Provisions Concerning Medicaid Transfers of Assets, Treatment of Certain Trusts, and Estate Recoveries." Clearinghouse Review, February, 1994, lists Massachusetts rather than Iowa as the fifth grandfathered state.
The new law requires states to establish procedures for determining when to waive recovery due to hardship. These procedures must be established "in accordance with standards specified by the Secretary" of HHS, and criteria upon which hardship would be determined are also to be established by HHS.\[13\]

The House Report accompanying the estate recovery amendments provides in this regard that, in developing hardship standards, HHS must address (1) adequacy of notice to, and representation of, affected parties, (2) the timeliness of the process, (3) and the availability of appeals.\[14\] With respect to establishing criteria for states to apply in determining whether to waive recovery, the Report states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is (1) the sole income-producing asset of survivors, such as a family farm or other family business, (2) a homestead of modest value, or (3) other compelling circumstances.\[15\]

The OBRA '93 estate recovery amendments also provide a specific definition of the term "estate". It is defined to include "all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law." The state has the option, however, to expand this definition to include:

any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.\[16\]

OBRA 1993's estate recovery amendments apply to Medicaid payments made on or after October 1, 1996.


\[13\] 42 U.S.C. § 1396p(b)(3).


\[15\] Id.

after October 1, 1993, regardless whether HCFA has promulgated regulations. They do not, apply, however to individuals who have died before that date. States can delay implementation if they require state legislation. They have until the first quarter following the close of the first legislative session that begins after October 1, 1993.

II. The June 3 Roundtable Discussion

A. General Discussion

Predictably, there was not complete agreement among the roundtable participants as to the intent or wisdom of Medicaid estate recovery policy generally, or specifically as to how the OBRA '93 amendments should be implemented. Most of the participants agreed on the need for clear policy direction, and the importance of establishing guidelines on hardship exceptions. Most state Medicaid staff supported estate recovery efforts to avoid Medicaid dollars going to elderly who are not needy. Most advocates and representatives of aging groups criticised the policy of mandatory estate recovery as misguided and ineffective in remedying the evils it was intended to target. HCFA staff also were sensitive to that issue and emphasized that their charge was to implement changes consistent with the specifics of the 1993 statutory amendments.

Discussion of the intended policy goals of the OBRA '93 estate recovery provisions highlighted five goals listed below, each of which evoked questioning about their appropriateness as public policy and concerns over the ability of estate recovery programs to achieve these goals:

1. Preventing abuse of the Medicaid system by "rich" (i.e., non-poor) persons by cutting off their ability to "game the system." Policymakers have become increasingly concerned about the practice commonly referred to as Medicaid estate planning, by which individuals allegedly "game the system" by attempting to meet the Medicaid asset test by divesting or sheltering their assets through legally permissible estate

17 § 13612(d)(1)(A) of P.L. 103-66.

18 § 13612 (d)(2) of P.L. 103-66.

19 § 13612 (d)(1)(B) of P.L. 103-66.

Several Congressional staffers also were invited to the Roundtable but were unable to attend because of health care reform legislative activity being deliberated at the time in Congress.
planning devices before applying to Medicaid. The true extent to which Medicaid estate planning occurs is unknown, but fear of its growth motivated Congress to enact several provisions in OBRA '93, including the estate recovery provisions, which tighten Medicaid eligibility and deter Medicaid estate planning.27

None of the participants objected to this goal in concept. However, there was considerable agreement that the estate recovery provisions do not affect those Medicaid recipients who engage in estate planning. As one state official noted: "Those whom we are recovering from have not engaged in estate planning. Those who are sophisticated enough to engage in estate planning have been able to get those assets out of their estates." Thus, estate recovery does not appear to affect those against whom it is aimed, if prevention of "gaming" is the goal.

2. Promoting cost containment (i.e., maximum recovery from all possible beneficiaries). This goal supports any strategy to recover amounts expended on behalf of any Medicaid beneficiaries. Estate recovery, in effect, converts certain benefit payments into "loans" that must be repaid later. This goal raises at least two important concerns. First, how much do estate recovery programs actually save? State attendees reported that actual saving produced by estate recovery programs have generally fallen below anticipated revenues. Second and more importantly, is estate recovery ethical? No other health benefit or insurance program in the country, public or private, treats health coverage as a "loan" that must be paid back by the beneficiaries' estates. Why is health coverage treated as such only for poor, and primarily older, long-term care recipients, but not for any other segment of the American public?

3. Discouraging the use of nursing homes. This goal supports the imposition of disincentives to nursing home care such as recoupment of amounts expended on behalf of nursing home residents. Under pre-OBRA '93 law, states could focus estate recovery on expenditures for institutionalized residents. However, the OBRA '93

27 Little hard evidence exists regarding the extent to which Medicaid estate planning occurs. A 1993 study by the General Accounting Office in Massachusetts found that 54 percent of applicants converted some of their countable assets to non-countable assets, and 13 percent transferred assets to others. Asset transfers accounted for approximately two-thirds of the dollar amount of these transactions. However, 52 percent of these applications were denied, accounting for 67 percent of the dollar value of the transfers. Thus, the GAO report presents mixed messages about the extent of Medicaid estate planning. See General Accounting Office, Medicaid Estate Planning (GA)-HRD-93-29R (1993); see also, Brian Burwell, State Responses to Medicaid Estate Planning (SysteMetrics, Cambridge, MA, 1993); Brian Burwell, Middle-Class Welfare: Medicaid Estate Planning for Long-Term Care Coverage (SysteMetrics, Lexington, MA, 1991).
amendments mandate recovery, not only for institutional services, but also for home and community-based care and related hospital and prescription drug costs. Consequently, the targeted disincentive no longer exists.

4. **Discouraging the use of all long-term care benefits.** The broad scope of the estate recovery mandate seems to suggest such a goal. Participants criticized the appropriateness of this disincentive and acknowledged the likelihood of adverse health consequences to older persons, which in turn may result ultimately in higher expenditures for more seriously ill beneficiaries.

5. **Encouraging the purchase of long-term care insurance.** The availability of Medicaid nursing home benefits to persons of previously moderate means who "spend down" or divest assets has frequently been cited as a reason why so few persons have taken advantage of long-term care insurance. Perhaps, greater disincentives against the use of Medicaid would encourage more individuals to acquire long-term care insurance, thereby reducing Medicaid expenditures. Unfortunately, state experience with estate recovery appears to provide little support for its use as a means of encouraging the purchase of long-term care insurance. Most recovery dollars derive from the sale of quite modest residences, owned by persons who never would have been able to afford long-term care insurance. Several studies of long-term care insurance have concluded that only between 10 and 20 percent of the current elderly can afford high-quality long-term care insurance.22

Many of the Elder law attorneys, legal aid attorneys and national, state, and local senior and low-income advocacy groups were more of the view that the estate recovery laws - and the recent OBRA '93 amendments in particular -- would be viewed by the states as providing a green light to implement and stretch recovery laws in a manner that will cause great difficulty among low-income senior citizens whose only estate is a modest home. Advocates stressed that for many of the elderly the home is seen as sacrosanct, as the one legacy they can pass onto their children. They will "go without" to be able to pass on the family home. Indeed, a number of the advocates argued that the estate recovery amendments would ultimately result in higher costs to the Medicaid program because low-income seniors wanting to avoid loss of the family home, will put off receipt of preventive or essential primary care, prescriptions, etc., and eventually succumb to more serious (possibly preventable) illnesses that would result in more expensive medical care or institutionalization.

These advocates also suggested that although the estate recovery amendments were

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intended, in part, by Congress to lead to the recoupment of funds from the "wealthy" who are claimed to be legally "ripping off" the Medicaid program, they, in fact, would have a disproportionate impact on low-income seniors. Several maintained that the number of upper middle class or wealthy Medicaid recipients are minimal to begin with, and that these recipients are most apt to have taken necessary legal and practical steps to protect their property before applying for coverage.

Most of the Elder law practitioners appeared to agree with the position taken by legal aid attorneys and senior advocacy groups. They expressed the additional concern that the new estate recovery law allows states to define "estate" to include any real or personal property in which an individual had any legal title or interest at the time of death, including assets conveyed to a survivor, heir or assign of the deceased through joint-tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangements. They maintained that these options to the states could wreak havoc with state property laws relating, for example, to the ability to transfer title ("clouding title"), inchoate liens, etc.

B. State Agency Practices

Presentations by state Medicaid staff on their current (pre-OBRA '93) discretionary recovery practices did little to assuage the concerns of the advocates, and to some it verified their contention that estate recovery had minimal pay off for the potential harm it may create with elderly recipients. For example:

- **Maryland** has had a Medicaid estate recovery program in operation since 1973. The State receives a list of the deceased/estates every two weeks from the Registrars of Wills. Recoveries have ranged from $5,000 (trailers) up to $125,000, but by and large tend to be modest amounts between $20,000-$60,000. Monies recovered under the program do not go into the state's general fund, but rather are earmarked to go into the State's Medicaid fund. Recoveries totaled $2.1 million for the fiscal year ending June 30, 1994.

Proposed legislation would authorize the Maryland program to secure bank account funds of deceased nursing home residents directly from banks without...
going through probate proceedings. These funds by definition contain less than $2500 each, the State’s Medicaid asset limit. It is estimated that the proposal would provide an additional $3.5 million per year in reimbursement.

* Massachusetts also returns its estate recoveries to its Medicaid fund, and collected $8.9 million in 1993. It expects to recover $11 million in 1994. The State is notified whenever there is a filing for probate, and then checks records to see if the deceased was a Medicaid recipient. State law provides the State with priority over general creditors (but not funeral expenses). If a year passes and no one has filed for probate, the State can contact the State Administrator who can file.

If the home is occupied by persons against whom the claim is not presently recoverable (e.g., siblings, disabled children) or by other relatives who wish to preserve the home, the state will often propose a lump sum settlement for a lower amount than is owed and may accept a promissory note secured by a mortgage. Without a settlement, probate of the estate may not be closed. Consequently, family members face a real (and perhaps undue) pressure to settle. Moreover, the practice of negotiating settlements, even though the claim cannot yet be recovered, may violate the Medicaid lien law itself, since the law provides that any adjustment or recovery may be made only after the death of the individual’s surviving spouse and when no other specified family members continue to live in the home.

The State currently collects on all Medicaid assistance provided for those over 65, not just for nursing home care. It has a right of recovery from the estate but will not require payment until after the spouse has died. Proposed legislation to expand the definition of the “estate” against which recovery can be made generated much opposition by the bar and title companies.

* New Jersey has had an estate recovery program since 1970. Like Massachusetts, it recovers for all services received on or after age 65. Medicaid application forms contain language intended to notify applicants that benefits received after age 65 may be subject to recovery from their estates. New Jersey does not file liens against living institutionalized individuals but does file liens against estates. The State returns all recovered funds into its Medicaid fund. Currently, New Jersey recovers only against estates above a threshold claims level of $500 and a threshold estate size of $3000, although these levels may be changed or eliminated in the near future.

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The State projects recoveries totalling $2 million in calendar year 1994. The State does not force sale of real property when dependent relatives reside there, but will file a lien against the estate and permit extended repayment settlements. New Jersey favors an interpretation that would give maximum flexibility to states in applying the hardship waiver provisions of OBRA '93. New Jersey's Medicaid estate claims have a lower priority than funeral expenses, administration expenses, and debts and taxes with a preference under federal or state law, and a priority equal to medical and hospital expenses relating to the deceased's last illness.

- Vermont's current recovery efforts appear a great deal more modest than the three states previously described. The State only goes after estates filed in probate, where the deceased received long term care and home and community based services. State staff noted that the recovery program has, in fact, resulted in some recipients withdrawing from home and community-based services, while others, ask their providers to cut back on services. The State does not go after the home of the deceased if children or siblings are living there, nor will it pursue the assets of a family business if it provides sole support.

- Wisconsin began an estate recovery program in October, 1991. The program includes claims against estates and, in the case of nursing home residents determined unlikely to return home, liens on homes. If there is a surviving spouse, recovery will be from the estate of the spouse. Recovery was initially for all Medicaid services provided nursing home residents and persons age 65 and over in the community, but because of the outcry associated with persons in the community refusing services, recovery for services to non-institutionalized persons age 65 and over was repealed in April, 1992. The OBRA '93 amendments will force a return to the repealed practices. The state carries out collection functions but counties identify cases, make determinations of permanent institutionalization, and provide notice and information. In exchange for these activities, counties receive 5% of collections on their cases (referred to as a "bounty" by one advocate). Total yearly recovery is currently $6.2 million.

C. The Experience of Legal Aid and Advocacy Groups

Prior to OBRA '93, Vermont had attempted estate recovery programs twice and both times abandoned it.
The experience of legal aid and private attorneys and advocacy groups presented a picture of state recovery processes much less benign than that described by some of the states. For example, according to these participants:

• In rural areas, California has been placing liens on the homes of surviving spouses without any form of notice or due process protection. Advocates are also concerned about the possibility of selective enforcement where, for example, the State might concentrate recovery efforts in poorer, usually rural, areas of the State because there is less resistance to recovery.

• Colorado has contracted out its estate recovery program. These contractors are on a contingency fee and they can decide whether the patient will be capable of returning home.\textsuperscript{26}

• Illinois’ current estate recovery law allows for claims for all Medicaid benefits retroactive to the date of receipt. Receipt of Medicaid at age 25, for example, can be recovered if the same recipient later becomes permanently institutionalized and has real property subject to a lien. Estate recovery against a recipient who was over age 65, but not otherwise permanently institutionalized with property subject to a lien, reaches back to all services received after age 65. (Presumably the State will lower the age to 55 pursuant to OBRA ’93.) The State’s new law includes no hardship exception.

• Concerns raised by senior citizens in Michigan led Governor John Engler to notify the Secretary of the U.S. Department of Health and Human Services in June of 1994 that the State of Michigan would not take action to implement the OBRA ’93 estate recovery provisions unless and until the federal government promulgates implementation rules and the Michigan legislature conducts hearings on the issue.

• In New York, false information and rumors on the workings of estate recovery have lead to a reluctance by seniors to apply for Medicaid. There is not an adequate notice process that would help applicants understand how the recovery process works.

• Oregon’s aggressive estate recovery law goes after all assistance provided a recipient (Medicaid, general assistance, etc). The State sends out notices to joint-holders of the property. State banking law allows a bank to turn over

\textsuperscript{26} HCFA staff disputed this representation of the Colorado program, maintaining that the outside contractor is on a fixed fee and is an independent medical examiner.
funds to the State for amounts owed. The State does not differentiate between benefits received by an individual before the age of 65 or after. The State will go after funds from a surviving spouse that may be in excess of the actual amount the spouse received from the estate of the deceased recipient.

- In Wisconsin, there are believed to be a considerable number of errors made where liens are improperly placed or enforced. Counties often give out inaccurate information. The notices sent to recipients are not sufficiently detailed with respect to the specific services, dates and amounts for which recovery will be sought and create the presumption that none of the recovery-defeating conditions apply. The State has consistently over-estimated the total amount of funds recovery will yield. The State will recover from the estate of the surviving spouse, although federal law allows recovery only from the estate of the deceased Medicaid recipient.

- In one particular Wisconsin case, the State sought recovery from an individual who had less than $2,000 in total assets (including his homestead). This was considered especially egregious, since the amount represents the most paltry of estates and, in determining eligibility for Medicaid, the law unconditionally exempts $2,000 in assets held by any Medicaid recipient.

D. HCFA Survey and Policy

At the time of the roundtable meeting, HCFA had just completed a survey of the states regarding implementation of Medicaid estate recovery laws. Overall, the results showed the following:

- Twenty-six states had an estate recovery program in operation prior to August, 1993.
- Forty states required additional state legislation to implement the new federal estate recovery laws; of these 40, all but nine currently had legislation passed and/or pending with passage anticipated by January, 1995.
- Twelve states anticipated applying a definition of "estate" that went beyond state probate law.
- Twenty-four states planned on recovering for services beyond those mandated in the new law.
- Thirty-one states will use liens as part of their recovery program.

HCFA indicated that it did not anticipate publishing proposed regulations on the new estate recovery amendment soon but would be issuing a State Medicaid Manual (SMM)
transmittal on the new law in several months time. Agency staff also highlighted the following policy expected to be included in its SMM transmittal:

- States will be given substantial flexibility in implementing the new law.
- The agency reads the law as requiring states to recover for home and community-based services. Home and community-based services for purposes of the recovery laws, will be defined to include the services provided under community supported living arrangements in 42 U.S.C. § 1396a.
- The agency believes the law allows states the option to avoid recovery efforts from estates that are not cost-effective. HCFA will not establish specific dollar thresholds and will review state procedures on a case-by-case basis; but it expects to allow a state to determine that it will not seek to recover from any estate that is valued at less than a particular dollar amount (set by the state).
- Since the statute does not outline specific recovery procedures and processes, HCFA is likely to provide state flexibility to establish "reasonable procedures" and will not establish specific guidelines for them to follow.
- The agency is likely to provide guidance on criteria to be applied to determine "undue hardship." In that regard, the agency expects to rely substantially on the specific guidelines provided in the legislative history in concluding as hardship exemptions: homesteads of modest value and sole income-producing assets of survivors. The agency staff anticipated states will be allowed a great deal of flexibility in determining "undue hardship." Despite the concerns of the roundtable participants, HCFA expected to remind states that Congressional history states that the hardship must be "compelling."
- In response to advocates' questions, agency staff indicated that they are leaning toward an inclusion of Qualified Medicare Beneficiaries (QMBs) under the

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27 Several of the policy conclusions proffered by agency staff were in direct response to specific concerns and questions raised by Roundtable conferees.


29 QMBs are Medicare recipients with income below 100% of the income poverty line who are eligible to have Medicaid cover the cost of Medicare-related cost-sharing. 42 U.S.C. § 1396d(p). For many QMBs, their only Medicaid benefit is payment for Medicare co-payments, deductibles, premiums, etc.
estate recovery laws but that they will consider the possibility of exempting that category of recipients on the basis that it would not be cost effective to seek recovery from them.

- HCFA will make it clear to the states that the expanded parameters of the new law apply only for payments made after October 1, 1993, but if a state has to delay compliance with the law beyond that date due to the need for state legislation, etc., it can make the effective date of implementation retroactive to that date.

- For those permanently institutionalized, the agency will allow states the option to recover for only institutional services or for all services.

- The agency expects to interpret the term "related hospital and prescription drugs services" to mean those related to long-term care. (States, therefore, are not required to recover hospital and drug service otherwise.)

Subsequent to the roundtable meeting, HCFA issued Transmittal No. 63 (September 1994) with implementing instructions on estate recovery.

III. Summary and Recommendations

Throughout the roundtable session (and in follow-up correspondence to HCFA by several conferees) many participants continued to emphasize several key concerns and recommendations relating to the implementation of the amended Medicaid estate recovery laws. The following summary findings and recommendations reflect the views of the participating advocates, attorneys, and agencies serving the elderly and low income persons, although not necessarily the views of HCFA and state Medicaid agency attendees.

1. Mandatory Estate Recovery Hurts the Poorest of the Poor. It Does Not Affect Those Who Shelter Assets or Who Have Substantial Assets.

   - Low-income senior citizens often consider the family home the only legacy they leave their children (or other relatives) and may put off needed care to avoid the loss or taking away of their properties.30

   - Mandatory estate recovery under OBRA 1993 impacts

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30 In a letter to HHS Secretary Donna Shalala, the Governor of Michigan echoed concern that the recovery laws frightened the senior citizens in that State. Letter of June 24, 1994 from Governor John Engler to Donna Shalala.
disproportionately the poorest seniors who cannot purchase long-term care insurance and who do little or no estate planning. Those with substantial assets take advantage of available legal protections before seeking Medicaid coverage.

Recommendation: Congress should repeal mandatory Medicaid estate recovery or, at a minimum, amend the estate recovery provisions to require states to set an estate recovery threshold, below which estates of beneficiaries are exempt from recovery or adjustment for Medicaid expenditures. Such an exemption is analogous to the homestead exemption in bankruptcy law and the estate tax exempt estate in tax law.

2. Recovery of Benefits Paid for Non-Institutional Care is Bad Health Policy and Produces New Hidden Costs.

Mandatory Medicaid estate recovery laws for non-institutional care are likely to lead to higher medical costs and higher incidence of avoidable illness and health deterioration, because seniors will avoid home and community-based care and primary care, rather than lose minimal assets that could go to their spouse and kin.

Recommendation: Absent total repeal of mandatory recovery, Congress should amend the estate recovery provisions to make clear that recovery of benefits paid for non-institutional ("home and community-based") care is optional. The policy justifications for mandating states to recover such expenditures are tenuous, and state experience already indicates the occurrence of harmful consequences to older and disabled Americans.

An argument can be made that the OBRA '93 language already makes recovery of benefits paid for home and community-based care optional. Between December 1993 - May 1994, the Coalition of Wisconsin Aging Groups (CWAG) engaged in correspondence with HCFA maintaining that because the new law requires recovery for "](i) nursing facility services, home and community-based services and related hospital and prescription drug services or (ii) at the option of the state, any item or services under the state plan", the state has authority to choose those items and services it will subject to Medicaid estate recovery. The federal agency maintains, however, that it reads the law to mandate states to adjust or recover for the services listed in subparagraph (i) and provides states only the option to include any other items or services under the state plan. Letter of December 20, 1993 from Betsy Abramson, CWAG, to Bruce Vladeck, HCFA; Letter of February 21, 1994 from Vladeck to Abramson; Letter of March 25, 1994 from Abramson to Vladeck; and Letter of May 25, 1994 from Vladeck to Abramson.
3. The Federal Mandate that States Recover Benefits Paid On Behalf Of All Medicaid Beneficiaries 55 Years of Age or Older Represents Unjustifiable Age Discrimination.

- The OBRA 1993 provisions mandate estate recovery against the estates of two groups: those permanently institutionalized and those age 55 or older. No justification exists, or was even offered by Congress, for using a discriminatory age standard. Such discrimination based on age historically has been contrary to federal policy established in areas of employment, accessibility to federal programs, and health care. Its use as a basis for estate recovery is arbitrary and unjustifiable.

Recommendation: Congress should amend the estate recovery provisions to eliminate both mandatory and optional estate recovery based on age of the Medicaid recipient.

4. Estate Recovery Information and Notice Is Inadequate.

- Implementation of the Medicaid lien and mandatory estate recovery law can create (and in some states, already has created) numerous problems resulting from: inadequately trained state or county workers erroneously applying recovery laws; inadequate or inaccurate (or no) notice; erroneous serving of notice of liens to surviving spouses; establishment of a rebuttable presumption that the deceased has no surviving spouse or children; illegal recovery from surviving spouse, etc.

- Notice cannot realistically be given when recovery for benefits is permitted to reach back prior to the time of permanent institutionalization. For example, benefits paid to a 20 year old living in the community are not normally recoverable. However, if that person enters a nursing home 25 years later as a permanent resident, then all Medicaid benefits paid to the beneficiary during his or her lifetime are recoverable, even those benefits paid 25 years earlier. It is hardly possible to give meaningful notice of such inchoate future liabilities to every Medicaid recipient.

Recommendation: Congress should prohibit retroactive estate recovery of benefits received prior to permanent institutionalization.

Recommendation: Federal regulation should provide clear, straight-forward
federal requirements relating to notice, due process, limitation and prohibition of recovery under differing circumstances. States should be directed, specifically, to adhere to federal Medicaid due process guidelines (42 C.F.R. 433.36).

5. **Minimum Standards Are Needed For "Undue Hardship."**

The states have generally given little attention to establishing standards for waiving estate recovery due to "undue hardship." Accordingly, there is need for clear federal minimum criteria for undue hardship. States should be able to expand the minimum criteria at their option.

**Recommendation:** The minimum criteria should ensure waivers of Medicaid estate recovery and liens for at least the following groups:

a) Surviving spouses whose residences become encumbered by a lien by the Medicaid program, where the lien will substantially undermine the spouse's ability to maintain her independence in the community and maintain the home. For example, a lien may prevent refinancing of the home or eligibility for a reverse mortgage, either of which may be essential to produce needed resources for personal or home maintenance.

b) Survivors of the deceased for whom the estate subject to recovery is the sole income-producing asset of survivors, such as the family farm or other family business.

c) Estates consisting of a homestead of modest value.

d) Persons in the home who would be forced to move if recovery is carried out (including adult children who have cared for the recipient, siblings, parents, close friends and other caregivers).

e) Persons who would be impoverished if there is recovery.

f) Qualified Medicare Beneficiaries.

6. **Cost Effectiveness.**

Prior to enactment of OBRA 1993, many states chose not to develop Medicaid estate recovery programs, often because fairness and cost-effectiveness of such programs were in doubt. States are fully aware of the need to control the costs of their Medicaid programs and are in the best position to determine the means.

**Recommendation:** Congress should reinstate the pre-OBRA 1993 state option for Medicaid estate recovery programs. If Congress chooses to retain the mandate, then federal regulation should provide maximum flexibility to define the benefit amount and estate value below which recoveries will be deemed not cost effective.
7. Statewide Uniformity of Application.
Legitimate concerns exist regarding possible selective and discriminatory enforcement of estate recovery by states. For example, anecdotal evidence indicates that some states may concentrate recovery efforts in poorer, often rural, areas of the state because there is less resistance to recovery.

Recommendation: Federal regulation should require fair and equitable statewide application of recovery programs to all residents of the state. States should be sanctioned for targeting rural areas, or avoiding more affluent areas, where recipients are more likely to have sought legal advice on avoiding recovery.

8. Monitoring.
Information about estate recovery practices is largely anecdotal, because systematic monitoring of state practices does not occur. The lack of adequate monitoring raises significant concerns about fairness of implementation and the actual impact of Medicaid estate recovery.

Recommendation: HCFA should ensure full and accurate reporting by states to HCFA, and monitor state efforts closely to ensure that estate recovery is not being implemented unlawfully by the states. Tracking of the size of estates from which recoveries are made is needed in order to confirm or dispel the criticism that the estate recovery program disproportionately impacts the poorest of the poor.

IV. CONCLUSION
HCFA and the states are embarking on a new phase of Medicaid estate recovery, which many roundtable participants believed could have an inequitable and harmful impact on low income seniors. It is essential that these changes be instituted fairly, monitored closely, and that state agencies have the ability to exempt from their program those who remain in need. At the same time, Congress should reassess both the means and ends of the OBRA '93 estate recovery mandate and modify the program in accord with the above recommendations.

These recommendations do more than just protect the elderly poor. They have the additional merit of granting to states the flexibility and discretion they need to operate a fiscally sound yet fair Medicaid program. States already had the option to operate a Medicaid estate recovery program under the law prior to OBRA '93, and they needed no urging or mandates in OBRA '93 to find ways to save Medicaid dollars. That goal is a high priority in every state. Ultimately, the states are in a much better position than the federal government to determine effective fiscal strategies.
For all the reasons stated, the Commission on Legal Problems of the Elderly urges adoption of this recommendation.

Respectfully submitted,

Alexander D. Forger
February 1995
1. **Summary of Recommendation(s).**
   The recommendation supports repeal of a Medicaid estate recovery mandate enacted in OBRA 1993 and reinstatement of the pre-OBRA 1993 state option for Medicaid estate recovery programs. In the absence of repeal, the recommendation specifies several legislative and regulatory options to be followed by States and the Federal Government to ensure protection of the poorest and most vulnerable Medicaid recipients.

2. **Approval by Submitting Entity.**
   October 1994 - Commission on Legal Problems of the Elderly.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**
   No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**
   Recommendation is consistent with and does not change ABA's existing policy in support of a coordinated and comprehensive system of long-term care (adopted February 1989). The proposed recommendation deals only with a specific, new fiscal mandate (i.e., estate recovery) applicable only to the Medicaid program.

5. **What urgency exists which requires action at this meeting of the House?**
   States are required to have the mandatory estate recovery programs in place no later than April 1995, so any action to repeal the mandate or to correct inequities in the mandate is imperative now.
6. **Status of Legislation.** (If applicable.)
   See #5. No repeal legislation is pending at this time. Federal regulations to implement the estate recovery mandate have not yet been issued.

7. **Cost to the Association.** (Both direct and indirect costs.)
   None.

8. **Disclosure of Interest.** (If applicable.)
   We are aware of no actual or potential conflicts of interest.

9. **Referrals.**
   Simultaneously with this submission, referral is being made to:
   - Senior Lawyers Division
   - Section of Real Property, Probate & Trust Law
   - Section of Administrative Law & Regulatory Practice
   - Section of Urban, State & Local government Law
   - Section of Individual Rights & Responsibilities
   - Standing Committee on Legal Aid & Indigent Defendants
   - Section of General Practice
   - Section of Health Law
   - Commission on Homelessness and Poverty
   - Commission on Mental and Physical Disability Law

10. **Contact Person.** (Prior to the meeting.)
    Alexander Forger, Chair, Commission on Legal Problems of the Elderly (202-331-2297).
    Nancy Coleman, Director, Commission on Legal Problems of the Elderly (202-331-2630).

11. **Contact Person.** (Who will present the report to the House.)
    Alexander Forger, Chair, Commission on Legal Problems of the Elderly (202-331-2297).
    John Pickering, Senior Advisor (202-331-2297)

12. **Contact Person Regarding Amendments to This Recommendation.** (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)
    None proposed at this time.