



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 02 OMM/ADM-3

TO: Commissioners of
Social Services

DIVISION: Office of Medicaid
Management

SUBJECT: Medicaid Liens and Recoveries

DATE: April 17, 2002

**SUGGESTED
DISTRIBUTION:**

Medicaid Staff
Temporary Assistance Staff
Fair Hearing Staff
Legal Staff
Staff Development Unit
Accounting Staff

**CONTACT
PERSON:**

Bureau of Local District Support
Upstate: (518) 474-8216
NYC: (212) 268-6855

ATTACHMENTS:

Attachment I: Informational Notice to Institutionalized
Individuals With Real Property (available on-line)
Attachment II: Notice of Intent to Impose a Lien On
Real Property (available on-line)
Attachment III: Sample Notice of Medical Assistance
Lien (available on-line)

FILING REFERENCES

Previous ADM's/INF's	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref	Misc. Ref.
88 INF-12		360-1.4(f)			GIS 96 MA/04
87 ADM-40		360-1.4(h)	101, 104,		State Fin.
89 ADM-45		360-1.4(k)	104-b, 106,		Law 18(4&5)
89 ADM-47		360-4.7(a)	111, 366, 369,		Gen Bus. Law
92 ADM-45		360-4.4	SSA 1917(b)		453-2
94 ADM-17		360-7.2			95 LCM-73
	92 ADM-53	360-7.3			SOL #97-15
		360-7.4			GIS 98 MA/29
		360-7.11			

Date: April 17, 2002

Trans. No. 02 OMM/ADM-3

Page No. 2

TABLE OF CONTENTS

	<u>Page</u>
I. PURPOSE	4
II. BACKGROUND	4
III. PROGRAM IMPLICATION	4
Definitions	4
IV. REQUIRED ACTION	6
A. Liens	6
1. Policy	6
2. Exceptions	6
B. Recovery From an Estate	7
1. Policy	7
2. Exceptions	7
a. Surviving Spouse	7
b. Sibling or Child	8
c. Long Term Care Insurance	8
d. Undue Hardship	8
e. American Indians	9
f. Reparation Payments	10
g. LDSS May Hold Mortgage	10
3. Court Procedures	10
a. Formal Court Administration	10
b. Voluntary Administrator	12
c. Absence of Fiduciary	12
d. Debtor Creditor Law	13
C. Recovery From Personal Injury Lawsuits	14
1. Legal Basis	14
2. Policy	14
3. Exceptions	15
4. Procedures	15
5. Proceeds Available to Satisfy Lien	17
D. Recovery From LRR	17
1. Policy	17
2. Exceptions	18
3. Procedures	19
E. Medicaid Incorrectly Paid	19
1. Definition	19
2. Policy	19
3. Procedures	20
F. Miscellaneous Recovery Requirements	20
1. May never recover more than Medicaid paid	20
2. Recovery should be cost effective	20
3. Voluntary repayments	20
4. Recovery of premium payments	20

Date: April 17, 2002

Trans. No. 02 OMM/ADM-3

Page No. 3

G. Establishing Amount of the Claim	21
H. Notices	21
I. Operational Responsibility	21
IV. Systems Implications	22
VI. Effective Date	22

Date: April 17, 2002

Trans. No. 02 OMM/ADM-3

Page No. 4

I. PURPOSE

This Administrative Directive (ADM) sets forth Medicaid policy related to liens and recoveries with particular emphasis on changes for estate recoveries brought about by revisions to Federal statute concerning such recoveries.

II. BACKGROUND

A. Federal Statute

Prior to the passage of the estate recovery provisions of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), pursuing estate recoveries was voluntary and limited to Medicaid provided to individuals 65 years of age or older or permanently institutionalized.

OBRA '93:

1. expands Medicaid estate recoveries to Medicaid provided to individuals 55 years of age and older;
2. makes estate recovery activity mandatory; and
3. requires that provision be made to avoid imposing undue hardship as a result of estate recovery actions.

B. State Social Services Law (SSL) and New York Codes, Rules and Regulations (NYCRR)

Sections 451 and 452 of Chapter 170 of the Laws of 1994 amended SSL Section 369.2 effective October 1, 1993, to conform to the provisions of OBRA '93.

III. PROGRAM IMPLICATIONS

For purposes of this ADM, the following definitions will apply:

Beneficiary: any person entitled to any part or all of an estate.

Claim: a statement setting forth the amount of, and the basis for, a Medicaid recoupment sought by the local department of social services (LDSS).

Dependent relative: a relative of the recipient, provided that over 50 percent of the maintenance needs of the relative are met by the recipient. The term relative includes a child, stepchild, or grandchild; parent, stepparent, or grandparent; aunt, uncle, niece or nephew; brother, sister, stepbrother, stepsister, half brother or half sister; cousin; or in-law.

Disabled child: a recipient's child of any age who is certified blind or certified disabled, pursuant to the requirements of the Supplemental Security Income (SSI) program as specified in 20 CFR 416.901-416.998.

Date: April 17, 2002

Trans. No. 02 OMM/ADM-3

Page No. 5

Discharge from a medical institution and return home: a medical institution's release, with a plan of discharge, of an individual to his/her principal residence (as opposed to a temporary return or visit to the home).

Estate: all real and personal property and other assets included in an individual's estate, and passing under the terms of a valid will or by intestate succession (i.e. pursuant to the laws governing the distribution of property when a person dies without leaving a valid will).

Fiduciary: an executor named in the will of a deceased person (decedent), an administrator for a person who died without a will, or any other executor or administrator, who has been issued the appropriate letters by the Surrogate's Court and is obligated to settle and distribute the decedent's estate; or a voluntary administrator of the personal property of a small estate.

Lawfully residing in the recipient's home on a continuing basis: the uninterrupted residence of the sibling or child of a permanently institutionalized individual in the individual's home, with the consent of the individual.

Legally responsible relative: a person legally obligated to financially support a Medicaid applicant/recipient. Married persons are obligated to support their spouses pursuant to Section 412 of the Family Court Act, Section 32 of the Domestic Relations Law, and Section 101 of the SSL. Parents are obligated to support their children under twenty-one years of age (including stepchildren, foster children, children born out of wedlock, and legally adopted children) pursuant to Sections 413 and 513 of the Family Court Act, Section 32 of the Domestic Relations Law, and Section 101 of the SSL.

Lien: a legal claim, which attaches to and binds specified property for the purpose of obtaining the payment of a debt or obligation. Medicaid liens are only imposed in certain situations, pursuant to specific authority granted in statute. Having a legal basis to pursue a Medicaid recovery from an individual, by itself, does not confer the authority to place a lien against that individual's property.

Minor child: a recipient's child who is under 21 years of age.

Permanently institutionalized individual: an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, who is not reasonably expected to be discharged from the medical institution and return home. Medical evidence can be presented to dispute the presumption that the placement is permanent.

Recovery: repayment of Medicaid paid, as a result of a lien, estate claim, court judgment or settlement, or voluntary repayment.

Sufficient ability to provide medical support: a legally responsible relative of a Medicaid applicant/recipient has sufficient ability to provide medical support if, under the rules of the Medicaid program, any portion of the relative's income and/or resources would be deemed available to the applicant/recipient, or would be requested to be contributed toward the cost of medical care.

Third party resource: any individual, entity or program that is or may be liable to pay all or part of the medical expenses of a Medicaid recipient. Examples include: commercial insurance companies through employment-related or privately purchased health insurance or through casualty coverage resulting from an accidental injury; an individual who has either voluntarily accepted or been assigned legal responsibility for the health care of one or more Medicaid recipients; fraternal groups; unions; or the State Workers' Compensation Board. Other examples of third party resources include absent parents or other entities providing medical support or services.

IV. REQUIRED ACTION

A. Liens

1. Policy. There are two main situations in which Medicaid liens must be imposed:
 - a. On the real property of a permanently institutionalized Medicaid recipient, to recover, at the time the property is sold, the cost of Medicaid provided to the permanently institutionalized individual; the statutory authority for this kind of lien is found in SSI Section 369(2)(a)(ii); and
 - b. On the proceeds of a Medicaid recipient's pending personal injury lawsuit, to recover from the liable third party the cost of Medicaid provided to the recipient; the statutory authority for this kind of lien is found in SSI Sections 104-b and 369(2)(c).

NOTE: If a district obtains a judgment of a court on account of incorrectly paid Medicaid benefits, the district may place a lien against the recipient's property in order to enforce the judgment, pursuant to SSI Section 369(2)(a)(i). See Section IV.E. of this directive for more information concerning recoveries of Medicaid incorrectly paid.

2. Exceptions

- a. A lien should not be imposed against the home of a permanently institutionalized individual (PII) if any of the following persons is lawfully residing in the home:
 - a spouse;
 - a minor child, or a child of any age who is certified blind or certified disabled; or
 - a sibling who has an equity interest in the home and who was residing in the home for at least one year preceding the date the A/R became a PII (see 89 ADM-45 for information on documenting an equity interest).

- b. A lien should not be imposed against the real property of a PII if the value of the property is counted in determining eligibility and results in the applicant having to spend down excess resources. An example of such property is the home of a PII if the PII does not intend to return to the home, and no spouse, child under 21 years of age, certified blind or certified disabled child, or other dependent relative is living in the house. In this case, the home is a countable resource.
- c. Before imposing a lien against the homestead of a PII, the district must afford the PII an opportunity to make an exempt transfer of the home. See 18 NYCRR 360-4.4(c)(2)(iii)(b) for a list of the persons to whom an exempt transfer of a homestead may be made. If the PII elects to transfer the home, the LDSS must document the intent to transfer and allow a reasonable timeframe to accomplish the transfer (90 days or longer if necessary due to difficulty or delay beyond the control of the PII).
- d. A lien against the real property of a PII must be removed if the individual is discharged from the medical institution and returns home.

B. Recovery from the recipient or his/her estate

1. **Policy.** Recovery of correctly paid Medicaid must be made:

- a. Upon the sale of real property subject to a lien imposed on account of Medicaid provided to a PII; the liquidation of the property may take place either during the recipient's lifetime or after his/her death; and
- b. From the estate of a person who died as a PII, to recover Medicaid provided during the period in which the individual was permanently institutionalized; and
- c. From the estate of any person who was 55 years of age or older when he or she received Medicaid, to recover Medicaid provided on and after the person's 55th birthday.

2. **Exceptions**

- a. No recovery of correctly paid Medicaid may be made during the lifetime of the Medicaid recipient's surviving spouse, or at a time when the recipient has a surviving child who is under 21 years of age or who is certified blind or certified disabled.
- b. In the case of a lien on the recipient's home, no recovery of correctly paid Medicaid may be made if:
 - (1) a sibling of the recipient resided in the home for at least one year immediately before the recipient's admission to the medical institution, and has lawfully resided in the recipient's home on a continuous basis from the date of the recipient's admission to the medical institution through the present day; or

(2) a child of the recipient resided in the home for at least two years immediately before the recipient's admission to the medical institution, provided care to the recipient which permitted the recipient to reside at home rather than in an institution, and has lawfully resided in the recipient's home on a continuous basis from the date of the recipient's admission to the medical institution through the present day.

The lien should remain on the home to protect the asset should the individual no longer reside in the home and the property is liquidated.

c. Pursuant to SSL Section 367-f, no lien should be imposed, and no recovery should be made, with respect to correctly paid Medicaid furnished to a person who received 36 months of nursing home benefits or its equivalent pursuant to a long term care insurance policy approved under the New York State Partnership for Long Term Care. For more information, see 96 ADM-8, 97 OMM LCM-3, and GIS 01 MA/022.

d. No recovery of correctly paid Medicaid may be made if it will result in undue hardship. Undue hardship may exist when the estate asset subject to recovery is the sole income-producing asset of the beneficiaries, such as a family farm or family business, and income produced by the asset is limited; the estate asset subject to recovery is a home of modest value (i.e. with a value no higher than 50 percent of the average selling price in the county where the home is located, as of the date of the recipient's death) and the home is the primary residence of the beneficiary; or there are other compelling circumstances. The LDSS should consider the potential for undue hardship when deciding whether to pursue a particular recovery. In addition, any beneficiary of the estate, or the estate fiduciary on the beneficiary's behalf, may request that recovery be waived on the basis of undue hardship.

Undue hardship will not be found to exist: (a) based solely on the inability of any of the beneficiaries to maintain a pre-existing lifestyle; or (b) if the alleged hardship is the result of Medicaid or estate planning methods involving divestiture of assets.

In some cases, it may only be necessary for a LDSS to waive recovery with respect to certain estate assets in order to avoid causing an undue hardship; in these situations, the LDSS may still pursue a recovery from any remaining part of the estate.

If an LDSS does not agree to waive recovery based on undue hardship, and the fiduciary of the recipient's estate nevertheless rejects the LDSS's claim, the LDSS will have to pursue the claim in Surrogate's Court, as described in Section IV.B.3.a. of this directive.

e. No recovery of correctly paid Medicaid may be made from the following income, resources and property belonging to an American Indian (AI) or Alaskan Native (AN):

- (1) Certain AI/AN income and resources (such as interests in and income derived from Tribal land and other resources currently held in trust status and judgment funds from the Indian Claims Commission and the U.S. Claims Court) that are exempt from Medicaid estate recovery by other laws and regulations;
- (2) Ownership interest in trust or non-trust property, including real property and improvements:
 - a. Located on a reservation (any federal recognized Indian Tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established by Alaska Native Claims Settlement Act and Indian allotments) or near a reservation as designated and approved by the Bureau of Indian Affairs of the U.S. Department of Interior; or
 - i. For any federally-recognized Tribe not described in (a), located within the most recent boundaries of a prior Federal reservation.
 - ii. Protection of non-trust property described in 1) and 2) above, is limited to circumstances when it passes from an Indian (as defined in section 4 of the Indian Health Care Improvement Act) to one or more relatives (by blood, adoption, or marriage), including Indians not enrolled as members of a Tribe and non-Indians, such as spouses and step-children, that their culture would nonetheless protect as family members; to a Tribe or Tribal organization; and/or to one or more Indians;
- (3) Income left as a remainder in an estate derived from property protected in 2) above, that was either collected by an Indian, or by a Tribe or Tribal organization and distributed to an Indian(s), as long as the individual can clearly trace it as coming from the protected property.
- (4) Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of Federally-protected rights, and income either collected by an Indian, or by a Tribe or Tribal organization and distributed to an Indian(s) derived from these sources as long

as the individual can clearly trace it as coming from protected sources; and

- (5) Ownership interests in or usage rights to items not covered by 1 - 4 above that have unique religious, spiritual, traditional, and/or cultural significance or rights that support subsistence or a traditional life style according to applicable Tribal law or custom.
- f. Reparation payments. No Medicaid recovery of government reparation payments to special populations should be pursued.
- g. When an estate is not exempt from recovery requirements or subject to an undue hardship waiver, provision may be made to permit beneficiaries of the estate to satisfy the LDSS's claim without liquidating an asset that is part of the estate. For example, rather than requiring the sale of a home, the LDSS might agree to hold a mortgage on the home in the amount of its recovery, and permit the beneficiary to pay the LDSS in accordance with a reasonable payment schedule, subject to reasonable interest.
3. Procedures. The steps to be taken depend on which one of the following situations exists: letters have been issued by Surrogate's Court authorizing a fiduciary to settle and distribute an estate; a voluntary administrator is acting as the fiduciary of a small estate, without the formality of court administration, in order to settle and distribute personal property; or no estate fiduciary has qualified or been appointed.
 - a. Formal court administration. When letters testamentary have been issued to an executor pursuant to Article 14 of the Surrogate's Court Procedure Act (SCPA), in relation to the probate of a will, or letters of administration have been issued pursuant to Article 10 of the SCPA, in relation to the distribution of an intestate decedent's estate, the SCPA sets forth detailed requirements for asserting claims against the estate.
 - i. Filing the claim. The LDSS should file its claim within seven months from the date a fiduciary is first appointed. If the LDSS files its claim after this seven-month period, the fiduciary will not be liable if he or she has in good faith paid other claims or distributed the estate.
 - (a) The claim must be in writing, giving the facts upon which the claim is based and the amount of the claim. It must state that any beneficiary of the estate, or the estate fiduciary on the beneficiary's behalf, may request that recovery be waived on the basis of undue hardship. The following language should be included in the claim, describing the undue hardship criteria:

"Undue hardship may exist when the estate asset subject to recovery is the sole income-producing asset of the beneficiaries, such as a family farm or family business, and income produced by the asset is limited; the estate asset subject to recovery is a home of modest value (i.e. of a value no higher than 50% of the average selling price in the district) and the home is the primary residence of the beneficiary; or there are other compelling circumstances. Undue hardship will not be found to exist based solely on the inability of any of the beneficiaries to maintain a pre-existing lifestyle, or if the alleged hardship is the result of Medicaid or estate planning methods involving divestiture of assets."

(b) A copy of the notice of claim must be presented personally or by certified mail, return receipt requested, to the fiduciary. If the fiduciary cannot be found or served within the State after due diligence, the notice of claim may be served upon the clerk of the court. To be paid, a claim must be presented in the manner described, unless a court order directs otherwise.

ii. Allowance or rejection of the claim. The fiduciary must promptly give notice in writing of the allowance or rejection of a claim. If the fiduciary fails to allow a claim (i.e. accept it as valid) within ninety days from the date it is presented to him or her, the claim is deemed rejected. If the LDSS's claim is rejected, it has two options:

(a) within eight days after being served with notice that the fiduciary has petitioned Surrogate's Court for judicial settlement of his or her accounting, file objections to the accounting with Surrogate's Court, in order to have the validity of the claim decided by that Court; or

(b) within sixty days after rejection of the claim, commence an action in a court other than Surrogate's Court seeking payment of the rejected claim.

iii. Compromise of the claim. The fiduciary generally has the power to compromise (i.e. agree to the payment of an amount in settlement of) a claim without the approval of the Surrogate's Court. However, in order to avoid personal liability for an imprudent compromise, the fiduciary usually will seek Surrogate's Court approval of any proposed compromise.

b. Voluntary administrators. A voluntary administrator is a person who qualifies and undertakes to settle, without the formality of court administration, the estate of someone who dies leaving personal property having a gross value of \$20,000 or less. A voluntary administrator is the fiduciary of the estate until such time, if any, as another fiduciary (e.g., an executor or administrator) qualifies or is appointed. This small estate procedure only applies to personal property; however, it may be used to administer the personal property of a person who owned real property at the time of death.

i. To qualify as a voluntary administrator, a person files an affidavit with Surrogate's Court. Surrogate's Court provides the voluntary administrator with a certified copy of this affidavit, and, upon request, with short form certificates showing the filing of the affidavit. The short form certificate evidences the qualification and authority of the voluntary administrator to act.

ii. If the decedent died without a will, the right to act as a voluntary administrator is given first to the surviving adult spouse, and if there is none or the spouse renounces, then to a competent adult who is a child, grandchild, parent, brother or sister of the decedent.

iii. If the decedent has a will, the right to act as a voluntary administrator is given first to the named executor or alternate executor, and if the named executor or alternate executor renounces or fails to qualify, then to the beneficiaries of the decedent.

iv. To recover from such an estate, the LDSS will need to file its claim with the voluntary administrator. It is recommended that the district file a statement of claim with the individual most likely to act as voluntary administrator immediately upon receiving notification of the recipient's death. If a different person ultimately qualifies as voluntary administrator, the LDSS must file its claim with that person once he or she has been identified.

c. Absence of fiduciary. Pursuant to Section 1310 of the SCPA, a person or entity that owes a debt to a decedent may, under certain circumstances and subject to specified monetary limits, make payment to the decedent's relatives and creditors without the formality of court administration. When a resident of a nursing facility dies, the nursing facility owes such a debt to his or her estate, namely the obligation to pay over the funds maintained by the nursing facility in the resident's personal account. As a result of SCPA Section 1310, if the decedent is not survived by a

spouse or minor child, and no estate fiduciary has qualified or been appointed, a nursing facility may be able to pay funds in the decedent's personal account, which do not exceed \$5,000, directly to the LDSS, once six months have passed from the decedent's death.

In order for the nursing facility to be able to make the payment, the LDSS must provide the nursing facility with an affidavit showing:

- i. the date of death of the decedent;
- ii. that no fiduciary has qualified or been appointed;
- iii. that the decedent was not survived by a spouse or minor child;
- iv. that the LDSS is entitled to the payment as a recovery of Medicaid; and
- v. that the payment, and all other payments made by the decedent's debtors pursuant to SCPA Section 1310, known to the LDSS after diligent inquiry, do not exceed \$5,000 in the aggregate.

NOTE: Recovery should not be pursued from the personal account of a veteran who died in a Veterans' Administration (VA) nursing facility. In addition, if a veteran was transferred from a non-VA nursing facility to a VA facility (e.g. a VA hospital) for treatment and died while in the VA facility, recovery should not be pursued from funds remaining in the personal account maintained by the non-VA nursing facility. Likewise, if the VA contracted for the care of a veteran in a private nursing facility at VA expense, recovery should not be pursued from the personal account maintained by the private nursing facility.

d. **Debtor and Creditor Law.** If a LDSS has a legal basis for making a Medicaid recovery from a recipient or his or her estate, it may commence a court action pursuant to the Debtor and Creditor Law to undo transfers of assets by the recipient, and have those assets returned to the recipient or his or her estate, so that sufficient assets will be available to satisfy the LDSS's claim. Miner v. Edwards, 221 A.D.2d 934 (1995); Woodhouse v. McCarthy, 198 A.D.2d 909 (1993); Crabb v. Estate of Mager, 66 A.D.2d 20 (1979); Bandas v. Emperor, 121 Misc. 2d 192 (1983); In re Estate of Rhodes, 148 Misc. 2d 744 (1990).

i. The Debtor and Creditor Law cannot be used to attempt to have assets returned to a Medicaid recipient for the purpose of making the recipient ineligible for Medicaid prospectively. The only actions which can be taken with regard to an individual's Medicaid eligibility as a result of a transfer of assets

are set forth in the Medicaid transfer-of-assets rule (18 NYCRR 360-4.4(c)). The Medicaid transfer-of-assets rule preempts, or supersedes, the Debtor and Creditor Law with respect to when an asset transfer affects an individual's eligibility for Medicaid. Cattaraugus County v. Keller, 1997 U.S. Dist. LEXIS 20193 (W.D.N.Y. Dec. 11, 1997).

- ii. The Debtor and Creditor Law is a tool for having assets returned to a Medicaid recipient or his or her estate, in order to have those assets available for recovery. It is not the basis for the recovery itself. The LDSS must have an independent basis for making a Medicaid recovery pursuant to SSL Section 369 before utilizing the Debtor and Creditor Law. See Bourgeois v. Stadtler, 256 A.D.2d 1095 (1998).

C. Recovery from a third party for recipient's personal injuries ("104-b liens")

1. Legal basis. To ensure that Medicaid remains the "payor of last resort", Federal law requires Medicaid recipients to cooperate in identifying any third party who may be liable to pay for care and services. Such cooperation requires Medicaid applicants to assign to the LDSS the right to seek reimbursement from any third party. See SSL Section 366(4)(h)(1) and 18 NYCRR 360-7.4(a)(4). In addition, the LDSS is subrogated to any rights a Medicaid recipient may have to third party reimbursement. See SSL Section 367-a(2)(b) and 18 NYCRR 360-7.4(a)(6). As a result of this assignment and subrogation, the LDSS obtains all of the Medicaid recipient's rights against a third party to recover for medical expenses, including the ability to immediately pursue those claims (e.g. by commencing a lawsuit against the third party).

When a third party is responsible for personal injuries suffered by the Medicaid recipient, SSL Section 104-b provides the LDSS with an alternative to suing the third party directly. Section 104-b authorizes the LDSS to place a lien against personal injury lawsuits brought by the Medicaid recipient against the responsible third party. Once the statutory notice and filing requirements are met, the lien attaches to any verdict, judgment, or award, as well as to the proceeds of any settlement.

2. Policy. LDSSs must seek recovery of Medicaid paid on behalf of a recipient who has a lawsuit or other action against a third party as a result of a personal injury. To do this, LDSSs should impose liens pursuant to SSL Section 104-b. The amount of the lien is to be set by the LDSS, but must not exceed the maximum amount paid by Medicaid for services related to the injury.

NOTE: Regardless of whether a personal injury lawsuit is commenced, the recipient may have third party coverage (e.g., health insurance or no-fault insurance) which is available to provide reimbursement for personal-injury-related medical services. The LDSS is responsible to seek coverage and/or reimbursement from these sources. The policy regarding the pursuit of payments from medical and no-fault insurance is provided in 87 ADM-40.

3. Exceptions

- a. No lien should be imposed, and no recovery should be made during the lifetime of the recipient, if the recipient's personal injury action is against a nursing facility. Public Health Law Section 2801-d(5) provides, in part, that any damages recovered by the recipient in such an action must not be required to be applied toward the payment or part payment of the cost of medical care and services under the Medicaid program. In addition, such funds would not be counted as a resource. However, upon death such funds may be recoverable from the estate.
- b. No lien should be imposed, and no recovery should be made, when the injury-related Medicaid furnished was for school-based medical care and services provided to a disabled child, which the child was entitled to receive under the Federal Individuals with Disabilities Act (IDEA) as part of a free and appropriate public education.
- c. SSL Section 104-b specifically prohibits placing liens on claims or awards pursuant to the Workers' Compensation Law or the Volunteer Firemen's Benefit Law.

4. Procedures. Specific instructions are provided here for pursuing third party payments from personal injury lawsuits by means of SSL Section 104-b liens.

- a. An attempt must be made to ascertain whether the defendant in the personal injury lawsuit is insured for liability. If so, determine the identity of the carrier.
- b. A written notice of lien must be prepared. A sample notice of lien form is included with this directive (Attachment III). Subject to the requirements of this section with regard to the contents of the notice of lien, the LDSS may modify this form as necessary to conform to local requirements. The notice of lien must contain:
 - i. the name and address of the injured recipient;
 - ii. the date and place of the incident;

- iii. the identity of the person, firm or corporation alleged to be liable for such injuries (liable third party); and
- iv. a brief statement of the nature of the lien, which should state: that the lien is claimed pursuant to SSL Section 104-b upon the recipient's right of action, suit, claim, counterclaim or demand against the liable third party; the amount of the Medicaid claim; and that the LDSS is entitled to be paid before the injured recipient pursuant to the provisions of Sections 366(4)(h)(1) and 367-a(2)(b) of the SSL. The amount initially specified on the notice of lien as being owed to the LDSS does not need to be exact. Any amount, from one dollar to the entire amount of injury-related Medicaid expenditures to date, may be stated. As indicated below, the LDSS will have an opportunity to serve an amended notice of lien later, which reflects the total amount of the Medicaid claim.

c. Prior to payment being made to the injured recipient, the notice of lien must be served by registered mail upon:

- i. the liable third party;
- ii. the third party's attorney, if known; and
- iii. the insurance carrier (a copy of the notice of lien must be mailed to the insurance carrier at least 20 days before the date the carrier makes a payment to the injured recipient).

d. A copy of the notice of lien must be served by regular mail upon the recipient and, if known, the recipient's attorney.

e. A copy of the notice of lien must be filed in the county clerk's office in the county of the LDSS.

f. The liable third party or the insurance carrier is required by Section 104-b to notify the LDSS, by certified or registered mail, of the proposed amount and date of payment on the personal injury claim at least ten days prior to making such payment. Within five working days of receiving this notification, the LDSS may serve and file, by certified or registered mail, an amended notice of lien which includes the amount of injury-related Medicaid provided subsequent to the original notice of lien.

5. Proceeds available to satisfy lien. Court decisions have established several significant principles regarding the satisfaction of SSL Section 104-b liens.

- a. The LDSS is entitled to have its Section 104-b lien satisfied from the proceeds of a personal injury award or settlement before those funds may be transferred to a supplemental needs trust for the benefit of the Medicaid recipient. Cricchio v. Pennisi, 90 NY2d 296 (1997).
- b. All of the proceeds of a personal injury award or settlement are available to satisfy a Section 104-b lien, not merely the portion intended to compensate the Medicaid recipient for past medical expenses. Calvanese v. Calvanese, 93 NY2d 111 (1999). In other words, neither courts, nor Medicaid recipients acting in conjunction with liable third parties, can limit the amount of the Medicaid recovery by strategically allocating settlements to specific categories of damages.
- c. The provisions of SSL Section 104(2) limiting the amount of assistance recovered from a minor to amounts in excess of his or her reasonable requirements (i.e. to the amount of the personal injury award or settlement intended to compensate the minor for past medical expenses) do not apply to Medicaid recoveries. Gold v. United Health Services Hospitals, Inc., 95 NY2d 683 (2001). In other words, as with adults, all of the proceeds of a minor's personal injury award or settlement are available to satisfy a Section 104-b lien.

D. Recovery from legally responsible relative who fails or refuses to support

1. Policy. There are two situations in which a recovery is made from a legally responsible relative (LRR) of a Medicaid recipient.

- a. Medicaid has been furnished during a period when the LRR has failed to provide required medical support under an existing court order.
- b. Medicaid has been furnished pursuant to SSL Section 366(3)(a). Section 366(3)(a) requires Medicaid to be furnished to otherwise eligible applicants/recipients when a LRR has sufficient ability to provide medical support, but fails or refuses to make income and resources available for the payment of medical care. However, Section 366(3)(a) creates an implied contract between the LRR and the LDSS, allowing the LDSS to recover from the LRR the cost of the Medicaid furnished.
- i. The implied contract created by SSL Section 366(3)(a) applies to any LRR who fails or refuses to make income and resources available, including a community spouse of an institutionalized person whose case is budgeted using spousal impoverishment budgeting. Commissioner of the Dept. of Social Services v. Spellman, 243 A.D.2d 45 (1998).

ii. A recovery pursuant to SSL Section 366(3)(a) may be pursued from a living LRR or from the estate of a deceased LRR. The amount that can be recovered may not exceed the amount of Medicaid paid. For example, if the community spouse had \$100,000 in resources above the maximum community spouse resource allowance, but the district only paid \$40,000 as of the time of the recovery, only \$40,000 can be recovered. In either case, a recovery is only permitted if the LRR had sufficient ability to provide medical support at the time the applicant/recipient was determined to be eligible for Medicaid pursuant to Section 366(3)(a). Matter of Craig, 82 NY2d 388 (1993). The LDSS does not have to prove the LRR's ongoing ability to support subsequent to this eligibility determination, or continue to monitor the LRR's ability to support throughout the period Medicaid is provided. Commissioner of the Dept. of Social Services v. Fishman, 280 A.D. 2d 396 (2001).

2. Exceptions

- a. In determining the Medicaid eligibility of certain children, the income and resources of the children's parents are not counted or requested to be contributed toward the cost of care. In these situations, recoveries should not be pursued from the parents. See. GIS 01 MA/016. Specifically, recoveries should not be pursued from the parents of:
 - i. children participating in one of the home and community-based waiver programs;
 - ii. pregnant minors;
 - iii. certified blind or certified disabled children who are 18 years of age or older; or
 - iv. children under age 18 who are expected to be living separately from their parents' household for at least 30 days.
- b. No recovery should be pursued from the parents of a disabled child, for Medicaid furnished for school-based medical care and services provided to such child, which the child was entitled to receive under the IDEA as part of a free and appropriate public education.

3. Procedures

- a. If the recipient is under the age of twenty-one and the LRR is his or her parent, referral should be made to the Child Support Enforcement Unit (CSEU).
- b. Any other situation involving the failure or refusal of a LRR to provide medical support should be referred to the office of the attorney representing the LDSS in such actions.
4. Confinement expenses. Although the father of a child born out of wedlock is not a legally responsible relative of the unwed mother, Section 514 of the Family Court Act imposes liability on such a father for the reasonable expenses of the mother's confinement and recovery, and for such reasonable expenses in connection with the pregnancy as the Family Court deems proper. See the letter issued jointly on December 5, 2000, by the Office of Temporary and Disability Assistance and the Department of Health for a full description of the policy and procedures related to recoveries of these expenses.

E. Medicaid incorrectly paid

1. Definition: Any Medicaid paid for an ineligible recipient is incorrectly paid. It does not matter whether the incorrect payment was due to an error by the LDSS or the applicant/recipient, or due to fraud or misrepresentation. Oxenhorn v. Fleet Trust Company, 94 NY2d 110 (1999).

2. Policy.

- a. When a LDSS learns that Medicaid has been incorrectly paid, it should pursue a recovery. Unlike recoveries of Medicaid correctly paid, there are no limitations on pursuing the recovery of incorrectly paid Medicaid during the recipient's lifetime..
- b. The LDSS should seek to recover the amount of Medicaid that was incorrectly paid since the first day the recipient became ineligible. In the case of a recipient who was furnished full Medicaid coverage when he or she should have been subject to an income and/or resource spenddown, the Medicaid recovery is limited to the amount of the spenddown liability or, if less, the total amount of Medicaid paid during the applicable period.

Example: In the month of June, an individual was authorized for full Medicaid coverage. It was later discovered that based on the individual's income in that month, a \$100.00 income spenddown should have been budgeted. The LDSS can seek to recover the Medicaid expenditures for June, up to a maximum of \$100.00 (since any Medicaid expenditures in excess of \$100.00 were correctly paid).

3. Procedures:

- a. The LDSS may request a voluntary repayment from the recipient. Any such request must be in writing and set forth the basis for the LDSS's conclusion that Medicaid was incorrectly paid. The request may inform the recipient that, if the recipient does not respond or does not agree to make the repayment, a court action may be commenced by the LDSS to recover the incorrectly paid Medicaid. However, the request must NOT state, suggest, or imply that the recipient's continued receipt of Medicaid will be affected in any way by the failure to make a voluntary repayment.
- b. If the LDSS commences a court action and obtains a judgment against the recipient for Medicaid incorrectly paid, SSL Section 369(2)(a)(i) authorizes the LDSS to place a lien against the recipient's property in order to enforce the judgment. None of the limitations described in Section IV.A.2 of this directive apply to a Section 369(2)(a)(i) lien.
- c. In the case of overpayments made on behalf of institutionalized recipients, due to increases in the recipients' income or other changes in circumstances, LDSSs are required to project and reconcile income over budgeting periods. In this way, overpayments are corrected by adjusting the recipient's liability toward the cost of care (NAMI) in subsequent months. See Administrative Directive 00 OMM/ADM-6 for more details.

Note: Federal regulations prohibit the reduction of money payments from another program (e.g., Public Assistance, Supplemental Security Income) as a means of recovering Medicaid incorrectly paid.

F. Miscellaneous recovery requirements

1. Under no circumstances may the LDSS seek to recover an amount in excess of the total amount of Medicaid paid on behalf of the recipient.
2. A LDSS need not pursue a given recovery if it is not cost effective to do so (e.g. where the amount reasonably expected to be collected will be less than the cost of the recovery effort).
3. Regardless of limitations on active recovery efforts described in this ADM, voluntary repayment of Medicaid may be accepted by the LDSS.
4. Payment for Medicare premiums for cases with a coverage code 09, which would include Qualified Medicare Beneficiaries (QMBs) when the individual is not eligible for full Medicaid, Specified Low Income Medicare Beneficiaries (SLIMBs), Qualified Individuals (QI-1s and QI-2s), and Qualified Disabled Working Individuals (QDWIs) are not recoverable.

5. Correct payments made under Medicaid Managed Care contracts are considered Medicaid correctly paid and are recoverable in accordance with the provisions of this ADM.
6. Payments made through the Comprehensive Outpatient Program (COPS) are not recoverable. COPS is a program that provides supplemental reimbursements to designated outpatient (OMH clinics and continuing day treatment) "preferred" providers to cover costs for the uninsured.

G. Establishing the amount of the claim. Regardless of the method or recovery, the LDSS must determine the amount of Medicaid it is entitled to recover. Information pertaining to the amount Medicaid paid on behalf of a recipient is available through adjudicated claims data (ADJ).

H. Notices

1. Informational Notice to Institutionalized Individuals With Real Property (Attachment I). This is provided at the time of application and describes the circumstances in which a lien will be imposed against a Medicaid applicant's/recipient's real property.
2. Notice of Intent to Impose a Lien on Real Property (Attachment II). This notice informs the applicant/recipient that the LDSS has determined that he or she is an inpatient in a medical institution who is not reasonably expected to be discharged and return home; and intends to impose a lien on specified real property pursuant to SSL Section 369. This notice is available through the Client Notice System (CNS) as Intent to Impose Lien on Real Property - Institutionalized Individual, Reason Code S06.
3. Notice of Medical Assistance Lien (Attachment III). This is a sample notice of lien form which LDSSs may use or adapt for purposes of filing SSL Section 369 liens against real property.

I. Operational Responsibility

1. As an alternative to pursuing recoveries directly, LDSSs have the option to contract with private entities who will conduct recovery activities. Two methods are available.
 - a. The LDSS may sell the debt. Under this arrangement, the right to reimbursement from third party payors or client-owned assets is purchased by an agent who assumes both the responsibility for, and the revenue associated with collection activity. Generally, such an arrangement calls for the agent to buy the debt for an amount representing a percentage of the total outstanding amount.

Date: April 17, 2002

Trans. No. 02 OMM/ADM-3

Page No. 22

b. The LDSS may contract to have recovery-related tasks performed by an agent while retaining status as a creditor. Reimbursement for the services would be made on a contingency basis (i.e., linked to a percentage of the amount collected by the contractor) or a fee per activity basis.

V. SYSTEMS IMPLICATIONS

There are no systems implications.

VI. EFFECTIVE DATE

The provisions of this ADM are effective immediately.

Kathryn Kuhmerker
Deputy Commissioner
Office of Medicaid Management

INFORMATIONAL NOTICE TO INSTITUTIONALIZED INDIVIDUALS WITH REAL PROPERTY

This notice explains what happens when you apply for Medical Assistance and you own real property, such as your home. A lien may be placed on your real property because of Medical Assistance paid or to be paid for you if you are receiving or expected to receive care in a medical institution and are not reasonably expected to return home.

A lien is a legally filed claim on your property. You still own your property if a lien is placed on it but, when the property is sold, the lien must be satisfied.

However, if you provide adequate medical evidence (such as from your doctor or discharge planner) that you are reasonably expected to return home, we will not put a lien on your real property. Please provide this information within 20 days from the date of your interview, or advise us if, due to conditions beyond your control, you will need additional time. If you need to discuss this issue with this agency, please request a conference as soon as possible.

You will receive a written notice if we intend to impose a lien on your real property.

If the real property is your home, we will not place a lien as long as you can prove that one of the following persons still lives in your home:

- ?? your spouse;
- ?? your child under age 21, or your child of any age who is certified as blind or disabled; or
- ?? your brother or sister who already has a right to part of your home and lived in your home for at least one year immediately before you went into a medical institution.

If a lien is placed on your real property, the department of social services will remove the lien if you return home from the medical institution.

If you have a long term care insurance policy certified under the New York State Partnership for Long Term Care, Medical Assistance may pay for your care after your policy pays for 36 months of nursing home care or its equivalent. In such instance, we will not place a lien on your real property.

**NOTICE OF INTENT TO IMPOSE A LIEN ON REAL PROPERTY
(INSTITUTIONALIZED INDIVIDUAL)**

NOTICE DATE:		NAME AND ADDRESS OF AGENCY/CENTER OR DISTRICT OFFICE		
CASE NUMBER		CIN/RID NUMBER		
CASE NAME (And C/O Name if Present) AND ADDRESS 				
GENERAL TELEPHONE NO. FOR QUESTIONS OR HELP				
OR Agency Conference				
Fair Hearing information and assistance				
Record Access				
Legal Assistance information				
OFFICE NO.	UNIT NO.	WORKER NO.	UNIT OR WORKER NAME	TELEPHONE NO.

We have determined that you are an inpatient in a medical institution who is not reasonably expected to be discharged and return home.

You have an ownership interest in real property located at:

This real property is not counted as a resource to determine your Medical Assistance eligibility, since:

- the property is your home and you have expressed your intent to return to the home;
- the property is your home, and although you do not intend to return home, the property continues to be occupied by your dependent
 - adult child who is not certified blind/disabled, stepchild, or grandchild
 - parent, stepparent, grandparent, aunt, uncle, niece, or nephew
 - sibling (who does not have equity interest in the property and has not resided in the home for at least one year), stepsibling, half brother/sister, cousin, or in-law;
- the property is used in a trade or business;
- there is a legal impediment which prevents you from selling the property. The property will be a countable resource as of the first of the month following the month that the legal impediment has been removed.

We intend to impose a lien (a secured legal claim) on the above-listed property for Medical Assistance paid or to be paid on your behalf. The lien does not affect your ownership of the property. If you are discharged from the medical institution and return home, we will remove the lien.

You are not required to sell the property. However, whenever the property is sold, we will recover the amount of Medical Assistance paid or to be paid on your behalf from the proceeds of the sale. If the proceeds of the sale are more than the amount of Medical Assistance paid or to be paid on your behalf, we will redetermine your Medical Assistance eligibility based on your income and resources at that time.

The LAWS and REGULATIONS which allow us to do this are Sections 369.1 and 369.2 of Social Services Law and 18 NYCRR 360-7.11.

REGULATIONS REQUIRE THAT YOU IMMEDIATELY NOTIFY THIS DEPARTMENT OF ANY CHANGE IN NEEDS, INCOME, RESOURCES, LIVING ARRANGEMENTS OR ADDRESS

**YOU HAVE THE RIGHT TO APPEAL THIS DECISION
BE SURE TO READ THE BACK OF THIS NOTICE ON HOW TO APPEAL THIS
DECISION**

RIGHT TO A CONFERENCE: You may have a conference to review these actions. If you want a conference, you should ask for one as soon as possible. At the conference, if we discover that we made a wrong decision or if, because of information you provide, we determine to change our decision, we will take corrective action and give you a new notice. You may ask for a conference by calling us at the number on the first page of this notice or by sending a written request to us at the address listed at the top of the first page of this notice. This number is used only for asking for a conference. It is not the way you request a fair hearing. If you ask for a conference you are still entitled to a fair hearing. Read below for fair hearing information.

RIGHT TO A FAIR HEARING: If you believe that the above action is wrong, you may request a State fair hearing by:

(1) **Telephoning:** (PLEASE HAVE THIS NOTICE WITH YOU WHEN YOU CALL)

If you live in:	New York City (Manhattan, Bronx, Brooklyn, Queens, Staten Island): (212) 417-6550
If you live in:	Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans or Wyoming County (716) 852-4868
If you live in:	Allegany, Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne or Yates County: (716) 266-4868
If you live in:	Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tompkins, or Tioga County: (315) 422-4868
If you live in:	Albany, Clinton, Columbia, Delaware, Dutchess, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Orange, Otsego, Putnam, Rensselaer, Rockland, Saratoga, Schenectady, Schoharie, Sullivan, Ulster, Warren, Washington or Westchester County: (518) 474-8781
If you live in:	Nassau or Suffolk County: (516) 739-4868

OR

(2) **Writing:** By sending a copy of this notice completed, to the Fair Hearing Section, New York State Office of Temporary and Disability Assistance, P.O. Box 1930, Albany, New York 12201. Please keep a copy for yourself.

as I want a fair hearing. The Agency's action is wrong because:

Signature of Client: _____ Date: _____

YOU HAVE 60 DAYS FROM THE DATE OF THIS NOTICE TO REQUEST A FAIR HEARING

If you request a fair hearing, the State will send you a notice informing you of the time and place of the hearing. You have the right to be represented by legal counsel, a relative, a friend or other person, or to represent yourself. At the hearing you, your attorney or other representative will have the opportunity to present written and oral evidence to demonstrate why the action should not be taken, as well as an opportunity to question any persons who appear at the hearing. Also, you have a right to bring witnesses to speak in your favor. You should bring to the hearing any documents such as this notice, paystubs, receipts, medical bills, heating bills, medical verification, letters, etc. that may be helpful in presenting your case.

LEGAL ASSISTANCE: If you need free legal assistance, you may be able to obtain such assistance by contacting your local Legal Aid Society or other legal advocate group. You may locate the nearest Legal Aid Society or advocate group by checking your Yellow Pages under "Lawyers" or by calling the number indicated on the first page of this notice.

ACCESS TO YOUR FILE AND COPIES OF DOCUMENTS: To help you get ready for the hearing, you have a right to look at your case file. If you call or write to us, we will provide you with free copies of the documents from your file which we will give to the hearing officer at the fair hearing. Also, if you call or write to us, we will provide you with free copies of other documents from your file which you think you may need to prepare for your fair hearing. To ask for documents or to find out how to look at your file, call us at the Record Access telephone number listed at the top of the front page of this notice or write us at the address printed at the top of the front page of this notice.

If you want copies of documents from your case file, you should ask for them ahead of time. They will be provided to you within a reasonable time before the date of the hearing. Documents will be mailed to you only if you specifically ask that they be mailed.

INFORMATION: If you want more information about your case, how to ask for a fair hearing, how to see your file, or how to get additional copies of documents, call us at the telephone numbers listed to the top of the front page of this notice or write to us at the address printed at the top of the front of this notice.

SAMPLE
(amend as appropriate)

NOTICE OF MEDICAL ASSISTANCE LIEN

Pursuant to Social Services Law, Section 369
and Book 18 of the New York Codes Rules and Regulations, Section 360-7.11

LIENOR: _____, Commissioner,

County Department of Social Services
Street Address,
City, State, zip Code

To: The Clerk of _____ County, New York
and to all others to whom it may concern:

Please take Notice that the _____ County Department of Social Services has and claims a Medical Assistance Lien, pursuant to Social Services Law Section 369 and 18 NYCRR 360-7.11, upon the house, building and appurtenances, and upon the lot, premises and parcel of land upon which the same may stand, hereinafter mentioned, for Medical Assistance paid or to be paid on behalf of the owner of said real property, pursuant to Title 11 of Article 5 of the Social Services Law of the State of New York, and hereby states:

OWNER OF THE PROPERTY: _____
First Name _____ Middle Name _____ Last Name _____

ADDRESS OF PROPERTY: _____
Street Address _____ City _____
State _____ Zip Code _____

The interest of the owner so far as is known to lienor, is: _____
(e.g.: as tenant by entirety, joint tenant, or appropriate designation)

ATTACHMENT III

The real property described above on which lienor claims a lien is listed in the _____ County, in _____ State, and is described in the _____ County Clerks Office in: _____

Deed Dated: _____

Deed Recorded: _____

Liber and Page: _____

Grantor: _____

Grantee: _____

Tax Map Number: _____

This lien is for Medicaid coverage for care in a medical institution. The Medical Assistance lien is in the sum of \$ _____ for Medical Assistance provided to the owner of the above described real property. This lien is not limited to the amount stated and shall include the cost of all Medicaid paid for care in a medical institution provided to the owner by the _____ Department of Social Services.

NAMES AND ADDRESSES OF NURSING FACILITIES:

The name and address of the nursing facility, intermediate care facility for the developmentally disabled, or other medical institution in which said owner is an inpatient and from which said owner is not reasonably expected to be discharged and to return home is/are:

[
[
[
[

]
]
]
[

]
]
]
[

]
]
]
[

LIENOR'S ATTORNEY: _____

First Name

Last Name

Street Address

City

State

Phone Number

DATED: _____, _____

ATTACHMENT III
County
Department of Social Services

STATE OF NEW YORK)
)
)
) ss.:
COUNTY OF _____)

I, _____, being duly sworn, state that I am the Commissioner of the _____ County Department of Social Services; that I have read the foregoing Notice of Medical Assistance Lien and know the contents thereof; that the contents are true to the best of my knowledge and belief and that this lien is executed and filed pursuant to the Social Services Law and Regulations for Medical Assistance provided to the owner of the real property herein described.

(Commissioner's Name)
Commissioner

Sworn to before me this
____ day of _____, year

Signature of Notary Public