



Memorandum

To: Daniel J. Heim

cc: Patrick Cucinelli
Elliott Frost

From: Brian T. McGovern 
Christina T. Holder 

Date: October 24, 2011

Re: Response of Nursing Homes to OMIG Medicaid Estate Recovery Notices

You asked us to consider a nursing home's duty under New York law and regulations to assist the State Medicaid program in recouping payments from the estates of deceased nursing home patients. This issue has arisen in the context of the New York State Office of the Medicaid Inspector General ("OMIG") mailing to nursing homes a "Notice of Intent to File a Claim Against the Estate" enclosing a "New York State Recovery Questionnaire" (the "Notice") addressed to the "family" of the deceased Medicaid recipient at the mailing address of the nursing home. The Notice contains no instruction regarding the procedure a nursing home should follow upon receiving the Notice, although presumably OMIG expects the nursing home to forward the Notice to the "family" of the decedent.

Brief Conclusion

There appears to be no legal basis for OMIG to compel the enlistment of nursing homes in its Medicaid recovery efforts. Thus, nursing homes in receipt of an OMIG letter nominally addressed to a deceased resident's family have at least a couple of options, each of which appears to be lawful. Nursing homes could adopt a cooperative approach and forward the Notices to the decedent's executors and/or family member of record. If the nursing homes adopt this approach, they should consider preparing a cover letter for transmission of the Notices to family members, mindful of the possible sensitivity of still-bereaving family members, explaining that the Notices were received from OMIG, are being forwarded as a courtesy, and that all questions should be directed to OMIG's attention at the telephone number included on the Notice.

C A D W A L A D E R

Alternatively, the facilities could return the notices to OMIG citing uncertainty as to whom the Notices should be forwarded and offering to share the appropriate mailing addresses at OMIG's request.

Summary of Research

Our review of the relevant State and Federal laws and regulations, as well as case law and secondary sources, did not reveal (a) a general duty for a nursing home to assist the government in Medicaid estate recovery efforts or (b) a specific duty for a nursing home to forward letters, packages or legal process to a deceased resident's family. Accordingly, as described more fully below, a nursing home would be within its rights to refuse and return the Notice to the sender (if opened) or to the United States Post Office (if unopened). However, as a practical matter, refusal of the Notices could risk appearing to frustrate or obstruct OMIG's collection efforts. Given this concern, as well as the ambiguity as to whom the letter should be forwarded (i.e. the decedent's next of kin or individual administering the decedent's estate), the nursing home should consider (a) forwarding the Notices to the individual responsible for administering the decedent's estate, with a copy to the decedent's next of kin or other family member (if different from the executor), or (b) returning the Notices to OMIG, noting the uncertainty as to whom the Notice should be forwarded and offering to share all relevant contact information at OMIG's request.

The following discussion summarizes the relevant provisions of the Public Health Law, Social Services Law, and United States Postal Services guidance relating to a nursing home's duty to forward the Notices.

Discussion

Nursing Home's Responsibility to Cooperate with OMIG and Commissioner of Health

New York State Public Health Law Section 31 establishes the Office of the Medicaid Inspector General as the office "responsible for the department's duties . . . with respect to . . . recovery of improperly expended medical assistance funds." While the law establishing OMIG mandates that State and local government agencies provide the inspector and the inspector's contractors with "such information, assistance and cooperation" as requested, no similar mandate exists with respect to Medicaid providers. See Public Health Law § 33. Provider responsibilities are codified in Part 521 of 18 NYCRR, which sets forth the requirements of provider compliance programs. Provider compliance programs involve the provider's own Medicaid billing, care and payment practices, and do not include a general requirement that providers cooperate with OMIG in recoupment efforts directed toward recovery from a Medicaid beneficiaries' estate.

C A D W A L A D E R

A more general consideration is a nursing home's responsibility to cooperate with the Department of Health. In that regard, the Commissioner of Health has the authority to inspect or demand from a medical facility "such . . . medical facility records as may be required." 10 NYCRR § 400.3(a)(4). A nursing home must also adopt a policy to notify a decedent's next of kin of a determination of death (10 NYCRR § 400.16), and therefore should have a record of the mailing address of the decedent's next of kin. Based on the foregoing, a nursing home, if requested by the Commissioner, would arguably be able to, if not be required, to provide next of kin contact information in order for the Commissioner to carry out his or her recoupment responsibilities.

Resident's Right to Receive Mail and Nursing Home's Responsibility to Forward Personal Funds Deposited with Facility Upon Resident's Death

Nursing home certification regulations provide guidance with respect to the treatment of a resident's mail generally, but not the treatment of a deceased resident's mail. Under the regulations, patients have the "right to privacy in written communications, including the right to . . . [s]end and promptly receive mail that is unopened; and to [h]ave access to stationery, postage, and writing implements at the resident's own expense." See 42 CFR § 483.10(i). See also 42 USC § 1396r(c)(1)(A)(iii) (a resident has the "right to privacy with regard to . . . written and telephonic communications.") If a resident is adjudged incompetent under the laws of New York, then the rights of the resident "devolve upon" and are "exercised by" the resident's legal representatives. See 42 USC § 1396r(c)(1)(C).

In contrast to the lack of guidance about how nursing homes should handle the mail of deceased residents, the certification regulations do require that a nursing home convey the personal funds deposited with the facility on behalf of the resident within 30 days of the resident's death to the individual or probate jurisdiction administering the resident's estate. See 42 CFR § 483.10(c)(6). See also 42 USC § 1396r(c)(6)(B)(iv).

United States Postal Service Domestic Mail Manual Guidance

The Domestic Mail Manual ("DMM") contains the official mailing standards of the United States Postal Service ("USPS"). The DMM would permit various options for dealing with the Notices.

Refuse Notice and Return to Post Office or Sender

The DMM does not contemplate delivery of an addressee's mail to someone other than the addressee or the addressee's agent. In other words, there is no support in the DMM for the delivery of mail addressed to a decedent's family member to the decedent's former nursing home. See DMM § 508.1.4.1 ("[u]nless otherwise directed, an addressee's mail may be delivered to an employee, to a competent member of the addressee's family, or to any person authorized to represent the addressee").

C A D W A L A D E R

Even if the nursing home were properly authorized to receive mail addressed to a decedent's family member, such mail could be refused pursuant to DMM Section 508.1.1, which provides that "[a]ddressees may control delivery of their mail" and "may refuse to accept a mailpiece when it is offered for delivery." Regarding the correct procedure for refusing mail, the DMM specifies that "[a]fter delivery, an addressee may mark a mailpiece "Refused" and return it within a reasonable time, if the piece or any attachment is not opened. Mail that may not be refused and returned unopened under this provision may be returned to the sender only if it is enclosed in a new envelope or wrapper with a correct address and new postage." Id. Registered, certified, insured, collect on delivery, and return receipt for merchandise mail may not be refused and returned "postage-free" after delivery. Id.

Forward the Notice to Executor or Decedent's Family Member

The DMM includes guidance for managing mail addressed to patients residing in nursing homes and deceased individuals. While the Notices are addressed to the *families* of deceased individuals, rather than the decedents themselves, because the Notices concern the estates of the decedents, the DMM regulations may be instructive.

DMM Section 508.1.6 provides that "[m]ail addressed to a patient . . . at an institution is delivered to the institution authorities," and that "if the addressee is no longer at that address, the mail must be redirected to the current address, if known, or endorsed appropriately and returned by the institution to the Post Office." This provision arguably provides indirect authority for a nursing home to redirect mail concerning a deceased patient to the address of the decedent's executor or family member.

In addition, the DMM permits, but does not require, that a person who normally received the decedent's mail before his or her death continue to receive and manage the mail after death. See DMM § 508.1.4.4. ("[m]ail addressed to a deceased person may be received at the address of the deceased by anyone who would normally receive the addressee's mail at that address") and USPS web site ("[i]f you shared an address with someone who has since died and would normally receive their mail, you don't need to do anything. You can open and manage their mail"). This provision also provides indirect authority for the nursing home to manage mail received at the facility's address concerning the deceased resident by forwarding such mail to the estate executor or appropriate family member. The right of the estate's executor to manage the decedent's mail is further supported by a provision of the DMM providing that an appointed executor or administrator may submit an application to the Post Office to have the decedent's mail forwarded to their address. See 508.1.4.4.

B.T.M.
C.T.H.