

Special Needs Trust Panel

Medicaid Estate Recovery

Submitted By

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2010 RPTE SPRING SYMPOSIA
AMERICAN BAR ASSOCIATION
PHILADELPHIA
MAY 7, 2010

1) History of Estate Recovery

a) 1965 Medicaid statute

I) Signed into law as Title XIX of the Social Security Act by President Johnson on July 30, 1965 in a ceremony at the Harry S Truman Presidential Library in Independence, Missouri with former President Truman in attendance.
(<http://www.cms.hhs.gov/History/Downloads/PresidentCMSMilestones.pdf>)

II) Estate recovery under the 1965 Act

- Law limited a state's ability to recover assets to individuals 65 or older
- Power to recover was optional; as of October 1, 1993, 28 states had estate recovery programs that collected a total of \$63 million in fiscal year 1992 (*Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices*)
- 1965 Act did not define "estate"; left it up to the States (*National Perspective on Expanded Estate Recovery: Case Law Analysis, Emerging Legislative Trends and Responsive Strategies for the Elder Law Attorney*, NAELA Journal Spring 2005)
- Citizens Action League v. Kizer, 887 F.2d 1003 (9th Cir. 1989) = interpreted 1965 statute to prohibit States from collecting non-probate assets because term "estate", since it wasn't defined by federal statute, was given its common law meaning
- States prohibited from placing liens during the life of the Medicaid beneficiary except for incorrectly paid benefits

b) Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)

- I) Allowed States to place liens on the home of a MA beneficiary during the person's lifetime unless the spouse, minor/disabled child, or sibling with equity interest and one year's residence resides there
- II) TEFRA liens must be dissolved if the beneficiary returns home
- III) Thus prior to 1993, States could only make claims against an individual's estate if the individual was 65 or older or if their property was subject to a TEFRA lien

c) Omnibus Budget Reconciliation Act of 1993 (OBRA)

- I) By the early 1990s, the increasing costs of nursing care had fueled interest in how to shave down the burgeoning expense of Medicaid
 - Based on reports such as *Medicaid recoveries from nursing home residents' estates could offset program costs*, US General Accounting Office. GAO/HRD-89-56, March 1989, Congress included a provision in OBRA requiring States to implement an estate recovery program (*Medicaid Estate Recovery*, Department of Health and Human Services Policy Brief #1, April 2005)
- II) Three major changes to 1965 Act
 - Basic estate recovery became mandatory as a condition for receiving federal aid for state programs
 - Benefits period subject to estate recovery was lowered from 65 to 55
 - The states were allowed to expand their definition of estate from the traditional probate estate to include non-probate assets

d) Reaction From The States

- I) The States' reaction to OBRA has been mixed as demonstrated by the AARP's 2005 survey of Medicaid officials across the country
- II) Positive Reactions
 - Estate recovery does generate modest revenue
 - It enables Medicaid enrollees to receive services without having to sell their property

- Estate recovery keeps Medicaid from being “an inheritance insurance program for heirs”
- It ensures fairness and is “the final backstop on trying to beat the system”

III) Negative Reactions

- May discourage people from applying for Medicaid
- Disproportionately affects unsophisticated parties who don't estate plan.
- Most commonly cited negative effect: negative PR
- *USA Today* 4/30/2002 article quoting Eliot Fishman, a researcher at the Institute for Medicare Practice at Mount Sinai School of Medicine: “It's a program to confiscate the money of middle-class people who have just lost a relative. Politically, that's not the most enticing revenue source for states.”
- State Medicaid officials have complained that estate recovery promotes the sheltering of assets. One referred to the “cat and mouse game with elder law attorneys” and said that there are too many ways to shelter assets.

IV) A really negative reaction – West Virginia

A) Since OBRA was passed, West Virginia officials have vehemently protested estate recovery because West Virginia has a high proportion of impoverished seniors who are also homeowners.

- 2005 census = WV 1st in rate of home ownership
- 2005 census = WV 48th in median household income
- 2000 census = WV 3rd in percentage of citizens over 65 as it is one of three states with 15% or more of the population over 65

In comparison, Michigan ranks:

- 2000 census = 30th in percentage of citizens over 65 but 8th in terms of number of citizens over 65
- 2005 census = 25th in median household income
- 2005 census = Michigan in virtual tie for 3rd in rate of home ownership, behind Mississippi and WV

B) The West Virginia Attorney General's webpage has information on how to avoid estate recovery and urges citizens to contact their senators and representatives to get the law changed (<http://www.wvago.gov/faqs.cfm?fx=cat&id=10>)

C) West Virginia v. HHS, 289 F.3d 281 (4th Cir. 2002)

- Facts: WV officials initially resisted implementing the estate recovery program and no legislation was passed in the 1994 legislative session. Thereafter, HHS notified WV that it would initiate compliance proceedings against the State that could result in WV losing “all or part” of its Federal aid. WV then authorized the program but the legislation included a provision directing WV’s attorney general to commence an action to test the constitutionality of the program in Court.
- Holding: The requirement that states implement an estate recovery program on pain of losing all or part of their Medicaid funds is not impermissibly coercive on its face and thus is not in violation of the Tenth Amendment.
- Notes: The 4th Circuit, unlike many other federal circuits, endorses the coercion theory under the Spending Clause and the Court strongly implied that if the only sanction available for states refusing to implement an estate recovery program were the loss of the State’s entire Medicaid reimbursement, the Court might reach a different result.
- Court’s holding rested on the fact that the feds had other remedies available to them and thus a facial challenge had to fail since there were circumstances under which the Act’s application would be constitutional.

D) West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007)

- Facts: WV sought to create an undue hardship exemption for each homestead in an amount equal to the statewide arithmetic mean appraised value. CMS disapproved on the basis that the State’s methodology, by not controlling for variations in home price, would exempt a high percentage of homes in many counties and thus defeat the purpose of estate recovery.
- Holding: Secretary’s determination that WV’s exemption was too broad to constitute an undue hardship was upheld under the APA.

e) Michigan Was The Last In Line - Passage Of Michigan's Law

- I) Senate Bill 374, which would eventually become MCL 400.112g et. seq. and MCL 700.3805, was introduced by State Senator Michael Switalski on 3/27/2007.
- II) Apparently, CMS became impatient while Michigan debated various forms of the Bill as Paul Reinhart, the state's Medicaid Director, received a letter from Dennis Smith, the Director of CMS, on August 24th, 2007 telling Mr. Reinhart that Michigan was the only State that remained non-compliant with estate recovery and furthermore, that HHS would initiate a compliance action if Michigan failed to enact an estate recovery program by September 30th, 2007.
- III) Janet Olszewski, the director of the Michigan Department of Community Health, then wrote a letter to State Senator Allen on September 5th, 2007, communicating that Michigan stood to lose over \$5 billion in federal Medicaid payments if legislation were not enacted by the 30th.
- IV) The Bill was passed 57-52 by the House on September 26th, 2007; by the Senate, 25-13, on 9/27/07 and was signed into law by Governor Granholm on 9/30/2007.

2) Estate Recovery Nationally

a) Basic Requirements Of Federal Law

- I) 42 U.S.C. § 1396a(a) = A State plan for medical assistance must... **(18)** comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;
- II) Who must the State seek recovery from?
 - 42 U.S.C. § 1396p(b)(1)(B) = State is required to seek adjustment or recovery of any MA correctly paid on behalf of individuals who were 55 or older when they began receiving assistance
 - Persons subject to TEFRA liens = 42 U.S.C. § 1396p(a)(1)(B)
- III) Which services must the State seek reimbursement for?

- 42 U.S.C. § 1396p(b)(1)(B)(i) = State must seek reimbursement for nursing facility services, home and community-based services, and related hospital and prescription drug services
- 42 U.S.C. § 1396p(b)(1)(B)(ii) = States given option of seeking reimbursement for any other items or services offered under the State plan

IV) Which assets may the State seek reimbursement from?

- 42 U.S.C. § 1396p(b)(4)(A) = State must try to recover from all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law
- 42 U.S.C. § 1396p(b)(4)(B) = State has the option to seek recovery from any other assets in which the individual had a legal interest at the time of death including 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

V) When may estate recovery occur?

- 42 U.S.C. § 1396p(b)(2)(A) = only when there is no surviving spouse and there are no surviving children under 21 or who are blind/disabled
- 42 U.S.C. § 1396p(a)(1)(B) allows the imposition of liens against the individual's home while the individual is still alive provided:
 - 1) There is no reasonable expectation that the person will return home;
 - 2) None of the following lawfully reside in the home:
 - a) Spouse
 - b) Minor or disabled child
 - c) Sibling with equity interest and one year's residence
- 42 U.S.C. § 1396p(b)(2)(B) = In the case of a lien on the individual's home, once the individual dies, the State can not recover from the home until none of the following are living in the home:
 - 1) A sibling of the individual who was residing in the individual's home for at least a year prior to individual's admission to medical institution;
 - 2) A son or daughter who was residing in the home for at least two years prior to admission.
- Again, no estate recovery may occur while there is a surviving spouse or minor/blind/disabled child

VI) State must establish procedures for hardship petitions = 42 U.S.C. § 1396p(b)(3)

b) Efficacy Of Estate Recovery

I) Financial Impact

- For FY 2004, only three states had estate recovery collections that were greater than 3% of nursing home Medicaid spending (*Medicaid Estate Recovery Collections*, Department of Health & Human Services, Policy Brief #6, September 2005)
- Median recovery in FY 2003 = just over 0.05% of annual Medicaid long-term expenses
- In 2005 AARP survey, only 9 states could provide fairly complete figures as to administrative costs which averaged 6.84% of collections
- Appears to be only a weak connection between a state's reported collections and the policy options it has chosen
- Some states have relatively low collection rates (e.g. Delaware) despite having chosen a broad range of options to maximize collection opportunities)

II) Estate recovery amounts per measured estate

- Average recovery per estate = \$8,116
- Median recovery per estate = \$5,081
- Amounts suggest that Medicaid enrollees frequently die with low levels of equity in their homesteads (see West Virginia)
- Tremendous variation in average recoveries (\$93 per estate in Kentucky to \$25,139 in Hawaii)

III) National trend is to expand scope of estate recovery

- A) 33 states appear to seek recovery beyond probate estate, compared with 20 in 1996
- B) States will try to push the envelope as to which assets are subject to recovery
- C) Estate of Paul Budney v. State of Wisconsin Dept. of Health and Social Services, 197 Wis.2d 948 (1995)
 - Facts: Paul's wife, Grace, predeceased him. When Paul died, Wisconsin attempted to recover from Paul's estate Medicaid payments made to Grace. Wisconsin law specifically required recovery from the estate of a surviving spouse of a Medicaid recipient.

- Holding: 42 U.S.C. § 1396p(b) does not specifically authorize States to recover from the estate of a surviving spouse. Thus the Wisconsin law conflicted with federal law and was invalid.

c) *Experiences Of Practitioners In Other States – What To Expect*

- I) AARP survey of 10 legal practitioners in different states
 - Legal practitioners' answers to questions often differed from the State administrators' answers
- II) Legal reviewers recounted frequent changes in the legislative and regulatory landscape
 - Within one year in Massachusetts, state amended its law to expand claims beyond probate estate; had second thoughts and postponed collections under the new law; and finally repealed the expanded law
- III) Lawyers said estate recovery operated as a significant deterrent to applying for MA
- IV) As far as the definition of "estate", lawyers noted differences between the law and practice
 - In particular, the Maryland attorney complained that case workers often do not understand the estate recovery rules and may seek to initiate recovery where there is no recoverable estate
- V) Most lawyers said that undue hardship petitions were difficult, if not impossible, to obtain

3) Estate Recovery in Michigan

a) *Who Must The State Of Michigan Seek Recovery From?*

- I) Currently unclear; MCL 400.112g(3)(b) says that the department of community health shall seek approval from the federal centers for medicare and Medicaid regarding which recipients of medical assistance are subject to estate recovery
- II) Again, 42 U.S.C. § 1396p(b)(1)(B) = State is required to seek adjustment or recovery of any MA correctly paid on behalf of individuals who were 55 or older when they began receiving assistance

b) *Which Services Are Recoverable?*

- I) Don't know for sure; MCL 400.112g(3)(a) = Department will seek approval from federal agency

- II) 42 U.S.C. § 1396p(b)(1)(B)(i) = State must seek reimbursement for nursing facility services, home and community-based services, and related hospital and prescription drug services
 - Seems unlikely that Michigan will opt to follow the lead of 42 U.S.C. § 1396p(b)(1)(B)(ii) = States given option of seeking reimbursement for any other items or services offered under the State plan
- III) MCL 400.112k = Estate recovery only applies to recipients who began receiving long-term care services after effective date of the Act (9/30/2007)

c) *From Which Assets May The State Seek Recovery?*

- I) MCL 400.112h defines “Estate” as all property subject to probate administration under article III of EPIC, except assets otherwise subject to claims under MCL 700.3805(3)
- II) MCL 400.112h(b) defines “Property” as synonymous with MCL 700.1106(s) = “Anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property.”
- III) Thus Michigan appears to have a bare-bones estate recovery program where recovery may be had only from assets that pass through probate
 - Remember, 42 U.S.C. § 1396p(b)(4)(B) gives State the option to recover from non-probate assets such as trusts
- IV) Community Spouse
 - MCL 400.112g(3)(c) = department will work with feds to determine under what circumstances they may collect from estates of community spouse

d) *When May The State Not Proceed With Estate Recovery?*

- I) State shall not place or record TEFRA liens = MCL 400.112g(9)
- II) Undue hardship
 - A) MCL 400.112g(3)(e) = Department shall develop standards for hardship that includes, but is not limited to, the following:
 - Exemption for portion of the homestead that is equal to or less than 50% of the average price of a home in the county in which the homestead is located as of the date of the person’s death
 - Portion of estate that is primary income-producing asset of survivors, including, but not limited to, a family farm or business
 - Rebuttable presumption of no hardship if hardship resulted from estate planning methods

B) Two caveats to hardship

- Department must also delineate circumstances under which they may review requests for exemptions that do not meet the definition of hardship developed by the department = MCL 400.112g(3)(f)
- Implementing hardship program to make sure heirs are not unreasonably harmed by estate recovery = MCL § 400.112g(3)(g)

III) Department shall not seek Medicaid estate recovery if costs of recovery exceed amount of recovery available or if recovery is not in best interest of the state = MCL 400.112g(4)

IV) Department shall not recover assets from the home if 1 or more of the following individuals are lawfully residing in the home:

- Spouse
- Child under 21 or who is blind/permanently disabled
- Caretaker relative (within fifth degree of relation) who resided in home for at least two years prior to nursing home admission. Relative must prove that care provided allowed person to live at home.
- Sibling with equity interest in home and one year's residence prior to admission

V) Department shall not charge interest on balance of estate recovery payments = MCL 400.112g(8)

e) *When May Estate Recovery Occur?*

- 42 U.S.C. § 1396p(b)(2)(A) = only when there is no surviving spouse and there are no surviving children under 21 or who are blind/disabled

f) *What Priority Does Estate Recovery Have In Probate?*

- MCL 700.3805(1)(f) = Estate recovery is sixth in line after: 1) Costs and expenses of administration; (2) Funeral and burial expenses; (3) Homestead allowance; (4) Family allowance; and (5) Exempt property.

g) *Implementation Issues*

I) MCL 400.112g(5) = Department shall not implement estate recovery until the program is approved by the federal government

II) Legislative analysis estimated that the Michigan estate recovery program would gross about \$10 million per year (Legislative Analysis by House Fiscal Agency)

h) Estate Planning Strategies

- I) Estate plan to transfer assets outside of probate in states that have not expanded the definition of an estate beyond the common law definition of the probate estate. For example, convey homestead (without divesting) to children via a “Ladybird” deed.
- II) Title home into joint tenancy with someone not legally responsible to support Medicaid recipient, wait out the look-back period. Nonspouse joint tenant can refuse to sell the property when Medicaid applicant enters nursing home. In many states no lien is filed against a former homestead - the homestead becomes nonhomestead when the applicant indicates an intent not to return home, in the SSI-related Medicaid states.
- III) Transfer the home to any of the following:
 - Child who provided care for at least 24 months, which kept parent out of home.
 - Transfer home to the sibling with equity interest who had lived there at least one year.
 - Transfer home to child under 21 or blind/disabled.
 - Transfer home to adult disabled child.
- IV) Exercise appeal rights
 - Pursue undue hardship
 - Where appropriate, challenge finding that other statutory preconditions have been met
 - Challenge cases dependent on state law more restrictive than federal law
 - Where relatively small amount, threaten full use of appeal right to encourage State to settle
- V) Educate the public and the bar as to which assets are subject to estate recovery