



Members Only

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The Medicaid Estate Recovery Program*

PREPARED BY: BOB BENNETT, LSC RESEARCH ASSOCIATE

REVIEWED BY: SHELAGH BAKER, LSC DIVISION CHIEF

The Ohio Department of Job and Family Services is required to institute an estate recovery program under which the Department, with certain exceptions, must seek adjustment or recovery from the estates of certain deceased Medicaid recipients.¹ The Department must also seek adjustment or recovery on the sale of property of a permanently institutionalized individual (or such an individual's spouse) that is subject to a lien imposed on account of Medicaid paid or to be paid on the individual's behalf. The recoveries and adjustments are for the costs of Medicaid services the Medicaid program correctly paid or will pay on an individual's behalf.

Individuals subject to estate recovery

The Department must seek adjustment or recovery from the estates of different groups of Medicaid recipients. One group consists of Medicaid recipients age 55 or older. Permanently institutionalized individuals of any age comprise another group.

An individual is considered to be permanently institutionalized if all of the following are the case: the individual is an inpatient in a nursing facility, intermediate care facility for the mentally retarded (ICF/MR), or medical institution; the individual is required, as a condition of the Medicaid program paying for the individual's services in the facility or institution, to spend for costs of medical or nursing care all of the individual's income except an amount for personal needs the Department specifies; and the Department determines that the individual cannot reasonably be expected to be discharged from the facility or institution and return home. A rebuttable presumption exists that an individual cannot reasonably be expected to be discharged and return home if the individual declares that the individual does not intend to return home or has been an inpatient in the facility or institution for at least six months.

Recovery for correctly paid Medicaid benefits must be sought against the estates of Medicaid recipients who are age 55 or older or permanently institutionalized.

* This *Members Only* brief is an update of earlier briefs on this subject dated November 23, 2005 (Volume 126 Issue 3) and October 18, 2007 (Volume 127 Issue 8).



Recovery for correctly paid Medicaid benefits may be sought against the estate of other individuals, if any, as permitted by federal law.

Property subject to recovery includes all real and personal property in which an individual has any legal title or interest at the time of death.

State law governing Medicaid estate recovery requires the Department also to seek adjustment or recovery from the estate of other individuals as permitted by federal law.

Federal law subjects an individual to estate recovery if the individual has received, or is entitled to receive, benefits under a long-term care insurance policy in connection with which assets or resources are disregarded to the extent that payments are made under a long-term care insurance policy or because the individual has received, or is entitled to receive, benefits under a long-term care insurance policy.² However, federal law prohibits a state from implementing recovery against an individual in this group if the individual received Medicaid from a state that has a qualified state long-term care insurance partnership program that provided for the disregard of assets or resources to the extent that payments are made under a long-term care insurance policy or because an individual has received, or is entitled to receive, benefits under a long-term care insurance policy.³ State law requires the Department to establish a qualified state long-term care insurance partnership program consistent with the federal definition of that term.⁴ “Qualified state long-term care insurance partnership” is defined as an approved state Medicaid plan amendment that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or

on behalf of an individual who is a beneficiary under a long-term care insurance policy. A long-term care policy must (1) cover an insured who was a resident of the state when coverage first became effective under the policy, (2) be a qualified long-term care insurance policy as defined in the Internal Revenue Code, (3) be issued not earlier than the effective date of the state Medicaid plan amendment, and (4) meet the model regulations and requirements promulgated by the National Association of Insurance Commissioners as of October 2000. A policy sold to an individual under age 61 must provide compound annual inflation protection, and a policy sold to an individual at least age 61 but less than age 76 must provide some level of inflation protection. The issuer of a long-term care insurance policy must provide regular reports to the United States Secretary of Health and Human Services. The state must also satisfy a few requirements to obtain federal approval of its qualified state long-term care insurance partnership program.⁵

Estate subject to adjustment or recovery

Prior to enactment of Am. Sub. H.B. 66 of the 126th General Assembly, the property in an individual’s estate that was subject to the Medicaid estate recovery program was property to be administered under the state’s probate law and property that would be administered



under that law if not for probate law authorizing limited releases from administration. H.B. 66 expanded the property in an individual's estate that is subject to adjustment or recovery by including all 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 the interest), including assets conveyed to a survivor, heir, or assign of the individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. In construing what this property is, "time of death" is not to be construed to mean a time after which legal title or interest in real or personal property or other asset may pass by survivorship or other operation of law due to the individual's death or terminate by reason of the individual's death.

Exceptions

No adjustment or recovery may be made from an individual's estate or, in the case of a permanently institutionalized individual, on the sale of property that is subject to a lien, if the individual has a surviving spouse or a surviving son or daughter who is under age 21 or considered blind or disabled under the Supplemental Security Income program. Further, no adjustment or recovery may be made from a permanently institutionalized individual's home that is subject to a lien while either of the following lawfully reside in the home:

(1) A sibling who resided in the home for at least one year immediately before the date of the permanently institutionalized individual's admission to the nursing facility, ICF/MR, or medical institution and has resided in the home on a continuing basis since that time;

(2) A son or daughter who provided care to the permanently institutionalized individual that delayed the individual's institutionalization and resided in the home for at least two years before the date of the individual's admission to the nursing facility, ICF/MR, or medical institution and on a continuous basis since that time.

Reduction for long-term care insurance

Adjustment or recovery is to be reduced for a participant in the qualified state long-term care insurance partnership program. The Department's rules provide for the reduction to equal the amount of the participant's resources that were disregarded at the time he or she was determined eligible for Medicaid due to participation in the qualified state long-term care insurance partnership program. However, resources that are in a special needs trust or pooled trust, and annuities, that are disregarded in determining the participant's eligibility for Medicaid are subject to adjustment or recovery. Also, the amount of resources that are transferred in a manner that would

Recovery may not be made under certain circumstances, including if the decedent is survived by a spouse or a blind or disabled child.

Individuals who participate in the qualified state long-term care insurance partnership program are subject to a reduced recovery.



Recovery may be waived if it would cause an undue hardship.

cause the participant to incur a Medicaid eligibility penalty if not for his or her participation in the qualified state long-term care insurance partnership program is added to the amount from which the state is to seek adjustment or recovery.⁶

Undue hardship waivers

The Department is required to waive adjustment or recovery if it determines that adjustment or recovery would cause an undue hardship. The Department is permitted, however, to limit the duration of the waiver to the period during which the hardship exists.

The Department's rule governing hardship waivers provides that undue hardship may be found in the following circumstances:

(1) The estate that is subject to recovery is the sole income-producing asset of the survivor, such as a family farm or other family business, and the asset produces a limited amount of income or is the survivor's sole asset.

(2) The survivor would become eligible for public assistance because of not receiving the estate proceeds.

(3) Recovery would deprive the survivor of necessary food, shelter, or clothing.⁷

(4) The survivor provides clear and convincing evidence of substantial personal financial contributions to the decedent, creating an equity interest in the property.

(5) The survivor is age 65 or older and financially dependent on receiving the estate proceeds.

(6) The estate proceeds are preserved for the benefit of a survivor who is totally and permanently disabled and financially dependent on receipt of the proceeds.⁸

Without an additional showing of hardship, preventing heirs from receiving an anticipated inheritance, losing a pre-existing standard of living, or preventing the establishment of a new source of maintenance are not grounds of undue hardship. An undue hardship waiver will not be granted when the hardship is created by using estate planning methods under which an individual divested, transferred, or otherwise encumbered assets in whole or in part to avoid estate recovery or when a waiver would result in payment of claims to other creditors with lower priority standing under Ohio's probate law.⁹

The Department's rule requires that a request for an undue hardship waiver be submitted within 30 days after notice of estate recovery is mailed. The request may be made by an heir or potential heir who would suffer an undue hardship without the waiver, a person with an interest in the estate, or a representative of such persons. A request may not be made by a creditor of the estate unless the creditor is also a potential heir. The Director of Job and Family Services may designate the form to be used to make the request. The Department must notify the individual requesting the waiver within 60 calendar days



of receiving the request of whether the request is approved or denied. The approval may be in full, in part, or for a limited time. Failure to meet the 60-day deadline does not result in an automatic decision. If the request is not approved in full or is approved for a limited time, the individual requesting the waiver may request that the Director, or a designee, review the decision. The request for review must be made within 30 calendar days.¹⁰ The review is to be completed within 60 calendar days. However, failure to meet the 60-day deadline does not result in an automatic decision.¹¹

Liens

With one exception, no lien may be imposed against the property of an individual before the individual's death on account of Medicaid services correctly paid or to be paid on the individual's behalf.¹² The exception is that the Department may impose a lien against the real property of a living Medicaid recipient who is a permanently institutionalized individual and against the real property of the recipient's spouse. This includes any real property that is jointly held by the Medicaid recipient and spouse. However, the Department may not impose a lien against the Medicaid recipient's home if any of the following lawfully reside in the home: the recipient's spouse; the recipient's son or daughter who is under age 21 or considered to be blind or disabled under the Supplemental Security

Income program; or the recipient's sibling who has an equity interest in the home and resided in the home for at least one year immediately before the date the recipient is admitted to the nursing facility, ICF/MR, or medical institution. Even if a lien is imposed, though, it dissolves on the Medicaid recipient's discharge from the nursing facility, ICF/MR, or medical institution and return home.

Estate recovery duties of individual responsible for a decedent's estate

The person responsible for the estate of a decedent subject to the Medicaid estate recovery program or the estate of a decedent who was the spouse of a decedent subject to the Medicaid estate recovery program is required to submit a properly completed Medicaid estate recovery reporting form to the administrator of the Medicaid estate recovery program.¹³ The person responsible for a decedent's estate is the executor, administrator, commissioner,¹⁴ or person who applied to the probate court to have the decedent's estate released from administration.¹⁵ The form must be submitted not later than 30 days after the granting of letters testamentary, administration of the estate, or filing of an application for release from administration or summary release from administration.

In addition, the person responsible for the decedent's estate is required to

A lien may be imposed against the real property of a living Medicaid recipient on account of correctly paid benefits only if the recipient is permanently institutionalized.

The person responsible for a decedent's estate must submit a reporting form to the Attorney General if the decedent was a Medicaid recipient whose estate is subject to recovery or the spouse of such a person.



The beneficiary of a transfer on death deed and the surviving tenant under a survivorship tenancy must report whether the deceased was subject to recovery or the spouse of an individual subject to recovery.

The Attorney General must present a claim for recovery not later than 90 days after receiving the reporting form or one year after the decedent's death, whichever is later.

mark the appropriate box on a form for the probate court to show that the estate recovery reporting form has been submitted. The probate court must send a copy of the probate form to the administrator of the Medicaid estate recovery program.

Reporting forms for transfers of death deeds and survivorship tenancies

The administrator of the Medicaid estate recovery program is required to prescribe a form regarding transfer of death deeds and a form regarding survivorship tenancies.¹⁶

The beneficiary of a transfer on death deed or the beneficiary's representative is to provide certain information on the form regarding transfer on death deeds if the beneficiary survives the deceased owner of the real property or is in existence on the date of death of the deceased owner. The information is whether (1) the deceased owner was either a decedent subject to the Medicaid estate recovery program or the spouse of such a decedent and (2) the real property was part of the estate of a decedent subject to estate recovery.

Regarding the form for survivorship tenancies, the surviving tenant or his or her representative is to indicate whether (1) the deceased survivorship tenant was either a decedent subject to the Medicaid estate recovery program

or the spouse of such a decedent and (2) the registered land under a survivorship tenancy was part of the estate of a decedent subject to estate recovery.

A county recorder is required to obtain a properly completed form regarding transfer on death deeds and send a copy to the administrator of the Medicaid estate recovery program before recording a transfer. A county recorder must obtain a properly completed form regarding survivorship tenancies and send a copy to the administrator before registering a title in the surviving tenants.

Collecting from the estate

The Department is required to certify amounts due under the Medicaid estate recovery program to the Attorney General.¹⁷ The Attorney General, as the Medicaid estate recovery program administrator, has a certain amount of time to present a claim for the amount sought from a decedent's estate under the estate recovery program. The claim must be presented to the person responsible for the decedent's estate or that person's legal representative not later than 90 days after the date on which the Medicaid estate recovery reporting form is received or one year after the decedent's death, whichever is later.¹⁸

The amount owed under the Medicaid estate recovery program is specifically listed as the seventh item



in the order in which a decedent's debts are to be paid from his or her estate.¹⁹ This follows debts that result from costs associated with administering the decedent's estate in probate court and the decedent's last sickness and funeral.

The Attorney General is permitted to present an affidavit to a financial institution requesting the release of a decedent's account proceeds as part of the estate recovery program.²⁰ The financial institution may release the account proceeds if: (1) the decedent held an account at the institution that was in the decedent's name only, (2) no estate has been opened for the

decedent and it is reasonable to assume no estate will be opened, (3) the estate recovery program administrator is unaware of any other outstanding debts owed by the decedent, and (4) the institution receives no valid objections to the release. If the account proceeds are released and the Department subsequently receives notice of a valid claim to the proceeds that has a higher priority under the order in which the decedent's debts are paid, the Department is permitted to refund the proceeds to the financial institution or pay the proceeds to the claimant. 

The Attorney General may seek release of a decedent's account proceeds from a financial institution.

Endnotes

- ¹ Revised Code § 5111.11 governs the Medicaid estate recovery program.
- ² Recovery for this group is limited to the costs incurred by the Medicaid program for nursing facility and other long-term care services.
- ³ 42 U.S.C. 1396p(b)(1)(C).
- ⁴ R.C. 5111.18.
- ⁵ The Department of Job and Family Services must provide information and technical assistance to the Department of Insurance on the latter department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care. The requirements Ohio imposes on long-term care insurance policies for the partnership program must also be imposed on all other long-term care insurance policies issued in the state. (42 U.S.C. 1396p(b)(1)(C)(iii).)
- ⁶ O.A.C. 5101:1-38-10(G).
- ⁷ Deprivation does not include a situation in which the survivor is inconvenienced but not at risk of serious harm.
- ⁸ O.A.C. 5101:1-38-10(H)(1).
- ⁹ O.A.C. 5101:1-38-10(H)(2) and (3).
- ¹⁰ Presumably, the 30 calendar days is from the date the waiver request is decided.
- ¹¹ O.A.C. 5101:1-38-10(I).
- ¹² R.C. 5111.111 governs the imposition of liens on the property of Medicaid recipients to help the state recover the costs of correctly paid benefits.



¹³ The Attorney General is the administrator of the Medicaid estate recovery program. As the administrator, the Attorney General is required to prescribe the reporting form. In the case of a decedent who was subject to the Medicaid estate recovery program, the form must require, at a minimum, that the person responsible for the estate list all of the decedent's real and personal property and other assets that are part of the decedent's estate. In the case of a decedent who was the spouse of a decedent subject to the Medicaid estate recovery program, the form must require, at a minimum, that the person responsible for the estate list all of the decedent's real and personal property and other assets that are part of the decedent's estate and were also part of the estate of the decedent subject to the Medicaid estate recovery program. The Attorney General must include on the form a statement printed in bold letters informing the person responsible for the estate that knowingly making a false statement on the form is the criminal offense of falsification, a misdemeanor of the first degree. (R.C. 2117.061(D).)

¹⁴ According to an official with the Attorney General's office, the commissioner is the individual who signs off as fiduciary when application is made to release an estate from administration.

¹⁵ An interested party may apply to a probate court to release an estate from administration if (1) the estate is valued at no more than \$35,000 or (2) the estate is valued at no more than \$100,000 and the decedent's surviving spouse is the sole heir of the entire estate either under the decedent's will or state law governing descent and distribution of the estate of a decedent who dies intestate. (R.C. 2113.03.)

¹⁶ R.C. 5302.221 and 5309.082.

¹⁷ R.C. 5111.112. The Attorney General is authorized to contract with any individual, private entity, or government entity to collect the amounts due on the Attorney General's behalf.

¹⁸ R.C. 2117.061(E).

¹⁹ R.C. 2117.25.

²⁰ R.C. 2113.041.

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9th Floor
Vern Riffe Center
Columbus, Ohio
614/466-3615

Director
Mark C. Flanders

Contributing Author
Bob Bennett
LSC Research Associate

Reviewer
Shelagh Baker
LSC Division Chief

Layout & Design
Jeanette Cupp