
Medicaid Estate Recovery

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In 1993 Congress amended Title XIX of the Social Security Act to require every state that receives federal Medicaid funding (and all states do so) to implement an estate recovery program. 42 USC 1396p(b). The amendment was part of the Omnibus Budget and Reconciliation Act (OBRA 93), PL 103-66, Section 13612. Prior to the 1993 amendment estate recovery was an optional component of a state's Medicaid program. OBRA 93 specified certain minimum requirements for an estate recovery program, but also gave states some options to expand the scope of its estate recovery program beyond the minimum requirements. Despite the change in the law, the federal agency that administers the Medicaid program, formerly the Health Care Financing Administration, now the Centers for Medicare and Medicaid (CMS), did not vigorously enforce the requirement. As of January, 2007, every state except Michigan had adopted an estate recovery program. On August 24, 2007 CMS sent a letter, to the Department of Community Health (DCH) giving the state until September 30, 2007 to enact necessary legislation to implement an estate recovery program or face monetary sanctions. On September 30, 2007 Governor Granholm signed PA 74, amending the Social Welfare Act. MCL 400.112g – 400.112k. That legislation required DCH (now the Department of Health and Human Services) to establish and operate an estate recovery program, defined certain requirements for the program, and required DCH to obtain approval from CMS prior to implementation of its estate recovery program. There were numerous delays in the approval process, but the state plan was finally approved on May 23, 2011, with an effective date retroactive to July 1, 2010. DHHS amended its policy manuals, effective July 1, 2011, to reflect the implementation of estate recovery.¹

¹ Medicaid eligibility policies are contained in the Department of Health and Human Services Bridges

Some of the policy manual provisions are inconsistent with the governing state and federal law and are subject to challenge through administrative appeals and judicial review. Other provisions will require further clarification by DHHS.

Estate recovery is a component of a state's Medicaid program that authorizes the state to seek recovery from the estate of a deceased Medicaid recipient for the amount that the state paid for certain medical services provided to the recipient. OBRA 93 requires a state, at a minimum, to seek recovery for long-term care services provided to a recipient age 55 and older. 42 USC 1396p(b)(1)(B). Long term care services include not only Medicaid-funded nursing home care, but also "home and community based waiver services",² and related hospital care and prescription drugs. States are also required to seek recovery for Medicaid payments on behalf of recipients of any age who are determined to be "permanently institutionalized, i.e., the state has made a determination that they could not reasonably be expected to return to their home. 42 USC 1396p(b)(1)(A). States have the option to seek recovery for payments for all other Medicaid services provided to persons age 55 and older. PA 74 did not address this option. The DHHS Bridges Administrative Manual (BAM) states that Medicaid beneficiaries who are age 55 or older and who have received long-term care services after September 30, 2007, are subject to estate recovery. BAM Item 120, p 7. This Manual item also states that recovery will be sought for services provided after July 1, 2010. However, as discussed later in this article, a recent Court of Appeals decision held that the state may only recover for services provided after July 1, 2011.

OBRA 93 requires the states, at a minimum, to seek recovery against the Medicaid recipient's probate estate. 42 USC 1396p(b)(4). It gives the states the option to seek recovery beyond the probate estate against any type of property in which the Medicaid recipient held any legal title or interest at the time of death, to the extent of such

Eligibility Manual, which can be accessed online by searching for "MDHHS policy manuals". Medicaid administrative policies are contained in the DHHS Bridges Administrative Manual.

² In Genesee County the Home and Community Based Waiver program is administered by the Valley Area Agency on Aging. It is also known as the MI Choice program.

interest. This would include jointly owned property, accounts with payable on death designations, life estates, and property held in a revocable trust. PA 74 adopted the minimum requirement, MCL 400.112h, and limited estate recovery to the assets that are subject to probate administration under article III of the Estates and Protected Individuals Code (EPIC), MCL 700.3101 et seq. MCL 400.112h specifically excludes from estate recovery any assets in a revocable trust established by the decedent that are otherwise subject to creditor claims under EPIC, MCL 700.3805(3). Thus, assets held in a revocable trust, as well as other assets that pass upon death outside of the probate estate, are not subject to estate recovery. PA 74 also specifically prohibits MDHHS from placing a lien on the recipient's home prior to death. MCL 400.112g(9).

The state's claim against the estate of a deceased Medicaid recipient is included in the category of "debts and taxes with priority under federal law" which are given priority over all other categories of claims except the costs and expenses of administration, reasonable funeral and burial expenses, and the statutory allowances. MCL 700.3805(1).

In most cases the only asset of significant value in the estate of a deceased Medicaid recipient is the recipient's former homestead, because the Medicaid eligibility rules strictly limit the amount of other assets that an individual can keep and still qualify for Medicaid. Under the current Medicaid eligibility rules for long-term care services the recipient's former homestead is an exempt (noncountable) asset if the equity value of the homestead is under \$552,000 [for 2016]. There is no limit on the equity value of the homestead if the recipient's spouse, minor child, or blind or disabled child is living in the home. BEM Item 400, p 32.

PA 74 requires the state to develop criteria for determining when an estate will be exempt from estate recovery due to a hardship and defines certain circumstances that must be included within the definition of hardship. The statute requires the state to include an exemption for that portion of the value of the recipient's homestead that is equal to 50% of the average price of a home in the county in which the homestead is located as of the date of death, MCL 400.112g(3)(e)(i), and an exemption for the portion

of the estate that is the “primary income-producing asset of survivors, including, but not limited to, a family farm or business”, MCL 400.112g(3)(e)(ii). However the DHHS policy manual restricts these exemptions in a manner not supported by the statutory language and adds a means test for eligibility that is not authorized by the statute.

In regard to the homestead exemption, the DHHS policy manual states that the Department may decide not to pursue estate recovery if “the estate is a home of modest value.” BAM Item 120, p 8. To qualify for this exemption the Manual states the home must be valued at 50% or less of the average price of homes in the county where it is located. BAM Item 120, p 9. Under the Department’s policy, if the average value of homes in the county is \$100,000 a home valued at \$50,000 would be exempt but a home valued at \$51,000 would be fully subject to estate recovery. This conflicts with the statutory language, which provides a \$50,000 exemption to be applied to the total value of the home, so that the first \$50,000 in value of the \$51,000 home would be exempt and only \$1,000 would be subject to estate recovery.

In regard to the exemption for income-producing assets, such as a family farm or business, the DHS policy manual states that the Department may decide not to pursue estate recovery if “the estate subject to recovery is the sole income-producing asset of the survivors (where such income is limited), such as a family farm or business.” BAM Item 120, p 8. The Manual substitutes the word “sole” for the statutory “primary” income-producing asset, and would thus allow DHS to deny an exemption where a survivor had any other income-producing asset.

The DHHS Manual also added a restriction on hardship exemptions, not authorized by PA 74, by requiring a means test for eligibility. The Manual states that the applicant’s total household income must be less than 200% of the poverty level and total household resources may not exceed \$10,000. BAM Item 120, p 8. The Manual also asserts, without any basis in the statute, that all hardship waivers are temporary. BAM Item 120, p 8.

PA 74 requires DHHS to develop criteria for reviewing requests for exemptions from estate recovery for cases that do not fall within any of the mandated exemptions. MCL

400.112g(3)(f). The DHS policy manual adds only a very limited exemption for situations where recovery would cause a surviving heir to become or remain eligible for Medicaid.

PA 74 provides that no recovery against the home can occur if any of the following persons are living in the home: a surviving spouse, a child under age 21, a blind or disabled child of any age, or a “caretaker relative” who was residing in the home for at least two years immediately prior to the recipient’s admission to the nursing home and who provided care that allowed the recipient to live at home, or a sibling who has an equity interest in the home and who resided in the home for at least one year immediately prior to the nursing home admission. MCL 400.112g(6). The DHS policy manual, BAM Item 120, p 7, incorporates the broader prohibition in OBRA 93 against estate recovery during the lifetime of the surviving spouse, or during such times as the beneficiary has a surviving child who is under age 21 or who is blind or disabled. 42 USC 1396p(b)(2)(A). This prohibition applies regardless of whether the spouse or child is living in the home. However the DHS policy manual does not incorporate the prohibition in PA 74 against recovery relating to a “caretaker relative.” “Caretaker relative” is defined in PA 74 as any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient. MCL 400.112g(6)(c). It should be noted that this is a much broader definition than the definition of “heir” in EPIC, MCL 700.1104(n). As an example of the difference between these two terms, if a Medicaid recipient died leaving no spouse, two surviving children, and no predeceased children, the heirs would be the two children, while the caretaker relatives could include aunts, uncles, siblings, grandchildren, their spouses, and some even more remote relatives.

PA 74 states that the estate recovery program shall only apply to recipients age 55 and older who began receiving Medicaid long-term care services after the effective date of the Act, which was September 30, 2007. However the DHS policy manual added a qualification that limits this exemption to Medicaid recipients who have continuously received Medicaid long-term care services beginning prior to September 30, 2007. BAM Item 120, p 7, states that if an individual over the age of 55 began receiving long-term care services prior to September 30, 2007, and there was a break in coverage and a

new eligibility period began any time after September 30, 2007, the Medicaid recipient will be deemed to have begun receiving long-term care services after September 30, 2007 and thus subject to estate recovery.

PA 74 requires DCH to provide individuals with notice regarding estate recovery at the time of application. MCL 400.112g(7). This notice requirement would support the position that estate recovery should be limited to those long-term care services provided after implementation of the notice requirement. DHS revised its "Medicaid Application: Patient of Nursing Facility" form (DHS-4574) in October, 2011, to include an acknowledgement that by signing the application the applicant understands that his/her estate will be subject to the requirements of the estate recovery program. However the DHS policy manual states that recovery will be sought for the amount the state Medicaid program paid for long term services provided to the recipient after July 1, 2010. BAM Item 120, p 7. CMS issued a letter in May, 2011 approving the state's plan for estate recovery, but further stated that its approval was retroactive to July 1, 2010. As noted earlier in this article, a 2016 decision by the Michigan Court of Appeals rejected that state's position that it could recover for all services provided after July 1, 2010, and held that the state may only recover for services provided after July 1, 2011, which was the effective date of changes to the DHHS policy manuals implementing CMS's approval of its estate recovery program.

States are required to return a portion of the funds that they collect through their estate recovery program to the federal government based on the rate at which the federal government matches the state's spending for Medicaid-covered services. The federal match rate for Michigan [effective October 1, 2015] is 65.60%. Thus for every dollar that Michigan collects from estate recovery, \$0.6560 must be returned to the federal government. DCH had originally estimated that it could recover about \$10 million per year from estate recovery. However for the period from July 1, 2012 to July 1, 2013 the gross recoveries were \$1,358,355.26 and the net recovery was \$930,767.70.