

Medicaid Estate Recovery Update

What You Need to Know Now

By Angela M. Swanberg and James B. Steward

The term “estate recovery” refers to the provisions of federal law requiring states to attempt to recover payments made to healthcare providers on behalf of a Medicaid recipient from the recipient’s estate after his or her death.¹ Under the federal statute, states are required to seek recovery for Medicaid payments for nursing home services, home- and community-based services, and related hospital and prescription drug services from the estate of a deceased recipient who was age 55 or older when the assistance was received,² as well as Medicaid payments on behalf of recipients of any age who are determined to be “permanently institutionalized.”³ The federal statute permits the state to expand estate recovery beyond those services “at the option of the State.”⁴ Estate recovery is limited to the amounts paid by Medicaid for services received by the individual.

In 2007, Michigan passed Public Act 74,⁵ allowing the state to implement an estate recovery program. By its terms, however, Michigan’s estate recovery program, while codified on September 30, 2007, could not be implemented until the federal government had approved the plan.⁶ This did not occur until May 23, 2011 (with an effective date retroactive to July 1, 2010⁷), and the revised Department of Human Services Bridges Eligibility Manual 400 was issued with a date of July 1, 2011, outlining for the first time how the state intended to assert estate recovery claims.⁸

Who is subject to estate recovery and in what amounts?

Whether the state can enforce its estate recovery claim against a particular decedent will depend on when the decedent died and when he or she began receiving Medicaid benefits that could be subject to estate recovery.

The Michigan statute states:

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving Medicaid long-term care services after the effective date of the amendatory act that added this section.⁹

The Bridges Eligibility Manual 400, page 10, currently reads as follows:

MA Only

The federal government requires Medicaid to recover money that it paid for services from the estates of Medicaid beneficiaries who have died. Medicaid will only recover the amount Medicaid paid for a beneficiary. This is estate recovery. The state will not seek recovery of certain Medicare cost-sharing benefits; see BAM 120, DCH/DHS Coordination.¹⁰



The Department of Human Services Bridges Administrative Manual 120, page 7, provides:

For individuals who received medical assistance at age 55 or older, recovery is made from the individual's estate for **all services covered by the Michigan Medicaid program with dates of service on or after July 1, 2010, except Medicaid cost sharing.** To be subject to estate recovery, a person over 55 must have begun receiving long-term care services after September 30, 2007. If a beneficiary 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 after September 30, 2007 and therefore be subject to recovery.¹¹ [Emphasis added.]

This wording appears to mean that Medicaid services received before July 1, 2010, are not subject to estate recovery, even if the individual began receiving the services after September 30, 2007—and indeed, that is how the state filed its claim in at least one case.¹² In addition, the statute specifically states that Michigan's estate recovery applies only to “medical assistance recipients who began receiving medicaid long-term care services after the effective date” of our act¹³ and does not mention anything about a “break in coverage.” As a result, that portion of the Bridges Administrative Manual 120 may not be enforceable against the estate of a decedent who began receiving Medicaid services before September 30, 2007, but who subsequently had a “break in coverage.”

The Michigan statute states that “the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX.”¹⁴ Our estate recovery statute says nothing about expanding estate recovery beyond the federally required nursing facility services, home- and community-based services, and related hospital and prescription drug services.¹⁵ As a result, our estate recovery statute can be interpreted as not allowing the state to file claims for any Medicaid-paid services beyond what is federally required.

Therefore, the proper amount of the claim depends not only on when the long-term care began, but also which services were received after July 1, 2010, and which services the state includes in its estate recovery claim. If the state does not provide that information, the validity of the claim should be questioned.

Which assets are subject to estate recovery?

At a minimum, the federal statute requires that the term “estate” from which estate recovery can be made “shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law. . . .”¹⁶ Michigan adopted the minimum requirement and limited estate recovery to assets subject to our probate proceedings under Article III of Michigan's Estates and Protected Individuals Code.¹⁷

Assets held in a revocable trust and assets that pass upon death outside of the probate estate are not subject to estate recovery.¹⁸ In addition, the state may not charge interest on estate recovery claims,¹⁹ and TEFRA liens are prohibited.²⁰

Should a probate estate be opened?

If the total amount of all creditor claims, including the estate recovery claim, is more than the value of the assets, it may not be worth beginning probate. However, because of limitations placed on estate recovery claims, the best choice may be to open the probate estate and challenge the state's claim if it is filed. The attorney must also keep in mind that all claims will be barred after three years from the date of the decedent's death.²¹ Therefore, before any probate documents are filed, the attorney must determine whether the decedent had received Medicaid benefits of any type after July 1, 2010; if so, further investigation will be needed.

Notice to creditors applies to estate recovery claims

After a probate estate is opened, a personal representative must publish a notice advising estate creditors to present their claims within four months unless notice has already been given.²² Additionally, a copy of the notice or a similar notice must be sent to each estate creditor “known” to the personal representative at the time of publication or during the four months following publication.²³

The Michigan Department of Community Health has claimed in probate court that the state became a known creditor on September 30, 2007, for all “recoverable” Medicaid benefits paid after that date because that is when Michigan's estate recovery statute was given legislative effect.²⁴ However, the program was not actually implemented until July 1, 2011, when the new Bridges Eligibility Manual 400 was issued.²⁵ Because of this delay, at least some probate courts have held that the state was not a known creditor before July 1, 2011.²⁶ However, as more time goes by, this nuance will be of limited utility.

In any case, simply because the decedent was covered by Medicaid in some manner does not automatically cause the state to be a known creditor. If the decedent was over age 55 and receiving Medicaid benefits for long-term care at the time of death (on or after July 1, 2011), the state should be considered at least

FAST FACTS

The possibility of an estate recovery claim by the state of Michigan must be analyzed before the probate estate is opened.

If the decedent received Medicaid-paid medical assistance, the state may be a known creditor, but that does not necessarily mean the state can collect on its claim.

Estate recovery procedure in Michigan is still evolving, and the state's pronouncements do not always comply with the statute.

a potential creditor and should be sent direct notice pursuant to MCR 5.208(B). Other circumstances may not be so clear. The attorney should always inquire about whether the decedent was receiving some type of Medicaid and, if so, when and what sort of medical assistance.

Required notices to the decedent

Whether the decedent had received the statutorily required notices²⁷ from the Department of Community Health is another significant issue. Several probate courts have held that the state cannot enforce recovery claims against the estate of a decedent who did not receive the notices required by the Michigan statute.²⁸

Priority of the estate recovery claim

State law establishes the priority of the Medicaid debt owed by the deceased recipient's estate relative to the estate's other debts.²⁹ Michigan gives its estate recovery claim lower priority than the costs and expenses of administration, reasonable funeral and burial expenses, and the statutory allowances.³⁰

The Bridges Administrative Manual states that the undue hardship exemption applies to the applicant only and not the estate generally, and all waivers are temporary and expire when the qualifying condition for the waiver no longer exists.

When recovery is prohibited

As required by federal law,³¹ the Bridges Administrative Manual 120 provides that estate “[r]ecovery of medical assistance will be made only after the death of the individual's surviving spouse, and only when the individual has no surviving child who is either under age 21, blind, or disabled.”³² This prohibition applies regardless of whether the spouse or child is living in the home. Since claims against a decedent's estate must be presented within four months of publication, the state could be considered to be prohibited from filing an estate recovery claim if the decedent left either a surviving spouse or a surviving child who is under age 21, blind, or disabled.

In addition, no recovery against the home can occur if any of the following persons reside there: a spouse, a child under age 21, a blind or disabled child of any age, a “caretaker relative” who resided there for at least two years immediately before the recipient's admission to the nursing facility and provided care that

allowed the recipient to live at home, or a sibling with an equity interest in the home who resided there for at least one year immediately before the nursing facility admission.³³ As with the limitation on estate recovery noted in the preceding paragraph, this is a statutory prohibition against the state's ability to assert an estate recovery claim.

Under Michigan's system, the existence of any of these circumstances could be an absolute defense to an estate recovery claim; however, at the time of this writing, there are no known probate court decisions in which this situation has arisen. The state's interpretation of these provisions is that its claim is only deferred.³⁴

Whether a hardship exemption applies

MCL 400.112g(3)(e) requires the Department of Community Health to develop criteria for determining when an estate is exempt from recovery because of hardship, and defines certain circumstances that must be included within the definition of hardship: an exemption for the portion of the homestead that is equal to or less than 50 percent 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, and an exemption of the portion of the estate that is a primary income-producing asset of survivors including, but not limited to, a family farm or business. However, the Department of Community Health “criteria” does not follow the requirements of our statute.

Contrary to the mandatory requirements of MCL 400.112g(3)(e), the Bridges Administrative Manual 120 asserts that a hardship waiver “may exist” if certain requirements are met, including a “means test” that is not included in the statute, but which the Department of Community Health now imposes on all undue hardship exemptions. Also, even though MCL 400.112g(3)(e) specifically refers to “the estates of medical assistance recipients,” the Bridges Administrative Manual states that the undue hardship exemption applies to the applicant only and not the estate generally, and all waivers are temporary and expire when the qualifying condition for the waiver no longer exists.³⁵

Under the Bridges Administrative Manual 120, an applicant satisfies the means test only if total household income is less than 200 percent of the poverty level for a household of the same size, and total household resources do not exceed \$10,000. The Department of Community Health defines resources to mean an individual's cash and any other personal and real property. This criteria was first published in the May 1, 2012, Bridges Administrative Manual 120.

According to the manual, an undue hardship may exist when one or more of the following is true:

- The estate subject to recovery is the sole income-producing asset of the survivors (not “primary income-producing asset” as stated in the statute).
- The estate subject to recovery is a residence valued at 50 percent or less of the average price of homes in the county where it is located (not “exemption for the portion of the value of the...homestead that is equal to or less than 50



percent of the average price of a home in the county..." as stated in the statute).

- The "state's recovery of decedent's estate would cause a surviving heir to become or remain eligible for Medicaid."

Also per the manual, "an applicant must file the application with the department not later than 60 days from the date the department sends the Notice of Intent to the personal representative or estate contact" to secure a hardship waiver.³⁶ However, as noted above, the statute refers to the statutory exemptions as applying to the estate, and Michigan's estate recovery procedure requires the state to file a claim against the probate estate. This raises the question of how the probate estate can be bound by an administrative requirement imposed on the decedent's family that is outside the statutory probate court claims procedure.

The dust has not settled on estate recovery

In the less than three years since implementing estate recovery, Michigan has changed its collection procedure as well as its interpretations of the various exemptions and hardships. This is likely to continue, particularly as more court decisions are issued. Estate recovery is not only a complex issue, but an ever-changing one. Attorneys who do not regularly handle estate recovery claims should consult with those who do, before attempting to deal with such claims. ■

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ENDNOTES

- 42 USC 1396p(b).
- 42 USC 1396p(b)(1)(B).
- 42 USC 1396p(b)(1)(A). This provision would not appear to be applicable to Michigan's estate recovery because Michigan does not permit liens, and Michigan does not have a procedure for determining whether the person can "reasonably be expected to be discharged from the medical institution and to return home."
- 42 USC 1396p(b)(1)(B)(ii).
- MCL 400.112g *et seq.*
- MCL 400.112g(5).
- See explanation included in *In re Salemka-Shire*, Case No. 11-127599-CZ (Clinton Co Prob Ct, 2012).
- See Department of Human Services, Bridges Eligibility Manual 400 (July 1, 2011).
- MCL 400.112k.
- This wording, without the reference to the Bridges Administrative Manual 120, originally appeared in the Bridges Eligibility Manual 400 on July 1, 2011, along with additional explanations of how estate recovery was supposed to work in Michigan, much of which was inaccurate. All of that additional explanation has since been deleted from the Bridges Eligibility Manual 400.
- Department of Human Services, Bridges Administrative Manual 120 (2014), p 7.
- In re Estate of Grosskopf* (Griatiot Co Prob Ct, 2012).
- MCL 400.112k.
- MCL 400.112g(1).
- See generally *id.*
- 42 USC 1396p(b)(4)(A).
- MCL 400.112h(a).
- Id.*
- MCL 400.112g(8).
- MCL 400.112g(9).
- MCL 700.3801(1); MCR 5.208(A).
- MCL 700.3801(1); MCR 5.208(A).
- MCL 700.3801(1); MCR 5.208(B).
- In re Bakos*, Case No. 2011-772-249-DE (Wayne Co Prob Ct, 2012); *In re Salemka-Shire*, n 7 *supra*; *In re Estate of Grosskopf*, n 12 *supra*; see also Bridges Administrative Manual 120, n 11 *supra* at 9.
- See Bridges Eligibility Manual 400, n 8 *supra*.
- See *In re Bakos*, n 24 *supra*; *In re Salemka-Shire*, n 7 *supra*.
- MCL 400.112g(3)(e) and (7).
- Id.*
- MCL 400.112g(9).
- MCL 700.3805.
- 42 USC 1396p(b)(2)(A).
- Bridges Administrative Manual 120, n 11 *supra* at 7.
- MCL 400.112g(6).
- See Michigan Department of Community Health Third Party Liability Division, Policy and Procedure, *Exemptions in Estate Recovery Cases*, ER-004 (2013) (copy on file with MDCH).
- Id.*
- Bridges Administrative Manual 120, n 11 *supra* at 8.