

HANDLING A MERP CLAIM IN TEXAS 2010

RANDY DREWETT
Attorney at Law
2925 Toccoa Road
Beaumont, Texas 77703

State Bar of Texas
ADVANCED ELDER LAW 2010
April 15, 2010
Dallas, Texas

CHAPTER 8

Handling a Medicaid Estate Recovery Program (MERP) Claim in Texas 2010

INTRODUCTION

Under the rules and regulations implemented by the Texas Health and Human Services Commission (HHSC) on March 1, 2005, the HHSC could not file probate claims under the Medicaid Estate Recovery Program (MERP) until (1) an individual who entered a nursing home and initially received Medicaid benefits after 3/1/05; (2) accumulated a total of Medicaid benefits while in the nursing home in an amount sufficient to justify the filing of a claim; and (3) subsequently died. Accordingly, it took some period of time before the HHSC began actively pursuing reimbursement under the MERP.

HHSC / DADS / HMS began their role as a collection agency early in 2007. Since that time, their tactics have escalated and they have become more aggressive. Elder Law Attorneys and their clients are now seeing first hand how the HHSC is handling claims from the government's perspective. This paper will attempt to provide sufficient background, current substantive law and planning options so that attorneys will steer clear of poor choices and better understand the potential positive planning alternatives available to their clients in dealing with this new program.

For purposes of the MERP, Texas is a "probate claim" state.¹ It obviously follows that anyone who intends to engage in MERP planning for the benefit of their clients must understand both the law of the MERP as enacted in Texas, as well as the procedures involved in filing and responding to probate claims. Boone Schwartzel, my co-presenter, has written an excellent detailed article which sets out the Texas law of probate claims and the procedures which are required under the *Texas Probate Code* in order for a creditor to perfect a claim against a decedent's estate. Part I of this paper is the "Medicaid Estate Recovery Program" portion of Clyde Farrell's classic work, *Financing Long-Term Care in Texas*, Edition 15.0 (2010), which examines the MERP statutes, with commentary, as well as the planning options available to clients who are engaging in planning prior to entering the nursing home. As Clyde points out, some strategies have potential and some are doomed to failure. Because this area is one of constant change, it is imperative that attorneys be familiar (and stay current) with what rulings have come out of Austin since this program was implemented.

Part II discusses the specific procedures and tactics being utilized by the state as they pursue reimbursement from surviving family members under this program, along with some potential strategies which are explored in order to give attorneys options for responding to the state's MERP collection attempts.

¹ William J. Browning, CELA, *Estate Recoveries and Liens* (NAELA – 2007 NAELA Symposium), p. 5.

As with all articles which discuss matters dealing with Medicaid, it is absolutely essential that the reader understand how often these rules and procedures change. What may be an **effective** planning tool today may be totally **ineffective** tomorrow. Little or no notice is given for such changes; the passage of new law is not required. Therefore, attorneys should not implement any planning strategy discussed within these pages until having first independently satisfied himself or herself that the technique is still viable in light of then-current HHSC rulings. As Mr. Browning states in his article for the 2007 NAELA Spring Symposium, “We should also consider the state policies a moving target, especially for clients with long life expectancies as the likelihood of changes in the state collection scheme are high.”²

For reference purposes, the forms described in body of the paper are attached collectively as **Appendix A**. They are placed in chronological order of when they are presented by DADS in the MERP process. These forms are the most current one that I have and I some recent changes may have been. For instance, some forms have changed from the DADS letterhead (I practice which I vigorously protested in the original presentation of this article in 2007) and some use HMS letterhead.

Appendix B contains redacted letters from my clients which are used to illustrate some of the tactics used by HMS.

Appendix C contains the documents from the “title company” controversy in 2009. The last two are included to impress upon practitioners to beware of the procedures and practices of HMS in the MERP process.

² Id, at 1.

PART I

H. CLYDE FARRELL

(from *FINANCING LONG-TERM CARE IN TEXAS* – 15.0 Edition)

MEDICAID ESTATE RECOVERY

1. Introduction

On June 1, 2003, the last day of the 2003 legislative session, the Texas Legislature passed a law requiring seizure of property in the estates of some Medicaid recipients after they die, to repay the Medicaid program for the assistance it has provided.¹ The law is very brief, essentially providing that the Texas Health and Human Services Commission is to comply with the Estate Recovery requirement of the federal Medicaid law.

On April 30, 2004, the Texas Health & Human Services Commission published proposed rules to implement estate recovery.² Those rules were withdrawn on November 19, 2004 and were subsequently republished as revised proposed rules on December 3, 2004.³ The final rules, which contain some minor changes, became effective March 1, 2005.⁴

The final rules are set out in full (underlined) below, with the author's commentary in italics. A summary of the December 3, 2004 proposed rules by the Texas Health & Human Services Commission is at <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-FAQ.html>.⁵

Both the state and federal laws discussed here refer to the Medicaid program asserting a "claim" as a creditor. They do not provide for the state's taking any more property than necessary to pay back the Medicaid program for what it has provided. For example, if the Medicaid claim against a decedent's estate is for \$20,000 and a home in the estate is sold for \$100,000, the Medicaid program would receive only \$20,000.

Practice Note: DADS has established an email address to which to send questions on MERP: stephanie.ryan@dads.state.tx.us Responses so far have been prompt and helpful.

¹ H.B. 2292, Sec. 2.17

² 29 *Texas Register* No. 18 (April 30, 2004).

³ 29 *Texas Register* No. 49 (December 3, 2004).

⁴ 30 *Texas Register* No. 7 (February 18, 2005).

⁵ It is likely by the time this article is published that HHSC will have revised the summary to include the minor changes in the final rules.

2. Analysis of the Estate Recovery Rules

The full text of the rules is set out and underlined below. Comments (not underlined) are provided by the author.

The section numbers below are in Title 1, Texas Administrative Code.

a) To whom applicable and definitions

Subchapter A. GENERAL

§373.101.Purpose.

The purpose of this chapter is to implement section 531.077, Government Code, consistent with applicable federal law at 42 U.S.C. §1396p(b)(1), which requires the Health and Human Services Commission, as the State Medicaid Agency, to operate a Medicaid Estate Recovery Program (MERP) to recover the costs of Medicaid long-term care benefits received by certain Medicaid recipients.

§373.103.Applicability.

(a) A Medicaid Estate Recovery claim may be filed against the estate of a deceased Medicaid recipient for covered Medicaid services if the recipient:

(1) Was age 55 years or older at the time the services were received; and

(2) Initially applied for covered Medicaid long-term care services on or after March 1, 2005, the effective date of these rules.

Comment: The first question to ask anyone inquiring about estate recovery is whether the person initially filed an application for Medicaid long-term care services before March 1, 2005. If so, and if the application was (or will be) certified, they are "grandfathered."

An application that is denied will not provide a basis for asserting this "grandfather" protection. Section 373.105(1) below defines an application for this purpose as one that results in a covered service being approved under Medicaid.

The word "initially" was added in (a)(2) in the final rules in response to a comment. That may be read as securing protection for individuals who initially applied before March 1, 2005 and were certified but lost eligibility (e.g., went home from a nursing home) and later reapplied. Likewise, it would appear to protect individuals certified for one kind of Medicaid long-term care as a result of a pre-March 1, 2005 application and changing to another type of service later--for example, changing from a home care program to nursing home Medicaid or vice-versa. Although agency representatives were quoted earlier as saying otherwise, both of those interpretations were adopted in a memo dated July 11, 2005.⁶

⁶ LCE ME Bulletin No. 05-06, "Policy Clarifications" (no longer published with the Medicaid Eligibility for the Elderly and People With Disabilities Handbook).

The same policy clarification commented that application for a Medicare savings program (QMB, SLMB or QI-1) before March 1, 2005 would not place a client outside the scope of estate recovery because those are not "covered services" as defined below.

(c) Covered Medicaid long-term care services include the following services provided to a recipient age 55 years or older under the State of Texas Medicaid plan under Title XIX of the Social Security Act (SSA):

(1) Nursing facility services;

(2) Intermediate Care Facilities for the Mentally Retarded (ICF-MR);

(3) Home and Community-Based Services (§1915(c), SSA) and Community Attendant Services (§1929(b), SSA); and

Comment: Although they are not specifically listed in the rules, HHSC asserts that the following Medicaid waiver programs are covered: Community Living Assistance and Support Services (CLASS), Deaf-blind with Multiple Disabilities (DBMD); Texas Home Living Program (TxHL); and Consolidated Waiver Programs (CWP).⁷

However, some home and community-based services are not within this definition. Most notably, the Family Care program is funded under Title 20 of the Social Security Act, not under either of the sections referenced above. There are other, smaller programs, some funded entirely with state money. Over the last few years they have been virtually wiped out by budget cuts, but advocates should always check the source of funding to determine whether an estate recovery claim is for a "covered service."

(4) Related costs of hospital and prescription drug services.

Comment: The word "related" was added in the December 3, 2004 proposed rules, presumably to make clear that estate recovery extends only to costs of hospital and prescription drug services related to long-term care and not to those incurred under the "regular Medicaid" services associated with the Supplemental Security Income and Temporary Assistance to Needy Families programs.

(b) For the purposes of this chapter, covered services do not include services provided before the effective date of these rules.

Comment: This is a corollary to the "grandfather" provision at (a)(2) above. In addition, it will protect people who have qualified for Medicaid in the past, then went home, then re-qualified after the effective date of the rules.

⁷ Medicaid Eligibility for the Elderly and People With Disabilities Handbook §R-2610.

§373.105.Definitions.

For the purposes of this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

(1) Applied for Covered Medicaid Long-Term Care Services--An individual or his or her representative files an application; a nursing facility submits an admission notice and medical necessity determination; or an individual elects Medicaid waiver services, which results in a covered service being approved under Medicaid.

(2) Claim--A right to recover the total amount of Medicaid assistance paid for the following services: nursing facility; Intermediate Care Facility for the Mentally Retarded (ICF-MR); Home and Community-Based Services (§1915(c), SSA) and Community Attendant Services (§1929(b), SSA); and all related hospital and prescription drug services, provided from the time the decedent was 55 years of age or older.

(3) Cost-effective--Economical to the extent that the amount reasonably expected to be recovered by the Medicaid Estate Recovery Program exceeds the cost of recovery by the program as provided in this chapter.

(4) Decedent--A deceased individual who was 55 years of age or older at the time that covered Medicaid long-term care assistance was received.

(5) Effective date--March 1, 2005, the date on which these rules take effect under §2001.036, Government Code.

(6) Estate--The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in §3(1), Definitions and Use of Terms, Texas Probate Code.

Comment: This is a key definition, because it appears to preclude recovery against non-probate assets such as remainder interests and the interests of survivors in multiple-party accounts (joint tenancy with right of survivorship, payable-on-death or in-trust-for). Most notably, it appears to preclude recovery against property held by remainder beneficiaries of trusts, raising the possibility (discussed more fully below) that estate recovery can be avoided simply by conveying the Medicaid beneficiary's residence to a revocable trust whose remainder beneficiaries do not include the settlor's estate. Section 373.205(a) supports this interpretation by requiring that the MERP claim be "presented to the estate personal representative (executor, administrator, or guardian) or filed by depositing it in the appropriate Probate Court." Although the interests of survivors in multiple-party accounts can be reached by compliance with statutory requirements,⁸ there is no statutory provision allowing an executor or administrator to reach remainder interests to satisfy creditors' claims. That would have to be done if at all by suit by the creditor directly against the remainder beneficiary, which is not allowed by the estate recovery rules.

⁸ TEXAS PROBATE CODE §442.

Also, under Probate Code §450(a), property passing by trust is expressly deemed "nontestamentary," which is generally understood to mean it is not within the definition of "estate" under Probate Code §3(1).

The Medicaid estate recovery program may someday be extended to reach property claimed by a survivor beneficiary or a remainder beneficiary of a revocable trust, which is an option allowed by the federal law, but in the author's opinion, the Texas rules at present do not.

(7) Federal Poverty Level--Income guidelines established annually by the federal government.

(8) Heirs--Those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate, as defined in §3(o), Definitions and Use of Terms, Texas Probate Code.

(9) Intestate--To die without leaving a valid will.

(10) Legatee--Any person entitled to a legacy under a will, as defined in §3(s), Definitions and Use of Terms, Texas Probate Code.

(11) MERP--The Medicaid Estate Recovery Program.

(12) Personal Representative--Includes executor, independent executor, administrator, temporary administrator, together with their successors, as defined in §3(aa), Definitions and Use of Terms, Texas Probate Code.

(13) Recipient--An individual who received covered long-term care Medicaid services on or after the effective date of these rules.

(14) Value of real property--Property value determined by current year tax appraisal district.

b) Exemptions and hardship waivers

Subchapter B. RECOVERY CLAIMS

§373.201.Basis for Claims.

The acceptance of Medicaid medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional payments under the Social Security Act, provides a basis for: A Class 7 probate claim, as defined in §322 of the Texas Probate Code, Classification of Claims against Estates of Decedents, in favor of the Medicaid Estate Recovery Program as an interested party in the estate of the deceased Medicaid recipient.

Comment: Read literally, this would allow claims against the estates of SSI and TANF beneficiaries who have never received long-term care services, and against the estates of persons receiving Medicaid long-term care services before the age of 55. However, §373.103(c) makes clear that the program does not (yet) extend to such estates.

§373.203.Claims Procedures.

(a) The Medicaid Estate Recovery Program (MERP) may file or present a: Class 7 probate claim under §298, Claims Against Estates of Decedents, Texas Probate Code, against the estate of deceased Medicaid recipients in accordance with the priorities contained in §322, Classification of Claims against Estates of Decedents, Texas Probate Code.

(b) A claim may be filed in accordance with applicable provisions of the Texas Probate Code, including §298, Claims Against Estates of Decedents, which allows unsecured claims to be presented at any time before the estate is closed or within 4 months of receipt of notice from the estate administrator.

§373.205.Medicaid Estate Recovery Program (MERP) Claim.

(a) Contents of MERP Recovery Claim. The MERP claim will be presented to the estate personal representative (executor, administrator, or guardian) or filed by depositing it in the appropriate Probate Court and will include the amount of the claim, the date or dates of the covered Medicaid services provided, and a statement that to MERP's best knowledge the deceased Medicaid recipient had:

(1) No surviving spouse;

(2) No surviving child under age 21;

(3) No surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c;

(4) No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death; and

(5) That to the best knowledge of the MERP no undue hardship, as defined by these rules, exists and that recovery will be cost-effective.

(b) A Medicaid Estate Recovery (MERP) claim will be filed within 70 days after MERP has actual notice of the death of a Medicaid recipient aged 55 years or older who received covered long-term care services.

Comment: This provides a useful checklist for advising clients as to important categories of individuals not subject to estate recovery. Since the agency will often have no way of know whether all exceptions are absent, the assistance of legal counsel in identifying erroneous claims will be critical.

We do not know what will be the effect of the agency's failure to file a claim within 70 days after MERP has actual notice of the death. The agency may argue that filing within this period is not mandatory because the verb is "will" rather than "shall." A notice meeting the requirements of Texas Probate Code §294(d) is more likely, under §298(a), to cut off estate recovery claims.

The "unmarried adult child" exception is more restrictive and less reliable than may appear. When the rule was adopted in 2005, Texas Probate Code §271 provided for exemption of the homestead of a person survived by any of the following persons "remaining with the family" at the time of death: a spouse and/or a minor child and/or an "unmarried child of any age." However, the Legislature removed the protection for an unmarried child in 2006. At various times, agency representatives have indicated they interpret their rule strictly to apply only if an unmarried child intends to continue to live indefinitely in the homestead, and they have indicated it is likely that all protection for an unmarried child will be removed from the rule at some point.

§373.207.Exemptions From Claims.

(a) Medicaid Estate Recovery claims will be sought only after the death of the Medicaid recipient, and if there is no:

(1) Surviving spouse;

(2) Surviving child or children under 21 years of age;

(3) Surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c; or

(4) Unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

(b) Certain assets and resources of American Indians (AI) and Alaska Natives (AN) are exempt from estate recovery claims. The following AI/AN income, resources, and property are exempt from Medicaid Estate Recovery:

(1) Certain AI/AN income and resources (such as interests in and income derived from Tribal land and other resources currently held in trust status and judgment funds from the Indian Claims Commission and the U.S. Claims Court) that are exempt from Medicaid estate recovery by other laws and regulations;

(2) Ownership interest in trust or non-trust property, including real property and improvements:

(A) Located on a reservation (any federally recognized Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established by Alaska Native Claims Settlement Act and Indian allotments) or near a reservation as designated and approved by the Bureau of Indian Affairs of the U.S. Commission of the Interior; or

(B) For any federally recognized Tribe not described in subparagraph (A) of this paragraph located within the most recent boundaries of a prior Federal reservation.

(C) Protection of non-trust property described in subparagraphs (A) and (B) of this paragraph is limited to circumstances when it passes from an Indian (as defined in section 4 of the Indian Health Care Improvement Act) to one or more relatives (by blood, adoption, or marriage), including Indians not enrolled as a member of a Tribe and non-Indians such as spouses and step-children, that their culture would nevertheless protect as family members; to a Tribe or Tribal organization; and/or to one or more Indians;

(3) Income left as a remainder in an estate derived from property protected in paragraph (2) of this subsection, that was either collected by an Indian, or by a Tribe or Tribal organization and distributed to Indian(s), as long as the individual can clearly trace it as coming from protected property;

(4) Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of Federally-protected rights, and income either collected by an Indian, or by a Tribe or a Tribal organization and distributed to Indian(s) derived from these sources as long as the individual can clearly trace it as coming from protected sources; and

(5) Ownership interests or usage rights to items not covered by paragraphs (1) - (4) of this subsection that have unique religious, spiritual, traditional, and/or cultural significance, or rights that support subsistence or a traditional life style according to applicable Tribal law or custom.

(c) American Indians and Alaska Natives Income, Resources, and Property Not Exempt from Medicaid Estate Recovery include:

(1) Ownership interests in assets and property, both real and personal, that are not described in subsection (b) of this section; or

(2) Any income and assets left as a remainder in an estate that do not derive from protected property or sources in subsection (b) of this section.

(d) Government reparation payments to individuals in special populations are exempt from Medicaid estate recovery claims.

§373.209.Undue Hardship Waivers.

(a) The Medicaid Estate Recovery Program (MERP) will not recover from estates if recovery would cause undue hardship. An undue hardship waiver request form will be provided with the MERP Notice of Intent to File a Claim, and undue hardship waiver requests must be made within 60 days of the date of the MERP Notice of Intent to File a Claim.

(b) An undue hardship does not exist solely because:

(1) Recovery would prevent heirs or legatees from receiving an anticipated inheritance; or

(2) The circumstances giving rise to the hardship were created by, or are the result of, estate planning methods under which assets were sheltered or divested contrary to the requirements of Medicaid law in order to avoid estate recovery.

(c) Undue hardship waivers include:

(1) The estate property subject to recovery has been the site of the operation of a family business, farm, or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income;

(2) Heirs and legatees would become eligible for public and/or medical assistance if a recovery claim were made;

(3) Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance;

(4) The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient; or

Comment: The cause of the Medicaid recipient's need for care is unrelated to possible "undue hardship" of a surviving family member. Therefore, this is really an exemption, which could be easily overlooked because it is not with the other exemptions. Also note that since it is classified as a "waiver," it is lost unless it is claimed in a "hardship waiver request form" within 60 days of the Notice of Intent.

(5) Other compelling reasons.

Comment: The "other compelling reasons" ground for a waiver may provide an important ground for advocacy.

(d) Undue Hardship Waivers Applicable to Homesteads. After receiving a Medicaid estate recovery claim, an heir may assert that recovery against a deceased Medicaid recipient's homestead would be an undue hardship and that the homestead should therefore be exempt from recovery for the cost of Medicaid long-term care services. The Health and Human Services Commission will exempt a decedent's home from estate recovery based on undue hardship when the following conditions have been established to the Commission's satisfaction:

(1) The tax appraisal district value of the homestead is less than \$100,000. If the tax appraisal district value of the homestead exceeds this amount, the first \$100,000 of the tax appraisal district value for the most recent tax year at the time of the recipients' death shall be exempt from estate recovery. Any equity value of the tax appraisal district value for the most recent tax year at the time of the recipients' death in excess of \$100,000 is subject to estate recovery.

(2) One or more siblings or direct descendants of the deceased person (lineal heir(s), such as children and grandchildren) will inherit the homestead of the deceased Medicaid recipient, provided that each sibling or lineal heir inheriting the homestead has gross family income below 300 percent of the Federal Poverty Level.

(3) When there are multiple heirs and not all heirs qualify for the hardship waiver, only that percentage of the homestead that corresponds to the qualifying heir or heirs' share of the homestead will be exempt from Medicaid estate recovery.

(4) "300 percent of the federal poverty level" is a gross income test; no exclusions or deductions are allowed.

(5) "Family" means that the Health and Human Services Commission will consider each heir separately. Heirs will not be aggregated into one family unless the heirs are minor children who are siblings. In the case of the adult heir, his or her family will be limited to the heir, the heir's spouse, and the heir's biological or legally adopted minor children and stepchildren residing in the household. In the case of the heir who is a minor, the heir's family will be the heir, his or her parent(s) or stepparent residing in the household, and the heir's minor siblings residing in the household, including half-, step-, and legally adopted siblings.

[Figure: 1 TAC §373.209\(d\)\(5\)](#)

Type of Heir	Family Members, If Living in the Heir's Household
Adult 18 years of age or older, or individual younger than 18 years of age and legally emancipated	Heir Heir's spouse Heir's biological or legally adopted minor children or stepchildren under age 18
Individual younger than 18 years of age and not legally emancipated	Heir Heir's parent(s) Heir's stepparent Heir's minor siblings residing in the household, including half-, step-, and legally adopted siblings under age 18

Comment:

I read this to mean the following:

- *Undue hardship will be conclusively presumed whenever one or more siblings or descendants of the decedent are members of family units with incomes less than 300 percent of the Federal Poverty Level and are distributees of an interest in the homestead through the probate estate of the decedent.*
- *If all distributees of interests in the homestead meet those requirements, and if the value of the homestead is less than \$100,000, there will be no estate recovery.*
- *If all distributees of interests in the residence meet those requirements, but the equity value of the homestead exceeds \$100,000, estate recovery will not exceed the amount by which the value exceeds \$100,000 (that is, the first \$100,000 will pass free of estate recovery).*
- *If one or more but not all distributees meet those requirements, the exempt amount will be the amount equal to the percentage interests of the distributees who do meet it, multiplied by the total value of the homestead. (Alternatively, the value used in the formula may be equity value of the homestead or \$100,000, whichever is less. Paragraph (d)(3) says the amount in the formula should be "the qualifying heir or heirs' share of the homestead," but paragraph (d)(1) says, "Any equity value...in excess of \$100,000 is subject to estate recovery.")*

Presented below is the same summary in matrix form. For this purpose "qualified distributees" are siblings or descendants of the decedent in family units with incomes under three times the Federal Poverty Level--

Distributees	If equity value < \$100,000	If equity value > \$100,000
<i>All are qualified distributees</i>	<i>No estate recovery</i>	<i>Recovery limited to the equity value exceeding \$100,000</i>
<i>None are qualified distributees</i>	<i>No automatic hardship exemption (all subject to estate recovery)</i>	<i>No automatic hardship exemption (all subject to estate recovery)</i>
<i>One or more are qualified distributees, one or more not qualified</i>	<i>Exempt amount = % share of qualified distributees X equity value of homestead</i>	<i>May be same formula as at left; or value multiplied by % share may be \$100,000</i>

Estate planning attorneys are at a disadvantage in interpreting this section because we define "heirs" as beneficiaries of the estate of an intestate decedent (one who died without a will). That is essentially how these rules define it, at §373.105(8), but it is not the intended meaning here, because if it were, there would be no protection of a person who takes under a will and therefore is not an heir but rather a "legatee" or "devisee." That is, such a definition would deny any protection to the siblings and descendants of a decedent merely because the decedent had the foresight to execute a will. On the assumption that that was probably not the intended result (and could constitute a denial of equal protection to devisees if it were), this discussion assumes the term "heir" is intended to be synonymous

with "distributee" of the decedent's estate, regardless of whether the distribution is under a will or by intestacy.

It is possible the use of the term "heirs" is intended to restrict the scope of distributees who are entitled to protection, even if a will is involved. For example, if a sibling is a beneficiary of the will of an unmarried decedent survived by one or more descendants, is the sibling denied all protection because she would not have been an heir had the decedent died without a will? Such a restriction would be necessary if charitable beneficiaries or unrelated persons could otherwise assert a hardship claim. However, that right is available only to siblings and descendants of the decedent anyway, so probably "heirs" in this context just means "distributees."

Another uncertainty is in paragraph (d)(1), which first allows for an exemption only if the "tax appraisal district value" is less than \$100,000, then says any "equity value" in excess of that amount is subject to estate recovery. Why does "equity value" modify only the definition of that which is not exempt and not the definition of what is exempt? If there is a \$50,000 mortgage against a homestead valued by the tax appraisal district at \$120,000, the residence does not meet the literal requirement for exemption set out in the first sentence, but neither does it meet the requirement of the last sentence for being subject to estate recovery. Because that result would leave a large category of mortgaged homes in uncertain status, and there is a clear intent to take into account the existence of a mortgage in defining the value subject to estate recovery, the probable intent is to look only to the equity value in every calculation to be made.

These rules do not purport to affect the shares distributable after application of the exemption. Consider, for example, a case involving a homestead with equity value of \$100,000 inherited equally by two children of the decedent, one of whom has less than 3 times Federal Poverty Level income and one of whom has income exceeding that limit. Fifty percent (\$50,000) will be excluded from estate recovery, but the higher-income heir will still have a right to 50% of the protected \$50,000 (each receives \$25,000). Unless the higher-income heir voluntarily assigns her share to the one with lower income, only half the intended benefit will go to the one with presumed undue hardship. The agency apparently is taking the position it has no authority to change the shares of distribution, only the amount subject to estate recovery.⁹ This places the responsibility squarely on estate planning attorneys to determine the incomes of all siblings and descendants who are intended beneficiaries and advise as to the effect of estate recovery. The client may elect to provide for shares of the homestead only to those qualified for estate recovery; or a formula clause in the will or revocable trust, whose operation is contingent on some share of the residence being subject to estate recovery, may be used for that purpose.

The chart below sets out the "poverty guidelines" of the U. S. Commission of Health & Human Services in effect as of this writing, which the author believes are probably the numbers intended by the reference to "Federal Poverty Level" in the rule:

⁹ A Colorado court has overturned that interpretation by the Medicaid agency of that state. *In Re Estate of Ligon*, (Colo. Ct. App., No. 05CA2442, March 8, 2007), available at http://www.courts.state.co.us/Courts/Court_of_Appeals/opinion/2007/2007q1/05CA2442.pdf

**3 Times Federal Poverty Level
Income for 4/1/08-3/31/09**

Family Size	Monthly Income	Annual Income
1	\$2,600	\$31,200
2	\$3,500	\$42,000
3	\$4,400	\$52,800
4	\$5,300	\$63,600
5	\$6,200	\$74,400
6	\$7,100	\$85,200
7	\$8,000	\$96,000
8	\$8,900	\$106,800
Each Added	\$900	\$10,800

There are two possible interpretations of the term "federal poverty level." It may be "poverty guidelines" determined by the U. S. Commission of Health & Human Services.¹⁰ That is the source of the eligibility numbers used in many other programs administered by the Texas Health & Human Services Commission and of the numbers in the chart above. Unfortunately, although the numbers are applied with seeming uniformity nationally, the definition of "income" varies from one state agency and program to another.¹¹

The other possible interpretation is it could refer to "poverty thresholds" determined by the U.S. Census Bureau. That interpretation has the advantage that there is a uniform definition of what constitutes "income."¹² However, because it is used primarily for social science and policy research, it is historical in nature, with the most recent numbers referring to 2003.

Probably, then, the intent is to use the numbers in the HHSC "poverty guidelines" in the table above, defining income in a way no other program does: "gross income test, with no exclusions or deductions." Even this seemingly clear definition leaves open some questions:

- *Does "no deductions" really mean business expenses are not deductible in the case a self-employed person? Probably not, as that would be a large and unjustifiable disadvantage to those who are self-employed.*
- *How will the agency handle "in-kind income," which is either excluded or limited by most definitions of income. For example, if a family lives in a home owned by a family member who does not live there, is the family unit receiving "income" from the owner of the property? If so, how is it valued?*

¹⁰ <http://aspe.hhs.gov/poverty/index.shtml>

¹¹ <http://aspe.hhs.gov/poverty/faq.shtml#before>

¹² <http://www.census.gov/hhes/poverty/povdef.html>

- *Are gifts "income"? They don't show up on tax returns, but the SSI and Medicaid programs count them if they are cash or food or shelter.*
- *What will be the treatment of distributions from third-party trusts (which are not counted by the IRS, except to the extent they carry out the trust's income, but are counted by benefit programs to the same extent as if they were gifts from individuals)*

(e) HHSC has exclusive authority to waive its Medicaid estate recovery claim and grant undue hardship waivers as determined by the Medicaid Estate Recovery Program (MERP) program on an individual case-by-case basis. An undue hardship waiver determination will be made by MERP within 40 days of the receipt of an undue hardship waiver request form and all required necessary supporting documents by MERP.

Comment: The "exclusive authority" provision appears designed to make clear that the issue of waiver is not to be decided by the Probate Court. Rather, if a waiver is denied, the only appeal is the "informal review" process established under §373.211 below.

(f) Undue hardship waiver request forms must be submitted to the following address: MERP, Hardship Waiver Request, P.O. Box 13247, Austin, Texas 78711.

§373.211.Right to a Review of an Undue Hardship Waiver Denial.

(a) A Medicaid Estate Recovery Program (MERP) undue hardship waiver applicant may request a review of the denial of an undue hardship waiver request within 60 days of receiving notice of the denial from MERP. The review is an informal process and is not a hearing.

(b) MERP will review the request within 40 days from the date the request is received by MERP. All requests for a review of the denial of an undue hardship waiver request must be made in writing to MERP, Hardship Waiver Denial Review Request, P.O. Box 13247, Austin, Texas 78711.

Comment: This appears to be a completely new administrative review process that expressly eschews the "notice and a hearing" requirements of the due process cases and denies the protections ordinarily afforded under the agency's own rules to individuals complaining of agency action.

It is unclear whether such agency decisions are subject to judicial review under Texas law.¹³ Because Medicaid is an entitlement under federal law, violation of rights based on the federal statute and regulations is actionable by suit.¹⁴ However, since "undue hardship" is a fact issue, such decisions are generally not reviewable in federal court. The federal courts may strike down this "informal" procedure on due process grounds because it does not allow for a hearing at any level, either agency or court.

§373.213.Deduction Allowed for Expenses for Home Maintenance and Costs of Care.

(a) An amount equal to necessary and reasonable maintenance expenses and taxes may be deducted from the Medicaid Estate Recovery Program (MERP) claim for maintaining the home of the deceased Medicaid recipient, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees. Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, insurance, home repairs, and home maintenance expenses such as lawn care.

The following exchange at a Continuing Legal Education conference indicates how DADS interprets this provision. The question was by the conference planners, and the answer was by the DADS officials who participated in the panel discussion. The Q & A was in writing:¹⁵

Q: The rule at 1 T.A.C. §373.213 addresses the deduction of home maintenance expenses from the estate recovery claim. Does it matter when these expenses were incurred and/or paid? For example, are deductible expenses limited to those incurred or paid after the client vacated the homestead and is approved for Medicaid? Or will a deduction be allowed for expenses incurred or paid prior to the time the client vacated the home? What about expenses paid by a family member living in the residence after the client is approved for Medicaid?

A: DADS interprets this provision to mean that home maintenance costs are allowed and limited to the expenses incurred for *vacant* homes of *institutionalized* individuals. *With the exception of property taxes and homeowner's insurance,*

¹³ TEXAS GOVERNMENT CODE §2001.223 generally denies judicial review to decisions of the Texas Health & Human Services Commission pertaining to "the granting, payment, denial, or withdrawal of financial or medical assistance or benefits," except as provided by §531.019. The latter section was passed in 2007 to allow for judicial review of Medicaid and other decisions of HHSC. However, it appears to apply only to appeal of decisions by a hearing officer. No hearing is afforded by the MERP waiver review. It remains to be seen whether a MERP waiver decision is within one of the four types of decisions for which §201.223 generally precludes judicial review. Advocates for the client's family members and other potential estate beneficiaries may argue it is not, so §531.019 is not needed as a basis for judicial review.

¹⁴ 42 U.S.C.A. §§1983, 1988. WILDER v. VIRGINIA HOSPITAL ASSN., 496 U.S. 498, 110 S. Ct. 2510 (1990); WOOD v. TOMPKINS, 33 F.3d 600 (6th Cir. 1994); but see SUTER v. ARTIST M., 112 S. Ct. 1360 (1992). The continuing viability of this cause of action has been under assault but has been reaffirmed recently in WESTSIDE MOTHERS v. HAVEMAN, No. 01-1494 (6th Cir., May 15, 2002) and ANTRICAN v. ODOM, No. 01-1693 (4th Cir., May 9, 2002).

¹⁵ University of Texas School of Law, *Estate Planning, Guardianship and Elder Law Conference*, August 10-11, 2007.

MERP does not permit claim deductions when a family member is residing in the recipient's home." (emphasis added)

(b) An amount equal to the necessary and reasonable expenses for the direct payment of the costs of care (including payment of personal attendant care) provided for a deceased Medicaid recipient that enabled the recipient to remain in his or her home and thereby delayed the institutionalization of the Medicaid recipient may be deducted from the MERP claim, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees.

(c) Requests for obtaining allowable deductions from MERP claims for expenses under subsections (a) or (b) of this section must be made in writing within 60 days after receipt of the Notice of the Intent to File a Claim by MERP. All supporting documentation must be attached to the request and sent to MERP, Home Maintenance/Costs of Care Request, P.O. Box 13247, Austin, Texas 78711.

Comment: Attorneys should advise all clients with residences who apply for Medicaid to keep receipts for all the expenses of maintaining the home listed above. In addition, individuals receiving home care who have not yet applied for Medicaid should keep receipts for personal attendant care and other costs of care.

§373.215.Recovery Not Cost-Effective.

No Medicaid estate recovery claim will be filed if it is not cost effective. A claim will not be cost-effective if:

(1) the value of the recoverable estate is \$10,000 or less,

(2) the recoverable amount of Medicaid costs is \$3,000 or less, or

(3) the cost involved in the sale of the property would be equal to or greater than the value of the property.

§373.217.Claim Amount.

(a) The amount of the Medicaid Estate Recovery Program (MERP) claim will be calculated as the amount paid under §373.103(c) of this title for the benefit of a Medicaid recipient for covered medical assistance services received after the Medicaid recipient reached 55 years of age.

(b) No claim will be filed for services received prior to the effective date of these rules.

(c) The claim amount may be amended prior to and after MERP files the recovery claim.

§373.219.Claim Payments.

(a) All payments on estate recovery claims must be made payable to the "Texas Medicaid Account for Long-Term Care," and must be sent to MERP, P.O. Box 13247, Austin, Texas 78711.

(b) HHSC MERP may compromise, settle, or waive any claim that does not qualify for an undue hardship waiver upon good cause shown. Interest on the unpaid portion of any claim is the same as the amount provided under §2251.025(b), Government Code.

c) Estate Recovery Procedure

Subchapter C. NOTICE

§373.301.Notice Upon Application.

(a) Written notice of the MERP provisions will be provided to:

(1) Individuals for Medicaid-covered nursing facility services:

(A) With an application packet or notice of eligibility for Medicaid nursing facility services;

(B) Within 14 days of the Commission of Aging and Disability Services' receipt of a nursing facility admission notice for a Medicaid recipient.

(2) Individuals for Medicaid-covered Home and Community-Based Services (§1915(c), Social Security Act) and Community Attendant Services (§1929(b), Social Security Act):

(A) Prior to an individual's signing an election statement for Home and Community-Based Services, as an alternative to institutionalization; or

(B) At the initial home visit for Community Attendant Services;

(3) Individuals for Medicaid-covered mental retardation services by the Local Mental Retardation Authority, in conjunction with other notification described in:

(A) 40 TAC §9.244, for Intermediate Care Facilities for the Mentally Retarded;

(B) 40 TAC §9.164, for the Home and Community-Based Services waiver; and

(C) 40 TAC §9.567, for the Texas Home Living waiver.

(4) Individuals committed by a court order for evaluation of fitness or competency to state Intermediate Care Facilities for the Mentally Retarded (ICFMR) will be notified of the MERP provisions by faculty staff at the time of their admission to the facility.

(b) Medicaid long-term care services provided before the effective dates of these rules are not covered services for the purpose of MERP.

§373.303. Additional Application Notice Provision to Recipients and Others.

Written notice about the Medicaid Estate Recovery Program (MERP) will be provided to the following, if known by MERP, upon request for an application for Medicaid benefits, release from a waiver interest list, or notice of admission to a nursing facility or an Intermediate Care Facility for the Mentally Retarded (ICFMR):

(1) The recipient;

(2) The recipient's guardian of the person, if any; guardian of the estate, if any; or guardian of the person and estate, if any, provided that the name and address of the guardian or guardians are known;

(3) The recipient's agent under a durable power of attorney if the name and address of the agent are known;

(4) The recipient's agent under a medical power of attorney if the name and address of the agent are known; or

(5) If none of the above are known, to family members acting on behalf of the recipient, provided that the name and address of those family members acting on behalf of the recipient are known.

§373.305. Medicaid Application Estate Recovery Notice Contents.

The written notice provided about the Medicaid Estate Recovery Program (MERP) to those listed in §373.303 of this chapter (relating to Additional Application Notice Provision to Recipients and Others) will contain the following information:

(1) Description of the Medicaid Estate Recovery Program;

(2) Information as to covered Medicaid long-term care services subject to estate recovery;

(3) Claim procedures found in §322, Classification of Claims Against Estates of Decedents, Texas Probate Code;

(4) Information as to applicable "look-back" penalties for transfers of property for less than market value when applying for Medicaid benefits described at 1 TAC §358.430(e);

(5) Description of undue hardship waiver requests and related request procedures in regard to any recovery claim; and

(6) Information concerning the MERP Notice of Intent to File a Claim and the Medicaid Estate Recovery Claim on the death of a Medicaid recipient.

§373.307. Notice of Intent to File A Claim upon the Death of a Medicaid Recipient.

(a) The Medicaid Estate Recovery Program (MERP) will, within 30 days of the notification of the death of a Medicaid recipient, provide a Notice of Intent to File a Claim, to the following:

(1) Estate representative;

(2) Recipient's guardian of the person, if any; guardian of the estate, if any; or guardian of the person and estate, if any, provided that the name and address of the guardian or guardians are known by MERP;

(3) Recipient's agent under a durable power of attorney if the name and address of the agent are known by MERP;

(4) Recipient's agent under a medical power of attorney if the name and address of the agent are known by MERP; or

(5) If none of the above are known, family members who have acted on behalf of the recipient provided that the name and address of those family members who have acted on behalf of the recipient are known by MERP.

(b) Contents of Notice of Intent to File a Claim. Written notice of MERP's intent to file an estate recovery claim against the estate of a deceased Medicaid recipient for covered services will be provided to individuals identified in subsection (a) of this section. The notice will include the following:

(1) A program overview;

(2) A questionnaire that seeks to determine whether the deceased recipient had:

(A) A surviving spouse;

(B) A surviving child under age 21;

(C) A surviving child of any age who is blind or disabled, as defined by 42 U.S.C. §1382c; or

(D) An unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

(c) An undue hardship waiver request form. Undue hardship request forms and supporting documentation must be submitted to MERP within 40 days of the date of the Notice of Intent to File a Claim. No action will be taken on an undue hardship request that is submitted without supporting documentation. The request form and documentation should be sent to MERP, Hardship Waiver Request, P.O. Box 13247, Austin, Texas 78711.

(d) The Notice of Intent to File a Claim will state the date that MERP received notification of the death of a Medicaid recipient and the source of the death notification of the Medicaid recipient.

Comment: Here is an overview of the claims process:

The Medicaid estate recovery program receives notification of the death of a Medicaid beneficiary. It isn't clear whether the clock starts ticking whenever any HHSC Medicaid program employee learns of it from any source. Does it make a difference whether the notice MERP comes from an interested party (as opposed to the nursing home)? Does the notice need to go to someone in MERP? It is unclear at this writing whether the estate's representative and/or beneficiaries have a right to notice within 30 days of MERP's learning of the death, or whether the 30-day period is merely a goal, like the 45-day period within which Medicaid applications are supposed to be processed but rarely are. However, look out if you fail to file that waiver application within 60 days after the notice is dated!

- 1. Within 30 days after receipt of notification of the death, the Medicaid estate recovery program sends Notice of Intent to File a claim to the estate's personal representative and to other specified representatives and family members. Usually a personal representative (executor, administrator or guardian) will not have been appointed by this time. Therefore, if they get the notice it will be because they received it in another capacity, or it will have been passed on by family members.*
- 2. Within 60 days of the date of the Notice of Intent to File, the Undue Hardship Waiver Request "must be made." No ambiguity as to what rights you have if you fail to get it in on time. Notice that the agency is not required to give notice to surviving siblings and descendants or anyone else who may be entitled to a waiver, but it appears their right to file a waiver is cut off 60 days after the notice is sent, even if it is sent to somebody else.*
- 3. Also within the same 60 days, if deductions are to be requested for home maintenance or home care expenses, a written request and documentation must be provided.*
- 4. The waiver determination "will be made" within 40 days of receipt of the undue hardship request form and all required supporting documents by MERP. Within 60 days after receiving notice that a hardship waiver is denied, the waiver applicant may request informal review. No right to a hearing, no appeal.*
- 5. Within 70 days after the date MERP has actual notice of the death, MERP files a claim, "in accordance with applicable provisions of the Texas Probate Code." That is, if there is an independent executor or administrator, it should not be filed in court but can be in*

any form and should go directly to the independent executor or administrator. If there is a dependent executor or administrator or a guardian, the claim must be filed in the probate court as a sworn claim meeting Probate Code requirements.

What if there is no executor or administrator? The rules do not authorize suit against heirs directly. Presumably, MERP will need to file an application for determination of heirship and appointment of a dependent administrator, or if there is a will, an application for probate and appointment of an executor as provided in the will. Only then will it have a forum for presenting a claim.

3. Before Considering Strategies--A Word On The Fraudulent Transfer Act

When the estate recovery program was first required by Congress in 1993, there was speculation that it might lead to efforts by the states to characterize transfers permitted under the Medicaid laws (subject to various "transfer penalties" and exceptions thereto) as "fraudulent transfers." However, a well-researched journal article demonstrated conclusively that any such state action was pre-empted by the comprehensive federal Medicaid regulatory scheme.¹⁶

Moreover, if the property being conveyed is exempt from execution under nonbankruptcy law--such as the exempt homestead of the debtor--it is by definition not an "asset" that can be "transferred" in fraud of creditors under the Uniform Fraudulent Transfer Act.¹⁷ If a residence can be lawfully conveyed without consideration to avoid its being taken in probate by general creditors, no reason appears why it could not be conveyed to avoid seizure after death by the state as a creditor.

To the author's knowledge, since publication of the above-referenced article in 1994, no state has taken the position that a properly disclosed transfer for the purpose of Medicaid qualification was a fraudulent transfer, nor has any published article made that argument. However, the North Dakota Supreme Court recently held that a *post-eligibility* transfer for no purpose other than avoiding estate recovery, by an individual who herself never applied for Medicaid, was a fraudulent transfer.¹⁸ In that case the transfer was by the surviving spouse of a Medicaid recipient. The funds in question had passed from the institutionalized spouse to the community spouse to qualify the former for Medicaid, a transfer that the Court expressly stated could not be considered a fraudulent transfer. However, after the death of the institutionalized spouse, the community spouse transferred the funds to her sons at a time when she had been diagnosed with a terminal illness and had been advised that if she owned the funds at the time of her death, the Medicaid program might recover them to reimburse expenses of her late husband. Both the trial court and the appellate court focused on the question of whether funds traceable from the community spouse to the institutionalized spouse were subject to estate recovery in the estate of the community spouse, even though they came from the institutionalized spouse by lifetime gift and were not in his estate. That is not an issue in Texas, which (like most states other than North

¹⁶Pantaleo & Freedman, *In Defense of Medicaid Planning: Federal Law Prohibits States from Applying Debtor-Creditor Laws to Asset Transfers*, NAELA QUARTERLY p. 15 (Fall 1994).

¹⁷TEX. BUS. & COMM. C. §24.002(2)(B), (12)

¹⁸ESTATE OF LUCILLE E. BERGMAN V. NORTH DAKOTA COMMISSION OF HUMAN SERVICES, 688 N.W.2d 187 (N.D. Sup. Ct. 2004).

Dakota) does not attempt to recover from the estate of a community spouse in any event. The community spouse was not receiving Medicaid herself and had no intention of applying for it, so the federal Medicaid transfer penalty rules were not involved. The issue of preemption was not discussed in the Supreme Court's opinion so apparently was not raised.

Comment: The preemption argument is strongest where the transfer is made in contemplation of qualifying for Medicaid so is subject to the comprehensive system of federal regulation of such transfers (that is, it potentially is subject to a transfer penalty). It is weakest in a case like the one just cited in North Dakota, in which the transferor is not on Medicaid and does not intend to apply for it. Where the transferor is on Medicaid and loses eligibility as a result of the transfer (pursuant to the comprehensive federal system), but the transfer was solely motivated by intent to avoid estate recovery (that is, the transferor has a terminal condition and the transfer occurs just before death), there may be some risk of a fraudulent transfer claim. However, even such a transfer may well be protected under the preemption doctrine.

4. Strategies That Will Definitely Work To Avoid Estate Recovery

a) Convey "Protected Resource Amount" to the community spouse as separate property

All nonexempt property must be titled in the name of the community spouse not later than the first annual review, which is supposed to be one year after the date of the notice certifying eligibility of the institutionalized spouse.¹⁹ There is no requirement that the property be conveyed to the community spouse as his or her separate property, which is necessary as a practical matter because in many cases, the institutionalized spouse has lost the capacity to make such a conveyance. If the property consists of interests in joint accounts, the funds or other assets can simply be transferred from the joint accounts to one or more accounts titled only in the name of the community spouse.

However, if the institutionalized spouse has the capacity or has appointed an agent with authority to convey without consideration to the community spouse, they may elect to convert all the community property of the institutionalized spouse to separate property of the community spouse. That was done even before the advent of estate recovery, primarily to allow the community spouse to direct all the property away from the institutionalized spouse--either to a testamentary Supplemental Needs Trust for the community spouse or to the children--to avoid disqualifying the institutionalized spouse for Medicaid in case she or he is the survivor. Now it is even more important, because community property retained by the institutionalized spouse will not only disqualify him or her after the death of the community spouse but will be subject to estate recovery if any is left after the death of the institutionalized spouse.

Some states seek to impose a lien on property of the institutionalized spouse and/or to trace it into the estate of the surviving spouse. Therefore, that strategy now has the additional advantage, even if the community spouse is the survivor, of emptying the estate of the institutionalized spouse so as to avoid the risk that Texas Medicaid may someday attempt to

¹⁹ Medicaid Eligibility for the Elderly and People With Disabilities Handbook §§J-4000, J-5100.

impose a lien on it and/or to trace it into the estate of the surviving spouse. Although a lien cannot be imposed on the survivor's homestead without a constitutional amendment, the program could conceivably seek to impose a lien against and/or trace non-homestead property, such as the institutionalized spouse's community interest in financial accounts if they are merely retitled by the community spouse.

If the property involves low-basis assets, both spouses should be advised that making it separate property involves loss of the step-up in basis on the death of the first spouse to die.

An attorney in Harris County reports that that tax appraisal district recently treated a deed converting community property of a homestead into separate property of one spouse as destroying the school tax freeze on the property--even though both spouses were over the age of 65. When a correction deed was filing reserving a life estate, the district restored the freeze. However, Texas Tax Code §11.26(c) provides no support for the district's position, and the author has been unable to find such support in the Code.

Because the agency cannot constitutionally impose a lien on the community spouse's homestead, there is less need to convert it (as compared to non-homestead property) to separate property of the community spouse. Moreover, there are considerations arguing for keeping it as community property. Here are some pro's and con's:

Pro's (for transferring the residence to the community spouse as separate property):

- Avoids probate of the institutionalized spouse's estate.
- Avoids estate recovery against the estate of the institutionalized spouse if he or she is the survivor (assuming the community spouse directs the property away from the institutionalized spouse if he or she is the survivor).
- Facilitates sale of the residence if the institutionalized spouse is the survivor, living in a nursing home on Medicaid. (Otherwise, it could not be sold during his or her lifetime without interrupting Medicaid eligibility until the proceeds from his or her half interest are used up and/or gifted).

Cons (against transferring the residence to the community spouse as separate property):

- If the community spouse owns the residence and it goes into a trust for the institutionalized spouse as survivor, he or she will probably not be able to claim the residence exemption from property tax, as the trust will own the residence. If he or she is in a nursing home, the exemption would otherwise be available; but as indicated above, the residence could not be sold without interrupting Medicaid. (Most people in this situation rent the residence to someone, usually a family member, for the cost of taxes, insurance and maintenance.) If the residence goes directly to the children, they may or may not be able to claim a residence property tax exemption, but it will not include the parent's school tax freeze nor (unless the "child" is age 65 or over) the age 65 residence exemption.

- Keeping ownership may make the institutionalized spouse feel more secure.

b) Have a surviving spouse or a child who is under 21, blind or disabled

This is not really a strategy because clients are not likely to marry or have or adopt children to save the residence from estate recovery. The residence qualifies for exemption under §373.207(2) whenever the decedent is *survived* by a spouse, a child under age 21 or a child of any age with blindness or any disability meeting the Social Security Disability standard.

However, note that persons in these categories enjoy *federal* protection only to the extent the residence cannot be sold during their lifetimes.²⁰ By legislation, Texas could someday seek to trace the property and recover it from the estate of the surviving spouse or could adopt a lien statute precluding its sale by a surviving spouse or protected child. In addition, if the surviving spouse has an interest in the residence, the whole property is arguably exempt under the Texas Constitution from any lien for estate recovery purposes (in case Texas someday adopts lien recovery).²¹ However, the program could conceivably try to trace the property into the estate of the child at his or her death.

Because of the risk of a lien or tracing at some time in the future, if the beneficiary has the capacity to execute a gift deed or has given an agent that authority, it may be preferable to transfer the property to the child as discussed below.

c) Transfer the residence to the Medicaid beneficiary's child under age 21

d) Transfer the residence to the Medicaid beneficiary's child with blindness or a disability

e) Transfer the residence to the Medicaid beneficiary's qualified brother or sister

f) Transfer the residence to the Medicaid beneficiary's 2-year resident caregiver child

The four strategies above are grouped for discussion here because they all fall under the same federal statute.²² That law and the state provisions based on it provide that certain transfers of the residence of a Medicaid beneficiary or applicant are protected, in the sense that they are not subject to the transfer penalty.²³ They include the following:

- To the beneficiary's spouse.
- To the beneficiary's child under age 21

²⁰ 42 U.S.C. §1396p9b)(2).

²¹ TEXAS CONSTITUTION §50.

²² 42 U.S.C.A. §1396p(c)(2); Medicaid Eligibility for the Elderly and People With Disabilities Handbook §I-3000.

²³ 42 U.S.C.A. §1396p(c)(2); Medicaid Eligibility for the Elderly and People With Disabilities Handbook §I-3000.

- To the beneficiary's child of any age who is blind or has a permanent and total disability (as defined by Social Security)
- To the beneficiary's brother or sister who has an ownership interest in the residence and who was residing in the residence for at least a year before the beneficiary was admitted to a nursing home or other medical institution
- To the beneficiary's child of any age who was residing in the residence for at least two years before the parent was admitted to a nursing home or other medical institution *and* who provided care that enabled the parent to reside at home rather than in a nursing home.
- To certain kinds of trusts for the benefit of persons under age 65 who have a permanent and total disability (as defined by Social Security)

The beneficiary should be advised that unless a life estate or other interest is reserved, resulting in inclusion in the beneficiary's gross estate, the child will receive the beneficiary's basis in the property. That will not matter if the property qualifies for exemption of tax on capital gains on sale of a residence; but under current law, if the child should move away for as long as three years then sell the property, the parent's basis would apply and the child would be taxed on all gains above that basis.²⁴

g) Transfer the residence to certain kinds of disability trusts

There is an exemption from the transfer penalty for transfers to two types of trusts for the “sole benefit” of a any person with a disability, regardless of age of the transferor, and regardless of relation of the beneficiary to the transferor. One type is the “under-65 special needs trust” discussed above. The other is a trust that is “actuarially sound based on the life expectancy of the individual involved.”²⁵

Based the State Medicaid Manual of the Centers for Medicare & Medicaid Services, the “actuarially sound” in this context means the same as in the annuity context.²⁶ That is, distributions must be made over a period not longer than the actuarial life expectancy of the beneficiary.²⁷ For example, the table says a female age 40 has a life expectancy of 40.61 years. It should therefore be sufficient to require that 1/40 of the initial contribution be distributed in the first year of the trust’s operation. In the second year, 1/39th of the amount in the trust at the end of the first year must be distributed, etc. Presumably, the trust could restrict distributions so as to protect Medicaid and other benefits of the beneficiary, in addition to allowing the settlor to qualify.

²⁴ INTERNAL REVENUE CODE §121.

²⁵ Medicaid Eligibility for the Elderly and People With Disabilities Handbook §I-3000.

²⁶ State Medicaid Manual §3258.10B, referencing the definition in the annuity section, §3257.

²⁷ At this writing, the current life expectancy table for this purpose is at www.ssa.gov/OACT/STATS/table4c6.html (June 27, 2006). This table is updated periodically.

h) Have an unmarried child of any age living in the residence at least a year

See page 6 above for a discussion of why this works.

i) Draft a will giving the residence to those who qualify for "undue hardship" waiver

In the rule discussed at page 10 above, there is a provision for waiver of estate recovery for "undue hardship" that applies only to siblings and descendants of the decedent living in families with income below three times the federal poverty level. If there are one or more distributees of interests in the residence who do not qualify, the exemption will be limited to a share of the residence value equal to the share of those who do qualify. Therefore, as long as at least one distributee qualifies, it apparently is possible to ensure the exempt share will be 100% of the maximum exemption (limited, perhaps, to \$100,000 total exemption) by providing in the will or trust that if this problem arises, only those eligible for this benefit will receive interests in the residence.

At this writing, since it appears that residences in revocable trusts are both exempt for eligibility purposes and pass outside estate recovery, the instrument of choice is likely to be a revocable trust and not a will. Unless the law is changed, the trust alone will protect the residence. However, the law could very well change or be reinterpreted, putting the residence again at risk. Here is a sample formula clause for maximizing use of the exemption:

Protection of My Home. It is my understanding that at this time, the Medicaid law allows for protection from Medicaid estate recovery of an interest in a residence that passes to specified family members who have incomes below certain levels. In the event that such a provision exists in the Medicaid law at the time of my death, establishing a means test of any kind or otherwise giving an advantage to any beneficiaries in this regard, and that my estate owns an interest in a residence that would otherwise be subject to Medicaid estate recovery, the following shall apply notwithstanding any other provisions herein: If but for this paragraph an interest in the residence would pass to a person who does not qualify for exemption or waiver of part or all of their share from the Medicaid estate recovery program, that gift shall not go to him or her but instead shall be divided among the other beneficiaries who do qualify, as if the non-qualifying beneficiaries had predeceased me. For example and without limitation, if my child who is a beneficiary of this will does not qualify but one or more of his or her descendants do qualify, my child's share shall pass to his or her qualifying descendants, as if that child had predeceased me.

j) Transfer any property and wait out the applicable transfer penalty period before applying

Of course, the client can avoid estate recovery against any property by lifetime transfers that create a penalty period.

Comment: This is likely to be the "strategy" clients think of first. It is our job to help find other options, including in many cases the avoidance of Medicaid eligibility altogether. Perhaps the feature of estate recovery that makes it most harmful to the interests of older Americans is that many feel they must part with the last remnant of their life's work and savings before getting help--if by bad luck they are stricken with a condition requiring long-term care not reimbursed by Medicare.

5. Strategies That May (Or May Not) Work

a) Transfer the residence reserving a life estate

Convey the residence to one or more persons, reserving a life estate. Unless an exemption from the transfer penalty applies, this will create a period of ineligibility, with the amount of the uncompensated transfer equal to a fraction of the fair market value of the fee simple title, as set out in Medicaid Eligibility for the Elderly and People With Disabilities Handbook Appendix X. For example, the value of the remainder interest transferred by an 80-year-old is 0.56341 of fair market value, which is presumptively the market value determined by the property tax appraisal. Therefore, if the appraisal district determines the value is \$100,000, conveyance reserving a life estate will be treated as a gift of a remainder interest with a value of \$56,341. If the monthly cost of nursing home care as determined by the Medicaid agency is \$2,908 at the time of application (as it is at this writing), the grantor will be ineligible for Medicaid for $\$56,341 \div \$2,908 = 19.37$ (rounded down to 19) months.

For example, the following reservation can be included in the deed to the remainder beneficiary:

Grantor reserves for Grantor and Grantor's assigns, a legal life estate in the property for Grantor's life, without liability for waste. Upon the death of Grantor, full record title shall vest in Grantee.

This has the following benefits:

- Unlike an absolute conveyance, it allows the grantor to retain the right to the over-65 property tax breaks (exemption and school tax freeze).
- Likewise, the grantee receives a stepped-up basis for capital gains tax purposes at the death of the grantor.
- It is not clear that the Medicaid estate recovery program could reach a vested remainder even if the state statute were amended to recover against non-probate assets. In the case discussed below holding the remainder interest of a Lady Bird deed recoverable under California's expanded estate recovery rule, the Court distinguished a "vested" remainder from one subject to revocation.²⁸ This is logical, as a creditor could not reach a remainder interest purchased in good faith for value. Unless a fraudulent transfer can be shown,

²⁸ BONTA V. BURKE, 98 Cal.App.4th788, 120 Cal.Rptr.2d 72 (2002).

then, the owner of a vested remainder after a life estate may be insulated from estate recovery even if it was conveyed as a gift.

A disadvantage of this strategy is that creditors of the grantees may be able to obtain a partition order and thereby force sale of the residence.

Comment: As indicated above, one of the possible responses of the Medicaid estate recovery program to use of revocable trusts to avoid estate recovery would be to treat residences in such trusts as countable resources. To continue or establish Medicaid eligibility, individuals owning an otherwise exempt residence in a trust would then have to reconvey it to themselves individually, thus subjecting it to estate recovery. Instead, individuals not yet otherwise eligible for Medicaid may prefer to convey reserving a life estate to "start the clock running" on the transfer penalty, with the idea of conveying the life estate later if Medicaid later begins recovering against them.

If you do this, be sure there is a power of attorney agent with express authority to convey the life estate by gift, describing the real property specifically. Also inquire as to the financial responsibility of the grantees, lest their creditors force sale of your client's homestead.

b) Transfer the residence by Lady Bird Deed

This type of deed adds to the reservation of a life estate, the reservation of the power to take away from the remainder owner(s) the rights given them in the deed and give those rights to someone else. It has the following benefits in addition to the benefits of reserving a life estate:

- If a remainder owner displeases the grantor, his or her interest can be taken away.
- If creditors of a remainder owner threaten action affecting the property, the grantor can protect his or her interests by appointing the remainder to someone else. This would not be a fraudulent transfer if the life tenants are not "debtors" as to the creditors.²⁹
- According to CMS, the conveyance creates no transfer penalty.³⁰

For example, the following deed reservation could create this interest:

Grantor reserves for Grantor and Grantor's assigns, a legal life estate in the property for Grantor's life, without liability for waste. Grantor further reserves the full power and authority, without the joinder of any other person, to sell, convey,

²⁹ TEX. BUS. & COMM. C. §24.005.

³⁰ State Medicaid Manual §3258.9A: "Some States allow life estates with powers, wherein the owner of the property creates a life estate for himself or herself, retaining the power to sell the property, with a remainder interest to someone else, e.g., a child. Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. In this situation, the individual has not transferred anything of value, because he or she can terminate the life estate at any time and restore full ownership to himself or herself. Instead, the full value of the asset in question is treated as a countable resource to the individual (assuming, of course, that it is not an otherwise excluded resource)."

mortgage, lease and otherwise dispose of the property in fee simple with or without consideration and without joinder by Grantee, to any person or persons whatsoever, and to keep absolutely any and all proceeds derived therefrom. Further, Grantor reserves the right to appoint different or additional remainder owners (Grantees), at any time and from time to time without consent of Grantee. Upon the death of Grantor, subject to any interests that may be created by Grantor under the powers reserved herein, full record title shall vest in Grantee.

In the author's opinion, at the death of the grantor, title would pass under such a deed outside the grantor's probate estate and would therefore not be subject to Texas estate recovery under the current state law. However, the following could interfere with the "ideal" operation of this strategy:

- Any rule change to deny exemption to a residence in a revocable trust could be made applicable to property held under such a deed. Therefore, a residence so conveyed would be countable property of the grantor, who in most situations could not qualify for Medicaid until the conveyance was reversed.
- The Medicaid program could seek to impose a transfer penalty, disregarding what is essentially a right of revocation, as has reportedly been done in Pennsylvania.
- The Texas Legislature could adopt "expanded estate recovery," thus possibly bringing property so held within the scope of estate recovery, as has happened in many states.³¹

Comment: Because there is no clear and settled impediment to its working at the present time, this is a strategy to consider. The most immediate concern is that a transfer penalty could be imposed, the risk of which can be reduced (but not avoided) by testimony of an expert in real estate valuation to the effect that the grantee's interest has no market value. Clients should also be warned of the other potential problems discussed above.

c) Transfer the residence into a joint tenancy with right of survivorship

Because property in a joint tenancy with right of survivorship passes outside the probate estate of an owner at death, it is apparently beyond the scope of Texas estate recovery. Therefore, transferring a residence into such ownership would presumably avoid estate recovery, while still allowing the owner's interest to have exempt status as far as Medicaid eligibility is concerned.

Conveying a 50% interest with such an agreement would result in a Medicaid transfer penalty based on 50% of the fair market value of fee simple ownership (unless you can establish with evidence that it is less). It would also result in loss of half of the over-65 residence exemption from property tax. However, those disadvantages can be largely avoided by limiting the

³¹ BONTA V. BURKE, 98 Cal.App.4th788, 120 Cal.Rptr.2d 72 (2002) held that property conveyed by this type of deed is subject to estate recovery in California, which has an expanded definition of estate recovery (including nonprobate assets).

fractional interest of the grantee. For example, Mom as grantor could convey a 1.0% interest to Son as grantee, with the following agreement at the end of the deed.³²

**SURVIVORSHIP AGREEMENT
(Pursuant to §46(a), Texas Probate Code)**

Date: The _____ day of _____, 20__.

Owners: Grantor(s) and Grantee(s)

Property (including any improvements):

«Property Description»

Owners own the property jointly and agree with each other as follows:

1. If no severance occurs before the death of any Owner, then on the death of either Owner, the interest of the joint Owner who dies shall survive to the surviving joint Owner.
2. Owners will after this date own the property in the same manner as joint tenants with right of survivorship.
3. This agreement is binding on Owners and Owners' respective heirs and personal representatives.
4. In the event that Grantor desires to sell, exchange, convey, mortgage, encumber, partition, subdivide, apply for zoning, rezoning or platting, grant options, lease or sublet or otherwise dispose of an estate or interest in the property or a right incident to the property, Grantee shall join Grantor in such transfer of interest in the property so that the grantee of such transfer of interest shall receive the 100% of the interest transferred, to the same extent Grantor could have transferred the interest but for this deed, without reservation.

(signature lines and acknowledgments of Grantor and Grantee(s))

Comment: As compared to reserving a life estate, this has the advantage of creating a much shorter period of ineligibility (transfer penalty) if only a small fractional interest is conveyed.

The Medicaid program may argue that the value transferred should be measured by the reduction in market value of what the seller owns and that the reduction is virtually the entire value of the property. That was the argument it made at one time to blunt the effect of transferring fractional interests in real estate under the "monthly gifting" strategy. CMS apparently rejected that argument, and the recent change in the gifting rules followed (making monthly gifting ineffective by striking the rule that fractional months are rounded down). Moreover, numbered paragraph 4. of the Survivorship Agreement above is intended to reserve to the grantor the full right of sale so that no transfer penalty is incurred, under the same CMS-approved theory that supports the Lady Bird Deed discussed above.

³² Survivorship Agreement adapted from STATE BAR OF TEXAS, TEXAS REAL ESTATE FORMS MANUAL Form 9-18 (2005).

d) Purchase a life estate in a residence

If the client does not own an interest in a residence, they may decide to purchase only a life estate in a residence. Under the rules in the Medicaid Eligibility for the Elderly and People With Disabilities Handbook, this should be treated as a transfer for full consideration as long as the client pays no more than the fair market value of the life estate as determined from Medicaid Eligibility for the Elderly and People With Disabilities Handbook Appendix X.

Under the Deficit Reduction Act, assets used for purchase of a life estate are treated as transferred without consideration if they are for "...the purchase of a life estate interest in another individual's home made on or after April 1, 2007, unless the purchaser resides in the home for a period of at least one year after the date of the purchase."³³ Therefore, a client already residing in a nursing home or who needs nursing home care within a year after the purchase cannot benefit from this strategy.

The author has been told that HHSC officials have in at least one case disregarded Appendix X and contended that a life estate has little or no fair market value, so a transfer penalty should be imposed on such a purchase. Such a policy by a Medicaid agency was approved by an Arkansas state court in a pre-DRA case.³⁴ However, the DRA seems impliedly to indicate that once the year of residence has been completed, a purchase of a life estate should be treated as a transfer for consideration under the rules expressly applying to life estates.

e) Transfer property shortly before death

Estate recovery will apply only to property owned at death. Therefore, the client presumably may convey a residence or any other property at any time before death, for the purpose of avoiding estate recovery. Such a transfer would have to be reported to the Medicaid program, and unless an exception to the transfer rules applies, it would result in termination of Medicaid eligibility. However, if life expectancy is short, paying privately may be a small price for the transferee to pay for avoiding estate recovery.

³³ S. 1932 §6016, 1 T.A.C. §358.431(I). The April 1, 2007 date is in the rule but not in the statute, which appears to indicate it applies to transfers on or after February 8, 2006.

³⁴ GROCE V. DIRECTOR, ARKANSAS COMMISSION OF HUMAN SERVICES (Ark. Ct. App. No. CA02-1274, June 11, 2003), at <http://courts.state.ar.us/opinions/2003a/20030611/ca021274.html>. At the national level, Vincent Russo, a former president of the National Academy of Elder Law Attorneys, has suggested to Congress that "loopholes" including purchase of a life estate be closed instead of more punitive changes to the transfer rules. U. S. Senate Special Committee on Aging (20 Jul 2005) <http://aging.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&Hear> .

Comment: As discussed beginning above, this is more likely to draw a "fraudulent transfer" claim than a transfer with purposes other than avoiding Medicaid estate recovery. However, in the author's opinion, it is at worst an unresolved issue, and therefore assisting a client to make such a transfer would not be unethical.

If this strategy is contemplated, the client should be advised of the need to execute a power of attorney authorizing gifts to the intended donee(s) and specifically describing any real property to be conveyed. If the primary agent is an intended donee, a special agent should be appointed for making gifts to the primary agent, to avoid possible title problems. Such a power of attorney allows the agent to make the conveyance even after the principal has lost capacity.

PART II

How Texas Medicaid is Handling MERP Claims

[Drewett Note: The Texas Department of Aging and Disability Services (hereafter “DADS”) has contracted with a company named Health Management Systems, Inc. who describes itself in court pleadings as “a foreign corporation doing business in Texas” and as “agent” for DADS. This company will hereafter be referred to as “HMS.”]

A. Initial Notice

There are actually multiple notices which could be defined as the “initial notice” of the state’s rights and intent to pursue reimbursement through the MERP. The first “initial notice” is given when an individual (or someone on their behalf) obtains a Medicaid application, files a Medicaid application or enters a nursing facility (among others). This notice is mandated by 1TAC 373.301; 373.303. The actual form is **Form 8001**. (The forms to which references are made in this Part II are reproduced collectively in Appendix A).

The initial notice sent upon the Medicaid recipient’s death is required by 1TAC 373.307. This notice is referred to as “**Notice of Intent to File a Claim Against the Estate.**” Officially, there are 2 parts to this notice: a “notice” letter and a “questionnaire.” In an effort to obtain the identity of the parties entitled to notice under the statute, another form is sent to the “**Nursing Home Administrator**” where the Medicaid recipient resided. This letter instructs the administrator to reveal the name, address and telephone number of any “personal representative” of the deceased individual.

The notice makes references to “you” or “your” although no individual addressee may ever be identified on the letter. The reader is instructed that he or she has been identified in “our records” as “the primary contact for the decedent.” If the reader does not agree with that assessment, he is instructed to contact “The Recovery Unit of Health Management Systems, Inc. (HMS), as the contract agent for DADS” and supply the name and contact information of such primary contact. In bold letters, the reader is given “two weeks of receipt of this notice” to complete and return the questionnaire.

The notice concludes by informing whoever receives (or does not receive) this notice that they must “within 60 days of the date of this notice” file an application for any (1) “deductions to the claim amount” or (2) “undue hardship” that exists. Failure to do so within the said 60 days “will result in denial of these requests.” The notice does not include an application for claiming hardship, but provides an “**Undue Hardship Waiver Request Form**” and instructs anyone intending to file such a waiver to send in this form and an **Application for Hardship Waiver** will be sent. The Request Form is attached at the end of the questionnaire. Both the Notice of Intent and the Application for Hardship Waiver state that the 60 day limitation period begins to run on the date of the Notice of Intent.

B. The MERP “Claim”

If the questionnaire is not completed and returned (or, for arguments sake, if it is never received by anyone with knowledge), HMS will presume that no exceptions under the statute exist and will issue a “claim.” This form is titled **“Medicaid Estate Recovery Program (MERP) Claim.”** By practical experience with clients, it appears that this “claim” is simply mailed to any known address and names the recipient as “Estate of: ____.” This notice clearly states that “As a result of your response or non-response” [to the previous questionnaire] MERP now assumes that (1) no statutory exceptions to recovery exist, (2) no undue hardship exists, and (3) pursuing estate recovery will be cost-effective.

If no probate is initiated by the family (or beneficiaries), MERP will send another notice. It is called an **“Estate Claim Follow Up Letter.”** The apparent intent of this letter is to convince the family to begin the probate proceedings. It states that “you” may be entitled to be paid if you serve as administrator, but not if the state initiates the probate. The reader is told that if they do not begin a probate proceeding “within the next few weeks” the state may do so.

C. Filing of Claim in Existing Probate Proceeding

Upon determining that a probate proceeding has been initiated, HMS will file a claim with the court clerk entitled **“Authenticated Unsecured Claim.”**

D. Initiating an Original Probate Proceeding

If no one steps forward to file a probate proceeding, HMS may do so. HMS originally contracted with the Austin law firm of Mitchell & Colmenero, LLP to file these proceedings. This author has only seen the initial pleading in one such case. The **“Application for Letters of Administration and to Determine Heirship”** was filed in the statutory probate court of Bexar County, Texas (see **Appendix J**). It is unknown whether or not any probate case initiated by HMS has proceeded to its conclusion. The Bexar County case above has not proceeded past the filing of the application. For reasons discussed in Part Five below, this author does not see how any similarly-filed application for probate can ever be granted in Texas.

E. Actual Experiences with HMS

While the “forms practice” outlined above can be expected in most every case, attorneys need to determine how they will respond to actual HMS demands, which will, as a practical matter, vary from case to case. The burden of proof is always on the state.

If no real property information is provided to HMS, they will be required to check deed records in order to determine whether or not the decedent owned real property through which they can satisfy

the Medicaid claim. In a recent case, one attorney was advised by HMS that records revealed real property ownership by the decedent in another Texas county. Upon reviewing the records, it revealed that the first and last names were the same but that the middle initial was different. The decedent's children denied that any family member had ever owned property in that distant county. When this denial of ownership was explained to HMS, the individual handling this case told the attorney that it was the attorney's responsibility to obtain records from the appraisal district of that county and other documents to prove that the decedent did not own that tract of land. If he did not do so, HMS would file a claim against that realty.

The burden of proving ownership is on HMS, not upon the decedent's family. We should not allow them to shift that burden to make their job easier. To comply with their demands, as illustrated above, a substantial amount of the client's money would be spent doing the job for which HMS is being paid. This should not happen.

Handling a MERP Claim

[It is imperative that any attorney who undertakes to represent distributees in MERP matters have a thorough understanding of the Texas Probate Code claims procedures as described in Boone Schwartzel's article and presentation].

A. Defenses to the State's Procedures Discussed Above

1. How can the state enforce their claim regarding unmarried adult children¹ where the TAC violates the express wording of the Texas Probate Code?²

For a detailed discussion of this question, see Part One, Page 8. An adult child is not required to live in the home for at least one year in order to be protected from creditor claims against the homestead. Since the state cannot enforce a rule that is more restrictive than the Probate Code, any personal representative facing this situation should deny the state's claim and litigate the issue and seek costs against the state.

2. How can the "Notice of Intent" (Appendix D-1) possibly impose a legitimate 60-day statute of limitations?

The "Notice of Intent" and its self-imposed 60-day statute of limitations should be opposed upon multiple grounds:

a. All matters involved in a MERP claim are subject to the probate laws of Texas. Their own rules state this as the basis of the claim.³ The rights of beneficiaries and heirs

¹ 1 TAC 373.205(a)(4).

² TPC 270; 271.

³ 1 TAC 373.201, referring to Sec. 322 of the *Texas Probate Code*.

are to be determined under the provisions of the Probate Code. No additional “rules” should be enforceable outside the scope of a probate proceeding.

b. The commencement of the statute of limitations purportedly begins with the date of the notice. Accordingly, the letter of the law with regard to the notice must be followed precisely. In the cases with which I am familiar, the notice was simply sent addressed to “The Estate of: <Name of Decedent>.” Even if such a notice was legally enforceable (which I believe is not), it must comply with the state’s own rules.⁴ This is rarely done. TAC 373.307 lists 5 categories of individuals to whom the “Notice of Intent” may be sent. The notice can only be effective when sent “to the following:” Every entity listed therein is an individual who can be identified and who had a specific relationship with the decedent. Therefore, by process of elimination, any notice sent anywhere other than to one or more individuals who are defined in that rule is completely superfluous and ineffective for any purpose. A notice sent to “Estate of: <Name of Decedent>” when no probate proceeding has been initiated cannot possibly be in compliance with 373.307 by its own terms.

c. This “rule” should be held unconstitutional for failure to provide due process under the reasoning of Tulsa Professional Collection Services v. Pope.⁵ In that probate case, Justice O’Connor declared unconstitutional, for lack of due process, an Oklahoma “self-executing statute of limitation” where state action is involved that would implicate the rights protected by due process. Justice O’Connor concluded that actual notice to known or reasonably ascertainable creditors, either by mail or other means, is necessary because the Oklahoma probate statute “adversely affects” a protected property interest.⁶ It was this case which caused the Texas legislature to amend TPC 295 to require actual notice to secured creditors. TAC 373.307 is:

- (1) applicable in a probate proceeding;
- (2) a self-executing statute of limitations;
- (3) adversely affects a protected property interest; and
- (4) provides no actual notice (in most cases).

3. The “Medicaid Estate Recovery Program (MERP) Claim.” What exactly is this “claim” form? Is it authorized? What does it accomplish?

This “claim” is in the form of a letter. Each of these that I have seen were addressed only to “Estate of: <Name of Decedent>” with no reference to an Executor, Administrator, Court or Cause Number. If that is the case, what is the purpose of this form? The practice of HMS actually violates the state’s own rules. 1 TAC 373.205(a) clearly defines to whom this notice shall be given: “The MERP claim will be presented to the estate personal representative (executor, administrator, or guardian) or filed

⁴ 1 TAC 373.307.

⁵ 485 U.S. 478(1988).

⁶ Joseph S. Horrigan, “Creditor Claims in Probate” (State Bar of Texas – Collections and Creditors’ Rights Course 2004), p. 1.

by depositing it in the appropriate Probate Court....” Mailing such a “claim” to whoever happens to receive it is not compliance with the rule. The only purpose is to copy the actions of “collection agencies” who attempt to convince anyone who will listen to pay them money.

What is even MORE interesting is the “Estate Claim Follow Up Letter.” By its title, one would presume that this letter will follow the “MERP Estate Claim.” However, this letter PRESUMES that no probate action has been filed and no personal representative has been appointed. If that is the case, why was a “MERP Estate Claim” mailed out in the first place? It is only supposed to be mailed to estate personal representatives or to the court. If there is no probate proceeding yet filed, neither of those entities can be properly noticed with a claim.

Options for Estates which are NOT Subject to MERP

A. The “Proactive” Approach

The goal of individuals choosing the “Proactive” course of action when the estate is not subject to MERP is to simply bring the matter to a swift conclusion in order to move on with the sale of the residence and the distribution of sales proceeds (or whatever similar determination is made by the testamentary beneficiaries or intestate heirs). In this approach, anyone who chooses may step forward and deal with HMS on behalf of the estate by complying with each of their requests or by even going further and initiating the process, as discussed below (but see discussion of “Liability Issues” below).

1. Send notice of death

Under this approach, one can either (1) wait to be notified by HNS or (2) send a notice of the Medicaid recipient’s death. Presumably, this could be accomplished by telephone to the agency’s toll free telephone number (1.800.458.9858); by email (merp@dads.state.tx.us); by contacting DADS through their website (www.dads.state.tx.us/services/estaterecovery/); by fax (512.279.1720); or to the address for correspondence (P.O. Box 149030, Mail Code E-411, Accounts Receivable, Austin, Texas 78714-9030).

2. Comply with Questionnaire

Upon receipt of the “Estate Questionnaire” provided with the “Notice of Intent”, the individual (referred to as the “Preparer” in the questionnaire) will complete all of the questions, provide the information required by the form, sign and return the questionnaire and documentation to the address provided or by fax (same as in “1” directly above).

Alternatively, even one who chooses this approach can take the position that DADS is not entitled to any information in addition to the proof of a “Statutory Claim Exemption.” For instance, why go to all the time, trouble and expense to supply the volume of property valuation information and personal information listed in the questionnaire if there is a surviving spouse? Just answer question No. 2 and send something to prove the existence of the spouse (copy of Texas Drivers

License or Medicare Card perhaps), sign and return the form.

3. Request Closed File Letter

Upon submission of the “Estate Questionnaire” to the appropriate address, the “Preparer” should request a written determination that the case is closed. This form is officially entitled **“Notification of Case Dismissal to File a Claim Against the Estate.”**

B. The “Force Compliance” Approach

The contrarian view espoused by some Texas elder law attorneys – even if the estate is not subject to MERP – is that individual family members are under no obligation to provide any information to HMS prior to the establishment of a formal probate proceeding. Accordingly, any information voluntarily provided to HMS is actually doing the work that HMS is being paid by the state to do. The conclusion is that by following the steps outlined in sub-section A above, the MERP program will be more cost-effective and will be encouraged to continue. Whereas, if the “Force Compliance” approach is adopted, HMS will be required to do substantial research and file probate proceedings in every case. This will make the MERP program much more expensive and less cost-effective. Lawmakers might then reconsider whether or not to continue the program as it currently exists.

C. Liability Issues

This section discussing “Liability Issues” is included solely for the purpose of stimulating thought and pointing out some potential problems. It actually applies equally to both this sub-section A and sub-section B below.

1. Is any individual, other than a court-appointed Executor or Administrator, bound to provide any information to HMS?

In my opinion, they are not. I know of no theory to support the position that any family member, spouse, child, friend, neighbor or any person is required by law to acknowledge receipt of correspondence from HMS, much less provide information to them.

2. If any such individual voluntarily undertakes to provide such information, do they subject themselves to liability?

In my opinion, very likely.

a. If you consider the TAC to be binding law (many of us have serious problems with such an assumption), individuals have financial rights under the provisions of Chapter 373. According to the TAC, there is a limitations period of 60 days for submitting an “Undue Hardship Waiver Application” and a “Claim for Allowable Expenses.”

Example 1: Decedent's child, Norma, now lives in mom's house (valued at \$150,000). She receives the "Notice of Intent" since it will have been mailed simply to "Estate of Mom" and mailed to mom's address. She sets it aside since it looks official and plans to deal with it when she has more time. She doesn't advise her siblings that she has received the notice since she always handled all of the business for mom. A month later, she decides to tackle the project. Misreading the form, she files the questionnaire claiming that MERP does not apply because she now lives in mom's house. By the time it is determined that MERP does in fact apply, the 60 days has long passed. Both of her siblings live in other towns, have limited education and fall below the undue hardship definition. One of them had been paying for the up-keep of the house. Neither of them ever heard of MERP.

- Did Norma voluntarily accept a responsibility; handle it negligently; and cause substantial financial harm to her siblings?

Example 2: Norma receives the "Notice of Intent." She has never considered her brother to be disabled. She just considers him to be lazy. He is on SSD, but Norma is not aware of this fact. They never really got along and he never helped with mom as much as Norma thinks he should have. He lives in another part of the state and they don't talk anymore. Norma completes the form without claiming the allowable exemption. The house is ultimately sold and Medicaid is repaid. A year later, brother reads an article about MERP for the first time.

- Did Norma voluntarily accept a responsibility; handle it negligently; and cause substantial financial harm to her brother?

Example 3: Norma doesn't like the government. She receives the "Notice of Intent" and throws it away after reading it. She never tells her siblings about the notice. Several months later, HMS files an administration and Medicaid is ultimately repaid.

- By accepting the notice, reading it and throwing it away, did Norma become liable for causing the undue hardship rights of her siblings to be lost?

Options for Estate which ARE Subject to MERP

The same two options are available for beneficiaries of decedent's whose estate is clearly subject to MERP. One can either take an aggressive approach or sit back and wait it out. This section is assuming that the estate distributees want to challenge or otherwise reduce the MERP claim.

A. The Proactive Approach

If the beneficiaries choose to be proactive and fight the claim, they should immediately hire an experienced probate attorney and take action. This approach assumes that there are no "undue hardship" issues.

1. Initiate a Probate Proceeding

Hopefully, there is a Will. A probate proceeding should be ready to file immediately upon the death of the Medicaid recipient. Set a hearing and obtain an appointment of a personal representative as soon as possible. What type of administration should you choose?

a. Independent Administration

Complying with the claims process under an independent administration is much less formal and easier on the creditor. An independent administration is much less expensive than a dependent administration. However, if there wasn't valuable property involved, the state would not be going forward with a claim. Since administration expenses are paid prior to the state's claim, perhaps cost should not be the over-riding consideration.

b. Dependent Administration

HMS will not be able to obtain an independent administration. Under TPC 145, all distributees must agree on the advisability of having an independent administration and upon who will be appointed as administrator. Since the distributees are unknown to HMS, they will be required to file a dependent application as was filed in the Bexar County case discussed above (see Appendix J). It will be a determination to be made by probate counsel as to the best approach. However, for the reasons discussed in Part Two, a dependent administration puts a creditor on the defensive.

2. Send TPC 294(d) Notice

Immediately upon obtaining letters testamentary or letters of administration, send out a proper TPC 294(d) unsecured creditors notice to DADS. It must comply with the statute and must be sent by certified mail. Always use "Return Receipt Requested" to establish that the notice was received and the date which it was received. This date of receipt begins a 120 day statute of limitations.⁷ For those who would take the position that the state is not held to such a statute of limitations, here is the argument which concludes that the state is absolutely bound by this statute:

a. Texas Civil Practice & Remedies Code, Title 2, Chapter 16 is the Texas law of "Limitations."

b. Section 16.061 defines when the state of Texas (and its agencies and other sub-divisions) are not held to a statute of limitations. There are 30 specific statutes cited under which limitations do not apply to the state (see below):

Sec. 16.061. RIGHTS NOT BARRED. (a) A right of action of this state or a political subdivision of the state, including a county, an incorporated city or town, a navigation district, a

⁷ See a more detailed discussion of this notice in Part Two, Page 24.

municipal utility district, a port authority, an entity acting under Chapter 54, Transportation Code, a school district, or an entity created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, is not barred by any of the following sections: 16.001-16.004, 16.006, 16.007, 16.021-16.028, 16.030-16.032, 16.035-16.037, 16.051, 16.062, 16.063, 16.065-16.067, 16.070, 16.071, 31.006, or 71.021.

c. The recent case of Tarrant County Hospital District v. GE Automation Services, 156 S.W.3d 885 (Tex.App.-Ft.Worth 2005) holds that the state is only entitled to immunity from limitations for the matters listed in TCPRC 16.061. If it's not listed there, then the state is subject to limitations.

d. There are no Texas Probate Code statutes are listed in TCPRC 16.061. Therefore, the state is subject to the limitations of TPC 294(d); i.e. 120 days to file a proper claim. This would also apply to any other probate code claim period of limitations.

3. File Claim as Creditor for Reimbursement: Class 3

Collect as much information as possible to support the maximum amount of expenses for dealing with the decedent's estate. This should not be limited to matters listed in the MERP rules. Any expense whatsoever should be included at its highest supportable value. File this claim as soon as possible and be sure to note that there are separate time limitations for personal representatives who are filing their own personal claim. These claims should be allowed as a Class 3 claim and have priority over the state's claim. If HMS doesn't agree, let them file suit.

4. Sell the Property

The state doesn't have a lien on the decedent's homestead. They are simply a creditor. You do not need to have their permission to administer the estate. If a family member is in a position to buy it (not the personal representative), obtain a conservative appraisal, apply any facts which would devalue the property and sell it to them. If it is a dependent administration, the court will approve the sale. If it is an independent administration, get reasonable support for valuation and then sell it.

5. Scrutinize the Claim

In a dependent administration, the rules involved in presentment of claims are very technical. Make HMS file the claim properly under the statute. If it is not properly filed, know the rules and file an objection.

6. Determine Whether or Not to Reject the Claim (Applicable to Dependent Administrations Only)

The personal representative is under a duty not to pay claims which are not legitimate or improperly filed.⁸ Closely examine the claim to determine the validity of what is included. If there are reasonable grounds to reject the claim, the administrator should consider the merits of doing so. Keep in mind the pro's and con's of rejecting a claim. If the claim is rejected, HMS must file suit within 90 days or the claim is barred.⁹

B. The “Force Compliance” Approach

If the family chooses this approach, they can sit back and ignore all of the notices. They will take no action until HMS files their application. Once that occurs, the following steps may be appropriate:

1. Challenge the Application

If the form of the application is similar to the one filed in Bexar County (Appendix J), challenge the application and move to have it dismissed. Force HMS to file properly.

2. Cross-Apply to be Appointed as Personal Representative of the Estate

Under TPC 77, any distribute (heir or beneficiary) has priority over a creditor. File a cross-application asserting the family's right to be appointed as personal representative of the decedent's estate.

3. Force Their Hand

If the estate is an independent administration, HMS can be forced to file suit to obtain a judgment. Perhaps the prospect of fighting that battle will lead toward a compromised settlement of the original claim.

4. Options Discussed in “A” Above

Once an administration is open and the family member is appointed as personal representative, consider all of the options set out in “A” above, paying close attention to the different requirements for dependent and independent administrations.

⁸ TPC 301, 304 for dependent administrations only.

⁹ TPC 313.

Parting Comments

In a March 2006 presentation at the State Bar of Texas Advanced Elder Law Course, the “Update on the State’s Perspective Medicaid Estate Recovery” included the following statements on page 4 concerning the “series of six hearings around the state” to get input concerning MERP:

“One clear message was received from both private citizens **and legislators** alike. In the implementation of the program, **the state should meet the minimum requirements of the federal statute but not go beyond what is required.**”¹⁰ (emphasis added)

If “minimum requirements” was what legislators want, would someone please explain where the state decided to ignore legislative intent? For the first year of the program, it was perfectly permissible for an individual Medicaid recipient to hold their personal residence in a revocable living trust. However, LTC ME Bulletin 07-05 demonstrated that the intent of the Texas legislature is of relatively little importance at the HHSC. Blaming estate planning attorneys for advising clients to place their residence in a living trust, which would have the desired planning effect -- “thus the homestead property is not subject to MERP” – HHSC decided to change the rules in order to grab a bigger piece of the pie. And by abandoning the intent of the Texas legislature, HHSC / DADS has now created an adversarial posture with regard to elder law attorneys who intend to aggressively represent the interests of estate distributees.

Understand that HMS is not the government, irrespective of the letterhead they use. They are a collection agency. When HMS sent a letter to Texas title companies informing them that they should not close real property transactions without paying MERP claims – an action which clearly had no basis in law and violated the rights of those involved in the real property transactions – HMS, when notified, replied that they had no knowledge of such letter. This is quite scary, since the letter from HMS was sent on state of Texas letterhead and resulted in a policy change memorandum at Chicago Title (which was later withdrawn) [**Appendix 3**].

Finally, be careful about giving deference to the actions of HMS. Their rules are not controlling law in Texas. Their demands are not from an IRS-type agency. Do not take their demands at face value without undertaking some serious research to validate the claim. I have attached some actual letters brought to me by clients to illustrate some of the tactics you will probably encounter [**Appendix 2**]. I suggest that each of you join NAELA and then the Texas Chapter of NAELA to subscribe to the Texas NAELA Listserv. This is the best way to keep current with regard to the matters discussed in this paper, as well as all other elder law-related topics.

¹⁰ Dennis H. Bach, “HHSC: Update on the State’s Perspective Medicaid Estate Recovery” (State Bar of Texas – Advanced Elder Law Course), p. 4.

APPENDIX A

Medicaid Estate Recovery Program Receipt Acknowledgement

To Persons Applying for Long-Term Care Services Paid by Medicaid

This is an informational notice only. The case manager or eligibility specialist will ask you to sign this form to show the state has met its obligation to inform you about Medicaid estate recovery. You do not have to sign this form. If you choose not to sign it, your application for Medicaid services will not be denied for that reason. However, the state may still file a claim against your estate after you die, unless certain exemptions or hardships exist at that time.

Medicaid Estate Recovery Program

Medicaid is a government program that pays for health care services. Some of these services are for people as they grow older. Medicaid pays for services that help people stay in their own home. It also pays for people to move to a facility, such as a nursing home, if that is what they need.

To help pay for these long-term care services, every state must have a Medicaid Estate Recovery Program (MERP). If you receive long-term care services paid for by Medicaid, the state of Texas has the right to ask for some money back from your estate after you die. In some cases, the state may not ask for anything back. The state will never ask for more money back than it paid for your services.

What is an estate?

An estate is property, such as money, a house or other things of value that a person leaves to family members or others (heirs) when he or she dies. MERP does not apply to all property that a person may own. Here are some examples of property that the state will not collect on:

- Life insurance policies that name a person to receive the payment.
- Bank accounts that are paid on death to another person.

Does MERP affect you?

This program will affect only long-term care services you receive after the age of 55 and only if you first apply for these services after March 1, 2005. If you applied for and received these services before March 1, 2005, MERP does not affect you. If you were on a waiting list for services before that date but did not complete an application for services until after March 1, MERP does affect you.

The following services and programs are affected by MERP:

- Nursing Facility Care (nursing homes)
- Intermediate Care Facility for Persons with Mental Retardation (ICF/MR)
- The following Medicaid Waiver Programs:
 - Home and Community-based Services (HCS)
 - Community Living Assistance and Support Services (CLASS)
 - Texas Home Living Program (TXHmL)

- Consolidated Waiver Program (CWP)
- Deaf-Blind with Multiple Disabilities Waiver (DBMD)
- Community Based Alternatives (CBA)

- Community Attendant Services (CAS)

Primary Home Care (PHC) is not affected by MERP.

If you are not sure whether MERP applies to the services that you will be receiving, you should ask your Department of Aging and Disability Services (DADS) case manager.

Are there any times when the state will not ask for money back?

Yes, the state will not ask for money back after you die if:

- Your spouse is still alive.
- You have a child under 21 years of age.
- You have a child of any age who is blind or permanently and totally disabled.
- The value of your estate is \$10,000 or less.
- The amount of your Medicaid costs was \$3,000 or less.
- Your unmarried adult child lives full-time in your home for at least one year before you die.
- The cost of selling your property is more than the property is worth.

Does the state make any exceptions for hardship?

Yes, the state may not file a MERP claim to ask for money back when this would cause an undue hardship for the heirs. The state may grant a hardship waiver when:

- The estate property is a family business, farm or ranch for at least 12 months before you die and is the main source of income for your heirs.
- Your heirs would need financial assistance from the government if the state files a MERP claim.
- Your heirs will be able to stop getting financial assistance from the government if the state does not file a MERP claim.
- You are receiving services as the result of being a crime victim.
- There are other circumstances that may create a hardship.

One type of hardship applies just to your home. If one or more of your heirs has a family income under a certain amount, MERP may grant a hardship waiver for up to \$100,000 of your home value. In 2007, this income limit for one person is \$30,630. For a family of four, it is \$61,950. These figures are adjusted each year.

To get a waiver based on an undue hardship, your heirs must ask for it and provide proof of the hardship.

Will the state ever reduce the amount owed?

Yes, if you or someone else spends money to maintain your home while you are in a nursing facility, these costs can be deducted from the MERP claim. If you or someone else spends money to pay for care that helps you live at home longer before entering a nursing home, those costs can be deducted as well. Your heirs must have receipts to show what was spent on your home or services when they ask the state to deduct these amounts from the MERP claim.

If your estate has debts such as funeral costs, legal costs, or a home mortgage, those costs are paid first before MERP is paid.

How does this program work?

You are receiving this notice because you are applying for long-term care services covered by MERP. When you die, the state will send a notice to your estate representative or heirs to remind them that the state can file a MERP claim. That notice will ask them for information so the state can decide whether it should file a claim, or whether your estate meets one of the exceptions described above. This notice will also explain the process the state will use to file a claim.

How can I get more information on Medicaid estate recovery?

For more detailed information on this program, call the agency's toll-free number at 1-800-458-9858. This line is answered from 8:00 a.m. through 5:00 p.m., Monday through Friday. Voicemail is available 24 hours a day.

You may also e-mail your questions to merp@dads.state.tx.us.

You may also visit the DADS website at: www.dads.state.tx.us/services/estate_recovery/.

I have received and understand the information about MERP.

Name

Date



COMMISSIONER
Adelaide Horn

DEPARTMENT OF AGING AND DISABILITY SERVICES
PO Box 149030
MAIL CODE E411 - ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 379-1720

Medicaid Estate Recovery Program

January 19, 2007

Recipient Name: [REDACTED]
Recipient SSN: [REDACTED]
Medicaid Recipient Number: 526469799

Dear Nursing Home Administrator:

The Texas Department of Aging and Disability Services (DADS) contracts with Public Consulting Group, Inc. to operate the Medicaid Estate Recovery Program to recover the costs of eligible Medicaid services.

DADS files show that the above listed Medicaid recipient received services at your facility. Our data systems do not identify a responsible party for this individual and therefore, we are requesting your assistance in locating the personal representative.

Please fill out the information below for the above listed Medicaid recipient and fax this page back to the Medicaid Estate Recovery Program at (512) 279-1720.

Personal Representative: _____

Personal Representative Address: _____

Personal Representative Phone Number: _____

Name of Person Completing Form: _____

Signature of Person Completing Form: _____

We have also attached a notice of intent to file a claim. We would appreciate if you forwarded the notice of intent to the personal representative or family member, if known.

Thank you in advance for your cooperation.

DADS MERP Recovery Unit
800-641-9356



COMMISSIONER
Adelaide Horn

DEPARTMENT OF AGING AND DISABILITY SERVICES
PO Box 149030
MAIL CODE E411 – ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 279-1720

XX/XX/XX

«LFIULL_NAM»
«LFIULL_NAM»
«LADDRESS1»
«LADDRESS2»
«LADDRESS3»
«LADDRESS4»
«LMAILCITY», «LSTATE» «LZIP»

RE: Estate of «EFULL_NAM»
Medicaid ID#: «ETX MEDICAID_NO»
Date of Death: «EDOD»

On behalf of the Department of Aging and Disability Services, we would like to express our sincere condolences for your recent loss. We recognize that this is a difficult time for you. We are required by law, however, to ask you for some information at this time.

Notice of Intent to File a Claim Against the Estate

Our records show that «EFULL_NAM» received certain Medicaid long-term care (LTC) services from the state. On xx/xx/xx we received notification from federal and state data systems the above recipient passed away on «EDOD». The Texas Department of Aging and Disability Services (DADS) is required by federal and state law ¹ to recover the costs of these services from the estates of Medicaid LTC recipients. The amount recovered will not exceed the value of the estate.

If there are certain surviving family members such as a spouse, DADS will not file a claim. If there are no exempted family members, but certain hardship conditions are met, DADS will not pursue recovery in these instances. More detailed information about these exemptions and hardship conditions is provided on the enclosed program overview.

If a claim is filed, the recoverable costs may include the following services provided on or after the age of 55: long-term care services, related hospital care, prescription drugs, Medicare cost-sharing expenses, and when applicable, premium payments made on managed care enrollees. The Recovery Unit of Health Management Systems, Inc. (HMS), as the contract agent for DADS, handles the recovery process. **Please complete and return this questionnaire with the requested documentation to the address or fax referenced above within two weeks of receipt of this notice.** This will assist DADS in determining whether an exemption may apply.

Our records identify you as the primary contact for the decedent. If this is not correct, please contact our office by calling (800) 641-9356 to provide us with the name and contact information of the individual who will be administering the estate. We also need to know if probate proceedings have already begun. Please note the State's claim is against the estate of the decedent and not the personal representative, family members, or heirs. We would appreciate your notifying any family members or heirs who may be affected by the proposed recovery.

If no recovery exemptions apply, but a legatee or heir can demonstrate collection of the state's claim would result in an undue hardship, please return the attached hardship waiver request form along with the estate questionnaire so we can send you a formal waiver application. The application must be mailed to our office within 60 days of the date of this notice so please call us if you would like an application sent immediately. Or if you prefer, you may download the application for hardship waiver from the DADS website at: http://www.dads.state.tx.us/services/estate_recovery/.

An undue hardship waiver determination is evaluated on a case-by-case basis and will be made within 40 days of the receipt of the Application for Hardship Waiver and all required supporting documentation. If no exemptions or approved hardship conditions exist, the State will pursue recovery. If a claim is filed against the decedent's estate, certain deductions to the claim amount may be allowed as explained in the program overview. Requests for allowable deductions with supporting documentation must be submitted in writing within 60 days from the receipt of this notice.

Failure to meet the stated deadlines for hardship applications or claim deduction requests will result in denial of these requests.

If you have any questions regarding this notice or the accompanying documents, please call us at (800) 641-9356.

Sincerely,

DADS Recovery Unit

Enclosures

¹ See generally Texas Administrative Code, Title 1, Part 15, Chapter 373

ESTATE QUESTIONNAIRE

1. TEXAS MEDICAID MEMBER'S INFORMATION:

Name: «FULL_NAM»
Birth Date: «EDOB»
Date of Death: «EDOD»
Medicaid ID #: «ERID»

2. STATUTORY CLAIM EXEMPTION:

Is there any surviving spouse? If yes, please provide the following information along with a copy of the Deceased Member's Death Certificate and proof of relationship.

YES NO

Name of Surviving Spouse: _____

Address: _____

Phone: _____

3. STATUTORY CLAIM EXEMPTION:

Is there a child under the age of 21, or surviving child of any age who is blind or permanently and totally disabled? If yes, please provide the following information along with proof of age, relationship, and disability (Birth Certificate, Benefit Award Letter, and a copy of the most recent federal income tax return).

YES NO

Name of Child: _____

Address: _____

Birth Date: _____

Social Security Number: _____

4. STATUTORY CLAIM EXEMPTION:

Is there an unmarried adult child residing continuously in the Medicaid recipient's homestead for at least one year before the recipient's death? If yes, please provide the following documentation: verification of single status letter from the Bureau of Vital Statistics, birth certificate, copy of income tax return spanning the one year prior to the recipient's death, copy of Texas driver's license, copy of bank statements or utility bills in heir's name verifying homestead address for one year prior to the recipient's death, employer's records verifying homestead address.

YES NO

Name of Child: _____

Address: _____

Birth Date: _____

Social Security Number: _____

5. STATUTORY CLAIM EXEMPTION:

If the decedent was an American Indian, Alaska Native, or if he had retained government reparation payments at the time of death, the estate might qualify for an exemption. Please contact us at our toll-free number (800) 641-9356 for more information.

6. ASSET INFORMATION:

Did the decedent own a home or other real property at the time of death? YES NO

If yes, please complete the following.

Homestead:

Other Real Property:

Property Address: _____

Property Address: _____

Approximate Fair Market Value: _____

Approximate Fair Market Value: _____

County Where Recorded: _____

County Where Recorded: _____

List any mortgages or liens against the property:

List any mortgages or liens against the property:

Does the estate contain any personal property? (Bank accounts, vehicle, jewelry, furniture, other personal items of value). If yes, please complete the following.

YES NO

Bank Name: _____

Acct#: _____

Balance: _____

Identify any additional Personal Property: _____

7. CONTACT INFORMATION: Attorney Personal Representative Guardian

Name: _____

Address: _____

Phone: _____

Has there been or do you anticipate any third party lawsuits filed on behalf of this Estate? YES NO

Has there been (or will there be) a petition for probate of the estate filed? YES NO

Has there been or do you anticipate a filing for muniment of title, affidavit of heirship, or small estate affidavit?
 YES NO

If yes to any of these, please complete the following information:

Cause Number: _____

Date filed: _____ County Court: _____

8. ESTATE ADMINISTRATION

Did the decedent have a will? YES NO

If yes and no statutory exemptions exist, please enclose a copy of the will when you return this questionnaire.

9. OTHER INFORMATION

If there are additional circumstances and/or information related to this claim, please include this information in the following section or provide attachments:

Please complete all requested information within two weeks and return this form to:

DEPARTMENT OF AGING AND DISABILITY SERVICES
PO Box 149030
MAIL CODE E411 – ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 279-1720

Preparer Name: _____

Estate of «FIRST_NAM»
Medicaid ID#: «EAHCCCS_NO»

Preparer Signature: _____

Date Prepared: _____

Application for Hardship Waiver

As stated in the Notice of Intent to File a Claim Against the Estate, the Medicaid estate recovery program (MERP) will waive, in whole or in part, its claim against the estate when recovery would cause an undue hardship for a legatee or heir. If you are not a legatee or heir and therefore do not have a legal right to the estate of the decedent, you do not qualify for a hardship waiver.

An undue hardship does not exist solely because recovery would prevent applicants from receiving an inheritance or when the hardship was created by using estate planning methods in order to avoid estate recovery.

All of the information requested in this application is voluntary; however, failure to completely and accurately provide the information may result in a denial of the waiver.

Each person who requests a hardship waiver must complete the appropriate section(s) of this application and return it **with supporting documentation** within 60 days from the date stated on the Texas Department of Aging and Disability Services (DADS) notice of intent to file a claim. **Applications returned later than 60 days from this date will not be accepted.**

Written notification will be sent to the applicant with an explanation of the determination. If the request is denied, the applicant has an additional 60 days to submit a written request for review of the denial. MERP will make a final determination within 40 days from the date it receives the request for review of the denial.

Mail or fax the completed application form and supporting documentation to the contact information below. DADS contracts with the Health Management Systems (HMS) Inc., to conduct its estate recovery program operations. If you have any questions about the claim against the estate or how to complete this form, contact HMS toll-free at 1-800-641-9356.

The criteria for a hardship waiver, as outlined in the Texas Administrative Code, are as follows.

1. The estate property has been the site of a family business, farm or ranch for at least 12 months before the death of the decedent; is the primary income-producing asset of the heirs; produces 50% or more of their livelihood; and recovery by the state would result in the heirs losing their primary source of income; **or**
2. The heirs would become eligible for public and/or medical assistance if the state were to recover the claim; **or**
3. The heirs would be able to discontinue public and/or medical assistance if the state did not recover the claim; **or**
4. The decedent had received Medicaid as the result of being a crime victim; **or**
5. Other compelling reasons.

One additional type of hardship applies just to the homestead:

When one or more siblings or lineal heirs has gross family income below 300% of the federal poverty guidelines, up to \$100,000 of the homestead value may be exempt from recovery.

Accounts Receivable – Mail Code E-411
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, TX 78714-9030
Fax: 512-279-1720

Application for Hardship Waiver

It is the applicant's responsibility to provide complete information to DADS. The hardship waiver request will be denied if the applicant does not submit the necessary supporting documentation that demonstrates to the state how recovery would result in an undue hardship.

Please fill out this form electronically or print in blue or black ink.

All applicants must complete the general information requested on this page.

Decedent's Name (First, Middle, Last)		
Decedent's Medicaid ID Number	Decedent's Social Security Number	Decedent's Date of Birth (mm/dd/yyyy)
List the estate assets that are subject to probate:		
List the estate assets that will pass directly to the beneficiaries independent of the probate process:		
Estimated Value of Estate:	Your Anticipated Share of the Estate: (50%, 75%, 100%, etc.):	

Attach a copy of the will or other legal documents that show the *names of all the heirs* and the percentage of the estate each will receive. Include documents showing assets that will pass directly to the beneficiaries.

Applicant's Name (First, Middle, Last)		Relationship to Decedent	
Applicant's Primary Residence		City	State ZIP Code
Area Code and Telephone Number ()	Social Security Number	Date of Birth (mm/dd/yyyy)	
Applicant's Employer		Employer Area Code and Telephone Number	
Employer Address	City	State	ZIP Code
Spouse's Name (First, Middle, Last)		Spouse's Area Code and Telephone Number	
Spouse's Address (If different from Applicant's)		City	State ZIP Code
Spouse's Employer		Spouse's Employer Area Code and Telephone Number	
Spouse's Employer Address	City	State	ZIP Code

UNDUE HARDSHIP WAIVER REQUEST FORM

Estate of: «EFULL_NAM»
Medicaid ID No.: «ETX MEDICAID_NO»
Date of Death: «EDOD»

If the recovery exemptions on the attached questionnaire do not apply, but a beneficiary or heir can demonstrate that recovery would result in an undue hardship, please complete this form and return it with the estate questionnaire. Upon receipt of this form, we will send you an Application for Hardship Waiver. The application will need to be mailed to our office within 60 days of the date of this Notice of Intent to File a Claim Against the Estate. Applications returned after this date will not be considered.

If you prefer, you may call our toll-free number (800) 641-9356 to request an application or download it from the DADS website at: http://www.dads.state.tx.us/services/estate_recovery/.

An undue hardship waiver determination is evaluated on a case-by-case basis and will be made within 40 days of the receipt of the Hardship Waiver Application and all required supporting documentation.

The criteria for a hardship waiver, as outlined in the Texas Administrative Code (Rule § 373.209), are as follows:

1. The estate property has been the site of a family business, farm or ranch for at least 12 months prior to the death of the decedent; is the primary income-producing asset of the heirs; produces 50 percent or more of their livelihood; and recovery by the state would result in the heirs losing their primary source of income; or
2. The heirs would become eligible for public and/or medical assistance if the state were to recover the claim; or
3. The heirs would be able to discontinue public and/or medical assistance if the state did not recover the claim; or
4. The decedent had received Medicaid as the result of being a crime victim; or
5. Other compelling reasons.

One additional type of hardship applies just to the homestead:

6. When one or more siblings or lineal heirs has gross family income below 300% of the federal poverty guidelines, up to \$100,000 of the homestead value may be exempt from recovery.

Requestor's Name: _____ Requestor's Signature: _____

Date Prepared: _____

Address to Mail Application(s): _____

Number of Applications Requested: _____

Please note: Each heir must apply individually if requesting an Application Hardship Waiver.

DEPARTMENT OF AGING AND DISABILITY SERVICES
PO Box 149030
MAIL CODE E411 – ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 279-1720

XXXXX, 2007

RE: Estate Of: XXXXX
Medicaid ID#: XXXXX
Date of Death: XXXXX
MERP Case #: XXXXX

MEDICAID ESTATE RECOVERY PROGRAM (MERP) CLAIM

Our records show that XXXXXX received Medicaid Long-Term Care (LTC) services from the State of Texas on or after March 1, 2005. On xx/xx/xxxx, our office received notification from federal and state data systems that the above Medicaid recipient passed away on xx/xx/xxxx. The Texas Department of Aging and Disability Services (DADS) is required by federal and state law to recover Medicaid services from the estates of Medicaid recipients who were age 55 and older when they received the services*.

The Recovery Unit of Health Management Systems (HMS), as the contract agent for DADS, previously forwarded a Notice of Intent to File a Claim Against the Estate and a Questionnaire to your attention to determine if there were any exceptions to recovery. As a result of your response or non-response, to the best knowledge of the MERP the deceased Medicaid recipient had:

1. No surviving spouse;
2. No surviving child under age 21;
3. No surviving child of any age who is blind or disabled; or
4. No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

Additionally, to the best knowledge of the MERP no undue hardship exists and recovery will be cost-effective.

The Medicaid services to be recovered may include Nursing Facility services, Intermediate Care Facilities for the Mentally Retarded services, Home and Community Based services (1915 c waivers), and Community Attendant services, as well as related hospital services, prescription drugs, and Medicare cost-sharing expenses. As of the date of this claim letter, the total amount of the MERP Claim is \$XXXXXX. On the back of this letter is a claim summary that details the services provided and the date(s) of the covered services.

Balances outstanding for more than 180 days from the date of this claim may be assessed an interest rate of 9.25% as provided by the Texas Government Code §2251.025(b).

As appropriate, the claim will also be filed in accordance with applicable provisions of the Texas Probate Code. The final probate claim may differ from this preliminary claim due to Medicaid claim adjustments that may occur during the estate settlement process. The total amount recovered will not exceed the value of the estate assets, if any.

Please call us at (800) 641-9356 if you have any questions regarding the MERP Claim.

Sincerely,

DADS Recovery Unit

Enclosures

* See generally Texas Administrative Code: Title 1, Part 15, Chapter 373

COMMISSIONER
Adelaide Horn



DEPARTMENT OF AGING AND DISABILITY SERVICES
PO BOX 149030
MAIL CODE E411 – ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 279-1720

July 27, 2007

JOHN SMITH
SMITH
1 TWO STREET
SUITE 4
BOSTON, MA 09808

RE: Estate of JOHN DOE
Medicaid ID: 999999999
Date of Death: 2006-02-11

Dear JOHN SMITH :

Estate Claim Follow Up Letter

Please be advised that the State of Texas has a claim in the amount of \$0.00 against the above Estate for the repayment of Medicaid. Our records indicate that the Estate owns real property which was the former residence of JOHN DOE. It also appears that no probate estate has been opened yet.

Texas law in this situation permits either the family or the State to begin probate proceedings to resolve this matter. If you choose to begin probate proceedings yourself, you may be entitled to certain fees and expenses as an administrator of the estate. However, you may not be entitled to these benefits if the State begins the probate proceedings. You may wish to consult with an attorney to determine your rights.

If we do not hear from you or your attorney within the next several weeks, we will assume that you do not intend to begin probate, and the State may begin probate itself. You are also welcome to call us at (800) 641-9356 should you wish to resolve the claim so the property will not have to be sold.

Sincerely,

DADS Recovery Unit



COMMISSIONER
Adelaide Horn

DEPARTMENT OF AGING AND DISABILITY SERVICES
PO Box 149030
MAIL CODE E411 – ACCOUNTS RECEIVABLE
AUSTIN, TX 78714-9030
FAX: (512) 279-1720

<<Date>>

<<Contact Name>>

<<Organization Name>>

<<Organization Address>>

<<Organization City/State/Zip>>

RE: Estate of <<Recipient First Name Last Name>>
MERP Case#: <<CaseNumber>>
Court Case#: <<Court Case Number>>

Dear Clerk:

Enclosed please find the original and one copy of a Claim for filing in the above-referenced case. Please return a date-stamped copy in the self-addressed, stamped envelope provided.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact me.

Sincerely,

DADS Recovery Unit

ESTATE OF NO. <<Court Case Number>>
 <<Recipient First Name Last Name>>
 DECEASED

)(
)(
)(
)(

IN THE PROBATE COURT
 OF
 <<Case County>> COUNTY, TEXAS

AUTHENTICATED UNSECURED CLAIM

1. The Texas Department of Aging and Disability Services (DADS) is an owner of an unsecured claim against this estate in the sum of \$<<Total Lien Amount>>, which may be amended prior to the estate being closed. This claim is founded on the following:
 Under T.A.C. § 373.103 - § 373.307, DADS is required to recover the costs of certain Medicaid long-term care benefits received by the above Medicaid recipient.
2. Claimant requests allowance and payment of this claim.

 Claimant, Authorized DADS Representative

Claimant's Name* <<Case Worker Name>>
The Recovery Unit of Health Management Systems
as Authorized DADS Representative
 Address*PO Box 149030
 Mail Code E411- Accounts Receivable
 City, State, Zip*Austin, TX 78714-9030

STATE OF TEXAS)(
)(
 COUNTY OF <<Case County>>)(

BEFORE ME, the undersigned authority, on this day personally appeared _____ and, after being duly sworn by me, stated that he foregoing unsecured claim is just and that all legal offsets, payments, and credits know to Claimant have been allowed.

 Claimant, Authorized DADS Representative

SUBSCRIBED AND SWORN TO BEFORE ME by _____ on _____.

 Notary Public, State of Texas

Notary's Name Printed:

My commission expires _____



COMMISSIONER
Adelaide Horn

<<Date>>

<<Personal Representative Name
Address
City, St Zip>>

RE: Estate of: <<Name>>
Medicaid Id# <<xxxxxxxx>>
Date of Death: <<xx/xx/xx>>

Notification of Case Dismissal to File a Claim Against The Estate

Upon review of the documentation submitted in response to the Notice of Intent to File a Claim Against the Estate, The Texas Department of Aging and Disability Services (DADS) Recovery Unit has determined that the estate of the deceased <<Name>> is not subject to recovery because either an exemption exists or a full waiver has been allowed for a documented and approved hardship. The conditions permitting exemption of the estate may include:

- There is a surviving spouse;
- There is a child under 21 years of age;
- There is a child of any age who is blind or permanently and totally disabled;
- The decedent was an American Indian, Alaska Native, or the decedent had retained government reparation payments at the time of death.
- The deceased applied for and received LTC services before March 1, 2005;
- There is an unmarried adult child who lived full-time in the recipient's home for at least one year before his death;
- The value of his estate is \$10,000 or less;
- The amount of the Medicaid costs incurred was \$3,000 or less; or
- The cost of selling the property is more than the property is worth.

The DADS Recovery Unit has closed this case and the Estate will no longer be subject to recovery. If you have any further questions, you may call our toll-free number: 800-641-9356.

Sincerely,

DADS Recovery Unit

APPENDIX B



**HMS- DADS RECOVERY UNIT
5615 HIGH POINT DRIVE, SUITE 100
IRVING, TEXAS 75038
FAX: (214) 560-3918**

March 4, 2009

Title Company Representative:

You are receiving this letter because you have been identified as a company offering title services in the state of Texas.

HMS is the agent for the Texas Department of Aging and Disability Services ("DADS") for purposes of seeking recovery under the Texas Medicaid Estate Recovery Program ("MERP"), pursuant to Texas Administrative Code, Title 1, Part 15, Chapter 373. The State of Texas is empowered to operate MERP per Texas Government Code § 531.077, which was enacted to comply with applicable federal law found at 42 U.S.C. §1396p(b)(1). Pursuant to MERP, DADS is responsible for seeking recovery of the cost of Medicaid long-term care services provided to certain Texas Medicaid recipients.

As you may be aware, DADS does not record liens against property belonging to decedent estates that are subject to the MERP program; however, Medicaid recipients are provided notice of the program upon application of Medicaid services. Notice may also have been received by family members who assist these recipients in completing these applications for service. Problems with MERP frequently arise when individuals seek to transfer property by Muniment of Title or Affidavit of Heirship.

Although you may not have actual notice of our claim, we ask that you contact our office to complete your due diligence requirements with respect to your title research procedures. Such contact is not required for all property transfers within the state, only for properties in which a deceased individual who passed at age 55 or older is listed as owner or part owner of the subject property. Use of the MERP Certification and Authorization form should also prevent any instances whereby knowledge of a MERP Claim was intentionally withheld from the title company.

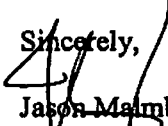
We have attached a copy of the MERP Certification and Authorization Form. This form should be completed by a representative of the estate who is seeking to sell property of a deceased

individual who passed at age 55 or older. Part one of the form, the Authorization, must be signed by the estate representative (or the attorney of the estate) before our office can release the Certification. The second part of the form, Certification, will be completed by our office and will indicate whether the property is subject to a MERP claim.

Please note that a MERP Certification and Authorization is required by many courts for probate proceedings. MERP Certification and Authorization are typically processed within five (5) days of receipt by our office. Please also be aware that the MERP Certification and Authorization does not constitute a withdrawal of any other claim that DADS or any other agency of the State of Texas may have against this estate. Estate representatives of deceased Medicaid recipients whose estates may include assets such as, but not limited to, qualified income trusts, other trusts, annuities, torts, or private insurance policies, should check with the DADS' Third Party Recovery Unit by calling: (512) 438-2200 #4 to determine if that Unit may have claims against this estate.

Completed MERP Certification and Authorization forms should be faxed to (214) 560-3918. If you have any further questions regarding this matter, or would like to request an electronic version of the MERP Certification and Authorization Form, please feel free to call Elizabeth Velazquez at (214) 453-3216 or email her at evelazquez@hms.com.

Sincerely,


Jason Malmberg
Attorney-DADS Recovery Unit
5615 High Point Drive, Suite 100
Irving, Texas 75038

AUTHORIZATION AND MERP* CERTIFICATION
***Texas Medicaid Estate Recovery Program**

TO: Texas Medicaid Recovery Program (MERP)
 c/o Health Management Systems
 Attention: Mr. Jason W. Malmberg, Attorney / Elizabeth Velazquez, Intake Coordinator
 5615 High Point Dr., Suite 100
 Irving, Texas 75038
 PHONE: (214) 453-3216
 FAX: (214) 560-3918

FROM: Requestor/Title Company Name:
 Requestor/Title Company File No.:
 Requestor/Title Company Phone Number:
 Requestor/Title Company Fax Number:

RE: Deceased Owner's Name:
 Deceased Owner's Medicaid ID and/or Social Security Number (required):
 Complete Property Address:

Section 1
AUTHORIZATION TO OBTAIN MERP CLAIM INFORMATION
 (To be Completed by Heirs/beneficiaries or Estate Representative)

The undersigned heir/beneficiaries of Deceased Owner or estate representative is attempting to sell or mortgage the Deceased Owner's Property and are unable to certify to Title Company that the estate of the Deceased Owner is exempt or is not subject to a MERP claim, and hereby authorize MERP to complete Section 2 of this form below and provide same or any other information related to a MERP claim against Deceased Owner to Title Company.

By: _____ By: _____
 (signature) (signature)

Name Printed: _____ Name Printed: _____

Section 2
CERTIFICATION BY MERP
 (To be Completed by MERP)

1.	<input type="checkbox"/> _____ initial	There is no pending MERP Claim against the Deceased Owner's estate and the State of Texas does not intend to file a MERP Claim against the Deceased Owner's estate.
2.	<input type="checkbox"/> _____ initial	There is a MERP Claim filed against the Deceased Owner's estate in the amount of \$ _____ as evidenced by the attached document.
3.	<input type="checkbox"/> _____ initial	MERP intends to file a MERP claim against the Deceased Owner's estate in the amount of \$ _____.

This is not a dismissal of any other claim the State may have against this estate. Estate representatives of deceased Medicaid recipients whose estates may include assets such as, but not limited to, qualified income trusts, other trusts, annuities, torts, or private insurance policies, should also check with the DADS' Third Party Recovery unit by calling: (512) 438-2200 #4 to determine if the Department of Aging and Disability Services may have other claims on this estate.

TEXAS MERP REPRESENTATIVE:

By: _____

Name Printed: Elizabeth Velazquez

Title: HMS TX DADS MERP AGENT

UNDERWRITING BULLETIN

UNDERWRITING DEPARTMENT • 2001 BRYAN STREET, SUITE 1700 • DALLAS, TEXAS 75201

TEXAS BULLETIN NO. 2008-05

TO: All Agents and Direct Operations in Texas
FROM: Mary Glenn, Underwriting Counsel ^{UG}
RE: Texas Medicaid Estate Recovery Program
DATE: March 5, 2008

Texas has adopted a Medicaid Estate Recovery Program to seek reimbursement against a deceased Medicaid recipient's estate (including a homestead) for certain Medicaid long-term care services received by the deceased recipient after March 1, 2005. The program is administered by the Texas Department of Aging and Disability Services, often referred to as DADS, and DADS has outsourced the administration of MERP to the following third party contractor;

Health Management Systems
Attention: Mr. Timothy P. Sommers, Attorney, Texas Estates
5615 High Point Drive, Suite 100,
Irving, Texas 75038.

MERP may only recover from the assets that pass through the deceased Medicaid recipient's estate, and recovery is sought by the filing of a Class 7 probate claim under Section 322 of the Probate Code. There are various situations (exemptions) where the state will not pursue a MERP claim.

Attached to this Bulletin please find form 8001 from DADS which contains a summary of MERP.

The purpose of this Bulletin is to provide the underwriting guidelines of the Company to address the ramifications of MERP when a deceased owner's property is being sold or mortgaged.

Underwriting Guidelines

1. If your chain of title reveals a predecessor in title or the current vested owner died prior to March 1, 2005, do not concern yourself with MERP. The transaction may be insured in accordance with your customary probate guidelines.
2. If your chain of title reveals a predecessor in title died after March 1, 2005, do not concern yourself with MERP unless your examination reveals the opening of a probate administration related to the deceased predecessor in title and the filing of a MERP

This document is confidential and intended only for agents and employees of Chicago Title Insurance Company, Ticor Title Insurance Company, Security Union Title Insurance Company, Ticor Title Insurance Company of Florida, and their affiliates. Further distribution is expressly prohibited.

claim with the court. You should contact MERP to determine if the claim has been paid. If the claim is unpaid, you should pay the MERP claim and may then insure the transaction in accordance with your customary probate guidelines.

3. If the current vested owner is deceased and the date of death is after March 1, 2005, the following guidelines apply:
 - a. If your examination reveals the opening of a probate administration related to the current vested owner and the filing of a MERP claim with the court, you should contact MERP to determine if the claim has been paid. If the claim is unpaid, you should pay the MERP claim and may then insure the transaction in accordance with your customary probate guidelines.
 - b. If your examination does not reveal the filing of a probate proceeding as to the current vested owner and no evidence of a MERP claim:
 - (i) the heirs/beneficiaries of the decedent or the decedent's estate representative must complete the attached MERP Certification by Owner/Estate Representative form. The purpose of the form is to establish whether: (1) the decedent's estate is exempt from a MERP claim; and/or (2) the estate has been notified by the State of Texas of its intent to file a MERP claim against the decedent's estate.
 - (ii) If the heirs/beneficiaries of the decedent or the estate representative sign and check Paragraph 1 (and one or more of the reasons why the estate is exempt from a MERP claim) and Paragraph 2 (certifying the estate has not been notified by the State of its intent to file a MERP claim), you do not need to concern yourself with MERP and may insure the transaction in accordance with customary probate underwriting guidelines.
 - c. If the heirs/beneficiaries of the decedent or the decedent's estate representative is unable to certify the estate is exempt from a MERP claim:
 - (i) the heirs/beneficiaries of the decedent or the estate representative must sign Section 1 of the attached Authorization and MERP Certification form authorizing MERP to complete Section 2 of the form and provide said form and any other information related to a MERP claim to your company.
 - (ii) This form should be faxed to MERP c/o Tim Sommers at 214-560-3918. MERP will need to conduct its own investigation which may take several days. At the top of the form make sure you insert your fax number so that MERP may complete Section 2 of the form and return the form to you. Please note that Mr. Tim Sommers may be reached at 800-641-9356 Ext. 3057.
 - (iii) If MERP certifies the State does not intend to file a MERP claim against the decedent's estate, you do not need to concern yourself with MERP and may insure the transaction in accordance with customary probate underwriting guidelines.

- (iv) If MERP certifies there is a MERP claim or the State intends to file a MERP claim against the decedent's estate, you should pay the MERP claim and may insure the transaction in accordance with customary probate underwriting guidelines.
- d. When you issue your commitment, insert the following requirement in Schedule C:

"Company has been advised that the party vested in title has died after March 1, 2005, and may have received Medicaid benefits after March 1, 2005. Company must be furnished evidence that such party did not receive Medicaid benefits after March 1, 2005; or, if such party did receive Medicaid benefits after March 1, 2005, that no claim under the Texas Medicaid Estate Recovery Program (MERP) will be filed. If such claim is filed, a release from MERP and proof of payment is required."

WESLEY E. WRIGHT††
MOLLY DEAR ABSHIRE†
JOY ECKELKAMP-TORRES
KELLEY M. BENTLEY
LANCE McLAIN

WRIGHT ABSHIRE
A T T O R N E Y S
A PROFESSIONAL CORPORATION
4949 BISSONNET • BELLAIRE, TEXAS 77401
PHONE 713.660.9595 • FAX 713.660.8889

COPY
† Board Certified in Estate
and Probate Law by the Texas Board
of Legal Specialization
† Certified as an Elder Law Attorney by
the National Elder Law Foundation

June 5, 2009

Chicago Title Company
Underwriting Department
c/o Ms. Mary Glenn
2001 Bryan Street, Suite 1700
Dallas, Texas 75201

Re: Chicago Title Underwriting Bulletin, dated March 5, 2008

Ms. Glenn:

The purpose of this correspondence is to call your attention to certain problems inherent in one of your company's recent Underwriting Bulletins. Specifically, the problems occur in the Texas Bulletin No. 2008-05, dated March 5, 2008, regarding the Texas Medicaid Estate Recovery Program ("MERP"). Please consider the following:

(1) Your "Underwriting Guidelines," Item #2, page 1, states:

"If your chain of title reveals a predecessor in title died after March 1, 2005, do not concern yourself with MERP unless your examination reveals the opening of a probate administration related to the deceased predecessor in title and the filing of a MERP claim with the court. You should contact MERP to determine if the claim has been paid. If the claim is unpaid, you should pay the MERP claim and may then insure the transaction in accordance with your customary probate guidelines."

(2) Your "Underwriting Guidelines," Item #3.a., page 2, states:

"If your examination reveals the opening of a probate administration related to the current vested owner and the filing of a MERP claim with the court, you should contact MERP to determine if the claim has been paid. If the claim is unpaid, you should pay the MERP claim and may then insure the transaction in accordance with your customary guidelines."

(3) Your "Underwriting Guidelines, Item #3c.(iv), page 3, states:

"(iv) If MERP certifies there is a MERP claim or the State intends to file a MERP claim against the decedent's estate, you should pay the MERP claim and may insure the transaction in accordance with customary probate underwriting guidelines."

With regard to the above statements, please note that payment of the Texas MERP claim may or may not be required. The MERP has no authority in this state to impose property *liens* (either pre-death or post-death liens) as an instrument of estate recovery, as your memo appears to imply. Texas has not adopted the optional provision of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, at 42 U.S.C.A. §1396p(a), which allows states to impose pre-death liens against the property of persons who have been determined to be permanently institutionalized. Moreover, Texas does not use the post-death liens that are allowed (but not required) under the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993") at 42 U.S.C.A. §1396p(b). Indeed, for the MERP to adopt the use of liens would require legislative action, which has not so far occurred.

A recently issued administrative statement directed to members of the local probate practice from a Harris County Statutory Probate Court, concerning the ability of an applicant to file a Muniment of Title application for a decedent's estate, stated as follows: "Texas has not adopted a Medicaid-lien approach to Medicaid recovery. Consequently, claims for Medicaid recovery in Texas are **debts of the estate.**" (emphasis added)

Since the MERP claim is not a lien, but an unsecured claim, it is under the exclusive authority of the personal representative of an estate to classify and pay legitimate claims in the proper statutory order. Therefore, it would appear that your guidelines are attempting to usurp the role of the executor/administrator by forcing payment of the MERP claim from the proceeds of the sale/transaction in which you are insuring title. Also, as mentioned in your bulletin, the MERP claim is a Class 7 probate claim. This means that the MERP claim is subordinate to the following claims enumerated in Texas Probate Code, §322.

Classification of Claims Against the Estates of Decedents:

- Class 1 - funeral expenses and expenses related to the decedent's last illness;
- Class 2 - expenses of administration;
- Class 3 - secured claims;
- Class 4 - delinquent child support;
- Class 5 - taxes;
- Class 6 - the costs of confinement by the Texas Department of Criminal Justice

Class 7 - claims for repayment of medical assistance payments by the state ..., to or for the benefit of the decedent; and

Class 8 - All other claims.

TEX. PROB. CODE ANN. § 322 (Vernon 2005).

After a thorough review of Texas Probate Code § 322, you will note that the MERP claim is only one class higher than that of a credit card debt. There is no legal authority to require that the MERP claim be automatically paid simply because a "*Notice of Intent to File A Claim*" has been issued or a probate claim has been filed. Underwriters do not require payment of credit card debt that may be filed in a probate administration to be paid prior to closing. In fact, Underwriters do not require payment of Estate Taxes, where the IRS has a lien right, prior to closing so long as the Seller(s) will give a sworn statement that there are sufficient assets in the Estate to pay the Estate Tax.

Even in situations where the MERP has issued a "*Notice of Intent to File a Claim*," recovery is not required if undue hardship is established. TEX. ADMIN. CODE § 373.2090. Additionally, recovery by the MERP may not be required if additional claims against the estate of higher classifications result in no estate assets remaining for payment of the MERP claim. And yet, your Memorandum instructs "If MERP certifies ...the State intends to file a MERP claim against the decedent's estate, you should pay the MERP claim" (Underwriting Guidelines, Item #3c.(iv), page 3). This statement alone places the Title Company in the role of the personal representative of the estate when determining whether or not the claim is valid and whether or not it has priority to other claims of the estate.

Another inaccurate position taken in your Memorandum is found on Item #2, page 1 (noted above). In this case, if there is a predecessor in title, you instruct your agents to check the probate records of any predecessor in title and if death was post March 1, 2005 and there is a MERP claim filed that has not been paid, that your agents should pay it. A predecessor in title is not a party to the sale. There is no requirement in your Memorandum to contact the Executor/Administrator of the prior owner's estate to determine if the claim is valid. The Memorandum contains just an instruction: Pay the MERP claim that is filed in the preceding probate. This would create a reduction in the expected net sales to the Seller, potentially causing the Seller to default on a simultaneous closing or other debt resulting in immense potential liability.

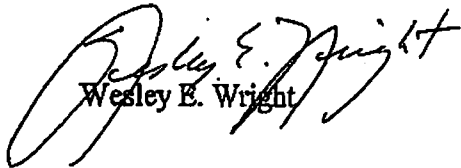
It is our understanding that you and many other Title Companies received a letter from the DADS Recovery Unit in March of this year concerning the MERP claims process. It may be that your recent procedural changes were based upon said letter advising you about possible MERP Claims against certain decedent's estates. Although said letter may advise you to notify DADS when you believe you have a case that may be

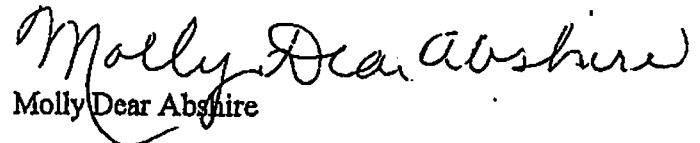
connected to a possible MERP Claim, *your in-house procedures responding to this request are seriously inaccurate.* As previously discussed, your internal memo instructs your staff to collect the funds due on a MERP Claim as if they have been proven in court and finalized by judgment. You are making a serious mistake by paying the MERP claim that may or may not have been approved by the Executor or Administrator of an estate depriving legatees or heirs of their rightful inheritance and you risk liability to other creditors of the Estate whose claims have a higher classification than that of the MERP.

We would suggest that you immediately revise your practice to exclude any direct payments of funds to the MERP, as there is no legal authority to make such a transfer and may result in tortious interference with the contract rights of other creditors.

Sincerely,

WRIGHT ABSHIRE


Wesley E. Wright


Molly Dear Abshire

Joined by:

SCHOENBAUM, CURPHY & SCANLAN, P.C.
112 E. Pecan St., Suite 3000
San Antonio, Texas 78205

LAW OFFICE OF H. CLYDE FARRELL
1411 W. Ave., Suite 100
Austin, Texas 78701





Patricia F. Sitchler
WEW/jet/bo
Attachments as noted

H. Clyde Farrell

cc: Texas Land Title Association
1717 W. 6th Street # 120
Austin, TX 78703

Mr. Jason Malmberg
DADS Recovery Unit
5615 High Point Drive, Suite 100
Irving, Texas 75038

Kathleen Anderson
Office of General Counsel, Health and Human Services Commission
Mail Code 1100
4900 N. Lamar Blvd.
Austin, Texas 78751

Texas Statutory Probate Judges:

Hon. Polly Jackson Spencer
Hon. Tom Rickhoff
Hon. Weldon Copeland
Hon. Nikki DeShazo
Hon. Robert E. Price
Hon. Michael E. Miller
Hon. Don Windle
Hon. Yvonne Rodriguez
Hon. Eduardo Gamboa
Hon. Gladys B. Burwell
Hon. Kathleen S. Stone
Hon. Mike Wood
Hon. Rory R. Olsen
Hon. William C. McCulloch
Hon. Homero Garza
Hon. Steve M. King
Hon. Pat Ferchill
Hon. Guy Herman

Texas Chapter, National Academy of Elder Law Attorneys

APPENDIX C



THE TEXAS MEDICAID
ESTATE RECOVERY CONTRACTOR

HMS
5615 High Point Drive, Suite 100
Irving, Texas 75038

8/31/2009

Family of MARCUS [REDACTED]
COLLEGE ST HEALTH CARE
4150 COLLEGE
BEAUMONT TX 77707

RE: Estate of MARCUS [REDACTED]
Medicaid ID#: [REDACTED]
Date of Death: 6/4/2009
MERP Case #: [REDACTED]

Family of MARCUS [REDACTED]

On behalf of the Department of Aging and Disability Services (DADS), we would like to express our sincere condolences for your recent loss. We recognize that this is a difficult time for you. We are required by law, however, to ask you for some information at this time.

Notice of Intent to File a Claim Against the Estate

On 8/1/2009, we received notification from federal and state data systems the above recipient passed away on 6/4/2009. Our records show that the State of Texas provided payment for certain covered Medicaid services for the benefit of MARCUS [REDACTED] on or after MARCUS [REDACTED] reached the age of 55. The covered Medicaid services may have included, but are not limited to, Nursing Facility services, Intermediate Care Facilities for the Mentally Retarded services, Home and Community Based services (1915c waivers), and Community Attendant services, as well as related hospital services, prescription drugs, Medicare cost-sharing expenses, and when applicable, premium payments made on managed care enrollees.

In accordance with Texas Administrative Code Title 1, Part 15, Chapter 373, DADS is required by federal and state law to recover the costs of Medicaid services from the estates of Medicaid recipients who were age 55 and older when they received the services. These costs may only be recovered from the decedent's estate and the amount recovered can not exceed the value of the estate's assets. HMS, as the contract agent for DADS, handles the recovery process.

In a few weeks, you should receive a letter presenting the Medicaid Estate Recovery Program Claim. This letter will provide the amount of the claim, the payments dates of recoverable services, information on penalty interest, as well as payment instructions. As appropriate, the claim may also be filed as a Class 7 claim for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent. Please note the State's claim is against the estate of the decedent and not the personal representative, family members, or heirs.

In some cases, DADS will release the MERP claim if there is a surviving spouse or an exempt child. So that we can determine whether an exemption should be applied, we ask that you please complete and return the attached Texas Estate Recovery Program Questionnaire within two weeks of receipt of this notice. **The questionnaire must be completely filled out with all requested documentation and faxed or mailed to the address referenced above.**

If no recovery exemptions apply, but a heir can demonstrate collection of the state's claim would result in an undue hardship, DADS may still waive the MERP claim. To apply for a hardship waiver, please call our office or return the



attached Undue Hardship Waiver Request so we can send you a Hardship Waiver Application. You may download the application for hardship waiver from the DADS website at: http://www.dads.state.tx.us/services/estate_recovery/. All Hardship Waiver Applications must be submitted to our office no later than 60 days from the date of this notice. Hardship Waiver Applications received after the 60 days period will not be reviewed. Undue hardship waiver determinations are evaluated on a case-by-case basis and will be made within 40 days of the receipt of the Application for Hardship Waiver and all required supporting documentation. If no exemptions or approved hardship conditions exist, the State will pursue recovery.

We also need to know if any probate proceedings have already begun. If a probate claim is filed against the decedent's estate, certain deductions to the claim amount may be allowed for home maintenance and/or costs of care. Requests for allowable deductions with supporting documentation must be submitted in writing within 60 days from the receipt of this notice. Failure to meet the stated deadline for claim deduction requests will result in denial of these requests. For more detailed information about these exemptions and hardship conditions please review the enclosed Medicaid Estate Recovery Program Overview.

You have received this notice because our records identified you as the primary, and perhaps only, contact for the decedent. If this is not correct, please contact our office by calling (800) 641-9356 to provide us with the name and contact information of the individual(s) who will be administering the estate. We would appreciate your notifying any family members or heirs who may be affected by the proposed recovery.

If you have any questions regarding this notice or the accompanying documents, please call us at (800) 641-9356.

Sincerely,

DADS Recovery Unit

Enclosures





[Redacted]

CUMMINGS
Admiral Horn

HEALTH MANAGEMENT SYSTEMS
DADS RECOVERY UNIT
5615 HIGH POINT DRIVE- SUITE 100
IRVING, TEXAS 75038
PHONE: 800-641-9355, FAX: (214) 560-3918

4/22/2009

RUDOLPH [Redacted]
Family Of: MARY [Redacted]
[Redacted]
GROVES, TX 77819

RE: Recipient: MARY [Redacted]
Medicaid ID#: [Redacted]
Date of Death: 12/27/2008
MERP Case #: [Redacted]

MEDICAID ESTATE RECOVERY PROGRAM (MERP) CLAIM

Our records show that MARY [Redacted] received Medicaid Long-Term Care (LTC) services from the State of Texas on or after March 1, 2005. On 3/7/2008 our office received notification from federal and state data systems that the above Medicaid recipient passed away on 12/27/2008. The Texas Department of Aging and Disability Services (DADS) is required by federal and state law to recover Medicaid services from the estates of Medicaid recipients who were age 55 and older when they received the services.

The Recovery Unit of Health Management Systems (HMS), as the contract agent for DADS, previously forwarded a Notice of Intent to File a Claim Against the Estate and a Questionnaire to your attention to determine if there were any exceptions to recovery. As a result of your response or non-response, to the best knowledge of the MERP the deceased Medicaid recipient had:

1. No surviving spouse;
2. No surviving child under age 21;
3. No surviving child of any age who is blind or disabled; or
4. No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

Additionally, to the best knowledge of the MERP no undue hardship exists and recovery will be cost-effective.

The Medicaid services to be recovered may include Nursing Facility services, Intermediate Care Facilities for the Mentally Retarded services, Home and Community Based services (1915 c waivers), and Community Attendant services, as well as related hospital services, prescription drugs, and Medicare cost-sharing expenses. As of the date of this claim letter, the total amount of the MERP Claim is \$26,937.60. On the back of this letter is a claim summary that details the services provided and the date(s) of the covered services.

Balances outstanding for more than 180 days from the date of this claim may be assessed an interest rate of 6.0% as provided by the Texas Government Code §2251.025(b).

As appropriate, the claim will also be filed in accordance with applicable provisions of the Texas Probate Code. The final probate claim may differ from this preliminary claim due to Medicaid claim adjustments that may occur during the estate settlement process. The total amount recovered will not exceed the value of the estate assets, if any.

Checks should be made payable to the Texas Department of Aging and Disability Services and mailed to the following address:

TEXAS DEPARTMENT OF AGING AND DISABILITY SERVICES
MAIL CODE E411 - ACCOUNTS RECEIVABLES
701 W. 51ST STREET
AUSTIN, TX 78714-9030

Please call us at (800) 641-9355 if you have any questions regarding the MERP Claim.

Sincerely,

DADS Recovery Unit

Enclosures

* See generally Texas Administrative Code Title 1, Part 15, Chapter 171

Recipient: **MARY**
 Medicaid ID#: **[REDACTED]**
 Date of Death: **12/27/2008**
 MERP Case #: **[REDACTED]**

Claim Summary of Service:

<u>Service Type</u>	<u>Date of Service</u>		<u>Amount Paid</u>
	<u>From</u>	<u>To</u>	
Long Term Care	3/19/2008	9/18/2008	\$26,937.60
Pharmacy			\$ 0.00
Medicare Part A Premium			\$ 0.00
Medicare Part B Premium			\$ 0.00
Medicare Cross Over			\$ 0.00
Hospital			\$ 0.00
StarPlus Premium			\$ 0.00
Total Paid:			\$26,937.60
Deductions:			\$ 0.00
Balance Due:			\$26,937.60



HMS
5615 High Point Drive, Suite 100
Irving, Texas 75038

12/22/2009

JENELL [REDACTED]
Family of ARCHIE [REDACTED]
[REDACTED]
[REDACTED]

RE: Estate of ARCHIE [REDACTED]
Medicaid ID#: [REDACTED]
Date of Death: 8/25/2009
MERP Case #: [REDACTED]

MEDICAID ESTATE RECOVERY PROGRAM (MERP) CLAIM

Our records show that ARCHIE [REDACTED] received Medicaid Long-Term Care (LTC) services from the State of Texas on or after March 1, 2005. On 10/24/2009 our office received notification from federal and state data systems that the above Medicaid recipient passed away on 8/25/2009. In accordance with Texas Administrative Code Title 1, Part 15, Chapter 373, the Texas Department of Aging and Disability Services (DADS) is required by federal and state law to recover Medicaid services from the estates of Medicaid recipients who were age 55 and older when they received the services.

HMS, as the contract agent for DADS, previously forwarded a Notice of Intent to File a Claim Against the Estate and a Questionnaire to your attention to determine if there were any exceptions to recovery. As a result of your response or non-response, to the best knowledge of the Medicaid Estate Recovery Program (MERP) the deceased Medicaid recipient had:

1. No surviving spouse;
2. No surviving child under age 21;
3. No surviving child of any age who is blind or disabled; or
4. No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

Additionally, to the best knowledge of MERP no undue hardship exists and recovery will be cost-effective.

The Medicaid services to be recovered may include Nursing Facility services, Intermediate Care Facilities for the Mentally Retarded services, Home and Community Based services (1915 c waivers), and Community Attendant services, as well as related hospital services, prescription drugs, and Medicare cost-sharing expenses. As of the date of this claim letter, the total amount of the MERP Claim is \$67,214.04.

Enclosed is a claim summary detailing the Medicaid payments, made on the recipient's behalf, to the care provider(s) as well as the and the date(s) of the covered services.

Balances outstanding for more than 180 days from the date of this claim may be assessed an interest rate of 9.25% as provided by the Texas Government Code §2251.025(b).

As appropriate, the claim may also be filed in accordance with applicable provisions of the Texas Probate Code. The final probate claim may differ from this preliminary claim due to Medicaid claim adjustments that may occur during the estate settlement process. The total amount recovered will not exceed the value of the estate assets, if any.

Checks should be made payable to the Texas Department of Aging and Disability Services and mailed to the following address:

**Texas Department of Aging and Disability Services
Mail Code E411- Accounts Receivable
701 W. 51st Street
Austin, Texas 78751**

Please call us at (800) 641-9356 if you have any questions regarding the MERP Claim.

Sincerely,

**Janet Sanchez
DADS Recovery Unit**

Enclosures

Recipient: ARCHIE [REDACTED]
Medicaid ID#: [REDACTED]
Date of Death: 8/25/2009
MERP Case #: [REDACTED]

Claim Summary of Service:

<u>Service Type</u>	<u>Date of Service</u>		<u>Amount Paid</u>
	<u>From</u>	<u>To</u>	
Long Term Care	12/1/2006	8/19/2009	\$62,555.43
Pharmacy	12/1/2006	8/5/2009	\$4,658.61
Medicare Part A Premium			\$ 0.00
Medicare Part B Premium			\$ 0.00
Medicare Cross Over			\$ 0.00
Hospital			\$ 0.00
StarPlus Premium			\$ 0.00
<hr/> Total Paid:			\$67,214.04
<hr/> Deductions:			\$ 0.00
<hr/> Balance Due:			\$67,214.04