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Medicaid Estate Recovery: Friend or Foe?

*Lisa M. Neeley**

I. INTRODUCTION

Medicaid is a costly federal-state partnership program that provides health insurance to our nation's most needy and vulnerable citizens. The demand for Medicaid has increased exponentially since its inception in 1965. It is now "one of the largest programs in the Federal budget as well as a major expenditure for State governments, which must finance a significant portion of Medicaid benefits on their own."¹

One of the largest expenditures in the Medicaid budget is the cost of long-term care for the elderly and disabled that reside in nursing homes. It is estimated that roughly two-thirds of individuals in nursing homes receive Medicaid benefits to pay for the cost of their institutionalization.² Institutionalized individuals are driven to apply for Medicaid benefits due to the lack of available funding options for nursing home care and the rising expenses of such care.³ Genworth estimates that the average cost of care for one year for a nursing home resident is \$90,155.00 in a semi-private room.⁴

It is a common misconception that Medicare or private health insurance will cover the cost of long-term care expenses. This is simply not

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¹ *Daley v. Sec'y of the Exec. Off. of Health and Hum. Servs.*, 74 N.E.3d 1269, 1272 (Mass. 2017).

² Kate Zernike et al., *In Health Bill's Defeat, Medicaid Comes of Age*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/health/medicaid-obamacare.html> [<https://perma.cc/6UG3-3XBY>]; see also Erica L. Reaves & MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, KAISER FAM. FOUND. 3 (2015), <http://files.kff.org/attachment/report-medicare-and-long-term-services-and-supports-a-primer> ("Institutional settings such as nursing facilities and residential care facilities are the most costly.").

³ *Daley*, 74 N.E.3d. at 1272-73.

⁴ *Genworth Cost of Care Survey 2019 Median Cost Data Tables*, GENWORTH, <https://pro.genworth.com/riiproweb/productinfo/pdf/282102.pdf> (last visited Oct. 3, 2020).

true. Medicare will only cover the first 100 days of institutionalization.⁵ Private health insurance programs do not provide coverage for long-term care costs.⁶ Long-term care insurance policies have become increasingly more difficult and expensive to obtain.⁷ Medicaid has therefore become the de-facto payer source of long-term care.

The Medicaid program has become something of a political hot potato. Congressional debates rage as to whether the program should be limited to providing medical care to only categorically needy individuals or expanded to accommodate individuals seeking to plan to protect their assets from the high costs of long-term nursing home care.⁸ As a result of this political tug of war, the Medicaid statute has been modified several times in an attempt to thwart efforts by individuals to plan to protect their assets from long-term care costs.⁹ Most recently, the Deficit Reduction Act of 2006 (“DRA”) imposed substantial constraints on Medicaid planning, such as the implementation of a five-year lookback period on disqualifying transfers and more stringent transfer penalties.¹⁰

One such area of continued debate concerns Medicaid’s estate recovery program. Estate recovery is a program that permits a state Medicaid agency to recover assets from the estate of a deceased Medicaid recipient after his or her death.¹¹ Federal law mandates that each state implement a basic estate recovery program intended to recoup federal

⁵ Rachel Shannon Brown et al., *Medicare Coverage and Major Medicare-Related Coverage Options for Elders and Persons with Disabilities*, in *ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT IN MASSACHUSETTS*, § 28.3.2(a) (4th ed. 2018).

⁶ See *Daley*, 74 N.E.3d. at 1272.

⁷ See Marc A. Cohen, *The State of Long-Term Care Insurance: The Market, Challenges and Future Innovations*, NAT’L ASS’N OF INS. COMM’RS & CTR. FOR INS. POL’Y & RSCH. 7, 22 (May 2016), https://www.naic.org/documents/cipr_current_study_160519_ltc_insurance.pdf; Educ. & Outreach, *Understanding Long-Term Care Insurance*, AARP, <http://www.aarp.org/health/health-insurance/info-06-2012/understanding-long-term-care-insurance.html> [<https://perma.cc/56MK-DYZ2>] (last updated May 2016).

⁸ *Cohen v. Comm’r of Div. of Med. Assistance*, 668 N.E.2d 769, 771-72 (Mass. 1996).

⁹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 622-29 (codified as amended at 42 U.S.C. § 1396p) [hereinafter OBRA]; Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified as amended at 42 U.S.C. § 1305) [hereinafter DRA].

¹⁰ See DRA §§ 6011, 6016.

¹¹ See K. Gabriel Heiser, *Medicaid Estate Recovery: Long-Term Care Benefits Aren’t Necessarily ‘Free’*, AGINGCARE, <https://www.agingcare.com/articles/medicaid-repayment-of-nursing-home-estate-recovery-150497.htm> [<https://perma.cc/VP55-3XZ4>] (last updated Jan. 17, 2020); Faith Mullen, *Questions and Answers on Medicaid Estate Recovery for Long-Term Care Under OBRA ‘93*, AARP (Sept. 1996), <https://www.aarp.org/health/medicare-insurance/info-1996/aresearch-import-629-D16443.html> [<https://perma.cc/7QX8-EXPJ>].

dollars for the program.¹² The Medicaid statute also provides states with the option to expand their recovery programs beyond the minimum requirements of the federal statute.¹³ For example, states can expand their definition of assets subject to recovery to include both probate and non-probate assets.¹⁴

As a result, there is inconsistency among the states in the implementation of their individual estate recovery programs. Some states, such as California, have limited estate recovery to solely the probate estate of a deceased member.¹⁵ Other states, such as Indiana, have expanded their estate recovery programs to permit recovery against both probate and non-probate assets.¹⁶ And, some states, such as Massachusetts, have implemented aggressive litigation units within their estate recovery programs that seek to expand the state's ability to recoup Medicaid dollars.¹⁷

Estate recovery is controversial. Supporters of the program argue that it returns needed dollars to the Medicaid program.¹⁸ However, estate recovery has mixed financial success. A 2014 report from the Office of Inspector General proved that the amount of assets recovered pales in comparison to federal dollars expended on Medicaid.¹⁹ Estate recovery has also been criticized for perpetuating the cycle of intergenerational poverty by depriving Medicaid recipients of the ability to pass along the family home to needy family members.²⁰

This article will provide an overview of Medicaid's estate recovery program, and highlight some of the key differences in how individual states have chosen to implement their individual programs. Finally, this article will discuss the advantages and disadvantages of the estate recovery program, and opine as to whether its implementation has done more harm than good.

¹² OBRA § 1396p(b).

¹³ *Id.* § 1396p(b)(1)(A)(B).

¹⁴ *Id.* § 1396p(b)(4).

¹⁵ Kristine J. Williams, *The Future of Estate Recovery: An Analysis of Different State Approaches and Changes*, 16 NAELA J. 17, 19 (2020).

¹⁶ *Id.* at 18, 32.

¹⁷ *Id.* at 25.

¹⁸ Rachel Corbett, *Medicaid's Dark Secret*, ATLANTIC (Sept. 23, 2019, 12:45 PM), <https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671> [<https://perma.cc/B9VK-NYTP>].

¹⁹ OFF. INSPECTOR GEN., DEP'T HEALTH & HUM. SERVS., *Report of OBRA and DRA* (July 7, 2014) [hereinafter Report of OBRA and DRA].

²⁰ Corbett, *supra* note 18.

II. OVERVIEW OF MEDICAID ESTATE RECOVERY

Since the implementation of the Medicaid program in 1965, states have been permitted to seek recovery against the estates of deceased individuals as recoupment for Medicaid expenses.²¹ However, a survey determined that as of 1990, only 12 states established Medicaid estate recovery programs.²²

A. Federal Mandate

In 1993, the federal government implemented the Omnibus Budget Reconciliation Act of 1993 (“OBRA”). OBRA implemented a change in the law that now requires every state to implement an estate recovery program.²³ As a result, the Medicaid statute now mandates that the states participating in the Medicaid program implement recovery against that individual’s estate for Medicaid benefits paid on behalf of the individual during his or her lifetime.²⁴ Non-complying states risk losing federal funding for their Medicaid program.

1. *Parameters of Recovery Under the Federal Rule*

The Medicaid statute permits recovery as to two categories of individuals. Recovery is permitted as to Medicaid recipients of any age who are permanently institutionalized in a medical institution, such as a nursing home.²⁵ All expenses incurred by the individual in the nursing home that Medicaid pays for, such as room and board, are recoverable.²⁶ However, Medicaid’s rate of reimbursement to nursing facilities is significantly less than the private pay rate.²⁷

The Medicaid statute also mandates that, as to individuals over age 55, recovery must be sought for “nursing facility services, home and community based services, and related hospital and prescription drug services[.]”²⁸ States are granted leeway under the statute to expand the category of recoverable expenses to “any items or services under the State [Medicaid] plan.”²⁹

²¹ Katie L. Summers, *Medicaid Estate Recovery: To Expand, or Not to Expand, That Is the Question*, 118 PENN. ST. L. REV. 465, 470 (2013).

²² *Id.* at 469.

²³ *Id.* at 468.

²⁴ See OBRA § 1396p(b)(1)(A).

²⁵ *Id.* § 1396p(a)(1)(B).

²⁶ *Id.*

²⁷ Liz Liberman, *Medicaid Reimbursement Rates Draw Attention*, NAT’L INV. CTR. (Mar. 21, 2018, 7:19 AM), <https://www.nic.org/blog/medicaid-reimbursement-rates-draw-attention> [<https://perma.cc/3CBC-EZHB>].

²⁸ OBRA § 1396p(b)(1)(B)(i).

²⁹ *Id.* § 1396p(b)(1)(B)(ii).

Such items and services under this expansive definition can include recoupment for capitated premiums paid to a managed care organization.³⁰ Recovery could also encompass services billed by a managed care organization to the Medicaid agency, such as meals on wheels. Under this expansive definition, the range of potentially recoverable services is so broad that an individual enrolling in community Medicaid would have no true understanding of the breadth of estate recovery.

The Medicaid statute provides that recovery may be implemented against an individual's probate estate.³¹ The statute broadly defines an "estate" as "all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law."³² However, states are permitted to expand their estate recovery programs to allow for recovery against both probate and non-probate assets.³³ This is typically referred to as "expanded estate recovery." Examples of assets potentially recoverable under a state that adopts the expanded definition of estate recovery include joint tenancies in real estate, life estates, living trusts, annuity remainder payments, and life insurance payouts.³⁴

2. *Exceptions to Recovery Under the Federal Rule*

The Federal statute provides very few exceptions to estate recovery. One of these exceptions merely defers the estate recovery claim in the event that the decedent is survived by a spouse, child under age 21, or blind or disabled child of any age.³⁵ States must also develop certain procedures designed to waive estate recovery claims when such recovery would cause undue hardship to the heirs of a deceased Medicaid recipient.³⁶ Implementation of the hardship waivers is a process that is largely left to the individual states. The federal government suggests that waivers be allowed for income producing properties and to estates consisting of a homestead of modest value.³⁷ States can also elect to waive estate

³⁰ *See id.*

³¹ *Id.* § 1396p(b)(1)(C), (4)(A).

³² *Id.* § 1396p(b)(4)(A).

³³ *See id.* § 1396p(b)(4)(B).

³⁴ Specifically, OBRA includes "assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or arrangement." Summers, *supra* note 21, at 481.

³⁵ *Id.* at 472.

³⁶ *Id.* at 473 (citing to OBRA § 1396p(b)(3)(A)).

³⁷ "A homestead of modest value is defined as fifty percent (50%) or less of the average price of homes in the county where the homestead is located as of the date of the beneficiary's death." *Estate Recovery*, S.C. DEP'T HEALTH & HUM. SERVS., <https://www.scdhhs.gov/organizations/estate-recovery> [<https://perma.cc/GY8N-F5QP>].

recovery where it would not be effective, such as when the estate is small or recovery would involve litigation.³⁸

B. State by State Analysis

There is no clear consensus among the states as to the best way to implement estate recovery. Data from a recent survey indicates that “17 states have adopted an expanded definition of estate, one state has a modified expanded definition of the term, 26 states recover from probate estates only, and six states provide for recovery from probate estates with further modifications regarding what is included in the definition of estate.”³⁹ Some states, such as California, have taken steps to roll back their estate recovery programs from the expanded definition of an estate to only permit recovery against probate assets.⁴⁰

Massachusetts’ estate recovery program consistently ranks among the highest in the country for collections, despite the state legislature mandating that recovery is only permissible against a deceased Medicaid recipient’s probate estate.⁴¹ The Massachusetts Medicaid program (“MassHealth”) contracts with a third-party vendor to implement its recovery program, and utilizes litigation as a means to advance claims.⁴² The tactics of the Massachusetts estate recovery program were recently the subject of a lengthy article in *The Atlantic*, which highlighted the story of the heir of a Medicaid recipient engaged in a protracted battle with the state over a large estate recovery claim.⁴³ This article prompted the Massachusetts legislature to propose emergency legislation rolled out during the COVID-19 pandemic to implement a moratorium on the sale of real estate to satisfy estate recovery claims during the pandemic.⁴⁴

III. ARGUMENTS IN FAVOR OF LIMITING MEDICAID ESTATE RECOVERY

The Medicaid estate recovery program was designed to recoup dollars for a federal program that does not have enough money to meet the

³⁸ Summers, *supra* note 21, at 472-73.

³⁹ Williams, *supra* note 15.

⁴⁰ *Id.*

⁴¹ MEDICAID INNOVATION ACCELERATOR PROGRAM, MEDICAID LTSS SPENDING & ESTATE RECOVERIES, FYS 2016-2018, CMS-64 EXPENDITURE REP. (on file with author).

⁴² See Report of OBRA and DRA, *supra* note 19.

⁴³ Corbett, *supra* note 18.

⁴⁴ Press Release, The Gen. Court of the Commonwealth of Mass., Senator Comerford & Representative Barber File Legislation to Temporarily Halt MassHealth Estate Recovery (June 17, 2020) (on file with author).

demands of a rapidly aging senior population. However, nationwide the estate recovery program generates approximately \$500 million for Medicaid, in comparison with the almost \$600 billion spent annually on the Medicaid budget.⁴⁵ In contrast, studies have demonstrated that anxiety and fear over the loss of the family home contribute to depression and hopelessness among elderly and disabled nursing home residents.⁴⁶ Estate recovery wreaks havoc on well-intentioned heirs, who may have resided in the family home for many years caring for an aging parent prior to their nursing home admission.⁴⁷ The program also highlights the gaps between rich and poor, and unfairly disadvantages individuals who are unable to avail themselves of planning to protect their assets. Congress may be better served by diverting federal resources to implement a solution to the pervasive problem of the nation's lack of payment sources for long-term care.

⁴⁵ See Report of OBRA and DRA, *supra* note 19; *NHE Fact Sheet*, CMS (Mar. 24, 2020, 4:14 PM), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet> [<https://perma.cc/2TPD-JQXV>].

⁴⁶ Williams, *supra* note 15, at 20.

⁴⁷ Corbett, *supra* note 18.

