



By Matthew Smith

Wrongful Death/Personal Injury Settlements and Medicaid Estate Recovery, You Can't Take It With You!

At the intersection of Personal Injury, Subrogation, Elder Law, and Probate sits an often misunderstood, and rarely thought about, legal issue known as Medicaid Estate Recovery. At first glance, estate recovery is not on the list of high priorities or even on the radar of most personal injury attorneys. However, a basic understanding of estate recovery is useful for a number of reasons, not the least being, making sure an unexpected bill does not confront your clients when a case is settled.

What is Medicaid Estate Recovery and to whom Does It Apply?

Any person, over the age of 55 who received waiver services, or was in a nursing facility, or in an intermediate care facility for individuals with intellectual disabilities are potentially liable to Medicaid Estate Recovery.¹

People over the age of 65 make up 13 percent of the population of the United States.² Many people know that when you are in a nursing home, and you are not able to afford nursing home care, then it is Medicaid who pays for your stay. In fact, 67 percent³ of the residents of nursing homes in Kentucky are receiving Medicaid. Many also know that when your stay at the nursing home ends, your family receives a letter stating that Medicaid has paid for your stay, and if there are any assets in your estate, you need to pay that amount back. In fact, the Federal government has made it mandatory that each state must have some form of estate recovery program.⁴ While Medicaid is not allowed to put a lien on property while the recipient is still alive, they can keep track of the bill.⁵ What many do not realize, however, is that Kentucky Medicaid has adopted “expanded” estate recovery,⁶ and unlike most creditors, Medicaid is not barred by the six-month period in which to file a claim against your estate.⁷

How Does the Process Work?

Martha is a 78-year-old widow who has been residing at Shady Acres nursing home in Eastern Kentucky for the

past two years. While visiting their sister, Martha, Sam and Tammy, discover that Martha is covered in bedsores and the staff of Shady Acres physically abused her. Sam and Tammy contact your office to discuss a possible personal injury case against Shady Acres. Unfortunately for Martha, she soon passes away but her claim against Shady Acres does not. Sam and Tammy decide to pursue their sister's claim, which means their sister's estate needs to be opened and a personal representative appointed.⁸

After two years of negotiations, depositions, meetings, arguments and traveling, a settlement is finally reached for \$150,000 for Martha's personal injury claim. There was no wrongful death claim. After paying expenses and the attorney's fee, the estate's proceeds are \$75,000.

The Cabinet for Health and Family Services (CHFS) is the Commonwealth of Kentucky's Administrative Agency that oversees Medicaid Long Term Care Services. Soon after Martha's death, a letter came in the mail from CHFS explaining that Martha had passed, gave their condolences, and then promptly furnished a bill for the previous two years of nursing home care. Martha's estate now has a claim from CHFS of \$125,000 for the services she incurred as a long-term care resident at Shady Acres. Not knowing what to do with the letter, Sam and Tammy gave the letter to their attorney who understands statutory liens regarding Medicaid and Medicare, but very little regarding estate recovery. The attorney does due diligence and is sure all Medicaid and Medicare liens relating to the injuries sustained regarding the personal injury claim have been paid. However, not understanding that the Medicaid Estate Recovery claim is different, they assume the issue has been resolved, i.e., Medicaid Lien = All Medicaid claims.

At the time of death, most Medicaid recipients are going to be broke, since the asset limit for an individual is \$2,000. However, the Medicaid recipient's estate still has an interest in any personal injury case brought on behalf of the decedent. This often leads to an initial contact with CHFS stating there was nothing in the Medicaid recipient's estate,

but then not re-notifying CHFS after there is a settlement.

Different States Different Rules

Each state operates its Estate Recovery Program a little differently. Medicaid is a state-run agency so each state has different rules and levels of aggressiveness in regard to pursuing their claims. For instance, Ohio law⁹ requires that a specific form¹⁰ be filed with the Administrator of the Medicaid Estate Recovery Program. Nevada courts ruled that a post death lien could be placed against the spouse of a Medicaid recipient,¹¹ with Idaho in agreement.¹²

A third-party credit collection company handled Kentucky Medicaid Estate Recovery for some time, but in 2010, the program returned to CHFS. The office is very small and, as you

can imagine, very underfunded. With 67 percent of nursing home patients on Medicaid, this is a herculean task even with a fully funded and staffed office. Even though at a disadvantage, it is my experience that Medicaid Estate Recovery is willing to negotiate claim amounts and forthcoming with information as long as one is willing to work from a non-adversarial role.

What is Your Responsibility?

Whether you, as the personal injury attorney, are handling the estate or have hired another attorney to handle the probate portion of this case, what do you do? Do you ignore the Estate Recovery Claim? Do you explain to the client there is the possibility there could be a claim filed against the estate? Do you trust that Medicaid will not aggressively pursue the claim? Do you

let the client know that paying back this claim falls solely on the shoulders of the family of the decedent? Do you tell the client that the chances are very limited that Medicaid will ever find out about the settlement? Do you advise your client that if Medicaid does not file a claim in six months against the estate, their claim is barred?

Before advising your client based on your understanding of how Medicaid liens or most probate cases operate, it is first important to understand how Medicaid Estate Recovery is distinct.

Six Months to File a Claim and Notice

Martha's estate is open and six months have passed. You check with the court clerk and no claim has been filed by CHFS against the estate. Do you

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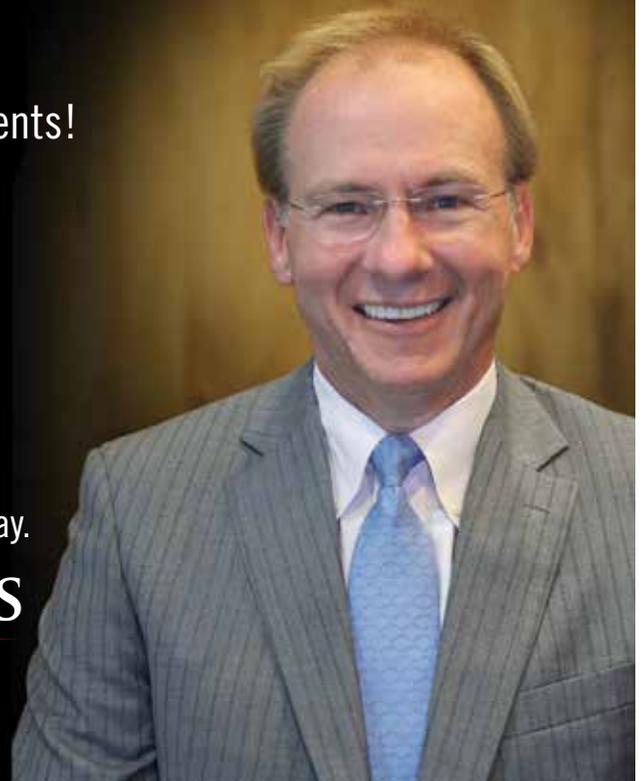
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advise your client that since no claim had been filed, it is okay to disburse the funds from Martha's estate? Not so fast. Upon review of the law regarding presentations of claims against estates:

1. All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, ***the State of Kentucky***, (emphasis added) and any subdivision thereof, whether due or to become due, are barred.¹³

You quickly realize that the CHFS, being the Commonwealth of Kentucky, is not beholden to the six-month time limit for the presentation of claims. It would appear that just because a claim was not filed against the estate does not mean that CHFS' claim is necessarily barred. Therefore, because the claim is not barred by the six-month statutory limit like most other creditors, Medicaid is free to sit back and wait until something comes into the estate.

But what about the notice requirement to the personal representative of the estate regarding the claim? They may not have received a Medicaid Estate Recovery Letter.

What if no claim is filed in District Court against the estate of Martha and the nursing home fails to report to CHFS, or CHFS does not properly send out the Medicaid Estate Recovery Letter to Martha's siblings, or the letter does not get to the proper person? Without notice, there is no way of knowing a debt owed is owed, right? The Kentucky Court of Appeals and the United States Supreme Court, seem to disagree. In quoting *Tulsa Professional Collection Services v Pope*¹⁴ the Kentucky Court of Appeals in *Thompson v Estate of George Lester* wrote:

The United States Supreme Court held that due process requires a representative to make a reasonable effort to determine creditors of an estate and to give them actual, rather than constructive, notice. The major import of the decision is that a representative cannot close his or her eyes to known or ***reasonably ascertainable creditors, publish for claims, and bar those claims based solely on the creditors' failure to see publication***. (emphasis added)¹⁵

Martha had been a resident of Shady Acres for two years and received Medicaid benefits to pay for her stay. If either Sam or Tammy helped Martha with filing the application for Medicaid, they would have been on notice of the Medicaid estate recovery. Within the application for long-term care services, there is a requirement that the applicant shall report all changes in circumstances and income within ten days from the day he or she became aware of the change. However, even if neither Sam nor Tammy helped with the initial Medicaid application, after living in the nursing home for two years, Martha would have at least annually been required to file paperwork with CHFS in order to maintain her benefits. It is reasonable to believe that at some point Sam or Tammy would have been made aware that Martha had been receiving long-term care services from Medicaid, either from CHFS directly or from Shady Acres.

This Does Not Apply to Wrongful Death, or Does It?

Recovery from wrongful death was established by The Kentucky Constitution Section 241 and later

adopted by the Kentucky Revised Statutes¹⁶ declaring that proceeds from a wrongful death action are to be paid directly to the heirs of the claimant, and not to the estate of the decedent. However, what is not often examined is what if the siblings, cousins or nieces of the decedent are bringing the wrongful death action?

If there be no widow, husband, children, mother and father. If none then (e) shall become a part of the *personal estate of the deceased, and after the payment of his debts*¹⁷ (emphasis added) the remainder if any shall pass to his kindred more remote than those above named, according to the law of decent and distribution.¹⁸

Therefore, even in a wrongful death action when there is no spouse, child or parent, the settlement proceeds would be paid to the estate of claimant, and at that time, would be susceptible to Medicaid Estate Recovery. The Kentucky Supreme Court in *Pete v. Anderson*¹⁹ recently affirmed this straightforward interpretation of the wrongful death statute, in which wrongful death proceeds could be distributed to an estate.

Exemptions for Clients

When it appears there is a valid Medicaid Estate Recovery Claim, and that there is going to be a personal injury settlement paid to the estate, your last step is a review of the eligible exemptions and limitations of recovery. Attached to the recovery letter sent to your client regarding Medicaid's claim, will be a form highlighting these exemptions, limitations, and more importantly, the steps for applying for these exemptions. Note that, just because your client qualifies for an exemption, does not mean it is

automatically granted. You still need to apply for approval of the exemption in writing, within 30 days from receipt of the notice from CHFS.²⁰

The most widely used exemptions are those for a surviving spouse or disabled child.

If there is a surviving spouse the estate is exempt from the claim.²¹ If there is a surviving adult child under the age of twenty-one (21), or a child that is blind or disabled as defined by 42 U.S.C. 1382c, the estate is exempt from the claim.²²

The second exemption is for resources protected from consideration during the eligibility determination process period based on payments issued by a long-term care partnership policy.²³ Third is an exemption called the Kentucky Hardship Provision—an

asset subject to recovery is the sole-income producing asset, for example a family farm or business, conveyed to the surviving recipient family member.²⁴ The fourth exemption is for a sole income-producing asset shall not include a residential real property producing income through a lease or rental agreement.²⁵ The fifth exemption is if it is not cost effective for CHFS to recover from the estate. CHFS makes the determination if it is cost effective if the total date of death value of the estate is less than the administrative cost of recovering from the estate or the total amount of the estate is less than \$10,000.²⁶

The final exemption is a catch all stating that on a case-by-case basis, to the extent of the anticipated cost of continuing education or health care needs of an estate heir,²⁷ an exemption

may be granted. (I have never seen this exemption granted.)

With the current administration's focus on Medicaid reform and the budgetary issues facing the commonwealth, it is not outside the realm of possibility that a viable option of recouping state expenditures is to ramp up efforts towards Medicaid estate recovery. What you, as a personal injury attorney need to be cognizant of, is that when someone is in a nursing home and has been receiving Medicaid benefits, there could be a potential Medicaid estate recovery claim and your client's need to be aware of that fact. Also, the claim Medicaid has against the estate is not the same as a statutory Medicaid lien for services provided the decedent that are connected with the damages

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in the personal injury claim. If you are not comfortable with helping your client navigate through the waivers, exemptions, limitations or negotiations with Medicaid estate recovery, then put them in contact with an attorney who has experience dealing with Medicaid.



— Matthew Smith is licensed to practice in the Commonwealth of Kentucky. Matthew received his B.A. from Centre College and his M.B.A from Walden University before eventually going back to school to earn his J.D. from Northern Kentucky Chase College of Law. Matthew opened Campbell & Smith Law, LLC with his law partner in 2014 where his practice focuses on Elder Law, which includes Wills, VA Benefits Planning, Powers of Attorney,

Trusts, Medicaid Planning, Special Needs, Social Security, Guardianship and Probate. Campbell & Smith serves all of Northern, Central, and Eastern Kentucky as well as Southern Ohio.

- 1 Omnibus Budget Reconciliation Act of 1993 (OBRA-93).
- 2 Loraine A. West, Samantha Cole, Daniel Goodkind & Wan He, U.S. Census Bureau, 65+ In the United States; 2010 3 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf>.
- 3 <https://www.kff.org/infographic/medicaid-role-in-nursing-home-care>.
- 4 USC 1396p(b)(1).
- 5 Id.
- 6 907 KAR 1:585(b).
- 7 KRS 396.011(1).
- 8 KRS 411.130 (1).
- 9 R.C. 5162.21.
- 10 [https://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/](https://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/probate_forms/decendentEstate/7_0A.pdf)

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- 11 *State Dep't. Of Human Resources v. Estate of Ullmer, et al.*, 120 Nev. 108, 87 P.3d 1045 (Nev. 2004).
- 12 *Idaho Dep't of Health & Welfare v. Peterson*, 2014 Ida. LEXIS 217 (Aug. 13, 2014).
- 13 KRS 396.011.
- 14 *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565(1988).
- 15 *Thompson v. Estate of Porter* (Ky. App.2011)(2011-CA-001055-MR).
- 16 KRS 411.130.
- 17 Id. at 2(e).
- 18 Id.
- 19 *Pete v. Anderson*, 413 S.W.3d 291, 299 (Ky. 2013).
- 20 907 KAR 1:585 Section 3(3)(b)(1).
- 21 Id. at Section 1(a).
- 22 Id. at Section 1(b).
- 23 Id. at Section 3(2).
- 24 Id. at Section 3(3)(a).
- 25 Id. at Section 3(a)(b)(c)(d).
- 26 Id. at Section 3(4)(b)(1)&(2).
- 27 Id. at Section 5(a).

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