

NC MEDICAID ESTATE AND THIRD PARTY RECOVERY

Presentation to the North Carolina Chapter of the
National Academy of Elder Law Attorneys

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IMPORTANT NOTICE: This presentation and the opinions expressed herein do not constitute a formal opinion of the North Carolina Attorney General's Office.

MEDICAID BACKGROUND

- What is Medicaid?
 - Cooperative federal state program
 - Governed by both federal and state law and regulations
 - Funded jointly by federal and state governments
 - Administered by the states
 - Provides medical assistance to needy individuals
- Who does Medicaid cover?
 - Families with dependent children
 - Blind or disabled individuals
 - Individuals aged 65 and older
 - At this time, NC has not expanded its Medicaid eligibility under the ACA

NC MEDICAID PROGRAM

- Medicaid program administration in NC:
 - **NC Department of Health and Human Services (NC DHHS)** – state agency charged with administration of the Medicaid program in NC.
 - **Division of Medical Assistance (DMA)** – division within NC DHHS that is responsible for the day-to-day operation of the program.
 - **County Departments of Social Services (DSS)** – responsible for Medicaid eligibility determinations.

NC MEDICAID PROGRAM

- Who is involved in NC Medicaid estate and third party recovery?
 - **County Departments of Social Services (DSS)** –
 - As part of eligibility determinations, DSSs document applicants' income and financial resources to verify financial eligibility;
 - Provide Medicaid estate recovery notices to applicants/recipients or their representatives;
 - Notify DMA to open an estate recovery case when a recipient dies.
 - **DMA Third Party Recovery Section ("TPR")** –responsible for overseeing the Medicaid estate and third party recovery programs.
 - **Health Management Systems, Inc. ("HMS")** – a private company contracted by DMA to carry out most day-to-day operations of the Medicaid estate and third party recovery programs.

FEDERAL ESTATE RECOVERY LAW

- Federal Medicaid law contained in section 1917(b) of the Social Security Act requires states to pursue Medicaid estate recovery. 42 U.S.C. §1396p(b).
- Applies to estates of:
 - permanently institutionalized individuals
 - Individuals age 55 or older when they received Medicaid

FEDERAL ESTATE RECOVERY LAW

- At minimum states must seek recovery of payments made for:
 - Nursing facility services
 - Home & community-based services
 - Related hospital and prescription drug services
- Optionally, states may recover for any other Medicaid services (except Medicare cost-sharing payments).

FEDERAL ESTATE RECOVERY LAW

- Recovery not permitted at a time when the recipient is survived by:
 - A spouse
 - A child under age 21
 - A blind or disabled child of any age
- States must have procedures for waiving estate recovery for “undue hardship.”
- Note – the exceptions to recovery in 42 U.S.C. 1396p(b)(2)(B) do not apply in NC because NC does not impose pre-death liens under subsection (a)(1)(B) of the statute.

NC MEDICAID ESTATE RECOVERY PLAN

- **N.C.G.S. § 108A-70.5** – NC's Medicaid estate recovery statute.
- **10A N.C. Admin. Code, Subchapter 21D** – administrative rules for estate recovery
 - Note – some rules have been updated by the NC Medicaid State Plan, Attachment 4.17-A.
- **NC Medicaid State Plan, Attachment 4.17-A** – contains additional/updated guidelines.

NC MEDICAID ESTATE RECOVERY PLAN

- Whose estate is subject to recovery?
 - Permanently institutionalized Medicaid recipients
 - **Medicaid recipients age 55 and older receiving:**
 - Nursing facility services;
 - Home and community-based services;
 - Hospital care;
 - Prescription drugs;
 - Personal care services.

NC MEDICAID ESTATE RECOVERY PLAN

- What assets are subject to recovery?
 - **The Medicaid Recipient's Estate** – “All the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1.” N.C.G.S. § 108A-70.5(b)(2).
 - **Revocable Trusts** – Assets in a revocable trust where the Medicaid recipient is the settlor to the extent that the settlor's probate estate is inadequate to satisfy claims against and costs of the estate. N.C.G.S. § 36C-5-505(a)(3); see also N.C.G.S. § 36C-8-818.

NC MEDICAID ESTATE RECOVERY PLAN

- Status of the Medicaid Estate claim:
 - **Sixth Class Estate Claim** – Medicaid is a sixth-class creditor under N.C.G.S. § 28A-19-6. N.C.G.S. § 108A-70.5(c) and § 28A-19-6(a).
 - Among sixth-class creditors, priority over DMA’s claim is given to “judgments in favor of other sixth-class creditors docketed and in force before the Department seeks recovery.” N.C.G.S. § 108A-70.5(c).
 - Note – Prior to July 1, 2012, Medicaid was a fifth class creditor under N.C.G.S. § 28A-19-6. See N.C. Sess. Laws 2012-18.

NC MEDICAID ESTATE RECOVERY PLAN

- Exceptions to Medicaid Estate Recovery:
 1. Continuous coverage that began prior to October 1, 1994;
 2. Waiver for surviving spouse/qualifying heirs;
 3. Claim amount or estate assets below recovery threshold;
 4. Undue Hardship Waiver.

NC MEDICAID ESTATE RECOVERY PLAN

- Continuous coverage that began prior to October 1, 1994:
 - Coverage must have been continuous;
 - If the beneficiary applied or re-applied after October 1, 1994, this exception will not apply.

NC MEDICAID ESTATE RECOVERY PLAN

- Waiver for surviving spouse/heirs:
 - NC does not seek estate recovery when recipient is survived by:
 - A legal spouse;
 - A child under the age of 21; or
 - A blind or disabled child of any age.
 - Note– to qualify as blind or disabled for purposes of this exemption, the child must meet the criteria in 42 U.S.C. § 1382(c).
 - See 42 U.S.C. § 1396p(b)(1), 10A N.C.A.C. 21D.0101, and NC Medicaid State Plan, Attachment 4.17-A.

NC MEDICAID ESTATE RECOVERY PLAN

- Claim amount or estate assets below recovery threshold:
 - NC waives estate recovery in the following circumstances:
 - When the amount of Medicaid payments for services and benefits subject to recovery is less than \$3,000.
 - When the gross assets of the estate are below \$5,000.
 - Note – waiver for low estate assets is conditional since additional estate assets may be discovered at a later time.
 - See 10A N.C.A.C. 21D.0501 and NC Medicaid State Plan, Attachment 4.17-A.

NC MEDICAID ESTATE RECOVERY PLAN

- Undue Hardship Waiver:
 - NC Admin. Code contains procedures for a surviving heir of a recipient to request a waiver of the Medicaid estate claim. See 10A N.C.A.C. 21D.0502 and .0503 and the NC Medicaid State Plan, Attachment 4.17-A.
 - If DMA denies a waiver request, the heir can appeal to the North Carolina Office of Administrative Hearings (“NC OAH”).
 - A waiver denial is not an estate matter, but instead is an administrative appeal and NC OAH has exclusive jurisdiction over this issue.

NC MEDICAID ESTATE RECOVERY PLAN

- Undue Hardship Waiver Scenarios:
 1. Real or personal property of the estate is the sole source of income for the surviving heir and the surviving heir meets financial criteria.
 2. Recovery would result in forced sale of the residence of surviving heir and the surviving heir meets residency and financial criteria.
- See 10A N.C.A.C. 21D.0502 and .0503 and the NC Medicaid State Plan, Attachment 4.17-A.

NC MEDICAID ESTATE RECOVERY PLAN

- Undue Hardship Waiver Procedures:
 - A claim of undue hardship must be made within 60 days of date of notice of the Medicaid claim.
 - Each claim of undue hardship will be evaluated by DMA within 90 calendar days from the date of receipt. A written decision will be made within 10 calendar days after completing the review.
 - If the heir disagrees with DMA's decision, he may further appeal to the NC OAH within 60 calendar days of the decision.
- See 10A N.C.A.C. 21D.0502 and .0503 and the NC Medicaid State Plan, Attachment 4.17-A.

RECENT NC STATUTORY CHANGES

- 2013 changes to Medicaid estate recovery:
 1. Personal notice to DMA required in estate cases;
 2. DMA has full rights as estate creditor;
 3. Personal notice to DMA required for revocable trusts.
- **These changes were all part of N.C. Sess. Laws 2013-378 and all became effective on October 1, 2013.**

RECENT NC STATUTORY CHANGES

- Personal Notice to DMA Required:
 - N.C.G.S. § 28A-14-1(b) now specifies that the personal representative of the estate of a Medicaid recipient must provide personal notice to DMA of the deadline for filing claims against the estate.
 - The notice required under this section should be addressed as follows:
 - NC Dept. of Health and Human Services
 - Division of Medical Assistance – Third Party Recovery Section
 - 2501 Mail Service Center
 - Raleigh, NC 27699-2501

RECENT NC STATUTORY CHANGES

- DMA Has All Rights Available to Estate Creditors:
 - A provision was added to N.C.G.S. § 108A-70.5(b)(2) stating: “The Department has all rights available to estate creditors, including the right to qualify as personal representative or collector of an estate.”

RECENT NC STATUTORY CHANGES

- Revocable Trusts:
 - New section added to the NC Uniform Trust Code (N.C.G.S. Chapter 36C) requiring the trustee of a revocable trust established by Medicaid recipient to provide notice of the recipient's death to DMA within 90 days of death. N.C.G.S. § 36C-8-818.
 - This provision does not apply to trustees of preneed funeral trusts. N.C.G.S. § 36C-8-818.
 - This provision facilitates Medicaid recovery from revocable trusts under N.C.G.S. § 36C-5-505(a)(3).

PRACTICAL ISSUES INVOLVING MEDICAID ESTATE RECOVERY

- Notice to Creditors:
 - It is important for attorneys to advise their client's that notice to DMA of the deadline for filing claims against a recipient's estate is required.
 - If a recipient's estate is administered without proper notice to DMA or DMA's claim is rejected without notice, DMA may bring an action against the personal representative for breach of fiduciary duty.

PRACTICAL ISSUES INVOLVING MEDICAID ESTATE RECOVERY

- Special Proceedings:
 - In many estate cases involving Medicaid estate recovery, Medicaid is the only creditor of the recipient's estate and real property is the only significant asset.
 - It is often necessary for the PR to file a special proceeding to petition for possession, custody, and control and for authority to sell the real property to create assets.
 - DMA is not a necessary party to these special proceedings under N.C.G.S. § 28A-17-4, but most estate attorneys name and serve DMA and DMA strongly encourages this.

PRACTICAL ISSUES INVOLVING MEDICAID ESTATE RECOVERY

- Public Administrators:
 - When Medicaid is the only creditor of a recipient's estate and real property is the only significant asset, recipient's family members often have little interest or motivation to open an estate.
 - In these circumstances, DMA will request that a public administrator be assigned to administer the estate and pay the Medicaid claim.

FREQUENTLY ASKED QUESTIONS

- Will Medicaid accept ownership of real property in satisfaction of its claim?
 - No, the State is not able to accept ownership of real property in lieu of payment of its estate claim.
- Will DMA negotiate its estate claim?
 - No, because of the joint federal-state nature of Medicaid, DMA is generally not in a position to negotiate the amount of its claim.

MEDICAID THIRD PARTY RECOVERY

- Federal TPR requirements:
 - Federal Medicaid law requires that states seek to recover expenditures for medical services on behalf of recipients from liable third parties. See 42 U.S.C. § 1396k(a)(1)(A) and § 1396a(a)(25)(H).
 - At the same time, the federal law contains an “anti-lien” provisions that limits a state’s ability to seek recovery by imposing a lien against a recipient’s property. 42 U.S.C. § 1396p(a)(1).

The *Ahlborn* Decision

- *Ark. Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006):
 - In this 2006 U.S. Supreme Court case, the Court reconciled the federal TPR requirements with the “anti-lien” provision, holding that while a state is required to seek third party recovery, it is limited to recovering from the portion of a beneficiary's settlement or judgment that represents recovery for medical expenses.

NC THIRD PARTY RECOVERY

- NC has two Medicaid TPR statutes:
 - N.C.G.S. § 108A-57 – provides that the State is subrogated to all of a beneficiary's rights of recovery from liable third parties up to the amount of related medical expenses paid by the State and capped at one-third of the beneficiary's gross recovery.
 - N.C.G.S. § 108A-59 – provides that acceptance of Medicaid constitutes an assignment to the State of a beneficiary's rights to third party benefits.

NC's PRE-2013 TPR STATUTE

- Prior to 2013, the one-third statutory presumption under N.C.G.S. § 108A-57 was conclusive and a beneficiary had no mechanism to challenge the amount of a settlement allocated to satisfy the Medicaid claim.
- In March 2013, the U.S. Supreme Court issued its decision in *Wos v. E.M.A.*, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013), which held that the statutory presumptions in § 108A-57 were preempted by federal law to the extent the statute did not provide such a mechanism.

NC's REVISED TPR STATUTE

- As a result of the *Wos* decision, the General Assembly made significant revisions to N.C.G.S. § 108A-57 in 2013, including the addition of a mechanism for a beneficiary to challenge the statutory presumptions. N.C. Sess. Laws 2013-274.
- The revisions to N.C.G.S. § 108A-57 were signed into law and became effective on July 18, 2013. The law applies to both (1) Medicaid claims that arise on or after that date, and (2) Medicaid claims arising prior to that date for which DHHS has not been paid in full. N.C. Sess. Laws 2013-274, Section 2.

NC's REVISED TPR STATUTE

- The Medicaid Claim – § 108A-57(a)
 - The State is subrogated to the beneficiary's rights of recovery against any person.
 - Medicaid claim definition: “a claim for all medical assistance payments for health care items or services furnished to the medical assistance beneficiary as a result of the injury.”
 - This section also provides that any personal injury or wrongful death claim brought by a beneficiary shall include a Medicaid claim and to the extent it does not, it is deemed to include the claim.

NC's REVISED TPR STATUTE

- Statutory Presumptions –§ 108A-57(a1)
 - The amount of the beneficiary's recovery that represents compensation for the Medicaid claim is presumed to be the lesser of:
 - The total amount paid by DMA on behalf of the beneficiary; or
 - One-third of the beneficiary's gross recovery.

NC's REVISED TPR STATUTE

- Challenging the presumptions – § 108A-57(a2)
 - A beneficiary can apply to court to challenge the statutory presumptions.
 - Must apply within 30 days of the settlement date or court approval of minor settlement.
 - Application must be served on General Counsel for DHHS.
 - If application is filed in an ongoing civil action, DHHS/DMA must be added as a party.

NC's REVISED TPR STATUTE

- The evidentiary hearing – § 108A-57(a2)
 - The court will hold an evidentiary hearing no sooner than 30 days after the filing.
 - The beneficiary must overcome the statutory presumptions by clear and convincing evidence.
 - If the beneficiary meets this burden, then the court has discretion to determine the portion of the recovery that represents compensation for the Medicaid claim.

NC's REVISED TPR STATUTE

- Negotiating the Medicaid claim – § 108A-57(a3)
 - This subsection gives DMA the authority to reach an agreement with the beneficiary regarding the Medicaid claim.
 - Agreement can be reached with DMA either before filing an application for reduction or after an application has already been filed.

NC's REVISED TPR STATUTE

- Deadlines for making payment to DMA – §§ 108A-57(a4) and (a5)
 - The beneficiary or beneficiary's attorney must notify DMA within 30 day of receiving settlement proceeds.
 - The beneficiary or beneficiary's attorney must pay the final claim amount to DMA within 30 days of: (1) expiration of the deadline to file an application; (2) agreement with DMA about the amount to be paid; or (3) judicial determination of the amount to be paid.

RECENT & FUTURE TPR DEVELOPMENTS

- In the Bipartisan Budget Act of 2013 (H.J. Res. 59), section 202, Congress made changes to the federal TPR statutes that effectively supersede the *Ahlborn* and *Wos* decisions by adding an exception to the anti-lien provision for Medicaid third party recovery.
- These changes were set to become effective on October 1, 2014. However, Congress took subsequent action to extend the effective date of these changes until October 1, 2016.
- DMA is monitoring these developments to determine if NC's statute will need to be revised if and when these changes go into effect.

CONTACTS FOR ESTATE/TPR QUESTIONS

- For questions about a particular estate case or a particular TPR case not yet in litigation, contact HMS at (919) 424-2800, or contact:
- Project Manager: Pratrice Partee
 - Direct Phone: (919) 424-2848
 - Email: ppartee@hms.com
- Project Director: Chad Slater
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CONTACTS FOR ESTATE/TPR QUESTIONS

- For general legal questions or for estate or TPR cases already in litigation:

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