

MEDICAID ESTATE RECOVERY

In Alabama

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For many participants, the program that provides health care to millions of low-income Americans isn't free. It's a loan. And the government expects to be repaid.

Rachel Corbett
From *Medicaid's Dark Secret*
The Atlantic, October 2019

THE HIGH COST OF MEDICAID

Medicaid represents \$1 out of every \$6 spent on health care in the U.S. and is the major source of financing for states to provide health coverage for low-income persons and long-term care for Middle and low-income residents.

Medicaid is a huge expense both on the federal and state level. Recognizing that, the government has implemented estate recovery as a recoupment measure for some of those funds.

In 2021 Alabama Medicaid recouped \$8,048,694 (up from \$4,155,514 in 2011). Recovery has significantly increased since 2019.

As early as 1993 the federal government required states to seek recovery from estates of deceased Medicaid recipients, but that law was not stringently enforced until some years later. Recovery has significantly increased since 2019 when state law first *required* estates to put Medicaid on notice to file claims against probate estates.

ESTATE RECOVERY OVERVIEW

Medicaid Estate Recovery is a federally mandated process that requires states to recoup money it spends for certain Medicaid payments. Pursuant to the Omnibus Budget Reconciliation Act of 1993, in order for a state to receive federal assistance for its Medicaid program, it must implement estate recovery.

The program operates differently in the states, subject to required federal standards.

At a minimum, all states must recover what it paid for care from the Medicaid recipient's assets that pass through probate, which is how the system works in Alabama. At a maximum, states have what is referred to as expanded estate recovery rules requiring recovery from any assets the deceased recipient owned at death.

In addition to estate recovery claims against estates, there are liens on individual properties that Medicaid takes while individuals are still alive. Authority to do so is found at 42 U.S.C. § 1396p(b)(1)(B)(i) & (ii). See slide 12.

WHICH MEDICAID BENEFITS ARE SUBJECT TO ESTATE RECOVERY

State Medicaid programs must recover certain Medicaid benefits paid on behalf of a Medicaid enrollee. In Alabama those categories include:

- For individuals age 55 or older, recovery of payments from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services.
- Expenditures for a person of any age who permanently resides in a nursing facility, intermediate care facility for the intellectually disabled or other medical institution (it is debatable that this exceeds federal requirements).
- States have the option, and Alabama has exercised that option, to recover payments for all other Medicaid services provided to persons 55 and older (this would include those on SSI and Medicaid). But there is an exception. Costs incurred for beneficiaries on or after 01/01/10 due to Medicare Savings Program beneficiaries (QMB, SLMB, and QI) cannot be subject to Medicaid Estate Recovery.
- Benefits that were not paid correctly to a person of any age (resulting in what is known as an overpayment).

DEFINING THE ESTATE: WHAT IS IN A PROBATE ESTATE?

A probate estate includes assets titled solely in the name of the decedent that would pass by will or by intestate succession if the decedent did not have a will. This would include the decedent's share of jointly owned assets held as "tenants in common" (without right of survivorship).

Non-probate property includes property that passes by beneficiary designation such as life insurance, an annuity, IRA, 401(k)), payable on death accounts, transfer on death accounts, property held in a trust, joint bank accounts, and jointly owned property in which the deed specifies "right of survivorship."

PROBATE RECOVERY STATES

Alabama

Alaska

Arizona

California

Colorado

Delaware

Florida

Hawaii

Illinois

Louisiana

Maryland

Massachusetts

Michigan

Missouri

Nebraska

New Mexico

New York

North Carolina

Oklahoma

Pennsylvania

Rhode Island

South Carolina

South Dakota

Tennessee

Texas

Vermont

DEFINING THE ESTATE: WHAT IS AN EXPANDED ESTATE?

States may adopt an expanded definition of “estate,” which “may include, at the option of the State . . . , any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement”. 42 U.S.C. § 1396p(b)(4)(B).

For estate recovery with an expanded definition of an estate the agency is able to reach any asset the deceased Medicaid recipient owned at the moment of his or her death.

Example: assets which, under ordinary probate law, would not be part of the Medicaid recipient’s estate, because they would pass immediately to someone else on the recipient’s death. For instance, when two persons hold property in joint tenancy with a right of survivorship and one dies, the deceased joint tenant’s interest ordinarily passes directly to the surviving joint tenant and is not part of the probate estate. Under the optional expanded definition allowed by federal law, for Medicaid recovery purposes the interest of a deceased joint tenant with right of survivorship who had received Medicaid would be included in his estate, rather than passing directly to the surviving joint tenant.

This is a little shocking that Medicaid Estate Recovery has actually changed property rights in some states.

EXPANDED RECOVERY STATES

Arkansas
Connecticut
Georgia
Idaho
Indiana
Iowa
Kansas
Kentucky
Maine
Minnesota
Mississippi

Montana
Nevada
New Hampshire
New Jersey
North Dakota
Ohio
Oregon
Utah
Virginia
Washington
Wisconsin
Wyoming

NURSING HOME PLACEMENT OUT OF STATE

Often Alabama residents are placed in nursing homes in adjoining states, so it is important to know that Florida and Tennessee are probate estate recovery states like Alabama, and Georgia and Mississippi are expanded recovery states.

States vary so drastically in how they define the recoverable estate because it is not as simple as just probate vs. expanded recovery states. Within those categories it may also be modified expanded or probate with modifications. This is why knowing the state law of any location where a potential placement is being considered is so important.

Sometimes a placement across state lines can subject the estate to debt that is not anticipated.

DISTINGUISHING ESTATE RECOVERY FROM TEFRA LIENS GIVEN DURING LIFE

Liens given to Medicaid during lifetime on specific property in order to qualify for benefits are given pursuant to the Tax Equity and Fiscal Responsibility Act (TEFRA). These pre-death liens are known as TEFRA liens.

TEFRA liens are seen in the Institutional Medicaid application process, but Medicaid does not take TEFRA liens from Medicaid Home and Community Based Waiver applicants.

Example: a single person of any age cannot qualify for nursing home Medicaid because he owns a home valued at more than \$2000, and he cannot live there any longer. He will put the property on the market to sell, give a lien to Medicaid to recoup funds it paid for care until it sells, and qualify under the bona fide effort to sell property exclusion. If the property sells during his lifetime, Medicaid is repaid, and any remaining funds are used to pay privately for care until spent down to \$2000 (or a special needs trust is funded with the excess funds). Then the person reapplies for Medicaid. But if that property remains unsold at death, Medicaid can claim against the estate by directly enforcing the TEFRA lien.

Note that a TEFRA lien allows recoupment against specific property for **benefits paid BEFORE or AFTER the age of 55**, whereas **estate recovery is limited to benefits paid after age 55** (or for a person of any age who permanently resides in a nursing facility, intermediate care facility for the intellectually disabled or other medical institution).

LIMITS ON PRE-DEATH LIENS

Generally, a lien is taken by the state when the Medicaid recipient is institutionalized and not expected to return home. If the individual does return home, the lien is removed. A lien is also removed if the home is sold and Medicaid is reimbursed. Selling the home while the recipient is still living, however, will most likely result in Medicaid disqualification for long term care due to “excess” assets (being over Medicaid’s asset limit). In a nutshell, with a lien given, the home may be exempt from Medicaid’s asset limit prior to sale, but when sold, it turns an exempt asset into a countable asset (cash). In some states, a lien may be removed following the death of the Medicaid recipient, while in other states, Medicaid will collect on the lien.

A lien cannot be put on a Medicaid recipient’s home if one of the following relatives lives in it:

- A spouse
- A child under 21 years old
- A disabled or blind child of any age
- A sibling who has an equity interest (ownership) in the home and has lived in it a minimum of one year immediately preceding the Medicaid recipient’s nursing home admittance

STATUTORY LIEN

Medicaid Estate Recovery goes a step further than a TEFRA lien. Without a specific TEFRA lien being given by the property owner on any particular property, Medicaid has a **statutory lien** (a lien created by law) to recover funds from an estate when the Medicaid recipient dies, and this statutory lien is given by the applicant upon filling out the application for benefits.

TOUGH DECISIONS

How often do you hear a person in dire need of care say they don't want to risk losing the home when they die preventing them from being able to leave it to their children? It is a common concern.

By the time someone is looking at either home and community based Medicaid Waiver Services or nursing home Medicaid it is often too late to remove the home from his or her name because of the Medicaid five year look back and transfer penalty.

There may be, however, steps a person can take to make the property more secure. But if no planning techniques can protect the property, then the potential Medicaid recipient must make a decision concerning priorities. What is more important - getting the care he or she needs, or leaving an inheritance for his or her children?

WHERE THE APPLICANT AGREES TO AN ESTATE LIEN

The application for Medicaid is Form 204/205 found here:

https://medicaid.alabama.gov/documents/9.0_Resources/9.4_Forms_Library/9.4.1_Applicant-Recipient_Forms/9.4.1_Form_204-205_EnD_App_1-14-21.pdf

Here is the place on Medicaid's web site that gives a link to a printed blank form or provides a fillable form:

https://medicaid.alabama.gov/content/9.0_Resources/9.4_Forms_Library/9.4.1_Applicant_Forms.aspx

On page 12 of the application Medicaid Recovery is addressed.

Page 12 of the
Medicaid Application

Applicant's Name: _____ SSN: _____

RELEASE OF INFORMATION

- I hereby authorize and give my consent for the Alabama Medicaid Agency to obtain information from any source for the purpose of determining my eligibility for Medicaid benefits. I authorize this release form to be in effect for as long as I am on Medicaid regardless of the date that it is signed. I further authorize copies of this document to be used in place of the original. I give my consent for the release of information for those purposes directly related to the administration of the Medicaid program. These purposes include, but are not limited to, establishing eligibility for benefits, determination of the amount of medical assistance received, the provision of service, and investigation of program violations.

AFFIRMATION AND AGREEMENT

- I understand that as a condition of receiving state medical assistance I shall disclose a description of any interest I or my spouse have in an annuity (or similar financial instrument), regardless of whether the annuity is irrevocable or is treated as an asset.
- I understand that as a condition of receiving state medical assistance the Alabama Medicaid Agency will become a remainder beneficiary on any annuity that I or my spouse purchased or on which we performed certain transactions on or after February 8, 2006.
- I certify under penalty of perjury that I am a citizen or national of the United States, or in satisfactory immigration status.
- I give permission to the Alabama Medicaid Agency to use my social security number to get information about my resources and income from banks, financial institutions, employers, and other county, state and federal agencies, and/or to see if I qualify for assistance or to see if I have insurance.
- I understand that if this application or other information shows that I may be eligible for payments or benefits from other sources, I am required to apply for them.
- I understand that if I am awarded nursing home benefits that part or all of my income must be applied to the nursing home bills directed by the Alabama Medicaid Agency.
- I understand that my case is subject to review by State and Federal Quality Control and that I must cooperate in completing the application process or in any subsequent reviews of my eligibility including reviews resulting from reported changes, recertification, or as a part of a State or Federal Quality Control Review.
- If I am approved for Medicaid, I assign all insurance and medical support benefits to Medicaid. If Medicaid pays my bills, then my insurance or other benefits (such as lawsuit settlements) must be used to pay Medicaid back. I agree to help and cooperate with Medicaid in identifying and collecting this money, or I may lose my Medicaid benefits. I give permission for my insurance company employer, and others to give needed information to Medicaid in order to administer the Medicaid program.
- I understand that resources that have been sold, transferred, disposed of, or given away within the past 5 years from the month of application, may affect eligibility for Medicaid in a medical institution or a Home and Community Based Waiver Program.

RESPONSIBILITIES

- I agree to notify the Medicaid District Office within ten (10) days, if there is a change in my address, living arrangements, family size, income or resources. I agree to notify the district office if I return to work, am discharged from the nursing home, hospital or move from one to the other. I also agree to report any improvement in my medical condition if I am receiving Medicaid benefits because I am blind or disabled and I am not yet 65 years of age.

ESTATE RECOVERY

- I understand that my estate may be subject to recovery of any funds expended by Medicaid pursuant to this application and/or redetermination. My sponsor, relative, or other person who files my estate MUST notify Alabama Medicaid at ATTN: Estate Administration, P.O. Box 5624, Montgomery, Alabama 36103-5624.

FALSE STATEMENTS

- I know that anyone who makes or causes to be made a false statement, misrepresentation or omission of a material fact in an application or for use in determining eligibility for Medicaid commits a crime punishable under Federal or State law or both. I affirm under penalty of perjury that all information I give in this document or in support of it is true.

Does the applicant and/or sponsor/representative accept the terms of the Release of Information, Affirmation and Agreement, Responsibilities, Estate Recovery, and False Statements listed above and agree to notify the Medicaid District Office of any changes?

☐ Yes ☐ No

Signature of Applicant Date

Signature of Spouse Date

Signature of Parent or Sponsor Date

Witness' Signature Date

Witness' Signature Date

I understand that my estate may be subject to recovery of any funds expended by Medicaid pursuant to the application and/or redetermination.

MEDICAID BENEFITS EXEMPT FROM ESTATE RECOVERY

Estate recovery does not apply to the Medicare Savings Programs known as QMB, SLMB and QI1 which are programs that help low income persons eligible for Medicare pay for healthcare costs through Medicaid (single persons with income not exceeding \$1549 and married couples with income not exceeding \$2080 per month). The purpose of this exemption is to avoid discouraging eligible beneficiaries from applying for these programs.

While benefits paid for MSP programs today are not subject to recovery, MSP benefits paid from 1989 – 2009 were recouped in the past.

An exception to this exception is the recoupment of funds paid through Medicare Savings Programs for beneficiaries of First Party Special Needs Trusts.

SEE U.S.C. § 1396p(a)(10)(E) and Medicare Improvements for Patients and Providers Act of 2008 (MIPPA)

DELAYING RECOVERY

States are not allowed to recover:

- During the lifetime of the surviving spouse, regardless to where the surviving spouse lives;
- When there is a surviving child under age 21, or a child who is blind or permanently disabled, regardless to where the child lives;
- In the case of the former home of the recipient, when a sibling has lived in the home for at least 1 year immediately before the deceased Medicaid recipient was institutionalized and has lawfully resided in the home continuously since the date of the recipient's admission (the sibling does NOT have to have an equity interest in the home);
- In the case of the former home of the recipient, when an adult child has lived in the home for at least 2 years immediately prior to the deceased Medicaid recipient being institutionalized who has lived there continuously since that time, and who can establish to that he or she provided care that may have delayed the recipient's admission to the nursing home or other medical institution.

These conditions only delay estate recover until all exemption conditions are no longer present. Some states waive estate recovery in these circumstances, but in Alabama a delay only is implemented.

UNDUE HARDSHIP

Estate recovery can be avoided if recovery would create an “undue hardship” on the surviving family members, as determined by state regulations. 42 U.S.C. § 1396p(b)(3).

The Alabama Medicaid Agency Administrative Code contains the following provision regarding undue hardship:

“The Agency will waive or delay recovery upon a showing that an undue hardship exists. For purposes of this Rule, “Undue Hardship” is defined as the existence of a situation, established by convincing evidence, that the estate subject to recovery is an asset such as a family farm or family business which produces “limited income” (defined as equal to or less than the income limit established in Rule 560-X-25-.14) and is the sole income-producing asset of one or more heirs to the estate.”

The produced income level referenced here is 141% of the federal poverty level (roughly \$1596.82 per month in 2022).

Each heir with an interest in the recipient's estate must apply for a separate undue hardship. If approved, that heir's interest in the estate will be exempt from recovery while any of the remaining heirs that did not apply for an undue hardship or were denied will still be subject to recovery.

A hardship waiver may be filed using the following form:

https://medicaid.alabama.gov/documents/7.0_Providers/7.1_Benefit_Coordination_3rd_Party/7.1.1_Estate_Recovery/7.1.1_Hardship_Waiver_Application.pdf

An undue hardship is not available in the following circumstances:

- For recipients with long term care insurance policies who became Medicaid eligible by virtue of disregarding assets because of payments made by a long term care insurance policy or because of entitlement to receive benefits under a long term care insurance policy;
- If the Agency determines the hardship was created by the recipient by resorting to estate planning methods under which the recipient **illegally** divested assets in order to avoid estate recovery.

In all honesty, I do not know what this means since “estate planning methods” generally imply **legal** divestment of assets.

ESTATE RECOVERY PROCESS

Before 2019 Medicaid would simply send letters to next of kin or legal representatives of the deceased Medicaid recipient to make arrangements for Medicaid payback if any assets remained in the estate of the deceased.

In 2019 Alabama passed a law requiring the personal representative of an estate (either probating a will or administering an estate or filing a small estate summary distribution) to provide notice of the estate filing to the Alabama Medicaid Agency, and this put teeth in the recovery process. Now there is no way to pass an estate without Medicaid being placed on notice to file a claim against the estate.

Notice must be sent to the agency by certified mail or submitted electronically at the following address:

<https://estatenotice.medicaid.alabama.gov/>.

This notice is required for ALL probate actions, even for persons who never drew Medicaid or contemplated applying for Medicaid.

Example: John died in an accident as a young adult, very wealthy and very healthy. Before probating his will or administering his estate, the personal representative of his estate would be required to send a notice of the proceeding to Medicaid.

NOTICE REQUIREMENTS

Alabama Code §43-2-697 sets out the requirements for an effective notice to Medicaid.

The personal representative, or person filing to initiate a proceeding in accordance with the Alabama Small Estates Act, Division 10 of this article, shall give notice of his or her appointment, or the filing of a petition in accordance with [Section 43-2-692](#) (summary distribution of personal property without administration), to the Medicaid Agency. The notice shall include all of the following information:

- (1) The full legal name of the deceased.
- (2) The date of birth of the deceased.
- (3) The date of death of the deceased.
- (4) The Social Security number of the deceased.
- (5) The marital status of the deceased at the time of death.
- (6) The name, address, and phone number of the spouse of the deceased, if applicable.
- (7) The court in which a probate estate has been opened.
- (8) The probate case number.
- (9) The date on which letters testamentary or letters of administration were issued by the probate court.
- (10) The name, address, and phone number of the person giving notice.
- (11) The type of probate proceeding.

The notice must be mailed to the Medicaid Agency, Attn: Estate Notice Office, P.O. Box 5624 Montgomery, AL 36103-5624, or such other address as the commissioner may provide by rule. The notice shall be mailed by United States Postal Service Certified Mail with instructions to forward, return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The return receipt shall be addressed to the probate court in which the estate was filed and shall identify the case number of the case to which the notice pertains. Upon mailing, the personal representative, or person filing to initiate a proceeding shall immediately file with the probate court an affidavit of certified mailing of notice to the Medicaid Agency, along with a copy of the notice sent. The affidavit shall verify that the notice has been mailed by certified mail or by online submission in accordance with the law. The probate court shall enter the return receipt into the case record.

The Medicaid Agency shall respond to the notice by sending one of the following documents to be filed in the probate court:

- (1) A claim
- (2) A waiver of claim
- (3) A statement that no amount is due

The Medicaid Agency shall send a response as soon as practicable, but no later than 30 days after the date of receipt of the notice. The claim is deemed to be waived if the agency has not delivered its response to the probate court within 30 days of receipt of the notice.

PRACTICAL ESTATE CONSIDERATIONS

Before opening an estate (probating a will, administering an estate, or filing for summary distribution) it is important to determine any amount of benefits Medicaid has paid for the deceased person subject to estate recovery. If this information is not known, you risk having an insolvent estate. That means that there is more debt than the estate property is worth, resulting in no recovery for the heirs who are doing the work of getting the estate transferred.

Example: Mary owned her home and lived there with her disabled adult daughter, Sue. Mary's will left the property to her two daughters, Sue and Dorothy. Mary went in the nursing home after age 55 and was awarded Medicaid. The home was excluded because Sue, her disabled daughter continued living there. After Mary died estate recovery was delayed because Sue continued living in the home. When Sue died the house had a value of \$175,000, and Dorothy was ready to probate Mary's will to get the home into her name. Medicaid had paid \$240,000 for Mary's care. There is absolutely no reason for Dorothy to probate Mary's will because the full value of the house will be payable to Medicaid from Mary's estate.

Often family members are not at all aware of estate recovery or that their parent signed a Medicaid application agreeing to estate recovery, for instance when someone applies for Home and Community Based Waiver Services. Family members are often surprised to find out that Medicaid will basically take the value of the house through satisfaction of their relative's debt to Medicaid. Sometimes you see these situations where family members just continue to occupy the property for years because Medicaid does not move to settle the estate even though the agency has the power to do so. Family members can negotiate with Medicaid if they want to purchase the property for less than the estate recovery claim.

Many families just abandon the property if Medicaid liens and estate recovery claims exceed the value of the property in the probate estate.

After three months have passed since the death of the Medicaid recipient, the law allows Medicaid to file to have the estate administered in any county where the deceased owned property. The agency can petition for appointment of a third-party administrator of the estate to recover lien and estate recovery claims, but it must be a third-party administrator because the law prohibits the appointment of any employee of Medicaid as administrator.

AVOIDING ESTATE RECOVERY

Medicaid's eligibility requirements generally do a sufficient job of avoiding estate recovery for a single person. Any property he or she owned probably had to be sold at the time of application, and assets spent down to \$2000, so it is seldom that the Medicaid recipient will have anything left in his or her probate estate. However, sometimes property will be left because it was excluded due to an intent to return home or due to a bona fide effort to sell the property, and it did not sell prior to the Medicaid recipient's death.

If money is left in a first party special needs trust (SNT) with a Medicaid pay back provision, the agency can recoup that money up to the amount it paid for the Medicaid recipient's care. Also the agency is due a pay back of any funds remaining in a Medicaid Qualifying Income Trust (MQIT). Note that if funds are recouped from a MQIT or SNT the estate recovery claim should be reduced by any amounts paid from the trusts, with the balance of debt filed as a probate claim, if anything remains in the probate estate.

Estate recovery is more likely to occur in cases of married couples. For this reason it is important to plan for this and take action to limit the impact of estate recovery. This might include:

- Retitling the home to the community spouse so it is not in the estate of the Medicaid recipient if the spouse dies first (do this before institutionalization). Note that there is no penalty for transfers between spouses.
- Drafting a new will for the community spouse leaving only the marital share to the Medicaid recipient (\$15,500 for homestead exemption + \$15,500 for family allowance + \$7750 for personal property exemption = \$38,750 routed into the estate from a separate bank account naming the community spouse's estate as the beneficiary or leaving with no beneficiary so that it is payable to the community spouse's estate). This will permit the community spouse to satisfy the Medicaid required marital claims against the estate and leave the home to the person of his or her choice.
- Have the community spouse change beneficiary designations from the Medicaid recipient to someone else.
- Selling the property that would otherwise land in the Medicaid recipient's probate estate for the tax assessor's appraised value.

NOTICE FROM ESTATE RECOVERY CONTRACTOR

Alabama has an estate recovery contractor who will send a letter to the sponsor when the Medicaid recipient dies demanding payment and providing deadlines to apply for undue hardship and estate recovery delay.

Whomever receives the letter should not send money without getting legal advice because it is important to determine what is and what is not in the probate estate and subject to recovery. For instance, joint accounts are not subject to estate recovery, but the person who received the letter may not know this.

The relative receiving the letter should realize that he or she is not personally responsible for the recovery demanded. Only the probate estate of the former Medicaid recipient is responsible for the debt.

The estate recovery contractor works on a contingency basis, meaning that company is paid based on how much it recovers, so there is an incentive to lead the relative to believe that non-probate property is recoverable.

BE CAREFUL ABOUT OUT OF STATE MEDICAID CLAIMS

Keep in mind that there may be estate recovery claims from other states. If that is the case, it will be necessary to obtain the opinion of an attorney from that other state. If there is any property that has escaped estate recovery in Alabama, unsatisfied debt from another state could cloud the title to the property in the future. In other words, when the personal representative is required to notify all known creditors, shouldn't he or she be under a duty to realize that Medicaid in another state is or may be, in fact, a creditor (or, at least, shouldn't his or her attorney know this)?

Be sure to get advice if you are in doubt concerning the applicability of estate recovery when a Medicaid recipient passes.