



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

March 9, 1995

Ms. DeAnn Friedholm  
Interim Commissioner  
Texas Health and Human Services  
Commission  
P.O. Box 13247  
Austin, Texas 78711

Letter Opinion No. 95-005

Re: Whether the Texas Health and Human Services Commission has statutory authority to pursue Medicaid estate recoveries in accordance with 42 U.S.C. section 1396p(b)(1) (RQ-697)

Dear Commissioner Friedholm:

You have asked whether the Texas Health and Human Services Commission (the "commission") is authorized to pursue "Medicaid estate recoveries" in accordance with the requirements of section 1917p(b)(1) of the Social Security Act, codified as 42 U.S.C. § 1396p(b)(1). The letter requesting advice states as follows:

This question is prompted by recent changes in federal law which affect the administration of federally funded medical assistance programs. In August of 1993, Congress enacted the Omnibus Budget and Reconciliation Act of 1993 (OBRA 1993). P.L. 103-66, 107 Stat. 312 (1993). Among other things, OBRA 1993 enacted several sweeping changes in the administration of federal medical assistance programs by the states under Title XIX of the federal Social Security Act. *One of these changes mandates that the states pursue what are known as "Medicaid estate recoveries."* [Emphasis added.]

You do not ask whether the federal requirements apply, since Texas must pursue Medicaid estate recoveries in order to comply with OBRA 1993 and Medicaid laws and regulations. Rather, the only question we are asked is whether the commission presently has statutory authority to do so, or whether legislation expressly authorizing Medicaid estate recoveries must be adopted during this legislative session.

The request letter proposes two possible answers to its inquiry:

1. The Health and Human Services Commission already has implied statutory authority to pursue Medicaid estate recoveries and must start doing so now.
2. The Health and Human Services Commission does not have statutory authority to pursue Medicaid estate recoveries and the

legislature must act to give it such authority by the delayed compliance date.<sup>1</sup>

For the reasons set out below, we believe that your second proposed answer is correct. To put your question in its proper context, we believe a brief explanation of the Medicaid program and the requirements of OBRA 1993 is appropriate. The Medicaid program, established under title XIX of the Social Security Act, provides for federal funding to assist states in furnishing medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient for the cost of necessary medical services. 42 U.S.C. § 1396. As a condition of participating in the Medicaid program and receiving federal assistance, a state must comply with the requirements of federal law. *See Thomas v. Johnston*, 557 F. Supp. 879, 919 (W.D. Tex. 1983). *See also* Hum. Res. Code § 32.002 (rendering inoperative provisions of chapter 32, Human Resources Code, that conflict with federal law to the extent that federal matching money is not available to the state).

Prior to the adoption of OBRA 1993, the Social Security Act authorized, but did not require, states to pursue recovery from an individual's estate of expenditures under the Medicaid program made on behalf of the individual. Before it was amended in August of 1993, section 1917p(b)(1) of the Social Security Act, codified as 42 U.S.C. § 1396p(b)(1), provided as follows:

No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan<sup>2</sup> may be made, except--

(A) the case of an individual described in subsection (a)(1)(B) on this section,<sup>3</sup> from his estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of such individual, and

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<sup>1</sup>A state subject to the delayed compliance date must submit a letter of explanation to the Health Care Financing Administration, a division of the United States Department of Health and Human Services. Dallas Regional Medical Services Letter No. 94-02 (from Jann Caldwell, Health Care Financing Administration Regional Office VI, to State Agencies Administering Approved Medical Assistance (February 23, 1994)).

<sup>2</sup>Each state that participates in federally funded medical assistance programs is required to adopt a state plan for medical assistance and file it with the Secretary of Health and Human Services. 42 U.S.C. § 1396a.

<sup>3</sup>Subsection (a)(1)(B) of 42 U.S.C. § 1396p describes an individual who is permanently institutionalized in a facility that is authorized to provide medical services that are reimbursable under the Medicaid program.

(B) the case of an individual who was 65 years of age or older when he received such assistance, from his estate. [Footnote added.]

As amended by section 13612 of OBRA 1993, 42 U.S.C. §1396p(b)(1) now *requires* states to pursue Medicaid estate recoveries in certain cases:

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, *except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:*

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when he received such assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of --

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

42 U.S.C. § 1396p(b)(1) (emphasis added).

Section 1396p(b), as amended, in essence mandates that any state that participates in Medicare must seek recovery for medical assistance received by one of the described individuals from the individual's estate or upon sale of his or her property subject to a lien imposed on account of medical assistance provided. Homestead property, ordinarily protected by article XVI, section 50 of the Texas Constitution from forced sale to pay debts, would be subject to a Medicaid estate recovery. See 42 C.F.R. § 433.36 (homestead is included in property subject to a lien under 42 U.S.C. §1396p(b)(1)).

Section 1396p(b)(1) applies to payments made to the states under title XIX of the Social Security Act beginning on or after October 1, 1993, unless state legislation is required to meet the additional requirements imposed by the amendments. In that case, the compliance date is delayed to allow time for action by the first regular session of the state legislature that begins after the August 1993 effective date of the amendment. The

compliance date will then be the first day of the first calendar quarter beginning after the end of the legislative session. In Texas, this date will be July 1, 1995. See Tex. Const. art. III, §§ 5, 24; Gov't Code § 301.001 (starting date and length of regular sessions of legislature).

In our opinion, the Health and Human Services Commission may not pursue Medicaid estate recoveries in the absence of express statutory authority. Prior legislative action on this subject convinces us that the commission does not presently have authority, either express or implied. The legislature adopted a statute permitting Medicaid estate recoveries in 1987, but repealed it at the next session.

The 1987 legislation provided as follows:

(a) Medical assistance payments made under this chapter<sup>4</sup> constitute a claim and lien against the property and estate belonging to the recipient of the medical assistance.

(b) The department [of Human Services]<sup>5</sup> may enforce the claim or lien established under this section only on the death of the recipient of medical assistance. However, the department may not enforce the claim or lien if the recipient has a surviving spouse or a surviving dependent or disabled child.

(c) The department shall adopt rules governing the recovery of medical assistance payments through the enforcement of the claims or liens established under this section.

Act of June 1, 1987, 70th Leg., R.S., ch. 1052, § 2.05, 1987 Tex. Gen. Laws 3546, 3559 (adding former Human Resources Code § 32.0331). Enforcement of the liens created by this statute was permissive, not mandatory.

The next session of the legislature repealed former section 32.0331 of the Human Resources by adopting the following bill:

**SECTION 1. Section 32.0331, Human Resources Code is repealed.**

**SECTION 2. The Texas Department of Human Services may not enforce a claim or lien established before the effective date of this Act under Section 32.0331, Human Resources Code.**

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<sup>4</sup>"[T]his chapter" is Chapter 32 of the Human Resources Code, which applies to federally funded medical assistance programs.

<sup>5</sup>The Department of Human Services and several other health and human services agencies have been placed under the Health and Human Services Commission. V.T.C.S. art. 4413(502) §§ 2, 19.

Act of May 12, 1989, 71st Leg., R.S., ch. 180, §§ 1-2 1989 Tex. Gen. Laws 819.

Thus, the legislature repealed the permissive authority to recover Medicaid expenditures from the recipients of benefits that it had previously granted the Department of Human Services. *See generally State v. Jackson*, 376 S.W.2d 341 (Tex. 1964) (legislature may withdraw from a state agency powers previously delegated to it). The second section of this bill prohibits the Department of Human Services from pursuing any Medicaid estate recoveries.<sup>6</sup> The repealer as a whole reveals the legislature's intent that the department not seek recovery for Medicaid expenditures from the property or estate of recipients. It is the duty of the courts, and of this office as well, to give full recognition to the legislative intent. *Minton v. Frank*, 545 S.W.2d 442 (Tex. 1976).

Accordingly, the Health and Human Services Commission does not at present have authority to pursue Medicaid estate recoveries. Legislation that is consistent with 42 U.S.C. §1396p(b)(1) and regulations adopted under that provision must be enacted<sup>7</sup> if the commission is to comply with the requirement of the federal Medicaid program and the State of Texas is to continue its participation in that program. A Texas statute authorizing Medicaid estate recoveries may of course include any exceptions to the recovery requirement permitted by federal statutes or regulations.

The leadership of this state has felt strongly about this issue, because of the great public interest in protecting the sanctity of the homestead. Article XVI, section 50 of the Texas Constitution, and article XVI, section 51, which describes the extent of the homestead, "establish the family home or place of business as an enclave exempted from the reach of most creditors." *United States v. Rodgers*, 461 U.S. 677 (1983). Because of the importance of the homestead exemption, Texas state officials sought an exemption for the state from the federal provision requiring Medicaid recoveries. Michelle Kay, *State seeks Medicaid plan exemption*, AUSTIN AMERICAN STATESMAN, Aug. 17, 1994, at B1, B6. We have been advised that Texas has not secured and is unlikely to secure an exception from the estate recovery requirement. For that reason, we have no choice but to now conclude that the legislature must act during the current legislative session to

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<sup>6</sup>You point out in your request letter that section 322 of the Probate Code, which states priority for payment of claims against an estate of a decedent, includes "[c]laims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent." This provision was adopted by the same bill that adopted former section 32.0331 of the Human Resources Code, Act of June 1, 1987, 70th Leg., R.S., ch. 1052, § 2.07, 1987 Tex. Gen. Laws 3546, 3560, and has not been repealed. You suggest that section 322 of the Probate Code may be a source of implied authority for the Commission of Health and Human Resources to engage in Medicaid estate recoveries. In view of the express statutory prohibition against the Commission's enforcement of claims or liens under former section 32.0331 of the Human Resources Code, we cannot agree that section 322 of the Probate Code may be a source of such implied authority.

<sup>7</sup>A bill adopted by a two-thirds majority as an emergency measure will meet a July 1, 1995 deadline. *See Tex. Const. art. III, § 39 (effective date of laws)*.

authorize the pursuit of Medicaid estate recoveries. If it does not, the state's noncompliance with the federal statute and regulations will in all likelihood preclude the state's participation in the Medicaid program and the eligibility of its people to continue receiving the benefits of that program.

**SUMMARY**

The Texas Health and Human Services Commission does not have authority to pursue "Medicaid estate recoveries" in accordance with 42 U.S.C. §1396p(b)(1). Legislation that is consistent with 42 U.S.C. § 1396p(b)(1) and regulations adopted under that provision must be in effect by July 1, 1995, if the commission is to comply with requirements of the federal Medicaid program.

Yours very truly,

A handwritten signature in black ink, appearing to read "Jorge Vega", is written over a faint, illegible typed name.

**JORGE VEGA**  
First Assistant Attorney General