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Opinion Committee

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

RICHARD C. LADD
COMMISSIONER

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SJS

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RQ-697

The Honorable Dan Morales
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Dear General Morales:

On behalf of the Texas Health and Human Services Commission, I request your opinion pursuant to section 442.042 of the Government Code on the following question:

Does the Texas Health and Human Services Commission have sufficient statutory authority to pursue Medicaid estate recoveries in accordance with section 1917p(b)(1) of the Social Security Act in the absence of state law establishing a debt in favor of the state?

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."

The remainder of this letter describes the legal issues we believe must be addressed prior to the initiation of medicaid estate recoveries by the state. We begin with a brief description of the state of the law prior to the enactment of OBRA 1993.

Medicaid Estate Recovery Prior to OBRA 1993.

Prior to OBRA 1993, the Social Security Act authorized, but did not require, states to pursue recovery of medical costs paid through the Medicaid program from the estates of certain individuals. As codified prior to OBRA 1993, section 1917p(b)(1) of the Social Security Act provided as follows:

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No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan¹ may be made, except —

(A) in the case of an individual described in subsection (a)(1)(B),² 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

(B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate.

42 U.S.C. § 1396p(b)(1).

Medicaid Estate Recovery Mandate in OBRA 1993

As amended by section 13612 of OBRA 1993, section 1917(b)(1) of the Social Security Act now *requires* states to pursue recovery of certain Medicaid costs from the estates of certain Medicaid recipients and establish procedures for waiving recovery in cases of undue hardship. P.L. 103-66, § 13612, 107 Stat. 627 (1993). Section 1917(b)(1) now provides as follows:

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

¹The "State plan" is the state plan for medical assistance (or "state Medicaid plan") each state is required to adopt and file with the Secretary of Health and Human Services under section 1902 of the Social Security Act, 42 U.S.C. § 1396a.

²Subsection (a)(1)(B) of section 1917 describes an individual who is permanently institutionalized in a facility which is authorized to provide medical services that are reimbursable under the Medicaid program. Such an individual is described as one

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home

42 U.S.C. § 1396p(a)(1)(B)(i) and (ii).

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), *the State shall seek adjustment or recovery from the individual's estate or upon sale of property subject to a lien³ 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 the individual received such medical 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).

Implementation of Medicaid Estate Recovery Mandate

The changes made by section 13612 are applicable to payments made to the states under Title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, unless delayed in accordance with the following provision:

(B) In the case of a State plan for medical assistance under Title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order to meet the additional requirements imposed by the amendments made to this section the State plan shall not be regarded as failing to comply with the requirements imposed by such amendments solely on the basis of its failure to

³Section 1917 of the Social Security Act gives states the option to impose liens on the property of individuals receiving medical assistance under certain circumstances. Texas has no statute authorizing such liens. *But see* Hum. Res. Code § 32.0331 (repealed in 1989, authorizing the state to place liens on property to recover costs of medical assistance provided by the state).

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meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the preceding sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

In a letter dated February 23, 1994, the Dallas Regional Office of the Health Care Financing Administration⁴ informed state agencies administering approved Medicaid programs of the date for compliance with the OBRA 1993 estate recovery mandate and the delay available to states that require legislative action. The letter advises state agencies that in order to obtain a delay in compliance, a state must submit a letter of explanation regarding the necessity of legislative action from the state attorney general. Letter from Jann Caldwell, Health Insurance Specialist, Health Care Financing Administration Regional Office VI, to State Agencies Administering Approved Medical Assistance (Feb. 23, 1994) (copy attached).

In accordance with this directive, we are requesting your official opinion on whether current state law is sufficient to authorize Texas to pursue Medicaid estate recoveries in the absence of state law establishing a debt in favor of the state.

Administration of Medical Assistance Program in Texas

The Texas medical assistance program is administered by the Texas Health and Human Services Commission (HHSC) pursuant to section 16 of article 4413(502), V.T.C.S., chapter 32 of the Human Resources Code, and rules adopted pursuant to the authority granted in section 32.021 of the Human Resources Code.

HHSC, like all Texas state agencies, is purely a creature of statute that may exercise only such authority as is specifically conferred by law or necessarily implied from specific grants of authority. *Tex. Dept. of Human Services v. ARA Living Centers of Texas*, 833 S.W.2d 689 (Tex. App.-Austin 1992, writ denied) (citing *Sexton v. Mt. Olivet Cemetery Ass'n*, 720 S.W.2d 129 (Tex. App.-Austin 1986, writ ref'd n.r.e.)). Chapter 32 of the Human Resources Code does not expressly authorize HHSC to pursue Medicaid estate recoveries. Thus, the initial issue is whether HHSC possesses implied authority to comply with the Medicaid estate recovery mandate of OBRA 1993.

⁴The Health Care Financing Administration (HCFA) is a division of the United States Department of Health and Human Services.

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Section 32.002 of the Human Resources Code requires that chapter 32 be liberally construed and applied in relation to federal laws and regulations to ensure that

adequate and high quality health care may be made available to all children and adults who need the care and are not financially able to pay for it.

It also states that provisions of chapter 32 in conflict with the Social Security Act or other federal law are inoperative to the extent of conflict.

Section 22.002 of the Human Resources Code generally describes the authority of the Texas Department of Human Services (TDHS), the state agency formerly responsible for administering the state medical assistance program. The provisions of this statute applicable to the state medical assistance program are applicable to HHSC, the successor to TDHS's duties and authority. Subsection (d) of that section provides that if the department determines that a provision of state law conflicts with federal law, the department may promulgate rules and policies necessary to allow the state to receive and use the greatest amount of federal matching funds in accordance with federal law, Title 2 of the Human Resources Code, the Texas Constitution, and appropriated funds. Subsection (c) states in part that "[n]otwithstanding any other law, the department may extend the scope of its programs to the extent necessary to ensure that federal matching funds are available." Hum. Res. Code § 22.002(c).

Section 32.021(c) of the Human Resources Code authorizes HHSC to "establish methods of administration and adopt necessary rules for the proper and efficient operation of the [medical assistance] program."

Although no provision of chapter 32 appears to conflict with section 13612 of OBRA 1993, it may be argued that these provisions, taken together, are sufficient to authorize HHSC to implement the estate recovery mandate by rule.

Necessity of Legislation Authorizing HHSC to Pursue Medicaid Estate Recoveries

It is a general rule that the state may initiate a suit in state court regardless of statutory permission. *State v. Thompson*, 64 Tex. 690 (1885). However, where such action by necessity must be initiated by administrative action, the need for specific enabling legislation seems manifest. This is particularly true with regard to the state medical assistance program.

It can be argued on the basis of prior enactments that the state may recover costs of the medical assistance program only in accordance with express state law.⁵ For example, in 1987 the legislature enacted section 32.0331 of the Human Resources Code, which authorized the state to place liens on the property of Medicaid recipients to recover costs of medical care provided under the state plan. As enacted, section 32.0331 provided as follows:

Sec. 32.0331. MEDICAL ASSISTANCE LIENS. (a) *Medical assistance payments made under this chapter constitute a claim and lien against the property and estate belonging to the recipient of the medical assistance.*

(b) The department 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. [Emphasis added.]

The legislature repealed this provision in 1989. Acts 1989, 71st Leg., ch. 180, § 1, at 819. The clear purpose of this act was to remove any authority TDHS (the agency then responsible for administering the state Medicaid program) possessed to enforce Medicaid liens. *See id.* § 2 (prohibiting TDHS from enforcing liens against estates established prior to repeal of section 32.0331). However, the legislature's failure to repeal a related provision, section 322 of the Probate Code, may indicate the legislature's belief that HHSC possesses sufficient statutory authority to pursue estate recoveries in the absence of express law conferring such authority. Section 322 is discussed below.

An additional example is found in subsections (d) through (g) of section 32.021 of the Human Resources Code. These provisions were enacted following the initiation of the administrative action that led to the decision in *TDHS v. ARA Living Centers, supra*, but prior to the rendition of the court's opinion and expressly authorize TDHS to pursue civil monetary penalties against nursing facility providers.

Finally, in section 32.033 of the Human Resources Code the legislature created a distinct and separate cause of action in favor of the state for subrogation of a Medicaid applicant's or recipient's right of recovery from third parties and other sources. The state's right of recovery

⁵Compare Attorney General Opinion JM-1174 (1990) (no additional state legislation required to extend Medicaid coverage to certain children under age 6).

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is limited to the cost of medical care services paid by the state. Hum. Res. Code § 32.033(e).
See also 40 T.A.C. §§ 45.501-45.504.

Necessity of State Legislation Creating a Debt in Favor of the State

Former section 32.0331 is significant for an additional reason. As the language highlighted above establishes, the legislature specifically made medical assistance provided to a decedent a claim against the decedent's estate. With the repeal of section 32.00331, there is no provision of state law which characterizes medical assistance payments as either a personal debt of a Medicaid recipient or a debt of that person's estate.

In the absence of a state law characterizing medical assistance as a personal debt of the beneficiary or a claim against the beneficiary's estate, it is unclear whether or to what degree an estate may be held liable for such costs. Section 37 of the Texas Probate Code establishes the order of distribution of an estate under a will or on intestacy. It provides that title to an estate passes to devisees or legatees under a will or to an intestate's heirs at law,

subject, however, to payment of debts of the testator or intestate, except such as is exempted by law, and subject to the payment of court-ordered child support payments that are delinquent on the date of the person's death.

Probate Code § 37.

Under the Medicaid regulatory scheme, payments for medical services provided to eligible recipients are paid directly to medical and health care providers under a contract with the state. *See, e.g.,* 40 T.A.C. § 29.1101. No payments are ever made directly to a Medicaid beneficiary. Recipients of medical assistance are liable to the state only for costs paid during periods of ineligibility, and recipients are not liable for additional medical costs that are not paid under the state plan. *See* 42 C.F.R. §§ 431.230(b); 447.15. *See also Banks v. Secretary of Indiana Family & Social Services*, 997 F.2d 231 (7th Cir. 1993). Thus, medical assistance payments could not be classified as debts of the beneficiary of those payments.

Section 322 of the Probate Code, mentioned earlier, may establish such liability. This provision establishes the order of priority for satisfaction of claims against an estate. It provides the following in pertinent part:

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Claims⁶ against an estate of a decedent shall be classified and have priority of payment, as follows:

. . . .

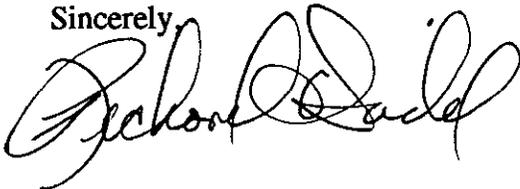
Class 6. *Claims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent.*

. . . . [Emphasis added.]

This provision was enacted in conjunction with former section 32.0331 of the Human Resources Code, which specifically designated medical assistance payments as a claim against an estate. The legislature's failure to repeal section 322 with section 32.0331 of the Human Resources Code suggests that the legislature may have intended for the state to reserve, without further legislation, authority to recover costs of medical assistance should future federal enactments require recovery.

In view of the foregoing, we respectfully request your opinion on whether the state may pursue Medicaid estate recoveries in compliance with section 13612 of OBRA 1993 in the absence of specific legislation establishing a debt in favor of the state against the estate of a Medicaid beneficiary.

Sincerely,



Richard C. Ladd

Enclosure

⁶"Claims" is defined in the Probate Code to mean

liabilities of a decedent which survive, including taxes, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration, estate and inheritance taxes, and debts due such estates.

Probate Code § 3(c).