

# Title Company Reverses Policy on Medicaid Claims

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section, October 27, 2009.

The Texas Medicaid Estate Recovery Program (MERP) has statutory authority to file a claim in probate court against the estates of deceased Medicaid recipients who received certain long-term-care services (including nursing home care) paid by Medicaid after age 55, and whose initial application for such services was filed on or after March 1, 2005.

Usually such a claim is against the homestead, which often is the most valuable asset belonging to the decedent.

Unlike some states, the Texas Medicaid program does not use property liens as an instrument of estate recovery, so the Medicaid claim is an unsecured one.

Moreover, there are many situations where the heirs/legatees successfully may press for an exemption from the Medicaid claim based on undue hardship, or Medicaid may drop the claim altogether because pursuing it would not be cost-effective.

The Chicago Tile Co. is a large real estate title company operating in many areas of the state of Texas. Recently, this company issued an underwriting bulletin instructing its agents that in certain situations where the decedent's home is sold, the MERP claim should be paid at that time, even before going through probate. Specifically, if the Medicaid program asserts its intent to file a claim, then the agents were instructed to pay the claim directly to MERP from the proceeds of the sale.

The problem with the above instruction is that it usurps the role of the executor/administrator of the estate, as well as the rights of creditors (other than Medicaid) whose claims may have a much higher priority under the law. Clearly, these other creditors have a right to assert their claims in court.

The Texas Probate Code assigns a "Class 7" status to the Medicaid claim. This means that claims for all of the following take priority over the Medicaid claim:

- (1) Funeral costs and expenses related to the decedent's final illness;
- (2) Expenses of administering the estate;
- (3) Secured claims (e.g., tax liens);
- (4) Delinquent child support;
- (5) Taxes; and
- (6) The costs of confinement by the Texas Department of Criminal Justice.

Indeed, the only claim over which the Medicaid claim takes priority is credit card debts.

So despite Medicaid's low-priority claim, Chicago Title was instructing its agents to pay the MERP claim up front.

This instruction not only violated the rights of other creditors, but also of the heirs/legatees to seek an exemption from the estate recovery claim based on undue hardship or other reasons.

In effect, Chicago Title was setting itself up as probate judge and executor/administrator of the decedent's estate - an open invitation for lawsuits. When contacted, Texas Medicaid program officials stated that they had nothing to do with the instruction issued by Chicago Title and the company acted independently of the Medicaid program in issuing its instruction.

On June 5, 2009, four elder law attorneys, sent a complaint letter to Chicago Title pointing out the errors in that company's underwriting bulletin dated March 5, 2008.

As a result of this letter, on June 17, 2009, Chicago Title officially withdrew its instruction to agents regarding the inappropriate payment of Medicaid estate recovery claims.

The above situation illustrates the complexity of laws pertaining to Medicaid, on which so many elderly people depend to help pay their nursing home costs.

Chicago Title failed to take account of how Medicaid law and regulations interface with other laws; in this case probate law. This points out the wisdom of contacting an experienced elder law attorney on all matters pertaining to Medicaid.