

No. A05-2346

---

STATE OF MINNESOTA

IN COURT OF APPEALS

---

In Re

Estate of Francis E. Barg  
a/k/a Francis Edward Barg

---

**MINNESOTA DEPARTMENT OF HUMAN SERVICES'  
AMICUS CURIAE BRIEF**

---

MIKE HATCH  
Attorney General

ROBIN CHRISTOPHER VUE-BENSON  
Assistant Attorney General  
Atty. Reg. No. 033408X  
445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127  
(651) 296-8714 (Voice)

ATTORNEYS FOR AMICUS  
CURIAE COMMISSIONER OF THE  
MINNESOTA DEPARTMENT OF  
HUMAN SERVICES

JANICE S. KOLB  
Mille Lacs County Attorney

DAWN R. NYHUS  
Assistant Mille Lacs County Attorney  
Atty. Reg. No. 0329733  
Courthouse Square  
535 2<sup>nd</sup> Street Southeast  
Milaca, MN 56353

ATTORNEYS FOR APPELLANT

---

THOMAS J. MEINZ  
Attorney at Law  
Atty. Reg. No. 7181X  
515 First Street  
Princeton, MN 55371-1603

ATTORNEY FOR RESPONDENT

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
LEGAL ISSUES .....	1
INTEREST OF THE DEPARTMENT OF HUMAN SERVICES.....	2
STATEMENT OF THE CASE AND OF THE FACTS.....	3
ARGUMENT .....	4
I. USING MARITAL PROPERTY TO DEFINE THE EXTENT OF THE INSTITUTIONALIZED SPOUSE'S RECOVERABLE INTEREST FROM THE COMMUNITY SPOUSE'S ESTATE MATCHES HOW FEDERAL MEDICAID LAW TREATS THE MARITAL ASSETS OF SPOUSES FOR OTHER PURPOSES.....	4
II. MINNESOTA'S USE OF MARITAL PROPERTY TO DETERMINE THE INSTITUTIONALIZED SPOUSE'S RECOVERABLE INTEREST IN MARITAL ASSETS FOUND IN THE COMMUNITY SPOUSE'S ESTATE IS FULLY COMPATIBLE WITH FEDERAL MEDICAID LAW.....	8
A. Rigorous Presumptions Favoring The Co-Existence Of State And Federal Laws Must Be Overcome Before A State Law Is Preempted By A Federal Law. ....	10
B. Congress Intended To Leave States Wide Latitude In Developing And Defining Their Medicaid Estate Recovery Programs And Supporting State Legislation.....	12
1. Congress adopted the Senate's proposed estate recovery amendments grounded in federalism's allowance of individual state autonomy within least restrictive federal boundaries. ....	13
2. The OBRA 1993 amendments did not displace the traditional police powers of states in the area of recovery of public welfare benefits.....	17
3. There is no clear statement in the Medicaid statutes prohibiting Minnesota from using marital property as the basis for recovery from community spouse's estate.....	18

C.	No Conflict Exists Between Minnesota’s Use Of Marital Property To Define The Recoverable Interest And Medicaid’s Expansive Optional Definition Of “Estate”.....	22
1.	Compliance is possible with both Federal and State Law. ....	23
2.	Minnesota law furthers federal objectives. ....	23
III.	MINNESOTA ESTATE RECOVERY LAW IS FULLY COMPATIBLE WITH FEDERAL STATUTES. ....	24
	CONCLUSION .....	26
	ADDENDUM	

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL CASES</b>	
<i>Aquilino v. United States</i> , 363 U.S. 509, 80 S. Ct. 1277 (1960).....	8
<i>Butner v. United States</i> , 440 U.S. 48, 99 S. Ct. 914 (1979).....	8
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504, 112 S. Ct. 2608 (1992).....	22
<i>Citizens Action League v. Kizer</i> , 887 F.2d 1003 (9th Cir. 1989).....	16
<i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363, 120 S. Ct. 2288 (2000).....	22
<i>DeMille v. Belshe</i> , No. C-94-0726 VRW, 1994 WL 519457 (N.D.Cal. Sept. 16, 1994).....	18
<i>Drye v. United States</i> , 528 U.S. 49, 120 S. Ct. 474 (1999).....	22
<i>English v. Gen. Elec. Co.</i> , 496 U.S. 72, 110 S. Ct. 2270 (1990).....	22
<i>Gade v. Nat’l Solid Wastes Management Ass’n.</i> , 505 U.S. 88, 112 S. Ct. 2374 (1992).....	24
<i>Gonzales v. Oregon</i> , ___ U.S. ___, 126 S. Ct. (2006).....	18, 19
<i>Johnson v. Guhl</i> , 166 F. Supp.2d 42 (D.N.J. 2001) .....	18
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470, 116 S. Ct. 2240 (1996).....	10, 12
<i>New York Dept. of Social Services v. Dublino</i> , 413 U.S. 405, 93 S. Ct. 2507 (1973).....	11

<i>New York State Conf. of Blue Cross &amp; Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645, 115 S. Ct. 1671 (1995) .....	10
<i>New York v. United States</i> , 505 U.S. 144, 112 S. Ct. 2408 (1992) .....	17
<i>Pharm. Research &amp; Mfrs. of Am. v. Walsh</i> , 538 U.S. 644, 123 S. Ct. 1855 (2003) .....	10
<i>Philbrook v. Glodgett</i> , 421 U.S. 707, 95 S. Ct. 1893 (1975) .....	12
<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654, 102 S. Ct. 3294 (1982) .....	10
<i>Rice v. Sante Fe Elev. Corp.</i> , 331 U.S. 218, 67 S. Ct. 1146 (1947) .....	11
<i>Schwartz v. Texas</i> , 344 U.S. 199, 73 S. Ct. 232 (1952) .....	11
<i>Schweiker v. Gray Panthers</i> , 453 U.S. 34, 101 S. Ct. 2633 (1981) .....	4
<i>West Virginia v. U.S. Dep't of Health &amp; Human Services</i> , 289 F.3d 281 (4th Cir. 2002) .....	10, 16
<i>Wisconsin Dep't of Health &amp; Family Services v. Blumer</i> , 534 U.S. 473, 122 S. Ct. 962 (2002) .....	4, 7
<b>MINNESOTA CASES</b>	
<i>In re Estate of Eggert</i> , 245 Minn. 401, 72 N.W.2d 360 (1955) .....	10
<i>In re Estate of Gullberg</i> , 652 N.W.2d 709 (Minn. Ct. App. 2002) .....	3, 9
<i>In re Estate of Jobe</i> , 590 N.W.2d 162 (Minn. Ct. App. 1999) .....	3, 6
<i>In re Estate of O'Keefe</i> , 354 N.W.2d 531 (Minn. Ct. App. 1985) .....	17

<i>In re Estate of Turner</i> , 391 N.W.2d 767 (Minn. 1986).....	3
<i>Janssen v. Janssen</i> , 331 N.W.2d 752 (Minn. 1983).....	21
<i>Oanes v. Allstate Ins. Co.</i> , 617 N.W.2d 401 (Minn. 2000).....	25, 26
<i>State v. First Nat'l Bank of St. Paul</i> , 313 N.W.2d 390 (Minn. 1981).....	10
<i>State v. Rainer</i> , 258 Minn. 168, 103 N.W.2d 389 (1960).....	25

**OTHER CASES**

<i>Bonta v. Burke</i> , 120 Cal. Rptr.2d 72 (Cal. Ct. App. 2002).....	3
<i>In re Estate of Imburgia</i> , 487 N.Y.S.2d 263 (N.Y. Surr. Ct. 1984).....	19
<i>Olszewski v. Scripps Health</i> , 69 P.3d 927 (Cal. 2003).....	10, 11

**FEDERAL CONSTITUTION, STATUTES, AND REGULATIONS**

26 U.S.C. § 6321 .....	22
42 U.S.C. § 1382c(f)(1).....	5
42 U.S.C. § 1396 .....	17
42 U.S.C. § 1396a(a)(17)(D).....	4
42 U.S.C. § 1396p(b)(4).....	passim
42 U.S.C. § 1396p(c)(1)(A) .....	6
42 U.S.C. § 1396p(c)(2)(B).....	6
42 U.S.C. § 1396p(e)(1) .....	6, 20
42 U.S.C. § 1396u-5(c)(2)(A).....	4

42 U.S.C. § 1396u-5(c)(2)(B) .....	4
42 U.S.C. § 1396u-5(c)(4).....	5
42 U.S.C. § 1396u-5(d) .....	5
42 U.S.C. § 1396u-5(d)(1)(B) .....	5
42 U.S.C. § 1396u-5(d)(4) .....	5

**STATE CONSTITUTION, STATUTES, AND RULES**

Minn. R. 9505.0135, subp. 4 .....	2
Minn. R. Civ. App. P. 129.03.....	2
Minn. Stat. § 256B.04, subd. 1 .....	2
Minn. Stat. § 256B.15 .....	2
Minn. Stat. § 256B.15, subd. 1(a) .....	2
Minn. Stat. § 256B.15, subd. 1a(c).....	2

**LEGISLATIVE MATERIALS**

H. Conf. Rep. 103-213, 103rd Cong., <i>reprinted in</i> 1993 U.S.C.C.A.N. 1088.....	14, 15, 16
H.R. 2264, 103rd Cong. § 13612 (1993).....	14, 21
H.R. 2264, 103rd Cong. § 5102 (1993).....	14, 20
H.R.2138, 103rd Cong. § 5112 (1993).....	13, 21
H.Rep. 103-111, 103rd Cong. (1993); <i>reprinted in</i> 1993 U.S.C.C.A.N. 378 .....	14, 20
<i>Medicare and Medicaid Budget Reconciliation: Hearing Before the Subcomm. on Health and the Environ. of the House Comm. on Energy and Commerce, 103rd Cong. (1993).....</i>	14
S. 1134, 103rd Cong. § 7421 (1993).....	14, 21
S.Rep. No. 89-404 ; <i>reprinted in</i> 1965 U.S. Code Cong. & Admin. News 2018 .....	4

**MISCELLANEOUS**

2A Sutherland, *Statutory Construction*, § 47.07 ..... 21

Dunlop, Burton D., et al., *Medicaid Estate Planning And Implementation of OBRA '93 Provisions In Florida: A Policy Context*, 19 *Nova L. Rev.* 533 (1995)..... 15

General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs* (1989) ..... 13, 15

M. Ann Miller, *Your Money For Your Life: A Survey and Analysis of Medicaid Estate Recovery Programs*, 11 *T.M. Cooley L. Rev.* 585 (1994)..... 15

Michael H. Armacost, Forward, in *Medicaid and Devolution: A View From the States*, (Frank J. Thompson & John J. DiIulio, Jr., eds., 1998) ..... 17

Office of Inspector General, U.S. Dept. of Health and Human Services, *Medicaid Estate Recoveries: National Program Inspection 50* (1988)..... 3, 13

U.S. Dept. of Health and Human Services, *Issues In Medicaid Estate Recoveries* (1989)..... 15, 17

U.S. Dept. of Health and Human Services, *Policy Brief: Spouses of Medicaid Long-Term Care Recipients at 1* (2005) ..... 5

## LEGAL ISSUES

- I. Medicaid treats married couples as one economic unit for purposes of eligibility. Is Minnesota's use of marital property as the basis for estate recovery in harmony with federal Medicaid policy?
- II. Is Minnesota's use marital property to define the extent of a Medical Assistance recipient's interest in property acquired during a couple's marriage to determine the extent of the allowable recovery of Medical Assistance benefits paid to a decedent's predeceased spouse in conflict with federal Medicaid law?
- III. What deference, if any, must be given to the discussion in *In re Estate of Gullberg* of the preemptive scope of the phrase "to the extent of such interest" on Minnesota's Medical Assistance estate recovery laws?

## INTEREST OF THE DEPARTMENT OF HUMAN SERVICES

The interest of the Department of Human Services (“Department”) in this matter is public in nature.<sup>1</sup> The Department is the state agency that administers and supervises Minnesota’s Medicaid program, known as “Medical Assistance” or “MA”. Minn. Stat. § 256B.04, subd. 1 (2004). Within this role, the Department is responsible for, and assists counties in, the recovery of Medical Assistance long-term care benefits from the estates of recipients and their spouses.<sup>2</sup> See Minn. Stat. § 256B.15 (2004). Minnesota’s stated policy requires that “individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program.” Minn. Stat. § 256B.15, subd. 1(a) (2004). As such, the Department has an interest in strengthening Medicaid estate recovery.

The significant public interest in ensuring the existence of a robust statewide system of Medicaid recovery is impaired by decisions like that of the Mille Lacs County District Court. The active recovery of Medical Assistance funds from fulfills the “very important state purpose” of replenishing public money to pay for health care for the needy. *In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986); see also *In re Estate*

---

<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the Department and its counsel certify that this brief was authored entirely by counsel for the amici and that no person or entity other than the amici made a monetary contribution to the preparation or submission of the brief.

<sup>2</sup> Under Minn. Stat. § 256B.15, subd. 1a(c) (2004), either the State or the appropriate county has authority to file an estate claim for reimbursement of Medicaid. The state has delegated to counties the primary responsibility for filing claims. See Minn. R. 9505.0135, subp. 4 (2005).

*of Jobe*, 590 N.W.2d 162, 166 (Minn. Ct. App. 1999) (“[A]llowing a state to recover medical assistance benefits previously paid furthers the broader purpose of funding future services to the medically needy.”); accord *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002). This purpose is best achieved by allowing the maximum possible recovery. See *Bonta v. Burke*, 120 Cal. Rptr.2d 72, 76 (Cal. Ct. App. 2002). The result of the district court’s ruling is a more anemic recovery program that allows many dollars to escape recovery only to enrich heirs at taxpayer expense. Cf. Office of Inspector General, U.S. Dept. of Health and Human Services, *Medicaid Estate Recoveries: National Program Inspection* 50 (1988) (hereinafter HHS, *Estate Recoveries National Program Inspection*) (assets retained in the absence of estate recovery pass to heirs at the expense of taxpayers).

#### **STATEMENT OF THE CASE AND OF THE FACTS**

The Department concurs with and adopts the Statement of the Case and Statement of Facts set forth in Appellant Mille Lacs County’s brief.

## ARGUMENT

### I. USING MARITAL PROPERTY TO DEFINE THE EXTENT OF THE INSTITUTIONALIZED SPOUSE'S RECOVERABLE INTEREST FROM THE COMMUNITY SPOUSE'S ESTATE MATCHES HOW FEDERAL MEDICAID LAW TREATS THE MARITAL ASSETS OF SPOUSES FOR OTHER PURPOSES.

From Medicaid's very beginning, it has embodied the principle that spouses are responsible for the support of each other. This principle is found both in Medicaid's legislative history and in the Medicaid Act. *Schweiker v. Gray Panthers*, 453 U.S. 34, 44-45, 101 S. Ct. 2633, 2640-41 (1981); *see also* S. Rep. No. 89-404, 77; *reprinted in* 1965 U.S. Code Cong. & Admin. News 2018 ("The [Senate Finance] committee believes it is proper to expect spouses to support each other."). Thus, state eligibility standards are expressly permitted to consider the financial responsibility of a spouse but prohibited from considering that of any other individual. 42 U.S.C. § 1396a(a)(17)(D) (2000). The United States Supreme Court has labeled spousal support a "background principle" of Medicaid. *Wisconsin Dep't of Health & Family Services v. Blumer*, 534 U.S. 473, 494, 122 S. Ct. 962, 974 (2002).

Medicaid treats all of a couple's marital assets, whether titled in both or either spouse's names together, as if the couple was one economic unit. For example, in determining the availability of a couple's resources, Medicaid requires that "all the resources held by *either* the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse." 42 U.S.C. § 1396u-5(c)(2)(A) (2000) (emphasis added). From these resources, an amount is set aside for the community spouse resource allowance. 42 U.S.C. § 1396u-5(c)(2)(B) (2000). The

amounts protected by the spousal anti-impoverishment provisions are relatively modest, but “far exceed the income and asset levels that may be retained in the case of unmarried recipients of Medicaid long-term care services.” U.S. Dep’t of Health and Human Services, *Policy Brief: Spouses of Medicaid Long-Term Care Recipients* at 1 (2005).

During eligibility, after this set aside has been made, the spousal anti-impoverishment reforms require that the resources be considered unavailable to the institutionalized spouse (so that they may be used for the community spouse’s support). *See* 42 U.S.C. § 1396u-5(c)(4) (2000); *see also* 42 U.S.C. § 1382c(f)(1) (2000) (SSI eligibility requirement that the income and resources of an applicant’s spouse shall include those of the spouse “whether or not available to such individual”). Even during eligibility, Medicaid recognizes a married couple as a single economic unit by allowing a minimum monthly income allowance and an excess shelter allowance to be used from the institutionalized spouse’s income (e.g., pension or social security payments) to continue supporting the community spouse. *See* 42 U.S.C. § 1396u-5(d) (2000). Such allowances are strictly tied to supporting the community spouse or other dependents. *See, e.g.,* 42 U.S.C. § 1396u-5(d)(1)(B) (2000) (community spouse monthly income allowance limited to the benefit of community spouse). The shelter allowance exists to allow some of institutionalized spouse’s income to be used to contribute to the community spouse’s rent, mortgage, or maintenance fee for the community spouse’s principal residence and for utility expenses. 42 U.S.C. § 1396u-5(d)(4) (2000).

Similarly, Medicaid’s asset transfer provisions treat a married couple as one economic unit even though only one of them may be the actual recipient of Medicaid

benefits. So, although transfers between a couple generally do not trigger penalties, transfers by either spouse outside the couple are treated as a transfer by the single economic unit. *See* 42 U.S.C. § 1396p(c)(1)(A) (2000) (applying the “look back” period to transfers by the institutionalized spouse or the community spouse). Medicaid also defines assets broadly to “include all income and resources of the individual [institutionalized spouse] and of the individual’s [community spouse].” 42 U.S.C. § 1396p(e)(1) (2000). Even for transfers between spouses, Medicaid will often require that the asset transferred be for the “sole benefit” of the community spouse. *See* 42 U.S.C. § 1396p(c)(2)(B) (2000).

The resources that are set-aside or excluded from resources that are counted as available for purposes of eligibility, are set-aside and excluded for the sole purpose of being used by the community spouse during his or her lifetime. This policy serves the important interest of preventing the destitution of a community spouse (which could lead to institutionalization and greater public expenses). As this court recognized in *In re Estate of Jobe*, however, after the community spouse dies and that interest is no longer served, the recovery of Medical Assistance benefits from those assets that were temporarily excluded is a public policy interest that takes over as paramount to the private interests of heirs. *See In re Estate of Jobe*, 590 N.W.2d 162, 166 (Minn. Ct. App. 1999).

Viewing Medicaid policy at a distance reveals a certain inherent symmetry in the availability of marital assets. For purposes of eligibility, marital assets are presumptively available for use toward meeting the institutionalized spouse’s medical and nursing

expenses. Some marital assets are temporarily excluded from availability but only because of the policy interest in allowing the community spouse to use those assets to meet that spouse's needs during his or her lifetime. These temporarily excluded assets include the homestead and the community spouse resource allowance. During eligibility, Medicaid continues to recognize the close economic relationship unique to spouses. *See Blumer*, 534 U.S. at 478, 122 S. Ct. at 966-67 ("spouses typically possess assets and income jointly and bear financial responsibility for each other").

The symmetry of availability is maintained by estate recovery from the marital assets that remain, largely due to Medicaid's protection of those assets for the community spouse, in the community spouse's estate. This principle of symmetry of availability recognizes that when one spouse applied for Medical Assistance, all of the couple's assets were presumptively available to be spent down before that spouse became eligible for Medical Assistance. Those assets that were spared from spend-down were only so spared because they were necessary to support the community spouse. Thus, when both spouses have died, all remaining marital assets must be considered available for purposes of estate recovery. Failure to honor this principle causes Medicaid's treatment of married couples to be thrown out of balance.

The district court's ruling in the case now before the court, if upheld, will result in an asymmetrical treatment of marital assets that is justified nowhere in state or federal Medicaid law. The County's arguments identifying Minnesota's definition of the recoverable interest in marital assets as congruent with the statutory definition of marital property should be adopted. Such a ruling gives effect to the background principle of

interspousal support. It also ensures that assets, which would have otherwise been depleted but for the existence of Medicaid, be recoverable to ensure that others in need benefit from Medicaid.

**II. MINNESOTA'S USE OF MARITAL PROPERTY TO DETERMINE THE INSTITUTIONALIZED SPOUSE'S RECOVERABLE INTEREST IN MARITAL ASSETS FOUND IN THE COMMUNITY SPOUSE'S ESTATE IS FULLY COMPATIBLE WITH FEDERAL MEDICAID LAW.**

Federal law does not define or determine the extent of interests in property. *See Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918 (1979) ("Property interests are created and defined by state law."); *see also Aquilino v. United States*, 363 U.S. 509, 512-13, 80 S. Ct. 1277, 1280 (1960) (requiring that state law be followed when determining the nature of a federal taxpayer's interest in property). Minnesota, as argued by Mille Lacs County, was free to define an institutionalized spouse's recoverable interest in former marital assets in the community spouse's estate using the concept of marital property. Minnesota's definition has remained unchanged since it was enacted in 1987, six years before the federal estate recovery amendments in the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993). In OBRA 1993, Congress provided a mandatory minimum definition of "estate" and an "optional" open-ended definition for purposes of estate recovery. These provisions read as follows:

For purposes of [recovery of Medicaid funds], the term "estate," with respect to a deceased individual:

- (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law;
- and

(B) 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) (2000) (emphasis added).

In *Gullberg*, a panel of this court identified the phrase “to the extent of such interest” as placing a preemptive limitation on the scope of Minnesota Statutes section 256B.15, subdivision 2. *Gullberg*, 652 N.W.2d at 714. That Minnesota statute allows recovery from a community spouse’s estate up to the full value of assets that were marital property or jointly owned property. Minn. Stat. § 256B.15, subd. 2. The question of the scope of any preemptive effect by the phrase “to the extent of such interest” was not directly before the panel in *Gullberg* and this court remanded the case to the district court for further action. *Gullberg*, 652 N.W.2d at 715.

This present case, then, is a test of *Gullberg*’s discussion of the preemptive effect of the phrase “to the extent of such interest.” The question raised is whether federal Medicaid law prevents Minnesota from defining, for purposes of recovery, an institutionalized spouse’s interest in marital assets as Minnesota has done (as explained in the Appellant’s Brief at 24-34). The answer to this question is controlled by the standards for evaluating preemption claims. These standards respect the autonomy of state laws in areas traditionally within state police powers and require a clear statement by Congress of an intent to preempt the specific type of state law. Moreover, any ambiguity is resolved against preemption. Under these standards, Minnesota’s legislative

determination that a spouse has an undivided interest in the whole of marital property for purposes of recovery is not preempted.

**A. Rigorous Presumptions Favoring The Co-Existence Of State And Federal Laws Must Be Overcome Before A State Law Is Preempted By A Federal Law.**

Those challenging a state law must overcome a number of presumptions against preemption; they carry a heavy burden of proving that Congress clearly intended to preempt the law in question. *See Olszewski v. Scripps Health*, 69 P.3d 927, 939 (Cal. 2003); *State v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390, 392 (Minn. 1981). Courts presume that a statute is valid. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-62, 123 S. Ct. 1855, 1867 (2003). “The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.” *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S. Ct. 3294, 3299 (1982).

In addition, a specific presumption against preemption applies when Congress legislates in an area historically the province of state police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996). The Medicaid estate recovery statutes at issue here address matters of public health, property interests, and inheritance that are traditionally within a state’s police powers. *In re Estate of Eggert*, 245 Minn. 401, 403, 72 N.W.2d 360, 362 (1955) (stating that “It is well settled that the descent and distribution of property of a decedent is a matter within the exclusive control of the [state] legislature.”); *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 294 (4th Cir. 2002); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661, 115 S. Ct. 1671, 1680 (1995) (public

health is an area of traditional state police power). This presumption can only be overcome by a clearly stated Congressional intent to preempt the specific area of state law. *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 414, 93 S. Ct. 2507, 2513 (1973) ); see also *Rice v. Sante Fe Elev. Corp.*, 331 U.S. 218, 237, 67 S. Ct. 1146, 1155-56 (1947).

Moreover, when a state participating in Medicaid cooperates with the federal government in pursuit of a common purpose, such as the provision of medical assistance to the needy and recovery of benefits to further fund that assistance, “the case for federal pre-emption becomes a less persuasive one.” *Dublino*, 413 U.S. at 421, 93 S. Ct. at 2517. “It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.” *Id.* at 413, 93 S. Ct. at 2513 (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03, 73 S. Ct. 232, 235 (1952)).

When interpreting a federal law authorized by the Spending Clause, as is the Medicaid program, courts must recognize that “Congress must unambiguously state that it is imposing an obligation and clearly define the scope of that obligation. In light of this need for congressional clarity and the presumption against preemption, any ambiguity in the Medicaid statutes and regulations must be construed against preemption.” *Olszewski*, 69 P.3d at 940.

**B. Congress Intended To Leave States Wide Latitude In Developing And Defining Their Medicaid Estate Recovery Programs And Supporting State Legislation.**

“The purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-empt[ing] statute must rest primarily on a fair understanding of *congressional purpose*.” *Medtronic*, 518 U.S. at 485-86, 116 S. Ct. at 2250 (quotation marks and citations omitted, emphasis in original). Congress’s intended purpose is construed primarily from a statute’s language and its broader statutory framework. *Id.* at 486, 116 S. Ct. at 2250-51. In interpreting the statute, a court “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. [The court’s] objective . . . is to ascertain the congressional intent and give effect to the legislative will.” *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S. Ct. 1893, 1899 (1975).

Congress’s purpose in enacting OBRA 1993’s Medicaid estate recovery amendments was to *strengthen* estate recovery. It did this by requiring *all* states to do *some* level of recovery. Congress also provided a tool, the open-ended “optional” add-on definition of estate, for use by states with active recovery programs. This purpose — to strengthen state estate recovery programs — is revealed in the text of the amendments and the legislative history surrounding those amendments. No evidence suggests that Congress clearly intended to displace already existing laws, such as Minnesota’s, that exceeded the minimum mandate set by Congress, concerning recovery from Medicaid recipients’ probate estates.

**1. Congress adopted the Senate's proposed estate recovery amendments grounded in federalism's allowance of individual state autonomy within least restrictive federal boundaries.**

In 1988, twenty-six states did not have programs and supporting laws to recover correctly paid Medicaid benefits from estates. HHS, *Estate Recoveries National Program Inspection* at 28. Congress was aware that this absence of recovery left hundreds of millions of dollars in nontax revenue untapped each year. See, e.g., General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs* at 17-24 (1989) (hereinafter GAO, *Medicaid Recoveries*).

Some states, such as Oregon, had active and established recovery programs. See GAO, *Medicaid Recoveries* at 25-39. As first proposed in the House by California Representative Henry Waxman, OBRA 1993's estate recovery amendments would have required states to adopt programs similar to Oregon's. See H.R.2138, 103rd Cong. § 5112 (1993) (available in the addendum to this brief). In this version, states, as a condition of receiving federal matching funds would have been required to establish systems for tracking assets for future recovery and the deaths of recipients and their surviving spouses; to recover from the estates of recipients and community spouses; and to use a definition of estate that reached far beyond traditional probate definitions of estate. *Id.* Thus, the Waxman proposal would have established a uniform national system of recovery that all states would have been required to follow.

This uniform recovery regime would have forced at least half of the states to go from having no recovery programs to having aggressive recovery programs supported by necessary changes to state laws. Representative Waxman apparently believed that such a

uniform system was required because states found it too politically difficult to exercise the discretion afforded by Medicaid law to do recovery at their option. During hearings on health program proposals leading up to OBRA 1993, Waxman stated, "States have discretion now to do anything they want, as I understand the Medicaid law, to recover assets and to make sure that people are, in fact, eligible. The problem is, the States don't always decide to get involved in this area. So if you give States discretion, they just may find it so politically unattractive that they just won't act." *Medicare and Medicaid Budget Reconciliation: Hearing Before the Subcomm. on Health and the Environ. of the House Comm. on Energy and Commerce*, 103rd Cong. 424 (1993) (Rep. Henry A. Waxman). Waxman's proposal was later adopted by the House. *See* H.R. 2264, 103rd Cong. § 5102 (1993); *see also* H.Rep. 103-111, 103rd Cong. 208-09 (1993); *reprinted in* 1993 U.S.C.C.A.N. 378, 535-36.

In contrast to Waxman's prescriptive uniform national program, the Senate version of Medicaid estate recovery amendments left much of the mechanics and scope of recovery to the states. The Senate version simply amended the Medicaid Act to *require* recovery from a recipient's probate estate. S. 1134, 103rd Cong. § 7421 (1993). The Senate version was silent as to how states were to structure their estate recovery programs. *Id.* The Senate version, nevertheless, retained Waxman's expanded definition of estate, but only as a state option that could be added onto the default probate definition of estate. *Id.* The House and Senate Conference Committee adopted the Senate's version. *See* H.R. 2264, 103rd Cong. § 13612 (1993) (as passed by House and Senate); H. Conf. Rep. 103-213, 103rd Cong. 834-35, *reprinted in* 1993 U.S.C.C.A.N. 1088, 1523-24;

see also GAO, *Medicaid Recoveries* at 41 (recommending that estate recovery legislation “address the appropriate balance between state flexibility and detailed federal requirements.”).

In adopting the Senate’s approach, Congress chose a version of mandatory estate recovery that best suited a federalist system with widely varying political receptiveness to estate recovery. Many states had reported, via the studies and reports submitted to Congress before OBRA 1993, that their efforts to either pass recovery legislation or implement recovery programs were stymied by local opposition. See, e.g., GAO, *Medicaid Recoveries* at 41-42 ; HHS, *Estate Recoveries National Program Inspection* at 20, 42-43; see also M. Ann Miller, *Your Money For Your Life: A Survey and Analysis of Medicaid Estate Recovery Programs*, 11 T.M. Cooley L. Rev. 585, 596-97 (1994) (describing blocking of estate recovery in Florida and Texas); Burton D. Dunlop, et al., *Medicaid Estate Planning And Implementation of OBRA '93 Provisions In Florida: A Policy Context*, 19 Nova L. Rev. 533, 558 (1995) (describing successful opposition to estate recovery in Massachusetts and Wisconsin).

Other states, however, already had established aggressive estate recovery programs. Oregon, California, and Minnesota, for example, were among the top states in estate recoveries. See, e.g., GAO, *Medicaid Estate Recoveries* at 24-39. Both Minnesota and Oregon already had estate recovery programs and supporting legislation allowing for recovery from the estates of spouses. GAO, *Medicaid Estate Recoveries* at 34; Miller, *Your Money For Your Life*, 11 T.M. Cooley L. Rev. at 605; *Jobe*, 590 N.W.2d at 164 n.1 (summarizing the 1987 statutory changes explicitly authorizing recovery from the estates

of spouses). Oregon and Minnesota also had political environments in which public welfare recovery laws were long-established and accepted. GAO, *Medicaid Estate Recoveries* at 26 (Oregon recovery legislation first enacted in 1949); *Dimke v. Finke*, 295 N.W. 75, 77-78, 209 Minn. 29, 31 (1940) (describing 1935 law allowing claim against estate of either spouse for public assistance paid to one or both spouses).

The fact that resistance to estate recovery in a number of states co-existed with an established acceptance of robust recovery in other states inevitably shaped Congress's effort to enhance and strengthen estate recovery. Overall, OBRA 1993 was a "carefully crafted, rational and constructive compromise" between various House and Senate bills. H.R. Conf. Rep. 103-213 at 399, 1993 U.S.C.C.A.N. at 1088. Such carefully crafted compromise is reflected in OBRA 1993's estate recovery provisions as well. Rather than mandating aggressive recovery across the nation, Congress started with mandating a basic level of recovery for all states.<sup>3</sup> Congress also recognized that already active states were being held back by the decision in *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989), which prevented a state, under the old federal law, from recovering beyond a probate estate. To remedy the latter, Congress included the open-ended optional definition of estate now found at 42 U.S.C. § 1396p(b)(4)(B).

Such attention to variations among the states was not uncharacteristic for Medicaid. Medicaid's preamble reflects Congress's recognition that the conditions in

---

<sup>3</sup> Even this moderate mandate has encountered resistance such as West Virginia's unsuccessful suit against the federal government in an effort to declare the OBRA 1993 recovery requirement to be unconstitutionally coercive. *West Virginia v. U.S. Dep't of Health & Human Services*, 289 F.3d 281 (4th Cir. 2002).

each state will practically affect how Medicaid operates there. See 42 U.S.C. § 1396 (2000). Indeed, federalism “profoundly shapes Medicaid. The joint responsibility of the national and state governments . . . has enmeshed it in perennial debates about the appropriate division of labor, or balance of power, between levels of government in the federal system.” Michael H. Armacost, Forward, in *Medicaid and Devolution: A View From the States*, at vii (Frank J. Thompson & John J. DiIulio, Jr., eds., 1998); see also U.S. Dep’t of Health and Human Services, *Issues In Medicaid Estate Recoveries* at 4 (1989) (Medicaid is “firmly grounded in Federalism principles”). As with other Spending Clause-based legislation, tension exists in Medicaid between encouraging states to adopt uniform federal policy choices and requiring the accountability of state officials to a state’s citizens; these factors affect the conditions to which federal aid is tied. Cf. *New York v. United States*, 505 U.S. 144, 167-68, 112 S. Ct. 2408, 2423-24 (1992) (discussing the federalism considerations involved when Congress tries to encourage states to adopt federal policies).

**2. The OBRA 1993 amendments did not displace the traditional police powers of states in the area of recovery of public welfare benefits.**

Congress, as described above, was well aware of both the political resistance to recovery and the existence in other states of well accepted practices that went well beyond the minimum of recovery from a recipient’s probate estate. Interests in property and inheritance are matters over which states have traditional power. Some states, such as Minnesota, exercised this power to enhance estate recovery even before OBRA 1993. See, e.g., *In re Estate of O’Keefe*, 354 N.W.2d 531, 533-34 (Minn. Ct. App. 1985)

(describing 1982 amendments removing homestead exemption as a bar to Medical Assistance claims); *Jobe*, 590 N.W.2d at 164 n.1 (1987 statutory changes authorizing Medical Assistance recovery from the estates of spouses). Congress's OBRA 1993 amendments did not displace these exercises of state power over traditional areas of state action.

**3. There is no clear statement in the Medicaid statutes prohibiting Minnesota from using marital property as the basis for recovery from community spouse's estate.**

A clear statement of an intent to preempt state law is a fundamental requirement for preemption analysis. Congress's silence in OBRA 1993 about state laws such as Minnesota's spousal recovery statute is "understandable given the structure and limitations of federalism, which allows the States great latitude under their police powers as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 904, (2006) (quotation marks omitted). Congress did not manifest an intent in OBRA 1993 to preempt state statutes such as the then six-year old spousal recovery provisions in Minnesota statutes section 256B.15 allowing recovery from the full value of a couple's marital property. *Cf. DeMille v. Belshe*, No. C-94-0726 VRW, 1994 WL 519457 at \*5-6 (N.D.Cal. Sept. 16, 1994) (construing silence in OBRA 1993 as "implicit authority" to impose a lien after a recipient has died) (unpublished opinion in addendum); *Johnson v. Guhl*, 166 F. Supp.2d 42, 50 (D.N.J. 2001) (absence of a particular type of provision in Medicaid estate recovery and asset transfer statute does not preempt a state policy that is consistent with the federal statutory scheme); *In re Estate of Imburgia*, 487 N.Y.S.2d 263, 265 (N.Y.

Surr. Ct. 1984) (rejecting argument that Medicaid statute's silence on recovery from a spouse prohibited such recovery).

The personal representative may suggest that there is indeed a clear statement that limits the scope of Minnesota's recovery in the form of the parenthetical phrase "to the extent of such interest" that appears in the optional definition. See 42 U.S.C. § 1396p(b)(4)(B). For several reasons, however, this phrase is not a valid basis for finding preemption.

First, the touchstone of preemption is Congress's intent. The "extent of such interest" phrase cannot be read as a clear statement of intent to limit recoveries. A reviewing court must look to the statute as a whole with its purpose and structure predominating over one vague phrase. The whole purpose of the OBRA 1993 amendments was to *expand* recovery by mandating minimum recovery by all states and by enhancing the ability of already active states by providing the optional open-ended definition of estate. Conventions of interpreting Congress's expression of intent "indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints." *Gonzales*, 126 S. Ct. at 925. Finding a limitation in the part of the amendments that were clearly meant to *remove* a limitation on recovery is inconsistent with the direction of those provisions.

Second, the "extent of such interest" phrase is at most an ambiguous qualifier. It is not a clear statement that displaces Minnesota's sovereign power to define interests in property and modify those interests for purposes of estate recovery. Cf. *Gonzalez*, 126 S. Ct. at 925 ("[T]he background principles of our federal system also belie the

notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the State's police power.”).

Third, on its face, the optional definition applies to “a deceased individual” which could be *either* the institutionalized spouse or the community spouse depending on who is the last to die (and, consequently, is the one against whose estate a claim is made). 42 U.S.C. § 1396p(b)(4)(B) (“‘estate,’ with respect to *a deceased individual* — . . . may include . . . any other real 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)”(emphasis added)). Thus, any limitation to “a deceased individual[’s]” interest when the individual is the community spouse, merely limits the outer boundaries of a recovery claim to the community spouse’s interests. The parenthetical phrase in this context, with the proper subjects, can therefore be read as “to the extent of the [community spouse’s] interest.” This reading aligns the definition with Medicaid’s overall treatment of married couples and the presumption that marital assets are available to either spouse regardless of whose name appears on the title. *See, e.g.*, 42 U.S.C. § 1396p(e)(1) (defining “assets” as used in estate recovery and asset transfer section as “all income and resources of the individual and of the individual’s spouse”).

This reading is also supported by the legislative history of the optional definition. When introduced, the definition was part of Representative Waxman’s uniform system that required recovery from a recipient’s estate or the community spouse’s estate, depending on who survived the other. H.R. 2264, 103rd Cong. § 5102(a)(C); H.Rep. 103-111, 103rd Cong. 209; *reprinted in* 1993 U.S.C.C.A.N 378, 536. Thus, as

introduced, the definition was to be applied to recoveries against *either* spouse. The subsequent modification of the definition, which essentially substituted the “extent of such interest” phrase for “legally cognizable” as a qualifier to “any interest,” does not change this analysis. The parenthetical phrase appears to have been included by the conference committee after the Senate had removed “cognizable” from its version. Compare H.R. 2264, § 13612 (as passed by both houses) (“in which the individual had *any legal title or interest* at the time of death (to the extent of such interest)”); with H.R. 2264, § 5112 (as passed by the House) (“other assets in which the individual had *any legally cognizable title or interest* at the time of his death”); and S.1134, § 7421 (as passed by the Senate) (“in which the individual had *any legal title or interest* at the time of death”).

Finally, the other language used in the optional definition evidences Congress’s clear intent that the optional definition be open-ended and reach as far as a particular state will need. The list of various property and interests is prefaced by the word “including.” 42 U.S.C. § 1396p(b)(4)(B). Well-established canons of statutory construction prohibit the term “including” from being read as a term of limitation:

A term whose statutory definition declares what it “includes” is more susceptible to extension of meaning by construction than where the definition declares what the term “means.” Thus, it has been said that the word ‘*includes*’ is usually a term of enlargement, and not of limitation . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated.

*Janssen v. Janssen*, 331 N.W.2d 752, 756 (Minn. 1983) (quoting 2A Sutherland, *Statutory Construction*, § 47.07) (ellipses in original) (emphasis added). Congress’s use

of “including” is a signal that, by including the optional definition of estate, it did not intend to limit, but instead intended to give full rein to states. Furthermore, Congress’s use of “any other real and personal property and assets” must be read consistently with Congress’s use of a similar phrase in the federal tax lien statute. 26 U.S.C. § 6321 (2000) (“...shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”). This phrase has been held to reflect Congress’s intent “to reach every interest in property that a taxpayer might have.” *Drye v. United States*, 528 U.S. 49, 56, 120 S. Ct. 474, 480 (1999) (quotation marks omitted). With this broad use of the term “property,” Congress intended to “reach every species of right or interest” recognized by law. *Id.* (quotation marks omitted).

**C. No Conflict Exists Between Minnesota’s Use Of Marital Property To Define The Recoverable Interest And Medicaid’s Expansive Optional Definition Of “Estate”**

“State law is pre-empted if that law actually conflicts with federal law.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992) (quotations and citations omitted). Such actual conflict may exist when compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal statutory scheme. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990). “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2289 (2000). Minnesota’s estate recovery statutes, as applied to a claim for recovery of benefits paid on behalf of an institutionalized spouse

from the estate of the community spouse, pose no obstacle to the accomplishment and purposes of the federal Medicaid estate recovery statutory scheme.

**1. Compliance is possible with both Federal and State Law.**

Here, compliance is possible with both state and federal law. The federal law mandates recovery from the estates of recipients but does not prohibit recovery from the estates of community spouses. *See* 42 U.S.C. § 1396p(b). The federal law mandates that a state's probate law be used as a minimum definition of estate but gives states the open-ended option to include other property and interests as determined by state law. 42 U.S.C. § 1396p(b)(4). Thus, federal law prescribes a minimum level and scope of recovery without prohibiting states from going beyond that scope. Federal Medicaid estate recovery statutes limit when recovery can be attempted (i.e., only after the death of a surviving spouse), but they do not speak definitively to what can be recovered or how recovery can be made. Thus, Minnesota's approach is entirely consistent with the latitude given by a reasonable interpretation of the federal statutes. *Cf. Jobe*, 590 N.W.2d at 166-67. Furthermore, the absence of a clear and unambiguous prohibition by Congress, particularly when Congress was aware of preexisting laws like Minnesota's, militates against a finding of conflict where Congress itself and the federal Department of Health and Human Services have not identified a conflict.

**2. Minnesota law furthers federal objectives.**

Congress's purpose for the OBRA 1993 Medicaid estate recovery amendments was to increase recoveries using means sensitive to the different starting points among the states for recoveries. Minnesota's use of marital property as the basis for identifying

the scope of recoverable interests from a community spouse's estate furthers that purpose by maximizing recovery of Medicaid funds. The result of Minnesota's use of marital property in this case alone will result in an additional \$22,000 being returned to the federal treasury (which is the federal share of the \$44,000 disallowed by the personal representative). Moreover, Minnesota's use of a stronger approach to estate recovery than the default national approach required by Congress cannot be held to be an obstacle to federal objectives when Congress has specifically declined to require states to follow one uniform national program of estate recovery. *Cf. Gade v. Nat'l Solid Wastes Management Ass'n.*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2385 (1992) (finding stricter state worker safety regulations to be an obstacle only because they interfered with the method Congress chose to use in accomplishing the same goal).

### **III. MINNESOTA ESTATE RECOVERY LAW IS FULLY COMPATIBLE WITH FEDERAL STATUTES.**

Minnesota estate recovery law, particularly section 256B.15, subdivision 2, is fully compatible with federal Medicaid estate recovery statutes. The Department of Human Services believes that this court's decision in *Gullberg* is correct. *Gullberg* held that a claim against the estate of a community spouse is "clearly allowed" when that claim is for benefits paid for the institutionalized spouse to be recovered from former marital assets in the estate. *Gullberg*, 652 N.W.2d at 712; *see also Searles v. Searles*, 420 N.W.2d 581, 583 (Minn. 1988) (holding that spouses have a common interest in marital property regardless of who holds title). The *Gullberg* court, however, then addressed the preemptive effect of the phrase "to the extent of such interest" in limiting

the scope of an allowable claim. *Id.* at 714. At this point, the court unnecessarily examined a question not raised by the parties and beyond the scope of its review of the district court's decision.

A review of the written submissions in *Gullberg* demonstrates that this precise issue was not argued by either party. See *State v. Rainer*, 258 Minn. 168, 177, 103 N.W.2d 389, 395 (1960) (examining the briefs and record of a prior case to determine what question was directly before the court). Although the phrase was tangentially referred to in the parties' arguments about whether a claim could be made against property in which the institutionalized spouse did not hold formal title, these references should not be construed as argument on the substantive and complicated question of federal preemption. The Department respectfully requests that *Gullberg's* discussion of the preemptive effect of the phrase "to the extent of such interest" be considered *obiter dictum* and corrected.<sup>4</sup>

Alternatively, if the Court does not consider the *Gullberg* discussion to be *dictum*, then a reversal of that part of *Gullberg* finding partial preemption is appropriate upon what the Department believes is a more complete discussion of that question here. The doctrine of *stare decisis* is not a barrier to such a reversal. "[S]*tare decisis* is not an

---

<sup>4</sup> Even if *Gullberg's* discussion of the phrase were viewed as "judicial dictum," that is "an expression of opinion on a question directly involved and argued by counsel though not entirely necessary to the decision," *Rainer*, at 177, 103 N.W.2d at 396, this Court need only give weight to it; the Court need not follow it as a holding. *Id.*

inflexible rule of law but rather a policy of the law.” *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (quotation marks omitted). *Stare decisis* does not bind this court to an earlier unsound holding. *Id.* The Department believes that its analysis here of the preemptive scope of the federal provision relied upon by *Gullberg* is correct and is a compelling reason to override any *stare decisis* concerns. Additional factors favoring an uninhibited review of *Gullberg’s* application of the “extent of such interest” phrase are that the holding is less than four years old and has not been relied upon by any other appellate court. The *Gullberg* panel also did not unanimously adopt the majority’s reasoning. Furthermore, district courts, as is illustrated by the difficulty the Mille Lacs District Court had here in applying this portion of *Gullberg*, have not found the discussion to be useful guidance in determining the scope of allowable Medical Assistance claims.

### CONCLUSION

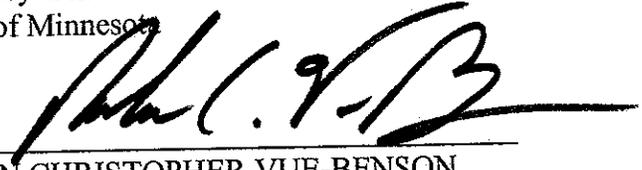
The Department supports Mille Lacs County’s appeal seeking to reverse the district court decision in this case. The county’s arguments demonstrate a principled basis for reversal of the district court within *Gullberg’s* framework. In addition, the Department requests reversal on the independent basis of a *de novo* review of the question of whether Minnesota Statutes section 256B.15, subdivision 2, is partially preempted by Congress’s use of the phrase “to the extent of such interest” in its open-ended optional definition of estate adopted in 1993. The only remand necessary is for entry of judgment because the record fully documents that Francis Barg’s estate contains

marital assets, a home valued at \$120,000, sufficient to satisfy the county's Medical Assistance claim for \$108,000.

Dated: 2/16/06

Respectfully submitted,

MIKE HATCH  
Attorney General  
State of Minnesota



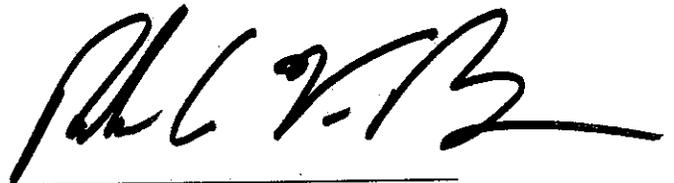
ROBIN CHRISTOPHER VUE-BENSON  
Assistant Attorney General  
Atty. Reg. No. 033408X

445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127  
(651) 296-8714 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR AMICUS CURIAE  
MINNESOTA DEPARTMENT OF HUMAN  
SERVICES

**CERTIFICATE OF COMPLIANCE**  
**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 6,994 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.



ROBIN CHRISTOPHER VUE-BENSON

AG: #1550416-v1

# **ADDENDUM**

## **Addendum**

### **Statutes**

42 U.S.C. § 1396p(b)(4)

Minn. Stat. § 256B.15, subdivisions 1 and 2.

### **Legislative Materials**

H.R.2138, 103rd Cong. § 5112 (1993)  
(As introduced in the House)

H.R. 2264, 103rd Cong. § 5102 (1993)  
(As passed by the House)

S. 1134, 103rd Cong. § 7421 (1993)  
(As placed on the calendar in the Senate)

H.R. 2264, 103rd Cong. § 7421 (1993)  
(As passed by the Senate)

H.R. 2264, 103rd Cong. § 13612 (1993)  
(As passed by both the House and the Senate)

### **Cases**

*In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002)

*DeMille v. Belshe*, 1994 WL 519457 (N.D.Cal. 1994)

**42 U.S.C. § 1396p(b)(B)**

**(4)** For purposes of this subsection, the term “estate”, with respect to a deceased individual—

**(A)** shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law; and

**(B)** may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), 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.

**Minn. Stat. § 256B.15, subdivisions 1(a), 1(a)(4) and 2**

**Subdivision 1. Policy and applicability.**

(a) It is the policy of this state that individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program according to applicable federal law and the laws of this state.

...

(4) all laws, rules, and regulations governing or involved with a recovery of medical assistance shall be liberally construed to accomplish their intended purposes;

...

**Subd. 2. Limitations on claims.** The claim shall include only the total amount of medical assistance rendered after age 55 or during a period of institutionalization described in subdivision 1a, clause (b), and the total amount of general assistance medical care rendered, and shall not include interest. Claims that have been allowed but not paid shall bear interest according to section 524.3-806, paragraph (d). A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage. Claims for alternative care shall be net of all premiums paid under section 256B.0913, subdivision 12, on or after July 1, 2003, and shall be limited to services provided on or after July 1, 2003.

The Library of Congress > THOMAS Home > Bills, Resolutions > Search Results

<i><u>THIS SEARCH</u></i>	<i><u>THIS DOCUMENT</u></i>	<i><u>GO TO</u></i>
<a href="#"><u>Next Hit</u></a>	<a href="#"><u>Forward</u></a>	<a href="#"><u>New Bills Search</u></a>
<a href="#"><u>Prev Hit</u></a>	<a href="#"><u>Back</u></a>	<a href="#"><u>HomePage</u></a>
<a href="#"><u>Hit List</u></a>	<a href="#"><u>Best Sections</u></a>	<a href="#"><u>Help</u></a>
	<a href="#"><u>Contents Display</u></a>	

## H.R.2138

### Medicare and Medicaid Budget Reconciliation Act of 1993 (Introduced in House)

#### SEC. 5112. MEDICAID ESTATE RECOVERIES.

(a) REQUIRING ESTABLISHMENT OF ESTATE RECOVERY PROGRAMS-

(1) IN GENERAL- Section 1902(a)(51) (42 U.S.C. 1396a(a)(51)) is amended by striking `and (B)' and inserting `(B) provide for an estate recovery program that meets the requirements of section 1917(b)(1), and (C)'.

(2) REQUIREMENTS FOR ESTATE RECOVERY PROGRAMS- Section 1917(b) (42 U.S.C. 1396p(b)) is amended--

(A) in paragraph (1)--

(i) by striking `(b)(1)' and inserting `(2)', and

(ii) by striking `(a)(1)(B)' and inserting `(a)(1)(B)(i)';

(B) in paragraph (2), by striking `(2) Any adjustment or recovery under' and inserting `(3) Any adjustment or recovery under an estate recovery program under'; and

(C) by inserting before paragraph (2), as designated by subparagraph (A), the following:

`(b)(1) For purposes of section 1902(a)(51)(B), the requirements for an estate recovery program of a State are as follows:

`(A) The program provides for identifying and tracking (and, at the option of the State, preserving) resources (whether excluded or not) of individuals who are furnished any of the following long-term care services for which medical assistance is provided under this title:

`(i) Nursing facility services.

`(ii) Home and community-based services (as defined in section 1915(d)(5)(C)(i)).

`(iii) Services described in section 1905(a)(14) (relating to services in an institution for mental diseases).

`(iv) Home and community care provided under section 1929.

`(v) Community supported living arrangements services provided under section 1930.

`(B) The program provides for promptly ascertaining--

`(i) when such an individual dies;

`(ii) in the case of such an individual who was married at the time of death, when the surviving spouse dies; and

`(iii) at the option of the State, cases in which adjustment or recovery may not be made at the time of death because of the application of paragraph (3)(A) or paragraph (3)(B).

`(C)(i) The program provides for the collection consistent with paragraph (3) of an amount (not to exceed the amount described in clause (ii)) from--

`(I) the estate of the individual;

`(II) in the case of an individual described in subparagraph (B)(ii), from the estate of the surviving spouse; or

`(III) at the option of the State, in a case described in subparagraph (B)(ii), from the appropriate person.

`(ii) The amount described in this clause is the amount of medical assistance correctly paid under this title for long-term care services described in subparagraph (A) furnished on behalf of the individual.'.

(b) **HARDSHIP WAIVER-** Section 1917(b) (42 U.S.C. 1396p(b)) is further amended by adding at the end the following new paragraph:

`(4) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection if such application would work an undue hardship (in accordance with criteria established by the Secretary).'

(c) **DEFINITION OF ESTATE-** Section 1917(b) (42 U.S.C. 1396(b)) is further amended by adding at the end the following new paragraph:

`(5) For purposes of this section, the term 'estate', with respect to a deceased individual, includes all real and personal property and other assets in which the

individual had any legally cognizable title or interest at the time of his death, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, survivorship, life estate, living trust, or other arrangement.'

(d) EFFECTIVE DATE-

(1)(A) The amendments made by subsections (a) and (b) apply (except as provided under subparagraph (B)) to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations or standards to carry out such amendments have been promulgated by such date.

(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 for the plan to meet the additional requirements imposed by the amendments made by subsections (a) and (b), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to 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 previous 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.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

## **SEC. 5113. CLOSING LOOPHOLE PERMITTING WEALTHY INDIVIDUALS TO QUALIFY FOR MEDICAID.**

(a) IN GENERAL- Section 1902(r)(2) (42 U.S.C. 1396a(r)(2)) is amended by adding at the end the following:

`(C)(i) Notwithstanding subparagraph (A), except as provided in clause (ii), a State plan may not provide pursuant to this paragraph for disregarding any assets--

`(I) to the extent that payments are made under a long-term care insurance policy; or

`(II) because an individual has received (or is entitled to receive) benefits for a specified period of time under a long-term care insurance policy.

`(ii) Clause (i) shall not apply to State plan provisions that are approved as of May 14, 1993.'

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall take effect on the date of the enactment of this Act.

The Library of Congress > THOMAS Home > Bills, Resolutions > Search Results

<i>THIS SEARCH</i>	<i>THIS DOCUMENT</i>	<i>GO TO</i>
<a href="#">Next Hit</a>	<a href="#">Forward</a>	<a href="#">New Bills Search</a>
<a href="#">Prev Hit</a>	<a href="#">Back</a>	<a href="#">HomePage</a>
<a href="#">Hit List</a>	<a href="#">Best Sections</a>	<a href="#">Help</a>
	<a href="#">Contents Display</a>	

## H.R.2264

**Omnibus Budget Reconciliation Act of 1993 (Engrossed as Agreed to or Passed by House)**

### **SEC. 5112. MEDICAID ESTATE RECOVERIES.**

(a) REQUIRING ESTABLISHMENT OF ESTATE RECOVERY PROGRAMS-

(1) IN GENERAL- Section 1902(a)(51) (42 U.S.C. 1396a(a)(51)) is amended by striking `and (B)' and inserting `(B) provide for an estate recovery program that meets the requirements of section 1917(b)(1), and (C)'.

(2) REQUIREMENTS FOR ESTATE RECOVERY PROGRAMS- Section 1917(b) (42 U.S.C. 1396p(b)) is amended--

(A) in paragraph (1)--

(i) by striking `(b)(1)' and inserting `(2)', and

(ii) by striking `(a)(1)(B)' and inserting `(a)(1)(B)(i)';

(B) in paragraph (2), by striking `(2) Any adjustment or recovery under' and inserting `(3) Any adjustment or recovery under an estate recovery program under'; and

(C) by inserting before paragraph (2), as designated by subparagraph (A), the following:

`(b)(1) For purposes of section 1902(a)(51)(B), the requirements for an estate recovery program of a State are as follows:

`(A) The program provides for identifying and tracking (and, at the option of the State, preserving) resources (whether excluded or not) of individuals who are furnished any of the following long-term care services for which medical assistance is provided under this title:

` (i) Nursing facility services.

` (ii) Home and community-based services (as defined in section 1915(d)(5)(C)(I)).

` (iii) Services described in section 1905(a)(14) (relating to services in an institution for mental diseases).

` (iv) Home and community care provided under section 1929.

` (v) Community supported living arrangements services provided under section 1930.

` (B) The program provides for promptly ascertaining--

` (i) when such an individual dies;

` (ii) in the case of such an individual who was married at the time of death, when the surviving spouse dies; and

` (iii) at the option of the State, cases in which adjustment or recovery may not be made at the time of death because of the application of paragraph (3)(A) or paragraph (3)(B).

` (C)(i) The program provides for the collection consistent with paragraph (3) of an amount (not to exceed the amount described in clause (ii)) from--

` (I) the estate of the individual;

` (II) in the case of an individual described in subparagraph (B)(ii), from the estate of the surviving spouse; or

` (III) at the option of the State, in a case described in subparagraph (B)(iii), from the appropriate person.

` (ii) The amount described in this clause is the amount of medical assistance correctly paid under this title for long-term care services described in subparagraph (A) furnished on behalf of the individual.'

(b) **HARDSHIP WAIVER-** Section 1917(b) (42 U.S.C. 1396p(b)) is further amended by adding at the end the following new paragraph:

` (4) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection if such application would work an undue hardship (in accordance with criteria established by the Secretary).'

(c) **DEFINITION OF ESTATE-** Section 1917(b) (42 U.S.C. 1396(b)) is further amended by adding at the end the following new paragraph:

` (5) For purposes of this section, the term `estate', with respect to a deceased individual, includes all real and personal property and other assets in which the individual had any legally cognizable title or interest at the time of his death, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, survivorship, life estate, living trust, or other arrangement.'.

(d) EFFECTIVE DATE-

(1)(A) The amendments made by subsections (a) and (b) apply (except as provided under subparagraph (B)) to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations or standards to carry out such amendments have been promulgated by such date.

(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 for the plan to meet the additional requirements imposed by the amendments made by subsections (a) and (b), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to 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 previous 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.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

**SEC. 5113. CLOSING LOOPHOLE PERMITTING WEALTHY INDIVIDUALS TO QUALIFY FOR MEDICAID.**

(a) IN GENERAL- Section 1902(r)(2) (42 U.S.C. 1396a(r)(2)) is amended by adding at the end the following:

` (C)(i) Notwithstanding subparagraph (A), except as provided in clause (ii), a State plan may not provide pursuant to this paragraph for disregarding any assets--

` (I) to the extent that payments are made under a long-term care insurance policy; or

` (II) because an individual has received (or is entitled to receive) benefits for a specified period of time under a long-term care insurance policy.

` (ii) Clause (i) shall not apply to State plan provisions that are approved as of May 14, 1993.'.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall take effect on

The Library of Congress > THOMAS Home > Bills, Resolutions > Search Results

<i><u>THIS SEARCH</u></i>	<i><u>THIS DOCUMENT</u></i>	<i><u>GO TO</u></i>
<a href="#">Next Hit</a>	<a href="#">Forward</a>	<a href="#">New Bills Search</a>
<a href="#">Prev Hit</a>	<a href="#">Back</a>	<a href="#">HomePage</a>
<a href="#">Hit List</a>	<a href="#">Best Sections</a>	<a href="#">Help</a>
	<a href="#">Contents Display</a>	

## S.1134

### Omnibus Budget Reconciliation Act of 1993 (Placed on Calendar in Senate)

#### SEC. 7421. MEDICAID ESTATE RECOVERIES.

(a) MANDATE TO SEEK RECOVERY- The matter preceding subparagraph (A) of section 1917(b)(1) (42 U.S.C. 1396p(b)(1)) is amended to read as follows: 'The State agency shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan--'.

(b) HARDSHIP WAIVER- Section 1917(b) (42 U.S.C. 1396p(b)) is amended by adding at the end the following new paragraph:

'(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.'

(c) DEFINITION OF ESTATE- Section 1917(b) (42 U.S.C. 1396p(b)), as amended by subsection (b), is amended by adding at the end the following new paragraph:

'(4) DEFINITION- For purposes of this section, the term 'estate', with respect to a deceased individual--

'(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State law with respect to inheritance, and

'(B) may include, at the option of the State, any or all other real or personal property or other assets in which the individual had any legal title or interest at the time of death, 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.'

(d) EFFECTIVE DATE- (1)(A) Except as provided in subparagraph (B), the amendments made by this section shall apply to payments under title XIX of the

Social Security Act for calendar quarters beginning on or after October 1, 1993.

(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 for the plan to meet the additional requirements imposed by the amendments made by 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 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.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

## **SEC. 7422. TRANSFERS OF ASSETS.**

(a) MANDATORY AND OPTIONAL PERIODS OF INELIGIBILITY- Section 1917(c) (42 U.S.C. 1396p(c)) is amended--

(1) by amending paragraph (1) to read as follows:

`(1)(A) In order to meet the requirements of this subsection for purposes of section 1902(a)(18), the State plan shall provide that any institutionalized individual (or the spouse of such individual) who disposes of assets for less than fair market value on the date specified in subparagraph (B)(ii), or at any time thereafter during such individual's lifetime, is ineligible for medical assistance for--

`(i) nursing facility services,

`(ii) a level of care in any institution equivalent to that of nursing facility services, and

`(iii) home or community-based services under subsection (c) or (d) of section 1915,

during any and all applicable periods specified in paragraph (2).

`(B)(i) The date specified in this clause, with respect to an institutionalized individual, is the first date as of which the individual--

`(I) is an institutionalized individual, and

`(II) has applied for or is receiving medical assistance under the State plan.

`(ii) The date specified in this clause, with respect to an institutionalized individual, is the date 30 months before the date specified in clause (i) (or, at the option of the

The Library of Congress > THOMAS Home > Bills, Resolutions > Search Results

<i>THIS SEARCH</i>	<i>THIS DOCUMENT</i>	<i>GO TO</i>
<a href="#">Next Hit</a>	<a href="#">Forward</a>	<a href="#">New Bills Search</a>
<a href="#">Prev Hit</a>	<a href="#">Back</a>	<a href="#">HomePage</a>
<a href="#">Hit List</a>	<a href="#">Best Sections</a>	<a href="#">Help</a>
	<a href="#">Contents Display</a>	

## H.R.2264

### Omnibus Budget Reconciliation Act of 1993 (Engrossed Amendment as Agreed to by Senate)

#### TE RECOVERIES.

(a) *MANDATE TO SEEK RECOVERY-* The matter preceding subparagraph (A) of section 1917(b)(1) (42 U.S.C. 1396p(b)(1)) is amended to read as follows: 'The State agency shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan--'.

(b) *HARDSHIP WAIVER-* Section 1917(b) (42 U.S.C. 1396p(b)) is amended by adding at the end the following new paragraph:

'(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.'

(c) *DEFINITION OF ESTATE-* Section 1917(b) (42 U.S.C. 1396p(b)), as amended by subsection (b), is amended by adding at the end the following new paragraph:

'(4) *DEFINITION-* For purposes of this section, the term 'estate', with respect to a deceased individual--

'(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State law with respect to inheritance, and

'(B) may include, at the option of the State, any or all other real or personal property or other assets in which the individual had any legal title or interest at the time of death, 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.'

(d) *EFFECTIVE DATE-* (1)(A) Except as provided in subparagraph (B), the

*amendments made by this section shall apply to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993.*

*(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 for the plan to meet the additional requirements imposed by the amendments made by 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 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.*

*(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.*

## **SEC. 7422. TRANSFERS OF ASSETS.**

*(a) MANDATORY AND OPTIONAL PERIODS OF INELIGIBILITY- Section 1917(c) (42 U.S.C. 1396p(c)) is amended--*

*(1) by amending paragraph (1) to read as follows:*

*“(1)(A) In order to meet the requirements of this subsection for purposes of section 1902(a)(18), the State plan shall provide that any institutionalized individual (or the spouse of such individual) who disposes of assets for less than fair market value on the date specified in subparagraph (B)(ii), or at any time thereafter during such individual's lifetime, is ineligible for medical assistance for--*

*“(i) nursing facility services,*

*“(ii) a level of care in any institution equivalent to that of nursing facility services, and*

*“(iii) home or community-based services under subsection (c) or (d) of section 1915,*

*during any and all applicable periods specified in paragraph (2).*

*“(B)(i) The date specified in this clause, with respect to an institutionalized individual, is the first date as of which the individual--*

*“(I) is an institutionalized individual, and*

*“(II) has applied for or is receiving medical assistance under the State plan.*

*“(ii) The date specified in this clause, with respect to an institutionalized individual,*

The Library of Congress > THOMAS Home > Bills, Resolutions > Search Results

<i><u>THIS SEARCH</u></i>	<i><u>THIS DOCUMENT</u></i>	<i><u>GO TO</u></i>
<a href="#"><u>Next Hit</u></a>	<a href="#"><u>Forward</u></a>	<a href="#"><u>New Bills Search</u></a>
<a href="#"><u>Prev Hit</u></a>	<a href="#"><u>Back</u></a>	<a href="#"><u>HomePage</u></a>
<a href="#"><u>Hit List</u></a>	<a href="#"><u>Best Sections</u></a>	<a href="#"><u>Help</u></a>
	<a href="#"><u>Contents Display</u></a>	

## H.R.2264

### Omnibus Budget Reconciliation Act of 1993 (Enrolled as Agreed to or Passed by Both House and Senate)

>

#### SEC. 13612. MEDICAID ESTATE RECOVERIES.

(a) MANDATE TO SEEK RECOVERY- Section 1917(b)(1) (42 U.S.C. 1396p(b)(1)) is amended by striking 'except--' and all that follows and inserting the following: '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), 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 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.

`(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

` (ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources--

` (I) to the extent that payments are made under a long-term care insurance policy; or

` (II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.'.

(b) HARDSHIP WAIVER- Section 1917(b) (42 U.S.C. 1396p(b)) is amended by adding at the end the following new paragraph:

` (3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.'.

(c) DEFINITION OF ESTATE- Section 1917(b) (42 U.S.C. 1396p(b)), as amended by subsection (b), is amended by adding at the end the following new paragraph:

` (4) For purposes of this subsection, the term `estate', with respect to a deceased individual--

` (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

` (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), 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.'.

(d) EFFECTIVE DATES- (1)(A) Except as provided in subparagraph (B), the amendments made by this section shall apply to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

(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 for the plan to meet the additional requirements imposed by the amendments made by 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 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.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

## **PART III--PAYMENTS**

### **SEC. 13621. ASSURING PROPER PAYMENTS TO DISPROPORTIONATE SHARE HOSPITALS.**

(a) DISPROPORTIONATE SHARE HOSPITALS REQUIRED TO PROVIDE MINIMUM LEVEL OF SERVICES TO MEDICAID PATIENTS-

(1) IN GENERAL- Section 1923 (42 U.S.C. 1396r-4) is amended--

(A) in subsection (a)(1)(A), by striking 'requirement' and inserting 'requirements';

(B) in subsection (b)(1), by striking 'requirement' and inserting 'requirements';

(C) in the heading to subsection (d), by striking 'REQUIREMENT' and inserting 'REQUIREMENTS';

(D) by adding at the end of subsection (d) the following new paragraph:

'(3) No hospital may be defined or deemed as a disproportionate share hospital under a State plan under this title or under subsection (b) or (e) of this section unless the hospital has a medicaid inpatient utilization rate (as defined in subsection (b)(2)) of not less than 1 percent.'

(E) In subsection (e)(1)--

(i) by striking 'and' before '(B)', and

(ii) by inserting before the period at the end the following: ', and (C) the plan meets the requirement of subsection (d)(3) and such payment adjustments are made consistent with the last sentence of subsection (c)'; and

(F) in subsection (e)(2)--

(i) in subparagraph (A), by inserting '(other than the last sentence of subsection (c))' after '(c)',

(ii) by striking 'and' at the end of subparagraph (A),

## C

Briefs and Other Related Documents

Court of Appeals of Minnesota.  
In re ESTATE OF Jean GULLBERG, a/k/a Jean  
Weiland Gullberg, Deceased.  
No. C0-02-668.

Oct. 29, 2002.

County brought action against estate of deceased for reimbursement of medical assistance benefits paid on behalf of deceased's husband, who predeceased her. The District Court, Dakota County, Thomas Lacy, J., denied petition for allowance of claim. County appealed, and state department of human services intervened. Granting state's motion to intervene and county's motion to join in state's brief, the Court of Appeals, Klaphake, J., held that: (1) county could make claim against estate of surviving spouse of Medicaid recipient who conveyed his interest in homestead to spouse, to the extent of recipient's interest in homestead at time of death, and (2) state estate recovery statute was preempted by federal law to the extent that state statute permitted recovery beyond the value of recipient's interest in asset at time of death.

Reversed and remanded.

Minge, J., concurred specially and filed separate opinion.

## West Headnotes

**[1] Appeal and Error**  **893(1)**  
30k893(1) Most Cited Cases

The issue of whether federal law preempts state law is generally an issue of statutory construction, which is reviewed de novo.

**[2] States**  **18.3**  
360k18.3 Most Cited Cases

Federal law will preempt state law in three distinct situations: explicit preemption, implicit preemption, or conflict preemption.

**[3] States**  **18.5**  
360k18.5 Most Cited Cases

Suit involving whether federal law preempts state law in action regarding Medicaid presents a "conflict preemption" situation, in which preemption will arise only when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme.

**[4] Health**  **494**  
198Hk494 Most Cited Cases

Under federal law, a state may choose to enact legislation that allows recovery of claims against estate of surviving spouse of Medicaid recipient if the estate contains property or assets in which the Medicaid recipient had some legal title or interest at the time of his or her death. Medicaid Act, § 1917(b)(4)(B), as amended, 42 U.S.C.A. § 1396p(b)(4)(B).

**[5] Health**  **494**  
198Hk494 Most Cited Cases

Phrase "at the time of death" in federal law permitting state to define Medicaid recipient's estate to include assets in which the recipient had legal title at the time of death must be construed to mean a point in time immediately before death; any other reading of this phrase would render the estate recovery statute meaningless because upon death, property immediately passes to beneficiaries. Medicaid Act, § 1917(b)(4)(B), as amended, 42 U.S.C.A. § 1396p(b)(4)(B).

**[6] Health**  **494**  
198Hk494 Most Cited Cases

County retained right to make claim against estate of surviving spouse of Medicaid recipient who conveyed his interest in homestead, which was marital property held in joint tenancy, to spouse prior to his receipt of Medicaid, to the extent of recipient's interest in the homestead at the time of death. Medicaid Act, § 1917(b)(4)(B), as amended, 42 U.S.C.A. § 1396p(b)(4)(B); M.S.A. § 256B.15, subd. 2.

**[7] Homestead**  **113**  
202k113 Most Cited Cases

**[7] Homestead**  **140**  
202k140 Most Cited Cases

Deceased recipient of medical assistance had some legal interest in homestead he conveyed to his spouse, even though he did not hold legal title to homestead, because he and spouse were still married at time of his death. M.S.A. § 524.2-402(a, c).

[8] Health  457  
198Hk457 Most Cited Cases

[8] States  18.79  
360k18.79 Most Cited Cases

State statute allowing county to make claim against estate of surviving spouse of Medicaid recipient who conveyed his interest in homestead to spouse prior to his receipt of Medicaid is preempted by federal law only to extent that state statute permits recovery beyond the value of a recipient's interest in an asset at the time of death. Medicaid Act, § 1917, as amended, 42 U.S.C.A. § 1396p; M.S.A. § 256B.15, subd. 2.

West Codenotes  
Limited on Preemption Grounds

Minn.Stat. § 256B.15

*\*710 Syllabus by the Court*

1. When a Medicaid recipient conveys his or her interest in the homestead to a spouse, who survives the recipient, the county retains the right to make a claim \*711 against the surviving spouse's estate, but only to the extent of the recipient's interest in the homestead at the time of death.

2. Minnesota's estate recovery statute, Minn.Stat. § 256B.15 (2000), is preempted by federal law, 42 U.S.C. § 1396p (1994), only to the extent that the Minnesota statute permits recovery beyond the value of a recipient's interest in an asset at the time of death.

James C. Backstrom, Dakota County Attorney, Margaret M. Horsch, Assistant County Attorney, Dakota County Judicial Center, Hastings, MN, for appellant Dakota County.

Mike Hatch, Attorney General, Suzette C. Schommer, Assistant Attorney General, St. Paul, MN, for intervenor Department of Human Services.

Randy F. Boggio, Bloomington, MN, for respondent.

Considered and decided by TOUSSAINT, Chief Judge, KLAPHAKE, Judge, and MINGE, Judge.

**OPINION**

KLAPHAKE, Judge.

Intervenor appellant Minnesota Department of Human Services (the state) and appellant Dakota County (the county) challenge a district court decision denying the county's claim against respondent, the Estate of Jean Gullberg, for reimbursement of medical assistance benefits paid on behalf of Jean Gullberg's husband, Walter Gullberg, who predeceased her. The district court denied the county's petition for allowance of the claim, holding that Minnesota's estate recovery statute, Minn.Stat. § 256B.15, subd. 2 (2000), is preempted by 42 U.S.C. § 1396p(b)(4)(B) (2000).

On appeal, this court has granted the state's motion to intervene and the county's subsequent motion to join in the state's brief. Because Minnesota's estate recovery statute is preempted only to the extent that it conflicts with federal law, we reverse and remand to determine the nature and extent of Walter Gullberg's interest in the homestead at the time of his death.

**FACTS**

Walter and Jean Gullberg were married when they purchased their homestead property in 1983. The warranty deed listed them as joint tenants. On October 30, 1992, Walter Gullberg conveyed his interest in the homestead by quit claim deed to Jean Gullberg, who was still his wife. Less than one month later, Walter Gullberg applied for medical assistance. On the application for medical assistance, the homestead was valued at between \$57,300 and \$59,000. Between December 1, 1992 and his death on February 13, 1994, at the age of 70, Walter Gullberg received \$40,081.31 in medical assistance benefits.

Jean Gullberg died more than six years later, on September 11, 2000, having never received medical assistance benefits. The only asset listed in her estate inventory was the homestead, which was valued at \$119,900.

On March 15, 2001, the county filed a claim in the amount of \$40,081.31 against the estate under Minnesota's estate recovery statute, Minn.Stat. § 256B.15, subd. 2 (2000). The Gullbergs' daughter, who had been appointed personal representative of the estate, disallowed the claim. The county thereafter filed a petition with the district court seeking allowance of the claim. On May 31, 2001, while the county's petition was pending, the personal

representative sold the homestead and placed the proceeds in the estate account.

\*712 In denying the county's claim against the estate, the district court concluded:

The State may not seek reimbursement of Medical Assistance benefits from the assets of the estate of the surviving spouse of a Medical Assistance recipient where those assets were conveyed to the recipient's surviving spouse prior to the recipient's death.

The court reasoned that because federal law limits the definition of "estate" to property and assets in which the recipient had legal title at the time of death, federal law preempts Minnesota's estate recovery statute, which defines "estate" to include any property that was jointly owned at any time during the marriage.

#### ISSUE

Did the district court err in concluding that Minnesota's estate recovery statute is preempted by federal law, thus disallowing the county's claim in its entirety?

#### ANALYSIS

[1] The issue of "[w]hether federal law preempts state law is generally an issue of statutory construction," which is reviewed de novo. Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn.2002) (citing Pikop v. Burlington N.R.R. Co., 390 N.W.2d 743, 748 (Minn.1986)). To the extent that the preemption doctrine finds its roots in the supremacy clause, it implicates constitutional concerns, burdens, and standards. See U.S. Const. art. VI; Martin, 642 N.W.2d at 17 (finding of preemption implicates obligation to interpret statute to avoid constitutional defects).

[2][3] Federal law will preempt state law in three distinct situations: explicit preemption, implicit preemption, or conflict preemption. Martin, 642 N.W.2d at 10-11. Because Congress "specifically permits state action regarding Medicaid" and "requires that a participating state's Medicaid plan conform to federal requirements," this case does not involve explicit or implicit preemption. See id. at 11 ("there is no explicit or implicit federal preemption of the [Medicaid] field"). Rather, this case presents a "conflict preemption" situation, in which preemption will arise only "when state law conflicts with federal law, either because compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal scheme." Id. (citations omitted).

[4] Since 1993, federal law has required states to recover the costs of certain medical assistance provided to individuals over the age of 55 from the "individual's estate," but only after the "death of the individual's surviving spouse." 42 U.S.C. § 1396p(b) (2000). Federal law defines the term "estate" to include all assets within the individual's estate under state probate law. 42 U.S.C. § 1396p(b)(4)(A) (2000). At the "option" of a state, an individual's "estate" may also include

any other real and personal property and any 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) (2000). Thus, under federal law, a state may choose to enact legislation that allows recovery of claims against a surviving spouse's estate if the estate contains property or assets in which the Medicaid recipient had some legal title or interest at the time of his or her death. See, e.g., \*713 In re Estate of Jobe, 590 N.W.2d 162, 165-66 (Minn.App.1999), review denied (Minn. May 26, 1999); In re Estate of Wirtz, 607 N.W.2d 882, 886 (N.D.2000).

In Minnesota, the estate recovery statute allows claims against the estate of a surviving spouse but limits those claims "to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn.Stat. § 256B.15, subd. 2 (2000). In Jobe, 590 N.W.2d at 165-66, this court allowed a claim against a surviving spouse's estate where the only asset in that estate consisted of the homestead, which was held by the couple in joint tenancy and became the property of the surviving spouse on the death of the recipient. In so doing, we concluded that there was no preemption because compliance with federal and state law was possible. Id. at 166.

This case presents a slightly different situation. Here, the recipient spouse conveyed the homestead, which was marital property and held in joint tenancy, to the surviving spouse shortly before he applied for and began to receive medical assistance benefits. While the county's claim against the estate is clearly allowed by Minnesota's estate recovery statute, the issue is whether allowance of the claim in its entirety complies with federal law.

[5] Again, federal law permits a state to define a Medicaid recipient's estate to include

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 \* \* \* 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). [FN1]

[FN1. "[A]t the time of death" must be construed to mean a point in time immediately before death. Any other reading of this phrase would render the estate recovery statute meaningless because upon death, property immediately passes to beneficiaries. Cf. Minn.Stat. § 645.16 (2000) ("Every law shall be construed, if possible, to give effect to all its provisions.").

[6][7] At the time of his death in early 1994, Walter Gullberg did not hold legal title to the homestead, having conveyed it in late 1992 to his wife, Jean Gullberg. Nevertheless, he continued to have some legal "interest" in the homestead because he and Jean Gullberg were still married at the time of his death. See Searles v. Searles, 420 N.W.2d 581, 583 (Minn.1988) ("the law recognizes that spouses have a common ownership interest in property acquired during coverture, regardless of who holds title"); Minn.Stat. § 524.2-402(a), (c) (2000) (homestead descends to surviving spouse free from any testamentary disposition to which surviving spouse has not consented, but subject to claim filed under 256B.15 for medical assistance benefits). Moreover, the homestead was conveyed to Jean Gullberg through some "other arrangement." See Bonta v. Burke, 98 Cal.App.4th 788, 120 Cal.Rptr.2d 72, 76 (2002) (recipient, who conveyed homestead to her daughters but retained life estate and right to revoke the remainder, held significant interest in property until her death); Wirtz, 607 N.W.2d at 885 (North Dakota Supreme Court recognizes that "other arrangement" language has been interpreted by courts to include community property and homestead interests). We therefore conclude that at the time of his death, Walter Gullberg continued to have some legal interest in the homestead, albeit contingent on any number of factors. [FN2]

[FN2. The special concurrence notes that at oral arguments, the estate suggested that if recovery is allowed in this case, then the county would be "fully reimbursed for its

claim." This statement was not made in the context of our decision here. The value of Walter Gullberg's interest in the homestead at the time of his death is a matter for the district court to determine on remand.

\*714 [8] Nonetheless, to the extent that Minnesota's estate recovery statute allows recovery "to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage," we conclude that it goes beyond what is allowed by federal law, which allows recovery only "to the extent of" the individual's legal interest at the time of death. This apparent conflict, however, does not render the state law preempted in its entirety. See Martin, 642 N.W.2d at 16. "Preemption of state laws is generally disfavored," and courts will find state laws "preempted only to the extent that they are in conflict with federal law." Id. at 11 (citations omitted). Such a "partial" preemption fulfills our obligation to construe statutes to avoid constitutional defects. Id. at 18. Thus, we must construe Minn.Stat. § 256B.15, subd. 2 so as to allow it to operate in harmony with the federal law. See id.

We therefore conclude that Minn.Stat. § 256B.15, subd. 2 allows claims against a surviving spouse's estate only to the extent of the value of the recipient's interest in marital or jointly owned property at the time of the recipient's death. This construction allows some tracing of assets back through the marriage, but restricts recovery to the value of the recipient's interest in those assets at the time of the recipient's death. Cf. Wirtz, 607 N.W.2d at 886 (holding that 42 U.S.C. § 1396p(b) "contemplates only that assets in which the deceased recipient once held an interest will be traced" and that "recovery from a surviving spouse's separately-owned assets \* \* \* or recovery from the surviving spouse's entire estate, including assets not traceable from the recipient, is not allowed").

Typically, the homestead is the only significant asset subject to estate recovery provisions. West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 284-85 (4th Cir.2002) (because potential Medicaid beneficiaries are required to "spend down" their income and assets before they become eligible for benefits and because the homestead is one of the few assets which is exempt from these spend down provisions, the homestead is typically the only significant asset subject to estate recovery provisions). Thus, allowing a claim like this serves to fulfill the purposes of the Medicaid Act by protecting the surviving spouse's right to enjoy and

use assets during his or her lifetime, while enabling the county to recoup a portion of its expenditures and to prevent "capable individuals from using Medicaid as artificially inexpensive long-term care insurance." Jon M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L.J. 359, 374-76 (Fall 1997) (noting that 1993 changes in federal law were aimed "both at reducing manipulation [of eligibility provisions] and at giving the state a second chance at the sheltered wealth after the recipient's death" and predicting that because estate recovery "may prove unsettling to members of the middle class," many will "seek out long-term care insurance \* \* \* before the need for it arises and when the product is still financially within reach").

#### DECISION

The district court's disallowance of the county's claim is reversed and the matter \*715 is remanded to determine and reevaluate Walter Gullberg's interest in the homestead at the time of his death. The county's claim is limited to recovering only to the extent of that interest.

#### Reversed and remanded.

MINGE, Judge (concurring specially).

This decision results in partial preemption of the Minnesota law. In addition, the decision limits the long-term ability and flexibility of the state of Minnesota to collect reimbursement for Medical Assistance from those able to pay. Finally, it creates opportunity for estate planning creativity and abuse that would frustrate such collections of Medical Assistance reimbursement in the future.

As the majority opinion in this case recognizes, we should avoid finding federal preemption unless it is clearly required. Section 1396p(b)(4) of title 42 of the federal code was amended in 1993 to both set a higher minimum standard for state efforts to collect reimbursement for Medicaid (in Minnesota the Medicaid program is known as Medical Assistance) and to give the states flexibility to accomplish this. Pub.L. No. 103-66, § 13612(c) (1993). The language in the federal law is admittedly not a model of clarity. To the extent this decision limits the efforts of the state of Minnesota to deal with the unfortunate, but persistent, efforts of some to enhance their final estate by sheltering and divesting assets in order to qualify for Medical Assistance, this decision takes us down the wrong road. That road and federal preemption can be avoided by construing words

"estate," "interest," and "other arrangement" in 42 U.S.C. § 1396p(b)(4) (2000) to include any estate, interest, or arrangement that the state by law establishes for purposes of recovery of Medical Assistance (Medicaid) benefits. By this approach, we minimize the endless scheming. The all-together human temptation to take advantage of a generous government program is controversial, brings discredit to estate planning, and breeds cynicism in the larger community. Since I do not agree that the federal law should be read to preempt Minnesota law and preclude an expansive state interpretation of "estate," "interest," or "arrangement," I do not join in the opinion of the court. However, at oral argument the respondent stated that if the state of Minnesota could reach the limited interest attributed to Walter Gullberg as allowed by the majority, the state would be fully reimbursed for its claim. Therefore, I concur in the result.

652 N.W.2d 709

#### Briefs and Other Related Documents [\(Back to top\)](#)

- 2002 WL 32694445 (Appellate Brief) Reply Brief and Appendix of Intervenor Appellant Minnesota Department of Human Services (Jul. 26, 2002)
- 2002 WL 32694444 (Appellate Brief) Respondent's Brief (Jul. 15, 2002)
- 2002 WL 32704736 (Appellate Brief) Intervenor Appellant Minnesota Department of Human Services' Brief (May. 24, 2002)

END OF DOCUMENT

Not Reported in F.Supp.

Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082

(Cite as: Not Reported in F.Supp.)

## H

### Briefs and Other Related Documents

United States District Court, N.D. California.  
Lynn Roy DEMILLE, Reyna Seagraves, Evia  
Gordon, Dorothy Brubaker, Lena Mezzavilla, Ralph  
Ainsworth, Delores Gunz, Grace Kleiman, Bertha  
Stapleton, and California Advocates for Nursing  
Home Reform, Plaintiffs,

v.

Kimberly BELSHE, Director of California  
Department of Health Service, Gerald Rohlfs, Chief  
of the Third Party Liability Branch of the California  
Department of Health Services, John Rodriguez,  
Chief Deputy Director of Programs of the California  
Department of Health Services, in their official  
capacities, Defendants.  
No. C-94-0726-VRW.

Sept. 16, 1994.

### ORDER

WALKER, District Judge.

\*1 Plaintiffs in this case raise numerous challenges to California's Welfare & Institutions Code § 14009.5. Under the federal Medicaid Act, 42 U.S.C. § 1396 et seq, states that subsidize medical treatment for the poor are provided federal funds to defray the costs. As a condition of participating in the program, states must promulgate legislation that complies with various requirements. The statutory framework for California's Medicaid program, known as the "California Medical Assistance Program" or "Medi-Cal," appears at Cal.Welf. & Inst.Code § 14000, et seq.

The Medicaid Act, while encouraging states to give free or reduced-cost medical care to the needy, also provides that the state can recoup some of its expenses. After a Medicaid recipient dies, the state is entitled, with certain important exceptions, to seek reimbursement from the "estate" of the recipient. See 42 U.S.C. § 1396p. California has asserted its right to reimbursement by enacting Cal.Welf. & Inst.Code § 14009.5. This statute provides, inter alia, that upon the death of a Medi-Cal recipient, the state may attach a lien to the decedent's interest in the property of the surviving spouse. *Id.*

This suit was originally filed by ten plaintiffs-nine individuals and one association. The individual plaintiffs are persons who own property on which the state has imposed a lien pursuant to Cal.Welf. & Ins.Code § 14009.5 (a "Medi-Cal lien"). The plaintiff association, California Advocates for Nursing Home Reform (CANHR), is a non-profit organization that seeks to protect the rights of the elderly. CANHR is suing on behalf of its elderly members who own property that has been subjected to a Medi-Cal lien.

Plaintiffs complain that the California statute authorizing Medi-Cal liens runs afoul of the federal Medicaid Act. Plaintiffs also contend that the state, in obtaining Medi-Cal liens on their property, has provided no hearing and no pre-lien notice, thus depriving them of procedural due process. Plaintiffs seek injunctive and declaratory relief.

After this suit was filed, the state reexamined the 400 Medi-Cal liens it had imposed since Cal.Welf. & Ins.Code § 14009.5 went into effect on June 30, 1993. Upon reviewing a 1989 Ninth Circuit decision, Citizens Action League v. Kizer, 887 F.2d 1003 (9th Cir.1989), the state determined that 260 of these liens were improper. Therefore, the state has now dissolved those liens, including the liens on the properties of six of the nine individual plaintiffs. Additionally, the state has extinguished the liens on the homes of two other individual plaintiffs, one because the lien was imposed while the home was in escrow and the other because the lien was erroneously placed. Thus, there are now only two plaintiffs remaining in this suit: Delores Gunz and CANHR.

Presently before the court are numerous cross-motions for summary judgment. Plaintiffs' notice of motion indicated that they would be seeking summary judgment on claims one, three, four, six, seven, eight, nine and ten. Yet for some reason, plaintiffs' brief does not directly address claims nine or ten. Defendants, on the other hand, originally filed a notice of motion indicating that they would be seeking summary judgment on all ten claims. The court will proceed on the assumption that plaintiffs have moved for summary judgment on all claims except two and five, and defendants have moved for summary judgment on all claims. Defendants have also challenged the standing of the two remaining

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

plaintiffs to raise the claims asserted herein.

## I

\*2 In order to address defendants' motion for summary judgment based on lack of standing, it is necessary first to review the nature of the ten claims raised in plaintiffs' complaint. These claims can be broken down into two general categories. First, plaintiffs assert a number of claims (counts four, six, seven, eight and nine) that challenge the *text* of Cal.Welf. & Ins.Code § 14009.5 as being in conflict with the federal Medicaid Act. Second, plaintiffs bring various causes of action (counts one, two, three and five) that attack the manner in which Cal.Welf. & Inst. Code § 14009.5 is carried out. In these claims, plaintiffs argue that the state is not affording affected parties procedural due process. claim ten of the complaint is for declaratory relief, stating merely that "[t]he parties are entitled to a declaration of their rights." First Amend Compl. (FAC) ¶ 164.

The husband of plaintiff Delores Gunz, Mr. Edward Gunz, died on or about October 19, 1993. FAC ¶ 104. At the time of his death, both Mr. and Mrs. Gunz were trustors and trustees of a trust that held a home and a parcel of property located in Santa Ana, California. FAC ¶ 105. Plaintiffs claim that after Mr. Gunz's death, the property and the home remained in the trust, and Mr. Gunz's estate had no interest therein. FAC ¶ 106. On January 10, 1994, Mrs. Gunz received a letter from the California Department of Health Services informing her that a Medi-Cal lien had been placed on the home and property. FAC ¶ 107. The notice stated that this lien, in the amount of \$17,287.53, was for the cost of medical services rendered to Mr. Gunz between January 6, 1993, and September 29, 1993. FAC ¶ 110.

Defendants argue that Mrs. Gunz lacks standing "because she has asserted no injury in fact." Defs' Mem in Supp. at 3-4. Defendants seem to believe that Mrs. Gunz will be injured only if she actually attempts to sell or refinance her home and is precluded from doing so due to the presence of the Medi-Cal lien. *Id.* This argument entirely misses the mark.

The attachment of a lien to property, in and of itself, can have significant consequences for the property owner. See Connecticut v. Doehr, 501 U.S. 1, 11 (1991). For instance, the lien may adversely affect the owner's credit rating, or "can even place an

existing mortgage into technical default where there is an insecurity clause." *Id.* Therefore, the erroneous imposition of a lien can constitute an "injury in fact" even if the property owner has no immediate plans to sell or refinance the property. Mrs. Gunz, having had her property subjected to a lien, seeks to challenge: (1) the state's right to attach the lien in the first place; and (2) the state's right to impose a lien without affording pre-attachment notice and a pre-attachment hearing. Under the circumstances, the court concludes that Mrs. Gunz has sufficiently asserted an actual injury to bring these claims.

The plaintiff association, CANHR, professes to work with nursing home residents and their families to address the quality of care in California nursing homes. FAC ¶ 13. Additionally, CANHR alleges that it advises consumers over the age of sixty about in-home services, and about how such persons may maintain their independence while remaining in their own home. *Id.* According to Patricia McGinnis, the Executive Director of CANHR, many of CANHR's 2500 members have had Medi-Cal liens placed on their homes by the state. McGinnis Decl. at 2. One such member is Israel Auerbach, whose wife died on October 29, 1993. Auerbach Decl. at 1. On February 22, 1994, Mr. Auerbach received notice from the state that a Medi-Cal lien in the amount of \$7,619.62 has been placed on his property. *Id.*

\*3 Defendants argue that CANHR lacks standing to raise any of the claims asserted in this suit. Under the law of this circuit, an organization may sue on behalf of its members if: "(1) any one of its members would have standing to sue; (2) the interests the organization seeks to protect are germane to the purposes of the organization; and (3) neither the action nor the relief sought requires participation by the individual member or members." EEOC v. Nevada Resort Association, 792 F.2d 882, 885 (9th Cir.1986) (citing Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977)). Here, CANHR meets all three requirements.

First, there is no question that Mr. Auerbach, a CANHR member, would have standing to sue in his own right if he chose to do so, just as Mrs. Gunz. Additionally, Ms. McGinnis has stated that there are many other CANHR members who have had Medi-Cal liens imposed on their property. Because CANHR need only demonstrate that at least one of its members would have standing to sue in his own right, the court concludes that CANHR satisfies the first of the associational standing requirements.

Second, the claims and rights asserted here are germane to CANHR's purpose. Protecting elderly persons from unauthorized liens is closely connected to CANHR's objective of "representing \* \* \* consumers aged 60 and over" regarding "how those elderly people may maintain their independence at home." FAC ¶ 13. Finally, neither this litigation nor the relief requested requires participation of CANHR's members. CANHR's suit poses primarily legal questions regarding the interpretation of California's statutory scheme, and the relief requested is merely an injunction preventing enforcement of that framework. Neither of these call for CANHR's members to be present.

Therefore, the court concludes that both Mrs. Gunz and CANHR have standing to raise the claims asserted in this suit. Accordingly, defendants' motion for summary judgment for lack of standing is hereby DENIED.

## II

The court next turns to those claims that attack the text of Cal.Welf. & Inst.Code § 14009.5 as being inconsistent with federal law. Plaintiffs allege that the state's self-granted power to impose Medi-Cal liens on the homes of surviving spouses conflicts with 42 U.S.C. § 1396p. Plaintiffs have enumerated five related bases for this contention in claims four, six, seven, eight and nine. A preliminary step to addressing these claims is briefly to review the two statutes.

Section 1396p details the means by which a state may seek reimbursement for sums it has previously paid to a Medicaid recipient. Subsection (a) discusses the state's authority to impose liens upon the property of the recipient before the recipient's death. § 1396p(a). Subsection (b) covers the state's power to seek "adjustments" or "recoveries." § 1396p(b). The relevant language of § 1396p(a) provides as follows: (a)(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except

\*4 (B) in the case of the real property of an individual-

(i) who is an inpatient in a nursing facility \* \* \*; and  
(ii) with respect to whom the State determines, after notice and an opportunity for a hearing \* \* \* that he

cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if-

(A) the spouse of such individual \* \* \* is lawfully residing in such home.

§ 1396p(a). Subsection (b), covering "adjustments" and "recoveries" provides, in pertinent part:(b)(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except \* \* \*

(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 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 the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate \* \* \*.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse \* \* \*.

### § 1396p(b).

From these two statutory subsections, a few general principles can be discerned. First, the general rule is that the state may not impose liens on a Medicaid recipient's property while the recipient is still alive. § 1396p(a)(1). If, however, the recipient is committed to a nursing home and the state determines, after notice and a hearing, that the recipient cannot reasonably be expected to return home, the state may impose a lien on the recipient's real property. § 1396p(a)(1)(B). An important exception to the state's power to do so arises when the spouse of the recipient is residing in the home. § 1396(a)(2)(A).

The state is also generally prohibited from seeking an "adjustment" or "recovery" of assistance correctly paid to recipients. § 1396p(b)(1). In certain circumstances, however, the state is required to seek an adjustment or recovery. If a lien has been imposed upon the recipient's property pursuant to subsection (a), the state must seek an adjustment or recovery either upon the sale of the lien property, or from the recipient's "estate" after he dies. § 1396p(b)(1)(A). In either case, however, the state may not seek an adjustment or recovery if the recipient's spouse is still alive. § 1396p(b)(2). In cases not involving liens under subsection (a), the state must seek an adjustment or recovery for

amounts paid to recipients over age 55. § 1396p(b)(1)(B). These adjustments or recoveries must be obtained from the "estate" of the recipient after his death. *Id.* Again, the state cannot seek an adjustment or recovery if the recipient's spouse is alive. § 1936p(b)(2).

\*5 The California statutory provision challenged by plaintiffs, Cal.Welf. & Inst.Code § 14009.5, provides in relevant part:

(a) Notwithstanding any other provision of this chapter, the department shall claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival an amount equal to the payments for health care services received or the value of the property received by any recipient from the decedent by distribution or survival, whichever is less.

(c) The department shall place a lien against the decedent's interest in the real property of a surviving spouse in the amount of the department's entitlement \* \* \* The lien shall become due and payable upon the death of the surviving spouse or upon the sale, transfer, or exchange of the real property.

Cal.Welf. & Inst. Code § 14009.5. The state statute thus contemplates that upon the death of a Medi-Cal recipient, the state will impose a lien on the property of the surviving spouse. Cal.Welf. & Inst.Code § 14009.5(c). This lien becomes "due and payable" upon either the death of the surviving spouse or the sale, transfer or exchange of the lien property. *Id.*

A

In plaintiffs' sixth cause of action, they allege that "the defendants are violating federal law by imposing liens upon the property of persons who did not receive medical assistance through the Medi-Cal program." FAC ¶ 156. Plaintiffs point out that the text of 42 U.S.C. § 1396p(a) expressly permits liens only against the property of the Medicaid recipient (prior to his death), and only in certain narrow circumstances. Plaintiffs reason that because this is the statute's only explicit grant of the power to impose liens, § 1396p implicitly prohibits all other liens. Plaintiffs thus argue that Cal.Welf. & Inst.Code § 14009.5, which allows for liens against the property of the *surviving spouse*, conflicts with the federal law. The court disagrees.

The focus of § 1396p(a) is on the propriety of imposing a lien against the property of a Medicaid recipient *while the recipient is still alive*. Indeed, the opening clause of § 1396p(a) itself states that "[n]o lien may be imposed against the property of any individual *prior to his death* \* \* \*." § 1396p(a)(1) (emphasis added). The exceptions which follow also presume that the recipient is still living. *Id.* Therefore, subsection (a) was not meant to be a comprehensive exposition on the use of liens. Rather, Congress' purpose in including subsection (a) in the statute was merely to limit the state's ability to impose liens against the property of *living* recipients. Nothing in subsection (a) appears calculated to address the imposition of liens *after* the recipient's death.

Although Congress took great pains to curb the state's ability to resort to liens *before* the death of the recipient, it remained silent on the use of liens *after* the recipient's death. Under these circumstances, the court can only conclude that the state is free to employ liens provided that the recipient is not alive. Accordingly, the fact that the state law calls for the imposition of a lien on the property of the surviving spouse does not, in itself, abridge the federal statute. Plaintiffs' motion for summary judgment on their sixth cause of action is therefore DENIED, and defendants' motion for summary judgment on plaintiffs' sixth claim is hereby GRANTED.

B

\*6 Plaintiffs' ninth cause of action appears closely related to their sixth claim. In plaintiffs' ninth claim, they allege that "[t]he defendants are violating federal law by imposing liens upon homes subsequent to the Medi-Cal recipient's death." FAC ¶ 162.

The court cannot be certain of plaintiffs' contention in bringing this claim, as they have neglected to brief it in their moving papers. Nevertheless, the court presumes that plaintiffs here argue, again, that the only liens authorized by federal law are those that appear in § 1396p(a), which apply only while the recipient is still alive. Therefore, the argument would continue, the imposition of a lien after the recipient dies is implicitly prohibited. Because Cal Welf & Inst Code § 14009.5 permits postmortem liens, plaintiffs argue that the state statute runs afoul of federal law.

This argument must be rejected for the reasons discussed supra part II.A. Subsection (a) covers only

(Cite as: Not Reported in F.Supp.)

pre-death liens, leaving unaddressed the use of liens after the recipient dies. And for the reasons detailed above, Congress' silence on this point provided implicit authority for the state to impose such postmortem liens. Therefore, the state statute's provision for postmortem liens does not, in itself, violate the federal statute. Accordingly, plaintiffs' motion for summary judgment on their ninth cause of action is hereby DENIED, and defendants' motion for summary judgment on plaintiffs' ninth claim is hereby GRANTED.

## C

In plaintiffs' eighth claim for relief, they assert that "[t]he defendants are violating federal law by imposing liens upon homes while the surviving spouse of a deceased former Medi-Cal recipient lawfully resides in the home." FAC ¶ 160. Plaintiffs, citing § 1396p(a)(2)(A), argue that the federal statute expressly forbids the recording of a lien against a home if the surviving spouse is lawfully residing there. Because Cal Welf & Inst Code § 14009.5 mandates that a lien be placed on the property of the surviving spouse without regard to whether the spouse is living on that property, plaintiffs claim that the state law cannot stand.

Once again, the court must note that the statutory prohibition cited by plaintiffs, i.e., § 1396p(a)(2)(A), appears within subsection (a), which, as described above, applies only when the recipient is still alive. See supra parts II.A, II.B. It is therefore true that while the recipient is alive, the state may not impose a lien against the home in which the spouse is lawfully residing, § 1396p(a)(2)(A). But nothing in subsection (a) prohibits liens against the spouse's residence *after* the recipient's death.

There is, however, a related limitation contained in the federal statute. Subsection (b) of § 1396p allows the state, in limited circumstances, to seek an "adjustment" or "recovery" from the estate of a deceased Medicaid recipient. But the state's ability to seek such an "adjustment" or "recovery" is held in abeyance so long as the surviving spouse is still alive. § 1396p(b)(2). Therefore, if the imposition of a postmortem lien can be considered an "adjustment" or "recovery," such a lien would be prohibited, by subsection (b)(2), during the life of the surviving spouse.

\*7 The terms "adjustment" and "recovery" are apparently not defined in the federal statute.

Therefore, the court must give these terms their ordinary, commonsense meaning. While it is difficult to imagine how a lien could qualify as an "adjustment," an argument could be made that a lien constitutes a "recovery."

Nevertheless, the court concludes that this would strain ordinary usage, and the mere placement of a lien, without more, does not amount to a "recovery." A lien simply provides notice of a claim against property, and is intended to protect both the lienholder and future purchasers of the liened property. So long as the party holding the lien does not foreclose on the property, no money changes hands, and no "recovery" can be said to occur.

Of course, none of this is meant to trivialize the effect that a lien can have on the property owner. See Connecticut v. Doehr, 501 U.S. 1, 11 (1991). Indeed, as discussed *infra* part III.A, the imposition of a lien by the government amounts to a "taking" of property, thus implicating due process concerns. Rather, the court merely holds here that a "recovery" necessitates something more than the acquisition of an inchoate property right. Therefore, because a lien does not constitute an "adjustment" or "recovery," the state's use of postmortem liens is consistent with subsection (b) of § 1396p.

Accordingly, the court finds no conflict between the state's attachment of liens to the homes of surviving spouses, and either subsection (a) or subsection (b) of § 1396p. Plaintiffs' motion for summary judgment on their eighth claim is hereby DENIED, and defendants' motion for summary judgment on plaintiffs' eight claim is hereby GRANTED.

## D

In plaintiffs' seventh cause of action, they claim that "[t]he defendants are violating federal law by seeking to recover from persons who did not receive Medi-Cal benefits." FAC ¶ 158.

The federal statute allows the state to recoup its expenses only from those persons who are holding real or personal property in which the deceased recipient held a legal interest at the time of death. See § 1396p(b)(1) (requiring state to recover from decedent's "estate") and § 1396p(b)(4) (defining "estate"). The amount of expenses the state may recover from such persons is capped by the amount of the decedent's interest in the property. § 1396p(b)(4). In other words, the federal statute only

contemplates that the deceased recipient's assets will be traced, not that other persons can become liable to pay over their own personal assets.

Plaintiffs' brief asserts that Cal.Welf. & Inst.Code § 14009.5 improperly permits recovery from the personal assets of those persons in possession of property of the deceased recipient. Pls' Mem. in Supp. at 23-24. This is entirely incorrect. The state statute expressly limits recovery to the lesser of the amount of the medical bills paid by the state, or the decedent's interest in the property. CalWelf & InstCode § 14009.5(a). The state statute is thus facially consistent with federal law

\*8 Plaintiffs have also raised valuation problems with these liens. See Pls' Mem. in Supp. at 23-24. Specifically, they claim that the state has often recorded liens in amounts greater than the decedent's interest in the property, thus reaching into the personal assets of non-recipients. *Id.* The court concludes that this allegation, even if true, cannot support plaintiffs' seventh claim.

Plaintiffs are not here requesting that the excessive liens be reduced to the proper amount. Rather, plaintiffs seek an injunction prohibiting defendants from, *inter alia*, "implementing or enforcing the provisions of [Cal.Welf. & Inst.Code] § 14009.5 \* \* \* except as permitted by federal law." FAC ¶ 4. Because plaintiffs have not alleged that the state has *intentionally* imposed liens that it knows to be excessive, any errors made must be attributed to inadvertence or negligence. Injunctive relief is ordinarily directed at the *willful* conduct of another. Plaintiffs have cited no authority that would permit the court to issue an injunction against negligent or inadvertent mistakes of the type apparently involved here.

Additionally, it is not at all clear that plaintiffs can raise a Supremacy Clause claim against the state's inadvertent errors. Supremacy Clause analysis is usually reserved for situations in which a federal law or policy comes into conflict with a state law or policy. See, generally, Laurence Tribe, *American Constitutional Law*, pp. 479-528 (Foundation Press, 1988). Given that the state's errors here are apparently unintentional, the state cannot be said to have a "policy" of imposing excessive liens. Therefore, although the state's miscalculations may violate its own statute, they do not appear to implicate the Supremacy Clause of the United States Constitution.

Finally, as discussed *infra* part III.A, the court today determines that the state may not impose Medi-Cal liens on property without providing the owner with pre-attachment notice and a pre-attachment hearing. As a practical matter, these procedural safeguards should eliminate the problem of excessive liens.

Accordingly, plaintiffs' motion for summary judgment on their seventh claim for relief is hereby DENIED, and defendants' motion for summary judgment on plaintiffs' seventh claim is hereby GRANTED.

E

In plaintiffs' fourth cause of action, they maintain that "[t]he defendants are violating federal law by seeking to foreclose on liens upon the 'transfer or exchange' of property." FAC ¶ 152. Plaintiffs suggest that "[f]ederal law only permits recovery upon the 'sale' of the property." *Id.*

As mentioned *supra* part II.C, the federal statute prohibits the state from seeking an "adjustment" or "recovery" from the decedent's estate so long as the surviving spouse is still alive. § 1396p(b)(2). But under the state statute, a lien imposed upon the property of the surviving spouse "shall become due and payable upon the death of the surviving spouse *or upon the sale, transfer or exchange of the real property.*" Cal.Welf. & Inst.Code § 14009.5(c) (emphasis added). Therefore, if the surviving spouse sells, transfers or exchanges the lien property during his lifetime, the lien becomes "due and payable" under the state law. Plaintiffs argue that this "due and payable" clause permits the state to achieve a "recovery" during the lifetime of the surviving spouse, thereby violating federal law.

\*9 As a preliminary matter, the court notes that none of the plaintiffs has alleged facts demonstrating an actual injury from the "due and payable" clause of Cal.Welf. & Inst.Code § 14009.5(c). In other words, the court is not aware of any person who has actually sold, transferred or exchanged property subject to a Medi-Cal lien and who has been called upon to pay the state the amount of the lien. Therefore, plaintiffs' fourth claim, standing alone, may not be justiciable.

But plaintiffs have also included in their first amended complaint a general claim for declaratory relief. FAC ¶ ¶ 163-64. By combining plaintiffs' declaratory relief claim with their fourth cause of

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

action, the court *may* be able to rule upon the latter. Under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., a person may seek clarification of his rights if he can demonstrate: (1) an “actual controversy;” and (2) that the matter is one over which the federal court has subject matter jurisdiction. See William Schwarzer, A Wallace Tashima & James Wagstaffe, *Federal Civil Procedure Before Trial*, § 10.6 (The Rutter Group, 1994). Plaintiffs’ fourth claim for relief clearly raises issues within the court’s subject matter jurisdiction. Therefore, the only question that remains is whether plaintiffs have established an “actual controversy.”

The definition of “actual controversy” is far from clear. The essential question is whether there is a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Hillblom v. United States, 896 F.2d 426, 430 (9th Cir.1990). Put another way, “the adversarial relationship must have crystallized to the point that there is a specific need for the court to declare the parties’ rights and obligations.” Schwarzer, § 10:24.

The court concludes that plaintiffs’ fourth cause of action sufficiently states an “actual controversy.” Because the state law makes the lien “due and payable” upon the sale, transfer or exchange of the property, it is quite possible that some elderly persons are presently being inhibited from engaging in certain transactions merely out of fear of liability to the state. If the state’s “due and payable” clause is impermissible under federal law, such persons are entitled to know that. Thus, the adversarial relationship between the parties has sufficiently “crystallized” as to permit the court to entertain plaintiffs’ declaratory relief claim. Accordingly, the court will combine plaintiffs’ tenth and fourth causes of action and proceed to consider the merits of their fourth claim.

The court concludes that the state statute provision making the Medi-Cal lien “due and payable” upon the “sale, transfer or exchange” of the lien property contravenes federal law. As discussed supra part II.C, the mere imposition of a lien, without more, cannot be said to amount to a “recovery.” The state may thus impose such liens during the lifetime of the surviving spouse without abridging federal law. See supra part II.C. But if the state actually forecloses on the lien, it ineluctably follows that the state has

achieved a “recovery;” after all, the state has collected its money and has no continuing interest in the property. Therefore, if the state forecloses on a Medi-Cal lien during the lifetime of the surviving spouse, it has obtained a “recovery” in violation of § 1396p(b)(2).

\*10 Defendants argue against this conclusion on numerous grounds. First, they contend that the “due and payable” language of Cal.Welf. & Inst.Code § 14009.5(c) does not necessarily mean that the state will receive payment as soon as the lien property is sold, transferred or exchanged. Defendants suggest that the statutory language is, at most, ambiguous as to when the state will collect its money. The court disagrees. The phrase “shall become due and payable” reasonably allows for only one interpretation—that the state will be reimbursed as soon as the property is sold, transferred or exchanged.

Next, defendants assert that they intend to promulgate, at some indefinite point in the future, a regulation preventing the state from foreclosing on the lien during the life of the surviving spouse, even if the property is sold, transferred or exchanged. This promise is of little solace to the court. A defendant cannot be allowed “to defeat injunctive relief by protestations of repentance and reform.” United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). Furthermore, defendants have cited no authority indicating that a facially defective statute can be salvaged by an implementing regulation.

Finally, defendants argue that the “due and payable” clause is merely meant to prevent the lien from dissolving when the property is sold, transferred or exchanged. Defendants suggest that the clause somehow ensures that the lien remains on the property. The court agrees that the proper means for the state to maintain its protection is to keep the lien on the property even after it has been conveyed by the surviving spouse. But there is simply no feasible interpretation of the “due and payable” clause that would effectuate that result.

Accordingly, the court concludes that the portion of Cal.Welf. & Inst.Code § 14009.5(c) which mandates that the Medi-Cal lien “shall become due and payable” upon the “sale, transfer or exchange” of the property conflicts with § 1396p(b)(2). Therefore, plaintiffs’ motion for summary judgment on their fourth claim, when combined with their tenth claim, is hereby GRANTED, and defendants’ motion for summary judgment on plaintiffs’ fourth and tenth

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

claims is hereby DENIED.

### III

The court now turns to plaintiffs' claims challenging the constitutionality of the manner in which Cal.Welf. & Inst.Code § 14009.5 is carried out.

#### A

In their first cause of action, plaintiffs allege as follows:

Defendants' past and continuing failure to provide notice, hearing and other procedural safeguards to plaintiffs \* \* \* before imposing liens on real property is a deprivation of property without due process in violation of the Fourteenth Amendment to the United States Constitution.

FAC ¶ 146.

At the time the complaint in this matter was filed, the state's procedure for the imposition of Medi-Cal liens did not afford the surviving spouse either a hearing or pre-attachment notice. Upon the death of the Medi-Cal recipient, the state would immediately record its lien, only later informing the surviving spouse that it had done so. If the surviving spouse wished to challenge the imposition of the lien or the amount thereof, he had to do so without the benefit of a hearing. For these reasons, plaintiffs complained that the state's procedure deprived them of due process of law.

\*11 Perhaps in response to the instant suit, the state has promulgated "emergency regulations" effective April 1994. These new regulations provide that after the state has recorded its Medi-Cal lien, the surviving spouse is to be given notice of the lien and an opportunity to request a hearing. If the surviving spouse desires a hearing, he must request one within sixty days. If a hearing is held, the regulation provides that a decision will be rendered within 60 days of the hearing. Therefore, the delay between an erroneous imposition of a lien and the ultimate correction of the mistake via the hearing could be as great as 120 days. Plaintiffs thus contend that the post-attachment notice and hearing do not provide adequate safeguards. Plaintiffs insist that due process necessitates that they be given pre-attachment notice and a pre-attachment hearing.

The United States Supreme Court has established a

two-part analysis for due process challenges to state statutes that implicate property rights. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976). The first inquiry is whether the statute results in the deprivation of a "significant" property interest. Fuentes, 407 U.S. at 86. If the interests affected are "significant," then the court must examine what process is due under the particular circumstances.

The parties agree, as do the courts, that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." Connecticut v. Doehr, 501 U.S. 1, 12 (1991). Thus, there is no question that the Medi-Cal liens at issue in the instant case affect "significant" property interests.

The only dispute, therefore, concerns the process which is due. In considering this issue, the court is guided by the three-factor balancing test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). The Mathews Court held that in determining the sufficiency of the process provided by the state, the court should consider:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

In support of their argument that the state must provide notice and a hearing *before* attaching a Medi-Cal lien, plaintiffs cite Connecticut v. Doehr, 501 U.S. 1 (1991). In Doehr, the Court struck down a Connecticut statute that allowed plaintiffs in civil matters to obtain prejudgment attachment of a defendant's real property. The invalidated attachment procedure required the plaintiff to submit an ex parte affidavit to the state court. In the affidavit, plaintiff had to assert that the facts alleged in the complaint were true and that those facts established "probable cause." If the judge reviewing these materials agreed that "probable cause" existed, he could order immediate attachment of the defendant's property. No pre-attachment notice or hearing was given to the defendant. After the property had been attached, however, the defendant was to be provided with "expeditious" notice, an adversary hearing, judicial review of any adverse

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

decisions, and a double damages action if the original suit was commenced without probable cause. Defendant challenged the statute on due process grounds.

\*12 Applying the three-factor *Mathews* test, the Court concluded that the Connecticut statute was unconstitutional. The Court first noted that the private interest affected was significant, because: attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

*Doehr*, 501 U.S. at 11. The Court next considered the risk of erroneous deprivation. The Court noted that despite the statutory requirement that the judge find "probable cause," the chance for error was simply too great to justify postponement of the hearing until after attachment. *Id.* at 13. Notably, the Court also rejected the state's argument that the post-attachment remedies provided by the statute adequately protected the defendant, stating that "[these] would not cure the temporary deprivation that an earlier hearing might have prevented." *Id.* Finally, the Court observed that the third *Mathews* factor, the governmental interest, was not implicated because the benefit of the state statute ran in favor of private parties (i.e., plaintiffs in civil cases), not the state. The Court thus concluded that the process contemplated by Connecticut's statute failed to satisfy the strictures of the Due Process Clause.

The *Doehr* case, though presenting a slightly different context than the one before this court, is still highly instructive. The *Doehr* Court's analysis of the first *Mathews* factor is equally applicable here. The Medi-Cal lien imposed by the state can have numerous negative consequences for the owner of the property, including those listed by in *Doehr*. See *Doehr*, 501 U.S. at 11. Therefore, the court concludes that the private interest affected by the state's Medi-Cal lien procedure is substantial.

The court also concludes that the state's present attachment procedure poses an intolerably high risk of erroneous deprivation. In *Doehr*, the Court found insufficient the combination of: (1) a pre-attachment judicial determination of "probable cause;" (2) an "expeditious" post-attachment notice; (3) a post-attachment hearing; (4) judicial review of an adverse decision at the hearing; and (5) double damages if the original complaint was filed without "probable

cause." Clearly, if this extensive set of protections cannot suffice to prevent erroneous deprivations, nor can the mere post-attachment notice and hearing provided by the state in the instant case.

Defendants argue that the risk of error is low because it is simply a "ministerial" task to check the Medi-Cal records of the decedent for the amount of disbursements paid, and to obtain a lien in that amount on the appropriate property. Yet defendants are utterly unable to respond to the numerous instances cited by plaintiffs in which the state has imposed liens on the incorrect property, or in the incorrect amount. In fact, defendants' brief actually *highlights* the fact that errors are made.

\*13 First, defendants admit that the state improperly placed a Medi-Cal lien on the trust of Mrs. Kleiman. Defs' Mem. in Opp. at 5. This error allegedly occurred because the state did not realize that the decedent, Leonard J. Kleiman, also had a son by the same name. *Id.* Second, defendants acknowledge that the state, after improperly interpreting federal law, mistakenly imposed Medi-Cal liens on some 260 properties. *Id.* at 5-6 n. 3. Third, when the state undertook efforts to remove these 260 erroneously placed liens, it overlooked two of them. *Id.* at 9-10. Fourth, defendants concede that the post-attachment notice sent to Mr. Ainsworth included incorrect dates. *Id.* at 8. Fifth, defendants confess that the Medi-Cal lien originally imposed on the Whitsons' property was not calculated correctly. *Id.* at 9.

Defendants attempt to explain away these mistakes by suggesting that the state took prompt remedial action immediately upon learning of each of these mistaken liens. This, of course, is not the point. The above examples demonstrate that errors do in fact occur, and that the risk of erroneous deprivation, therefore, is very high. Pre-attachment notice and a pre-attachment hearing would prevent many of these problems.

As an alternative basis for their argument that post-attachment notice and hearing provide sufficient protection, defendants cite *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). In *Mitchell*, the Court was faced with a state statute permitting lien-holding creditors to obtain sequestration of consumer goods. In that context, the Court held that post-deprivation notice and hearing are sufficient for due process purposes. But there is a critical distinction between *Mitchell* and the case before this court. The statute involved in *Mitchell* permitted persons *already holding a lien* to seek sequestration. Here, the very

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

question presented is whether the imposition of the lien is proper in the first place. For this reason, the instant case is more akin to *Doehr* than to *Mitchell*.

Finally, the court must consider the third *Mathews* factor, the governmental interest. The Medi-Cal lien at issue here, unlike the liens involved in *Doehr*, inure to the benefit of the state. Therefore, the court must examine both the nature of the state's interest and the burden that additional safeguards would impose on the state. In that regard, defendants advance two arguments. First, they contend that were the state to provide pre-attachment notice, surviving spouses would promptly divest themselves of the subject property. By doing so, the surviving spouse would successfully shield the property from the state's claim. Second, defendants argue that the costs entailed in an expeditious pre-lien hearing are too high.

As an initial matter, defendants' argument is that grieving widows and widowers, upon receiving notice of a Medi-Cal lien hearing, will have the wherewithal and legal sophistication necessary to dispose of the subject property quickly. While some surviving spouses may resort to such strategic behavior, this cannot constitute a legitimate reason to permit the state to provide lesser process. After all, the risk of pre-attachment divestment inheres in every law allowing the imposition of a lien. But as evidenced by *Doehr*, not all such laws can Constitutionally dispense with the pre-attachment notice and pre-attachment hearing requirements. The court sees no reason to single out grieving widows and widowers for a heightened suspicion regarding such propensities.

\*14 Nor is the court is persuaded by defendants' cost argument. Given that the state has already promulgated "emergency regulations" providing for a post-deprivation hearing, the court cannot agree that a pre-attachment hearing will necessarily entail significantly greater costs. And to the extent that the costs of an expedited pre-attachment hearing are greater, the court need only note that Constitutional protections often carry attendant costs. See *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

The court therefore concludes that before the state may impose a Medi-Cal lien pursuant to Cal.Welf. & Inst.Code § 14009.5, the state must provide affected property owners with notice and a hearing. Accordingly, plaintiffs' motion for summary judgment on their first claim is hereby GRANTED, and defendants' motion for summary judgment on

plaintiffs' first claim is hereby DENIED.

## B

In plaintiffs' second cause of action, they assert that: [d]efendants' past and continuing failure to provide notice to plaintiffs \* \* \* of the procedures under which they may obtain a waiver of the lien and recovery provisions when the lien or recovery will work an undue hardship upon the plaintiff or others is a denial of due process under the Fourteenth Amendment to the United States Constitution.

FAC ¶ 148. Plaintiffs have not squarely addressed this claim in their brief, so the court can only guess at its import. The court surmises that plaintiffs are here arguing that the state's current post-deprivation notice is inadequate because it does not fully inform the surviving spouse of the procedures for obtaining a hardship waiver. See Pls' Mem. in Supp. at 16-17.

As discussed supra part III.A, the court has concluded that the state may not attach a Medi-Cal lien without first providing notice and a hearing. Therefore, plaintiffs' challenge to the form of the state's present post-attachment notice is moot. Accordingly, defendants' motion for summary judgment on plaintiffs' second claim is hereby GRANTED.

## C

In plaintiffs' fifth cause of action, they assert that "[t]he defendants are violating federal law by failing to establish hardship waiver procedures mandated by 42 U.S.C. § 1396p(b)(3)." FAC ¶ 154. The directive in § 1396p(b)(3) requires participating states to create a hardship waiver procedure, "in accordance with standards specified by the Secretary." § 1396p(b)(3).

Defendants contend that after this suit was filed, the state did promulgate a hardship waiver procedure. Defs' Mem. in Supp. at 4. Defendants also allege that the Secretary has not yet articulated standards for such procedures, making compliance therewith impossible. *Id.* Defendants move for summary judgment on plaintiffs' fifth claim.

In response, plaintiffs have submitted an affidavit pursuant to FRCP 56(f) seeking further discovery. Schwartz Decl. In the affidavit, plaintiffs assert that in order to respond to defendants' statement of facts,

(Cite as: Not Reported in F.Supp.)

they need the following discovery: (1) the deposition of Gerald Rohlfes; (2) the deposition of one or two collection representatives of the Department of Health Services; and (3) one set each of document requests, requests for admission and interrogatories. Id. at ¶ 5. Plaintiffs also state that they "need discovery to determine whether the hardship waiver procedures mandated by federal law actually work in practice." Id. at ¶ 7j, although it is not clear what portion of the discovery specified above is necessary for this purpose.

\*15 Because plaintiffs have had virtually no discovery in this case, the court concludes that summary judgment on plaintiffs' fifth claim would be premature. Therefore, defendants' motion for summary judgment on plaintiffs' fifth claim is hereby CONTINUED until plaintiffs have had an adequate opportunity to conduct the portion of the requested discovery pertaining to the state's hardship waiver procedure.

#### D

In plaintiffs' third cause of action, they claim that "the defendants are violating federal law by seeking to recover Medi-Cal payments from property that is not part of the Medi-Cal beneficiary's 'estate' within the meaning of 42 U.S.C. § 1396p(b)." FAC ¶ 150.

The federal Medicaid statute has always provided that participating states are entitled, under certain circumstances, to reimbursement for Medicaid funds from the "estate" of the decedent. 42 U.S.C. § 1396p(b)(1)(B). Prior to October 1, 1993, the term "estate" was nowhere defined in the statute. Therefore, the Ninth Circuit held in Citizens Action League v. Kizer, 887 F.2d 1003, 1006 (9th Cir 1989), that the common law definition must be used. The *Kizer* court concluded that the common law meaning of "estate" does not encompass property held in joint tenancy. Id. Thus, if the decedent and the surviving spouse were formerly joint tenants of certain real property, that property could not be used to reimburse the state.

Recent Congressional amendments to the Medicaid statute, effective October 1, 1993, adopt an expansive definition of the term "estate." Now, the state is permitted to recoup its expenses from property (such as joint tenancies) not included within the common law definition of "estate." But the state can recover against such properties only for Medicaid recipients who died after October 1, 1993, and only for those

Medicaid payments made after October 1, 1993. Pub.L. No. 103-66 § 13611(e), 13612(d). For deaths before October 1, 1993, or for payments made before that date, the common law definition of "estate" still controls.

Plaintiffs here challenge the state's conduct in two regards. First, plaintiffs allege that the state has imposed Medi-Cal liens against property formerly held in joint tenancy for payments made before October 1, 1993. Pls' Mem. in Supp. at 18-19. Because joint tenancies were not part of the "estate" prior to October 1, 1993, Kizer, 887 F.2d at 1006, plaintiffs contend that payments made before October 1, 1993, are not recoverable from joint tenancy property. Second, plaintiffs note that the state is also seeking reimbursement from property formerly held in revocable trusts. Plaintiffs complain that the state is seeking such reimbursement for deaths occurring before October 1, 1993, and for payments made before October 1, 1993. Plaintiffs argue that revocable trusts do not fall within the common law definition of "estate." If they are correct, then the state may not recover against property held in such trusts for pre-October 1, 1993, deaths or payments.

\*16 Defendants admit that the state acted in error in initially attempting to recover against joint tenancy property for payments made before October 1, 1993. Defs' Mem. in Opp. at 15-16. Because the parties are in agreement that a violation occurred, the court concludes that plaintiffs' summary judgment motion on their third claim, insofar as it is premised on the state's attempts to recover pre-October 1, 1993, payments from properties held in joint tenancy, should be GRANTED.

Defendants dispute plaintiffs' assertion that revocable trusts fall outside the common law definition of "estate." But defendants have produced little support for their position. They initially note that the value of a revocable trust is taxable, under federal law, to the estate of the settlor upon his death. 26 U.S.C. § § 2031, 2038. As plaintiffs point out, however, federal law also taxes joint tenancies, which are not part of the "estate" at common law. In short, the federal tax code is not an accurate source for demarcating the boundaries of the "estate."

Next, defendants cite extensively from the recommendations and comments of the California Law Revision Commission. These comments recommend that creditors of a settlor ought to be permitted to assert claims against property held in revocable trust. Apparently in response to the

Not Reported in F.Supp.  
 Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082  
 (Cite as: Not Reported in F.Supp.)

Commission's report, the state legislature promulgated Cal Prob Code § 19000 et seq., which states in pertinent part:

[u]pon the death of the settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate \* \* \*.

Cal.Prob.Code § 19001(a). Defendants posit that this demonstrates that at common law, the "estate" included property in a revocable trust. The court disagrees.

As plaintiffs argue, the promulgation of Cal.Prob.Code § 19001(a) actually indicates that revocable trusts were *not* included within the settlor's "estate" at common law. If they were, there would be no reason for the state legislature to pass redundant legislation. Plaintiffs also cite Estate of Parrette, 211 Cal.Rptr. 313 (Cal.App.1985), in which the court noted:

[w]hen a person creates, and transfers property to, an inter vivos trust and the trust estate does not revert to the settlor's estate on his death, the trust property is not subject to probate administration in the settlor's estate. \* \* \* The property is not subject to probate administration even if the decedent-settlor was a life beneficiary of the trust or retained the unexercised power to revoke.

*Id.* at 318 (quoting II Cal.Decedent Estate Administration (Cont.Ed.Bar (1971) § 4.57, p. 162)).

The court concludes that property held in a revocable trust does not fall within the common law definition of "estate." Therefore, the state may not impose Medi-Cal liens on such property for payments made before October 1, 1993, or for recipients who died before that date. Accordingly, plaintiffs' motion for summary judgment on their third claim is hereby GRANTED in its entirety, and defendants' motion for summary judgment on plaintiffs' third claim is hereby DENIED.

#### IV

\*17 In conclusion, the court hereby ORDERS the following: (1) plaintiffs' motion for summary judgment on claims one, three, four and ten is hereby GRANTED, and defendants' motion for summary judgment on those claims is hereby DENIED; (2) defendants' motion for summary judgment on claims six, seven, eight and nine is hereby GRANTED, and

plaintiffs' motion for summary judgment on those claims is hereby DENIED; (3) defendants' motion for summary judgment on claim two is hereby GRANTED; (4) defendants' motion for summary judgment on claim five is hereby CONTINUED pending further discovery; and (5) defendants' motion for summary judgment based upon lack of standing is hereby DENIED.

In order to provide plaintiffs with the proper relief, the court hereby ORDERS the parties to submit briefs addressing the following issues:

- (1) What should be the form of the injunction to be granted pursuant to plaintiffs' first, third, and fourth/tenth claims? The parties are encouraged to confer and to submit a stipulated form of injunction if at all possible. In the event that the parties are unable to agree, they may submit separate proposals.
- (2) How much time is necessary for plaintiffs to complete the additional discovery they need in order to respond to defendants' summary judgment motion on plaintiffs' fifth claim?

The briefs addressing these issues shall be submitted within 20 days of the date of this order.

IT IS SO ORDERED.

Counsel shall appear for a status and scheduling conference on Friday, December 2, 1994, at 2 pm.

N.D.Cal., 1994.

Demille v. Belshe

Not Reported in F.Supp., 1994 WL 519457 (N.D.Cal.), Med & Med GD (CCH) P 43,082

Briefs and Other Related Documents ([Back to top](#))

• [3:94cv00726](#) (Docket) (Mar. 03, 1994)

END OF DOCUMENT