

## Top Ten Medicaid Estate Recovery Issues 2019 and Forward

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The Medicaid Estate Recovery Program (“MERP”) regulations have been one of those projects that have always been in the forefront of my mind since they became effective March 1, 2005. And as an attorney who represents estate Personal Representatives, I am required to make sure that the Personal Representative does not breach the fiduciary duty to the legatees or heirs to make sure that any claim against the estate is valid. Thus, a significant part of my practice has included counseling clients, attorneys and title companies on the proper administration of a Medicaid Estate Recovery claim.

### **Acknowledgments**

I was not alone in working through these ten MERP issues over this last year. Elisa Rainey, James Rainey, Kristen Porter, Randy Drewett, Jennifer Coulter, Chris Dewitt, and Renee Lovelace were major forces in raising these issues with Health & Human Services Commission (“HHSC”) and Office of Inspector General-MERP (“OIG-MERP”). Also, Marilyn Miller, Tom Fisher and all of the practitioners who sent case scenarios to me have challenged me to analyze strategies. Jennifer Coulter graciously read and offered generous comments toward the final draft. And, of course, I must thank the individuals at the HHSC and OIG-MERP for welcoming an open dialogue on attorney concerns.

### **Genesis of this Paper**

In May, 2019, I, along with Elisa Rainey, Kristen Porter, Randy Drewett, Jennifer Coulter and Chris Dewitt, met with a number of OIG-MERP and HHSC representatives in Austin trying to resolve some concerns about the administration of MERP claims. The following is a status report on the outcome of our talks over the last year. For clarity, I’ll define:

Independent Administration "IA"

Independent Executor "IE"

Dependent Administration "DA"

Dependent Administrator "DAdm"

The issue that started our talks with HHSC and OIG-MERP was the concern that Independent Executors were having difficulty resolving disputed MERP claims.

In a DA, if the DAdm gives MERP permissive unsecured creditor notice and the MERP claim is disputed, the 90 day statute of limitations for filing a creditor’s suit applies. So if the State files a claim and the DAdm believes that the claim is not valid, the DAdm can deny the claim and if the State fails to respond to the claim or fails to file suit on the denied claim within the statutory time limit, the MERP claim can be barred.

However, the permissive notice limitations period does not run against a MERP claim in an IA, and there is no way to force the State to file suit on a MERP claim in an IA to litigate a disputed claim.

An amendment was filed in the 2019 legislative session that would apply the same DA limitation to an IA but HHSC/OIG-MERP placed a fiscal note on the amendment and so the amendment was withdrawn from the bill.

## **Outcome of 2019 - early 2020 discussions with HHSC & OIG-MERP**

When the 2019 legislative amendment was withdrawn, we found that HHSC and OIG-MERP were willing to listen to the limitations issue and concerns about several other MERP procedures. As a result of the May 2019 meeting, the following 10 issues were discussed and in some cases, resolved.

1. **CLARIFYING TO THE PUBLIC THAT MERP IS NOT A LIEN STATUTE.** We expressed our concerns that many title companies as well as judges believe that MERP is a lien statute. We asked OIG to publically announce that MERP is not a lien statute but rather, an unsecured creditor claim. The requested notice has been published in the Medicaid Estate Recovery Program FAQs at [hhs.texas.gov/laws-regulations/legal-information/...](https://hhs.texas.gov/laws-regulations/legal-information/)

2. We expressed concern that the MERP process often resulted in **UNNECESSARY EXPENSE AND STRESS FOR FAMILIES WITH CLEAR EXEMPTIONS.** For example, there was a surviving spouse but after twelve months the attorney was still trying to obtain a release of MERP claim. The following is the OIG-MERP response:

"Estate representatives should submit documentation for exemption as specified in the MERP correspondence received from the vendor [HMS, Inc.]. If no response is received from the vendor in what the representative deems a timely manner, the representative should call or contact the MERP vendor [HMS, Inc.] and request an update. [Jennifer Lusk is the attorney for HMS, Inc. and can be contacted at [Jlusk@hms.com](mailto:Jlusk@hms.com)] If issues persist, the representative may email HHSC-OIG MERP at [merp@hhsc.state.tx.us](mailto:merp@hhsc.state.tx.us) and request a follow up. HHSC-OIG MERP will review the vendor's response to determine if there are valid reasons for the delay. If it is determined that the MERP vendor has all required documentation to close a case, they will be instructed to do so at that time and the situation will be documented as part of ongoing contract monitoring."

3. **BARRED CLAIMS, BUT STILL NO RELEASE.** In many cases, attorneys reported having properly barred a MERP claim but described being unable to close on the sale of the property of the estate because the attorney was unable to obtain a written release of MERP claim that the title company requested for closing. The following is the OIG-MERP response:

"When no suit has been filed within 90 days after a claim in a dependent administration has been rejected or deemed rejected, the case will be closed on that basis and HMS will begin adding a code to the file in its case tracking program. If a MERP Certification is requested for a case with this code, the HMS staff working that certification will forward it to the HMS MERP lead (currently Jennifer Lusk). The MERP lead will make a notation on the MERP certification that there is no actional MERP claim pending against the decedent's estate and will return the MERP Certification to the requestor."

4. **MERP WEBSITE NOTICE OF LEGAL ADVICE.** Prior to our meeting with the OIG-MERP & HHSC, there was some language on the MERP website that did not clearly indicate that a person should contact their own attorney for legal advice. The OIG-MERP revised the language. See [hhs.texas.gov/MERP](https://hhs.texas.gov/MERP)

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