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**THE MEDICAID ESTATE RECOVERY PROGRAM:  
WHAT IT IS, WHAT IT ISN'T, AND HOW TO AVOID IT**

**Jennifer L. Coulter**

## **THE MEDICAID ESTATE RECOVERY PROGRAM: WHAT IT IS, WHAT IT ISN'T, AND HOW TO AVOID IT**

“My mom refuses to sign the Medicaid application because she’s afraid the State is going to take her house away,” and “Why do we have to probate the estate? Isn’t the State just going to take the house over?” are the most common laments in my office about the Medicaid Estate Recovery Program (MERP). Both of them stem from the same misapprehensions about the dreaded MERP. This may be one of the single most misunderstood programs out there, serving as a boogeyman that prevents many people who desperately need care from receiving it, and frequently involving individuals paying bad claims to the State under MERP because they do not understand when they might not need to pay them. This misunderstanding is not limited to lay persons, though. MERP is often misunderstood by practitioners who allow or even encourage their clients to pay bad claims to the State. I have even had title companies misunderstand the program as a lien program. These misconceptions about the program can cost tens or even hundreds of thousands of dollars for our clients when the program isn’t avoided or rejected where appropriate. This paper is intended to provide a practical guide for understanding MERP, which can help practitioners keep tens of thousands of dollars in their clients’ pockets and make them heroes by saving the family home.

### **I. The MERP Mandate**

Since Medicaid was created in 1965, States have had the ability to create recovery programs to offset the costs of providing this medical care.<sup>1</sup> There was, however, a decided lack of enthusiasm for voluntary recovery programs. Some states, like Oregon, did have a form of MERP in place.<sup>2</sup> Most States, though, simply, quietly did not establish any recovery programs.

As the cost of care ballooned and more and more individuals relied on long term care Medicaid benefits to pay for the bulk of their long-term care, Congress took action. Under the Omnibus Reconciliation Act of 1993 (OBRA 93), Congress demanded that each State establish a Medicaid Estate Recovery Program.<sup>3</sup> The statute provided the basic guidelines for the individuals and programs to which MERP was to apply. It was to apply to individuals over 55 years of age at the time of receipt of benefits who received certain long-term care Medicaid benefits, including for nursing homes and waiver programs providing in home care, and to the related hospital and prescription costs.<sup>4</sup>

Congress left some leeway in exactly how each State was to establish its program, though, resulting in a complex patchwork of state-by-state rules with widely disparate results. States **must** try to collect against the probate estate of certain Medicaid recipients. They may also collect

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<sup>1</sup> <http://aspe.hhs.gov/basic-report/medicaid-estate-recovery>.

<sup>2</sup> *Id.*

<sup>3</sup> 42 U.S.C. §1396(p)(b)(1) (b). (2011)

<sup>4</sup> *Id.*

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