STATE OF MICHIGAN

IN THE PROBATE COURT

FOR THE COUNTY OF CLINTON

IN RE: The Estate of Kathryn M. Salemka-Shire

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH, File No. 11-27599-CZ

Plaintiff

v Hon. Lisa Sullivan

ESTATE OF KATHRYN M. SALEMKA-SHIRE,

Defendant.

OPINION

Factual Summary

This matter came before the Court on Defendant's Motion for Summary Disposition. The undisputed facts are as follows: Decedent, Katherine Salemka-Shire (Shire), began receiving Medicaid benefits in October, 2010, through the Michigan Department of Community Health (Plaintiff). She passed away on November 24, 2010. An estate was opened on March 28, 2011, and notice to creditors was published on April 10, 2011. Prior to the expiration of the 4-month notice period, Plaintiff contacted Shire's estate about its intent to file a claim, and then Plaintiff presented its claim on August 16, 2011, six (6) days after the 4-month period expired. Subsequently, Defendant disallowed the claim. As a result, Plaintiff filed a Complaint, pursuant to MCR 5.101(C), seeking recovery of $6,617.05.

Defendant asserts that Plaintiff should be barred from recovering Shire's Medicaid benefits and moves for summary disposition for the reasons that: 1) Plaintiff's claim was not timely filed; 2) Plaintiff seeks to recover for benefits provided to Shire prior to the implementation of Michigan's Medicaid

estate recovery plan (State Plan Amendment, hereinafter SPA); and 3) Plaintiff failed to provide Shire with the required statutory notice at the time Shire applied for Medicaid benefits.

Legal Issues and Arguments

1. Untimely Claim

The personal representative of an estate is required to publish a notice, notifying estate creditors to present their claims within four (4) months of the publication date. MCL 700.3801. Claims, which are not timely filed, are barred. MCL 700.3803(1). However, if a creditor is "known" to a personal representative, the personal representative must provide written notice directly to the creditor. MCL 700.3801. A creditor is considered "known" if the personal representative has actual knowledge of the creditor, or if the creditor's existence is reasonably ascertainable based on an investigation of decedent's available records for the two years immediately preceding death. MCL 700.3801(1). Further, a personal representative is required to investigate the decedent's available records for the two years immediately preceding death and to review the decedent's mail after death to identify known creditors. MCL 700.3801(1). *See also Tulsa Prof'l Collection Servs, Inc v Pope*, 485 US 478 (1988).

At the time of Shire's death, she was receiving Medicaid benefits. A reasonable diligent inquiry of her recent records would have identified Plaintiff as a creditor; moreover, Medicaid benefits are listed under MCL 700.3805(1)(f) as a priority claim. Plaintiff argues that, as a known creditor, proper notice was not given to it by the personal representative of Shire's estate. Defendant does not dispute that fact. As a result, Plaintiff has three years after Shire's death to present its claim. MCL 700.3803(1)(c). Plaintiff has, in fact, already filed its claim with Shire's estate.

Therefore, Defendant's request for Summary Disposition on this basis is denied.

2. Claim Seeks Recovery for Services to Individual Prior to the Implementation of the Estate Recovery Program

Defendant argues that, because Michigan's SPA did not receive federal approval until May 23, 2011, Plaintiff is not permitted to seek recovery of the benefits paid on decedent's behalf because her benefits were paid in October and November 2010. However, pursuant to 42 CFR 447.256(c), the effective date of an approved SPA is "not earlier than the first day of the calendar quarter in which an approvable amendment is submitted . . . . " Michigan submitted its SPA on September 29, 2010. *See* Defendant's Brief in Support of its Motion for Summary Disposition, Exhibit B. The first day of the quarter in which the SPA was submitted was July 1, 2010. Accordingly, Michigan's SPA became effective July 1, 2010.

Therefore, Defendant's request for Summary Disposition on this basis is denied.

3. Plaintiff's Claim is Invalid Due to Notice Deficiencies

The federal government, in 1993, required each state to enact a Medicaid estate recovery law. Michigan did not adopt its law until 2007 (Public Act 74 of 2007). Even then, the Michigan statute did not set forth the specifics of its SPA; rather, it required Plaintiff to work with the appropriate state and federal departments to develop a voluntary estate preservation program. MCL 400.112g(1). The statute further instructs Plaintiff to seek inclusion in its SPA of certain procedural and notice provisions, including but not limited to the following:

1. At the time the individual **enrolls** in Medicaid, the Department shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. MCL 400.112g(3)(e). [Emphasis added.]; and,

2. The Department shall implement provisions of the federal law in a way to ensure that the heirs of persons subject to Michigan's SPA will not be unreasonably harmed by the provisions of the program. MCL 400.112g(3)(g).

Distinct from the above-referenced instructions, Michigan law requires Plaintiff to include a specific notice requirement in its SPA:

> The department of community health **shall** provide written information to individuals seeking Medicaid eligibility for long-term care services **describing the provisions** of the **Michigan** Medicaid estate recovery program, **including . . . a statement that some or all of their estate assets may be recovered**. MCL 400.112g(7). [Emphasis added.]

Defendant asserts that the statutory requirements were not satisfied by Plaintiff in the case of Shire. It is undisputed that Plaintiff failed to provide any written materials to Shire about Michigan's SPA at the time of her enrollment. Instead, Plaintiff argues that, despite the specific language set forth, the mere existence of the statute satisfies its notice obligation under MCL 400.112g(7).

Recently, the Michigan Supreme Court opined that the goal of statutory interpretation is to identify the legislative intent that may reasonable be inferred from certain statutory language. *Krohn v Home-Owners Insurance*, 490 Mich 145; 802 NW2d 281 (2011). Further, every word or phrase of a statute should be accorded its plain and ordinary meaning, given the context in which the words are used. *Id.* In this case, the statutory notice requirements of MCL 400.112g are significant because the actual provisions and details of Michigan's SPA would not be available to enrollees until after federal government approval. In fact, no program could even be implemented in Michigan until the state received such federal approval. MCL 400.112g(5).

On May 23, 2011, Michigan's SPA finally received federal approval. Although its SPA was effective July 1, 2010, the actual detailed provisions were not available to Shire at the time she enrolled in the program (on or about October 2010). It is misguided to suggest that Shire could have relied on the underlying state statute for her information about Michigan's SPA because, for example, MCL 400.112g(3)(e) requires the state to seek approval of a provision which would provide to the individual applying for benefits written materials explaining the process for applying for a waiver from estate recovery due to hardship. Yet, in Plaintiff's response to the Motion for Summary Disposition, it indicated that this provision, although in the statute, is **not** actually a provision of Michigan's approved SPA.

The unambiguous language of the statute requires Plaintiff to provide written materials to an individual at the time of enrollment for Medicaid benefits. These materials must describe the provisions of Michigan's SPA and must explain that recovery efforts under the SPA may invade some or all of that individual's estate. MCL 400. 112g(7). Given the common and ordinary meaning of these words, and given the context of MCL 400.112g(3)(g), which requires implementation of an SPA without unreasonable harm to a recipient's heirs, the intent of the statute is to provide distinct written materials about Michigan's SPA to enrollees, in this case Shire, at the time of enrollment. Plaintiff failed to comply with mandatory notice requirement.

Plaintiff argues that, even if it failed to satisfy the statutory notice requirements to Shire, it should not be barred from recovery. In support of its argument, Plaintiff cites the unpublished opinion of *Dep't of Community Health v Douglas Link, DVM*, Docket No. 289177 (June 29, 2010). In the this case, Link argued that the applicable statute required discipline of Link by appellee to occur no more than one year after the initiation of an investigation. Appellee exceeded the one-year limit, and Link argued that the complaint against him should have been dismissed. The court of appeals rejected his argument for the reason that the statute did not require dismissal when the timeframe was violated and, instead, provided the sanction of reporting the violation to the Legislature in an annual report. The court further opined that because the Public Health Code should be liberally construed to protect the public, a dismissal would not be reasonable and would not serve the public interest.

In the case at bar, Plaintiff argues that neither Michigan's statute nor its SPA includes a sanction of dismissal where notice provisions have not been followed. Plaintiff further suggests that Michigan's statute should be liberally construed for the public purpose of preventing individuals from using taxpayer monies for personal care while preserving assets for their heirs. Plaintiff's arguments fail for the following reasons:

First, the underlying federal statute, which required state recovery programs, 42 USC 1396p, Section 1917(b)(1), explicitly provides that there can be **no** recovery of Medicaid benefits paid to enrollees, such as Shire, except under the provisions of an SPA. Given that Plaintiff did not comply with Michigan's SPA, recovery of Shire's estate is barred by federal law.

Second, Michigan courts have recognized that, under the Due Process Clause of the Fourteenth Amendment, individuals, whose property interests are at stake, must be afforded notice and an opportunity to be heard. *Dusenbery v United States*, 534 US 161, 122 S Ct 694, 151 L Ed2d 597 (2002). Due Process is a limitation on state action. *Dow v State of Michigan*, 396 Mich 192, 202, 240 NW2d 450 (1976)[1]. Its "root requirement" is a meaningful opportunity to be heard, not a balancing of an importance government interest. *Id*. at 205. In fact, in cases involving the deprivation of property rights, Michigan courts have held that proceedings, which are conducted without compliance with a statutory notice requirement, are invalid. *In re Petition by Wayne Co Treasurer*, 265 Mich App 285, 698 NW2d 879 (2005). Federal law requires Michigan to have a voluntary Medicaid estate recovery program. State law requires Plaintiff to provide written notice to Medicaid enrollees, explaining the possibility of recovering the cost of their benefits from their estates; further this notice is to be provided at the time of enrollment. It is undisputed that Shire did not receive the written notice required by statute. Given her passing, there is no meaningful opportunity for her to knowingly and voluntarily place her estate at risk of recovery by Plaintiff. As a result, the lack of due process renders the recovery proceedings invalid.

Finally, as a matter of public policy, individuals seeking Medicaid benefits are usually of limited means and medically fragile. They are turning to the state as a payer of last resort for their immediate health care and are vulnerable to decisions of duress. Plaintiff's own response to the Motion for

[1] *Dow* has been distinguished but not overturned.

Summary Disposition cites a passage from the House Committee on Energy and Commerce which recognized that the Medicaid program provides for those who do not have the resources to provide for themselves. *Cook v Dep't of Social* Services, 225 Mich App 318, 322, 570 NW2d 684 (1997), quoting HR Rep No 265, 99th Cong, 1st Sess, pt 1, at 72. The specific notice provisions required by MCL 400.112g safeguard these individuals by providing the resources that explain the future risk to their assets as a result of accepting Medicaid benefits. Plaintiff's position that it should not be barred from recovery, where it failed to comply with these safeguards, renders the notice provisions useless and is contrary to the intent of both federal and state Medicaid laws.

Therefore, for all of the reasons stated above, summary disposition of Plaintiff's claim is granted.

ORDER

At a session of court held in the Probate courtrooms
In St. Johns, Clinton County, Michigan, on
this 30th day of April, 2012.

Hon. Lisa Sullivan, Clinton County Probate Judge

This matter came before the Court on Defendant's Motion for Summary Disposition, Having reviewed the Motions and Briefs filed by the parties, having heard legal arguments in open Court on April 19, 2012, being otherwise fully advised in the premises, and for the reasons stated in the foregoing opinion,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition is granted.

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Hon. Lisa Sullivan
Clinton County Probate Judge