An Analysis of the Thompkins Decision and its Impact on Estate Law

Introduction

When the Thompkins case went before the Court of Appeals this past summer, it was the perfect case for the government to obtain a broad decision to allow them to go after estates past when the statute of limitations had run. State HHS v. Thompkins, 695 S.E.2d 133 (N.C. App. 2010). Almost all of the legal issues arising in this case had already been decided by the North Carolina Supreme Court. The court did decide in the State's favor, allowing the North Carolina Department of Health and Human services to obtain a judgment for past Medicaid expenses paid, even after the statute of limitations had run. This landmark decision was the first case in North Carolina to allow the State to sue the executor of an estate past the statute of limitations.

North Carolina's Push for Medicaid Funds

Governor Bev Perdue has recently targeted Medicaid fraud and abuse as a major concern for her administration. In 2009, the state Medicaid division expenditures rose by 9%, going more than $160 million over its budget while servicing 1.6 million enrollees.[1] In 2010, Medicaid was the fastest growing part of the state budget.[2] With the North Carolina Medicaid budget growing $430.5 million in the 2010-11 fiscal year, legislators are looking for any way to obtain additional funds. Legislators have built into the 2010-2011 budget already a $40 million savings from "enhanced techniques of detecting Medicaid fraud and abuse."[3]

During the summer of 2009, Gov. Perdue doubled the size of the fraud prosecution unit under Attorney General Roy Cooper, and instituted a new computer program to track and analyze files for cases of potential fraud.[4] On October 4, 2010, Gov. Perdue signed into law Senate Bill 675, entitled the "Medicaid Anti-Kickback Law."[5] In a press release announcing these new programs, she stated "In these tough times, when Medicaid enrollment is growing even as we face deep budget shortfalls, we must do more to root out waste and crack down on folks who are abusing or defrauding Medicaid. Tens of millions of taxpayer dollars each year are wasted on Medicaid fraud, waste and abuse. It's got to stop and we will not allow it to

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[1] Christopher, Abby, NC Medicaid Program $160 Million over Budget, Fierce Healthcare, 2 December 2009, *available at* http://www.fiercehealthcare.com/story/sugar-sweetened-soda-can-cause-risk-pregnancies/2009-12-02.
[2] North Carolina Center for Public Policy Research, Medicaid is the Fastest Growing Program in the State's Budget: Growth Will Accellerate as the State's Population Ages, 29 January 2010, *available at* http://www.nccppr.org/drupal/content/news/2010/01/29/271/medicaid-is-the-fastest-growing-progam-in-the-states-budget-growth-will-.
[3] Balfour, Bryan, North Carolina's FY 2010-2011 State Budget: Health and Human Services, John W. Pope Civitas Institute, *available at* http://www.jwpcivitasinstitute.org/media/publication-archive/policy-brief/north-carolina-s-fy-2010-11-state-budget-health-and-human-ser.
[4] Robertson, Gary, NC Medicaid Fraud, Waste Prevention Effort Begun, Bloomberg Businessweek, 24 March 2010, *available at* http://www.businessweek.com/ap/financialnews/D9EL8IV80.htm.
[5] North Carolina Cracks Down on Medicaid Fraud and Kickbacks, GovMonitor, 4 Aug. 2010, *available at* http://www.thegovmonitor.com/world_news/united_states/north-carolina-cracks-down-on-medicaid-fraud-and-kickbacks-36542.html.

continue."[6] The Thompkins case is perhaps a sign of this increased push to recover Medicaid funds, as well as a warning to estate lawyers of more legal action to follow.

Facts of the Case

Ms. Sallie Dye Anthony died on August 27, 2004. Prior to her death, $52,575.14 of Ms. Anthony's medical care had been paid by Medicaid under the Division of Medical Assistance (DMA) of the North Carolina Department of Health and Human Services. Ten months later, on July 5, 2005, defendant Anna Thompkins contacted the Estate Recovery Section of the DMA to inquire about resolving Ms. Anthony's debt. After this communication, there was no further action taken for almost three years. On July 1, 2008, Thompkins qualified as the Executrix of Ms. Anthony's estate, and on July 5 published notice to Ms. Anthony's creditors. The DMA was not given notice. On July 10, 2008, the real property owned by Ms. Anthony was sold for $110,000, and with the exception of a little over $6,000, which was used for funeral expenses, legal fees and administrative expenses, the proceeds were retained by the devisees. On November 10, 2008, Thompkins filed a final accounting with the Office of the Clerk of Superior Court of Guilford Country, which was approved on December 8, 2008.

Also on December 8, 2008, the DMA sent a claim for reimbursement to the Clerk of Superior Court of Guilford County. Thompkins denied the claim pursuant to the time limit for claims against the estate in N.C. Gen. Stat. § 28A-19-3(f), which states that "All claims barrable under the provisions of subsections (a) and (b) hereof shall, in any event, be barred if the first publication or posting of the general notice to creditors as provided in G.S. 28A-14-1 does not occur within three years after the death of the decedent." On March 31 of 2009, the DMA filed suit, claiming that the estate owed the DMA for the Medicaid debt. Again Thompkins asserted a defense that the claim was barred due to the expiration of the time limit for bringing a claim against an estate found in § 28-19-3(f), but the trial court granted summary judgment for the DMA. Plaintiff Thompkins subsequently appealed to the N.C. Court of Appeals.

The Court of Appeals Decision

The facts of this case were perfect for the government. Most of the legal arguments that Thompkins could have made had already been decided by the North Carolina Supreme Court. Consequently, the best argument she could muster was that the statute "expressly" included the government by including "all claims" within its coverage. The government had a strong argument to win the case, but wanted to get as broad a decision as possible in order to set a strong legal precedent for future cases. Also in the governments favor was the fact that it was fairly clear from the facts in the case that Thompkins had attempted to use the statute of limitations to block the government claim. She had called the DMA, and then waited exactly three years to the day in order to give notice to creditors. The property was sold five days later. § 28A-19-3(f) states that any claims barrable by §§ 28A-19-3(a) and (b) are automatically barred if the first publication of notice to the creditors does not occur within three years after the death of the decedent. It was fairly clear that Thompkins was acting in bad faith by waiting three years

[6] Pearson, Chrissy, Office of Governor Bev Perdue, Gov. Perdue Kicks Off Campaign to Crack Down on Medicaid Fraud, Waste and Abuse, 24 March 2010, *available at* http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemid=996.

before disposing of the estate. And while it should have no bearing on the legal outcome of the case, a court never looks favorably upon a party acting in bad faith.

Legal Analysis of the Case

As stated above, this was a great case for the government because most of the legal points had already been decided by the North Carolina Supreme Court.

First, it is well established in North Carolina that care for the indigent sick is a governmental function. The North Carolina Supreme Court stated in 1935 "The people of the State of North Carolina, in their Constitution, section 7 of Article XI, have declared that beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. In accordance with this principle, it has been uniformly held in this State that the care of the indigent sick and afflicted poor is a proper function of the government of this State." Martin v. Bd. of Comm'rs, 208 N.C. 354 (1935). This doctrine is so well established that Thompkins did not attempt to argue this point during the case.

Second, the North Carolina Supreme Court made clear in a 1992 decision that the doctrine of *nullum tempus occurrit regi* (literally: "no time runs against the king") is applicable in North Carolina. Throughout North Carolina's legal history, there have been two lines of court decisions, one allowing *nullum tempus* in North Carolina, and the other barring it. In 1992, Rowan County Bd. of Ed. V. U.S. Gypsum Co., 332 N.C. 1 (1992) finally settled this issue. After acknowledging both lines of cases, the court stated "We now clarify the status of this doctrine in this jurisdiction: *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State." Rowan, 332 N.C. at 8. The doctrine of *nullum tempus* has a two prong test. "If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State." Rowan, 332 N.C. at 19 (emphasis in original).

In Thompkins, the Court stated that providing Medicaid assistance was a governmental function and therefore the statute must specifically include the State in order for the statute of limitations to apply. Although Thompkins made an argument that the State was expressly included, it was clear that it was not. The Court determined that because the State was not specifically included in the Statute, the doctrine of *nullum tempus* applied and the time limitation would not run against the State.

Lastly, the fact that §28A-19-3 is a non-claim statute rather than a statute of limitations has no effect on the doctrine of *nullum tempus*. This issue was also specifically litigated in Rowan, *supra*. In Rowan, defendant U.S. Gypsum Co. argued specifically that a statute of repose (or non-claim statute) is materially different from a statute of limitations, and therefore the doctrine of *nullum tempus* would not apply. The court ruled against this argument, stating that "despite the fact that statutes of repose differ in some respects from statutes of limitations, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign." Rowan, 332 N.C. at 15.

The only argument that Thompkins made before the Court of Appeals was that under the *nullum tempus* test, even though this issue is governmental, § 28A-19-3 specifically includes the State. According to Thompkins, "§ 28A-19-3(a) begins by including 'all claims' within its coverage. As a result of the fact that N.C. Gen. Stat. § 28A-19-3(a) then excludes 'tax claims of the State of North Carolina and subdivisions thereof,' Defendant argues that the statute covers all other claims asserted on behalf of the State, including the type of claim advanced by the [DMA] in this case." Thompkins, 695 S.E.2d at 336. The argument that an implied inclusion rose to the level of an express inclusion did not work in this court and the Court of Appeals upheld the decision of the Guilford County Superior Court.

Due to the fact that the North Carolina Supreme Court had already decided that *nullum tempus* is applicable in this State, that it applies to both statutes of limitations and non-claim statutes, and that care for the indigent is a governmental function, it would have been extremely difficult for the court to not decide in favor of the DMA. It should also come as no surprise, as a similar decision was handed down in 1992 by the North Carolina Court of Appeals. In County of Guilford v. National Union Fire Ins. Co., 108 N.C. App. 1 (1992), George Harris, an indigent inmate in the Guilford County Jail, was assaulted by another inmate. Harris was admitted to Moses Cone Memorial Hospital in Greensboro, where he was treated, but died shortly thereafter. His medical bill of $28,585.61 was paid mostly by Guilford County. The Administratrix sued in negligence three parties, the inmate who assaulted Mr. Harris, the Sheriff of Guilford County and Guilford County, and obtained a $90,000 settlement from the insurers of the Sheriff of Guilford County and Guilford County. The County then sought reimbursement from the insurance settlement for the money spent on Mr. Harris' care. The insurance company filed a motion for summary judgment, claiming, among other things, that the action was barred by the applicable statute of limitations. The National Union court spends exactly one paragraph dispatching this argument. Citing Rowan, the court stated that *nullum tempus* applies and the claim is not barred by the statute of limitations. The court ordered the insurers to pay the County for the medical bills prior to paying the Administratrix.

Impact of the Thompkins decision

While the Thompkins decision can be seen as an extension of the National Union case, in reality it is much more. The Thompkins case allowed the State to sue the Executrix of the estate for bills owed by the deceased for Medicaid treatment. The proceeds of Thompkin's estate had been distributed to the devisees in August 2008 with the final accounting coming in December of that year, and yet even after the estate was distributed, the State brought suit and obtained a favorable judgment. The decision was also extremely broad. Consider one of the last sentences of the opinion where the court states:

"Given the General Assembly's failure to explicitly subject the State to the bar created by N.C. Gen. Stat. § 28A-19-3(a), we conclude under these facts that the trial court correctly determined that the *'doctrine of nullum tempus occurritt regi exempts the State from any statute of limitation defense'* because the State was otherwise not 'expressly included in the statute of limitation.'" Thompkins, 695 S.E.2d at 137 (emphasis added).

The thrust of this opinion is that the government has absolutely no statute of limitations with regards to time limits on the presentation of estate claims under § 28A-19-3. This includes the State Medicaid Office, along with other governmental entities and their subdivisions. The Medicaid Office will be able to look back decades and bring suit against anyone who they find took Medicaid benefits and subsequently acquired or sold assets after their death. This decision has also implemented a strange regime of subjecting tax claims to a statute of limitations, while allowing all other claims from the government to be brought past the statute of limitations. Generally tax claims have the highest priority, but according to the statute, as interpreted by Thompkins, after the statute of limitations has run, only tax claims on an estate will be barred under § 28A-19-3(a).

Executor Liable to Creditors for Mishandling Funds

North Carolina has previously allowed suits by beneficiaries against executors for a breach of fiduciary duty. *See* Bruce v. N.C.N.B., 62 N.C. App. 724, 727 (1983); Tyson v. N.C.N.B., 305 N.C. 136, 141 (1982); Shelton v. Fairley, 72 N.C. App. 1 (1984); Motyka v. Nappieri, 9 N.C. App. 579 (1970); In re: Estate of Mills, 207 N.C. App. LEXIS 2344 (2007). It does not appear that North Carolina has ever allowed a suit for an executor's breach of fiduciary duty by a creditor, but there is a federal statute on point that requires this result. 31 U.S.C. § 3713(b) states "a representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." The New York case of US v. Coppola, 74 A.F.T.R.2d (RIA) 7284 (E.D.N.Y. 1994), specifically made this provision applicable when an executor makes distributions to the beneficiaries of the estate before satisfying the claims of the United States. Yet, 31 U.S.C. § 3713(b) has generally only been applied against tax debts to the United States government. Whether this statute would apply in this case is uncertain, and also perhaps why the statute was not cited in the decision. Even aside from this statute, however, other jurisdictions have determined that an executor has a fiduciary duty to the creditors and can be held liable. *See* In re Estate of Lucas, 48 Ill. App. 3d 1009, 1014 (4th Dist. 1977); U.S. v. First Midwest Bank, 1997 U.S. Dist. LEXIS 16913 (1997).

The Next Legal Battleground: What is a Governmental Function?

One argument that Thompkins could have made was to compare these facts to Guilford County v. Hampton, 224 N.C. 817 (1945). In that case, Sarah Saferight, an indigent woman of subnormal mentality, had been admitted to the Guilford County Home in 1909 and was still there though when the case was brought in 1944. Saferight did own a parcel of real property, and in 1943, Guilford County brought a proceeding to have the land sold in order to pay the County for her treatment. The land was sold, but Guilford County was only awarded payment for the last three years of her treatment, as the rest fell outside of the statute of limitations.

The North Carolina Supreme Court saw the issue as a creditor going after a bad debt, stating that Guilford County was simply attempting to recover on the debt, which is not a governmental function. The court stated:

"The county of Guilford is under what we might regard as a constitutional mandate to provide for its poor at the public expense, through the levying and collection of a general tax for that

purpose, and may provide a County Home. It is under no constitutional mandate to collect from a nonindigent inmate, or from her property, reimbursement for sums disbursed for her maintenance. That is merely a wise and just provision of the statute… No one could contend that the power thus sought to be exercised by a civil action is the sovereign power of condemnation, conscription, or taxation, for, amongst other disqualifying features, it is not for a public purpose. It reaches no further than fair compensation for the maintenance, care and attention given her. It tends to reduce the general taxes, of course, but in so far as the defendant is concerned, and her relation to the action and to the party plaintiff, it is a private obligation arising out of the statute, which provides a simple procedure for its collection out of private property. While the general law may affect a great many persons, it is not in any sense a contribution levied by the State or county in its sovereign capacity for a public purpose, and is subject to the bar of the three-year statute of limitations." Hampton, 224 N.C. at 820-21.

The argument that collecting a debt is not a governmental function could be the next major battleground in the legal maturation of this issue. While the general law to provide healthcare to the indigent is undoubtedly for a public purpose, the collection of this one debt out of a singular person's estate is not for a public purpose, as interpreted by the Hampton court.

It is frequently unclear, however, when an action is a public function. As the N.C. Supreme Court acknowledged earlier this year, "The determination of what constitutes a governmental function as opposed to a proprietary function has bedeviled the courts." Mecklenburg County v. Time Warner Ent., 2010 U.S. Dist. LEXIS 6215, 37 (2010). The test used in Mecklenburg County is to determine whether the state is enforcing rights that are "essentially equivalent to those that private parties may have," or whether the state is "enforcing rights that are unique to it, or otherwise peculiar to the operation of government." Id. The court has also stated that it will not look to the large-scale function of the activity, but rather will look "with particularity" at the specific act. City of Gastonia v. Balfour Beatty Constr. Corp., 222 F. Supp. 2d 771, 774 (W.D.N.C. 2002). While looking at water treatment in the Balfour case, the court stated, "A Court should not look at the process of construction of a water treatment plant as a whole, but rather should examine the *specific portion of the long process of construction for which immunity is claimed*. This reflects the fact that North Carolina courts recognize that certain aspects of an activity can be considered governmental, while other aspects of the same activity are considered proprietary. Id. (emphasis added). In Thompkins, when the DMA was collecting a debt from a deceased's estate, it could be argued that the right to collect a debt from an estate is a right held by many private parties, satisfying the Mecklenburg test for a proprietary function. Furthermore, even if the debt is from the use of a state service, the *collection* of that debt is not a governmental function. According to the Balfour case, the court must look at the specific action at issue, not the act as a whole.

The test was stated another way in Rhodes v. City of Asheville, where the court stated "Any activity by the [state] which is discretionary, political, or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary." 230 N.C. 134, 137 (1949). Under this test as well, the actions in Thompkins should be considered proprietary. Collecting a debt is not discretionary, political or public, but rather a commercial activity.

Perhaps the best summary of this convoluted rule was stated in Evans v. Hous. Auth., 359 N.C. 50, 54 (2004), when the court stated "We have provided various tests for determining into which category a particular activity falls, but have consistently recognized one guiding principle: Generally speaking, the distinction is this: If the undertaking of the [state] is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and private when any corporation, individual, or group of individuals could do the same thing."

In the past, actions which have been declared by the court to be public functions have included:

- Contracting for the construction of a public school, Rowan, *supra*;

- Construction of a waste water treatment plant, MCI Constructors, Inc. v. City of Greensboro, 125 Fed. Appx. 471, 479 (4th Cir. 2005);

- Construction and operation of an airport, Greensboro-High Point Airport Authority v. Johnson, 226 N.C. 1 (1946);

- Operating a library, Seibold v. Kinston-Lenoir County Public Library, 264 N.C. 360 (1965);

- Maintaining and operating a fire department, Howland v. City of Asheville, 174 N.C. 749 (1917);

- Removing prunings from shrubbery and trees from homes of citizens and residents of a city, Stephenson v. Raleigh, 232 N.C. 42 (1950);

- Keeping the peace, Moffit v. City of Asheville, 103 N.C. 237, 256 (1889);

- City trash pick-up services for city residents, James v. City of Charlotte, 183 N.C. 630 (1922);

- Maintenance of a public road or highway, Sisk v. City of Greensboro, 183 N.C. App. 657 (2007); and

- Construction of a state art museum, State ex rel. State Art Museum Bldg. Com'n v. Travelers Indem. Co., 111 N.C.App. 330, 335, *review denied* 335 N.C. 181 (1993).

Actions that have been held to be proprietary actions by the government include:

- The state enforcing title to real property, Tillery v. Whiteville Lumber, 172 N.C. 296, 297 (1916);

- Creating a cable channel to be distributed through the local cable television company, Mecklenburg County, *supra*,

- Building and operating a hotel, Nash v. Tarboro, 227 N.C 283 (1947);

- Operating an airport, Rhodes, *supra*;

- Operating a public park with a small admittance fee, Glenn v. Raleigh, 246 N.C. 469 (1957);

- Supplying water for profit, Foust v. Durham, 239 N.C. 306 (1954);

- Providing electricity for profit, Rice v. Lumberton, 235 N.C. 227 (1952); and

- Providing health care in a county home or state mental hospital, Hampton, *supra*; State Hospital v. Fountain, 129 N.C. 90, 92-93 (1901).

Several courts have noted that these classifications are drawn "none too sharply" and they seem to be "subject to a change in position as society changes and progresses and the concepts of functions of government are modified." Balfour, 222 F. Supp. at 773. Specifically, in decisions within three years of each other, the court determined the operation of an airport to be both a governmental and a proprietary function. Rhodes, *supra*; Greensboro-High Point Airport Authority, *supra*; *See* Sides v. Cabarrus Memorial Hospital, Inc., 287 N.C. 14, 21 (1975).

Whether the government collecting a debt out of a decedent's estate is a governmental function will almost certainly be the next challenge to the Thompkins ruling. While convoluted, there is a strong body of case law to make an argument that collecting a debt out of an estate for Medicaid treatment should not be a governmental function. By phrasing the governmental action as collecting a debt rather than providing medical treatment, defendant Thompkins could have used the Hampton decision and perhaps framed the legal arguments differently. However, Thompkins assumed that providing healthcare was a governmental function and did not even assert otherwise, even admitting this point at oral argument.

Conclusion

Going forward, for attorneys working with wills and estate plans, the Thompkins decision will mean that the executors and assets are not safe from suit by the State after any amount of time has passed. Attorneys need to be extremely careful about determining if any claim could be brought by the State, making sure to obtain all the information possible about any potential claims against the estate from the government. After the Thompkins decision, it will be imperative to determine if there are any outstanding Medicaid bills that will have to be paid to the government. If the State discovers these assets, no matter how long from the time the estate is disbursed – years or even decades, the State can bring suit against the executor to recover those funds.