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INTRODUCTION

Contrary to R.C. 2117.061's plain language and intent, Appellee Diane Nancy Fiorille asks this Court to bar every Medicaid Estate Recovery Program ("recovery program") claim presented more than one year after a Medicaid recipient's death. R.C. 2117.061 establishes two alternative limitations periods, and explains that "whichever is later" applies. Fiorille now urges the Court to disregard that phrase—offering no alternative explanation of its meaning—and instead asserts that whichever date is *earlier* applies. Because R.C. 2117.061's plain language flatly disproves Fiorille's interpretation, the Court need look no further. Even if the Court were to look beyond the text of R.C. 2117.061, however, Fiorille's remaining arguments are unpersuasive and improperly ask this Court to assume a policymaking role. Accordingly, the Court should reject Fiorille's claims and adopt the only interpretation consistent with the statute's text.

R.C. 2117.061 defines the limitations period for recovery program claims as follows: The recovery program administrator must present any such claim against the estate of a deceased Medicaid recipient "not later than ninety days after the date on which the medicaid estate recovery reporting form is received under division (B) of this section *or* one year after the decedent's death, *whichever is later.*" R.C. 2117.061(E) (emphasis added). By using this language, the statute establishes two *alternative* limitations periods for Medicaid estate recovery claims and directs that "whichever is later" governs. Thus, the program administrator has *at least* ninety days after receiving notice—and never less than one year from the date of a Medicaid recipient's death—to bring a claim against the decedent's estate.

These alternative limitations periods reflect the General Assembly's intent to balance the estates' interest in finality against the State's interest in recovering money due under the recovery program. Before the enactment of R.C. 2117.061, the State could file Medicaid recovery claims indefinitely. In 2003, however, the General Assembly decided to offer some

protection for estates by imposing a limitations period. At the same time, the General Assembly continued to protect the State's strong interest in recovery by guaranteeing the administrator at least ninety days after receiving notice of an estate—and never less than one year from the recipient's death—to bring a recovery claim.

Though the statute's language and intent do not support her, Fiorille offers several policy reasons to impose an absolute one-year bar on recovery claims. None of these policy arguments withstand scrutiny, but even if they did, they are not properly before this Court. The General Assembly is the final arbiter of public policy, and Fiorille is asking for relief that can only be accomplished through legislative reform.

For these reasons and the others set forth in Appellant Ohio Department of Job and Family Services' ("ODJFS") opening brief and below, this Court should reverse the decision of the Eighth District Court of Appeals.

ARGUMENT

Ohio Department of Job and Family Services' Proposition of Law:

Under the plain language of R.C. 2117.061, the State has either one year from the date of a Medicaid recipient's death or ninety days after receiving notice of the death, whichever is later, to file a claim for Medicaid estate recovery.

- A. R.C. 2117.061 establishes alternative limitations periods for presenting Medicaid estate recovery claims, explaining that “whichever is later” applies, and Fiorille offers no textual support for her contrary claim that whichever is earlier applies.**

The plain language of R.C. 2117.061 establishes two alternative limitations periods for estate recovery claims, and it explains when each applies:

The administrator of the medicaid estate recovery program shall present a claim for estate recovery to the person responsible for the estate of the decedent or the person's legal representative not later than ninety days after the date on which the medicaid estate recovery reporting form is received under division (B) of this section *or* one year after the decedent's death, *whichever is later*.

R.C. 2117.061(E) (emphasis added). The State must file a recovery claim against a Medicaid recipient's estate within *either* (1) ninety days after receiving notice from the person responsible for the estate, *or* (2) one year after the Medicaid recipient's death. Because whichever deadline is “later” governs, if the program administrator has not received notice under R.C. 2117.061(B) in a particular case, then the limitations period has not run. See *In re Estate of Centorbi* (8th Dist.), No. 93501, 2010-Ohio-442, ¶ 22 (Gallagher, A.J., dissenting) (“[T]he provision requiring a claim within one year of decedent's death resolves only half the puzzle.”).

Fiorille contends that ODJFS's interpretation improperly reads language out of the statute; but it is her interpretation that suffers from that flaw. According to Fiorille, R.C. 2117.061 is structured like R.C. 2117.07, which sets the limitations period for regular creditors' claims against an estate. She argues that both statutes establish an absolute limitations period, then “give an estate representative a way to shorten that claim period” by giving notice. Ape. Br. at 11; see *id.* at 6.

But Fiorille is wrong for two glaring reasons. First, Fiorille’s interpretation—not the State’s—would require the Court to read words out of R.C. 2117.061 and insert new language. See *State v. Teamer* (1998), 82 Ohio St. 3d 490, 491. When interpreting an alternative limitations period, a court must read the statute “so as to give each part [of it] a meaning.” *Sweet v. United States* (S.D. Cal. 1947), 71 F. Supp. 863, 864. Here, “the plain meaning of the phrase ‘whichever is later’ refers to the later of two dates” separated by the “or.” *Morris v. Haren* (11th Cir. 1995), 52 F.3d 947, 949 (per curiam). In fact, the General Assembly repeatedly has used this construction, without confusion, to establish alternative limitations periods for numerous causes of action. See Apt. Merit Br. at 7-8.

Disregarding the canons of statutory interpretation, Fiorille would have the Court disregard the language “whichever is later,” and instead interject the directly opposing concept of “whichever is earlier.” Her interpretation would also render meaningless another provision of R.C. 2117.061: Paragraph (B). Under that provision, estates must give notice to the program administrator. But if an absolute one-year bar applied, that notice would serve no purpose in countless cases: The State would not be able to pursue a recovery claim any time it received notice more than one year after a Medicaid recipient’s death.¹ Because Fiorille would read language out of the statute, add language to it, and render part of the statute meaningless, her interpretation cannot stand.

Second, unlike R.C. 2117.07, Section 2117.061 does not permit acceleration of the limitations period. Section 2117.07 allows an estate representative to “accelerate the bar against claims against the estate established by section 2117.06 . . . by giving written notice to a

¹ The State often receives notice more than one year after a Medicaid recipient’s death because the notice requirement is not necessarily even triggered until after one year has passed. See Apt. Br. at 10; R.C. 2117.061(B).

potential claimant.” A creditor must present her claim “within *the earlier of* thirty days after the receipt of the notice . . . *or* six months after the date of the death of the decedent.” *Id.* (emphasis added). By contrast, R.C. 2117.061 gives ODJFS more time to act—one year from the date of death, or ninety days after receiving notice—and it says that whichever date is *later* applies. Estates cannot accelerate the limitations period for Medicaid estate recovery claims, and the State never has less than one year to bring a claim. The conduct of the person responsible for an estate does influence when the estate will have finality, but only because the timing of her notice determines when the State’s limitations period will end.

Fiorille also objects to a limitations period that always gives ODJFS at least ninety days after receiving notice to present a recovery claim because, she says, it gives “the State . . . *unlimited*[] time to perfect a claim,” Ape. Br. at 5 (emphasis added), and “leave[s] the estate recovery program unrestricted,” *id.* at 6. But R.C. 2117.061 in no way establishes a limitless limitations period, nor does the State claim to have one. In fact, the period for estate recovery claims is quite limited: Estates will have finality within one year of a Medicaid recipient’s death, as long as they provide notice to the program administrator at least ninety days before that one year period elapses. If the program administrator receives notice after that point, then the estate will have finality exactly ninety days after the notice is received.

The flaws in Fiorille’s reasoning confirm that R.C. 2117.061 means what it plainly says: The State may present an estate recovery claim *either* within one year of the Medicaid recipient’s death, *or*, in the alternative, within ninety days of receiving notice of a decedent’s estate, *whichever is later*. Because plain language is the best indicator of legislative intent, see *State v. Elam*, 68 Ohio St. 3d 585, 587, 1994-Ohio-317, the text of R.C. 2117.061 resolves this inquiry.

B. The Court need not reach Fiorille’s legislative history or policy arguments, but even if it did, those arguments are equally unpersuasive.

The Court need not even address Fiorille’s remaining arguments because the text of R.C. 2117.061 answers the question before the Court. But even if the Court were to seek confirmation in legislative history, the circumstances of R.C. 2117.061’s enactment bolster the State’s interpretation and undermine Fiorille’s arguments. Similarly, Fiorille’s policy arguments are unpersuasive and are not even properly before the Court.

1. Fiorille’s interpretation would upset the careful balance that the General Assembly struck between the State’s interest in recouping benefits owed to it and the interest of estates in finality.

The General Assembly enacted R.C. 2117.061 against the backdrop of *no limitations period*. Before 2003, the State had an indefinite period of time to present a Medicaid estate recovery claim. See *Ohio Dep’t of Human Servs. v. Eastman* (9th Dist. 2001), 145 Ohio App. 3d 369, 373. In 2003, the General Assembly recognized that estates had a repose interest in not being forever subject to these claims, and it decided to enact a limitations period. See R.C. 2117.061. This effectively guaranteed estates finality within a fixed period calculated from the time of notice, greatly restricting the State’s former ability to bring claims indefinitely. The General Assembly thereby put finality in the hands of the person responsible for an estate, while simultaneously protecting the State by always giving the program administrator *some* opportunity—at least ninety days after receiving notice and never less than one year after a Medicaid recipient’s death—to present a claim. See R.C. 2117.061(E).

Fiorille mistakenly claims that the General Assembly intended to strike a different balance, and she urges the Court to disregard the statute’s plain language in order to effectuate that supposed intent. As support for her extraordinary request that the Court legislate from the bench, Fiorille offers two equally unpersuasive justifications from legislative history.

First, she points to the legislative analysis of R.C. 2117.061:

Claims against the estate

(R.C. 2117.06 and 2117.061)

All claims against an estate must be presented within one year of the decedent's death. The act permits the administrator of the Medicaid Estate Recovery Program to present claims the later of one year after the decedent's death or 90 days after receiving notice from the person responsible for the estate that the decedent was a Medicaid recipient.

Legislative Service Commission, Final Analysis, Am. Sub. H.B. 95, 125th General Assembly (as passed), at 310-11. But this analysis does not illuminate the General Assembly's intent. The Legislative Service Commission merely summarized the statutory language, then clarified that the program administrator may present claims "*the later of*" one year after death or ninety days after receiving notice. *Id.* (emphasis added). The legislative analysis thus supports the State's interpretation, not Fiorille's.

Second, Fiorille points to the simultaneous enactment of R.C. 2117.061 and R.C. 2117.07. According to Fiorille, because the General Assembly enacted these provisions in the same year, it must have intended to allow estate representatives to accelerate *all* creditor claims—including recovery claims—against an estate. The plain language of R.C. 2117.061 and R.C. 2117.07 immediately defeats Fiorille's argument, for the reasons explained above: For the State, whichever date is *later* applies, see R.C. 2117.061(E), while for regular creditors, whichever date is *earlier* applies, see R.C. 2117.07. Indeed, the juxtaposition of R.C. 2117.061(E) and R.C. 2117.07 simply underscores that if the legislature wanted to let estate representatives accelerate the time bar for estate recovery claims, it knew exactly how to accomplish that goal. See R.C. 2117.07. In fact, it could have made this change simply by replacing the phrase "whichever is later" in R.C. 2117.061 with the phrase "whichever is earlier."

The General Assembly's decision to distinguish estate recovery claims and other creditor claims makes sense. The State is in a very different position from other creditors when it asserts a recovery claim. Federal law requires every State to adopt a recovery program to recoup benefits from the estates of deceased Medicaid recipients. See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 13612, 107 Stat. 312 (1993). When Ohio recovers funds from a Medicaid recipient's estate, those funds flow back into the Medicaid program and are used to benefit other Medicaid recipients. In this way, the situation differs significantly from that of a private creditor pursuing a claim against an individual.

In sum, the General Assembly enacted the alternative limitations period in R.C. 2117.061 to give some finality to estates, while simultaneously ensuring that the State is never prevented from recovering funds simply because it is unaware of a deceased Medicaid recipient's estate. Fiorille's contrary interpretation defies legislative history and would defeat the General Assembly's intent, at great detriment to the Medicaid estate recovery program and Ohio residents.

2. Fiorille's policy arguments are irrelevant and unpersuasive.

Fiorille devotes the bulk of her brief to making a series of policy arguments supporting an absolute one-year limitations period for estate recovery claims. These arguments should be rejected.

As a preliminary matter, policy arguments are appropriately addressed to the General Assembly, as the final arbiter of public policy, not to the courts. As the Court has repeatedly recognized, "[i]t is not this court's role to establish legislative policies." *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 212. Instead, "the General Assembly is responsible for weighing [policy] concerns and making policy decisions," *Arbino v. Johnson &*

Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶ 113, and this Court will not “second-guess” those choices, *Groch*, 2008-Ohio-546, at ¶ 212. “Judicial policy preferences may not be used to override valid legislative enactments.” *State v. Smorgala* (1990), 50 Ohio St. 3d 222, 223.

“The period within which a claim must be brought . . . is a policy decision best left to the General Assembly.” *Leininger v. Pioneer Nat’l Latex*, 115 Ohio St. 3d 311, 2007-Ohio-4921, ¶ 32. Here, the General Assembly set the limitations period for estate recovery claims in R.C. 2117.061(E). If Fiorille wants Ohio to change that limitations period to bar all recovery claims presented more than one year after a Medicaid recipient’s death, then she needs to seek legislative amendment of R.C. 2117.061. This Court can do nothing more than implement the regime adopted by the General Assembly after *it* balanced the interests and made a policy choice.

But even if they were properly before this Court, Fiorille’s policy arguments fail on their own terms. First, according to Fiorille, an absolute one-year bar should apply because the program administrator does not *need* the notice required by R.C. 2117.061(B). Ape. Br. at 10. This argument turns on Fiorille’s mistaken assumption that the program administrator *already knows* when a Medicaid recipient dies and, further, has extensive knowledge of the decedent’s assets. See *id.* at 2, 9-10. In many cases, the program administrator does become aware of an estate after it is opened—and when he does, he generally presents a claim within thirty days (and often much sooner). But in other circumstances, Fiorille’s assumption is flatly incorrect. The program administrator does not automatically have all the information that Medicaid applicants, Medicaid recipients, or the estates of deceased recipients give to the *county personnel* who administer the Medicaid program. See O.A.C. 5101:1-38-01.2(G) (county departments of job and family services determine eligibility for all medical assistance programs except the Ohio breast and cervical cancer project). This case is a prime example: No one ever gave notice of

Centorbi's estate and the program administrator only learned of the State's claim when special counsel to the Recovery Program stumbled onto the estate months later. Regardless of whether Fiorille thinks the State *needs* the notice required by R.C. 2117.061, the General Assembly decided that the State is *entitled to* a ninety-day cushion to account for these situations when it otherwise lacks notice.

Second, Fiorille advocates an absolute limitations period because, she says, it would provide greater finality for estates and protect bona fide purchasers of real property. See Ape. Br. at 11. As an initial matter, the General Assembly considered these issues when it enacted R.C. 2117.061. It decided how much weight to give these concerns, and this Court should not question that judgment. But Fiorille's argument is also unpersuasive for several other reasons. First, as explained above, an estate easily can achieve finality simply by providing timely notice. Second, as a practical matter, the State has no incentive to delay making a claim. In fact, the program administrator consistently acts as soon as practicable to make such claims. And, third, the State does not pursue true bona fide purchasers for value when it belatedly learns of an estate recovery claim; instead, the State only seeks to recover from the person who received the proceeds from the sale to the bona fide purchaser.

Fiorille's next policy grab is to portray the current Medicaid and probate regimes as unduly complex and unfair to Medicaid recipients and their families. Ape. Br. at 1. In light of this complexity, she suggests, it is unfair to eradicate finality whenever the person responsible for an estate inadvertently fails to give notice under R.C. 2117.061(B). *Id.* at 12-13. But the idea that the State should lose an otherwise valid recovery claim whenever someone is (innocently or willfully) ignorant of her notice obligations under the recovery program defies the very notion of fairness. Allowing an estate to avoid recovery in this way would cost the State significant

money, to the detriment of the Medicaid program and other Medicaid recipients. See Apt. Br. at 11 (explaining how the lower court's decision undercuts the purpose of R.C. 2117.061 by creating perverse incentives for estates to delay the submission of notice and by encouraging unintentional noncompliance with reporting requirements). Certainly that loss for future recipients is as unfair as, if not more unfair than, the loss for a single deceased recipient's estate.

Finally, in keeping with her more general charges of systemic unfairness, Fiorille objects that estates cannot possibly have a statutory obligation to provide notice under R.C. 2117.061 because the State has not promulgated a "Medicaid estate recovery reporting form." Ape. Br. at 10-11. R.C. 2117.061(D) directs the State to create this form, indicates that it should require estate representatives to list all estate assets, and requires it to include warnings about criminal penalties for lying. According to Fiorille, the State has not created a form that complies with these requirements, and therefore a person responsible for an estate "cannot be penalized for . . . lack of compliance" when she fails to "fil[e] a form that [does] not exist." Ape. Br. at 12 (invoking the Due Process Clause).

This objection fails for at least two reasons. First, the State *does* have a form, appropriately titled "Notice [to] Administrator of Estate Recovery Program," that covers all estates that might be subject to a recovery claim under R.C. 2117.061. See State Probate Form 7.0, Notice [to] Administrator of Estate Recovery Program, available at http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/probate_forms/decedentEstate/7_0.pdf (last visited Mar. 10, 2011). Any person responsible for a Medicaid recipient's estate is required to file Probate Form 7.0. Because R.C. 2117.061 applies only to probate estates, this form gives ODJFS notice of every recovery claim the program administrator may be able to assert under that provision. (Fiorille's objection that Probate Form 7.0 does not do the work that a "Medicaid Estate

Recovery Reporting Form” would for other, non-probate estates is beside the point, because R.C. 2117.061 does not apply to claims against non-probate estates). The form does not identically match the requirements laid out by the General Assembly—it is *less* burdensome for estates—but it *does* serve R.C. 2117.061(D)’s underlying purpose by giving notice to the program administrator.

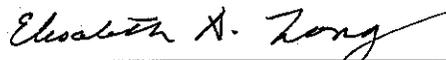
No one ever filed a “Notice [to] Administrator of Estate Recovery Program” or provided any other notice to the program administrator on behalf of Centorbi’s estate, a fact that Fiorille never undertakes to explain. Accordingly, under the plain language of R.C. 2117.061, the State may still timely present a recovery claim against Centorbi’s estate.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eighth District’s decision, reopen Centorbi’s estate, and allow the State to pursue its Medicaid estate recovery claim.

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CERTIFICATE OF SERVICE

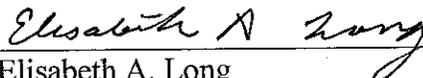
I certify that a copy of the foregoing Reply Brief of Appellant Ohio Department of Job and Family Services Brief was served by U.S. mail this 11th day of March, 2010, upon the following parties:

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