

**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF FINANCE AND ADMINISTRATION**

IN THE MATTER OF:)
)
 [REDACTED],) APPEAL to the DIVISION OF
Appellant.) TENNCARE
)
) Appeal # [REDACTED]
)

RESPONSE TO MOTION TO DISMISS BASED ON UNTIMELINESS

[REDACTED], Appellant, files this Response to Motion to Dismiss Based on Untimeliness as follows:

Facts

Appellant incorporates by reference the facts stated in Appellant’s Consolidated Statement of Facts for All Responses to TennCare Motions, filed August 1, 2022.

As stated in paragraph 13 of her Consolidated Statement of Facts, Appellant seeks coverage beginning January 1, 2021 and has no knowledge of applications allegedly filed in 2020.

Argument

TennCare’s reliance on Tenn. Comp. R. & Regs. 1200-13-19-.07(3) is misplaced and does not support its motion. The Motion to Dismiss Based on Timeliness should be denied for the following reasons:

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In the fair hearing held March 29, 2022, Judge Ren held “neither Petitioner nor Mr. [REDACTED] had the legal authority to redeem the life insurance policy or to spend down the proceeds of said policy, absent a court order authorizing such action. Moreover, the record reflects that any delay in securing such an order was not the fault of Mr. [REDACTED]. TennCare Notice of Hearing, page 43.

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Judge Ren held that “the record establishes that at the time of application and at all times relevant to this matter, Petitioner no longer had the legal right or authority to

liquidate the [REDACTED] life insurance policy of her own accord, as this right was conferred upon Mr. [REDACTED].” TennCare Notice of Hearing, page 41. That holding alone requires that eligibility be granted beginning July 1, 2022, because “If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).” 20 C.F.R. 416.1201(a)(1).

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Further, if Judge Ren had considered Tennessee conservatorship law, then in accordance with 42 C.F.R. § 435.915, he should have granted eligibility back to May 3, 2021 when the Petition for Emergency Conservatorship was filed. If he had further considered Tennessee law regarding legal incapacity, Judge Ren could have awarded eligibility back to April 1, 2021 (or January 1 based on the initial application) in accordance with 42 C.F.R. § 435.915.

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TennCare believes its 1115 waiver approval means it can ignore the mandate in 42 C.F.R. § 435.915. It makes that argument at section 5.3 of the Notice of Hearing. However, Appellant contends TennCare is mistaken as a result of poor drafting in its 1115 waiver.

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42 C.F.R. § 435.915 provides:

- (a) The agency **must** make eligibility for Medicaid effective no later than the third month before the month of application **if** the individual -
 - (1) **Received Medicaid services**, at any time during that period, of a type covered under the plan; and
 - (2) **Would have been eligible** for Medicaid at the time he received the services **if he had applied** (or someone had applied for him), regardless of whether the individual is alive when application for Medicaid is made.
- (b) The agency may make eligibility for Medicaid effective on the first day of a month if an individual was eligible at any time during that month.
- (c) The State plan must specify the date on which eligibility will be made effective.

(Emphasis added)

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TennCare drafted its agreement (contract) with CMS and 42 C.F.R. § 431.420(a)(1) provides: “Any provision of the Social Security Act **that is not expressly waived** by CMS in its approval of the demonstration project **are not waived**,” (Emphasis added). TennCare acknowledged it must follow all required provisions (e.g., required elements of the State Plan under 42 U.S.C. § 1396a, other Medicaid statutes,

regulations, Social Security rules relating to Supplemental Security Income) not expressly waived since it cited 42 C.F.R. § 431.420 at page 14 of its Notice of Hearing.

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Since ambiguous contracts are usually construed against the drafter, Appellant contends it is worth exploring the text of TennCare's 1115 waiver.

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The precise text of the waiver is “To enable the state not to extend eligibility prior to the date that an application for assistance is made.”¹ Although TennCare will likely argue it meant the current (in Appellant's case, the July 21st) application, TennCare could have used the definite article and said “the application;” instead TennCare used the indefinite article and said “an application.” Appellant therefore contends the language in TennCare's 1115 waiver is ambiguous and does not expressly waive TennCare's obligation to provide retroactive coverage pursuant to 42 C.F.R. § 435.915(a) when Appellant had another application pending. Appellant's April 22, 2021 application was an application that escapes TennCare's ability to deny retroactive coverage and so was her application filed on January 22, 2021.

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In *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014), the Tennessee Supreme Court said:

If the contractual language is clear and unambiguous, the literal meaning of the contract controls the dispute, *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008), and the language used in the contract is construed using its “plain, ordinary, and popular sense.” *Bob Pearsall Motors v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). If, however, contractual provisions prove to be ambiguous (where more than one reasonable interpretation of the provision exists), the courts will employ other rules of contract construction to determine the parties' intent. *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013). One of these principles is that ambiguous contract provisions will be construed against the drafter of the contract. *Kiser v. Wolfe*, 353 S.W.3d 741, 748 (Tenn. 2011); *Betts v. Tom Wade Gin*, 810 S.W.2d 140, 143 n.4 (Tenn. 1991).

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Appellant contends the ambiguous language in TennCare's 1115 waiver means she can seek eligibility for any period during which a Medicaid application is pending and

¹ TennCare III Demonstration Approval Period: January 8, 2021 – December 31, 2030, available at <https://www.tn.gov/content/dam/tn/tenncare/documents/tenncarewaiver.pdf>. See also TennCare's Notice of Hearing, section 5.3, at page 13.

during which she can establish eligibility because the mandate in 42 C.F.R. § 435.915(a) was not expressly waived under these circumstances.

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Further, as described in Appellant's Consolidated State of Facts, paragraphs 23 through 28, TennCare's conduct and routine practice was to protect dates by allowing nursing home caseworkers to file a second application before the first was denied (and so on) when there are processing delays or delays securing verification. As shown by TennCare's ultimate acceptance of the spend-down of the [REDACTED] life policy by using it to purchase a burial plan, TennCare intended to protect the date of the original application when Ms. [REDACTED] told [REDACTED] to submit a second application so Appellant's family would have time to assign the policy toward payment of a burial plan.

For the reasons stated above, TennCare's Motion to Dismiss Based on Untimeliness should be DENIED.

Respectfully submitted this 1st day of August, 2022.

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**CERTIFICATE OF SERVICE OF
RESPONSE TO MOTION TO DISMISS BASED ON UNTIMELINESS**

The undersigned hereby certifies that this day true and correct copies of the foregoing Appellant's Response was sent as follows:

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Respectfully submitted this 1st day of August, 2022.

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