Medicaid Secondary Payer Laws Revisited:

Supreme Court Decisions, Congressional Action, Budget Act

By Nicholas W. D'Aquilla and Megan Heller

In 2016, Louisiana expanded Medicaid eligibility criteria under the terms of the Affordable Care Act. Since then, more than 450,000 new beneficiaries have enrolled in the program, bringing the current enrollment to approximately 1.2 million as of November 2018. With a quarter of the state's population enrolled in Medicaid, Medicaid secondary payer issues are becoming more frequent in personal injury settlements. In June/July 2014, the *Louisiana Bar Journal* addressed the topic, providing an overview of the pertinent laws. Since 2014, just like the ever-changing landscape of our healthcare system, the legal framework for compliant and optimal resolution of Medicaid liens has been in a constant state of change. In February 2018, Congress enacted legislation that cemented the legal framework that all parties (plaintiff's counsel and the defendant) must adhere to when resolving a personal injury claim with a Medicaid beneficiary.

This article provides an overview of the state and federal laws that establish Medicaid secondary payer requirements, reviews the two key Supreme Court decisions that shaped the practical framework for resolving Medicaid liens, the Congressional actions since 2014 that impacted the framework set forth by the Supreme Court, and a summary analysis of Louisiana's Medicaid lien resolution laws under the framework cemented by the Budget Act of 2018.

Medicaid Secondary Payer Laws

When a person with health insurance is injured in an accident and seeks medical treatment, his or her health insurer typically pays for the associated medical bills. If the accident was the fault of another person and the insured sues that person, secondary payer laws

may come into play. In this case, the plaintiff's health insurer (whether government, private, ERISA, etc.) usually has a right to be reimbursed for its past expenditures on the tort-related injury. This right of reimbursement functions as a lien and attaches to any settlement, judgment or other award the plaintiff may later receive as a result of the underlying third-party liability action.

State Medicaid programs are required by federal law to implement laws that allow Medicaid agencies to receive reimbursement from any settlement or payment made by a third party for covered healthcare services.[1] These statutes, however, must comply with the federal anti-lien statute, which prevents a Medicaid program from asserting a lien on a beneficiary's personal property (such as lost wages), including any portion of a settlement not related to compensation for past medical expenses.[2] It has been difficult for parties settling a personal injury claim with a Medicaid beneficiary to identify and comply with their rights and responsibilities at the intersection of the federal anti-lien statute and state Medicaid secondary payer laws. In 2006, and then again in 2013, the absence of statutory and regulatory guidance led to the Supreme Court issuing landmark decisions centered on the issue.

The *Ahlborn* and *Wos* Decisions

Ahlborn[3]

Ahlborn was a young woman who suffered severe injury from a car accident. Arkansas Medicaid paid $215,645.30 for her medical care. She subsequently settled a personal injury lawsuit related to the accident for $550,000, with no allocation of the settlement funds among the various damages types. The state sought full reimbursement of the amount paid for her care. Ahlborn argued that the state was only entitled to recover $35,581.17, the amount of the settlement the parties had later stipulated was for past medical expenses.

The Supreme Court agreed with Ahlborn and found that the text of the applicable federal statutes allowed a state to recover only the portion of a liability settlement attributable to past medical expenses as the federal anti-lien provision protects all other portions of the funds. The Court did not address how to determine the portion of the settlement attributable to past medical expenses, as the parties in the case had stipulated to that amount.

The *Ahlborn* decision limited the ability of state Medicaid agencies to recover their expenses from personal injury settlements and left states considering whether and how to amend their statutes and devise a method for determining the portion of a settlement allocated to past medical expenses.

Wos[4]

With the questions left unanswered by *Ahlborn*, the *Wos* case was a natural successor. In *Wos*, the minor plaintiff suffered from numerous birth defects and eventually settled a case against the delivering doctor and hospital for $2.8 million. North Carolina Medicaid had paid $1.9 million for her care. North Carolina law provided that when the value of the agency's lien exceeded one third of a beneficiary's total settlement recovery, there was an irrebuttable presumption that one third of the settlement was for past medical expenses. This presumption applied even if there was an allocation of less than one third of the settlement dollars to past medical expenses.

The Supreme Court found that this irrebuttable presumption violated the federal anti-lien statute. The arbitrary assignment of one third of the settlement to past medical expenses did not comply, as it allowed the state to assert a lien on settlement proceeds that were not intended for payment of past medical expenses.

Congressional Action After the *Ahlborn* and *Wos* Decisions

BBA of 2013[5]

Following the *Ahlborn* and *Wos* decisions, certain stakeholders put pressure on the federal government to correct what they saw as an intrusion into state rights to recover payment for past medicals. In 2013, the Bipartisan Budget Act was passed by Congress and signed into law by President Obama. The relevant section of the BBA modified the federal statutes to invalidate the holdings in the *Ahlborn* and *Wos* decisions. Section 202(b) of the BBA strengthened Medicaid's exception to the anti-lien statute and allowed recovery from the entire portion of a beneficiary's settlement, without considering what portion of the settlement was allocated to past medical expenses. The BBA provisions were scheduled to go into effect in October 2014.

PAM[6] **and MACRA**[7]

On April 1, 2014, President Obama signed the Protecting Access to Medicare Act of 2014, which delayed the implementation date of the BBA provisions until Oct. 2, 2016. The following year, the President signed the Medicare Access and CHIP Reauthorization Act of 2015, which further delayed the implementation of the provisions until Oct. 1, 2017. The provisions finally went into effect on that date.

BBA of 2018[8]

On Feb. 9, 2018, Congress passed and President Trump signed into law the Bipartisan Budget Act of 2018. This act repealed the Medicaid lien expansions that took effect the prior October, and once again returned the law as it was after *Ahlborn* and *Wos* were decided. States are again limited to recovery only from the portion of a personal injury settlement that is attributable to past medical expenses.

Current State of the Law

Despite a tumultuous few years, *Alhborn* and *Wos* are once again the law of the land. When settling personal injury cases, it is important to allocate the damages in order to protect portions of a client's settlement not intended for past medical expenses. A third-party neutral familiar with such allocation methodology can be helpful in ensuring an apportionment

of damages that is fair to all parties.

As for the state of the law in Louisiana, La R.S. 46:446(F) provides in pertinent part:

> The Department of Health and Hospitals shall have a privilege for the medical assistance payments made by the department on behalf of an injured or ill Medicaid recipient on the amount payable to the injured recipient, his heirs, or legal representatives *out of the total amount of any recovery or sum had, collected, or to be collected, whether by judgment or by settlement or compromise*, from another person on account of such injuries, and on the amount payable by any insurance company under any contract providing for indemnity or compensation to the injured person. (Emphasis added.)

The Louisiana statute appears to be in direct conflict with the current state of federal law, as it was in 2014 following the *Ahlborn* and *Wos* decisions (and the last time this topic was addressed by this publication). The Louisiana Legislature may need to modify the statute and could face a challenge in court if it is not addressed. Practitioners should be well versed in the status of the relevant state law in order to protect a client's settlement from making an overpayment to Medicaid.

Conclusion

The *Ahlborn* and *Wos* decisions are again good law, with no known legislative challenges on the horizon. Louisiana's statute appears to be directly in conflict with the holdings of these decisions and may be ripe for challenge.[9]

When settling a personal injury case with a Medicaid-entitled plaintiff, parties should consider a damages allocation based on the underlying facts of the case and a historical settlement valuation of like claims. Where feasible, the proposed allocation should be developed or reviewed by a third-party neutral and then presented to the trial court for approval. Further, all litigating parties (plaintiff counsel, defendant/payers and defense counsel) should consult each state's full statutory framework to identify the obligations of each party involved in the action as all parties have a stake in compliant resolution of the case.

FOOTNOTES

1. 42 USC § 1396(a)(25)(H).
2. 42 USC § 1396p(a)(1)(a).
3. Arkansas Dep't of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006).
4. Wos v. E.M.A., 133 S.Ct. 1391 (2013).
5. Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165 (2013).
6. Protecting Access of Medicare Act of 2014, Pub. L. No. 113-93, 128 Stat. 1040 (2014).
7. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, 129 Stat. 87 (2015).
8. Bipartisan Budget Act of 2018, Pub. L. No. 115-123 (2018).
9. One such case is Weaver v. Malinda, 07-CA-708 (La. App 5 Cir. 2008), where the Court upheld the lower court's decision awarding DHS only the portion of the settlement allotted for medical expenses.

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