Medicaid Secondary Payer in Louisiana in View of *Wos* – What Next?

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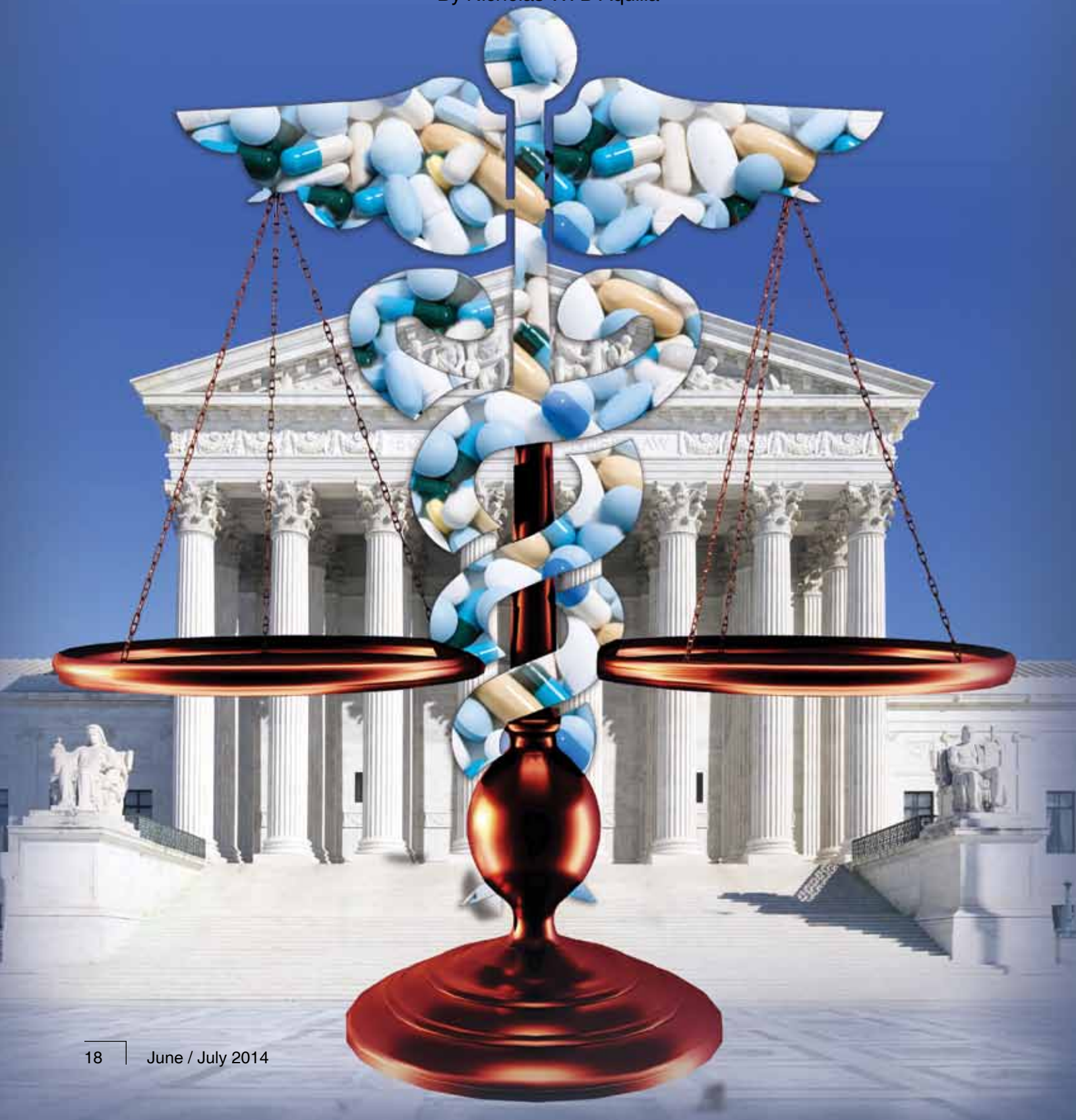

If you have paid attention to the news in the past several years, you are probably familiar with the rising costs of health care in our country. Government and private health insurers have begun re-engineering the way they do business, and, as a result, health insurance beneficiaries and the attorneys who represent them have been affected in monumental ways.

One way the attorney-client/beneficiary relationship has changed is through the emergence of secondary payer laws. When a person with health insurance is injured in an accident and seeks medical treatment, his 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.

If you have handled a third-party liability action in the past several years, you may be familiar with the intricacies of the Medicare Secondary Payer Act (MSP Act). While the MSP Act warrants in-depth discussion, this article focuses on a related topic that, until recently, has not garnered the same amount of attention: Medicaid[1] secondary payer reimbursement obligations.

Last year, in *Wos v. E.M.A.*,[2] the U.S. Supreme Court issued a landmark opinion relating to Medicaid secondary payer laws. The court's ruling shined a bright spotlight on the question of how much state Medicaid programs can recover from plaintiff-beneficiaries who settle third-party liability actions. Specifically, the decision expressed clear guidance that a state Medicaid program was prohibited from recovering any portion of a Medicaid beneficiary's settlement that was not identifiable as compensation for past medical expenses.

In response to *Wos*, several states began to revise their Medicaid secondary payer reimbursement statutes.[3] It seemed Louisiana was well-suited to follow the trend, as its secondary payer statute conflicted with the court's ruling. However, nine months after the *Wos* decision, President Obama signed the Bipartisan Budget Act of 2013 (the Budget Act), which contains provisions that appear to nullify the court's ruling and its antecedents. The provisions in the Budget Act are slated to become effective in October 2014, but, until then, it's important to understand both how we arrived at this point and the current status of Louisiana's Medicaid secondary payer statute.

Medicaid Secondary Payer Laws and the Federal Medicaid Anti-Lien Statute

In part because the federal government provides the majority of funding for most state Medicaid programs, federal statutes require all state Medicaid agencies to create and implement Medicaid secondary payer laws. States must develop procedures to identify liability actions involving Medicaid beneficiaries, and, according to 42 U.S.C. § 1396k(a)(1)(A) and 42 U.S.C. § 1396a(a)(25)(H), they must:

► require Medicaid beneficiaries "to assign the state any rights . . . to payment for medical care from any third party;"[4] and

► adopt secondary payer laws that grant the state the right to recover from any "payment by any other party for such health care items or services" a Medicaid beneficiary may receive, whether settlement, judgment or other award.[5]

These federal statutes appear to grant states an ironclad right to recover Medicaid-paid, past medical expenses caused by a tortfeasor. But because Medicaid is administered by each individual state, the framework for compliance varies and practical implementation of these directives has proven to be challenging and inconsistent.

Further complicating the creation and implementation of valid Medicaid secondary payer laws is 42 U.S.C. § 1396p(a)(1)(A), known as the Federal Medicaid Anti-Lien Statute. The Medicaid Anti-Lien Statute provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . ." The statute is interpreted to mean that a state Medicaid program cannot assert a secondary payer lien on the personal property of a Medicaid beneficiary prior to death and is limited to recovery from the portion of a beneficiary's settlement that is identifiable as compensation for past medical expenses.[6]

With somewhat conflicting instruction being delivered to the states, it was inevitable that state Medicaid agencies and beneficiaries would need to turn to the court system for clarification on their obligations relating to Medicaid secondary payer laws.

U.S. Supreme Court's Decision in *Wos v. E.M.A.*

In March 2013, the U.S. Supreme Court issued its ruling in *Wos v. E.M.A.* and provided further guidance on how a Medicaid secondary payer statute should operate. *Wos* involved a medical malpractice claim that settled for $2.8 million. Because North Carolina's Medicaid program paid a portion of the plaintiff's medical expenses, it sought to recoup its expenditures through its Medicaid secondary payer statute. The agency notified the plaintiff that it planned to seek one-third of the total settlement proceeds as partial reimbursement for the $1.8 million it had spent on her medical care. The plaintiff then challenged the agency's recovery attempt on the basis that it violated the Medicaid Anti-Lien Statute.

North Carolina's Medicaid secondary payer statute granted its Medicaid agency the right to seek reimbursement from any portion of a beneficiary's liability settlement, regardless of whether that portion was meant to compensate the beneficiary for pain and suffering, lost wages or other non-medical-related damages.[7] The plaintiff argued that the Medicaid Anti-Lien Statute clearly prohibited the agency's recovery of any portion of the settlement not designated as compensation for past medical expenses.

The Supreme Court ruled in favor of the plaintiff, reasoning that the North Carolina Statute was preempted to the extent that it allowed the state to recover any portion of a Medicaid beneficiary's judgment or settlement not designated for past medical care.[8] This result was attainable because the parties had not allocated damages in the settlement agreement. None of the interested parties, including the state, had attempted to determine which portion of the $2.8 million represented past medical expenses. The court relied on the Medicaid Anti-Lien

Statute, 42 U.S.C. § 1396k(a)(1)(A) and 42 U.S.C. § 1396a(a)(25)(H), in ruling that without a process for determining which part of a beneficiary's settlement was actually compensation for past medical expenses, the North Carolina statute's automatic lien on one-third of a beneficiary's settlement was arbitrary and could not stand.[9]

The decision affirmed that a state Medicaid agency could not seek reimbursement from any portion of a beneficiary's settlement not identifiable as compensation for past medical expenses, and it essentially tasked states with developing non-arbitrary methods to determine which portion of a beneficiary's settlement was attributable to past medical expenses.

Louisiana's Medicaid Secondary Payer Statute in Light of the *Wos* Ruling

Louisiana's Medicaid secondary payer process is codified in La. R.S. 46:446-446.6. These statutes impart notice requirements on both Medicaid beneficiaries and defendants involved in third-party liability actions. They also grant the state a statutory right of intervention to assert its right to reimbursement, its lien, for past injury-related medical expenses it paid. The general framework for Louisiana's Medicaid secondary payer process seems to comply with the federal requirements mentioned previously; however, La. R.S. 46:446(F) provides in pertinent part that:

> DHH shall have a privilege for the medical 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 . . . . (emphasis added.)

A plain reading of this portion of Louisiana's reimbursement statute is that Louisiana Department of Health and Hospitals' (DHH) right to recoup state-paid past medical expenses extends over the entire amount of any settlement or award received by a Medicaid beneficiary. Similar to the North Carolina statute challenged in *Wos*, Louisiana's reimbursement right is not limited to the portion of an award that represents past medical expenses. As such, the statute appears to be in direct conflict with the U.S. Supreme Court's ruling, which clearly states Medicaid agencies cannot arbitrarily seek reimbursement from any portion of a liability settlement not identifiable as compensation for past medical care.

Because Louisiana's current Medicaid secondary payer process extends DHH's secondary payer recovery rights beyond the bounds set by the U.S. Supreme Court's ruling in *Wos*, it is apparently necessary for the Louisiana Legislature to modify La. R.S. 46:446(F) and establish a method to reasonably determine which part of a Medicaid beneficiary's settlement or judgment is for past medical expenses (*i.e.*, the portion from which DHH may seek recovery of Medicaid-paid medical expenses). Prior to December 2013, it also appeared that Louisiana's secondary payer reimbursement statute would be ripe for challenge if not addressed in the near future.

The Bipartisan Budget Act of 2013: A Congressional Response to *Wos*

In December 2013, President Obama signed the Budget Act. Section 202(b) of the Budget Act effectively creates an exception to the Federal Medicaid Anti-Lien Statute such that states can recover from the entirety of a Medicaid beneficiary's settlement without allocation for past medical expenses. If Section 202(b) goes into effect as scheduled in October 2014, federal law will be modified to remove the limitations placed on states' (1) automatic assignment provision that formerly assigned to the state any right to recover payments for medical care from third-party settlements (42 U.S.C. § 1396k(a)(1)(A)); and (2) secondary payer laws that only granted recovery for health care items or services out of third-party settlements, judgments, or other payments (42 U.S.C. § 1396a(a)(25)(H)).[10]

Taken together, these changes aim to grant state Medicaid agencies the ability to recover all of their tort-related medical expenditures from the entire amount of any settlement, judgment or award received by a Medicaid beneficiary.

Section 202(b) also modifies the Medicaid Anti-Lien Statute to allow state Medicaid agencies to place a lien on the property of a beneficiary prior to his death as long as it relates to Medicaid secondary payer obligations. If the Budget Act changes become effective, 42 U.S.C. § 1396p(a)(1)(A)(ii) would read "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except pursuant to rights acquired by or assigned to the State in accordance with Section 42.U.S.C. 1396a(a)(25)(H) or 42 U.S.C. §1396k(a)(1)(A)."[11]

If the Budget Act provisions go into effect, the legislation effectively will overrule and invalidate the Supreme Court's ruling in *Wos*. Thus, the need for Louisiana's Legislature to modify La. R.S. 46:446(F) would dissipate, and Medicaid agencies across the country will be incentivized to seek full reimbursement from the total amount of any settlement or award received by a Medicaid beneficiary regardless of whether there is an allocation of damages.

Conclusion

Medicaid secondary payer laws are clearly in a state of flux. The U.S. Supreme Court's ruling in *Wos* in 2013 appeared to remove some of the obscurity that surrounded the laws and their implementation; the ruling made it clear that state Medicaid agencies were only entitled to recoup state-paid past medical expenses from the portion of a beneficiary's settlement designated as compensation for such, and that absent a non-arbitrary mechanism for determining which part of a beneficiary's settlement was for past medical expenses, such reimbursement statutes could not stand. However, any practical guidance provided to the states by the *Wos* decision may become meaningless if Section 202(b) of the Budget Act goes into full effect in October 2014. The Budget Act would invalidate the *Wos* ruling, modify the federal statutes that govern Medicaid secondary payer obligations, and potentially allow Medicaid agencies to seek reimbursement for state-paid past medical expenses from the entirety of a beneficiary's

settlement, regardless of whether there is an allocation of damages.

Louisiana's Medicaid secondary payer statute is currently not in compliance with the standards set forth in the *Wos* ruling; however, it would likely become compliant with the federal statutes as they are intended to be modified by the Budget Act. But until then and despite all the uncertainties, practitioners representing Medicaid beneficiaries should be cognizant of the *Wos* ruling when addressing a reimbursement request from Louisiana DHH but also should take steps to comply with the Louisiana Medicaid secondary payer obligations primarily found in La. R.S. 46:446-446.6., as penalties for failure to consider Medicaid's interest can include loss of health insurance coverage for clients and possible monetary penalties for all parties involved.[12]

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FOOTNOTES

1. Medicaid is administered by state agencies, such as the Louisiana Department of Health and Hospitals. In Louisiana, the primary recipients of Medicaid are children, parents, pregnant women and seniors with certain disabilities. As of January 2014, there were approximately 1.2 million people in Louisiana receiving Medicaid benefits (almost 30 percent of the state's population).

2. Wos v. E.M.A., 133 S.Ct. 1391 (2013).

3. Florida, West Virginia and Maryland.

4. 42 U.S.C. § 1396k(a)(1)(A).

5. 42 U.S.C. § 1396(a)(25)(H).

6. *See* Wos v. E.M.A., 133 S.Ct. 1391, 1402 (2013) (*citing* Ark. Dep't of Health and Human Services v. Ahlborn, 547 U.S. 268, 284 (2006)); Weaver v. Malinda, 07-708, p. 6 (La. App. 5 Cir. 2/19/08), 980 So.2d 55, 61.

7. The North Carolina Medicaid secondary payer statute provided that the state's recovery would be the lower of the actual medical expenses paid by Medicaid or one-third of the settlement value.

8. Wos at 1402.

9. *Id.*

10. If Section 202(b) goes into effect, 42 U.S.C. § 1396k(a)(1)(A) would require Medicaid beneficiaries "to assign the state any rights . . . to any payment from a third party that has a legal liability to pay for care and services . . . ." 42 U.S.C. § 1396(a)(25)(H) would allow states to have secondary payer laws granting the state the right to recover "any payments by such third party" a Medicaid beneficiary may receive in the form of a settlement, judgment or other award.

11. The statute actually cites sections 1902(a)(25)(H) and 1912(a)(1)(A) of the Social Security Act; however, 42.U.S.C. 1396a(a)(25)(H) and 42 U.S.C. § 1396k(a)(1)(A) are the statutory equivalents.

12. On April 1, 2014, President Obama signed the Protecting Access to Medicare Act of 2014 (U.S. House, 113th Congress, 2nd Session, H.R. 4302; Public Law No. 113-93). This legislation delays the implementation date of the provisions of the 2013 Budget Act affecting Medicaid secondary payer obligations until Oct. 1, 2016. This development further demonstrates that, for the immediate future, practitioners should be cognizant of the Wos ruling when addressing Medicaid secondary payer reimbursement obligations, as it is still the law of the land.

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