



Medi-Cal liens update

Medi-Cal's lien and reimbursement claims continue to defy common sense, federal law, the U.S. Supreme Court, and the California legislature.

By SCOTT H.Z. SUMNER

The beginning of a discussion concerning Medi-Cal's rights begins with the understanding that Medi-Cal "represents California's implementation of the federal Medicaid program (42 U.S.C. § 1396-1396v), through which the federal government provides financial assistance to states so they may furnish medical care to qualified indigent persons." (*Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 751 [55 Cal.Rptr.2d 107, 108]), and is thereby constrained by applicable federal Medicaid law.

The federal Medicaid law requires States to "seek reimbursement for [medical] assistance" (42 U.S.C. § 1396a(a)(25)(B)); and to enact "laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." (42 U.S.C. § 1396a(a)(25)(H).)

The statutory language referring to reimbursement "to the extent" that the beneficiary recovers payment from another "party for such health care items or services" simply observes the basic logic that since the rights of the program derive from its payment for medical services, its reimbursement cannot exceed the extent to which the beneficiary actually recovers damages for such services.

It is a matter of simple fairness, equity, and common sense.

That core concept – applicable not only to Medicaid – finds expression in the federal Medicaid law's anti-lien provision, § 1396p(a)(1), which prohibits States from imposing liens "against the property of any individual prior to his death on account of medical assistance paid... on his behalf under the State plan..." (*Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268, 283 [126 S.Ct. 1752, 1762]) ("*Ahlborn*"); and in the legal maxim, "one must so use his own rights as not to infringe upon the rights of another." (Civ. Code, § 3514.)

For instance, if a civil plaintiff in California is found to be 50 percent at fault for his or her own injuries, that plaintiff's recovery on a judgment is reduced by 50 percent as to every category of damages. Similarly, any time a settlement is reached based upon compromise due to liability insurance policy limits of a defendant, comparative fault of a plaintiff, liability problems or medical causation problems in a case, these basic principles compel that lien and reimbursement claimants – including the federal Medicaid program – equitably apportion their recovery on these principles.

Despite the federal Medicaid laws and the inherent limitations on reimbursement to the extent that a plaintiff beneficiary actually recovers damages for medical services for which they received benefits, it was long the practice of Medi-

Cal, as it is with essentially any lien or reimbursement claimant, to insist on reimbursement based on the full cash payments advanced by the program or health insurer, regardless of circumstances that caused the beneficiary to recover less than all of the past medical services damages to which the reimbursement or lien relate.

The U.S. Supreme Court's Ahlborn decision and California Welfare and Institutions Code section 14124.76

Requests for equitable and proportional reductions were met with sharp resistance by Medi-Cal. Then, in 2006, one of the earliest decisions of Chief Justice Roberts' U.S. Supreme Court, applied these principles and the federal Medicaid statutes in a case involving the Arkansas State Medicaid Program.

Following the publication of *Ahlborn*, one would expect that the California Department of Health Care Services ("DHCS") would have followed the dictate of the U.S. Supreme Court and begun properly applying the federal and state laws and the underlying principles governing lien and reimbursement claims. Unfortunately, that was not the case.

Though Medi-Cal/DHCS advanced a variety of explanations for their refusal to follow *Ahlborn*, the arguments generally boiled down to DHCS' assertion that *Ahlborn* did not mandate a formula; coupled with DHCS' failure to offer any other approach that did not itself limit



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their recovery to that portion of a settlement, judgment or award that represents payment for past medical expenses.

In January, 2007, the California Legislature made the first substantive change to the Medi-Cal lien provisions in the Welfare and Institutions Code in many decades, enacting Welfare and Institutions Code section 14124.76.

The amendments originally included language in subsection (d) to Welfare and Institutions Code section 14124.70, which sought to preserve a larger damage allocation for past medical services by precluding measuring a third party's liability by the amount of Medi-Cal benefits, and instead requiring past medical damages to be measured by a medical provider's reasonable and customary charges. When that proposed language was stricken from the legislation prior to passage, it left not only DHCS, but also Medi-Cal beneficiaries subject to a limitation on past medical damages recovery in personal injury cases which stemmed from a 1988 Court of Appeal decision, and was recognized by the California Supreme Court in *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 25]:

Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third-party tortfeasor. (See *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 639-644 [246 Cal.Rptr. 192] [where the provider has relinquished any claim to additional reimbursement, a Medicaid beneficiary may only recover the amount payable under the state Medicaid plan as medical expenses in a tort action]).

Medi-Cal and DHCS now had a California statute expressly limiting lien recovery to a proportional allocation, "guided by" the U.S. Supreme Court *Ahlborn* decision. The key passage from Welfare and Institutions Code Section 14124.76(a) provides:

Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary.... Absent the director's advance agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary, the matter shall be submitted to a court for decision. Either the director or the beneficiary may seek resolution of the dispute by filing a motion, which shall be subject to regular law and motion procedures. In determining what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268 and other relevant statutory and case law.

Once again, one would naturally expect that with a legislative history showing that language had been stricken from the statute which would have increased the statutory allocation to past medical damages to which DHCS' proportional lien rights would attach, the DHCS would now acknowledge the applicability of fairness, equity, common sense, basic legal principles, federal Medicaid law, the holding of the U.S. Supreme Court and a directive from the California Legislature in pursuing their lien recovery rights.

However, DHCS did not.

Instead, DHCS engaged in strained readings and limitations on the applicability of Welfare and Institutions Code section 14124.76 which were without support in the language of the statute, or in any other legal authority.

Again, DHCS advanced an argument that the statute did not mandate a formula (putting aside the fact that the proportionality language of the statute embodies the mathematical concept of, well, proportionality). DHCS also argued that the statute did not limit their lien to the past medical damages portion of the recovery, but instead gave them a stake in all medical damages, despite the express statutory reference to "benefits provided" – a rather unambiguous reference to past benefits as an element of a "settlement, judgment, or award."

Espericueta, McMillian, Bolanos, and Lima

In 2008, DHCS appeared to score a couple of appellate court victories in the cases of *Espericueta v. Shewry* (2008) 164 Cal.App.4th 615 [79 Cal.Rptr.3d 517], and *McMillian v. Stroud* (2008) 166 Cal.App.4th 692 [83 Cal.Rptr.3d 261]. In each of those cases, the appellate court refused to retroactively apply *Ahlborn* and federal Medicaid law proportionality to cases where an unallocated lien reimbursement had been approved by a trial court in a minor's compromise proceeding.

In other words, both cases involved requests based on *Ahlborn* to go back and unwind a final compromise and distribution of settlement funds including an agreed lien repayment to Medi-Cal that had been recommended by plaintiff's counsel, a *guardian ad litem*, and received court approval.

Any concern over whether the courts of this State would prospectively follow *Ahlborn* and apply Welfare and Institutions Code section 14124.76 have now been resolved through the cases of *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744 [87 Cal.Rptr.3d 174]; and *Lima v. Vouis* (May 27, 2009) 174 Cal.App.4th 242 [94 Cal.Rptr.3d 183].

Both *Bolanos* and *Lima* involve allocation requests pursuant to the law and motion provisions of Welfare and Institutions Code section 14124.76(a), where the Director of DHCS had persisted in



refusing to follow *Ahlborn* and section 14124.76. Both utilize the same analysis employed in *Ahlborn*.

As explained by the *Bolanos* court, *supra*, 169 Cal.App.4th at 755, the application of section 14124.76 is relatively simple in the context of judgments, since “a judgment will be predicated on special verdicts that reflect jury determinations about the actual value of past medical expenses.” Thus, proportionality will be a simple matter of mathematics based on those findings, findings of comparative fault on plaintiff and the total judgment.

Both *Ahlborn* and the relevant statutes require proportional allocation in the context of settlements, however. The *Bolanos* court observed that:

Ahlborn brought two basic changes that are reflected in the 2007 amendments. First, the director is limited to recovering only from payments, whether by settlement, judgment or award, made for medical expenses. Second, when the settlement, judgment or award does not specify what portion thereof was for past medical expenses, an allocation must be made in the settlement, judgment or award that indicates what portion is for past medical expenses as distinct from other damages. The director’s recovery is limited to that portion of the settlement that is allocated to past medical expenses.

(*Bolanos, supra*, 169 Cal.App.4th at 748.)

Ahlborn “requires a determination of what portion of the settlement is attributable to medical expenses.” (*Id.*, 4th at 750.)

...in a settlement that is not allocated between past medical expenses and other damages, the ratio of the settlement to the total of the claim, when applied to the director’s total payments to the beneficiary, is an acceptable approximation of the amount of medical expenses.

(*Id.*, at 748.)

DHCS made arguments – based upon *Espericueta v. Sheury, supra*, 164 Cal.App.4th 615, and *McMillian v. Stroud, supra*, 166 Cal.App.4th 692 – for calculating Medi-Cal reimbursement on an entire settlement. (*Bolanos, supra*, 169 Cal.App.4th at 751.) The *Bolanos* court dealt with those arguments in a section of the opinion entitled “*Espericueta* and *McMillian* Do Not Apply to This Case,” explaining that both cases “are distinguishable because they involve attempts to modify final orders approving settlements...” (*Id.*, at 758.) The court went on to explain that *Espericueta* “is predicated on the finality of decisions and not on *Ahlborn*,” and that “both *Espericueta* and *McMillian* stand for the proposition that settlements that have received the court’s final approval cannot be undone on the mere mention of *Ahlborn*.” (*Id.*, at 758, 760.)

Bolanos summarized:

Ahlborn has three aspects to it...

First, the state is entitled only to that portion of the settlement that compensates for past medical expenses. (*Id.*, 169 Cal.App.4th at 752.)

Second, this means that the state is not automatically entitled to the entire settlement, even if the claim for reimbursement exceeds the settlement ... a settlement that does not distinguish between past medical expenses and other damages must be allocated between these two classes of recoveries. ... an allocation between past medical and other expenses or damages may be made by the judgment itself. If there is no such allocation, as in a settlement, the parties must attempt to allocate; if they cannot agree, they must turn to the court. (See pp. 755-756, *post*, citing § 14124.76, subd. (a).) (*Id.*, at 753.)

Third... *Ahlborn*... addresses how to allocate medical and non-medical damages in an otherwise unallocated settlement.

(*Id.*, at 753.)

Lima v. Vouis, supra, 174 Cal.App.4th 242, reaffirmed the applicability of *Ahlborn* and the plain meaning of Welfare and Institutions Code section 14124.76:

There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care... [however]... that does not mean that the State can force an assignment of, or place a lien on, any other portion of [the plaintiff beneficiary’s] property.

(*Id.*, at 257.)

Using Welfare and Institutions Code section 14124.76

Although it is reasonable to presume that in the wake of *Bolanos* and *Lima*, DHCS should at last actually seek to arrive at agreed allocations in settlements of personal injury claims involving Medi-Cal beneficiaries, that does not yet seem to be the case.

Welfare & Institutions Code section 14124.785 provides that, “The director’s recovery is limited to the amount derived from applying Section 14124.72, 14124.76, or 14124.78, whichever is less.” In practice, though, DHCS will always begin any discussion of compromise by applying Welfare and Institutions Code section 14124.72 (d), reducing their lien by 25 percent for attorneys’ fees, and agreeing to a proportional reduction for litigation costs.

If that sum exceeds 50 percent of the plaintiff’s recovery net of attorneys’ fees and costs, DHCS will agree to limit their recovery to 50 percent of the plaintiff’s recovery net of attorneys’ fees and costs.

What we have yet to experience is DHCS observing even the pretense of seeking in good faith to arrive at “agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary,” as required by Welfare & Institutions Code section 14124.76(a).



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In practice, this means that plaintiff's counsel must provide evidence supporting and an explanation of, a Welfare & Institutions Code section 14124.76(a) allocation. If you cannot reach an agreement with DHCS, you will then have to submit the matter to a court for determination per section 14124.76(a).

Doctors' reports of future care needs, life-care plans, vocational assessments, economic analyses of all economic damages, and any other items you would use to prepare a case for trial on damages, will all be tools that will assist a trial court in making findings for a Welfare & Institutions Code 14124.76(a) allocation. Your goal is to establish a compelling showing as to the full damages value of your client's injury claim, unadulterated by issues such as defendant's limited insurance coverage or assets, plaintiff's comparative fault, contested liability, contested medical causation or any other issues which served to compel a compromise settlement.

It will be plaintiff's burden to request, support, and obtain specific findings as to all categories of damages:

- Past medical damages** – can be established through Medi-Cal's lien figure, plus any medical expenses paid through other coverage, out-of-pocket expenses, or outstanding debt to medical providers;
- Future medical damages** – life care plans, cost of care calculations, economist analyses;
- Past wage loss or loss of earning capacity** – pay records, W-2s, 1099s, economist analyses;
- Future wage loss or loss of earning capacity** – economist analyses, vocational assessments; and
- Past and future pain and suffering** – just as with trial, testimony of lay witnesses, family members, friends, as well as physicians' reports, medication charts, life-care plans, vocational and economists' reports, and plain old-fashioned argument of counsel.

A failure by counsel to obtain special findings in each of these categories will deprive a court of the figures needed to perform an *Ahlborn*/section 14124.76 allocation.

The DHCS will rely on language in both *Bolanos* and *Lima* referring to fair and equitable allocation. The attitude of the DHCS is that a "full value" allocation, which was the *Ahlborn* allocation approach, is not equitable, because it is only fair to the beneficiary, and not the department.

One unsettled issue remains: once a court has arrived at an *Ahlborn* allocation, is that figure in turn subject to a proportional cost reduction and to a reduction of 25 percent to represent "the director's reasonable share of attorneys' fees" as set forth in 14124.72(d)?

DHCS has contended, and doubtless will continue to contend, that the 25 percent attorneys' fees and pro rata cost provisions of section 14124.72 are a limit on DHCS' recovery of benefits that exists as an alternative to 14124.76, and that where a lien reimbursement is based on section 14124.76, DHCS is not required to further reduce for attorneys' fees and costs.

Were the issue confined to the Welfare and Institutions Code sections alone, DHCS might be expected to prevail on that position, but under the federal Medicaid law and the logic which drove *Ahlborn*, those reductions should still apply. Indeed, the statutory allocation of only 25 percent for attorneys' fees reduction in section 14124.72 is itself suspect under the federal Medicaid anti-lien provisions and the principles of law those statutes express.

Abusing Welfare and Institutions Code section 14124.76

One of the concerns expressed by the Arkansas Department of Health and Human Services in the *Ahlborn* case was that, "there is an inherent danger of manipulation in cases where the parties to a

tort case settle without judicial oversight or input from the State." (*Ahlborn, supra*, 547 U.S. 268, 287 [126 S.Ct. 1752, 1764].)

Surprisingly, early in the wake of *Ahlborn*, Medi-Cal's DHCS representatives sought to avoid the application of *Ahlborn* to any settlement where the settling parties did not themselves allocate damages. By taking this position, DHCS actually encouraged parties to allocate away the State's interest in a settlement.

It is important to remember that under the federal Medicaid laws, and under Welfare and Institutions Code sections 14124.70, 14124.71, and 14124.72, a Medicaid beneficiary who brings a claim or lawsuit against a third-party tortfeasor cannot unilaterally choose not to pursue a claim for DHCS' past medical damages absent a 14124.71(b)(2) waiver of the claim by the director of the DHCS.

Similarly, a settling tortfeasor and their insurer are liable to Medi-Cal directly, and should insist on settling Medi-Cal's claims as a condition of settling plaintiff's claims, or continue to expose themselves to responsibility to Medi-Cal for the benefits provided to plaintiff. (Welf. & Inst. Code, § 14124.71(a) (director has a right to recover from the tortfeasor).)

In the event you reach a settlement that allocates no monies to past medical services, or which seeks to impose too strained an allocation to benefit the plaintiff, DHCS retains its rights under 14124.76(a) to bring a motion and submit the matter to a court for decision. In such a setting, it is easy to imagine a trial judge taking great exception to the effort to marginalize the State's interest, and imposing a harsh allocation against the plaintiff at the State's request.

Overreaching allocation attempts that seek to preserve a greater percentage of settlement for one plaintiff pose a threat to plaintiffs collectively – they risk a backlash by the courts against all plain-



tiffs seeking *Ahlborn*/section 14124.76(a) allocations, and increase the likelihood that DHCS will continue to resist proper application of the law.

The greater good can be achieved by familiarizing our trial courts with proportional allocation procedures, and laying the groundwork for expanding these

fundamental proportional allocation rights into all lien and reimbursement arenas, where they rightfully belong.

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