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Impact of *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) on Virginia Law Governing Medicaid Liens

One of the recurring themes of personal injury litigation is the inability to compensate fully the victim for the damages resulting from the alleged tortuous conduct. This dilemma arises when:

- a judgment exceeds the assets available to satisfy it;
- when an assessment of the difficulties of imposing liability on a defendant or concerns about availability of insurance coverage or other assets to pay a judgment lead to acceptance of a compromise settlement.

In such situations, victims who are Medicaid recipients often find themselves embroiled in a dispute with the state Medicaid program seeking reimbursement for the medical expenses paid for treatment of the injuries caused by the alleged tortuous conduct. Virginia, and other states, historically claimed entitlement to recovery of the full amount of payments made by the Medicaid program on all the proceeds of an award or settlement even in situations where the victim would receive less than full or indeed no recovery on other elements

of damages of the personal injury claim such as loss of income, diminishment of earning capacity, pain, suffering and emotional distress.

In 2006, the Supreme Court of the United States determined that a state Medicaid program was entitled to recover its payments only from the portion of settlement proceeds representing compensation for the medical expenses paid by the Medicaid program. *Arkansas Dept. of Health and Human Servs. v. Ahlborn,* 547 U.S. 268 (2006). In light of *Ahlborn*'s construction of the federal Medicaid statutes, the Virginia regime for resolving Medicaid liens violates the federal law to which a state must comply as a condition of receiving federal funding.

The Facts and Holding of *Ahlborn*

Heidi Ahlborn, a 19 year old college student, sustained a severe brain injury as a result of a car accident. She commenced a civil action against two alleged tortfeasors seeking damages for past medical costs, permanent physical injury, past and future pain, suffering and mental anguish, past lost earnings and permanent impairment of the ability to earn in the future. *Ahlborn,* 547 U.S. at 273.

Ahlborn's medical expenses were paid by the Arkansas Medicaid program. Arkansas law mandated that as a condition of eligibility, Ahlborn automatically assign her right to any settlement, judgment, or award obtained from a tortfeasor to the agency administering the Arkansas Medicaid program, Arkansas Department of Health and Human Services ("ADHS"). This assignment "shall be considered a statutory lien on any settlement, judgment, or

award received…from a third party". *Ahlborn,* 547 U.S. at 278 (*quoting* Ark. Code. Ann. § 20-77-307(c)).

Ahlborn settled her tort action for $550,00. ADHS asserted a lien against the entire settlement proceeds in the amount of $215,645.30-the total of the Medicaid payments for treatment of Ahlborn's injuries. Ahlborn filed a declaratory judgment action in federal court seeking a judgment that the Medicaid lien violated federal Medicaid laws to the extent that satisfying the lien for past medical expenses would require depletion of compensation for the other elements of damages. *Ahlborn*, 547 U.S. at 274.

In order to facilitate the District Court's resolution of the legal issue, the parties stipulated that the reasonable value of Ahlborn's claim was $3,040,708.18. Ahlborn posited that, since the $550,000 settlement approximated one sixth of the reasonable value of the claim, ADHS would only be entitled to one sixth of its expenditures for the medical expenses of Ahlborn-$35,581.47. *Ahlborn,* 537 U.S. at 274.

The Supreme Court agreed unanimously with Ahlborn. According to the Court, federal Medicaid law does not authorize a Medicaid lien in an amount exceeding the portion of a settlement or judgment representing compensation for past medical expenses. *Ahlborn,* 537 U.S. at 275, 292.

In so holding, the Court rebuffed the fears expressed by ADHS and its *amici* that limiting liens to the portion of settlements designated as payments for medical costs would created an "inherent danger of manipulation in cases where

the parties to a tort case settle without judicial oversight or input from the State." *Ahlborn,* 537 U.S. at 287. A rule of full reimbursement is not needed to thwart settlement manipulation because, the risk that parties to a tort action will allocate away the State's interest "can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Ahlborn,* 537 U.S. at 288.

The Wake of *Ahlborn*

Ahlborn provokes both substantive and procedural concerns for courts adjudicating Medicaid lien controversies. The substantive impact is relatively straightforward. Pursuant to the Supremacy Clause of the U.S. Constitution, the *Ahlborn* holding overrules state law to the contrary and limits a state's Medicaid lien to the portion of a settlement or judgment representing payments made for medical care. See *Jordan v. Western Pa. Hosp.*, __A.2d__. 2008 WL 481303 (Pa. Cmwlth. Nov. 10, 2008); *Doran v. Missouri Dept. of Social Services,*, 2008 WL 4151617 (W.D.Mo. Sept. 2, 2008); *Espericueta v. Shewry,* 164 Cal. App. 4th 615, 79 Cal. Rptr.3d 517 (July 1, 2008) (state statute amended to limit Medicaid lien to portion of settlement, judgment, or award representing medical expenses payment); *Lugo v. Beth Israel Med. Ctr.*, 13 Misc.3d 681, 839 N.Y.S.2d 432 (2006).

Ahlborn affords little guidance as to how and when an allocation will be made of the amount of a settlement, judgment or award representing medical expenses. The Supreme Court noted that some states had in place special rules and procedures for allocating tort settlements and left open the possibility these

rules and procedures could be employed in determining the quantum of proceeds subject to a Medicaid lien. See *Ahlborn,* 537 U.S. at 287 ,fn. 17.

Post *Ahlborn* litigation has witnessed states applying their own procedural requirements in disposing of *Ahlborn* driven efforts to reduce Medicaid liens. In Oklahoma, the lien applies to the entire settlement unless Medicaid recipient shows by clear and clear convincing evidence that a more limited allocation of damages to medical expenses is warranted. *Price v. Wolford,* 2008 WL 4722977 (W.D. Ok. Oct. 23, 2008) (applying Okla. Stat. tit. 63 § 5051. 1(D)(1)(d)). Idaho, by statute, provides that if a settlement is received by a recipient without delineating what portion of the settlement is in payment of medical expenses, it will be presumed that the settlement or judgment applies first to the medical expenses. *Hudelson v. Hudelson,* __P.3d__, 2008 WL 4595251 (Oct. 16, 2008) (applying I.C. § 56-209b).

A Medicaid recipient seeking to limit a Medicaid lien to a portion of proceeds may be stymied by a failure to comply with state imposed procedural requirements. In *Hudelson*, the plaintiff Medicaid recipient settled his tort action subject to court approval. The court approved the settlement amount in a proceeding without notice to the Idaho Medicaid program. The plaintiff then petitioned the court to establish a special needs trust and to determine the amount necessary to satisfy the Medicaid lien. The Medicaid program objected to the allocation contending the Idaho presumption required full reimbursement of its expenditures because the settlement amount had been approved without

the required notice to the Medicaid program. The Idaho Supreme Court agreed ruling that *Ahlborn* "does not prohibit states from implementing procedures on how to allocate settlements." *Hudelson,* 2008 WL 4595251 at 6. See also *Espericueta v. Shewry,* 164 Cal. App. 4th 692, 79 Cal. Rptr. 3d 615, 79 Cal. Rptr. 3d 517 (July 1, 2008) (Failure to present evidence in support of allocation position at time of approval of infant's settlement precluded subsequent quest for an *Ahlborn* inspired allocation of proceeds to reduce Medicaid lien).

Virginia's Medicaid Lien Law and *Ahlborn*

The Commonwealth of Virginia, when it pays for health care provided to a tort victim under the Virginia Medicaid program (the "Virginia Medical Assistance Program") has a lien "on the claim of such injured person or his personal representative against the person, firm or corporation who is alleged to

have caused such injuries." Va. Code § 8.01-66.9.[1]

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[1] § 8.01-66.9. Lien in favor of Commonwealth, its programs, institutions or departments on claim for personal injuries.

Whenever any person sustains personal injuries and receives treatment in any hospital, public or private, or nursing home, or receives medical attention or treatment from any physician, or receives nursing services or care from any registered nurse in this Commonwealth, or receives pharmaceutical goods or any type of medical or rehabilitative device, apparatus, or treatment which is paid for pursuant to the Virginia Medical Assistance Program, the State/Local Hospitalization Program and other programs of the Department of Medical Assistance Services, the Maternal and Child Health Program, or the Children's Specialty Services Program, or provided at or paid for by any hospital or rehabilitation center operated by the Commonwealth, the Department of Rehabilitative Services or any state institution of higher education, the Commonwealth shall have a lien for the total amount paid pursuant to such program, and the Commonwealth or such Department or institution shall have a lien for the total amount due for the services, equipment or devices provided at or paid for by such hospital or center operated by the Commonwealth or such Department or institution, or any portion thereof compromised pursuant to the authority granted under § 2.2-514, on the claim of such injured person or of his personal representative against the person, firm, or corporation who is alleged to have caused such injuries.

The Commonwealth or such Department or institution shall also have a lien on the claim of the injured person or his personal representative for any funds which may be due him from insurance moneys received for such medical services under the injured party's own insurance coverage or through an uninsured or underinsured motorist insurance coverage endorsement. The lien granted to the Commonwealth for the total amounts paid pursuant to the Virginia Medical Assistance Program, the State/Local Hospitalization Program and other programs of the Department of Medical Assistance Services, the Maternal and Child Health Program, or the Children's Specialty Services Program shall have priority over the lien for the amounts due for services, equipment or devices provided at a hospital or center operated by the Commonwealth. The Commonwealth's or such Department's or institution's lien shall be inferior to any lien for payment of reasonable attorney's fees and costs, but shall be superior to all other liens created by the provisions of this chapter and otherwise. Expenses for reasonable legal fees and costs shall be deducted from the total amount recovered. The amount of the lien may be compromised pursuant to § 2.2-514.

The court in which a suit by an injured person or his personal representative has been filed against the person, firm or corporation alleged to have caused such injuries or in which such suit may properly be filed, may, upon motion or petition by the injured person, his personal representative or his attorney, and after written notice is given to all those holding liens attaching to the recovery, reduce the amount of the liens and apportion the recovery, whether by verdict or negotiated settlement, between the plaintiff, the plaintiff's attorney, and the Commonwealth or such Department or institution as the equities of the case may appear, provided that the injured person, his personal representative or attorney has made a good faith effort to negotiate a compromise pursuant to § 2.2-514. The court shall set forth the basis for any such reduction in a written order. (Code 1950, § 32-139.1; 1972, c. 481; 1974, c. 518; 1979, c. 722; 1981, c. 562; 1982, c. 491; 1983, c. 263; 1984, c. 767; 1985, c. 580; 1986, c. 238; 1988, c. 544; 1989, c. 624; 1992, c. 104; 2003, c. 525.)

Any doubts that a lien created by Va. Code § 8.01-66.9 encompasses the entire amount of a personal injury or wrongful death judgment or settlement is dispelled by an examination of related statutes and precedents. In *Commonwealth v. Lee,* 239 Va. 114, 387 S.E.2d 770 (1990), the Supreme Court held the lien would attach to the proceeds of an infant's claim for personal injuries even though past medical expenses were not a part of the claim. The Court construed *claim* as used in § 8.01-66.9 to encompass the entire claim and not just a portion attributable to past medical expenses:

> the phrase "claim of such injured person" means precisely what it purports to say. The statute imposes the Commonwealth's lien upon the injured person's *claim* against the alleged tort-feasor, regardless of the nature of the claim. The General Assembly could have limited the Commonwealth's lien to an injured person's claim for medical expenses, but it did not choose to do so. Instead, the General Assembly, using the broadest language available, imposed the lien on claims of every kind. Thus, it is immaterial whether the medical expenses, in this case, are recoverable by the infant. Even if his claim is limited, the Commonwealth's liens attach to such claim as he has.

239 Va. at 117-18, 387 S.E.2d at 772.

Similarly, Va. Code § 8.01-66.10 mandates that the Medicaid lien will attach to amounts received by statutory beneficiaries for their damages which would not include medical expenses of the deceased.[2]

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[2] § 8.01-66.10. Death claims settled by compromise or suit.

In case of personal injuries resulting in death and settlement therefor by compromise or suit under the provisions of §§ 8.01-50 to 8.01-56, the liens provided for in this article may be asserted against the recovery, or against the estate of the decedent, but not both. If asserted against the recovery and paid, such liens shall attach pro rata to the amounts received respectively by such

Virginia Medicaid lien law violates federal law as interpreted by *Ahlborn* by failing the limit the breadth of the lien to the portion of a settlement or judgment representing compensation for past medical expenses. Although it has been argued that Virginia law need not comply with the dictate of *Ahlborn* due the statutory empowerment of a court pursuant to § 8.01-66.9 to apportion the recovery "as the equities may appear", nothing in Virginia statutory or decisional law requires the court to limit the Medicaid lien to the portion of proceeds representing compensation for past medical expenses. Indeed, since *Ahlborn* has been decided, the Office of the Attorney General has posited the Medicaid lien attaches to the entire recovery and urges courts apportioning recoveries pursuant to § 8.01-66.9 to award the Commonwealth amounts exceeding recoveries if an *Ahlborn* allocation were applied to the proceeds.

Changes Needed for *Ahlborn* Compliance

In order to rectify the Virginia statutes violative of *Ahlborn*, the General Assembly should amend Va. Code § 8.01-66.9. The amendments should limit Medicaid liens to the portion of recovered proceeds allocated to past medical expenses. Doing so would require a straightforward change in the scope of the lien and specifying a procedural path for how and when an allocation would transpire.

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beneficiaries as are designated to receive the moneys distributed and in their respective amounts; and such beneficiaries, or the personal representative for their benefit, shall be subrogated to the liens against the estate of such decedent provided for by § 64.1-157. (Code 1950, § 32-141; 1979, c. 722.)

Allocation of proceeds to identify a portion representing compensation for past medical expenses requires a process heretofore absent in the vast majority of personal injury claims litigated in Virginia. The Virginia Supreme Court has not sanctioned the use of special verdicts in negligence actions. See *Johnson v. Smith,* 241 Va. 396, 401, 403 S.E.2d 685, 688 (1991). With the exception of awards in wrongful death actions and to parents in an infant personal injury action, a jury's verdict will not specify an amount awarded for medical expenses.

Several possibilities come to mind for modifying current Virginia practice to effect the allocation necessary for application of *Ahlborn*. One suggestion would be to mandate notice to the Commonwealth of a pending settlement negotiations and afford the Commonwealth an opportunity to participate with the hope that in many instances, the parties could agree to an allocation at the time of settlement and in the case of a trial, task the trier of fact with the allocation chore.

Another solution would be to continue the current practice of permitting the plaintiff, without participation by the Medicaid lienholder, to negotiate a settlement knowing it will be subject to a Medicaid lien. If the claim is tried, a judgment based upon the lien would be allocated either by the trier of fact (in contravention of current general verdict practice) or in the process of resolution of the lien post judgment, at the time proceeds are actually received by the Medicaid beneficiary by the court.

The solution least disturbing to current Virginia practice and affording protection of the Commonwealth from manipulation calculated to constrict proceeds subject a lien would be to keep in place the grant of authority to the trial court to apportion the recovery "as the equities of the case may appear" per § 8.01-66.9 in the context of a clear directive thata the Medicaid lien attaches only to the portion of the recovery deemed by the trial court representing compensation for past medical expenses. For example, § 8.01-66.9 could be amended to read:

Whenever any person sustains personal injuries and receives treatment in any hospital, public or private, or nursing home, or receives medical attention or treatment from any physician, or receives nursing services or care from any registered nurse in this Commonwealth, or receives pharmaceutical goods or any type of medical or rehabilitative device, apparatus, or treatment which is paid for pursuant to the Virginia Medical Assistance Program, the State/Local Hospitalization Program and other programs of the Department of Medical Assistance Services, the Maternal and Child Health Program, or the Children's Specialty Services Program, or provided at or paid for by any hospital or rehabilitation center operated by the Commonwealth, the Department of Rehabilitative Services or any state institution of higher education, the Commonwealth shall have a lien for the total amount paid pursuant to such program, and the Commonwealth or such Department or institution shall have a lien for the total amount due for the services, equipment or devices provided at or paid for by such hospital or center operated by the Commonwealth or such Department or institution, or any portion thereof compromised pursuant to the authority granted under § 2.2-514, on the claim of such injured person or of his personal representative against the person, firm, or corporation who is alleged to have caused such injuries.

The Commonwealth or such Department or institution shall also have a lien on the claim of the injured person or his personal representative for any funds which may be due him from insurance moneys received for such medical services under the injured party's own insurance coverage or through an uninsured or underinsured motorist insurance coverage endorsement. The lien granted to the Commonwealth for the total amounts paid pursuant to the

Virginia Medical Assistance Program, the State/Local Hospitalization Program and other programs of the Department of Medical Assistance Services, the Maternal and Child Health Program, or the Children's Specialty Services Program shall have priority over the lien for the amounts due for services, equipment or devices provided at a hospital or center operated by the Commonwealth. The Commonwealth's or such Department's or institution's lien shall be inferior to any lien for payment of reasonable attorney's fees and costs, but shall be superior to all other liens created by the provisions of this chapter and otherwise. The lien granted to the Commonwealth for the total amounts paid pursuant to the Virginia Medical Assistance Program shall attach only to the portion of the claim representing compensation for incurred medical expenses. Expenses for reasonable legal fees and costs shall be deducted from the total amount recovered. The amount of the lien may be compromised pursuant to § 2.2-514.

The court in which a suit by an injured person or his personal representative has been filed against the person, firm or corporation alleged to have caused such injuries or in which such suit may properly be filed, may, upon motion or petition by the injured person, his personal representative or his attorney, and after written notice is given to all those holding liens attaching to the recovery, determine the amount of and allocate the liens, reduce the amount of the liens and apportion the recovery, whether by verdict or negotiated settlement, between the plaintiff, the plaintiff's attorney, and the Commonwealth or such Department or institution as the equities of the case may appear, provided that the injured person, his personal representative or attorney has made a good faith effort to negotiate a compromise pursuant to § 2.2-514. The court shall set forth the basis for any such reduction in a written order.[3]

Wrongful death actions and claims involving Medicaid payments for recipients for expenses incurred during the recipient's minority present special problems. By allocating a disproportionate share of offered settlement proceeds to statutory beneficiaries to the prejudice of medical expenses element of damages in wrongful death claims and similarly underallocating a parent's medical expense claim or indeed not asserting such a claim at all, a claimant

[3] Va. Code § 8.01-66.10 should also be amended to eliminate Medicaid liens from attaching pro rata proceeds awarded to a statutory beneficiary.

could "game" the system. Tactics in claims arising out of wrongful death and infant personal injuries calculated to shortchange the Medicaid lienholder could be defeated by requiring court approval with notice to the Commonwealth of any distribution of proceeds recovered by judgment or settlement in such cases. In such instances, the court would be empowered to apportion the recovery to ensure a fair allocation of proceeds to the incurred medical expenses component of a claim.

The vast majority of these claims already require court approval.[4] Statutory change would simply require notice to lienholders and require the court to employ the apportionment power vested in the court by virtue of § 8.01-66.9 to redress any prejudice resulting from "claim manipulation".

[4] The only claims in the described categories not requiring court approval currently would be personal injury claims arising during minority but resolved after the injured person attains majority.