

The Newsletter[®]

A newsletter by the Law Offices of J. Michael Hayes devoted to relevant issues of negligence and insurance law.
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MEDICAID

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The definitive pronouncement regarding Medicaid as a “recovery right” is in *Arkansas Dept. Health and Human Services [ADHD] v. Ahlborn*, 126 S. Ct. 1752 (2006). Federal Medicaid laws provide for joint Federal and State funding of medical care for individuals who are not able to pay for their own health care 42 USC § 1396, *et seq.* A requirement of that statute is that States take reasonable measures to recover payments made for client’s benefit that were necessitated by third parties, 42 USC § 1396a (a)(25)(A). To the extent of payments made, the State acquires the right of the individual as subrogor. The State of Arkansas had enacted legislation that gave ADHS a “statutory lien on any settlement, judgment or award”. Ark Code Ann §§ 20-77-301, 20-77-307(a). ADHS’s position was it was entitled to recover the full amount of its expenditures, despite the stipulated fact in that case that the compromise settlement for the injuries, medical expenses and other losses was only one-sixth (1/6th) the total value of the case.

In contrast with the Arkansas legislation, the Federal Medicaid enabling statute prohibits States from placing liens against personal injury settlements. 42 USC §1396p. The United States Supreme Court held that the Arkansas lien provision “violates Federal Law” and affirmatively prohibited Arkansas from asserting a lien on the recovery. The United States Supreme Court did recognize that “there is no question that the State can acquire an assignment of the right or chose in action [subrogation], to receive payments for medical care.” 42 USC §§ 1396a (25)(A) and 1396k (a).

New York State has long taken the position that it, as did Arkansas, had a “lien” on any third party recoveries where medical expenses had been paid by Medicaid. *Social Services Law* § 104-b.

That New York felt that it had a lien as opposed to a subrogation right, one only has to look to the title of *Social Services Law* § 104-b: “Liens for public assistance and care on claims and suits for personal injuries”. It would appear that the Federal Medicaid Act’s “anti-lien” provision had escaped practitioners and legislative attention in New York and elsewhere from its inception to the present.

The reality, as articulated by the United States Supreme Court, is that at best, States have a right of subrogation and they may proceed directly against the responsible third party, the tortfeasor. As an alternative, a State may intervene in the plaintiff’s personal injury action. Finally, the State may recover its proportionate share of the settlement or recovery from the claimant directly provided it represents compensation for medically related expenses.

RECOMMENDATIONS

As a practical matter, Plaintiff’s attorney should decline to pursue medical expenses on behalf of Medicaid. To do so could create a potential conflict: If a personal injury client is inclined to accept a proffered settlement and the State or other provider objects to the amount of the settlement or to their proportionate share, a conflict is created.

It is an obvious conflict of interest for the attorney to attempt to represent two parties with competing claims. *Disciplinary Rule* 1-105(a). It is suggested that the Plaintiff be clear in his allegations that he is seeking recovery for “bodily injury, pain and suffering only” and that medical expenses are never pled or alleged. If counsel receives a “Notice of Lien” from his local state authority, he should advise them in writing that he will not, and is ethically prohibited from, representing the Government’s or provider’s interests relative to medical expenses.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact J. Michael Hayes, Esq. at 69 Delaware Avenue, suite 1111, Buffalo, NY 14202, telephone (716) 852-1111 or e-mail jmh@jmichaelhayes.com. Newsletter available by e-mail if you so request.

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