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THE BEGLEY LAWYER ALERT

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REDUCING A MEDICAID LIEN

By Thomas D. Begley, Jr., Esquire

There are three ways to reduce a Medicaid lien. These strategies can be used separately or in combination.

- *Procurement Costs.* Under New Jersey law, where a Medicaid recipient settles a case against a third party, the Medicaid lien can be reduced by attorneys' fees and costs and expenses. Many lawyers simply ask for and receive a one-third or 25% reduction, depending on the engagement letter with the plaintiff. Expenses should always be included in the reduction. The procurement costs are based on a pro rata share. If the attorney's fee is 33-1/3% and the costs and expenses are 10%, the total procurement cost should be 43%.

- *Ahlborn.* The second way to reduce a Medicaid lien is through the application of an *Ahlborn* argument. The Supreme Court discussed the Federal Anti-Lien Statute prohibiting liens against the property of an individual prior to his death on account of medical assistance paid. The court held that based on this statute, a state is prevented from attaching the past *non-medical portion of the settlement*. In the *Ahlborn* case, it was determined that the plaintiff received only one-sixth of the overall damages so that the right of the State of Arkansas was limited to one-sixth of the past medical claim. In order to determine the pro rata share to which the state is entitled, it is necessary to establish the reasonable value of the case. In the *Ahlborn* case, this was accomplished by a stipulation with the State Medicaid Agency. It is unlikely that will happen again. The stipulation could possibly be made by the defendant, but it would have to be a bona fide stipulation. A common method of arriving at the full value is to obtain a report from

an expert witness, or finally a court order may be necessary. If the case is to be resolved by a settlement prior to trial and the State Medicaid Agency is unwilling to agree on a satisfactory reduction, it may be necessary to give notice to Medicaid and have the court enter the order.

- *Collateral Source Rule.* A third argument that could be made to reduce the Medicaid lien is the Collateral Source Rule. If a state has a Collateral Source Rule, such as exists in New Jersey, a Medicaid lien may not apply. Under the New Jersey statute, if a plaintiff receives or entitled to receive benefits for injuries allegedly incurred from any other source other than a joint tortfeasor, the benefit shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff. The purpose of this type of statute is to avoid double recovery and reduce insurance costs. The statute prevents insured plaintiffs from seeking payment for costs for which they have already been compensated. In an interesting case, the plaintiff sought to enforce an ERISA lien against a personal injury settlement. The defendant argued that the money held in escrow could not be the specific funds that belong to the plaintiff ERISA plan, because the personal injury victim never came into possession of such funds as a matter of law. The personal injury plaintiff claimed that property recovered in New Jersey is not money on which the ERISA plan has an equitable claim. The personal injury victim took the position that the plan must pursue the tortfeasor itself. The court acknowledged that it must dismiss the claim, if the beneficiary never received such money in the tort action for medical benefits. "If state law prohibits a plaintiff's claim for medical benefits paid by his or her own insurance, there would be nothing to which Rhodia could attach its equitable lien or constructive trust and the court could not grant relief."

N.J.S.A. 30-4D-7.1(b).

² Arkansas Department of Health and Human Services v. Ahlborn, 126 S. Ct. 1752 (2006).

³ 42 U.S.C. §1396p(a)(1).

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