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MEMORANDUM

To: **Interested Parties**

From: **Lou Bograd, Senior Litigation Counsel**

Re: **Possible Extension of *Ahlborn* Ruling to Medicare and Guidance to Plaintiffs' Counsel Regarding the Decision**

Date: **May 16, 2006**

In a significant victory for injured plaintiffs, the Supreme Court ruled unanimously on May 1st that state Medicaid agencies' claims for reimbursement out of tort settlements are limited to that portion of any settlement attributable to past medical expenses. The ruling means that the agencies may not lay claim to any portion of a plaintiff's recovery for lost wages, pain and suffering, permanent disability or other future damages. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752 (2006).

Medicaid is not the only federal health care program that has asserted a right to priority repayment out of tort settlements; ATLA members report similar claims by Medicare.

We believe that *Ahlborn's* logic should control repayment claims by other federal programs, such as those asserted under the Medical Care Recovery Act ("MCRA") and the Medicare Secondary Payer Act ("MSPA"), despite differences in the language of each statute, because the basic structure of the repayment obligation is the same under all three federal statutes and because all three acts share a common congressional purpose.

In our view, plaintiffs' counsel should begin to treat the decision in *Ahlborn* as controlling in cases involving Medicare and other federally-funded health care programs and should be on the lookout for an appropriate case to seek to extend the holding in *Ahlborn*.[1]

The *Ahlborn* Ruling

Heidi Ahlborn was a 19-year-old college student when she was involved in an automobile accident that left her severely and permanently disabled. The Arkansas Department of Health and Human Services, the state's Medicaid agency, paid more than $215,000 for her medical treatment. When Ms. Ahlborn recovered $550,000 for her injuries through settlements

[1] Alternatively, it might be possible to challenge certain of Medicare's third-party reimbursement rules through an Administrative Procedures Act action against the Centers for Medicare and Medicaid Services.

with various auto insurers, the state agency sought full reimbursement of its Medicaid payments, even though—as the state acknowledged—the settlement recovery amounted to only about one sixth of her total damages. Ms. Ahlborn then brought a declaratory judgment action to limit DHHS's reimbursement to that portion of the settlement amount—approximately $35,000—attributable to her past medical expenses.

Under the federal Medicaid Act, "to the extent that payment has been made under the State plan for medical assistance [to an individual] in any case where a third party has a legal liability to make payment for such assistance, . . . 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(25)(H). The act requires Medicaid recipients "to assign [to] the State any rights . . . to payment for medical care from any third party" and "to assist the State in pursuing any third party who may be liable to pay for care and services available under the [State Medicaid] plan." 42 U.S.C. § 1396k(a). The Supreme Court rejected the argument of the State of Arkansas—supported by the federal government and thirty other states—that these statutory provisions entitled the state agency to full reimbursement out of any settlement. To the contrary, the Court found that the language of the federal third-party liability provisions focused solely on "recovery of payments for medical care." 126 S.Ct. at 1761. Moreover, the Court ruled, the State itself could not adopt more expansive reimbursement rules, because any reimbursement out of damages paid to plaintiff for lost wages or pain and suffering would contravene the anti-lien provision of the Medicaid Act. 126 S.Ct. at 1762-64.[2]

The Court's statutory construction analysis closely tracked that in the *amicus* brief submitted by CCL on behalf of ATLA. The Court shared ATLA's concern that any rule granting "absolute priority" to the state's reimbursement claim "might preclude settlement in a large number of cases," and further agreed with ATLA that any concern that settlements would be manipulated to avoid repayment could be addressed through judicial procedures to allocate settlements when the state and the plaintiff cannot agree on a fair allocation. 126 S.Ct. at 1764-65.

Comparison of the Statutory Language

The text of the third-party liability provisions in the Medical Care Recovery Act (MCRA), 42 U.S.C. §§ 2651-53, and the Medicare Secondary Payer Act (MSPA), 42 U.S.C. § 1395(y), are similar to the language in the Medicaid Act interpreted in *Ahlborn*. The MCRA entitles the federal government to recover the cost of medical care from third party tortfeasors. Section 2651(a) of MCRA provides, in relevant part:

> In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment . . . to a person

[2] Medicaid differs from other federal health care programs in that it is a joint federal-state program. Each state designates an agency to administer the program in accordance with federal requirements, and the federal government reimburses the state for a substantial portion—between 50 and 83%--of its medical expenses under the program. Because of this structure, and because the Arkansas statutes at issue in *Ahlborn* clearly provided for full repayment to the state, the Court needed to consider whether the federal third-party liability provisions merely established a floor on reimbursement requirements which the states could exceed. The Court decided that Medicaid's anti-lien provision precluded such a construction of the act.

> who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment . . . and shall as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment . . . . The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person . . . to assign his claim or cause of action against the third person to the extent of that right or claim.

To "enforce a right under" MCRA, the United States may intervene or join in any action brought by the injured person, or institute its own legal action against the liable third party. 42 U.S.C. § 2651(d). Moreover, the statute expressly authorizes the United States to "compromise, or settle and execute a release of, any claim which the United States has by virtue of the right established by section 2651" or to "waive any such claim, in whole or in part, for the convenience of the Government, or if [the head of the department or agency] determines that collection would result in undue hardship upon the person who suffered the injury or disease resulting in care or treatment." 42 U.S.C. § 2652(b).

Importantly, MCRA also expressly protects the rights of the tort victim. The act explicitly states: "No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder." 42 U.S.C. § 2652(c).

MSPA was enacted to address a somewhat different situation. It was intended to ensure that Medicare's obligation to pay will be secondary to that of another insurer when both Medicare and the other insurer (or self-insured person) are responsible for the cost of medical treatment. Nevertheless, MSPA has been applied to tort litigation because many tortfeasors have liability insurance that covers the cost of injuries they may inflict on others. Where such "primary plan" insurance cannot reasonably be expected to make payment promptly (for example, because the insured's legal liability has not yet been established), Medicare will make payments for the medical treatment, subject to a right of reimbursement. The repayment and enforcement provisions under MSPA mirror those under MCRA and Medicaid:

> A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means. . . .

42 U.S.C. § 1395y(b)(2)(B)(ii).

MSPA permits the Secretary of Health and Human Servies to waive any provision of the act when he or she determines that "waiver is in the best interests of the program." 42 U.S.C. § 1395y(b)(2)(B)(v).

> The statutory language of MCRA and MSPA parallels that of the federal Medicaid Act. When the federal government (or, in the case of Medicaid, the state agency) pays for medical care or treatment for which a third party may be liable, the government acquires a right to recover payment from that third party. 42 U.S.C. §§ 1395y(b)(2)(B)(ii), 1396a(25)(H), 2651(a). It is subrogated to and/or assigned the program beneficiary's rights to recover for the costs of that treatment. 42 U.S.C. §§ 1395y(b)(2)(B)(iv), 1396k(a), 2651(a). And the government may bring an independent legal action to obtain reimbursement. 42 U.S.C. §§ 1395y(b)(2)(B)(iii), 1396a(a)(25)(B), 2651(d).

Most importantly, in each case, the statutory scheme limits the government's repayment rights to payments for medical expenses, while leaving the injured plaintiff's right to recover for other items of damages undisturbed. The Medicaid Act speaks of the State being assigned the "rights . . . to payment for medical care from any third party;" MCRA of "a right to recover . . . the reasonable value of the care and treatment;" and MSPA of reimbursements from primary plans that have "responsibility to make payment with respect to such item or service." In *Ahlborn,* the Supreme Court read this language in the Medicaid Act not to reach portions of a tort settlement that represent items of damages other than medical expenses. *See, e.g.,* 126 S.Ct. at 1764 n.15. ("assignment of the right to compensation for lost wages and other nonmedical damages is nowhere authorized by the federal third-party liability provisions").

To be sure, there are significant differences in the legislative language among these three statutes. MSPA, for example, places the legal obligation on the primary plan to reimburse the government, rather than codifying a governmental right to recovery. MSPA also authorizes the government to collect double damages from a primary plan that does not fulfill this obligation. But these differences in statutory language do not necessarily place the Medicaid recipient in a stronger position than beneficiaries of other federal health care programs. Both MCRA and MSPA expressly authorize the government to waive all or part of its claim to reimbursement under certain circumstances. MCRA also permits the government to compromise its claim and expressly protects the injured person's right to recover "for that portion of his damage not covered hereunder."[3]

In short, there is no reason to read the statutory language of either MCRA or MSPA to grant the government a broader right to recover third-party liability payments than under Medicaid.

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[3] Arguably, this last provision brings governmental reimbursement under MCRA under the "made-whole" doctrine, pursuant to which a health insurer may not obtain reimbursement for medical payments from a third-party tortfeasor until the injured plaintiff has been fully compensated for his damages. *See Allen v. U.S.,* 668 F.Supp. 1242 (W.D.Wis. 1987) (MCRA requires that injured party be made whole before government can be reimbursed); *see generally,* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation,* 70 Mo. L. Rev. 723, 738-73 (34 states have adopted the made-whole doctrine by statute or court decision).

Moreover, the primary legislative purpose of all three statutes is the same: to make the government the "payer of last resort" and thereby reduce the overall cost of government health care programs.[4] The *Ahlborn* Court ruled that this interest did not justify overriding the injured plaintiff's right to recover for her injuries; there is no reason why it should do so in other health care programs, absent explicit statutory language granting priority to the government's reimbursement claims.

Likewise, the public policy arguments for and against a more expansive reading are the same. The government can argue, as it did in *Ahlborn*, that apportioning settlements will discourage plaintiff cooperation with the government and result in settlement manipulation to reduce government recoveries; plaintiffs can argue that a rule granting priority to the government would discourage tort victims from seeking redress in many cases, would discourage settlements, and would be unfair to the victims of tortious misconduct. There is no reason why the courts should find the government's arguments more persuasive under MCRA or MSPA than the *Ahlborn* Court found them in the Medicaid context.

Finally, while it is true that the Centers for Medicare and Medicaid Services contends that MCRA and MSPA should be interpreted to grant priority to the government's reimbursement claims, that was also true for Medicaid. The Supreme Court declined to defer to this administrative interpretation of the governing statute in *Ahlborn*, on account of "internal inconsistency" and "a conscious disregard for the statutory text" in the agency's reasoning. 126 S.Ct. at 1267. There is no obvious reason why the issue of administrative deference should be resolved differently under the other statutes.

Advice to Plaintiffs' Counsel

How should plaintiffs' counsel respond to the Supreme Court ruling in *Ahlborn*, when representing a client who has received medical care through a government-funded health care program? We suggest the following strategies:

1) **Provide timely written notification to the relevant governmental agency** that you will be seeking recovery for tort damages, possibly including repayment of the government's medical expenses. Ask the government to provide an accounting of its medical costs. Invite the government to participate in the lawsuit. Inform the government agency of your understanding, based on *Ahlborn*, that any tort recovery must be equitably apportioned between the plaintiff and the government. (Although the Court did not accept the government's characterization in *Ahlborn* that the plaintiff had breached her duty of cooperation, you do not want to give a court any basis for concluding that you are trying to gain an unfair advantage over the government in pursuing any recovery.)

2) **Make a tactical decision whether to seek recovery for medical costs paid by the government and be explicit about that decision in your pleadings.** (Unless some

[4] The statutes also serve a secondary purpose of preventing windfalls to either the tortfeasor or the tort victim, depending upon the collateral source rules applicable in different states.

particular regulatory or contractual requirement obligates the plaintiff to herself seek reimbursement of the government's health care expenses, plaintiff would appear to have the option of leaving it to the government to pursue its claim for reimbursement. Whether to seek recovery of such costs [which will need to be paid over to the government], therefore, becomes a tactical decision, based on factors such as the collateral source rule in your local jurisdiction, the likely effect on the size of any judgment/recovery, the willingness of the government to contribute to litigation costs, etc. If a decision is made not to seek recovery for the government's medical costs, this fact should be made explicit in the pleadings, thereby putting both the government and the defendant on notice of the possibility of a separate claim by the government to recover its costs. Likewise, any settlement, release, etc. under such circumstances should make clear that it is not waiving any claim by the government.)

3) **Seek to negotiate an agreement with the government over the equitable apportionment of any settlement and, if such an agreement cannot be reached, apply to the court for an order that equitably allocates any court settlement among categories of damages.** (It is simplest if the government will agree to a reasonable division of any recovery. If not, it is important to ask the court to allocate any settlement recovery among various items of damages, along the lines of a special verdict. You can alert the court to the Supreme Court's endorsement of this practice in the *Ahlborn* ruling. 126 S.Ct. at 1265 and n.17. It would probably be the best practice to notify the government of such an allocation request and invite government counsel to appear and present argument concerning an equitable allocation. If, for any reason, the court declines to allocate the settlement, plaintiff—perhaps in conjunction with the settling defendant—should propose an equitable allocation of the settlement and incorporate it into any agreement. Recognize that you may later be called upon to defend the reasonableness of this allocation.)

4) **If the government agency asserts a right to priority reimbursement, be prepared to argue that the government's claim of priority was rejected by (or is at least inconsistent with) the rationale of the Supreme Court in *Ahlborn.*** (Contact the Center for Constitutional Litigation if you would like assistance in developing this argument.)