

November 2006

**MEDICARE AND MEDICAID LIENS**  
**by Ted Babbitt**

Anyone who has attempted to deal with the State or Federal government on Medicaid or Medicare liens knows the frustration of attempting to settle that kind of lien. That frustration is heightened when the case is one of uncertain liability or limited coverage. Oftentimes the lien exceeds the value of the settlement.

Until recently, there was very little that could be done about these liens. The recent squib opinion in Ross v. Agency for Health Care Admin., 31 Fla. L. Weekly D2159 (Fla. 3<sup>rd</sup> DCA, August 16, 2006) epitomizes the frustration of arguing about a valid Medicaid lien. In that case, the trial court's order granting the State of Florida 100% on its lien was sustained by the District Court citing Strafford v. Agency for Health Care Admin., 915 So. 2d 643 (Fla. 2<sup>nd</sup> DCA 2005) and Englich v. Agency for Health Care Admin., 916 So. 2d 994 (Fla. 4<sup>th</sup> DCA 2005). Fla. Stat. 409.910(11)(f)(1) provides that Medicaid gets full reimbursement unless such reimbursement would take away more than half of a third party benefit.

The landscape on Medicaid and Medicare liens has completely changed with the unanimous decision of the United States Supreme Court in Arkansas Dept. of Health and Human Services v. Ahlborn, 126 S. Ct. 1752 (2006). In that case, the Supreme Court rejected the contention of Arkansas, joined by 30 other States and the United States government, that Arkansas was entitled to the full amount of its lien of \$215,000.00 for a \$550,000.00 settlement. The Supreme Court limited Arkansas to the portion of the settlement that dealt exclusively with past medical costs of approximately \$35,000.00. The Court held that Medicaid, which had paid only medical expenses, could not recover from any portion of the settlement which did not deal with medical expenses and was, therefore,

not entitled to reimbursement out of any portion of the settlement which dealt with recovery for lost wages or pain and suffering. At Page 1755, the Supreme Court held:

“Arkansas’ statute finds no support in the federal third-party liability provisions. That ADHS cannot claim more than the portion of Ahlborn’s settlement that represents medical expenses is suggested by § 1396k(a)(1)(A), which requires that Medicaid recipients, as a condition of eligibility, ‘assign the State any rights ... *to payment for medical care* from any third party’ (emphasis added), not their rights to payment for, *e.g.*, lost wages.’ (Emphasis in original.)

In Ahlborn, the State admitted that the plaintiff was receiving only about 1/6 of her overall damages and that only approximately \$35,000.00 of that sum was compensation for past medical expenses. Under these circumstances, the Court held that a State’s statute which attempted to recover its lien from portions of the settlement unrelated to medical expenses would run afoul of the Federal anti-lien law provision.

The Court also rejected the contention of Arkansas and the United States that failure to provide for 100% reimbursement would allow parties to manipulate the settlement of cases to preclude recovery by the state. At Page 1756, the Court held:

“The risk that parties to a tort suit will allocate away the State’s interest can be avoided either by obtaining the State’s advance agreement to an allocation or, if necessary, to submitting the matter to a court for decision.”

In this age of fractured United States Supreme Court’s decisions, often on apparent political grounds, a unanimous decision severely limiting Medicaid liens is a strong argument that the Ahlborn case applies with equal weight to Medicare liens under the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payer Act (MSPA). The portion of the opinion inviting parties to obtain the State or Federal government’s agreement to allocation is an important message to anyone handling a case where a

governmental lien exists. Notice to the Federal or State government of an intention to bring an action for tort recovery or to settle such an action makes a great deal of sense. Inviting the government to take part in either the action or the settlement or, alternatively, agree upon an allocation also avoids serious future problems. As a last resort, a motion to allocate with notice to the government citing Ahlborn is a second line of defense. This case is one of the most important decisions on governmental lien law ever to be decided by the United States Supreme Court. It is an important decision that everyone practicing personal injury law ought to carefully read.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE BY CALLING (561) 684-2500.