

The Long Hand of Medicaid

John T. Sly



In 2006, the United States Supreme Court upheld the Eight Circuit's decision in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), which sharply limited the ability of State Medicaid programs to recover against Medicaid beneficiaries in third party lawsuits. As a result of *Ahlborn*, Medicaid's recovery of third party settlement proceeds, at most, is limited to the amount of the settlement attributable to past medical expenses. In other words, Medicaid cannot seek more than what the parties attributed to past medical expenses paid by Medicaid.

This is all set to change. With the enactment of the Bipartisan Budget Act of 2013, Congress responded to the limitation created by *Ahlborn*, and amended the **Medicaid** recovery laws to expand Medicaid's recovery rights. Congress passed the Medicare Access and CHIP Reauthorization Act of 2015. Section 220 of this act delays the effective date of the Medicaid recovery amendments to **October 1, 2017**. (www.congress.gov/bill/114th-congress/house-bill/2) "(Sec. 220) Amends the Bipartisan Budget Act of 2013, as amended by the Protecting Access to Medicare Act of 2014, to delay until October 1, 2017, the effective date for certain Medicaid amendments relating to third-party liability settlements and judgments received by Medicaid beneficiaries from all portions of which a state may recover Medicaid payments."

Medicaid is often supplemented by federal funding. As a condition to receiving federal funding, the Federal Medicaid laws mandate:

1. (A) That the State or local agency administering such plan will take all reasonable measures *to ascertain the legal liability of third parties...* to pay for care and services available under the plan.

42 U.S.C.S. §1396a(a)(25)(A) (emphasis added). Going further:

1. (B) that in any case *where such legal liability is found* to exist after medical assistance has been made available on behalf of the individual and where the amount of reim-

bursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C.S. §1396a(a)(25)(B) (emphasis added).

In order to enable the State programs to recover third party liability proceeds, federal law requires states to have their own laws in place that force the assignment of the right to recovery for medical costs incurred:

To the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, 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.S. §1396a(a)(25)(H). In fact, as a condition of the individual's Medicaid eligibility:

As a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—

(A) to assign the State any rights . . . to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State . . . in obtaining support and payments (described in paragraph (A)) for himself . . . ; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan...

42 U.S.C. §1396k(a). This statute forces Medicaid recipients to assign their rights to recovery against a third party to the State Medicaid program as a condition of receiving those benefits.

The effect of the Medicare Access and CHIP Reauthorization Act of 2015 is to make it much harder to negotiate liens with Medicaid and may create real problems in setting up special needs trusts which are designed to protect a person's eligibility for Medicaid while permitting them to take advantage of funds placed into the trust. This is because Medicaid may demand upfront payments and may be less inclined to compromise the liens.

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Anyone practicing in areas of law that may result in payments to persons for whom Medicaid has made payments for medical services must be aware of this statute and that its effective date is fast approaching.

John T. Sly is a trial attorney and partner at Waranch & Brown, LLC. His practice focuses on the aggressive defense of physicians and health care facilities, and product manufacturers and retailers throughout Maryland. Since becoming a trial attorney he has served on the Executive Board of the Maryland Defense Counsel and is actively involved with ABOTA, the Maryland State Bar Association, the Defense Research Institute and the MD-DC Society for Healthcare Risk Management.