IS OHIO'S MEDICAID RIGHT OF RECOVERY STATUTE PREEMPTED BY FEDERAL LAW?

By Zachary Pyers and Nicole Koppitch

While the current state of the law leaves some questions unanswered, it appears inevitable that Ohio practitioners can expect changes in the way Ohio Medicaid liens are handled in personal injury settlements.

The U.S. Supreme Court recently issued a federal Medicaid anti-lien preemption ruling in *Wos v. E.M.A. ex rel. Johnson*[2] that will likely affect the continuing validity of Ohio's Medicaid Right of Recovery statute. Ohio's statute determines and calculates the amount of a personal injury settlement apportioned to repay medical expenses originally paid by Ohio's Medicaid program and is strikingly similar to the North Carolina statute addressed in *Wos* and found to violate federal law.

In *Wos*, the plaintiffs filed a medical malpractice suit in North Carolina state court against a physician who delivered plaintiffs' child, as well as the hospital where the child was born.[3] Plaintiffs' expert witness estimated damages in excess of $42 million for medical and life-care expenses, loss of future earning capacity, and other assorted expenses such as architectural renovations to Plaintiffs' home and specialized transportation equipment.[4] The largest portion of the estimated damages was $37 million allocated for "skilled home care" over the child's lifetime;[5] however, the Plaintiffs also sought damages for pain and suffering and emotional distress.[6] Then the parties began settlement negotiations and informed the North Carolina Department of Health & Human Services, the entity responsible for administering North Carolina's Medicaid program, of these negotiations.[7]

North Carolina, pursuant to state statute, had a statutory right to intervene and participate in the parties' settlement negotiations in order to obtain reimbursement for medical expenses it paid on Plaintiffs' behalf, up to one-third of the total recovery. The State decided not to participate.[8] But it did notify plaintiffs that it expended $1.9 million for medical care, which it would seek to recover from any tort judgment or settlement.[9]

In November 2006, the court approved a $2.8 million settlement.[10] That settlement agreement did not allocate money among the different claims that plaintiffs had advanced.[11] In approving the settlement, the trial court placed one-third of the $2.8 million recovery into an interest-bearing escrow account "until such times as the actual amount of the lien owed by [plaintiffs] to [North Carolina] is conclusively judicially determined."[12] The plaintiffs brought a subsequent action under 42 U.S.C. §1983 seeking declaratory injunctive relief, arguing that North Carolina's reimbursement scheme violated the federal Medicaid anti-lien provision, §1396p(a)(1).[13]

The Western District of North Carolina held that the irrebuttable statutory presumption, that one-third of a Medicaid beneficiary's tort recovery is attributable to medical expenses, was a "reasonable method for determining the State's medical reimbursements." The Fourth Circuit Court of Appeals disagreed and found that North Carolina's statutory scheme could not be reconciled with the United States Supreme Court's decision in *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, thereby vacating and remanding the Western District's decision.[14] In *Ahlborn*, the Court held that the anti-lien provision in federal Medicaid law prohibits a state from recovering any portion of a settlement or judgment not attributable to medical expenses. But what the Court did *not* address was the portion of a settlement that represents payment for medical expenses.

On appeal, the Supreme Court held that North Carolina's Medicaid lien statute was preempted by the federal Medicaid anti-lien statute, 42 U.S.C. §1396p(a)(1).[15] 42 U.S.C. §1396p(a)(1) states that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan," and then provides certain exceptions.[16] These exceptions primarily address situations where medical bills were improperly paid by a Medicaid plan, or where the Medicaid recipient has real property, is confined to a long term care facility, and is not expected to be released.[17]

North Carolina defended its statute by arguing that it defined medical expenses as the portion of the settlement representing past medical expenditures or one-third of the total settlement value, whichever was lower.[18] To the Court, this meant that even if a verdict or a settlement expressly allocated less than one-third of the settlement to medical expenses, North Carolina could recover one-third of the total settlement as long as the Medicaid expenses represented more than one-third of the settlement value.[19] This directly contradicts the federal statute, which forbids recovery for any portion of the settlement not "designated as payment for medical care.[20] The Court was additionally concerned that North Carolina's argument lacked a limiting principle, fearing that states would designate one-half or more of the total recovery as the portion for medical expenses, and thus the portion recoverable by the state.[21] Finally, the Court was distressed that North Carolina had not adopted a specific procedure for allocating Medicaid beneficiaries' tort recoveries, instead relying on what the Court called "an arbitrary, one-size-fits-all allocation for all cases."[22]

Ohio's Medicaid Right of Recovery statute[23] bears a striking resemblance to the invalidated North Carolina statute. The Ohio statute provides that the state "shall receive no less than one-half of the remaining amount, [after attorney's fees] or the actual amount of medical assistance paid, whichever is less."[24] This creates the same problem as the North Carolina statute because, if the medical expenses paid by the state exceed one-half of the total recovery, the state can recoup one-half of the recovery. This appears to be true even if a settlement or verdict allocate less than one-half of the recovery for medical expenses. Like the invalidated North Carolina statute, the Ohio statute does not allow for a judicial allocation: it too appears to set an "arbitrary, one-size-fits-all allocation for all cases." Ohio is empowered to enforce their right to recovery through suit, and the courts are not empowered to deviate from the statutory mandate.[25]

The Ohio statute suffers from the same deficiencies that distressed the United States Supreme Court about the North Carolina statute: the possibility of recovery in excess of the allocated amount for medical expenses and a one-size-fits-all recovery ratio. As a result, the Ohio statute is likely preempted by 42 U.S.C.A. §1396p(a)(1) after the Court's decision in *Wos*. This leaves questions for Ohio practitioners as to the validity of the current statutory scheme in Ohio, as well as what the future may look like for practitioners resolving cases in which Medicaid has a lien.

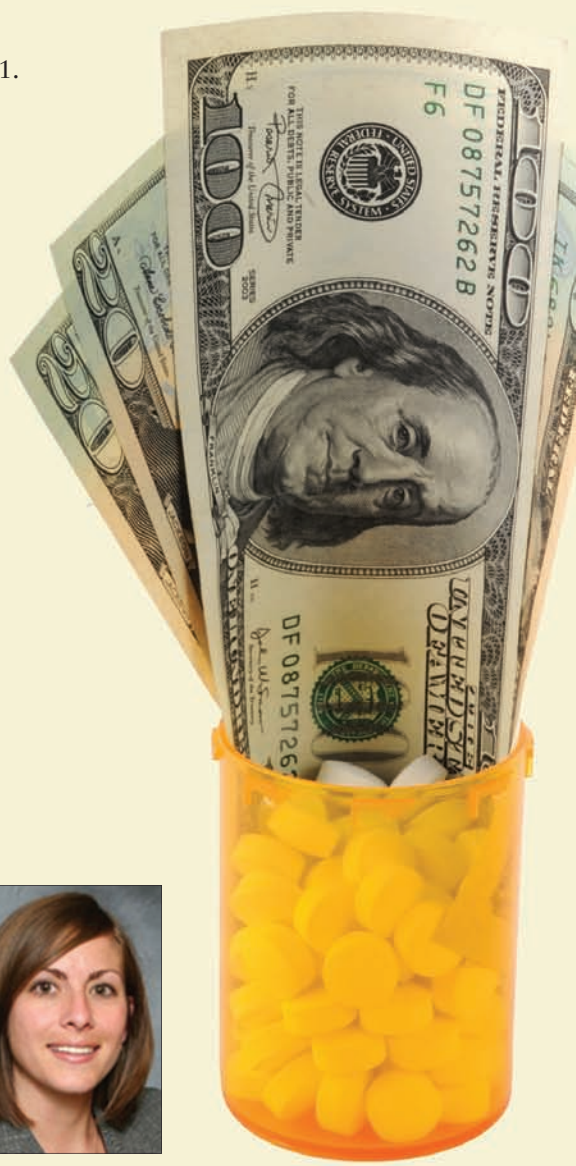
First, there appears to be little doubt, based upon the Supreme Court's ruling in *Wos*, that the current statutory scheme in Ohio violates the anti-lien provision in the federal Medicaid law. However, the Ohio statute has not been invalidated and has not yet been amended by the legislature. Thus, the Ohio statute remains good law – at least for now.

Second, the Supreme Court provided options that allow states to comply with the federal Medicaid anti-lien statute. Ohio will likely be looking to these options if the current statute is challenged or amended. For example, states can provide for an administrative or judicial proceeding to determine the amount of a settlement that should be attributed to Medicaid expenses and reimbursed to the state.[26] Currently, sixteen states and the District of Columbia provide for these hearings.[27] Additionally, states may also be permitted to establish rebuttable presumptions and adjusted burdens of proof to continue to protect a state's interest in receiving reimbursement from settlements.[28]

While the current state of the law leaves some questions unanswered, it appears inevitable that Ohio practitioners can expect changes in the way Ohio Medicaid liens are handled in personal injury settlements.

zpyers@reminger.com
nkoppitch@reminger.com

1. Zachary Pyers and Nicole Koppitch thank David Dirisamer, a third year law student at Ohio State University's Moritz College of Law, for his assistance with this article.
2. 133 S.Ct. 1391 (2013).
3. *Id*., at 1395.
4. *Id*. at 1395.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at 1395-1396.
14. 547 U.S. 268 (2996)
15. *Id*. at 1402.
16. 42 U.S.C. §1396p(a)(1)(A) and (B).
17. See 42 U.S.C. §1396p(a)(1).
18. *Wos,* 133 S.Ct. at 1397.
19. *Id*. at 1398.
20. *Id*. at 1397 (internal citation omitted).
21. *Id*.
22. *Id*. at 1402.
23. Ohio's current statue, O.R.C. 5101.58, has been amended to O.R.C. 5160.37. See 2013 Ohio Laws File 25 (Am. Sub. H.B. 59). This amended is not yet effecitive. The amended does not change the substance of the law as it relates to Medicaid's right of recover.
24. O.R.C. 5101.58.
25. O.R.C. 5101.58(H).
26. *Wos*, 133 S.Ct. at 1401.
27. *Id*.
28. *Id*.



Zachary Pyers and Nicole Koppitch, Reminger Co.[1]