

Orders From On High: The Current Struggle over Medicaid Third Party Recovery Between North Carolina and the Supreme Court of the United States¹

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

INTRODUCTION

Suppose the following: Your client, an indigent, is injured in an automobile accident by a negligent driver. Unable to cover the medical expenses, your client applies for and is approved for Medicaid assistance. Medicaid then pays the full cost of the medical expenses arising from the accident. One year later you represent this victim in a suit against the negligent driver, eventually reaching a settlement. At some point during the proceedings, the state department responsible for administering Medicaid seeks reimbursement for the payments it made on behalf of your client. Unfortunately for your client, the amount Medicaid is seeking constitutes a majority of the settlement amount. How should this problem be handled? Should Medicaid be able to reimburse itself fully? If not, what percentage of the money expensed by Medicaid should be reimbursed? What if the damage claim includes elements other than medical bills, such as future or past lost wages?

By way of statute and the decision in *Ezell v. Grace Hospital*,² North Carolina purports to have answered these questions. However, the recent decision of the Supreme Court of the United States in *Arkansas ADHHS v. Ahlborn*³ has rendered the North Carolina approach moot.⁴ These contradicting decisions have resulted in an

1. The author would like to thank Yuliya Loshinsky, who first alerted him to this issue, and Christopher Nichols of the Nichols Law firm, Raleigh, North Carolina, whose guidance in the development of this Comment was invaluable.

2. 631 S.E.2d 131 (2006), rev. denied 342 N.C. 896 (2006).

3. *Arkansas Dep't of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

4. See generally John L. Saxon, *Medicaid "Liens" on Personal Injury Judgments and Settlements: The Ahlborn and Ezell Decisions*, *Social Services Law Bulletin*, Number 41, July 2006. See also JULIE L. BELL ET AL., *NORTH CAROLINA PERSONAL INJURY LIENS MANUAL* 160-62 (Christopher R. Nichols ed., 2007).

unstable personal injury environment for Medicaid beneficiaries in North Carolina.

This Comment will first present a brief legal background of the Medicaid program, and specifically its presence in North Carolina. It will then explore the federal statutes which broadly govern Medicaid recovery from third parties, as well the North Carolina Medicaid statutes which specifically govern this area of recovery. It will explore the two decisions, *Ezell* and *Ahlborn*, which have clouded this area in North Carolina. Following that explanation, the aforementioned hypothetical will be revisited and taken through both the North Carolina and United States Supreme Court's analytical models. Finally, suggestions for both statutory and judicial resolutions of this issue will be presented. As the legal world of Medicaid is extensive, the scope of this Comment will necessarily be limited to Medicaid's recovery from liable third parties.

THE MEDICAID PROGRAM

I. GENERAL BACKGROUND

Launched as a cooperative venture of the federal and state governments in 1965, the Medicaid program was intended to alleviate the burden of health care costs borne by impoverished Americans.⁵ Medicaid pays health care providers for the medical care that is given to certain citizens who are unable pay for the care themselves.⁶ Medicaid is structured such that the federal and state governments share the costs of providing that care.⁷ There is no federal mandate for states to participate; however, all of the states do, and maintain a Medicaid program in one form or another.⁸ For many states, Medicaid is the one of

5. "Medicaid represents a major attempt by the federal government to improve access to medical care for the poor. Its enactment in 1965 (as an amendment to the Social Security Act of 1935) arguably represented the high-water mark of then-President Lyndon Johnson's 'War on Poverty.'" Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

6. "Medicaid provides health insurance to pregnant women, low income children, parents of dependent children, seniors (age 65 or older), people with disabilities, and certain other specified groups (such as women diagnosed with breast or cervical cancer). In addition to belonging to one of these target groups, Medicaid recipients must satisfy certain financial requirements in order to qualify. Medicaid also supplements Medicare coverage for many low income seniors or people with disabilities." LISA J. BERLIN, AN OVERVIEW OF MEDICAID IN NORTH CAROLINA I, http://www.familyimpactseminars.org/s_ncfis01c01.pdf (last visited Mar. 8, 2008).

7. 42 U.S.C. § 1396b(a) (2000).

8. *Ahlborn*, 547 U.S. at 268 (2006).

the largest expenditures, often second only to education.⁹ Even still, federal monies constitute the significant majority of the overall funding for Medicaid.¹⁰ As a condition of having a Medicaid program and receiving this federal funding, the states are required to adhere to federal statutory guidelines.¹¹ These guidelines are broad and allow the states to determine, among other things, the particular eligibility requirements, the nature of the services offered, and the means of administration.¹²

II. THE FEDERAL GUIDELINES

The federal statutes which govern Medicaid are found in Title XIX of the Social Security Act, particularly at 42 U.S.C. § 1396 *et seq.* These statutes provide the basic framework of the program, with the function of allowing the states to flesh out their respective Medicaid programs within its bounds. In order to provide this freedom to the states, the federal statutes are understandably broad. Many elements of Medicaid are mandated in this statutory scheme, but those statutes governing areas outside of state recovery from liable third parties are not within the scope of this Comment.

A. Federal Medicaid Third Party Liability

Medicaid was intended to provide assistance to the poor, but it was not intended to act as an insurance policy.¹³ The program was intended to be, and for the most part operates as, a payer of last resort.¹⁴ Thus, the federal statutes require the states who participate in Medicaid to take all reasonable measures to ascertain the legal liability

9. Abigail R. Moncrieff, *Payments to Medicaid Doctors: Interpreting the "Equal Access" Provision*, 73 U. CHI. L. REV. 673 (2006).

10. E.g. in 2006, the federal government paid 60.69% of North Carolina's Medicaid expense, North Carolina paid 33.98% combined, and the counties paid 5.34%. NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, MEDICAID IN NORTH CAROLINA, ANNUAL REPORT 65 (2006), <http://www.ncdhhs.gov/dma/2006report/2006report.pdf>. See also *Ahlborn*, 547 U.S. at 275 (2006) (stating "... the Federal Government pays between 50% and 83% of the costs the State incurs for patient care ..."); The exact percentage of the federal contribution is calculated under a formula keyed to each State's per capita income. 42 U.S.C. § 1396a (2000).

11. See 42 U.S.C. § 1396(a) (2000).

12. NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERVICES, HISTORY OF NORTH CAROLINA MEDICAID PROGRAM STATE FISCAL YEARS 1970 TO 2006 I (2006), <http://www.dhhs.state.nc.us/dma/historyofmedicaid.pdf>.

13. Suzanne G. Clark, *An Accident Waiting to Happen: Arkansas Department of Health and Human Services v. Ahlborn Exposes Inequities in Medical Benefits Legislation*, 60 ARK. L. REV. 533 (2007).

14. See S. Rep. No. 99-146 (1985), 1986 U.S.C.C.A.N.

of third parties.¹⁵ Once the liability is ascertained the federal statutes require the state to seek reimbursement to the extent of the legal liability.¹⁶ To facilitate recovery of such monies from liable third parties, states are mandated to pass laws which provide the states a means to recover these monies.¹⁷ In situations where a third party has a legal liability to make payments for medical bills and services on behalf of a beneficiary, the states are required to have in place laws under which the state is deemed to have acquired the beneficiary's rights to those payments.¹⁸ Similar to this is the requirement that states have effective laws which allow the state to recover medical expenses paid on behalf of the beneficiary from the third party.¹⁹ Thus Medicaid beneficiaries must agree to allow Medicaid to seek payment from third parties as a condition to receiving Medicaid benefits.²⁰ In addition, should a beneficiary be awarded or receive monies, federal statutes enable the state to reimburse itself before the proceeds are remitted to the beneficiary.²¹

B. *Federal Medicaid's Ambiguities*

As a product of the broad nature of the federal Medicaid guidelines, many questions were, and to an extent still are, unanswered. While the statutory scheme must be broad in order to accomplish the goal of individual state administration, it is precisely this vague governance which led to the various court interpretations that ultimately have resulted in the current struggle in North Carolina.

These issues are apparent on the face of the statute. The statutes do not uniformly describe the types of third party payment from which the government can recover, nor do they definitively state the limitations of the recovery other than to proscribe liens against beneficiary's property during the beneficiary's lifetime.²² In addition to the ambiguous provisions, some provisions seem to stand in contradiction to each other. For example, 42 U.S.C. § 1396k(a) limits the state's recovery to third party compensation for medical expenses, while other statutes state that the state shall seek reimbursement to the full

15. 42 U.S.C. § 1396a(a)(25)(A) (2000).

16. § 1396a(a)(25)(B); § 1396k(a)(1)(A).

17. See § 1396k(a); 1396a(a)(25)(H).

18. § 1396k(a). "[T]he statute does not sanction an assignment of rights to payment for anything other than medical expenses-not lost wages, not pain and suffering, not an inheritance." *Ahlborn*, 547 U.S. at 281 (2006).

19. § 1396(a)(25)(H).

20. See 42 C.F.R. § 433.136 (2005).

21. 42 U.S.C. § 1396k(b) (2000).

22. See § 1396a(a)(25)(A); § 1396k(a)(1)(A); § 1396p(a)(1).

extent of the legal liability of a third party.²³ However, regardless of these, and any, ambiguities within these statutes, it is within them that the states are allowed to set up their respective programs. At first glance, the North Carolina statutes seem to operate well within their federal parents, but upon closer inspection subtle differences, which carry significant effect, are revealed.

III. NORTH CAROLINA MEDICAID: THIRD PARTY LIABILITY STATUTES

North Carolina's Medicaid program was created in 1969, and began operating in 1970.²⁴ The program is principally governed by chapter 108A of the North Carolina General Statutes. It is administered by the North Carolina Division of Medical Assistance (hereinafter "NC DMA") and otherwise by various county authorities.²⁵ As such, the NC DMA would be the party to initiate recovery or reimbursement from a third party when a settlement or verdict becomes available.²⁶ Since Medicaid is a statutory creature on both the federal and state level, the rights surrounding it and its benefits are purely statutory.²⁷

For the purposes of this Comment, the most important statutes are those which govern third party liability. These three statutes are section 108A-57, 108A-59, and to a certain extent, 108A-70(b) of the North Carolina General Statutes.

Section 108A-57 gives the state a general right of subrogation where third party liability is present.²⁸ It specifically states that the

23. Compare § 1396a(a)(25)(B) (2000) with § 1396k(a)(1)(A).

24. NORTH CAROLINA DIVISION OF MEDICAL ASSISTANCE, HISTORY OF NORTH CAROLINA MEDICAID PROGRAM STATE FISCAL YEARS 1970 TO 2006 I, <http://www.dhhs.state.nc.us/dma/historyofmedicaid.pdf>.

25. *Id.*

26. The NC DMA has been allowed by the Court to intervene in settlement proceedings to assert a Medicaid lien on behalf of the state. *See e.g.*, Payne by Rabil v. State Dep't of Human Resources Division of Medical Assistance, 126 N.C. App. 672 (1997), *rev. denied* 347 N.C. 269; Ezell v. Grace Hosp., 360 N.C. 529 (2006).

27. For example, subrogation is a right arising from, and normally governed by, the common law. *See generally* General Insurance Co. of Am. v. Faulkner, 259 N.C. 317, 324, 130 S.E.2d 645, 651 (1963). However, North Carolina has stated that since this right is codified, it is governed by the statutes, and not by the common law. Ezell v. Grace Hosp., 175 N.C. App. 56, 60 (2006).

28. John L. Saxon, *Medicaid "Liens" on Personal Injury Judgments and Settlements: The Ahlborn and Ezell Decisions*, Social Services Law Bulletin, Number 41 (July 2006) ("Subrogation' may be defined broadly as the substitution of one party (the subrogee) in place of another (the subrogor) with respect to the second party's (subrogor's) legal right or claim against a third part (the obligor.); *see also, Id.* at n.23. ("The subrogee, therefore, 'stands in the shoes' of the subrogor with respect to the subrogor's claim against the third party. Because subrogation puts the subrogee in

state is subrogated to the extent of all Medicaid payments made on behalf of a Medicaid beneficiary to all rights of recovery against any person.²⁹ It also states that the amount of Medicaid's claim or lien is based on the amount that Medicaid paid on behalf of the beneficiary.³⁰ The amount or the enforceability of the claim does not change based on the liability of a third party, such as a tortfeasor's insurance company, to the beneficiary.³¹ As far as notice to the beneficiary is concerned, Medicaid is not required to give notice of its lien to the beneficiary or the beneficiary's attorney.³²

While it may initially seem overbroad, this statute has a built-in limitation on the right of subrogation. In cases where the Medicaid beneficiary's attorney receives money in connection with the beneficiary's injury, payment of Medicaid's subrogation claim cannot exceed one-third of the gross amount received.³³ This statute does not interfere with the beneficiary's right to sue a potentially liable third party.³⁴ The beneficiary must disclose to the government the identity of a person or entity that the beneficiary has a claim against,³⁵ but there is no requirement that the beneficiary notify Medicaid that a suit against a third party has been initiated.³⁶

Seemingly similar to the right of subrogation, section 108A-59 builds on section 108A-57 by stating that the acceptance of Medicaid assistance by a Medicaid beneficiary constitutes an assignment of the Medicaid beneficiary's right to third party benefits.³⁷ Not only does

the position of the legal owner of the subrogor's right or claim against the third party it is similar, but not identical, to an assignment of the subrogor's right or claim by operation of law.").

29. N.C. GEN. STAT. § 108A-57 (2007).

30. *Id.*

31. *Id.*

32. BELL ET AL., *supra* note 4, at 149.

33. BELL ET AL., *supra* note 4, at 151, fn. 8 ("[n]ot[ing] that this one third limitation only applies when the plaintiff is represented by an attorney."); *see also*, N.C. GEN. STAT. § 108A-57 (2007)

34. N.C. GEN. STAT. § 108A-57 (2007).

35. § 108A-57(b) (2007) ("It is a Class 1 misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise.").

36. § 108A-57 (2007).

37. § 108A-59 (2007). Subrogation and assignment are distinct legal concepts. *See Payne v. Buffalo Reinsurance Co.*, 317 S.E.2d 408, 410-11 (1984). Thus, it is not entirely clear whether the state's claim against a third party is based on assignment or subrogation. *See* John L. Saxon, *Medicaid "Liens" on Personal Injury Judgments and*

the Medicaid beneficiary assign his or her rights to the state at the time he accepts the assistance, but Medicaid's lien against the proceeds in the amount of such payments vests on acceptance as well.³⁸ While North Carolina common law generally prohibits the assignment of the *right* to personal injury claims,³⁹ it does not prohibit assigning the *right to the proceeds* from personal injury claims.⁴⁰

Finally, section 108A-70(b) provides that to the extent that Medicaid has paid for a beneficiary's medical services or health care items, and where a third party has a legal liability to make those payments, the state is considered to have acquired the rights of the beneficiary to payment by any other party.⁴¹ While this statute addresses the right to payment, it is not germane to the conflict between the U.S. Supreme Court and North Carolina in this area.

DECISIONS, DECISIONS

For the past forty years, the Supreme Court was relatively unclear about how the states should interpret the application of the federal Medicaid third party liability statutes to their own programs. Many state supreme courts ruled in ways much similar to that of North Carolina.⁴² However, soon after the North Carolina ruling in *Ezell v. Grace*

Settlements: The Ahlborn and Ezell Decisions, Social Services Law Bulletin, Number 41, (July 2006).

38. *Payne v. State Dep't of Human Resources Division of Medical Assistance*, 126 N.C. App. 672 (1997), 486 S.E.2d 469 (1997) (holding that Medicaid's lien vested when the plaintiff beneficiary accepted Medicaid assistance), *rev. denied* 347 N.C. 269, 493 S.E.2d 656.

39. *N.C. Baptist Hosp. v. Mitchell*, 88 N.C. App. 263, 266 (1987) (holding that it is void as against public policy to assign the right to a tort claim of action); *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268 (1996) (holding that action arising out of contract generally can be assigned; however, assignments of personal tort claims are void as against public policy because they promote champerty.).

40. The North Carolina Supreme Court distinguishes the assignment of a personal injury claim and the assignment of the right to the proceeds of a personal injury claim. This is based on the reasoning that by assigning the right to a personal injury claim, the assignee is in effect gaining control over the case, and thus any such assignment is void as against public policy. However, in the case of the assignment of the right to the *proceeds* from a personal injury action, the assignee has received no real control over the case, and therefore such an assignment is not violative of public policy and is otherwise valid. *See Charlotte-Mecklenburg Hosp. Authority v. First of Georgia Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995).

41. N.C. GEN. STAT. § 108A-70(b) (2007).

42. *Wilson v. State*, 10 P.3d 1061 (Wash. 2000) (holding that the federal Medicaid statutes allow recovery from third-party settlements without restriction); *Houghton v. Dep't of Health*, 57 P.3d 1067 (Utah 2002) (holding that Medicaid liens against third-party settlements are valid because Medicaid is reimbursed before the proceeds

Hospital, the Supreme Court handed down the ruling in *Arkansas ADHHS v. Ahlborn*, which stands for the opposite proposition. These contradicting analytical approaches to lien calculation result in very different outcomes for the Medicaid beneficiary plaintiff in a tort action.

I. EZELL V. GRACE HOSPITAL

A. Background

This case arose from a medical malpractice claim against a hospital and a pediatrician.⁴³ Soon after Michelle Morland was born, she developed a respiratory distress condition.⁴⁴ Her pediatrician, Dr. John F. Whalley, initiated treatment for the next several hours until Michelle was finally moved to another hospital.⁴⁵ Medicaid covered the cost of this initial treatment, and some of the resulting treatment.⁴⁶ Years later, Michelle was diagnosed with cerebral palsy.⁴⁷

Suspecting a link between the care Michelle received post-birth and her cerebral palsy condition, Michelle's grandmother and guardian ad litem brought a malpractice action against Grace Hospital, Dr. Whalley, and his employer Mountain View Pediatrics.⁴⁸ Early in the proceeding, the plaintiff settled with defendant Grace Hospital for \$100,000.00.⁴⁹ During discovery depositions, expert testimony was taken which significantly damaged any causal link between the actions of the pediatrician and the cerebral palsy.⁵⁰ This prompted a settlement between the plaintiff and the pediatrician, again for \$100,000.00.⁵¹

At the settlement approval hearings, NC DMA asserted the state's right to reimbursement for monies paid on behalf of the beneficiary by Medicaid.⁵² Medicaid's total lien was \$86,840.92.⁵³ The trial judge

become the property of the beneficiary.); *but c.f.* *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002) (holding that the federal Medicaid statutes restrict the state's recovery for Medicaid liens to the amounts representing compensation for medical expenses.).

43. *Ezell v. Grace Hosp.*, 175 N.C. App. 56, 58 (2005).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Ezell v. Grace Hosp.*, 175 N.C. App. 56, 58 (2005).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 58-59.

52. *Ezell v. Grace Hosp.*, 175 N.C. App. 56, 59 (2005).

53. *Id.*

approved the settlement, but limited NC DMA's recovery to \$8,054.01. This reduced amount represented the *past* medical expenses he determined to be *causally related* to the alleged negligence of the remaining defendants, Dr. Whalley and Mountain View Pediatrics.⁵⁴

B. *The Appeal*

NC DMA filed a timely appeal, asserting that the trial court erred by limiting the Medicaid lien to the amount Medicaid paid for the medical expenses causally related to the defendant's negligence.⁵⁵ The North Carolina Court of Appeals denied NC DMA's appeal, reading the section 108A-57 narrowly and finding that the subrogation is limited to the amount arising from the injury itself.⁵⁶ In justifying this narrow reading, the court stated that "the legislature surely did not intend that DMA could recoup for medical treatment unrelated to the injury for which the beneficiary received third-party recovery."⁵⁷ To further rebut NC DMA's argument, the court used an illustrative hypothetical, explaining that under NC DMA's statutory construction, a Medicaid beneficiary cancer patient who is injured in an automobile accident and who settles with a third party could have Medicaid impose a lien for the prior cancer treatments on the settlement, even though the settlement was for injuries arising out of the automobile accident.⁵⁸

C. *The Dissent and Final Ruling*

Judge Steelman dissented in part, stating that DMA was entitled to full recovery under North Carolina law.⁵⁹ Judge Steelman relied primarily on the decisions of *Campbell v. NC Dep't of Human Resources*⁶⁰ and *Cates v. Wilson*⁶¹ in formulating his dissent. He read section 108A-57 broadly and claimed, among other things, that the majority had incorrectly read clearly separate sentences in the statute as one.⁶² This

54. *Id.*

55. *Id.*

56. *Ezell v. Grace Hosp.*, 175 N.C. App. 56, 63 (2005).

57. *Id.* at 61.

58. *Id.*

59. *Id.* at 63-64.

60. 153 N.C. App. 305 (2002) (Holding that it was irrelevant whether a settlement compensated a plaintiff for medical expenses because North Carolina's subrogation statute does not restrict defendant's right of subrogation to a beneficiary's right of recovery only for medical expenses).

61. 321 N.C. 1 (1987) (Holding that North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages.)

62. *Ezell*, 175 N.C. App. at 64 (2005).

dissent is significant, because it not only provided an automatic appeal to the Supreme Court of North Carolina,⁶³ but it also eventually served as the basis for the court's reversal. On appeal, the North Carolina Court of Appeals was reversed, and Judge Steelman's dissent was adopted.⁶⁴

This case may be reflective of some other states' supreme court rulings,⁶⁵ but it is clearly in conflict with the United States Supreme Court's ruling in *Arkansas DHHS v. Ahlborn*, and is therefore no longer good law.

II. ARKANSAS DHHS V. AHLBORN

A. Decision

In 1996, Heidi Ahlborn was injured in a car accident that was allegedly caused by the negligence of another driver.⁶⁶ She was unable to pay for her medical care, so she applied and was accepted for Arkansas' Medicaid assistance.⁶⁷ Arkansas Medicaid paid approximately \$215,000.00 in various medical bills and expenses which arose from the car accident.⁶⁸

Heidi Ahlborn brought an action, the following year, against the driver of the vehicle who injured her.⁶⁹ The claim included past and future medical expenses, lost wages, and lost wage potential.⁷⁰ In 1998, the Arkansas Department of Health and Human Services (hereinafter "ADHHS") intervened in the pending lawsuit and asserted a lien in the amount of \$215,645.30 for medical bills and expenses paid on behalf of Ahlborn.⁷¹ In 2002, the remaining parties to the action agreed to settle the claim for \$550,000.00.⁷² As part of the settlement, Ahlborn and ADHHS stipulated that the settlement represented one-sixth of the total value of Ahlborn's claim.⁷³

ADHHS argued that the lien should be paid in full from the settlement.⁷⁴ Ahlborn argued that the lien attached only to that portion of

63. N.C. R. App. P. 14(b)(1).

64. *Ezell v. Grace Hosp.*, 360 N.C. 529 (2006).

65. Discussion, *supra* note 42.

66. *Ahlborn*, 547 U.S. at 273, 274 (2006).

67. *Id.*

68. *Id.*

69. *Id.* at 273.

70. *Id.*

71. *Ahlborn*, 547 U.S. at 274.

72. *Id.*

73. *Id.*

74. *Id.*

the settlement allocated for *past* medical expenses related to the accident.⁷⁵ Ahlborn filed an action against ADHHS to resolve the matter. The federal district court found in favor of ADHHS, holding that the lien was valid and enforceable in full against the settlement because Ahlborn had assigned her right to *any* recovery from the third-party tortfeasor up to the full amount of the payments made on her behalf.⁷⁶

Ahlborn then appealed to the United States Court of Appeals for the Eighth Circuit, which reversed, and held that the Arkansas Medicaid lien applied only to that portion of the settlement designated for payment of *past* medical expenses.⁷⁷ ADHHS then appealed to the Supreme Court of the United States, which granted certiorari and affirmed.⁷⁸

The Supreme Court held that Arkansas' third party liability lien attached *only* to the portion of Ahlborn's settlement that was designated for payment of past medical expenses paid by Medicaid.⁷⁹ This amount came out to \$35,581.47.⁸⁰ The Court went on to hold that the remainder of the claim could not be asserted against the remainder of the settlement.⁸¹ Specifically, the Supreme Court held that the Arkansas Medicaid third party liability statutes, namely the lien provision and the assignment provision, violated the federal Medicaid statute.⁸² Justice Stevens wrote for the majority, stating that the federal third party liability provisions require an assignment of *no more* than the right to recover the portion of the settlement proceeds which are designated for *past* medical bills paid by Medicaid.⁸³ The Court also concluded that federal statutes prohibit state Medicaid programs from asserting a third party liability claim against a Medicaid beneficiary's settlement or judgment for personal injury damages other than medical expenses.⁸⁴

B. *Practical Pitfalls of Ahlborn*

While *Ahlborn* seems to provide clarity, the opinion makes broad proclamations that may be difficult to implement. The most glaring example is centered on the apportionment of damages. The parties in

75. *Id.* at 268.

76. *Ahlborn*, 547 U.S. at 274.

77. *Id.* at 275.

78. *Id.* at 272.

79. *Id.*

80. *Id.* at 274.

81. *Ahlborn*, 547 U.S. at 280-81.

82. *Id.* at 286.

83. *Id.* at 282.

84. *Id.* at 286.

Ahlborn stipulated the total value of the claim and, in effect, stipulated what portion of the settlement the Medicaid lien represented.⁸⁵ It is reasonable to think this would not be the case in the average dispute, and such a situation would require the intervention of the court. Furthermore, *Ahlborn* requires the trial judge take into account all damages stemming from the negligence of the tortfeasor when calculating Medicaid's lien.⁸⁶ While the *Ahlborn* analysis may not be simple to implement, it is not beyond the comprehension of the North Carolina General Assembly and North Carolina court system.

III. DIFFERENCES HIGHLIGHTED

It is clear that the two decisions are in conflict with one another, and that the means of analysis presented by each are in contrast. What is less clear is how these contrasting analytical models affect the Medicaid beneficiary plaintiff. The two models result in significantly different ends for such plaintiffs. In order to illustrate this difference, we will return to the introductory hypothetical.

Suppose that in the hypothetical, the total value of your client's claim against the negligent third party is \$1,000,000.00. This claim includes damages for pain and suffering, past and future medical bills arising from the injury, and past and future lost wages. In addition, suppose that North Carolina Medicaid paid \$200,000.00 in medical bills arising from the injury for the client. A settlement is reached with the defendant in the amount of \$400,000.00. Assume that, either by stipulation or by a judge's decree, \$50,000.00 of this amount was apportioned for medical bills. During the proceedings, NC DMA asserts Medicaid's lien in the full amount of \$200,000.00. Finally, assume that your attorney's fees constitute one third of the gross settlement. To determine how the proceeds would be disbursed, we look to the contrasting analytical frameworks presented in the two aforementioned cases.

A. Ezell Analysis

Under *Ezell*, one must first determine the total settlement amount, which was \$400,000.00 in the above hypothetical. One-third, or \$133,333.33, of this amount would be allocated for your attorney's fees.⁸⁷ Since the amount of the Medicaid lien is determined by the

85. Arkansas Dep't of Health and Human Servs. v. Ahlborn, 547 U.S. 268, 274 (2006).

86. See generally *Id.* at 268.

87. In North Carolina, the assignment statute does not govern private attorney's fees arrangements between the attorney and client, and regulates the amount of the

amount of money that Medicaid expended on behalf of the beneficiary,⁸⁸ the initial lien amount would be \$200,000.00. However, pursuant to section 108A-57, the total Medicaid lien cannot exceed one-third of the gross settlement amount.⁸⁹ Thus, the lien amount would be reduced from \$200,000.00 to \$133,333.33. Therefore, in determining what amount is available to the client, we subtract the attorney's fees and the Medicaid lien, which amounts to \$266,666.66, from the settlement amount of \$400,000.00, to arrive at a sum of \$133,333.34 as the final disbursement to the client.

B. *Ahlborn Analysis*⁹⁰

Under *Ahlborn*, the amount available to the client is naturally different than under *Ezell*. The first step in this analysis is to determine how the damages are apportioned. For the purposes of this hypothetical, assume that the damages are apportioned (or pro-rated), either by the judge or by stipulation of the parties, as follows: \$200,000.00 in past medical bills (paid by Medicaid), \$400,000.00 for future medical bills, \$200,000.00 for past and future lost wages, and \$200,000.00 for pain and suffering. The next step is to determine the portion of total damages that the Medicaid lien constitutes. This is done by dividing the amount of the Medicaid lien, \$200,000.00, by the total settlement amount, \$1,000,000.00,⁹¹ resulting in 20%. The final step is to multiply the percentage of the total damages that the Medicaid lien constitutes by the amount of the lien.⁹² This calculation results in a Medicaid lien in the amount of \$40,000.00. Thus, when the attorneys' fees of \$133,333.33, together with the Medicaid lien of \$40,000.00 are subtracted from the total settlement of \$400,000.00, the amount available to the client is \$226,666.67.

attorney's fee only as it relates to the amount of the Medicaid lien payable to the plaintiff. See North Carolina Dep't of Human Resources, Division of Medical Assistance v. Weaver, 466 S.E.2d 717 (1996).

88. BELL ET AL., *supra* note 4, at 164.

89. N.C. GEN. STAT. § 108A-57 (2007).

90. The presentation of this hypothetical analysis is intended merely to highlight the differences between the two approaches to Medicaid lien calculation in *Ezell* and *Ahlborn*. The hypothetical fact pattern is abbreviated for ease of presentation. For a more detailed instruction on correctly applying the *Ahlborn* analysis in North Carolina, and for otherwise handling a claim of this nature, see JULIE L. BELL ET AL., NORTH CAROLINA PERSONAL INJURY LIENS MANUAL 164-70 (Christopher R. Nichols ed., 2007).

91. Arkansas Dep't of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006).

92. *Id.*

THE CONFLICT

I. OVERVIEW

It is readily apparent that the Supreme Court of North Carolina's decision in *Ezell* is in conflict with the United States Supreme Court's decision in *Ahlborn*. Despite *Ahlborn*'s language, the Supreme Court of North Carolina simply applied the total lien to the total settlement, capped by the one-third subrogation limitation of section 108A-57.⁹³ The breakdown of the damages actually received in the settlement was not considered.⁹⁴ This application of a Medicaid lien is in direct conflict with the language of *Ahlborn*, which requires the trial judge (or stipulation of the parties) to divide up the settlement with respect to each of the claimed damages.⁹⁵ *Ahlborn* clearly states that Medicaid's lien should be reduced to a fair share of the recovery.⁹⁶

Notwithstanding the fact that the means of analysis are markedly different, reasons to change the current North Carolina Medicaid reimbursement extend beyond simply keeping with orders from a higher court. North Carolina has an interest in maintaining an efficient personal injury settlement system, and the reluctance to conform with *Ahlborn* has damaged that system. The solutions presented in *Ahlborn*, however, are not without issues themselves.

As previously noted, the *Ezell* and *Ahlborn* analyses are structurally different. Our hypothetical client would receive nearly \$100,000 more under the *Ahlborn* analysis. Under *Ahlborn*, the amount available to the client would invariably rise as the difference between the Medicaid lien and the value of the total damages rises.⁹⁷ This proration of the state's Medicaid lien ensures that the lien does not infringe on monies designated for other damages. The lien calculation in *Ezell* ignores this, allowing for the full amount of the lien to be asserted from the full amount of the settlement, unless the lien exceeds one-third of the gross settlement, at which point the lien would be reduced to one-

93. N.C. GEN. STAT. § 108A-57 (2007).

94. See generally *Ezell v. Grace Hosp. Inc.*, 631 S.E.2d 131 (N.C. 2006).

95. *Ahlborn*, 547 U.S. at 268.

96. *Id.* at 292.

97. For example, if the total value of the damages in this hypothetical were \$2,000,000 instead of \$1,000,000, the percentage that the Medicaid lien would represent would only be 10%. After proration, this would render a Medicaid lien in the amount of \$20,000 and a total amount of \$246,666.67 would be disbursed to the client.

third of the gross settlement.⁹⁸ The North Carolina Supreme Court has not recognized this difference. Not only was the supreme court made aware of the *Ahlborn* decision prior to ruling in *Ezell*,⁹⁹ but a petition in *Ezell* for rehearing in light of *Ahlborn* was later denied.¹⁰⁰

II. EFFECT OF THE CONFLICT ON NORTH CAROLINA LAW

This lack of uniformity has changed the landscape of personal injury settlement negotiations for Medicaid beneficiaries. The role of the state is in question, as are the aims of the lawyers on each side. Ambitious plaintiffs' lawyers will certainly attempt to implement an *Ahlborn* analysis, while the NC DMA will certainly stick to current North Carolina law and apply *Ezell*.¹⁰¹ This is not a productive personal injury settlement negotiation environment for either party in a suit and, furthermore, will work against judicial economy. Attorneys and judges alike must know the standard in order to correctly apply the law, and in this situation, the attorneys simply do not know the correct standard. Plaintiffs' attorneys will argue one way, and the NC DMA will argue another. Thus, North Carolina should not tarry in conforming to the United States Supreme Court's interpretation.

THE PATH AHEAD - RESOLUTIONS FOR A STUBBORN STATE

For all of the aforementioned reasons, the *Ahlborn* decision stands for the opposite proposition of the *Ezell* decision. North Carolina needs to fall in line with the federal statutes and case law. To begin, Medicaid is a state program which draws its authority from the federal statutes.¹⁰² Medicaid is a dominantly federally funded program, the seminal statutes are federal, and the United States Supreme Court has spoken as to how the statutes are to be interpreted. As such, attempts by state courts and legislatures, like the North Carolina Supreme Court in *Ezell*, to contravene will ultimately fail. The question is not whether such contravention will ultimately fail, but when. It would not require an overhaul of the North Carolina system to comply with *Ahlborn*, and as such it is the state's duty to correct the issue.

98. See *Ezell v. Grace Hosp., Inc.*, 623 S.E.2d 79, 84 (N.C. Ct. App. 2005) (Steelman, J., dissenting), *rev'd*, 631 S.E.2d 131 (N.C. 2006), *reh'g denied*, 641 S.E.2d 4 (N.C. 2006).

99. Both parties submitted notices to the Supreme Court of North Carolina, making it aware of the decision in *Ahlborn*. *Ezell*, 360 N.C. 529 (2006), review denied 342 N.C. 896 (2006). See also BELL ET AL., *supra* note 4, at 160 n. 26.

100. See *Ezell*, 641 S.E.2d 4 (N.C. 2006).

101. See generally BELL ET AL., *supra* note 4, at 147-246.

102. See 42 U.S.C. § 1396 (2000).

The solution to this problem must be statutory, as well as judicial. A condition of participation in Medicaid, and receiving relatively massive amounts of federal funding, is that the states regulate their own Medicaid programs in accord with federal Medicaid statutes.¹⁰³ While it can be argued that, at one time, the federal statutes were somewhat ambiguous on the issue of third party liability, any such ambiguity has since been resolved by *Ahlborn*. *Ahlborn* sets out a clear and applicable analytical framework under which these issues can be resolved. The North Carolina General Assembly bears the burden of drafting statutes which comply with the *Ahlborn* decision, but North Carolina courts have the obligation to apply *Ahlborn* now.

I. THE ADHERENCE OF THE NORTH CAROLINA COURTS

The first step is for the North Carolina court system to both respect and implement the decision of the United States Supreme Court. This is the most obvious solution, but it is not without complication.¹⁰⁴ The *Ahlborn* decision first requires that either the parties, or the courts by decree, apportion the damages by category.¹⁰⁵ This is contrary to North Carolina common law.¹⁰⁶ The solution is that in the instance of Medicaid third party liability, or otherwise in general, damages must be available for categorization. While it may otherwise be contrary to North Carolina case law,¹⁰⁷ North Carolina courts must be willing to apportion the damages should the parties be unable to stipulate the proportions themselves. In addition, the Supreme Court of North Carolina must be prepared to overrule the *Ezell* decision.¹⁰⁸

103. See generally 42 U.S.C. § 1396a (2000) (providing federal guidelines to state Medicaid programs).

104. The NC DMA has argued that *Ahlborn* does not apply in North Carolina based on distinctions between the Arkansas and North Carolina statutory schemes. *BELL ET AL.*, *supra* note 4, at 155. This failure by the NC DMA to apply *Ahlborn* is but one contributing factor to the uncertainty surrounding this issue in North Carolina.

105. *Ahlborn*, 547 U.S. 268 (2006).

106. See *Ezell v. Grace Hosp., Inc.*, 623 S.E.2d 79, 85 (N.C. Ct. App. 2005) (Steelman, J., dissenting) (stating “[o]ur cases have consistently rejected attempts by plaintiffs to characterize portions of settlements as being for medical bills or for pain and suffering in order to circumvent DMA’s statutory lien”).

107. *Id.*

108. The Supreme Court of North Carolina has the opportunity to resolve this issue in the ongoing case *Andrews, et. al., v. North Carolina Department of Health and Human Services, Division of Medical Assistance*. “Because I find that our Supreme Court has not yet squarely answered the question presented to us by this case, I certify by dissent for a decision on the issue of whether the amount of the State Division of Medical Assistance’s subrogation claim on a Medicaid recipient’s settlement is controlled by the United States Supreme Court decision in *Arkansas Department of*

II. STATUTORY CHANGE

While the North Carolina court system should be ruling under the instruction of *Ahlborn*, the real solution must come from the North Carolina General Assembly. To resolve any remaining ambiguities and improper case law, the North Carolina General Assembly should amend, pursuant to the U.S. Supreme Court's instruction, the statutes which govern Medicaid third party liability.

Section 108A-57 of the North Carolina General Statutes should be revised to read that the right of subrogation extends to those monies which are causally related to the cause of action of the plaintiff against the defendant. This would limit, in accordance with the statutory interpretation of *Ahlborn*, the right of subrogation and, effectively, the amount of the Medicaid lien, to the amount of the monies paid by Medicaid for the medical bills of the beneficiary. In a similar fashion, section 108A-59 should be amended such that the beneficiary's assignment of the right to payments from a third-party for medical bills extends only to those amounts which constitute payments for medical expenses. This could also be accomplished by creating a new statutory provision which simply codifies the *Ahlborn* decision.

Finally, the North Carolina General Assembly must create a means or method by which personal injury damages can be apportioned. This provision should be set up such that the parties may stipulate the apportionment of the damages. If the parties are not able to reach agreement, then the trial judge should have the authority to do so.¹⁰⁹ In the past, North Carolina plaintiffs have attempted to apportion damages in order to avoid the Medicaid lien.¹¹⁰ To protect the interest of the state in the proceedings, the statute should mandate that the NC DMA participate in the settlement negotiations. Such a mandate would not deter settlement, but would provide a back up means of resolution should an agreement fail to materialize.

Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).” *Andrews, et. al., v. North Carolina Department of Health and Human Services, Division of Medical Assistance*, 2008 N.C. App. LEXIS 91, *10 (Wynn, J. Dissenting).

109. Examples of similar models for such systems of apportionment have been used in both Minnesota and Wisconsin. See *Henning v. Wineman*, 306 N.W.2d 550, 551 (Minn. 1981) (holding that the district court has the jurisdiction to allocate the proceeds of a third party settlement between amounts recoverable under workers' compensation and amounts not so recoverable); See also *Rimes v. State Farm Mut. Ins. Co.*, 316 N.W.2d 348, 356 (Wis. 1982) (holding that the trial court was not in error when it determined what sum would have made the plaintiffs whole).

110. Discussion, *supra* note 106.

CONCLUSION

With a clear voice, the U.S. Supreme Court has spoken as to the way it expects the states to interpret the federal Medicaid statutes. The North Carolina General Assembly and the North Carolina Supreme Court's failure to adhere to the *Ahlborn* decision has clouded the interpretation of Medicaid statutes in North Carolina, and will only injure those indigents that Medicaid was designed to aid. To prevent further injury, and to fulfill the obligation of the state to abide by the federal statutory scheme, the North Carolina General Assembly must amend the current statutes which govern North Carolina Medicaid, and the North Carolina court system must enforce these amended statutes in accord with the *Ahlborn* decision. The aforementioned proposed solutions are both practical and feasible and would result in North Carolina finally fulfilling its obligation to operate Medicaid within the guidelines of the federal statutes.

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