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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE

December 2018 Issue

Medi-Cal lien resolution

A LOOK AT THE MEDI-CAL LIEN RULES, FROM CASE INTAKE THROUGH SETTLEMENT

If you practice personal-injury law in California, it is only a matter of time before you will have to deal with a Medi-Cal lien. Over 13 million people – one of every three Californians – are covered by Medi-Cal, the state’s health plan for low-income residents. While it is virtually impossible to avoid dealing with the Medi-Cal system, navigating the system can prove difficult and time consuming. If liens are not handled properly, settlement funds can be delayed for months and you can open yourself to complaints from your clients and possible State Bar discipline. This article provides an overview and practical tips for Medi-Cal lien resolution from intake through pre-trial settlement.

Perform a thorough intake and investigate coverage

It is key to discuss how medical treatment has been and will be paid for during your intake with a potential client. Many people do not realize that they will have to pay back their health insurer from settlement proceeds. It is important to explain this up front so that you can manage client expectations about the amount of money they can expect to receive and the time it will take to resolve a claim. Medi-Cal liens often are not resolved for several months after settlement has been reached.

You may be surprised to learn that some people do not know they are Medi-Cal beneficiaries. Medi-Cal benefits can be administered by the Department of Health Care Services (“traditional Medi-Cal” or “Medi-Cal Fee-for-Service”) or by a third-party insurance plan (“Medi-Cal HMO” or “Managed Medi-Cal”). (See California Department of Health Care Services, Medi-Cal Managed Care Health Plan Directory, <http://www.dhcs.ca.gov/individuals/Pages/MMCDHealthPlanDir.aspx> (March 2018).)

Medi-Cal benefits can be administered by entities such as Kaiser Permanente or Anthem Blue Cross, so even if your client states they have what sounds like

private insurance, it may not be. You may not be able to determine whether a specific plan is a Medi-Cal plan without contacting the health-care plan. Ask the client to bring in their health-benefits card and make a copy front and back. You will want to contact the health plan immediately to determine the type of plan, whether Medi-Cal, Medicare Supplement, ERISA, or private. The type of plan will affect how you deal with the lien and advise your client.

You will also want to order any hospital records immediately. An injured party can receive temporary Medi-Cal benefits while in the hospital through the Hospital Presumptive Eligibility (HPE) program. The hospital submits an application on behalf of the patient. Due to the circumstances, a client may not realize or remember that they have signed up for Medi-Cal benefits. Furthermore, when applying for Medi-Cal coverage, benefits can be made retroactive up to three months. If the bills have already been paid, the beneficiary can request reimbursement from Medi-Cal for payments of medical bills within three months of coverage.

Determine if Medical Payments (Med-Pay) coverage applies to the accident. Med-Pay can apply when someone is a passenger in another person’s vehicle or even when someone is a pedestrian. Many people are unfamiliar with Med-Pay coverage, whether they have it, or how it works. Ensure that any applicable Med-Pay coverage is engaged and exhausted. You will have to report to Medi-Cal any applicable Med-Pay coverage, including the amount and whether it has been exhausted.

Setting up a claim

Within 30 days of filing an action or claim, a Medi-Cal beneficiary or his/her personal representative is required to notify DHCS. (Welf. & Inst. Code, § 14124.73.) If no action or claim is filed in court, notice must be provided before settlement. (Welf. & Inst. Code,

§ 14124.76, subd.(a) [“No settlement, judgment, or award in any action or claim by a beneficiary to recover damages for injuries, where the director has an interest, shall be deemed final or satisfied without first giving the director notice and a reasonable opportunity to perfect and to satisfy the director’s lien.”].)

It is in the best interest of your client to notify DHCS that a third party may be liable for an injury as soon as possible. The notification can be made online or by mail. If notice is required, you must include the date of injury, your client’s Medi-Cal number, and the name and contact information of the liable third party, insurance carrier (including claim number), and defense counsel. (Welf. & Inst. Code, § 14124.73, subd. (c).) If the insurance carrier or defense attorney information is not known at that time, you have 15 days to provide the information once you obtain it. (*Id.*, § 14124.73, subd. (d).)

In order to notify DHCS online, you must provide your name and email, your client’s name, date of birth, and Medi-Cal number, injury information, and Medical Payment coverage information in order to submit the New Case Notification form. Online forms are found at http://www.dhcs.ca.gov/services/Pages/TPLRD_PI_OnlineForms.aspx. Be prepared when you sit down to complete the form – there is no “save draft” function and you are timed out of the system after 15 minutes. Before you click “submit,” save a copy of your form for your file. Once the form is submitted, you cannot go back to it. Only submit this form once because multiple submissions can delay the process. DHCS should send a Notice of Lien asserting its recovery rights within 30 days. Calendar this date! If you do not receive the notification, call DHCS and follow up. It is important to be proactive with Medi-Cal liens. You do not want to wait until settling a case to realize that the notification was never received.

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As an attorney, you must submit an authorization for DHCS to communicate with you. You may send the authorization by mail with the initial notification or upload the authorization after you receive the initial letter from DHCS. If you choose to notify DHCS online, there is no ability to upload documents with the initial submission. You should not submit any updates, including an authorization, until the DHCS account number is received. Any submission without the DHCS account number will likely never make it to the file.

Obtaining a lien and settling without a lien

DHCS will provide a lien after they receive the final date of Medi-Cal treatment or the settlement information. If your client has completed treatment, notify DHCS immediately. It can take months to obtain a lien amount from DHCS. In speaking with individuals at DHCS, I have been told that they will wait up to four months before beginning to put together the lien information. However, if it is clear that Medi-Cal's lien will exceed the policy limit, you can call and request that the lien be expedited. If approved, once the Settlement Release is uploaded, they will run the report with the information they currently have. It is recommended that you follow up in two to three weeks to ensure it is being processed as an early report. This can greatly speed up the receipt of settlement funds for a client.

If your client is still treating when you are preparing your demand for settlement, you will have to put together the medical expenses by ordering the billing directly from providers. Some third-party administrators can provide the billing, while others cannot. For example, you can obtain the Medi-Cal benefits provided from Kaiser but cannot obtain them through Partnership HealthPlan of California. You may also have to work with a different department or company to obtain Medi-Cal billing. For example, if the benefits are administered by Kaiser, you will not obtain the billing information from Equian, but

rather through Kaiser's third-party billing department.

Be sure that you have obtained the billing records for all treatment, as Medi-Cal's lien will be determined later. If the policy limit is not tendered, you could leave money on the table and reduce the amount of the settlement received by your client.

Recovery rights and negotiation strategies

Medi-Cal is entitled to recover from both third-party and uninsured/underinsured motorist policies and required by federal law to seek recovery of payments made. (Welf. & Inst. Code, § 14124.70, subd. (a), § 14124.71, subd. (a); 42 U.S.C. § 1396a(a)(25).) While DHCS usually asserts a lien, DHCS can institute legal proceedings to recover the reasonable value of benefits provided against the liable tortfeasor or insurance carrier directly. (Welf. & Inst. Code, § 14124.71.) Thus, even if a Medi-Cal recipient decides not to pursue an action against the liable party, DHCS can still obtain reimbursement for the benefits it extended.

Medi-Cal is only entitled to collect on treatment up to the date of settlement. (Welf. & Inst. Code, § 14127.785.) Unlike with Medicare, there is no provision for recovery for future medical treatment at this time. In the right case, this can prove important with regard to timing of treatment. If a surgery can be delayed until after settlement, that amount will not be included in the lien amount. You will want to confirm that your client will still be eligible for Medi-Cal benefits at the time of the treatment. On the other hand, if no further treatment will be required and thus, Medi-Cal will not be spending additional funds on the injury, remind them of this fact, especially if pursuing a reduction under section 14124.76.

DHCS is required by statute to reduce its lien. The reduction required depends on the value of the claim, settlement amount, lien amount, attorneys' fees and litigation costs. Pursuant to section 14124.785, DHCS's recovery on its

lien is limited to the least amount from applying section 14124.72, 14124.76, and 14124.78. (But, see *Aguilera v. Loma Linda Univ. Med. Ctr.* (2015) 235 Cal.App.4th 831.)

The 25 percent rule

The most DHCS is ever entitled to in reimbursement is 75 percent of the benefits it provided. Section 14124.72, subdivision (d) requires DHCS to reduce the lien by 25 percent for its share of attorneys' fees and a proportional share of the costs. For example:

Settlement:	\$50,000
Lien:	\$10,000
Attorneys' Fees	\$15,000 (30%)
Costs:	\$200

Lien after reduction: $(\$10,000 * 25\%) - [\$200 * (\$10,000/\$50,000)] = \$7,460$

The 50 percent rule

In no case is DHCS entitled to receive more of the settlement funds than the beneficiary after reduction for attorneys' fees and costs. (Welf. & Inst. Code, § 14124.78.)

In our previous example, if settlement was in the amount of \$15,000 instead of \$50,000, attorneys' fees would be \$4,500, and the amount due to the client would be \$10,300. DHCS would be entitled to no more than 50 percent of this amount, or \$5,150. It is important to run both the 25 percent and 50 percent calculations to ensure the correct reduction is applied.

Settlement:	\$15,000
Lien:	\$10,000
Attorneys' Fees	\$4,500
Costs:	\$200
Due Client:	\$10,300
50% to DHCS	\$5,150

Made whole rule – the Ahlborn formula

DHCS's recovery is limited to the portion of the settlement that "represents payment for medical expenses, or medical care, provided on behalf of the

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beneficiary.” (Welf. & Inst. Code, § 14124.76; *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268.)

Settlements rarely allocate specific dollar amounts to different elements of damages, which raises the question, what portion of the settlement “represents payment for medical expenses, or medical care, provided on behalf of the beneficiary”? Section 14124.76 provides, “In determining what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268 and other relevant statutory and case law.”

In *Ahlborn*, the U.S. Supreme Court held that in seeking reimbursement of Medicaid benefits, a state cannot “lay claim to more than the portion of [the beneficiary’s] settlement that represents medical expenses.” (*Ahlborn*, 547 U.S. at 280.)

The Court explained that Congress did not “sanction an assignment of right to payment for anything other than medical expenses – not lost wages, not pain and suffering, not an inheritance.” (*Id.*, 547 U.S. at 281.) In *Ahlborn*, the state’s lien was reduced by applying a ratio of the settlement to the overall damages to the paid amount of Medicaid benefits. California cases have endorsed this approach as a reasonable and equitable method of apportioning an unallocated settlement in order to determine DHCS’s recovery. (*Lima v. Vouis*, 174 Cal.App.4th 242 (2009), *Bolanos v. Superior Court*, 169 Cal.App.4th 744 (2008), *Lopez v. Daimler Chrysler Corp.*, 179 Cal.App.4th 1373 (2009).)

Trump signs plaintiff-friendly measure

In 2013, Congress approved the Budget Act of 2013, (The Bipartisan Budget Act of 2013, Pub.L. 113-67, 2013 H.J.Res 59.) which included language overturning *Ahlborn* and permitting

states to assert a Medicaid lien for the full amount of benefits paid without regard to other damages or comparative fault. States were supposed to pass legislation enacting these changes. However, on February 9, 2018, Congress passed and President Trump signed into law the 2018 Budget Act, (The Bipartisan Budget Act of 2018, Pub.L. 115-123, 2018 H.J.Res 1892.) which repeals the scope of state Medicaid lien expansion. (The Bipartisan Budget Act of 2018, Pub.L. 115-123, 2018 H.J.Res 1892., §53102.) In effect, this change makes *Ahlborn* the law of the land again and limits Medicaid recovery to the portion of a settlement that represents paid medical expenses.

It should be noted that the recent case of *Aguilera v. Loma Linda Univ. Med. Ctr.* (2015) 235 Cal.App.4th 831, may lead to significant changes in Medi-Cal reimbursements under section 14124.76. In *Aguilera*, the Court of Appeal “agree[d] in theory with the Department’s contention that future health care expenses must be excluded, as a matter of law, in applying the *Ahlborn* formula to reduce the Department’s lien ... contingent on the Department presenting sufficient evidence that it will in fact pay [the beneficiary’s] as long as she qualifies for the benefits she is presently receiving.” (*Id.*, 235 Cal.App.4th at pp. 831-832.)

In *Aguilera*, DHCS submitted a declaration by a collection representative stating that the plaintiff’s future care would be covered by Medi-Cal. The court found this evidence lacking because “nothing in her declaration suggested any expertise with regard to past or future benefit eligibility or benefit determinations,” and “[she] cited no statutes or regulations requiring that Medi-Cal pay for all her health care needs, showing that Medi-Cal paid for these expenses in the past or that it is reasonably probable Medi-Cal will pay all of these expenses in the future.” You should be prepared to deal with an argument from DHCS that future medical expenses are excluded from your client’s overall damages.

Aguilera also brought good news for plaintiff’s attorneys. The court held that

a DHCS lien must be reduced for attorneys’ fees and costs pursuant to section 14124.72, subdivision (d), rejecting DHCS’s assertion that section 14124.785 sets forth three separate methods of apportioning the claim as “nonsensical.” (*Aguilera*, 235 Cal.App.4th at pp. 834-835.)

The *Ahlborn* calculation

The best way to assert a lien reduction under 14124.76, subdivision (a) is to truly understand your case, provide evidence of the amount of each category of damages, and fully explain the allocation and requested reduction. In *Aguilera*, the court held that by presenting evidence of the value of overall damages and evidence supporting the application of the *Ahlborn* formula, a Medi-Cal beneficiary “satisfie[s] her burden of proving the facts essential to her claim for relief.” (*Id.*, at p. 830-831.)

Plaintiff’s counsel should provide evidence of past medical damages (e.g., all paid medical bills, out-of-pocket expenses, and outstanding bills or liens), future medical damages (e.g., doctor’s reports, life care plans, and economic report), past wage loss records (e.g., W-2s, 1099s, tax returns, and economic report), future lost earning capacity (e.g., Functional Capacity Evaluation, vocational expert report, and economic report), and both past and future general damages (e.g., photographs, lay witness testimony, verdicts, medical reports, life care plans, functional capacity evaluation). This is information that you will likely have already put together in order to obtain a settlement. Establish the full value of your client’s damages, without taking into consideration contested issues or limited coverage and assets, through compelling evidence and argument. DHCS does not usually submit competing evidence of the overall damages, as this would require it to expend money retaining experts.

Once the value of overall damages is established, the settlement amount is compared to the overall damages to obtain the *Ahlborn* ratio and applied to

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DHCS's lien. The lien amount should then be further reduced pursuant to 14124.72, subd. (d) for attorneys' fees and costs.

Overall Damages: \$1,000,000
 Settlement: \$250,000
 Lien: \$200,000
 Costs: \$25,000

Lien after *Ahlborn* reduction:
 $[(\$250,000/\$1,000,000) * \$200,000] =$
 \$50,000
 Further reduction under § 14124.72(d):
 $(0.75 * \$50,000) - [(\$50,000/\$250,000) *$
 $\$25,000] = \$32,500$

DHCS typically asserts a lien in the amount it claims it paid in benefits and attempts to limit reductions to the 25 percent rule or the 50 percent rule. It is difficult to obtain an agreement from DHCS for a further reduction under section 14124.76. DHCS often asserts that the *Ahlborn* formula is not mandated by statute or case law, however, it fails to provide an alternative rational method for calculating the lien amount. DHCS also regularly contends that any apportionment of settlement proceeds is an attempt by the plaintiff or counsel to manipulate the settlement to avoid paying its lien. An attempt to overreach in your allocation should be avoided.

If you cannot reach an agreement with DHCS as to what portion of the settlement represents payment for medical expenses, you can file a motion and submit the matter to be decided by a judge. (Welf. & Inst. Code, § 14124.76.)

Settlement, release and disbursement

You must protect Medi-Cal's lien. Attorneys risk personal liability and State Bar discipline if they settle around or purposely disregard known valid liens. (See *Sanford v. Rasnick*, (2016) 246 Cal.App.4th 1121, 1131.) DHCS will require a copy of the settlement agreement, attorney fees and itemized litigation costs before reducing its lien, so it is best to provide the documents and information as soon as you are able. Settlement information can be submitted online.

A settling third party and their insurance carrier are liable to Medi-Cal directly. (Welf. & Inst. Code, § 14124.71.) As a result, you may encounter an insurance company that refuses to accept a hold-harmless clause in the settlement agreement or release and insists on including DHCS as a payee on the check. A check made payable to the Medi-Cal beneficiary and DHCS can be submitted to DHCS along with a Letter of Guarantee (Form 4204), available on the DHCS website. This does not prevent further negotiation or lien reductions. It can take up to 60 days to obtain the endorsement,

but the turnaround is often much quicker.

Full payment of the lien is due when the case settles. Payment can be made online by Electronic Fund Transfer (EFT) or by mailing a check payable to Department of Health Care Services. The DHCS account number must be provided to ensure proper posting.

Continuing Medi-Cal eligibility

A client may lose eligibility for Medi-Cal depending on the settlement size and how the settlement is distributed. This is beyond the scope of this article, but you should discuss this with the client early on and consider different options to protect their eligibility, including a special-needs trust.

While Medi-Cal liens can be difficult and time consuming to negotiate and navigate, understanding all of the tools available, being proactive, and acting timely can streamline the process and help to reduce headaches.

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