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The nuts and bolts of Medi-Cal liens

THE MEDICAID PROGRAM HAS VERY SPECIFIC RULES ABOUT REIMBURSEMENT OF ITS EXPENSES BY A THIRD-PARTY TORTFEASOR

What is a Medi-Cal lien?

Third-party tort injury medical bills paid by Medi-Cal are required to be repaid upon a monetary recovery by a Medi-Cal beneficiary from a third-party tortfeasor. (Welf. & Inst. Code §§ 14124.70 -14124.795.)¹ A “lien” is automatically created and “means the director’s claim for recovery, from a beneficiary’s tort action or claim, of the reasonable value of benefits provided on behalf of the beneficiary.” (§ 14124.70, subd. (d).) Payment of the lien is made to the “Director” of the Department of Health Care Services (DHCS).

DHCS recovery rights

The DHCS can recover the “reasonable value” of benefits paid “. . . because of an injury for which another person is liable . . .” by:

- Bringing its own subrogation action through the California Attorney General against the third-party tortfeasor (§ 14124.71);
- Asserting a lien in an action by the injured beneficiary against the tortious third-party (§ 14124.72); or
- Intervening in a beneficiary’s action against the third-party tortfeasor (§ 14124.73).

The DHCS director has the power to compromise, settle or waive the department’s lien claim. (§ 14124.71, subd. (b).) When attorney fees and litigation costs are incurred by the injured beneficiary, the DHCS lien claim is to be reduced by 25 percent for attorney fees and a pro rata share of costs. (§ 14124.72, subd. (d).)

Medi-Cal’s website contains pertinent statutes, forms, contact information, and instructions on paying Medi-Cal through the “TPLRD Personal Injury Program.” Submissions to notify Medi-Cal of a new case to provide additional information are

easily done online at https://www.dhcs.ca.gov/services/Pages/TPLRD_PI_OnlineForms.aspx. Medi-Cal’s Personal Injury Program can also be reached via phone at 916-445-9891.

In June 2019, in the case of *Lomeli v. State Department of Health Care Services* (2019) 36 Cal.App.5th 817, the California Court of Appeal called for a “reality-based approach” in determining the Medi-Cal lien amount despite *Ahlborn, infra*. As of this writing, the case is under review with the California Supreme Court.

Notice requirements

Who has the duty of notice to DHCS?

Multiple parties have a duty to notify DHCS of an action against a third party. Specifically, section 14124.79 provides notices of “legal proceedings,” settlement and other notices under the code shall be given “by insurance carriers . . . having liability for the beneficiary’s claim, and by the attorney retained to assert the beneficiary’s claim, or by the injured party beneficiary . . .” or representative, if no attorney is retained by the beneficiary.

Similar to Medicare obligations, the third-party tortfeasor insurance carrier has duties of notification and is legally obligated to reimburse Medi-Cal. (§ 14124.79.)

Required notices by the beneficiary to DHCS

If a beneficiary has a *claim* or *court action* against a “third party or carrier,” the DHCS is to be so notified in writing. Further, timely written notice to the DHCS of a potential “settlement, judgement, or award” is mandatory. (§§ 14124.79 and 14124.73) A claim against a *carrier* includes a claim for uninsured (UM) or underinsured (UIM) motorist benefits. (§ 14124.70, subd. (a).)

Section 14124.73 requires written notification to DHCS by the beneficiary or attorney of any lawsuit or UM/UIM claim filed against the third-party tortfeasor or carrier, within 30 days of filing. Subdivision (a) should be reviewed for items required to be included in the written notification to DHCS.

(Note that *all* communications with Medi-Cal must contain the beneficiary's DHCS number, which can be found on the beneficiary's Medi-Cal identification card.)

How to notify Medi-Cal

There are two ways Medi-Cal will accept notification that an injured party has sustained injuries by a third party, where Medi-Cal paid medical benefits for that injury:

- Online notification to DHCS can be accomplished on Medi-Cal's "Personal Injury Notification Form," available at https://www.dhcs.ca.gov/services/Pages/TPLRD_PI_OnlineForms.aspx; or
- Notification by mail. The mail notification should include all of the information required on the online form. It should be addressed to: (This address is also a general correspondence address.)
Department of Health Care Services
Third Party Liability and Recovery Division
Casualty Insurance Operations - MS 4720
P.O. Box 997425
Sacramento, CA 95899-7425

Service of notice on DHCS

Written notice to DHCS of an action or claim against a third-party tortfeasor or carrier is required to be done "within 30 days of filing the action" (or claim?) and served personally or by registered mail. The notice is to include the "name of the court or state or local agency in which the action or claim is brought." (14124.73, subd. (a).)

Proof of service

"Proof of service shall be filed in such action or claim." (14124.73, subd. (a).)

Attorney's mandatory requirements

To obtain lien information from DHCS, a representative attorney *must* submit the following two *client-executed* documents (can be combined into a single, self-made document) to the above address: (Be sure to include the beneficiary's DHCS number.)

"Representation Letter"; and
"Authorization for Release of Information and Medical Records" form.

Response by DHCS

There are two formal responses by DHCS:

- After submission of case notification, DHCS will mail its initial "Notice of Lien."; and
- DHCS will issue a "Final Lien Claim" 120 days after DHCS receives notice of the final date of treatment with any and all Medi-Cal providers *and/or* the date of settlement.

The final lien claim will include an itemization of injury-related services paid by Medi-Cal. A copy of the final lien claim will also be sent to the liable third party (or attorney).

It is wise to review the list of injury-related medical services claimed to have been paid by Medi-Cal. If Medi-Cal made an error and included unrelated medical care or included bills not paid, DHCS should be immediately notified. The lien claim should not be paid until the final lien claim contains only legitimate paid billings.

Notice of court action against third party by DHCS

Within 30 days of the DHCS bringing its own court action against a third-party tortfeasor, the DHCS is required to notify the beneficiary, representative or survivor of the following:

- The beneficiary or survivor's right to intervene into the DHCS court action against the third-party tortfeasor;
- The right to obtain an attorney for representation in the matter; and
- Medi-Cal's right to recover the reasonable value of provided benefits. (§ 14124.73, subd. (b).)

The beneficiary then has the right to:

- Intervene into the DHCS' court action against the third-party tortfeasor; or
- Consolidate his/her own court action against the third-party tortfeasor with the court action brought by the DHCS. (§ 14124.73, subd. (b))

Requesting Medi-Cal's lien amount

Obtaining the lien claim amount

To obtain Medi-Cal's lien claim amount, contact DHCS at:

Department of Health Care Services
Third Party Liability and Recovery Division
Casualty Insurance Operations—MS4720
P. O. Box 997425
Sacramento, California 95899-7425

Delay in obtaining lien amount

DHCS reports it can take up to 120 days to determine the amount of its lien claim. The lien amount is not finalized until after it receives notification the case has settled. After payment data is reviewed by DHCS staff, an itemized list of injury-related services will be established, and a lien will be sent to the beneficiary and the liable third-party insurance carrier. Delays can occur, because medical providers have up to one year from date of service to submit bills to Medi-Cal for payment.

Medi-Cal's lien rights are for related medical services up to the date of settlement. However, Medi-Cal payments for provable, future medical care may be recoverable under the holding of *Aguilera v. Loma Linda University Medical Center* (2015) 235 Cal.App.4th 821, 828, discussed below.

Calculating Medi-Cal's recovery rights

Medicaid preemption of state law

Medi-Cal is an extension of the federal Medicaid law designed to provide health care to needy persons. California gets federal Medicaid money to support its Medi-Cal program, and the state must adhere fully to the federal Medicaid Act. Medicaid rules preempt California rules regarding DHCS recovery. (42 U.S.C. §§ 1396a-1396v.) Although Medicaid has an "anti lien" provision, Medicaid requires states to seek reimbursement for medical expenses in third-party tort actions.

Medi-Cal's recovery is limited to medical expenses

A state cannot demand a portion of a beneficiary's tort recovery that is not attributable to medical expenses. Section 14124.76, subd. (a), codifying *Ahlborn, infra*, states:

Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary.

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The Ahlborn calculation

The value of the DHCS lien claim is dependent on a percentage ratio to the value of the case. This ratio percentage, discussed below, was established by the U.S. Supreme Court decision of *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 126 S.Ct.1752. The *Ahlborn* holding was reiterated and explained in *Aldona Wos [Wos], Secretary, North Carolina Department of Health and Human Services v. E.M.A., a Minor, by and Through Her Guardian ad Litem, Daniel H. Johnson, et al.* (2013) 133 S.Ct. 1391.

In *Ahlborn*, the parties stipulated that the Arkansas Medicaid payments represented one-sixth of the actual value of the potential damages. The Court upheld this one-sixth formula, but the Court did not make it a mandatory guideline for other cases. Instead of a mandatory guideline, the Court allows the parties to determine the allocation, and, if the parties do not do so, a trial court is empowered to take evidence and set out the proper percentages.

The Court in *Wos* found North Carolina’s “blue line rule” that its Medicaid program was entitled reimbursement of a preset one-third of any monetary damages a Medicaid beneficiary recovers from a third-party tortfeasor was preempted by Medicaid’s anti-lien provision. For an easy understanding of the reasoning behind *Ahlborn*, a reading of *Wos* is recommended.

In *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, the trial court followed the one-sixth percentage used in *Ahlborn* and stated: “While the precise formula used in *Ahlborn* is not mandated, the principles of that decision *are* mandated as guidelines by subdivision (a) of section 14124.76.”

Making the calculation

Ahlborn requires the parties or the trial court to determine the appropriate Medi-Cal lien amount by:

- establishing the actual damages to the injured party;
- establishing the percentage of the actual recovery to the actual non-recovered actual damages, and then
- applying that percentage to the past medical costs paid by DHCS.

(See *Lopez v. Daimler Chrysler Corp.* (2009) 179 Cal.App.4th 1373, 1378 and *Lima v. Vous* (2009) 174 Cal.App.4th 242.)

Aguilera v. Loma Linda Univ. Med. Cent. (2015) 235 Cal.App.4th 821, 828 explained *Ahlborn*’s formula as follows:

Expressed mathematically, the *Ahlborn* formula calculates the reimbursement due as the total settlement divided by the full value of the claim, which is then multiplied by the value of benefits provided. (Reimbursement due=[Total Settlement ÷ Full Value of Claim] x Value of Benefits Provided.)

California and Ahlborn

Based on the holding in *Ahlborn*, the California Legislature amended section 14124.76 to read:

. . . In determining what portion of a settlement, judgement, 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 . . . [*Ahlborn*] and other relevant statutory and case law.

Motion for court approval of calculation dispute

The code provides a mechanism for obtaining court resolution of a repayment dispute between DHCS and the beneficiary. The code states: “Either the director or the beneficiary may seek resolution of the dispute by filing a motion, which shall be subject to regular law and motion procedures.” . . . [The court is to be guided by the *Ahlborn*] “and other relevant statutory and case law.” (§ 14124.76, subd. (a) (bracket added).)

Procedural aspects of the motion can be found in subdivisions (b) and (c) of section 14124.76. The court’s holding can set the amount owing and order that sum to be paid to DHCS or order DHCS to reimburse an overpayment. (See *Branson v. Sharp Healthcare, Inc.* (2011) 193 Cal.App.4th 1467, 1476-1477.)

Tentative rulings – The court’s findings, decision, or order is final, unless the settlement is contingent upon an acceptable allocation of the settlement proceeds, then it is considered a tentative determination. The tentative determination

becomes final 30 days after entry, unless the beneficiary serves notice of rejection prior thereto that is based “solely upon a rejection of the contingent settlement.” (§ 14124.76, subd. (c).) Modification of the tentative findings may be sought under subdivision (d).

Minor’s compromise – Note that the mandatory petition for minor’s compromise (Judicial Council form MC-350) has a section for the court to set forth the amount due Medi-Cal either by agreement of the parties or by a holding on a motion filed concurrently with the compromise petition.

The *Ahlborn* application is not applied retroactively once settlement benefits to the injured party are approved by a probate court or otherwise finalized. (See *McMillan v. Stroud* (2008) 166 Cal.App.4th 692.) In *McMillan*, DHCS was not notified of the civil action, until after the settlement was approved by the probate court.

Appellate rights – Both Medi-Cal and the beneficiary may appeal the final findings, decisions, or order. (§ 14124.76, subd. (b).)

No Ahlborn calculation for future medical/attendant care to be paid by Medi-Cal

Aguilera v. Loma Linda University Medical Center (2015) 235 Cal.App.4th 821 held future medical and attendant care that is “reasonably probable” to be paid by Medi-Cal is excluded from the *Ahlborn* calculation. The court stated:

Based on evidence provided, the trial court must make a determination whether it is reasonably probable the Department will pay [plaintiff’s] future health care expenses. If the trial court makes such a finding, it is directed to exclude these expenses from its *Ahlborn* calculation.

(*Id.* at p. 833.)

Aguilera, at page 835, citing *Bolanos, supra*, holds Medi-Cal can obtain its “reasonably provable” future lien claim from the gross recovery payable by the third-party tortfeasor, subject to the three limitations set forth in the following codes:

- “[R]easonable value of benefits provided to the beneficiary under the Medi-Cal

program less 25 percent' [and litigation expenses] with 'benefits' limited to those expended for medical care and services." (§ 14124.72, subd. (d) (bracket added).);

- "[T]o that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary." (§ 14124.76, subd. (a).); and
- "[A] single, absolute limitation on the director's recovery that precludes the reimbursement of medical expenses from the beneficiary's own resources." (§ 14124.78.)

Will the Ahlborn calculation survive?

In December 2013, Congress amended the Medicaid Act to limit the application of *Ahlborn's* calculation. "The amendments permit a state to assert a lien on a Medicaid beneficiary's third-party recovery for the full amount of the benefits paid, regardless of the other injuries and damages that the beneficiary suffered (and regardless of the beneficiary's comparative fault)."² (Specifically see 42 U.S.C. section 1396a (a)(25)(E)(i), (a)(25)(F)(i), (a)(25)(H); section 1396k (a)(1)(A).) These Medicaid amendments went into effect on October 1, 2017. As of this writing, California's Welfare and Institutions Code section (§ 14124.76) currently codifying *Ahlborn* has not been amended to reflect the 2013 federal amendments.

Moreover, in June 2019, in the case of *Lomeli v. State Department of Health Care Services* (2019) 36 Cal.App.5th 817, [___ Cal.Rptr.3d ___], the California Court of Appeal called for a "reality-based approach" in determining the Medi-Cal lien amount despite *Ahlborn* and its progeny. The *Lomeli* court ruled that the proper lien amount was the "gross sum of actual costs, minus an attorney fee adjustment [of 25% per § 14124.27, subd. (d)], minus a litigation cost adjustment." (*Id.* at 822.)

Although the *Lomeli* Court did not overturn *Ahlborn* or the California cases interpreting it, it found a way around them. The plaintiff used *Ahlborn* and its progeny to challenge the approach, which the Court rejected, distinguishing *Ahlborn* based on the fact that the parties

in *Ahlborn* stipulated to the reasonable value of the plaintiff's personal injury suit, which was not done in *Lomeli*. (*Id.* at 824.) The Court thus determined, "Nothing in *Ahlborn* disapproved of a reality-based approach in cases lacking stipulations." (*Ibid.*) Ultimately, the Court rejected a formula whereby the amount of actual settlement is divided by the "hypothetical base-case scenario" value of the claim, then the Medi-Cal amount paid is multiplied by that fraction. (*Id.* at 825.)

As of the time this article was prepared, the *Lomeli* case was under review with the California Supreme Court. (Petition for Review filed August 5, 2019).

Statutory limitation of Medi-Cal's recovery rights, or the 50 percent rule

Under former section 14124.78, a limitation was placed on the recovery amount by DHCS: "... in no event shall the director's claim exceed one-half of the beneficiary's recovery after deduction for attorney's fees, litigation costs, and medical expenses relating to the injury. . ." Based on *Ahlborn*, section 14124.78 was amended to limit Medi-Cal's lien recovery to be no more than the beneficiary's net recovery. Specifically, section 14124.78 states:

Notwithstanding any other provision of law, in no event shall the director recover more than the beneficiary recovers after deducting from the settlement, judgment, or award, attorney's fees and litigation costs paid by the beneficiary. If the director's recovery is determined under this section, the reductions in subdivision (d) of Section 14124.72 shall not apply.

Medi-Cal's further limitation on its lien recovery can be found in section 14124.785, which states: "The director's recovery is limited to the amount derived from applying Section 14124.72, 14124.76, or 14124.78, whichever is less." (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 755-757.)

Medi-Cal's attorney fees and costs contribution

Section 14124.72, subdivision (d), sets forth Medi-Cal's contributory 25

percent attorney fee reduction and a pro rata share of litigation costs, when Medi-Cal liens the beneficiary's case. The common fund doctrine has no application when Medi-Cal seeks reimbursement from the beneficiary's tort recovery in accordance with section 14124.72 subd. (d). (For further discussion, see *Aguilera v. Loma Linda University Medical Center* (2015) 235 Cal.App.4th 821, 833-836.)

To reduce the Medi-Cal lien for a proportionate amount of litigation costs, it is imperative that an itemization of the costs be timely presented to Medi-Cal. Otherwise, substantial delays in Medi-Cal's approval of its fair share of litigation costs will be delayed.

Payment to Medi-Cal

Method of payment of lien claim

Medi-Cal accepts checks, money orders, and electric fund transfers. Payment should be made to the "Director of Department of Health Care Services." It is imperative that the beneficiary's identification number be placed on the check or money order.

DHCS requests that all payments be sent through its "Electronic Fund Transfer," if possible. DHCS provides information on its electronic payment procedure in its "Electronic Funds Transfer Information Guide" on its website. (<https://www.dhcs.ca.gov/services/Pages/TPLRD-EFT-Payments.aspx>)

Address for payments

If payment is not made electronically, payment of lien amounts should be mailed to:

Department of Health Care Services
 (DHCS)
 Casualty Insurance Operations - MS
 4720
 P.O. Box 997421
 Sacramento, CA 95899-7421

When third-party carrier makes DHCS a payee on the settlement check

DHCS requests that the third-party insurance carrier issue separate checks to the plaintiff and to DHCS. However, if a joint check is issued to the beneficiary and DHCS, FAQ 19 on the DHCS website sets forth the following three

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options to be followed by the beneficiary:

- “Endorse the check and send it to DHCS. We will cash the check, deduct the Medi-Cal lien amount, and send you a refund for the difference. This process takes up to 60 days,” or
- “Pay Medi-Cal’s lien amount via cashier’s check, money order, or electronic fund transfer in exchange for our endorsement,” or
- “If you’re an attorney and listed as one of the payees on the check, send us a completed Letter of Guarantee (Form 4204) along with the check in exchange for our endorsement.”

The check to DHCS must include the beneficiary’s account number. Note that DHCS will not endorse a check when it has no interest in the payment. After the lien is paid in full, DHCS will issue a release letter if so requested. (It should be requested.)

Miscellaneous items

“Substitute” billing

Sections 14124.791 and 14124.74 are held preempted by federal Medicaid statutes and regulations, and thereby eliminates a Medi-Cal provider’s reimbursement claim against a Medi-Cal beneficiary’s tort recovery. (See *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 825-828.)

Prior to the preemption, the two codes allowed a medical provider to bill and receive an adjusted payment from Medi-Cal, return that payment to Medi-Cal, and then lien the injured Medi-Cal beneficiary’s tort claim for the full amount of the bill. This procedure was known as “substitute” billing, which is similar to balance billing. *Olszewski* held substitute billing, like balance billing, is prohibited by the federal Medicaid Act.

Wrongful death actions

The code is quite clear that the DHCS lien claim is recoverable, if the injured plaintiff, heirs, guardian, etc., seeks and recovers medical expenses against the third-party tortfeasor. A wrongful death action, however, is statutory and recovery does not automatically

include past medical expenses. Thus, unless medical bills are pled in the wrongful death complaint, DHCS has no lien claim against a wrongful death recovery.

Wrongful death damages are for harm done to the survivors, not for medical bills previously incurred by the decedent. (See *Fitch v. Select Products Company* (2005) 36 Cal.4th 812.) *Fitch* held:

... to allow the DHS [now DHCS] to recover the decedent’s medical expenses from the wrongful death damages would reduce those damages below the amount needed to fully compensate the survivors for the harm done to them. Such a recovery would not be from the third party tortfeasor. . . and therefore it is not statutorily authorized.

(*Id.* at p. 820.) Section 14124.72, subd. (b), authorizes the DHCS to bring its own action to recover from a third party tortfeasor the costs incurred in providing medical treatment to a beneficiary after the beneficiary’s death. (*Id.* at p. 822.)

Medi-Cal lien against a special needs trust

Probate Code sections 3600-3605 allow settlement funds to be placed into a special needs trust for future care of a severely injured plaintiff. Such a trust enables a disabled person to qualify for and receive future Medi-Cal and other public agency benefits during existence of the trust, even though there is a largesse put into the trust from the personal injury recovery. (Prob. Code, § 3604.)

A special needs trust requires court approval. (Prob. Code, § 3602, subd. (d).) To obtain such approval, the trust order must provide that, upon the death of the trust beneficiary, all statutory liens in favor of Medi-Cal and other public agencies are to be satisfied from funds remaining in the trust. Additionally, the court is to order payment of all Medi-Cal liens and liens of other public agencies, incurred prior to establishment of the special needs trust, be paid before the special needs trust is funded. (Prob. Code, § 3604, subd. (d).)

The trustee is required to notify DHCS of the death of the beneficiary. DHCS then has four months to file its lien claim. (Prob. Code, § 9202.) For issues concerning distribution of trust assets to DHCS upon the death of a special needs beneficiary, see:

- *Herting v. California Department of Health Care Services* (2015) 235 Cal.App.4th 607; *Shewry v. Arnold* (2004) 125 Cal.App.4th 186;
- *Gonzalez v. City National Bank* (2019) 36 Cal.App.5th 734;
- Welf. & Inst. Code, § 14009.5, amended and effective June 27, 2016; and
- Medi-Cal’s estate recovery program and special needs trust section of the DHCS website. (<https://www.dhcs.ca.gov/services/Pages/Special-Needs-Trust.aspx>)

Release of Medi-Cal’s lien claim

As with Medicare liens, it is advisable to get the DHCS to issue a letter releasing its lien claim upon payment of the lien. Medi-Cal will do so upon request. Such a release most likely can thwart any future reimbursement claim by Medi-Cal, if medical care is obtained after resolution of the tort claim.

Subpoenas

Medical expense records or personal appearances can be subpoenaed and served at:
Department of Health Care Services
Office of Legal Services
1501 Capital Avenue–MS 0010
Sacramento, CA 95814

Additional resources:

A special thanks to Michael S. Fields for his contribution of the Medi-Cal Lien Claim Section of the Lien Guide for the July 2017 edition of Advocate, on which I relied extensively in preparing this article with the permission and guidance of Mr. Fields.

For additional information and updates on the *Lomeli* case, see the syllabus materials on Medi-Cal liens from Steven B. Stevens prepared for the 2019 CAALA Vegas liens panel. “Medi-Cal Lien Resolution,” Allison Karp, Advocate (December 2018).

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Endnotes:

- ¹ All California code references are to Welfare and Institutions Code, unless otherwise mentioned.
² See Advocate (www.advocatemagazine.com), *Developments in Medicaid Lien Law 2015*, March 2015, page 93, Steve Stevens, Esq.

