

ABA ESTATE PLANNING, PROBATE & TRUST COMMITTEE Newsletter  
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ABA General Practice, Solo and Small Firm Division American Bar Association

Chairs - Kenneth Vercammen, Edison, NJ and Jay Foonberg, Beverly Hills, CA

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### **1. USING THE AHLBORN DECISION TO REDUCE A MEDICAID LIEN**

***By: Thomas D. Begley, Jr., Esquire***

What could be done when the Medicaid lien is so large that it would consume all or a substantial portion of the recovery.

A recent United States Supreme Court case has provided personal injury attorneys with ammunition to reduce a Medicaid lien in a personal injury case so that the payment to the State Medicaid Agency is fair and reasonable. After a series of cases around the country divided on the issue as to whether the State Medicaid Agency may recover from that portion of a settlement not earmarked for past medical expenses the United States Supreme Court decided the issue in the Ahlborn case,<sup>[1]</sup>The Court held that federal law requires states to ascertain the legal liability of third parties and to seek reimbursement for medical assistance to the extent of such legal liability. The state is considered to have acquired the rights of the injured party to payment by any other party for such health care items or services. As a condition of Medicaid eligibility, the individual is required to assign to the state any rights to payment for medical care from any third party. The Arkansas statute required that if the lien exceeds the portion of the settlement representing medical costs, satisfaction of the lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs, such as pain and suffering, lost wages, and loss of future earnings.

In the Ahlborn case, the plaintiff was involved in an automobile accident. Medicaid paid \$215,645.30 on her behalf. Plaintiff filed suit for past medical costs and for other items, including pain and suffering, loss of earnings and working time, and permanent impairment of her future earning ability. The case was settled for \$550,000, which was not allocated between categories of damages. The parties stipulated that the settlement amounted to approximately 1/6th of the reasonable value of Ahlborn's claim. The court stated that the

federal requirement that states “seek reimbursement for medical assistance *to the extent of such legal liability*” refers to the legal liability of third parties *to pay for care and services available under the plan.*” Here, because the plaintiff received only 1/6th of her overall damages, the right of the state of Arkansas was limited to 1/6th of the past medical claim or \$35,581.47.

The court also held that 42 U.S.C. §1396p(a)(1) prohibits states from imposing liens “against the property of any individual prior to his death on account of medical assistance paid...on his behalf under the state plan.” This prevents the state from attaching the non-past medical portion of the settlement. As a result of this ruling, states can assert a Medicaid lien only against that portion of a settlement earmarked for past medical expenses. The state may not recover against non-medical expense claims, such as pain and suffering, loss or earnings and permanent loss of future earnings. Needless to say, it is good practice in a personal injury settlement to make a clear allocation of damages.

Allocation is not only important, but must be fair. As Justice Stevens said in the Ahlborn opinion, “Although more colorable, the alternative argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation also fails. The risk that parties to a tort suit will allocate away the state’s interest can be avoided either by obtaining the state’s advanced agreement to an allocation or, if necessary, by submitting the matter to a court for a decision.”

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## **2 EXECUTOR OF A WILL- DUTIES AND RESPONSIBILITIES**

Compiled by Kenneth A. Vercammen, Esq.

Providing service to worried clients who are not familiar with the legal requirements is important to Elder Law attorneys. The following short article can be revised and sent to your clients who are executors or administrators of estates.

The procedures in an Estate Administration may take from six months to several years, and a client's patience may be sorely tried during this time. However, it has been our experience that clients who are forewarned have a much higher tolerance level for the slowly turning wheels of justice. The following is a portion of the details you may wish to inform clients who are executor after you have been retained:

#### Duty of Executor in Probate Estate Administration

1. Conduct a thorough search of the decedent's personal papers and effects for any evidence which might point you in the direction of a potential creditor;
2. Carefully examine the decedent's checkbook and check register for recurring payments, as these may indicate an existing debt;
3. Contact the issuer of each credit card that the decedent had in his/her possession at the time of his/ her death;
4. Contact all parties who provided medical care, treatment, or assistance to the decedent prior to his/her death;

Your attorney will not be able to file the NJ inheritance tax return until it is clear as to the amounts of the medical bills. Medical expenses can be deducted in the inheritance tax.

Under United States Supreme Court Case, Tulsa Professional Collection Services, Inc., v. Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr., Deceased, the Personal Representative in every estate is personally responsible to provide actual notice to all known or "readily ascertainable" creditors of the decedent. This means that is your responsibility to diligently search for any "readily ascertainable" creditors.

#### Other duties/ Executor to Do

Bring Will to Surrogate

Apply to Federal Tax ID #

Set up Estate Account at bank (pay all bills from estate account)  
Pay Bills

Notice of Probate to Beneficiaries (Attorney can handle)  
If charity, notice to Atty General (Attorney can handle)

File notice of Probate with Surrogate (Attorney can handle)

File first Federal and State Income Tax Return [CPA- ex Marc Kane]

Prepare Inheritance Tax Return and obtain Tax Waivers (Attorney can handle)

File waivers within 8 months upon receipt (Attorney can handle)

Prepare Informal Accounting

Prepare Release and Refunding Bond (Attorney can handle)

Obtain Child Support Judgment clearance (Attorney will handle)

Let's review the major duties involved-

**In General.** The executor's job is to (1) administer the estate--i.e., collect and manage assets, file tax returns and pay taxes and debts--and (2) distribute any assets or make any distributions of bequests, whether personal or charitable in nature, as the deceased directed (under the provisions of the Will). Let's take a look at some of the specific steps involved and what these responsibilities can mean. Chronological order of the various duties may vary.

**Probate.** The executor must "probate" the Will. Probate is a process by which a Will is admitted. This means that the Will is given legal effect by the court. The court's decision that the Will was validly executed under state law gives the executor the power to perform his or her duties under the provisions of the Will.

An employer identification number ("EIN") should be obtained for the estate; this number must be included on all returns and other tax documents having to do with the estate. The executor should also file a written notice with the IRS that he/she is serving as the fiduciary of the estate. This gives the executor the authority to deal with the IRS on the estate's behalf.

**Pay the Debts.** The claims of the estate's creditors must be paid. Sometimes a claim must be litigated to determine if it is valid. Any estate administration expenses, such as attorneys', accountants' and appraisers' fees, must also be paid.

**Manage the Estate.** The executor takes legal title to the assets in the probate estate. The probate court will sometimes require a public accounting of the estate assets. The assets of the estate must be found and may have to be collected. As part of the asset management function, the executor may have to liquidate or run a business or manage a securities portfolio. To sell marketable securities or real estate, the executor will have to obtain stock power, tax waivers, file affidavits, and so on.

**Take Care of Tax Matters.** The executor is legally responsible for filing necessary income and estate-tax returns (federal and state) and for paying all death taxes (i.e., estate and inheritance). The executor can, in some cases be held

personally liable for unpaid taxes of the estate. Tax returns that will need to be filed can include the estate's income tax return (both federal and state), the federal estate-tax return, the state death tax return (estate and/or inheritance), and the deceased's final income tax return (federal and state). Taxes usually must be paid before other debts. In many instances, federal estate-tax returns are not needed as the size of the estate will be under the amount for which a federal estate-tax return is required.

Often it is necessary to hire an appraiser to value certain assets of the estate, such as a business, pension, or real estate, since estate taxes are based on the "fair market" value of the assets. After the filing of the returns and payment of taxes, the Internal Revenue Service will generally send some type of estate closing letter accepting the return. Occasionally, the return will be audited.

**Distribute the Assets.** After all debts and expenses have been paid, the executor will distribute the assets. Frequently, beneficiaries can receive partial distributions of their inheritance without having to wait for the closing of the estate.

Under increasingly complex laws and rulings, particularly with respect to taxes, in larger estates an executor can be in charge for two or three years before the estate administration is completed. If the job is to be done without unnecessary cost and without causing undue hardship and delay for the beneficiaries of the estate, the executor should have an understanding of the many problems involved and an organization created for settling estates. In short, an executor should have experience

At some point in time, you may be asked to serve as the executor of the estate of a relative or friend, or you may ask someone to serve as your executor. An executor's job comes with many legal obligations. Under certain circumstances, an executor can even be held personally liable for unpaid estate taxes. Let's review the major duties involved, which we've set out below.

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**3. BALANCE BILLING** between the Medicaid program and the Medicare program.

***By: Thomas D. Begley, Jr., Esquire***

There is a significant difference on the issue of balance billing between the Medicaid program and the Medicare program.

1. *Medicaid.* Medicaid reimbursement rates are very low and as a result it is often difficult to obtain services because providers refuse to accept Medicaid. It is not possible for the patient to pay the difference between the private pay rate and the Medicaid pay rate. This is known as balance billing. Medicaid participating providers must accept the Medicaid payment as “payment in full.”<sup>[1]</sup> This means that providers accepting Medicaid waive their right to bill Medicaid beneficiaries for any amounts over the Medicaid payment.

Several states have refused to allow providers to assert liens against Medicaid beneficiaries where there is clear third party liability and the Medicaid beneficiary has obtained a significant tort recovery.

In Illinois,<sup>[2]</sup> the hospital brought an action against the Medicaid agency to allow it to refund the Medicaid reimbursement so that it could sue the Medicaid beneficiary who had obtained a substantial tort judgment. The Seventh Circuit held that the hospital could not refund the Medicaid payment to the Medicaid agency and sue the Medicaid beneficiary. The Court noted, “Medicaid is a payer of last resort.” The state can seek reimbursement from third parties, but private providers may not.

In a similar case in Florida,<sup>[3]</sup> the hospital placed a lien on the settlement award, but the court held that when a Medicaid patient obtains a tort recovery in excess of the medical expenditures paid by Medicaid, that recovery is meant to go to the injured party, not the provider. A similar result was reached in another Florida case.<sup>[4]</sup>

A federal appellate court has found that a hospital’s lien on the proceeds of a malpractice settlement was invalid and unenforceable because the hospital had already accepted Medicaid payments for the care provided to the patient.<sup>[5]</sup> “By accepting Medicaid payments, Spectrum waived its right to its customary fee for services provided to Bowling...” “Although Medicaid rates are typically lower than a service provider’s customary fees, medical service providers must accept state-approved Medicaid payment as payment in full and may not require that

patients pay anything beyond that amount.”

California invalidated two state statutes authorizing provider liens against Medicaid beneficiaries.<sup>[6]</sup> The statutes authorized providers to file liens against recoveries obtained by Medicaid beneficiaries even after the provider received Medicaid. The court found that the state statutes were preempted by federal legislation banning balance billing.

2. *Medicare.* Previously, Medicare had a prohibition against billing Medicare beneficiaries in excess of the payment made by Medicare. Participation has been limited to providers who agreed to accept Medicare as payment in full. Recent changes in the Medicare law<sup>[7]</sup> now permit a provider to bill a Medicare beneficiary or assert a lien against the beneficiary's recovery obtained from the tortfeasor by way of settlement or award.<sup>[8]</sup>

In the seminal case,<sup>[9]</sup> a hospital sought to recover from the Medicare patient more than it received from Medicare reimbursement. The 1st Circuit held that the fact that the patient recovered more than Medicare reimbursed the hospital did not entitle the hospital to charge the patient the difference between its full fee and Medicare's lower flat fee. The agreement between Medicare and the hospital was that in exchange for Medicare guaranteeing payment to the hospital, there would be no additional payment required from the Medicare beneficiary.

The recent changes now allow providers to bill the liability insurer or place a lien against the Medicare beneficiary's recovery.

142 U.S.C. §1396a(a)(25)(c); 42 C.F.R. §447.15; 42 U.S.C. §1320a-7b(d).

2 *Evanston Hospital v. Hauck*, 1 F.3d 540 (7th Cir. 1993).

3 *Mallo v. Public Health Trust of Dade County*, 88 F.Supp.2d 1376 (S.D. Fla. 2000).

4 *Public Health Trust of Dade County v. Dade County School Board*, 693 So.2d 562 (Fla. Dist. Ct. App. 1996).

5 *Spectrum v. Bowling*, 410 F.3d 304 (6th Cir. 2005).

6 *Olszewski v. Scripps Health*, 135 Cal. Rptr. 2d 1 (Cal. 2003).

7 68 Fed. Reg. 43940 (July 25, 2003).

8 42 C.F.R. 411.54(c)(2).

9 *Rybicki v. Hartley*, 782 F.2d 260 (1st Cir. 1986).

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#### 4. WE PUBLISH YOUR FORMS AND ARTICLES

To help your practice, we feature in this newsletter edition a few forms and articles PLUS tips on marketing and improving service to clients. But your Editor and chairs can't do it all. Please mail articles, suggestions or ideas you wish to share with others in our Committee.

Let us know if you are finding any useful information or anything you can share with the other members. You will receive written credit as the source and thus you can advise your clients and friends you were published in an ABA publication. We will try to meet you needs.

##### Send Us Your Marketing Tips

We are increasing the frequency of our newsletter. Send us your short tips on your great or new successful marketing techniques. You can become a published ABA author. Enjoy your many ABA benefits.

##### Send us your articles & ideas

To help your practice, we feature in this newsletter edition a few articles and tips on marketing and improving service to clients. But your Editor and chairs can't do it all. Please send articles, suggestions or ideas you wish to share with others.

General Practice, Solo and Small Firm Division:  
Elder Law Committee and the

##### Who We Are

The ESTATE PLANNING, PROBATE & TRUST COMMITTEE focuses on improving estate planning skills, substantive law knowledge and office procedures for the attorney who practices estate planning, probate and trust law. This committee also serves as a network resource in educating attorneys regarding Elder Law situations. We work with the Elder Law Committee to schedule programs at the ABA Annual meeting.

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Let us know if you are finding any useful information or anything you can share with the other members. You will receive written credit as the source and thus you can advise your clients and friends you were published in an ABA publication. We will try to meet you needs.

We also seek articles on Elder Law, Probate, Wills, Medicaid and Marketing. Please send your marketing ideas and articles to us. You can become a published ABA author.

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The Elder Law Committee of the ABA General Practice Division is directed towards general practitioners and more experienced elder law attorneys. The committee consistently sponsors programs at the Annual Meeting, the focus of which is shifting to advanced topics for the more experienced elder lawyer.

This committee also focuses on improving estate planning skills, substantive law knowledge and office procedures for the attorney who practices estate planning, probate and trust law. This committee also serves as a network resource in educating attorneys regarding Elder Law situations.

Kenneth Vercammen, Esq. co-Chair

Jay Foonberg, Beverly Hills Co-chair, Author of Best Sellers "How to Start and Build a Law Practice" and "How to get and keep good clients", Beverly Hills, CA [JayFoonberg@aol.com](mailto:JayFoonberg@aol.com)>

We will also provide tips on how to promote your law office, your practice and Personal Marketing Skills in general. It does not deal with government funded "legal services" for indigent, welfare cases.

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