

# Don't forget the liens: How to negotiate Medi-Cal and Medicare liens

By Parisima Roshanzamir

## INTRODUCTION

You have battled the insurance company and won, but alas, you are not done. Before any money can leave your trust account, you have to negotiate the liens. A “lien” is an insurance carrier, a medical provider, or a former attorney’s legal right to repayment. A lien holder’s right to be repaid attaches to the client’s recovery from a settlement or verdict.

Liens can present a daunting trap for the inexperienced. There are all sorts of liens out there. Some liens are statutory like the Medi-Cal lien (Welf. & Inst. Code §§ 14124.72-14124.791), the workers’ compensation lien (Lab. Code § 3856), the county medical benefits lien (Gov. Code § 23004.1), and the hospital lien (Civ. Code §§ 3045.1-3045.6). Other liens are contractual, like private insurance liens, attorney liens, or doctors-on-liens.

Negotiating liens is often a time consuming task: in the case of statutory liens like Medi-Cal or Medicare, an attorney’s failure to resolve these liens can result in disciplinary actions. The California State Bar provides a detailed discussion on the ethical parameters regarding an attorney’s

ethical obligations when dealing with liens. See California Standing Committee on Professional Responsibility and Conduct’s Formal Opinion 2008-175.

The focus of this article is limited to dealing with Medi-Cal and Medicare liens. Understanding the legislative history and the purpose behind the programs is a critical component to successful negotiation of these liens.

## MEDI-CAL, MEDICAID AND MEDICARE

### A. Medicaid or Medi-Cal: Which is it?

Not every client can afford to pay for health insurance. If you cannot afford your next meal, chances are you can’t afford to pay for health insurance. But even the poor deserve healthcare. This is the idea behind the Medicaid program.

The Medicaid program is a joint federal and state funded program that provides medical care for individuals who cannot afford to pay their own medical costs. The Medicaid program was launched in 1965 during the presidency of Lyndon B. Johnson and under Title XIX of the Social Security Act (“SSA”). (42 USC § 1396 et. seq.)

According to the U.S. Business insider, as of 2017, Medicaid provided free health insurance to 74 million low income and disabled people. While states are not required to participate in the Medicaid program, all states actually do participate in this program. *Medi-Cal is part of California’s federal Medicaid program.* (Welf. & Inst. Code, §§ 14000–14198, emphasis added.)

### B. Medi-Cal’s legal right to repayment is automatic

In exchange for receiving federal financial aid to give medical care to the needy, the State of California must comply with the Medicaid federal laws. (42 USC § 1396a; *Shewry v. Arnold*, (2014) 125 Cal. App.4th 186, 193.) Medi-Cal beneficiaries are also compelled to follow the Medicaid federal laws.

Specifically, Medicaid federal laws require California’s Department of Health Care Services (“DHCS”) to “take all reasonable measures to ascertain the legal liability of third parties ... to pay for [medical] care and services available under the plan ... to seek reimbursement for [medical] assistance to the extent of such legal liability; ... [and] to the extent that payment has been made ... for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.” (42 USC § 1396a(a)(25)(A)-(B),(H); emphasis added, internal citations excluded.)

Receiving health care benefits also requires, “the individual ... to assign the State any rights ... to payment for medical care from *any third party*; ... to cooperate with the State ... in obtaining [such] payments ... and ... in identifying, and providing information to assist the State in pursuing, *any third party* who may be liable.” (42 USC § 1396k(a)(1); see also *Arkansas Dep’t of Health & Human Servs. v. Ahlborn* (2006) 547 U.S. 268; emphasis added internal citations excluded.)

Thus, to receive benefits from Medi-Cal, your client must assign an automatic right



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to repayment to Medi-Cal and Medicaid services. Long before the case comes to your office, as a condition of being a Medi-Cal recipient, your client has assigned the State of California a statutory right to repayment, or a medical lien, out of any recovery received from a third party. (42 USC § 1396k(a)(1).) Most clients have no idea that Medi-Cal has a statutory right to repayment out of their recovery. Educate your client about Medi-Cal as early and as often as you can to help ease their anxiety at the end of the case and once it is time to negotiate your client's Medicaid or Medi-Cal liens.

### C. Medicare vs. Medi-Cal: What's the difference?

Medicare is a federally funded insurance program that provides healthcare for persons 65 years or older, certain disabled persons under 65, and persons with end-stage renal disease (permanent kidney failure requiring dialysis or a transplant). (42 USC § 1395.)

Until 1965, the Medicare program did not exist in the United States. President Johnson signed the program into law to provide health care for the elderly. The program has expanded over the years and its limits are constantly challenged depending on the country's political climate.

The history of Medicare and its different parts (A-D) is long and complex. One fundamental difference between Medi-Cal and Medicare is their application of benefits. Unlike Medi-Cal, Medicare is a secondary layer of health insurance. For example, Medicare may not pay for medical expenses when payment "has been made or can reasonably be expected to be

made under a workers' compensation plan, an automobile or liability insurance policy or self-insured plan, or under no-fault insurance." (42 USC § 1395y(b)(2); 42 USC § 1862(b)(2)(A)(ii); see the Medicare and Medicaid's comparison chart.)

### NEGOTIATING MEDICARE AND MEDI-CAL LIENS:

During your initial consult, find out if your client is a Medi-Cal or Medicare beneficiary. Make a copy of their Medi-Cal or Medicare benefit card. Let your client know from the very outset of the case that if Medi-Cal provides any payment for their medical care, Medi-Cal will have an automatic lien or right to repayment out of the client's recovery.

#### A. How to negotiate Medi-Cal liens

When it comes to negotiating Medi-Cal liens, first you must open a Medi-Cal lien claim. You can open a claim online or by mail. Once a claim has been opened, within 120 days you will receive an acknowledgement letter from Department of Health Care Services ("DHCS"). The acknowledgment letter will contain a claim number that you will need to include in all your future correspondence with DHCS.

At the end of the case, or once your client has completed treatment, whichever happens first, notify Medi-Cal through the Medi-Cal online Portal or by mail. (See chart included for online and mail information.) Before sending a final lien amount, Medi-Cal may take up to 180 days from the last date of your client's treatment to request a copy of all medical bills. Explain to your client that the process can be slow.

Once you have received a final lien amount, you may negotiate with Medi-Cal to reduce its final lien amount. Pursuant to California Welfare and Institution Code 14124.76(a), Medi-Cal's recovery 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.*" (Welf. & Inst. Code, § 14124.76(a), emphasis added.)

DHCS will require a copy of the parties' settlement agreement, attorney fees and litigation costs before accepting a *substantial* reduction of its lien amount. Thus, it is best to provide DHCS with the above items in advance.

#### B. When Medi-Cal's lien exceeds your client's recovery

Before 2006, all states (including California) could recover the entire value of their liens even if that would leave the injured person with little to no recovery. The case of Heidi Ahlborn changed all that.

Heidi Ahlborn was a 19-year-old college student and an aspiring teacher. (*Arkansas Dept. of Health and Human Servs. v. Ahlborn* (2006) 547 U.S. 268.) Heidi was involved in a serious, catastrophic crash that left her "brain damaged, unable to complete her college education, and incapable of pursuing her chosen career." (*Id.*) While the case was in litigation, Heidi applied for and was granted medical assistance through Arkansas' Medicaid health program. (*Id.*, at p. 270)

The case settled for policy limits of \$550,000. (*Id.*, at p. 274.) "The settlement was not allocated between the various categories of damages. The state of Arkansas

claimed that it was entitled to the entire sum of \$215,645 it had expended, while the beneficiary [Heidi Ahlborn] contended that [Arkansas] was entitled only to that portion of the settlement that was attributable to medical expenses.” (*Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 752; emphasis added.)

To facilitate resolution, the parties had stipulated to the following terms: “(1) the Ahlborn’s entire claim was reasonably valued at \$3,040,708; (2) the \$550,000 settlement amounted to approximately one-sixth of that amount; and (3) if the Ahlborn’s construction of the applicable federal law was correct, Arkansas Medicaid program was entitled to recover \$35,581, i.e., only approximately one-sixth of the \$215,645 benefits provided.” (*Ahlborn, supra*, 547 U.S. at p. 274; *Bolanos, supra*, 169 Cal.App.4th at p. 752.)

Deciding the case, the United States Supreme Court held “Federal Medicaid law does not authorize ADHS [Medicaid] to assert a lien on Ahlborn’s settlement in an amount exceeding \$35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas’ third-party liability provisions are unenforceable insofar as they compel a different conclusion.” (*Ahlborn, supra*, 547 U.S. at 292.) The U.S. Supreme Court explained “because the tortfeasors accepted liability for only one-sixth of Ahlborn’s overall damages ... the relevant “liability” extends no further than that amount.” (*Id.*, at 270.)

Section §1396k(b) of Medicaid law does not mean “that State must be paid in full from any settlement. Rather, because the State’s assigned rights extend only to recovery of medical payments, what §1396k(b) requires is that the State be paid first out of any damages for medical care before the recipient can recover any of her own medical costs.”

(*Ahlborn, supra*, 547 U.S. at p. 292, emphasis added.)

California Welfare & Institutions Code section 14124.76(a) incorporates the holding of *Ahlborn* into California’s governing Medi-Cal laws:

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,

MEDICAID / MEDI-CAL		MEDICARE
<b>Agency</b>	Federal and State Funded Program	Federal Funded Program
<b>Eligibility</b>	Provides health care coverage for low-income individuals regardless of their age	Provides health care coverage for <ul style="list-style-type: none"> <li>• 65 years or older,</li> <li>• Certain disabled persons under 65,</li> <li>• Persons with end-stage renal disease.</li> </ul>
<b>Coverage</b>	Covers basic health care and hospital stays.	Four part system each part covering different services. Part A: Hospital stay Part B: Doctor fees and lab costs Part C: Supplemental Coverage Part D: Prescriptions and drugs
<b>Contact Information</b>	DHCS Department of Health Care Services Third Party Liability and Recovery Division Personal Injury Unit - MS 4720 P.O. Box 997425 Sacramento, CA 95899-7425 (916) 650-0490 <a href="http://www.dhcs.ca.gov/services/Pages/TPLRD_PersonalInjuryProgram.aspx">www.dhcs.ca.gov/services/Pages/TPLRD_PersonalInjuryProgram.aspx</a>	BCRC Benefits Coordination and Recovery Center P.O. Box 138897 Oklahoma City, OK 73113-8897 (855) 798-2627 <a href="http://www.cob.cms.hhs.gov/MSPRP">www.cob.cms.hhs.gov/MSPRP</a>

or medical care, provided on behalf of the beneficiary .... Absent the director’s advance agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses, ... the matter shall be submitted to a court for decision. In determining what portion ... represents payment for medical expenses, ... 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.

(Welf. & Inst. Code, § 14124.76(a); see also 42 U.S.C. §§ 1396a(a)(18) and 1396p; emphasis added.)

The decision in *Ahlborn* radically reshaped the liens Medi-Cal could assert against recoveries in personal injury cases. The *Ahlborn* formula and its progeny provide ample leverage and legal authority to obtain substantial lien reduction in cases involving Medi-Cal.

### C. How to negotiate Medicare liens

Before resolving a Medicare lien, you will first need to open a claim with Medicare’s Benefit Coordination and Recovery Contractor (“MSPRC”).

Unlike Medi-Cal’s online program, Medicare’s Secondary Prayer Recovery Portal (“MSPRP”) requires a login and ID. The MSPRP verification process may take up to three weeks or longer. Thus, if your firm does not have an online profile, set one up today at <https://www.cob.cms.hhs.gov/MSPRP/>.

To open a Medicare claim, the Benefits Coordination & Recovery Center (BCRC) requires an attorney to submit a signed “proof of representation and consent to release” form. A copy of these forms can be found on MSPRP’s portal. Medicare will not send you a reminder to submit the above forms. So to avoid delay, make sure you include these documents when setting up a Medicare claim. Otherwise, you will be waiting for Medicare to send you an acknowledgement letter and none

will ever arrive.

Within 60-90 days of opening a claim, you will receive a notice of lien letter from Medicare Secondary Payor Recovery Center (“MSPRC”) outlining the process that you will need to follow. Contact Medicare if you have not received any correspondence within 90 days of opening your case. (See chart for contact information.)

As soon as the case is settled, or the client has completed treatment, whichever occurs first, notify MSPRC and request an itemized conditional payment lien from MSPRC. Once you have received the itemized payment carefully review each item. If you look carefully, you will often find charges unrelated to your client’s claimed injuries.

Cross out the unrelated claims with a pen. Using a pen is better than highlights because highlights don’t always transmit through fax or scans. Within 60-90 days, you should receive a response from Medicare regarding your disputed redactions and the final Medicare lien amount.

Once you have the final lien amount, you may pay, appeal, and request a waiver of the lien. Since Medicare is a federally funded program, its applicable deductions are governed by Federal Regulations. Pursuant to 42 CFR 411.37(d), “If Medicare payments equal or exceed the judgment or settlement amount, the recovery amount is the total judgment or settlement payment minus the total procurement costs.” (*Id.*) Procurement costs include attorney fees and litigation costs.

Sadly, Medicare lien laws have not yet been challenged the same way that *Ahlborn* challenged and changed Medicaid laws. Thus, Medicare is less flexible in accepting substantial lien negotiations and is more likely to pursue the full value of its asserted liens even if that may result in little to no recovery for the injured person. In cases involving Medicare liens, be sure to know and include the exact lien amount before accepting any offer of settlement.

## CONCLUSION

Negotiating Medicaid, Medi-Cal or Medicare liens can be time consuming and sometimes a headache. But if you set your client’s expectations early, start the process timely, and follow through with the deadlines described above, the process will be less daunting. ■

# Protecting rights on Medi-Cal liens

By Lea-Ann Tratten, CAOC Political Director

This past year saw Consumer Attorneys of California overcome an aggressive effort by the Brown Administration’s Department of Health Care Services to eliminate the equitable “50% rule” that helps reduce Medi-Cal liens.

The effort was mounted through the state budget process and was claimed to result in revenue of \$12 million to the state. Our grueling push to get the provision kicked out of the budget was aided by the insightful guidance of President Greg Bentley, former President Bruce Brusavich, and CAOC stalwarts Bob Bale and Steve Stevens.

This was no easy task and most experts thought we couldn’t do it. Especially surprising was our ability to convince each house of the Legislature to reject the provision without finding an additional \$12 million in the budget to replace it. Senate President Pro Tem Kevin DeLeon and Assembly Speaker Anthony Rendon had our clients’ backs and refused to further restrict the rights of Medi-Cal beneficiaries.

Make no mistake: This is a hit to the department. Under the ACA, the federal government foots the bill for the “expansion” population in the state’s Medi-Cal program. The state is, in turn, obligated to pay the feds back when it recovers any funds through a lien. Importantly, the state is prohibited from waiving the debt that the state must reimburse the federal government – reducing a claim under the 50% rule is considered waiving the repayment of the federal debt. So, when cases involving an injured individual covered under the ACA settle under the 50% rule, the Department of Public Health must reach into the state’s general fund to repay the Federal Government.

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One way for the state to avoid this problem is when beneficiaries use the so-called *Ahlborn* process to resolve liens. Reducing a lien under *Ahlborn* is not considered waiving a federal debt. We understand that very few practitioners use the reduction process. We urge you to consider learning about the process; practitioners report that the Department is much easier to work with when that the process is employed.<sup>1</sup>

We know that many of you are finding resolving Medi-Cal liens increasingly difficult. Some of the many challenges that have been reported to us include the following:

1. Prolonged delay in receiving lien information from the DHCS.
2. Low value of medical services devalues cases.
3. *Cuevas* – future medical damages.
4. Department reporting or threatening to report attorneys to State Bar alleging ethics violations.
5. Requirement by some judges to seek a letter that no lien is being asserted by the Department.

Now that we are out of the danger zone, we plan to open discussions with the health department in an attempt to address these concerns. If you have encountered any of the problems listed above, we would like to hear your stories. We would also like to learn of any other specifics on challenges you face in resolving these Medi-Cal liens.

As always, we thank you for your support. This was a quiet battle waged outside the typical committee process. Pure political strength along with our sound legislative strategy led to this terrific result. ■

<sup>1</sup> Although *Ahlborn* was reversed by Congress during a late-night budget deal in 2013, officials with the American Assn. for Justice say they anticipate that federal legislation will be passed reestablishing the process and applying it retroactively.