

Testimony
Reengrossed Senate Bill Number 2132 – Department Of Human
Services
House Human Services Committee
Representative Clara Sue Price, Chairman
February 21, 2007

Chairman Price and members of the House Human Services Committee, I am Melissa Hauer, an attorney with the Department of Human Services. I am here today to testify in support of reengrossed Senate Bill number 2132.

This bill clarifies Medicaid third party liability recovery in the context of the U. S. Supreme Court's decision in *Arkansas Department of Human Services v. Ahlborn* ("Ahlborn")¹. Third party liability (TPL) recovery is the process of identifying parties that might be liable to pay for medical care for Medicaid recipients and recovering from those parties payments made by Medicaid. All States that participate in the Medicaid program are required by federal law to engage in TPL recovery to ensure that Medicaid is the payer of last resort.² The Department of Human Services recoups some Medicaid expenditures in this way and these funds are recycled back into the Medicaid program.

An example of a common third party liability recovery scenario is when a Medicaid recipient is injured in a car accident due to the negligence of another driver. The Medicaid recipient needs medical care because of the accident and Medicaid pays for that care. The Medicaid recipient then attempts to recover his damages from the negligent driver. This may include the filing of a lawsuit against the driver or it may involve a

¹ 126 S.Ct. 1752, 164 L.Ed.2d 459, 74 USLW 4214, Med & Med GD (CCH) P 301,841, 06 Cal. Daily Op. Serv. 3597, 2006 Daily Journal D.A.R. 5159.

² 42 U.S.C. § 1396a(a)(25)

settlement before any lawsuit is filed. In this situation, the Department must be repaid for the cost of any medical care that was provided to the Medicaid recipient due to the accident. As a condition of receiving Medicaid benefits, recipients must agree to assign to the state any right of recovery the recipient may have against these liable third parties.³

While it is clear that states have to recover Medicaid funds paid when some third party is liable for those medical costs, it was not clear what happened when the medical costs were greater than the amount available from the liable third party. This question arose, for example, when a negligent driver caused injuries that resulted in a Medicaid recipient needing medical care totaling \$200,000, but the driver only had insurance coverage of \$100,000 for the accident and was otherwise judgment-proof. In that case, does the Medicaid agency have the right to claim the entire \$100,000 in order to satisfy its claim? Or does the Medicaid recipient get a portion of the proceeds to compensate him for pain and suffering, lost wages, or future lost earnings? If so, how much does the recipient keep and how much must be used to repay Medicaid? That is the question addressed in the *Ahlborn* decision.

In *Ahlborn*, the Court decided that the federal Medicaid law only permits a State to recover its payments for medical assistance from the portion of a settlement attributable to medical items and services. The Court further determined that the State may not attempt to recover from anything other than the portion allocated to medical items and services.

What this means for Medicaid third party liability recovery programs.

³ N.D.C.C. 50-24.1-02(2) and 50-24.1-02.1

Prior to the Supreme Court's decision in *Ahlborn*, the Centers for Medicare and Medicaid Services (CMS) had interpreted the Medicaid third party liability provisions to authorize States to pass laws permitting full recovery of Medicaid payments from third party liability settlements, regardless of how the parties allocated a settlement. The Supreme Court has rejected this interpretation. It did note, however, that States should become involved in the case to influence the amount that is allocated in a settlement to medical items and services. Thus, a State's recovery rights could be protected and the adverse consequences of the decision mitigated by vigorous action on the part of a State to increase the amount of a settlement allocated to medical items and services.

How This Bill Would Mitigate the Adverse Consequences of *Ahlborn*.

To protect the Medicaid program's interest in the allocation of settlement monies to medical items and services, the State must be involved in the litigation and settlement process. This bill will accomplish that goal by:

- Requiring the Department to join in a release or satisfaction of a cause of action when a Medicaid claim is at issue. This will ensure that the Department is notified of any potential release of the recipient's claim against the third party. The failure to get the Department to join in the release renders the release invalid as to the Department's claim.
- Requiring Medicaid recipients to cooperate in the recovery of third party benefits, including providing information about the liable third party.

- Allowing the Department to recover the full extent of Medicaid benefits paid from the third party, or from the recipient or his legal representative if they have actually received payment of third party benefits.
- Requiring the recipient and the Department to give written notice to the other if either brings a lawsuit against the third party and to give information about the court in which the lawsuit was filed. Either one may then join in the other's action.
- Providing that a judgment, award, or settlement in an action by a recipient may not be satisfied without first giving the Department notice and a reasonable opportunity to file and satisfy its claim or proceed with any other action allowed by law to recover third party benefits due.
- Providing that any transfer with an intent to defeat the Department's right to recovery is void.
- Providing that a Medicaid recipient who has received payment of any third-party benefits for which Medicaid has a claim, must pay the Department for its claim within 60 days after receiving those funds from the third party, or pay those funds into a trust account pending a decision by a judge as to how the third-party benefits should be allocated between the Department and the Medicaid recipient.
- Providing that the Department may determine that it is more cost-effective to accept payment of a lesser amount than the full cost of

Medicaid paid in order to avoid litigation. Cost-effectiveness will be determined on a case-by-case basis. The Department could reduce the amount of its claim when, for example, the legal liability of the third party is unclear or when an estimate of the cost to the Medicaid program of pursuing its claim would likely be greater than the amount available for recovery.

This concludes my testimony. I will be happy to try to answer any questions you may have. Thank you.