# AHLBORN REDUCTIONS

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Many of our clients are Medicaid beneficiaries. When our case resolves, the Arkansas Department of Human Services will want its money back. Invariably, it will want more than it is entitled to get. Accordingly, you may need to seek an allocation of damages in the matter pursuant to United States Supreme Court cases – *Arkansas Department of Health and Human Services, et al. v. Ahlborn*, 547 U.S. 268 (2006), and *Wos v. E.M.A. ex rel Johnson*, 133 S. Ct. 1391 (2013), -- so that any reimbursement made to the Arkansas Department of Human Services (hereinafter "Arkansas Medicaid") under the Medicaid program will be compliant with federal law. Because Medicaid is a cooperative federal/state program, Arkansas' statutory scheme governing Medicaid reimbursement must be read in harmony with federal law governing Medicaid. An allocation is necessary because:

- Federal law, including the United States Supreme Court decision in *Arkansas DHS v. Ahlborn,* 547 U.S. 268 (2006), establishes that the Medicaid assignment relied on by Arkansas Medicaid gives Arkansas Medicaid no more than the right to recover the portion of a settlement or judgment representing payments for past medical expenses.

- Under Arkansas Code section 20-77-315(a), Arkansas Medicaid is only entitled "to reimbursement for past medical assistance payments from that portion of a third-party settlement, judgment, or award or from any other third-party payment that compensates for the medical expenses." Ark. Code. § 20-77-315(a).

Given the binding federal precedent and the State's acknowledgment in most cases, consistent with *Ahlborn* that it's right to reimbursement is limited, the Court is obligated to conduct an allocation proceeding. The rule that has emerged in state and federal litigation after *Ahlborn* is that where there is sufficient evidence of the total value of a plaintiff's claim, the court, based on the evidence, computes a ratio based on the actual settlement versus the total value of the claim. This ratio can then later be applied to the total reimbursement claim being made by Medicaid. This procedure avoids running afoul of the anti-lien provisions of 42 U.S.C. sections 1396a(a)(18) and 1396p. Requiring a Medicaid recipient to reimburse Medicaid out of settlement funds designated for purposes other than past medical care is explicitly barred by the United States Supreme Court in *Ahlborn. Ahlborn,* 547 U.S. at 284-85.

**A. Arkansas's Medicaid Statutes Must Comply With Federal Law.**

The Arkansas Medicaid program is not a creature of state law but is a cooperative program with the federal government. "Once a state chooses to adopt the program, it must create a plan conforming to the requirements of the federal statute, 42 U.S.C. § 1396 et seq., and related federal regulations." *Id.* Arkansas courts are also bound by the United States Supreme Court's interpretation of the federal Medicaid statutes. Accordingly, federal law, including the United States Supreme Court's decision in *Ahlborn,* governs.

**B. In *Ahlborn,* the United States Supreme Court Limited Medicaid's Reimbursement to Damages Allocated to Past Medical Care.**

The United States Supreme Court's decision in *Ahlborn* is directly on point and established the proper procedure for Medicaid reimbursement without violating federal law. The *Ahlborn* court explicitly held that a state may not violate the anti-lien provisions of 42 U.S.C. §§ 1396a(a)(18) and 1396p by requiring a Medicaid recipient to reimburse it out of settlement funds designated for purposes other than compensation for medical care already received. While the parties in *Ahlborn* stipulated to the value of the claim, the holding in *Ahlborn* is not limited to cases where the parties have reached a stipulation. The United States Supreme Court articulated how a reimbursement is to be computed so as to avoid violating the anti-lien laws.

In *Ahlborn*, the United States Supreme Court addressed the very issue of Medicaid reimbursement that is presented by Arkansas Medicaid seeking to recover for medical expenses it paid on behalf of Plaintiff. Heidi Ahlborn sustained serious and permanent injuries in a car accident, and the Arkansas Department of Health and Human Services (Arkansas Medicaid) paid out $215,645.30 to health care providers on her behalf. Ahlborn filed suit against third-party tortfeasors for causing her injuries and sought damages for past medical expenses, pain and suffering, loss of future earnings, and future medical care. The parties settled the case for $550,000, but the parties did not allocate the settlement funds between categories of damages. Arkansas Medicaid then intervened in the suit and cited Arkansas law giving Arkansas Medicaid an assignment of any tort recovery. The parties stipulated that Ahlborn's case was reasonably valued at $3,040,708.12 and that the settlement of $550,000 amounted to approximately one-sixth of that sum.

The United States Supreme Court reviewed federal Medicaid law and concluded that Arkansas Medicaid's recovery for benefits paid could not exceed the portion of the settlement representing payments for medical care. The court held that a Medicaid lien is limited to

judgment or settlement proceeds from "that portion of a settlement that represents payments for medical care." *Ahlborn*, 547 U.S. at 282. The *Ahlborn* court also cited the anti-lien prohibition contained in 42 U.S.C. § 1396p(a), holding that while Medicaid may attach (in many cases) a lien to settlement proceeds attributable to past medical costs, this statute "precludes attachment or encumbrance of the remainder of the settlement." *Ahlborn*, 547 U.S. at 284. In determining the portion of Ahlborn's settlement attributable to medical expenses, the Court approved application of a ratio (based on the value of the claim versus the settlement amount) to Arkansas Medicaid's reimbursement claim, stating: "Here, the tortfeasor has accepted liability for only one-sixth of the recipient's overall damages, and Arkansas Medicaid has stipulated that only $35,581.47 of that sum represents compensation for medical expenses. Under the circumstances, the relevant 'liability' extends no further than that amount." *Ahlborn*, 547 U.S. at 280-81.

Nothing in *Ahlborn* limits the application of its central principle – that any reimbursement must comply with the anti-lien laws and be limited to the portion of damages attributable to past medical expenses. In addressing the stipulation made by the parties in *Ahlborn*, the United States Supreme Court found that "the effect of the stipulation is the same as if a trial judge had found that Ahlborn's damages amounted to $3,040,708.12 (of which $215,645.30 were for medical expenses), but because of her contributory negligence, she could only recover one-sixth of those damages." *Ahlborn*, 547 U.S. at 280 n.10. The court went on to make it plain that in cases where a settlement had been reached but no allocation had been made, the same principles must be applied. "Even in the absence of such a postsettlement agreement, ... the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Ahlborn*, 547 U.S. at 288. The requested allocation will do what

*Ahlborn* held needs to be done – create factual findings based on the evidence regarding the damages paid in settlement.

### C. The United States Supreme Court has Recognized That the Allocation Method Recognized in *Ahlborn,* and Such a Procedure and has Been Applied by Other State Courts.

In *Wos,* the United States Supreme Court specifically referenced for a court to allocate damages. *Wos,* 133 S. Ct. at 1401. Arkansas Medicaid's recovery must be limited to damages attributable to medical expenses and when a settlement had been reached, an allocation proceeding in the trial court is an appropriate mechanism for carrying out this requirement. Arkansas Medicaid's lien upon payment of medical assistance should be applied and considered valid as to the entire settlement, after the claim of the attorney or attorneys for fees and costs, unless a more limited allocation of damages to medical expenses is shown by a preponderance of the evidence. For example, in *Moss v. Wittmer,* 2009 OK CIV APP 102, 228 P.3d 541, the court of appeals held that this provision "restricts the enforcement of the statutory lien to that portion of a settlement which is allocated to *medical expenses.*" *Moss,* 228 P.3d at 545. To do otherwise would be "contrary to the federal Medicaid statute's anti lien provision …" as explained in *Ahlborn. Id.* The *Moss* court held that it was error for the trial court to find otherwise. *Id.* at 546. The court went on to reverse and remand, directing the trial court to conduct an evidentiary hearing on the allocation of the settlement proceeds. *Id.; cf. Edwards v. Ardent Health Serv., LLC,* 2010 OK CIV APP 113, 243 P.3d 25 (recognizing that the Oklahoma Medicaid lien "extends no further than the portion of the recovery representing medical costs," but reversing due to lack of evidentiary support for proposed allocation under 5051.1); *Price v. Wolford,* 608 F.3d 698, 707-08 (10th Cir. 2010) (approving application of section 5051.1 but reversing because no evidence was presented to support trial court's allocation of damages). Consistent with *Ahlborn* and *Wos,* the trial court may conduct an allocation hearing so that the damages may

be apportioned to determine what, if any, of the damages constitute payments for past medical expenses that could potentially be recoverable by Arkansas Medicaid.

### D. State Laws Cannot be used to Circumvent Federal Law that Limits Arkansas Medicaid's Recovery to Damages Attributable to Medical Expenses

Arkansas' own statutory scheme, amended in 2011, acknowledges that its right to reimbursement is limited. Section 20-77-315, which deals with proceeds from a third-party settlement such as this, includes the following language: "The Department of Human Services is entitled to reimbursement for past medical assistance payments from that portion of a third-party settlement, judgment, or award or from any other third-party payment that compensates for the medical expenses." Ark. Code. § 20-77-315(a). Section (b) further supports the need for an allocation proceeding:

> The department is entitled to receive the full amount of its medical assistance claim under this subchapter unless the portion of the third-party settlement, judgment, or award or other third-party payment that compensates for the medical expenses is less than the full amount of the department's medical assistance claim.

Ark. Code. § 20-77-315(b). Accordingly, under both federal and Arkansas law, it is necessary for this Court to determine what portion of the settlement is allocable to compensation for the past medical expenses paid by Arkansas Medicaid.

In no event may a state legislature or a state agency create a one-size-fits-all provision for Medicaid recovery or any other provision that allows the state to take damages from a plaintiff that are not attributable to past medical expenses. Recently, the West Virginia Supreme Court, in a thorough and well-reasoned opinion, explicitly held that despite a state statute similar to the Arkansas Medicaid Statute giving Medicaid a right to recover all payments expended for medical assistance with the exception of procurement costs, under *Ahlborn*, Medicaid could only obtain reimbursement from the portion of the settlement constituting damages for past medical

expenses. *In re E.B.*, 729 S.E.2d 270, 288 (W. Va. 2012) (a copy is attached as Exhibit "C"). The court held that in the absence of an allocation, the trial court was required to hold an evidentiary damages hearing to establish a proper allocation. *Id.* at 295. The court also approved the trial court's allocation of the settlement proceeds and use of the ratio recommended by the *Ahlborn* court. *Id.* at 295-96.

Other courts have similarly used allocation proceedings to avoid violating federal law. In *Bolanos v. Superior Court*, 169 Cal.App.4th 744, 87 Cal.Rptr.3d 174 (2008), a California appellate court held that an allocation of settlement proceeds was necessary because "without such an allocation, the principle set forth in *Ahlborn*, that the state cannot recover for anything other than past medical expenses, cannot be carried into effect." *Bolanos*, 87 Cal.Rptr.3d at 180. In a later case, a California court explained that, "the trial court was required to distinguish past medical benefits in the settlement from other categories of damage using a rational approach that takes into consideration the trial court's various findings, including its findings concerning the total value of plaintiff's damages and the reasonableness of the settlement amount in light of those total damages." *Lima v. Vouis*, 174 Cal.App.4th 242, 260, 94 Cal.Rptr.3d 183, 196 (Cal. App. 2009). A New York appellate court has also held that under *Ahlborn*, "a hearing is required to determine the total value of plaintiff's loss, from which the proportionate share [recoverable by Medicaid] of the settlement proceeds may then be calculated." *Homan v. County of Cattaraugus Dept. of Soc. Services*, 74 A.D.3d 1754, 1755, 905 N.Y.S.2d 387, 388 (N.Y. App. Div. 2010).

In *Wos*, the United States Supreme Court rejected North Carolina's attempt to automatically make one third of the proceeds from any settlement available to the state for Medicaid reimbursement. Under federal law, Medicaid cannot recover from the portion of a judgment or settlement not attributable to past medical expenses. Because the automatic one-

third scheme created by North Carolina could lead to that result, it violated federal law. *Wos*, 133 S. Ct. at 1297-98. The Supreme Court held that "an irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses." *Wos*, 133 S. Ct. at 1399. Instead, the Supreme Court made it clear that when the parties cannot agree on an allocation, the parties are to ""submi[t] the matter to a court for decision." *Id.* The Court went on to recognize that "trial judges and trial lawyers, however, can find objective benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial." *Wos*, 133 S. Ct. at 1400. That is precisely what Plaintiffs are asking this Court to do in this proceeding – review the evidence, project what damages Plaintiffs likely could have proved if the case had gone to trial, compare that to the actual amount of the settlement, and determine what percentage of the settlement is therefore allocable to past medical expenses. This will prevent Arkansas Medicaid from violating federal law by seeking reimbursement from the portions of the settlement that are not compensation for past medical expenses.

# APPENDIX

Attached are the following pleadings from a recent *Ahlborn* determination in Jefferson County:

1. Plaintiffs' Motion to Allocate Settlement Funds Pursuant to *Ahlborn*
2. Response to Plaintiffs' Motion to Allocate Funds Pursuant to *Ahlborn.*
3. Brief in Support of Response to Plaintiffs' Motion to Allocate Settlement Funds Pursuant to *Ahlborn*
4. Motion to Intervene
5. Complaint in Intervention
6. Chart
7. Order