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## Fed. Judge Cuts Medicaid Lien in \$12 Mil. Mold Settlement

In a decision that is sure to grab the attention of the personal injury bar, a federal judge has ruled that a settling plaintiff cannot be automatically required to reimburse the Pennsylvania Department of Public Welfare for 100 percent of her Medicaid expenses because a settlement always reflects a compromise.

The ruling by U.S. District Judge Berle M. Schiller comes just a few months after lawyers at Kline & Specter secured a settlement worth nearly \$12 million in a "state-created danger" suit against the Philadelphia Housing Authority over persistent mold in a home that allegedly triggered an acute asthma attack and left a teenage girl brain damaged.

The settlement in *McKinney v. PHA* sparked a new court battle when lawyers for DPW moved to vacate the settlement and to intervene in the suit to assert a \$1.2 million lien.

In court papers, DPW's lawyer, Michael J. Laffey of Laffey & Associates in Carnegie, Pa., argued that the agency was legally entitled to the full amount of its lien for the medical care provided to Angelique McKinney and her daughter, Ebony Gage.

Laffey argued that state law controlled the issue and that Pennsylvania has established a presumption that half of a plaintiff's settlement is properly attributed to compensation for medical expenses. As a result, Laffey argued, in cases such as *McKinney*, DPW can lawfully collect its full lien because that amount does not exceed half the total settlement in this case.

But Schiller flatly rejected some of Laffey's arguments about the nature of Medicaid liens.

"DPW's proposed rule ignores the reality of settlement," Schiller wrote.

"Settlement, by its very nature, involves compromise. In a legal system where outcomes are uncertain, parties settle to hedge against the risk of an unfavorable outcome. DPW's proposed rule amounts to a 'heads I win, tails you lose' scenario," Schiller wrote.

If the plaintiffs had taken the case to a jury verdict and been awarded the full \$1.26 million as compensation for past medical expenses, Schiller found that the agency "would undoubtedly be entitled to that money (less attorneys' fees and costs)."

But Schiller found that a settlement demands compromise on all sides.

"When parties settle, everyone sacrifices. DPW's suggestion that it does not need to sacrifice (unless its lien is for more than half of a plaintiff's total recovery) ignores this reality," Schiller wrote.

DPW's argument, Schiller said, ignored the fact that the plaintiff "traded away some of its recovery prospects for certainty (and cash) via a settlement," and would hold that DPW "would reap the benefits without giving up anything."

But Schiller also rejected the arguments of the plaintiffs lawyers who urged the judge to adopt a "ratio" method for calculating the proper reimbursement.

In court papers, plaintiffs attorneys **Shanin Specter, Charles L. Becker and Michael A. Trunk** argued that the *McKinney* case was worth more than \$45 million, and that the settlement therefore reflected a significant compromise.

As a result, the plaintiffs argued, DPW is entitled to just a fraction of its lien — about \$205,000.

The plaintiffs team argued that DPW was ignoring the teachings of the U.S. Supreme Court's 2006 decision in *Arkansas Department of Health and Human Services v. Ahlborn*, which clearly held that a state agency could not recover any funds that did not represent payment for medical expenses.

Schiller agreed that the *Ahlborn* decision provided significant guidance about the interplay between federal and state law.

The justices held that the federal Medicaid statute establishes a general "anti-lien" rule, barring states in most instances from placing liens on Medicaid beneficiaries' property. However, the high court noted that the Medicaid statute allows states to require Medicaid beneficiaries to assign to the state the beneficiaries' right to recover payments for medical care from third parties.

Since Medicaid creates a default anti-lien position and makes a specific exception for recovery of medical expenses, the justices held that states could not place liens on funds that compensated for damages other than medical expenses.

Schiller found that, in so deciding, the justices had "rejected the argument that a rule of full reimbursement was necessary to avoid settlement manipulation — the risk that plaintiffs and defendants would stipulate that only a small portion of their settlement was attributable to medical expenses and thereby prevent the state medical agency from recovering its rightful share."

But Schiller also rejected the plaintiffs' argument that *Ahlborn* called for a ratio approach.

"Plaintiffs are flat wrong when they argue that their ratio theory is required by *Ahlborn*. The parties in *Ahlborn* stipulated as to the portion of their settlement that represented compensation for medical expenses. ... However, it does not follow that all other parties are bound to apply this calculation," Schiller wrote.

The problem with the plaintiffs' ratio theory, Schiller said, "is that it requires a judicial ascertainment of the platonic 'true value' of plaintiffs' claims."

Such an approach, Schiller said, "would convert *Ahlborn* hearings into mini-trials, replete with competing damages experts and witnesses testifying as to issues like humiliation, pain and suffering, and loss of enjoyment of life. This would seriously undermine the economy of settlement."

Schiller decided instead that the proper approach was for the trial judge to "assess the factors that would have influenced the parties' settlement positions and to make an ultimate determination of what portion of the settlement represents compensation for past medical expenses."

As the judge who presided over the *McKinney* case through summary judgment and *Daubert* hearings, as well as settlement talks, Schiller concluded that the plaintiffs had settled for two-thirds of the value of the case.

As a result, Schiller said, DPW is entitled to two-thirds of its \$1.2 million lien, minus fees and costs, for a final reimbursement award of about \$537,000.

DPW spokesman Michael Race said the agency is evaluating whether to appeal the ruling.

"Obviously we would have preferred if the court had adopted our arguments," Race said. "But we have to look out for taxpayers — these are public funds — and we're happy to get some of the money back."

Becker, speaking for the plaintiffs' team, said Schiller's opinion "provides valuable guidance on the scope of DPW's reimbursement rights under federal Medicaid law. The opinion will be consulted frequently and should foster more efficient lien resolution in future cases."

