

**FILED**

**June 21, 2012**

**RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

Ketchum, C.J., dissenting:

I disagree with the majority's conclusion that West Virginia taxpayers can only be reimbursed from the pro rata portion of the plaintiff's settlement representing past medical expenses. As a result, West Virginia will only be reimbursed 17.24% of the \$557,104.71 (\$96,080.43) that DHHR paid on the plaintiff's medical bills. If West Virginia had been allowed to be reimbursed from that portion of the plaintiff's settlement representing damages for *all* medical expenses, past and future, it would have been reimbursed all of the \$557,104.71 it paid on plaintiff's medical bills.

The majority's holding is the result of an erroneous reading of the United States Supreme Court's seminal case on this issue, known as *Ahlborn*.<sup>1</sup> Contrary to the conclusion reached in the majority opinion, *Ahlborn* clearly held that West Virginia can be reimbursed from any part of a settlement representing damages for medical expenses, past and future.<sup>2</sup>

The Supreme Court in *Ahlborn* made no distinction between settlement damages for past medical care and those for future medical care. In addition, nothing in the Medicaid statutes indicate that the State may not seek reimbursement for medical bills it paid, for a Medicaid

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<sup>1</sup>*Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

<sup>2</sup>*Id.*, 547 U.S. at 281.

recipient, from the total settlement damages for medical care whether past, present, or future care.<sup>3</sup>

As a result of the majority holding, West Virginia's taxpayers will not be reimbursed for the millions of dollars a year it pays on the medical bills of Medicaid recipients. Settlements paid by insurance companies to Medicaid recipients will be kept by the recipients and West Virginia will keep paying their medical bills.

In this case, the plaintiff's part of the settlement money was placed in a "special needs trust." Under Medicaid law this money cannot be counted as an asset of the plaintiff when determining Medicaid eligibility.<sup>4</sup> Therefore, West Virginia's taxpayers will be paying, through Medicaid, plaintiff's future medical bills that will total more than \$19 million dollars. The plaintiff will be able to use the millions put in the special needs trust as a supplement to enhance quality of life.

### **WEST VIRGINIA IS LOSING MILLIONS – THE LEGISLATURE MUST ACT**

Six years ago, *Alborn* instructed that state legislatures can enact laws to enhance the reimbursement of Medicaid expenditures. It is a known fact that many settlements, where Medicaid has paid the plaintiff's medical bills, are not reported, not paid, and not aggressively pursued by the State. The Federal Government had a similar problem

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<sup>3</sup>See, 42 U.S.C. 1396p [2009]; *In re: Matey*, 147 Idaho 604, 213 P.3d 389 (2009).

<sup>4</sup>42 U.S.C. 1396p(d)(4)(A).

obtaining reimbursement for plaintiff's bills paid under Medicare. Congress took action to fortify Medicare's reimbursement efforts by passing the Medicare, Medicaid, and SCHIP Extension Act of 2007.<sup>5</sup> Under that Act, liability insurance carriers and lawyers **must** report claims where Medicare paid the medical bills or be subject to fines up to \$1,000 per day and suits seeking double damages. Our Legislature needs to promptly enact similar reporting and payment requirements for Medicaid.<sup>6</sup> Lawyers representing parties, and liability insurance companies, should be required to report claims and settlements and make sure that West Virginia is reimbursed for its Medicaid expenses. Our statutes should provide for substantial penalties for the failure to comply.

The majority opinion discussed other state laws that may be enacted to strengthen Medicaid reimbursement. I believe the Legislature should seriously consider these options: (1) enact a law which provides for a specific allocation amongst damages, *i.e.*, pain and suffering, lost wages, and medical claims, (2) enact a law that requires that cases can only be compromised with the consent of the State, (3) enact a law which requires the mandatory joinder of the State when a Medicaid lien is at issue, and (4) enact a law

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<sup>5</sup>42 U.S.C. 1395y. *See also*, Tamela White, "The Medicare Secondary Payer Act and Section 111 of the Medicare, Medicaid, SCHIP Extension Act of 2007: Implications for Claim Management and Resolution for Liability Insurance Plans," *77 Defense Counsel Journal* 180 (April 2010).

<sup>6</sup>*See*, 42 U.S.C. 1395y(b)(8)(E); *U.S. v. Harris*, 2009 WL 891931 (N.D.W.Va. 2009) (finding plaintiff's attorney individually liable for reimbursing Medicare because the government can recover "from any entity that has received payment from a primary plan," including an attorney.).

strengthening the duty of attorneys to notify and cooperate, to include provisions which could render voidable any settlement of which the State was not notified and given an opportunity to present its recovery claim for medical assistance paid.<sup>7</sup>

For the foregoing reasons, I respectfully dissent and urge the Legislature to act in order to save West Virginia's taxpayers millions of dollars a year.

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<sup>7</sup>See, Memorandum from Gale Arden, Director of CMS's Center for Medicaid and State Operations Disable and Elderly Health Programs Group (DEHPG) to all Associate Regional Administrators for Medicaid and State Operations, "State Options for Recovery Against Liability Settlements in Light of U.S. Supreme Court Decision in *Arkansas Department of Human Services v. Ahlborn*" (July 3, 2006).