Good Faith Lien Waiver Negotiation Guidelines
Pursuant to Va. Code Ann. § 8.01-66.9
Suggested By The Attorney General Of The Commonwealth Of Virginia
And Case Analysis of Lien Reduction Litigation
Is Virginia's Lien Statute Unenforceable?

Saturday, December 3, 2011

The Attorney General requests the following information be supplied when requesting reduction of the lien granted on personal injury actions in Va. Code Ann. § 8.01-66.9:

- A brief description of the injured person's injuries or illness and reason for compromise
- Prognosis for the injured person Injured person's disability (temporary, permanent) and degree (or percentage) of disability
- Future medical treatments expected to be required
- Brief description of accident and litigation risks bearing on recovery prospects (contributory negligence, assumption of risk, likely trial outcome)
- Post accident work history of the injured person
- Amount of settlement offer
- Medical payments made by automobile liability carriers, if any
- Attorney's fee, including any proposed reduction
- Attorney's costs and expenses
- Names of other entities asserting liens against the settlement, and "their compromised amounts.

The Attorney General has requested that inquiries for reductions or waivers be addressed to Ms. Jocelyn G. Maxim, at 804-786-6576. Her fax number is 804-786-4839. As of December, 2011, Chris Harris-Lipford, Esq., Senior Assistant Virginia Attorney General, is Chief of the Division of Debt Collections, responsible for these matters. Ms. Harris-Lipford's telephone number is (804) 786-1162.

The Boyd Graves Commission formed a blue ribbon Lien Study Committee to report the issue. An informal letter report from of Mr. Shea on behalf of the committee, posted here, will be informative to the reader.

Is Virginia's Lien Statute Unenforceable?

In *Arkansas Department Of Health And Human Services Et Al. V. Ahlborn*, Record No. 04–1506 (May 1, 2006), the United States Supreme Court addressed the Arkansas Medicaid lien statute. Like Virginia's, the Arkansas automatically imposed on a personal injury settlement in an amount equal to Medicaid's costs. Like Virginia's statute, when the amount of the Medicaid claim exceeded the portion of the settlement representing medical costs, satisfaction of the State's lien under the statute required payment out of proceeds meant to compensate the recipient for damages distinct from medical costs, such as pain and suffering, lost wages, and loss of future earnings.

Following a disabling car accident in which Ms. Ahlborn was injured, Arkansas qualified Ms. Ahlborn for benefits, and paid determined that Ahlborn was eligible for Medicaid, and paid providers $215,645.30 on her behalf. Ms. Ahlborn sued for damages, including past medical costs and for other items including pain and suffering, loss of earnings and working time, and permanent impairment of her future earning ability. She settled out of court for $550,000, which was not allocated between categories of damages. Medicaid did not participate in the settlement negotiations, and did not seek to reopen the judgment after the case was dismissed. It did intervene in the suit and assert a lien against the settlement proceeds for the full amount it had paid for Ahlborn's care.

Ms. Ahlborn filed a declaratory action in Federal District Court seeking a determination that the lien violated federal law insofar as its satisfaction would require depletion of compensation for her injuries other than past medical expenses. The parties stipulated that about a sixth of reasonable value of Ahlborn's claim was based upon her medical damages, and that, if her view of federal law was accurate, Medicaid could recover only that part of the settlement ($35,581.47) which constituted reimbursement for medical payments.

Ms. Ahlborn lost initially, but prevailed in the 8th Circuit Court of Appeals, and also in the United States Supreme Court.

The Supreme Court ***unanimously*** held that federal Medicaid law does not authorize a state to assert a lien on a personal injury settlement in an amount exceeding the amount allocable to medical expenses, and the federal anti-lien provision affirmatively prohibits it from doing so. Thus, the Arkansas statute for third-party liability were held unenforceable insofar as it required a different conclusion:

"In fact, though, the federal statute places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf. These limitations are contained in 42 U. S. C. §§1396a(a)(18) and 1396p. Section 1396a(a)(18) requires that a State Medicaid plan comply with §1396p, which in turn prohibits States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient:

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except –

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) [in certain circumstances not relevant here]

….

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an ndividual under the State plan may be made, except [in circumstances not relevant here].. §1396p.

Read literally and in isolation, the anti-lien prohibition contained in §1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payments for medical

care. [Footnote omitted.] Ahlborn does not ask us to go so far, though; she assumes that the State's lien is consistent with federal law insofar as it encumbers proceeds designated as payments for medical care. Her argument, rather, is that the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement.

We agree. There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient 'assign' in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. See Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U. S. 371, 383.385, and n. 7 (2003). But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception carved out by §§1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies."

As of November 10, 2011, no Virginia or Fourth Circuit precedent have applied Virginia law citing the *Ahlborn* decision. The only case which has been decided since *Ahlborn* applying Virginia law, *Afzall*, discussed below, concluded in favor of the Commonwealth on a plea of sovereign immunity.

Afzall v. Commonwealth, 273 Va. 226, 226, 639 S.E.2d 279 (2007), holding that in a declaratory judgment action by an injured minor for an order determining the Commonwealth's lien for treatment was subject the legal fees and costs the child incurred in proceeding against the tortfeasor, sovereign immunity applied to bar the Court of jurisdiction. Final judgment was entered in favor of the Commonwealth.

Department of Medical Assistance Services v. Huynh, Infant, 262 Va. 165, 546 S.E.2d 677 (2001), Mr. Majette's case, holding that because the statute employs the word "apportion," and the trial court placed **all** of the settlement funds in the special needs trust it simultaneously approved while refusing to reduce the attorneys' fee claim:

"*the trial court erred in failing to award some portion of the recovery to the Commonwealth while providing Huynh's attorneys the full amount of their contractual fee. This is particularly true in light of the fact that both the Commonwealth and Huynh's attorneys concede that the portion of the recovery afforded to Huynh under the trial court's apportionment provided her with less than complete relief, and was inadequate to meet her expected future needs. Indeed, the trial court's use of a "Special Needs" trust to preserve Huynh's share of the recovery was predicated on the inescapable conclusion that her future medical expenses would rapidly exhaust the money awarded to her if it were not sheltered in a manner that would allow her to continue receiving assistance from the Commonwealth. Accordingly, we will reverse the judgment of the trial court on this issue and remand this case to the trial court to make an appropriate apportionment.*"

University of Virginia v. Harris, 239 Va. 119, 387 S.E.2d 772 (S.Ct. 1990).

Commonwealth v. Lee, 239 Va. 114, 387 S.E.2d 770 (S.Ct. 1990).

Commonwealth v. Smith, 239 Va. 108, 387 S.E.2d 767 (S.Ct. 1990).

Nichols v. Gregory, 13 Cir. LW16204, 31 Va. Cir. 302 (Richmond Circuit Court 1993) (balancing the equities in a wrongful death case, the Richmond Circuit Court opined that "[h]aving considered all of the relevant facts, the court concludes that the lien reductions and distribution proposed by plaintiff are appropriate. First, unless the case is settled, there will be less money for everybody, since a trial will necessitate additional costs and expenses. Second, while the Commonwealth's taxpayers will be burdened by allowing payments to the beneficiaries, such burden is slight compared to the loss suffered by the beneficiaries. Third, by reducing the amount of attorney's fees claimed, the actual extra burden imposed upon the Commonwealth is only $12,570.40; i.e., plaintiff's attorney will receive a fee of $12,500 instead of the $16,667 agreed upon, a difference of $4,167. Subtracting that difference from the total amount to be paid to the beneficiaries — $16,737.40 — a net difference of $12,570.40 results. This is the extra burden on the taxpayers.

Finally, § 8.01-66.9, by its very enactment, envisions some burden on the taxpayers. Such a burden exists whenever a lien of the Commonwealth is reduced. If the General Assembly did not intend to create such a burden in cases such as this, the statute would not have been passed. Having considered all of the above factors, the lien reductions and distribution proposed by the plaintiff will be ordered.

Barreca v. Tillery, 13 Cir. LW202B (Richmond Circuit Court 1994).

Emery v. Fletcher, *23 Cir*. CL9348 (1995) (Roanoke Circuit Court, 1995) (Medicaid lien reduced by approximately 75%, balance held in trust for child).

In Re: Travis Alan Ashe, 13 Cir. 001 (Richmond Circuit Court 1995) (approving payment of funds of injured person to Medicaid special needs trust, refusing to reduce liens of MCV or Medicaid) (It must also be noted that plaintiff's net recovery in this case will be placed in a "special needs trust" to be established under 42 U.S.C. § 1396p, and the Virginia Plan for Medical Assistance, § VR 460-03-2.6109. What that means is that none of the proceeds will be available to pay for plaintiff's future medical needs. Thus, it is very likely that the Commonwealth, either through Medicaid or one of its other programs, institutions, or departments, will be called upon again to provide services to plaintiff, or to pay for services provided by others. It is appropriate, then, that while funds are available, and in light of the fairly significant net recovery which plaintiff will receive even without a reduction, that the Commonwealth be reimbursed for the services already provided, and for the payments already made. Neither of the Commonwealth's liens will be reduced.")

Ross v. Greene, 13 Cir. LB6744, 45 Va. Cir. 267 (City of Richmond Circuit Court 1998) (apportionment between lawyers', state medical provider's, and Child Support claims).

In Re: Wood, 13 Cir. LE26674 (Richmond Circuit Court 1999) (refusing to reduce lien of the Commonwealth but limiting liens of private entities to statutory maximums)

Terry v. Harris, 13 Cir. LM17814 (Richmond Circuit Court 2001) (reducing lien by 25%, the same amount that counsel for the Plaintiff reduced fee)(citing *Huynh*).

Quivers v. Suffee, 13 Cir. LM15854, 58 Va. Cir. 94 (Richmond Circuit Court 2001) (in a case in which the plaintiff is protected by the use of a special needs trust, "none of the $136,762.53

that plaintiff will receive as her net recovery will have to be used for medical treatment. Under those circumstances, the court feels that plaintiff's net recovery, even without a reduction in MCV's lien, is a 'just' one within the meaning of *Commonwealth v. Huynh, supra.* No reduction will be ordered.").

Diaz v. Arlington Anesthesia, Inc., 17 Cir. CL97662 (Arlington County Circuit Court 2001) (reducing plaintiff attorney's contingent fee from forty percent to thirty three and one third percent, reducing Commonwealth's lien from 866,000 to $85,000; disallowing certain "office overhead" related expenses of counsel for Plaintiff)(citing *Huynh* and *Barreca v. Tillery, supra).*

Tomlin v. Chesapeake Hosp. Corp., 13 Cir. CH041254 (City of Richmond Circuit Court 2005) (Citing *Commonwealth v. Huynh*, 262 Va. 165, 546 S.E.2d 677 (2001) (reduces liens of attorney and others to permit *some* recovery for plaintiff; rejecting plaintiff's counsel's argument that the Court could not reduce its fee, and the Commonwealth of Virginia's assertion that plaintiff's counsel should take nothing).