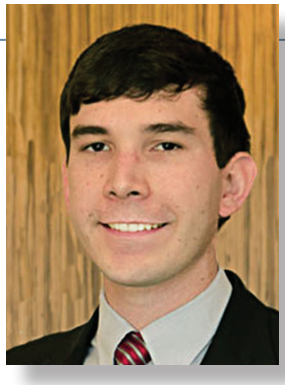

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Reducing Their Lien

Resolving Claims Under North Carolina's New Medicaid Subrogation Statute, N.C. Gen. Stat. § 108A-57

by John Taylor

Preface—the New Law and the Even Newer Law

The past few years have seen a sea change in Medicaid subrogation laws on both the state and federal level. On the heels of two landmark U.S. Supreme Court cases and a responding overhaul to North Carolina statutory law, more changes linger on the horizon.[1] The Federal government recently altered the Medicaid reimbursement law for third party liability claims as part of the 2013 budget bill, to the detriment of Medicaid recipients and personal injury plaintiffs.[2] This new federal law could again dramatically change the law and procedure for North Carolina personal injury practitioners when it takes effect. Fortunately, due to legislative efforts by our counterparts at the American Association for Justice, the effective date for the change to federal law was postponed for two years and does not go into effect until October 1, 2016.[3]

Despite future uncertainty, today the (new) North Carolina Medicaid subrogation statute, N.C. Gen. Stat. § 108A-57, is the law of the land. Accordingly, this article will focus on the here and now—how to negotiate, litigate and successfully resolve a Medicaid lien reduction claim under the current statute. I hope and expect the bulk of these techniques (many taken from the *North Carolina Personal Injury Liens Manual*)[4] to remain useful beyond October 1, 2016, as well.

North Carolina's New Medicaid Subrogation Law

In July 2013, the revised Medicaid subrogation statute, N.C. Gen. Stat. § 108A-57, went into effect and codified the changes required by the U.S. Supreme Court in *Wos v. E.M.A.*, 568 U.C. ___, 133 S.Ct. 1391 (2013).[5] *Wos* and the new subrogation statute provide that Medicaid's right to recovery from a beneficiary's tort settlement or judgment can now be limited to the portion of the recovery representing payments made by Medicaid for medical care. The new N.C. Gen. Stat. § 108A-57 allows a formal process for beneficiaries to promptly seek a reduction of Medicaid's claim for reimbursement in a judicial hearing. The prior and longstanding formula for determining Medicaid's lien is still alive, but is now a presumptive amount that is rebuttable.[6] These changes went into effect on July 18, 2013 and apply "to Medicaid claims that arise on or after that date and to Medicaid claims arising prior to that date for which the Department [of Health and Human Services] has not been paid in full."[7]

Here are some relevant portions of the current Medicaid subrogation statute, but practitioners should carefully read the entire language of 108A-57 before beginning the reduction process:

N.C. Gen. Stat. § 108A-57. Subrogation rights:

(a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person. A personal injury or wrongful death claim brought by a medical assistance beneficiary against a third party shall include a claim for all medical assistance payments for health care items or services furnished to the medical assistance beneficiary as a result of the injury, hereinafter referred to as the "Medicaid claim." Any personal injury or wrongful death claim brought by a medical assistance beneficiary against a third party that does not state the Medicaid claim shall be deemed to include the Medicaid claim.

(a1) If the amount of the Medicaid claim does not exceed one-third of the medical assistance beneficiary's gross recovery, it is presumed that the gross recovery includes compensation for the full amount of the Medicaid claim. If the amount of the Medicaid claim exceeds one-third of the medical assistance beneficiary's gross recovery, it is presumed that one-third of the gross recovery represents compensation for the Medicaid claim.

(a2) A medical assistance beneficiary may dispute the presumptions established in subsection (a1) of this section by applying to the court in which the medical assistance beneficiary's claim against the third party is pending, or if there is none, then to a court of competent jurisdiction, for a determination of the portion of the beneficiary's gross recovery that represents compensation for the Medicaid claim. An application under this subsection shall be filed with the court and served on the Department pursuant to the Rules of Civil Procedure no later than 30 days after the date that the settlement agreement is executed by all parties and, if required, approved by the court, or in cases in which judgment has been entered, no later than 30 days after the date of entry of judgment. The court shall hold an evidentiary hearing no sooner than 30 days after the date the action was filed. All of the following shall apply to the court's determination under this subsection:

(1) The medical assistance beneficiary has the burden of proving by clear and convincing evidence that the portion of the beneficiary's gross recovery that represents compensation for the Medicaid claim is less than the portion presumed under subsection (a1) of this section.

(2) The presumption arising under subsection (a1) of this section is not rebutted solely by the fact that the medical assistance beneficiary was not able to recover the full amount of all claims.

(3) If the beneficiary meets its burden of rebutting the presumption arising under subsection (a1) of this section, then the court shall determine the portion of the recovery that represents compensation for the Medicaid claim and shall order the beneficiary to pay the amount so determined to the Department in accordance with subsection (a5) of this section. In making this determination, the court may consider any factors that it deems just and reasonable.

(4) If the beneficiary fails to rebut the presumption arising under subsection (a1) of this section, then the court shall order the beneficiary to pay the amount presumed pursuant to subsection (a1) of this section to the Department in accordance with subsection (a5) of this section.

(a3) Notwithstanding the presumption arising pursuant to subsection (a1) of this section, the medical assistance beneficiary and the Department may reach an agreement on the portion of the recovery that represents compensation for the Medicaid claim. If such an agreement is reached after an application has been filed pursuant to subsection (a2) of this section, a stipulation of dismissal of the application signed by both parties shall be filed with the court.

Addressing Medicaid's Right of Recovery—
Calculate the Presumptive Lien Amount

The first step towards reducing a Medicaid lien (after the preliminary step of determining the total amount of related bills paid by Medicaid for your client's medical care) is to calculate the presumptive amount due to Medicaid under Section (a1). The presumption is the same as the longstanding prior formula for the maximum Medicaid lien: Medicaid's presumed lien is the lessor of one-third of the gross settlement, or 100 percent of the Medicaid lien prorated with all other medical liens or subrogation claims against the settlement or judgment.[8] I find it helpful to consult the liens manual for calculation examples and information on interactions with other liens.

To understand a basic application of the presumptive formula, take this example based on a recent auto-tort case handled by my firm. Client A suffered serious and permanent injury, and Medicaid paid about $45,000 towards his medical expenses. The negligent driver had minimum liability insur-

ance limits of $30,000, and client had underinsured motorist insurance of $100,000, both of which were tendered and paid in the settlement of $100,000.00. There were no other liens. Under this scenario, Medicaid's lien is presumed to be $33,333.33, one third of the gross settlement.

This scenario presents a good case to seek a reduction of the Medicaid claim, as it involves permanent injury and inadequate insurance coverage such that the proportion of the recovery representing bills paid by Medicaid is quite low. However, permanent injury to the beneficiary is not required to pursue a Medicaid claim reduction under the new statutory scheme. The presumptive lien amount can be reduced in any case where the portion of the Medicaid beneficiary's gross recovery representing compensation for medical assistance payments is less than the amount presumed under Section (a1).[9]

Calculate and Support Your Proposed Reduced Lien Amount—the True Value Proportion and Other Factors

A helpful starting place for developing the amount of the reduction request from Medicaid and the Court is based on the "true value proportion" formula. The idea is that Medicaid's lien should be proportionally reduced based on the ratio between the amount in damages that a jury would award for the harms caused by the defendant (the "true value"), and the actual settlement amount (reduction ratio = actual settlement amount ÷ true value of the case). You then multiply the reduction ratio by the total amount paid by Medicaid to equal the portion of your settlement representing Medicaid's claim (reduction ratio X amount Medicaid paid in medical expenses = amount that should be due to satisfy the Medicaid claim).

Naturally, the key variable in this formula is the "true value" of your case. The true value of the case will be the subject of disagreement unless the case resulted in a verdict and judgment, which finally answers the question. Any case settled for less than true value will be subject to differing opinions on the amount a jury or fact finder would award in your venue. You need to be prepared with justification for your position on the true value to submit to Medicaid or the Court.

You should approach the calculation of your case's "true value" in the same way you approach advocating with insurance adjusters, defense counsel, and ultimately a jury or fact finder. We typically total the special damages and then estimate non-economic damages by making a list of harms, much like what you would write on an easel during your closing argument at trial. We believe it lends credibility to track the language of the pattern jury instructions on personal injury damages when presenting these estimates.[10]

For an example, here is the estimation we did in the case described above for Client A's case, rounded for the sake of easier math (note that this case was post bill v. paid[11]):

Special Damages:	
Medicaid payments on behalf of beneficiary:	$45,000
Medical treatment paid for by Client A:	$1,000
Estimated cost of automotive hand controls due to permanent disability of right foot:	$2,000
Subtotal:	$48,000
Estimated non-economic losses (to be determined by a jury):	
Pain, suffering and mental anguish	$400,000
Permanent injury, scaring and disability	$400,000
Loss of use of right foot	$100,000
Loss of feeling of right foot	$100,000
Loss of right fifth toe	$50,000
Inability to drive with automobile pedals	$5,000
Loss of enjoyment of formative teenage years	$50,000
Subtotal:	$1,105,000
Total estimated value of the case:	$1,153,000

Based on our estimations, the true value of Client A's case was $1,153,000, but there was only $100,000 in available insurance coverage and the negligent driver did not have the personal financial means to cover the difference. Accordingly, we argued that Medicaid's allocated portion of the total value of Client A's case is $3,902.86. (($100,000 insurance coverage/$1,153,000 total case value = .0867 ratio) X Medicaid's total payments of $45,000 = $3,902.86).

Watch Out for Section (a2)(2)

It must be noted that the drafters of the new Medicaid statute threw a monkey wrench into the otherwise compelling "true value" formula for Medicaid lien reduction with the provision in section (a2)(2).[12] N.C. Gen. Stat. § 108A-57 (a2)(2) states that Medicaid's presumptive lien "is not rebutted solely by the fact that the medical assistance beneficiary was not able to recover the full amount of all claims." Putting aside the questionable logic behind this provision, practitioners should focus on how to explain this statutory language to the Court so as not to appear to be making argument forbidden by the statute.

The first key point to make is section (a2)(2) provides that "the fact that [your client] was not able to recover the full amount of all claims" is an absolutely valid reason for the Court to reduce the Medicaid lien, it just cannot be the "**sole**" reason.[13] In other words, you need some additional grounds, but do not let this provision cause you to abandon the true value formula and argument entirely.

Additional grounds to provide the Court can include any other reason why the proportion of the recovery that represents payments made by Medicaid is lower than the presumptive lien amount. Depending on the facts, any number of things could be cited, including but not limited to:

- Permanent injury
- Disability
- Lost wages
- Physical pain and suffering
- Mental anguish and suffering
- The total amount of medical bills and costs not paid for by Medicaid
- The amount of future medical costs the claimant is likely to incur
- The likelihood that a defendant has assets to satisfy a judgment in excess of available insurance coverage
- Other liens, and the pro-rata payments due out of the recovery to satisfy them
- Procurement costs
- Contributory negligence or other liability defenses to the underlying claims

The above items, either alone or in combination, could represent a proportion of the recovery large enough that Medicaid, in fairness, should not recover its full lien. A helpful analogy is to think of the settlement like a pie and come up with as many reasons as you can that it would be unfair for Medicaid to recover 33 percent of that pie (or the percent equal to the presumptive lien if less than 33 percent).[14]

Take our example case: Client A's true case value was $1.1 million, the vast majority of which was attributable on non-economic damages, with only $45,000 in paid medical bills. It would be unfair for Medicaid to take 33 percent of any settlement when the proportion of Medicaid's payments to the overall damages in the case is much lower (here, about 4 percent).[15] Even putting the true value formula aside, if the Court were to hypothetically assume that Client A went to trial and received a verdict of $100,000, the same amount as the settlement, it would still be unfair for Medicaid to take a 33 percent reimbursement because the overwhelming portion of the damages in the case represent non-economic harms.

Proration for Other Liens in Addition to the Statutory Reduction

Another important thing to point out is the fact that the new Medicaid statue reinforces the longstanding requirement that Medicaid liens must be prorated with other liens. The reductions achieved under the new statute should be in addition to, and concurrent with, reductions based on proration with other liens.[16]

Seeking a Reduction through Pre-Hearing Negotiation

Under the new statutory scheme, Medicaid is expressly permitted to reach an agreement to settle its claim with the beneficiary at any time and can no longer hide behind the position that it is not legally allowed to negotiate any lien reduction.[17]

I recommend sending a Medicaid reduction request and a detailed settlement demand package, much like one you already sent to a liability insurance adjuster pre-suit, early on the process. Settlement packages and correspondence should be sent to HMS,[18] the third party administrator used by North Carolina for Medicaid Subrogation claims. HMS and Medicaid are often overloaded with reduction requests, so the sooner you can initiate the negotiation process the better. I have found HMS to be generally responsive to reduction requests, especially when relaying to them that the deadline for filing the reduction application is approaching.

Deadline for Filing the Application for a Reduction Hearing

If you are unable to negotiate a resolution to Medicaid's claim, you must file a reduction application, and serve it upon North Carolina Department of Health and Human Services (NC DHHS), within "30 days after the date that the settlement agreement is executed by all parties and, if required, approved by the court, or in cases in which judgment has been entered, no later than 30 days after the date of entry of judgment."[19] The form of the application should be a standard complaint naming the underling tortfeasor and DHHS as defendants, or a declaratory judgment action naming only DHHS.[20] If you are already in litigation, you can amend your complaint and add DHHS as a party. Once a lien reduction petition is filed, "[the court shall hold an evidentiary hearing no sooner than 30 days after the date the action was filed."[21]

You must serve NC DHHS through its process agent,[22] and you should also send a courtesy copy of your pleadings to the Attorney General's office,[23] who will be defending the reduction hearing.

Hearing Practice

Burden of Proof

In a judicial reduction hearing, the beneficiary bears the burden of proving by clear and convincing evidence that Medicaid's claim is less than the presumptive amount.[24] The clear and convincing evidence standard is a high bar under our

case law; however, the same evidence and arguments discussed above should carry the day in a meritorious case.

You will need to present the court with evidence, such as affidavits, medical records, depositions or live witness testimony, supporting your position that the presumed Medicaid lien amount does not represent the proportional compensation of the medical bills paid for by Medicaid. Medical expert testimony may be required depending on the particular facts. Also, in the right case one might consider obtaining expert opinions by civil attorneys who practice in that area, on either the defense or plaintiff's side, to opine on case value. The Medicaid statute does not provide guidance on discovery procedure, so I recommend that practitioners consult with the Attorney General's Office and the Court to confirm the preferred and most economical method to proffer this evidence.

> The new N.C. Gen. Stat. § 108A-57 allows a formal process for beneficiaries to promptly seek a reduction of Medicaid's claim for reimbursement in a judicial hearing.

Conclusion

The new Medicaid subrogation and lien reduction statute provides beneficiaries a chance to seek never before seen lows in lien payments due to Medicaid in tort and workers' compensation cases. Following the framework laid out above should guide you and your clients to significant Medicaid lien reductions. ◆

1. *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268; 126 S. Ct. 1752 (2006); *Wos v. E.M.A.*, 568 U.C. ___, 133 S.Ct. 1391, 185 L. Ed. 2d 471 (2013).
2. Bipartisan Budget Act of 2013 (Public Law 113-67), Section 202(c). (2013).
3. H.R. 4302, 113th Congress. (2014).
4. **Buy the *North Carolina Personal Injury Liens Manual!*** Knowing how to reduce a Medicaid claim under the new N.C. Gen. Stat. § 108A-57 is only a small part of what a practitioner needs to know about the wide world of liens. Fortunately, practically everything you need to know about Medicaid and other common liens can be found in the *North Carolina Personal Injury Liens Manual*, authored by NCAJ members and edited by NCAJ president-to-be Chris Nichols, who also wrote the chapter on Medicaid. I strongly recommend buying the latest edition of the Liens Manual today if you don't own it already, and buying the next edition when the law changes again.
5. The *Wos* case was brought and litigated by NCAJ members Mark Holt and Bill Bystrynski.
6. *Id.*
7. N.C. Sess. Laws 2013-274: House Bill 982 (signed July 18 2013 and effective when it became law pursuant to Section 2). (2013).
8. N.C. Gen. Stat. § 108A-57 (a1).
9. N.C. Gen. Stat. § 108A-57 (a2)(1).
10. *See* N.C.P.I. Civil 810.02. (2014).
11. *See* N.C. Gen. Stat. § 8C-414. Although new evidence Rule 414 limits the amount of medical expenses you will be able to list as recoverable damages, we find it helpful to list the actual total of all billed medical expenses as proof of our client's actual damages and the severity of his or her injuries.
12. N.C. Gen. Stat. § 108A-57 (a2)(2).
13. *Id.*
14. It may even be helpful to use a pie chart at the hearing to present this concept visually to the Court.
15. Not coincidentally, multiplying this proportional ratio by the settlement total also equals the same requested reduction discussed above in the true value formula and further supports your position.
16. N.C. Gen. Stat. § 108A-57 (a5)(2).
17. N.C. Gen. Stat. § 108A-57 (a3).
18. Correspondence to HMS can be sent to the following address:
    HMS NC Casualty Subrogation Dept.
    P.O. Box 31803
    Raleigh, NC 27622-1803
    Fax 919-714-8574
    Phone 855-753-2177
19. N.C. Gen. Stat. § 108A-57 (a2).
20. The *North Carolina Personal Injury Liens Manual* contains sample pleadings that are a good reference point while drafting your application.
21. *Id.*
22. Practitioners should verify the process agent before attempting service on DHHS. The NC Attorney General's Office maintains a registry of process agents for State agencies, which is available online at http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Resources/Process-Agent-Directory.aspx. NC DHHS' current process agent is:
    Emery E. Milliken
    General Counsel
    North Carolina Department of Health and Human Services
    2001 Mail Service Center
    Raleigh, NC 27699-2001
23. Pleadings should be sent to the AG's office via Brian Rabinovitz at this address:
    Brian D. Rabinovitz
    Assistant Attorney General
    Health and Public Assistance
    N.C. Department of Justice
    P.O. Box 629
    Raleigh, NC 27602
24. § 108A-57(a2)(1).