



OADC OUTLOOK

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President's Message

by Nathan E. Clark

The last three months have been busy for OADC. Recently, it was our great honor and privilege to endorse Kevin Driskill for one of DRI's Executive Vice President positions. OADC has also endorsed Jeromy Brown to serve as the DRI Representative for the State of Oklahoma starting in 2013. We are so pleased that OADC continues to be well represented at DRI.

We are also pleased to announce that Jim Calloway of the Oklahoma Bar Association is going to be the featured speaker at an OADC sponsored CLE presentation on December 7, 2012. The CLE presentation will take place at Tulsa Country Club which is just outside downtown Tulsa. Mr. Calloway will present on two topics: "How Not to Commit Malpractice With Your PC" and "The iPad for Litigators." This will be a two hour credit CLE event with one of the hours being for ethics credit. We urge OADC's members to participate in this CLE event, and we hope this program is helpful for all of you. Once again, please thank Malinda Matlock for all of her efforts in coordinating the CLE events in 2012.

OADC has also been actively reinvigorating its legislative committee. The committee is staffed and has made various plans to push for legislative benefits to our members. If you are interested in becoming a part of this committee, please contact our office at 918-582-1173. Regardless, the legislative committee plans to, for example, sponsor and propose an improved medical records retrieval statute. This is just another of many ways that OADC is working hard to serve its membership.

**OADC 2013 Winter Meeting
January 18, 2013 - OKC**

Medicare / Medicaid Monkey Business

By Shannon Bickham, Associate Attorney
Pierce Couch Hendrickson Baysinger & Green, LLP

To most attorneys, the dreaded “M” words – Medicare and Medicaid – are painstakingly avoided. Unfortunately, they arise often in litigation.

I recently came across a Medicaid issue that was new to me. My case involves an allegation of medical negligence against my client, a physician, as well as a hospital in rural Oklahoma. Due to the treatment required, the patient accumulated thousands of dollars in medical bills, which were paid by Medicaid.

Plaintiff is *expressly* not seeking medical expenses as part of his damages. Thus, without a claim for medical expenses, Plaintiff’s counsel has taken the position that Medicaid cannot assert a lien against any monies recovered from settlement or trial.

This tactic was odd because, typically, plaintiff lawyers claim as much “economic” damages as possible. It also seemed to push Medicaid out of the picture too easily. I decided to investigate further.

The controlling case on this issue is *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 (2006). Heidi Ahlborn, a college student, suffered severe brain damage and permanent injuries following an automobile collision. The Arkansas Department of Health, the state’s Medicaid agency, paid \$215,645.30 for medical treatment.

Ahlborn filed suit seeking damages for medical expenses, amongst other economic and noneconomic damages. The Medicaid agency asserted a lien against the recovery for the full amount Medicaid paid for medical expenses. The suit was settled for \$550,000 with no allocation for each element of the damages claimed.

Early in the litigation the parties stipulated that Ahlborn’s total claim had a reasonable value of \$3.04 million, and that her settlement amount of \$550,000 represented approximately 1/6 of that sum. Ahlborn argued that the Medicaid agency was entitled to 1/6 of the settlement amount (\$35,581.47).

The trial court ruled that it was reasonable to require Ahlborn to repay Medicaid in full, even if the portion allocated for medical treatment was less than the amount demanded by Medicaid.

On appeal, the U.S. Supreme Court held that the federal Medicaid statute permitted Medicaid to recover payments for medical assistance only from the portion of a liability settlement attributable to medical items and services. If the Medicaid agency attempted to recover more than the portion of a settlement that was allocated to medical expenses, it would be in violation of the federal Medicaid anti-lien statute.¹

The Oklahoma Court of Civil Appeals applied *Ahlborn* to the same issue in *Moss v. Wittmer*, 2009 OK CIV APP 102, 228 P.3d 542. In *Moss*, plaintiff initiated a friendly suit on behalf of her minor child after the child was seriously injured due to an attack by a pet monkey owned by defendants.

A settlement agreement was reached among the parties; however, the Oklahoma Health Care Authority (OHCA) asserted an intent to enforce a statutory lien on the settlement proceeds as reimbursement for Medicaid payments made on the child’s behalf.

Plaintiff argued that OHCA could only enforce its lien against that part of the settlement proceeds that represented payments for “medical expenses.” Thus, OHCA had no lien rights because the settlement proceeds did not include payment for medical expenses.

OHCA asserted that 63 O.S. §5051.1 allowed a statutory lien in the amount of the Medicaid payments, which was enforceable against the proceeds recovered up to the amount of the damages for the total medical expenses. The trial court ruled that OHCA’s lien was enforceable and plaintiff appealed.

FALL CLE

Friday, December 7

Tulsa Country Club

9:30 - 11:30

1.0 Hour Ethics Credit

Presented by:

Jim Calloway, Director,

Management Assistance Program

Oklahoma Bar Association

How Not to Commit Malpractice with your PC – “A computer lets you make more mistakes faster than any other invention with the possible exceptions of handguns and Tequila.”

- Mitch Ratcliffe. Technology-related mistakes that can range from the embarrassing to disastrous. From inadvertent disclosure of client confidences to failing to understand the limitations or consequences of today’s technology, pitfalls exist for the unwary. Social media just increases the potential problems. Did you hear of the defense counsel who thought it was a good idea to post a picture of her client’s leopard print briefs on her Facebook page with a snide comment about appropriate court attire? The American Bar Association amended the Model Rules of Professional Conduct in August 2012 to include keeping abreast of “the benefits and risks associated with relevant technology” as a part of the Rule 1.1 requirement of competence. Learn how to avoid the risks of 21st Century technology.

The iPad for Litigators - Today, many trial lawyers are ditching their laptops and complicated trial technology set-ups in favor of the iPad. The iPad’s compact design, combined with its versatility and power, make it a convenient and surprisingly useful litigation tool. However there is much more that you can do with an iPad. It can now serve as a great deposition transcript management tool, a note-taking device, a portable movie recording, and movie production studio. This presentation will cover the equipment checklist for live wireless presentation with the iPad in the courtroom as well as the tools that allow a lawyer to make and edit videos of witness statements, accident scenes and more.

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The appellate court reversed the trial court and ruled that OHCA may only enforce its statutory lien upon the settlement proceeds paid by the tortfeasor for medical expenses.

The *Moss* court reasoned that: (1) Section 5051.1 restricts enforcement of OHCA's lien to the portion of settlement which is allocated for medical expenses² and (2) similar to *Ahlborn*, enforcement of the lien against the entire settlement is contrary to 42 U.S.C. §1396p(a)(1), the federal Medicaid statute's anti-lien provision³.

The question then arises, are Medicare liens treated in the same manner as Medicaid liens? Unfortunately, the law is not as clear. There has been much debate in the legal community for and against the application of *Ahlborn* to Medicare. With a lack of authority on the issue, the issue remains up for debate.

My case was filed prior to the enactment of caps on noneconomic damages. It is interesting to wonder whether, if the case had been filed after October 31, 2011, medical expenses would have been alleged.

¹ *Ahlborn*, 547 U.S. at 283.

² 63 O.S. §5051.1(D)(1)(d) states that the lien shall "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 clear and convincing evidence..."

³ See also *Edwards v. Ardent Health Services, L.L.C.*, 2010 OK CIV APP 113, 243 P.3d 25. Oklahoma Court of Civil Appeals refused to reduce the amount of OHCA's lien, finding that: (1) reduction of the lien was contrary to Section 5051.1 and (2) *Ahlborn* did not contravene Section 5051.1 to allow reduction of the lien where plaintiff claimed medical expenses as part of her damages and the settlement amount was more than adequate to pay attorney's fees, OHCA's lien and an ERISA lien in full, with money left over for plaintiff.



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