

Bolanos v Superior Court

_____12/23

Settlement; Liens; Ahlborn case; Allocation of damages

The four year old plaintiff is in an irreversible coma, requiring constant life support and nursing care. The California Department of Health Services paid **\$746,017** that she required as the result of alleged medical malpractice. The DHS advised Bolanos' counsel that a **lien** would be placed on any recovery in the malpractice action. In October 2007, the case was settled for \$1.5 million. The DHS lien was fixed at **\$546,651**.

Under [Welfare and Institutions Code section 14124.72\(d\)](#), the DHS was required to deduct **25 percent** of the amount owed to account for the Department's "...reasonable share of attorney fees," and "...the cost of litigation expenses.." As the result of the US Supreme Court's decision in *Arkansas Dept. Of Health and Human Servs. v Ahlborn* (2006) 547 U.S. 268, the W & I statute was amended to mandate a determination of the Department's share of the recovery by multiplying the ratio of the full amount of the reasonable value of benefits to the full amount of the judgment, award or settlement.

[The statute envisions an agreement as to the ratio, and if none, a motion before the court to determine the ratio.](#) Plaintiff filed such a motion and the DHS opposed, claiming it only had to make the 25% reduction, and that the entire settlement was subject to the lien for reimbursement. The trial court **denied** the motion, finding in favor of the DHS. This petition for a writ followed.

The Second DCA returned to the recent *Ahlborn* decision to begin the analysis. Under *Ahlborn* the DHS is only entitled to compensation for **past medical expenses**. Since the settlement is premised on **past and future damages**, the DHS is not automatically entitled to the entire settlement, even if the lien exceeds the settlement amount. The DHS' rights extend only to the recovery of payments for medical care. Thus, [a settlement that does not distinguish between past medical expense and other damages must be allocated.](#)

There is no basis, "... for treating the settlement here differently from a judge allocated settlement or even a jury award; all such awards typically

establish a third party's liability for both payment for medical care..." and other damages. An allocation between past medical expense and other expenses or damages may be part of the judgment or the parties must attempt to allocate. If they cannot agree, they must turn to the court.

In *Ahlborn*, a case of questionable liability, the plaintiff received \$215,645 in benefits from the Arkansas DHS. She settled her case for \$550,000. The parties agreed the case was reasonably valued at \$3,040,708. **Since the settlement of \$550,000 was approximately one-sixth of the total claim value, the plaintiff argued the DHS was only entitled to one-sixth of the provided benefits, \$35,581. The US Supreme Court agreed.**

The Second DCA endorsed the high court's analysis. [The Justices noted that past medical expenses are usually the "hard" figures of a medical case, when compared to future losses or pain and suffering. "Thus on average, the settlement will be influenced most directly by the amount of past medical expenses."](#)

Assume a total claim of \$100,000. If the case settles for \$80,000, it is likely the medical expenses were relatively high. If the case settles for \$20,000, it signals that medical expenses were relatively low. Assume medical expenses of \$50,000, which is 50% of the value of the claim. The \$80,000 settlement will produce \$40,000 for the DHS and the \$20,000 settlement will yield \$10,000. This is fair because, with an \$80,000 settlement, it is likely that past medical expenses were a larger component of the settlement than if the settlement had been for \$20,000. [The adversarial process of the settlement negotiations may be thought to produce a realistic figure of actual medical expenses.](#)

The Court noted that although speaking in terms of a "ratio" between settlement amount and total claim is proper, it may be easier to [determine "what percentage the settlement is to the total claim,"](#) and then apply that percentage to the sum paid by the DHS to the injured plaintiff. Thus, under *Ahlborn* \$550,000 (the settlement) is 18.08 percent of \$3,040,708 (the agreed value of the claim). The percentage of 18.08% applied to the benefits of \$215,645 yields \$38,988. The minimal difference from the actual amount in *Ahlborn*, \$35,581, likely represents the proportionate share of litigation costs.

The Justices added that there is nothing in *Ahlborn* which compels following its formula exactly. **What matters is that past medical expenses are distinguished in the settlement from other damages on the basis of a rational approach.** It may be the parties can reach an agreement without recourse to the formula. W & I section 14124.76(a) urges the parties to do so. If they cannot agree, the statute mandates that the trial court assume that responsibility.

Thus the practitioner is to make reasonable efforts to obtain the DHS' agreement, "...as to what portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care..." is provided on behalf of the beneficiary. If no agreement is reached it should be submitted to the law and motion court. The court shall be guided by *Ahlborn* and other relevant case and statutory law. (W & I section 14124.76(a)) Accordingly, plaintiff Bolanos in this case, *correctly* followed the law by filing her motion to allocate.

Here, the DHS spent \$746,017. The claim may be worth \$6 million or as much as \$11.4 million depending on life expectancy. The case settled for \$1.5 million. **It is not possible to determine the total amount of the claim without determining life expectancy.** Such a determination is one of **fact**, and must be made on the basis of expert testimony.

The Second DCA distinguished two post-*Ahlborn* decisions, *Espericuenta v Shewry* (2008) 164 Cal.App.4th 615, and *McMillian v Stroud* (2008) 166 Cal.App.4th 692, on the basis that both involved attempts to modify final orders approving settlements, based on the subsequent US Supreme Court decision in *Ahlborn*. In each case the trial court had already approved the settlement and the later decision could not be used to undo the court's determination.

The Justices concluded that **section 14124.76(a) requires both an allocation of any unallocated settlement and a limitation on the DHS recovery to that portion of the settlement that reflects past medical payments.** The trial court here is directed to vacate its order denying Bolanos' motion, and conduct hearings to determine the portion of the settlement that represents past medical expense and the maximum the Department may recover on the Medi-Cal lien.