

Offices in
Suffolk and
Virginia Beach, Virginia
Tel: 757-399-7506
Fax: 757-397-1267
Web: www.oasthook.com



MEMBER



Special needs require special lawyers.

INSIDE THIS ISSUE

- Medicaid's Rights of Recovery in Personal Injury Cases
- Ask Allie
- Speakers
- Distribution of this Newsletter

Editor
Sandra L. Smith,
Certified Elder Law Attorney

MEDICAID'S RIGHTS OF RECOVERY IN PERSONAL INJURY CASES BY BRIAN A. BOYS

The United States District Court for the District of Colorado recently decided a case that could have an impact on personal injury settlements and awards. In this case, the court found that the state Medicaid agency may obtain recovery from not only the settlement proceeds allocated to the cost of the beneficiary's future medical care, but also from proceeds allocated to future care.

In *Perez v. Henneberry* (D. Colo., No. 09-cv-01681-WJM-MEH, April 26, 2011), the plaintiff, Isabelle Perez, was a minor who suffered a brain injury at birth and, as a result, is permanently disabled. She had been receiving Medicaid benefits since birth, and as of April 24, 2009, these benefits totaled \$836,673.71. Perez, through her mother, filed a medical malpractice suit against the doctor and the hospital. The suit against the doctor was settled for an undisclosed amount, but resulted in the state being paid \$100,000 from the settlement proceeds for care provided to Perez before the settlement. Perez later reached a confidential settlement with the hospital, and, pursuant to Colorado's recovery statute, the state placed a lien upon the settlement proceeds for the remaining \$736,673.71.

Perez then filed suit against the state in federal court seeking a declaration that Colorado's Medical Assistance Act lien provisions are inconsistent with the anti-lien provisions of the Medicaid Act, and that Colorado could only recover amounts from the settlement for past medical damages, apportioned in accordance with *Arkansas Dep't. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). Colorado argued that *Ahlborn* did not prevent it from asserting a claim against the portion of the settlement allocated towards future medical care as well as past medical care.

The court compared *Ahlborn* to this case, noting that in *Ahlborn* the parties stipulated as to what portion of the damages represented compensation for medical costs, whereas in this case, no such stipulation existed and no

allocation occurred. The court rejected Perez's position that the court should therefore adopt the *Ahlborn* formula to determine what portion of the settlement to which Colorado should be entitled. The court found that the *Ahlborn* formula was strictly a product of the parties' stipulation, and in the absence of a similar stipulation in this case, the court would not dictate how the parties should allocate the proceeds in the settlement.

The court then analyzed the issue of the past versus future medical care costs, noting that while it is true that Colorado may only be reimbursed for its past medical expenses, *Ahlborn* does not require that, in seeking this reimbursement, Colorado is limited to funds allocated to past medical expenses. The court noted that the *Ahlborn* court made no such distinction, instead stating only "that the federal third-party liability provisions require an assignment of no more than the right to recover that portion of a settlement that represents payments for medical care."

In granting the defendant's motion for summary judgment, the court concluded that:

1. "Colorado's Medicaid lien statute is not invalid, i.e., it is consistent with the federal Medicaid statute's anti-lien provisions as interpreted by the Supreme Court in *Ahlborn*, and
2. "[T]he Department can seek reimbursement from that portion of Plaintiff's settlement proceeds that represents medical expenses – past and future – up to the total amount it spent on Plaintiff's behalf...." The court ordered the case to continue to trial to determine what portion of the plaintiff's settlement represents those medical expenses.

It is unknown at this time whether this decision will be upheld if appealed. The court in *Perez v. Henneberry*, however, has provided an argument that, if successful, could permit Medicaid to recover from a larger pool of settlement funds than previously thought possible. Oast & Hook will continue to monitor developments in this case and report on them in future issues of the *Oast & Hook News*.

The attorneys at Oast & Hook can assist clients with their estate, financial, insurance, long-term care, veterans' benefits and special needs planning issues.

Brian A. Boys is an elder law attorney with Oast & Hook, and he practices in the areas of estate planning, estate and trust administration, guardianships and conservatorships, and litigation.

Ask Allie

O&H: Allie, we've heard an amazing story about a cat in the aftermath of the tornadoes that struck Alabama. Please tell us about her.

Allie: Sure! Cadie was one of three cats living with Judy Pugh of Tuscaloosa, Alabama, when the tornadoes struck on April 27th. Ms. Pugh's two other cats survived the storm, but Cadie was missing. A crew from the local TV station interviewed Ms. Pugh, and during the interview, Cadie appeared out of nowhere. She survived the tornado and had been in the heat and cold, apparently without food or

water, for a month. Cadie's veterinarian said that although Cadie had lost half of her body weight, she is now eating well and is back on thyroid medicine. Two educators from the University of Alabama-Birmingham have offered to pay Cadie's veterinary bills and have also supplied Ms. Pugh with a stockpile of cat food. Other people have also volunteered to help. To see this story for yourself, please visit this link: www.cbs42.com/content/special/story/Miracles-Do-Happen-For-One-Tuscaloosa-Woman/9N2ja5htN0a0ZXPkcdMVoQ.csp. What a great story! Cadie may have used up one of her nine lives during this experience, but she is one fortunate cat. I hope all of our readers have a pleasant and safe Memorial Day weekend. See you next week!

Speakers

If you are interested in having an Oast & Hook attorney speak at your event, phone Jennifer Harris at 757-399-7506 or e-mail her at harris@oasthook.com. Past topics include estate planning, long-term care planning and veterans benefits.

Distribution of This Newsletter

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled, and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Oast & Hook News*, then please e-mail us at mail@oasthook.com, telephone us at 757-399-7506, or fax us at 757-397-1267.

Please visit us on the internet at:

www.oasthook.com

Our website contains information about Oast & Hook and an archive of our newsletters and other estate planning, estate administration, and elder law articles in searchable format.

Copyright © 2011 by Oast & Hook, P.C.

This newsletter is not intended as a substitute for legal counsel. While every precaution has been taken to make this newsletter accurate, we assume no responsibility for errors, omissions, or damages resulting from the use of the information in this newsletter.

This newsletter is produced to be sent electronically. If we currently fax you a copy of the Oast & Hook News but you prefer to receive it by e-mail, then please contact us at: mail@oasthook.com.

If you would like to be removed from our Oast & Hook News distribution list, please e-mail us at mail@oasthook.com, telephone us at 757-399-7506, or fax us at 757-397-1267.