MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

December 19, 2014

Ms. Karen McCarthy, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Ms. McCarthy:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Nunes, Allen v. Health Force and Visiting Nursing Association of Western New York, Inc.*
Document Received:	Notice of Motion with Motion
Name of Claimant:	Allen Nunes 329 Dingens Street Buffalo, New York 14206
Claimant's attorney:	Paul K. Isaac, Esq. Precision Resolution, LLC 3686 Seneca Street Buffalo, New York 14224

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle Parker
First Assistant County Attorney

MMP:dld
Enc.

PAID
CHECK
ERIE COUNTY
CLERK'S OFFICE

STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

ALLEN NUNES,

Plaintiff,

-against-

HEALTH FORCE and VISITING NURSING ASSOCIATION OF WESTERN NEW YORK, INC.,

Defendants.

Index No. I2008/10324

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the reading and filing of the annexed Affirmation of Paul K. Isaac, Esq., President of Precision Resolution, LLC, on behalf of Plaintiff's counsel Brown Chiari, LLC, affirmed on the 16th day of December, 2014; joined by the Supporting Affirmation of Michael R. Drumm, Esq., affirmed on the 11th day of December, 2014; and the exhibits annexed thereto, and upon all of the prior pleadings and proceedings heretofore had herein, Plaintiff will move this Court before the Honorable John M. Curran of the Supreme Court, County of Erie, located at Part 3, 92 Franklin Street, Buffalo, New York 14202 on the 29th of January, 2015, at 9:15 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, why an Order should not be entered in this proceeding granting the following relief:

A. Declaring as null and void, vacating, and/or invalidating any claimed subrogation right, lien, or other reimbursement claims alleged to exist in favor of HMS, Inc. and/or the Erie County Department of Social Services against any settlement proceeds received or to be received by the Plaintiff, Allen Nunes, in the above captioned matter for one or more of the following reasons:

1. The purported recovery rights violate Federal and New York State Anti-Recovery and Anti-Lien laws;

2. New York Social Services Law § 104-b, as written, violates the Supremacy Clause of the United States Constitution.

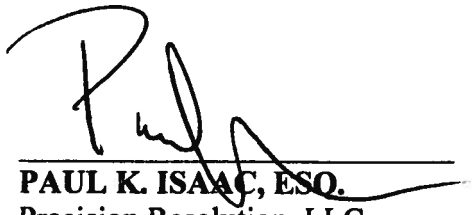
3. Statutory enforcement rights may only be sought against liable third parties, and the statute of limitations has long since expired; and/or

4. In the alternative, the September 14, 2006 GIS Memorandum issued by New York State Department of Health prohibits recovery to specifically identifiable past medical expenses; together with

B. Such other and further relief that the Court deems just, equitable, and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR Rule 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least two (2) days before the return date of this motion.

DATED: West Seneca, New York
December 16, 2014



PAUL K. ISAAC, ESQ.
Precision Resolution, LLC
3686 Seneca Street
West Seneca, New York 14224
Telephone: (716) 712-0417

TO: Thomas Kubiniec, Esq.
Erie County Department of Social Services
95 Franklin Street
Buffalo, New York 14202

Michael A. Siragusa, Esq.
Erie County Attorney
Erie County Department of Law
95 Franklin Street, Suite 1634
Buffalo, New York 14202

Hon. Eric T. Schneiderman
Attorney General of the State of New York
350 Main Street, Suite 300A
Buffalo, New York 14202

STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

ALLEN NUNES

Plaintiff,

-against-

HEALTH FORCE and VISITING NURSING ASSOCIATION OF WESTERN NEW YORK, INC.,

Defendants.

Index No. I2008/10324

AFFIRMATION OF COUNSEL

MICHAEL R. DRUMM, ESQ., being duly sworn, affirms the following:

1. That I am an attorney duly licensed in the State of New York and am the Attorney for the Plaintiff in the above-captioned matter.

2. That I hereby authorize and permit Precision Resolution, LLC to bring this motion on behalf of the Plaintiff Allen Nunes and join in the application for the relief requested in the herein Notice of Motion.

WHEREFORE, I respectfully request an Order of this Court declaring as null and void, vacating, and/or invalidating any claimed subrogation right, lien, or other reimbursement claims alleged to exist in favor of HMS, Inc. and/or the Erie County Department of Social Services, against any settlement proceeds received by the Plaintiff in the above captioned matter; and such other and further relief that the Court deem just, equitable, and, proper.

I, Michael R. Drumm, Esq., an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled cause, affirm the foregoing to be true under the penalties of perjury pursuant to CPLR Rule 2106 on this 11th day of December, 2014.

MICHAEL R. DRUMM, ESQ.
Attorney for the Plaintiff

STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

ALLEN NUNES,

Plaintiff,

-against-

HEALTH FORCE and VISITING NURSING ASSOCIATION OF WESTERN NEW YORK, INC.,

Defendants.

Index No. I2008/10324

SUPPORTING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:

PAUL K. ISAAC, ESQ., being duly sworn, affirms the following:

1. I am an attorney duly licensed to practice law in the State of New York. Additionally, I am the owner of Precision Resolution, LLC, which is regularly retained by attorneys for plaintiffs to resolve liens and claims of subrogation and reimbursement related to personal injury actions.

2. Precision Resolution, LLC was retained by the Plaintiff, through his attorney, Michael R. Drumm, Esq. of Brown Chiari, LLP, in the above-captioned personal injury matter to address a purported Medicaid claim of the Erie County Department of Social Services, and now pursued by its collection agent, HMS, Inc. (hereinafter "HMS/DSS") against the settlement proceeds of the Plaintiff, Allen Nunes, secured as a result of a medical malpractice settlement in the above-captioned action. Precision Resolution has been involved in this matter since August of 2013. As such, I am fully familiar with the facts and circumstances herein.

3. By way of general background as to my credentials, I am an attorney with over 27 years of experience practicing law in the states of New York and Pennsylvania. As previously stated, I am the owner of Precision Resolution, LLC, which was formed specifically to address and resolve Medicare, Medicaid, ERISA and other claims for reimbursement against plaintiffs' settlement proceeds. I have lectured in numerous states and for various bar associations and law-related organizations on issues relating to Medicare, Medicare Set-Asides, Medicaid reimbursement, ERISA liens, and other subrogation rights. I have developed and presented a statewide program in six venues for the New York State Academy of Trial Lawyers entitled "Settling Your Personal Injury Case and Sleeping at Night." I have lectured for the New York State Trial Lawyers Association on numerous occasions on the topic of liens and subrogation. Most recently, I presented an extended, six-hour version of "Settling Your Personal Injury Case and Sleeping at Night" for the Bar Association of Erie County. I have presented numerous times on these topics for the National Business Institute (NBI) and continue to lecture at seminars scheduled regularly by them.

4. Most relevant to the case at bar, in my current career, I advise plaintiffs and their counsel on a daily basis as to issues relating to Medicaid liens and recovery claims, including but not limited to the application of New York State Social Services Law; the Federal Anti-Lien Statute [42 U.S.C. § 1396p(a)(1)]; the Federal Anti-Recovery Statute [42 U.S.C. 1396(b)(1)]; and the decisions of *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 (2006) (hereafter "*Ahlborn*") and *Wos v. E.M.A.*, 568 U.S. ___ (Slip Op. March 20, 2013), and their interplay with New York Social Services Law §§ 104-b, 367-a, and 369.

RELEVANT BACKGROUND

5. As the Court may be aware, Mr. Nunes, prior to the alleged negligence at issue in this case, was a paraplegic, who required visiting nursing care. This action arises out of alleged medical negligence that took place on or about October 16, 2006, while being treated by the Defendant, Visiting Nursing Association.

6. As a result of alleged medical negligence, Mr. Nunes developed a decubitus pressure ulcer, which developed to a stage IV pressure ulcer. Mr. Nunes later developed a methicillin-resistant staphylococcus aureus (MRSA) infection and osteomyelitis, a bone infection.

7. The Plaintiff settled his claim in the above-captioned action against the Defendant for a confidential amount of which this Court is aware.

8. HMS, Inc., on behalf of the Erie County Department of Social Services and the State Medicaid program, now seeks to enforce a claim for reimbursement in the amount of $203,953.95. A copy of that correspondence from HMS, Inc., dated October 24, 2014, is attached hereto as Exhibit "A".

9. Precision Resolution, LLC was advised as to the nature of the claim and was retained to resolve the asserted Medicaid lien. Precision Resolution, LLC made reasonable attempts to resolve the purported claim with the HRA prior to this application to the Court. HMS/DSS has not reasonably responded to our offer to resolve the claim. As a result, Court intervention is sought to apply well-established Federal law to the purported lien here.

10. For the reasons set forth herein, based upon State and Federal law, it is clear that the purported lien of HMS/DSS against the settlement proceeds must be declared nonexistent, invalid, and/or unenforceable, and must be vacated by this Court.

11. For ease of reading, I will break down the legal arguments under different headings and corresponding sections.

GENERAL OVERVIEW

12. At the outset, it is the Plaintiff's position that the Federal and New York State Anti-Lien and Anti-Recovery Statutes bar any claim whatsoever by HMS/DSS against the Plaintiff's settlement proceeds in this action. As will be set forth later in this Affirmation, it is clear that it was the intent of Congress and the New York Legislature (following the mandate of Congress) to limit recovery by State Social Services agencies for medical expenses incurred by a Plaintiff Medicaid beneficiary to recovery only against *responsible third parties.*

13. The applicable statutory provisions which purport to create the "Medicaid Lien" are set forth under New York State's Social Services Law §104-b(1), which provides, in relevant part, as follows:

> If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred.

14. Preliminarily, it is important to point out that there is no mention anywhere in New York's Social Services Law that the lien is to be or can be enforced directly against

plaintiffs or against property belonging to them. Nor is there any authority for the proposition that the public welfare official can collect directly against proceeds in the possession of the plaintiff or plaintiff's counsel. Rather, it is clear from Social Services Law §104-b, when read in its entirety, that the lien is directed at the responsible third party or its liability insurance carrier.

MEDICAID'S THIRD PARTY LIABILITY STATUTES

15. The Medicaid Act was enacted in 1965 as part of Title XIX of the Social Security Act. The Medicaid program provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs. The Secretary of Health and Human Services administers the Medicaid program and exercises his/her authority through the Centers for Medicare and Medicaid Services (CMS). *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 275 (2006).

16. The program is cooperative; the federal government pays a portion of the costs incurred for patient care, and the states pay their portion of the costs and must comply with the statutory requirements of the Medicaid Act regarding eligibility determinations, collecting and maintaining information, and administering the program. *Id.*; see also 42 U.S.C. § 1396a.

17. The federal Medicaid statutes mandate that states, as a condition of eligibility, require that Medicaid recipients assign to the state any rights that they have to receive payment from third parties, including insurance companies, to pay for medical care. State agencies that administer the Medicaid program must enact their own forced assignment laws:

> (a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a *State plan for medical assistance shall*—

> (1) provide that, *as a condition of eligibility* for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the *individual is required*—
> (A) *to assign the State any rights* . . . to support (specified as support for the purpose of medical care by a court or administrative order) and *to payment for medical care from any third party*;
> (B) to cooperate with the State . . . in obtaining support and payments (described in paragraph (A)) for himself . . . ; and
> (C) *to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan* . . . .42 U.S.C. §1396k(a) (emphasis added).

18. The Federal Medicaid statutes also require that states pursue third parties who are legally liable for medical costs paid by the Medicaid program. Medicaid's statutory right to be reimbursed *from liable third parties* is found at 42 U.S.C. § 1396a(a)(25). Accordingly, a State agency shall:

> Take all reasonable measures to *ascertain the liability of third parties* . . . *to pay for care and services available under the plan.*
>
> In any case *where such legal liability is found to exist* after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, *the State or local agency will seek reimbursement to the extent of such legal liability.* 42 U.S.C. §1396a(a)(25)(A)-(B) (emphasis added).

It is therefore clear that the term "liability" refers to third party liability.

19. Additionally, under Federal law, in order to facilitate reimbursement from liable third parties, the State must:

> [have] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, *the State is considered to have acquired the rights of such individual to payment by any other party for such healthcare items or services.* 42 U.S.C. § 1396a(a)(25)(H) (emphasis added).

20. There can be no dispute that the above-referenced statutes allow for direct subrogation by the respective State Medicaid agency against a person or entity that is determined to be legally liable for specifically identifiable medical reimbursement.

RECOVERY OF A MEDICAID LIEN UNDER NEW YORK STATE SOCIAL SERVICES LAW SECTION 104-b IS PRECLUDED BY THE FEDERAL ANTI-LIEN AND ANTI-RECOVERY STATUTES, 42 U.S.C. 1396P, AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

21. Because New York State Social Services Law §104-b provides for the *possibility* for an improper taking of personal property of a plaintiff, and contains an irrebuttable presumption of 100% reimbursement rights, it violates the Federal Anti-Lien Statute and therefore violates the Supremacy Clause of the U.S. Constitution. Therefore, New York's Social Services Law §104-b, as written, is preempted by Federal law and cannot be enforced against the Plaintiff's settlement proceeds.

22. The Federal Anti-Lien Statute, 42 U.S.C. § 1396p, as part of the Medicaid Act, sets forth the prohibition regarding the imposition of liens under State Medicaid plans on the personal property of recipients and the right of recovery during the recipient's lifetime. The Federal Anti-Lien Statute commands: "*No lien may be imposed against the property of any individual during his lifetime* on account of medical assistance paid on his behalf under the State plan." 42 U.S.C. § 1396p(a) (emphasis added). Additionally, the Federal Anti-Recovery statute states: "No adjustment or ***recovery*** of any medical assistance correctly paid on behalf of an individual under the State plan may be made." 42 U.S.C. §1396p (b)(1) (emphasis added).

23. The statutes are clear, unambiguous, and provide no exceptions applicable to the case at bar.

24. New York State participates in the Medicaid program which is administered by the New York State Department of Health through the various counties as well as the City of New York. New York State's laws regarding Medicaid are codified under the Social Services Law. The federal mandates cited above regarding third-party liability as it relates to Medicaid recipients are incorporated in the Medicaid portions of New York's Social Services Law. The New York statute reiterates the Federal forced assignment provision:

> (h) Conditions of eligibility. A person shall not be eligible for medical assistance under this title unless he or she: . . .
>
> (1) **assign to the appropriate social services official or to the department, in accordance with department regulations: (i) any benefits which are available to him or her individually from any third party for care or other medical benefits available under this title and which are otherwise assignable pursuant to a contract or any agreement with such third party**; or (ii) any rights, of the individual or of any other person who is eligible for medical assistance under this title and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support specified as support for the purpose of medical care by a court or administrative order. N.Y. Social Services Law §366(1)(h)(1) (emphasis added).

25. In order to facilitate the State's rights as against liable third parties, the New York statute also provides that a social services district is subrogated, to the extent of medical care furnished, to any rights the Medicaid recipient may have to medical support or third-party reimbursement under New York Social Services Law §367-a(2)(b):

> (b) Any inconsistent provision of this chapter or other law notwithstanding, upon furnishing assistance under this title to any applicant or recipient of medical assistance, **the local social services district or the department shall be subrogated, to the extent of the expenditures by such district or department for medical care furnished, to any rights such person may have to medical support or reimbursement from liable third parties, including but not limited to health insurers, self-insured plans, group health plans, service benefit plans, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for**

> **payment of a claim for a health care item or service**. For purposes of this section, the term medical support shall mean the right to support specified as support for the purpose of medical care by a court or administrative order. The right of subrogation does not attach to insurance benefits paid or provided under any health insurance policy prior to the receipt of written notice of the exercise of subrogation rights by the carrier issuing such insurance, nor shall such right of subrogation attach to any benefits which may be claimed by a social services official or the department, by agreement or other established procedure, directly from an insurance carrier. No right of subrogation to insurance benefits available under any health insurance policy shall be enforceable unless written notice of the exercise of such subrogation right is received by the carrier within three years from the date services for which benefits are provided under the policy or contract are rendered. Liable third parties shall not deny a claim made by a social services official or the department in conformance with this paragraph solely on the basis of the date of submission of the claim, the type or format of the claim form, or a failure to present proper documentation at the point-of-sale that is the basis of the claim. The local social services district or the department shall also notify the carrier when the exercise of subrogation rights has terminated because a person is no longer receiving assistance under this title. Such carrier shall establish mechanisms to maintain the confidentiality of all individually identifiable information or records. Such carrier shall limit the use of such information or record to the specific purpose for which such disclosure is made, and shall not further disclose such information or records. N.Y. Social Services Law §367-a(2)(b) (emphasis added).

26. Additionally, and critically important here, Social Services Law §369 is the New York counterpart to the Federal Anti-Lien Statute, and its anti-lien and anti-recovery provisions mirror the language of the Federal statute. Regarding liens, the mandate of Social Services Law §369 is the same as that of the Federal Anti-Lien Statute and contains almost identical language: "**no lien may be imposed against the property of any individual prior to his or her death on account of medical assistance paid or to be paid on his or her behalf.**" N.Y. Social Services Law § 369(2)(a) (emphasis added).

27. New York's corresponding anti-lien provision at Social Services Law §369 contains all of the provisions of the Federal Anti-Lien Statute at 42 U.S.C. §1396p, except for

one notable addition. Social Services Law §369 attempts to create its own exception to the Federal anti-lien mandate:

> Nothing contained in this subdivision shall be construed to alter or affect the right of a social services official to recover the cost of medical assistance provided to an injured person in accordance with the provisions of **section one hundred four-b of this chapter**. NY Social Services Law §369(c) (emphasis added).

28. When a third party is responsible for personal injuries suffered by the Medicaid recipient, Social Services Law §104-b attempts to bypass the prohibitions of the Federal Anti-Lien Statute, and Social Services Law §369, and create an alternative to suing the third party directly, as required by the forced assignment and subrogation provisions of 42 U.S.C. §§1396a(a)(25) and 1396k. It is the position of the various Social Services Agencies that section 104-b of the Social Services Law purports to authorize the local DSS to place a lien against the proceeds of personal injury claims brought by the Medicaid recipient against liable third parties. Once the statutory notice and filing requirements are met, the lien purports to attach to any verdict, judgment, or award, as well as to the proceeds of any settlement. Section 104-b provides, in pertinent part:

> 1. If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care <u>shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred</u>. The welfare commissioner shall endeavor to ascertain whether such person, firm or corporation alleged to be responsible for such injuries is insured with a liability insurance company, as the case may be, and the name thereof.
> 2. No such lien shall be effective, however, unless a written notice containing the name and address of the injured recipient, the date and place of the accident, and the name of the person, firm or corporation alleged to be liable to the injured party for such injuries, together with a brief statement of the nature of

> the lien, the amount claimed and that a lien is claimed upon the said right of action, suit, claim, counterclaim or demand by the public welfare official be served prior to the payment of any moneys to such injured party, by certified with return receipt or registered mail upon such person, firm or corporation, and his or her, its or their attorney, if known, and upon any insurance carrier which has insured such person, firm or corporation against such liability. A copy of the notice of lien shall be mailed to such carrier at least twenty days prior to the date on which such carrier makes a payment to the injured party. Except as against such carrier, the effectiveness of the lien against any other party shall not be impaired by the failure to mail the required notice to such carrier. In addition, a true copy of such notice shall be served by regular mail to the welfare recipient and to his or her attorney, if known. Such mailing shall be deemed to be effective, notwithstanding any inaccuracy or omission, if the information contained therein shall be sufficient to enable those to whom the notice is given to identify the injured recipient and the occurrence upon which his or her claim for damages is based.
>
> 3. Upon the service of the notice, as aforesaid, the local public welfare official shall file a true copy thereof in the office of the clerk of the county in which his office is located, and, thereupon the lien of the public welfare official in the amount therein stated shall attach to any verdict, decision, decree, judgment, award or final order in any suit, action or proceeding in any court or administrative tribunal of this state respecting such injuries, as well as the proceeds of any settlement thereof, and the proceeds of any settlement of any claim or demand respecting such injuries prior to suit or action. . . . . New York Social Services Law § 104-b (emphasis added).

29. The "Medicaid lien" exception to the anti-lien provision (as set forth in Social Services Law §104-b) has no Federal counterpart in the Federal Anti-Lien Statute or anywhere else within the Medicaid Act.

30. However, as will be addressed later herein, it cannot be disputed that the language of Social Services Law §104-b is almost precisely the same and accomplishes the same result as the Arkansas statute which the United States Supreme Court unanimously struck down in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006). Hence, any "lien" under Social Services Law §104-b against the property of a plaintiff is invalid as a matter of law.

31. Again, it is important to note that the New York and Federal Anti-Lien Statutes are identical to each other. Specifically, 42 U.S.C. §1396p sets forth in relevant part the following:

> §1396p.(a)(1) Liens, adjustments and recoveries, and transfers of assets. (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… (emphasis added). See, 42 U.S.C. §1396p (a)(1).
>
> and
>
> §1396p.(b)(1) **No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made,** … *See*, 42 U.S.C. §1396p (b)(1).

32. New York Social Services Law §369 mirrors the restrictions in the aforementioned Federal Statutes. The relevant portions are as follows:

> 2. (a) Notwithstanding any inconsistent provision of this chapter or other law, **no lien may be imposed against the property of any individual prior to his or her death on account of medical assistance paid** or to be paid on his or her behalf under this title, except: (emphasis added).
>
> [Note: the exceptions generally do not apply to personal injury claims]
>
> (b) (i) **Notwithstanding any inconsistent provision of this chapter or other law, no adjustment or recovery may be made** against the property of any individual on account of any medical assistance correctly paid to or on behalf of an individual under this title, except that recoveries must be pursued: (emphasis added).
>
> [Note: again, the exceptions generally do not apply to personal injury claims]

33. There is no Federal counterpart to New York Social Services Law §104-b. Section 104-b directly conflicts with the Federal Anti-Lien Statute and New York's Anti-Lien

and Anti-Recovery Statute [Social Services Law §369(2)(a) and (b)(i)] since it does not limit a "lien" to that portion of the plaintiff's settlement which represents the medical reimbursement portion of the case, allowing it to potentially attach to the plaintiff's personal property portion of the settlement or verdict, and thus creates the possibility of taking the entirety of the plaintiff's settlement proceeds.

ARKANSAS DEPARTMENT OF HEALTH & HUMAN SERVICES V. AHLBORN

34. New York Social Services Law §104-b directly conflicts with the Federal Anti-Lien Statute, 42 U.S.C. §1396p, and the statutory guidelines set forth by the United States Supreme Court in *Arkansas Dep't of Health & Human Srvs. v. Ahlborn*, 547 U.S. 268 (2006). Again, New York State's Social Services Law §104-b (1) states, in pertinent part:

> If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care ***shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished*** by such public welfare official on and after the date when such injuries were incurred.(emphasis added).

35. The language of Social Services Law §104-b is almost precisely the same and accomplishes the same result as the Arkansas statute, which the United States Supreme Court unanimously struck down in *Arkansas Dep't of Health & Human Srvs. v. Ahlborn*, 547 U.S. 268 (2006). Hence, any "lien" on the property of a plaintiff is invalid as a matter of law.

36. *Ahlborn* limits a Medicaid recovery to only the amount owed by liable third parties in compensation for medical care, specifically past Medicaid-covered health care items or services. Any amount allocated towards other categories of damages is unavailable to satisfy a

lien of this sort. The Court held that to the extent that the Arkansas statute permits recovery of payments that do not represent past medical care, it is in conflict with the Federal Anti-Lien Statute and unenforceable:

> 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). . . . 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. . . . 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 payment for medical care. Beyond that, the anti-lien provision applies. *Ahlborn*, 547 U.S. at 284.

37 As Social Services Law §104-b provides for the *possibility* for such an improper taking of personal property of a plaintiff, it violates the Federal Anti-Lien Statute and hence violates the Supremacy Clause of the U.S. Constitution. Therefore, it is apparent that the New York statute, as written, is unconstitutional.

38. This is consistent with a careful reading of Justice Stevens's Opinion in the U.S. Supreme Court's decision in *Ahlborn,* which implied that the various Medicaid agencies might not be entitled to any "lien" against personal injury proceeds, even on that portion of the proceeds which reasonably represents past medical payments:

> 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. *Ahlborn,* 547 U.S. at 284-285.

39. It is important to note that the plaintiffs in *Ahlborn* never requested the Court to vacate the social services lien entirely. Rather, the parties **stipulated** that the social services agency was either entitled to the full amount of its lien or only that portion of the settlement

proceeds that reasonably represented the medical portion of the settlement. It is also important to point out that the statute at issue in *Ahlborn* was almost identical to New York's Social Services Law §104-b in that the Arkansas statute claimed entitlement to more than just that portion of a judgment or settlement that represented medical reimbursement.

40. A review of the relevant Federal and State statutes cited herein, in the context of Justice Stevens' dicta in U.S. Supreme Court's decision in *Ahlborn*, must result in the conclusion that there shall be no lien or recovery rights against any portion of a plaintiff's recovery.

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES RESPONSE TO *AHLBORN*

41. Social Services Law §104-b as written is directly at odds with *Ahlborn*, but this is more apparent when it is seen how the social services agencies apply §104-b in practice. The Centers for Medicare and Medicaid Services (CMS), the federal agency charged with administering Medicaid, issued a memorandum in response to the decision in *Ahlborn*.

42. On July 3, 2006, Gale Arden, the Director of the Centers for Medicare and Medicaid Services (CMS) sent a memorandum to all associate regional administrators for Medicaid and State operations regarding the then-recent holding of *Ahlborn*. "The purpose of this memorandum is to clarify third party recovery rules and options for States in the context of the U.S. Supreme Court's decision in [*Ahlborn*]." See CMS Memorandum, "State Options for Recovery Against Liability Settlements In Light of U.S. Supreme Court Decision in *Arkansas Department of Human Services v. Ahlborn*", July 3, 2006 (hereinafter "CMS Memorandum"). A copy of the CMS Memorandum is attached hereto as Exhibit "**B**". It noted that the holding had

an adverse impact on the states, but suggested strategies for states to mitigate the effects of the decision.

43. The Memorandum gave CMS's interpretation of the Court's unanimous decision in *Ahlborn*: only that portion of a liability settlement that is specifically designated as medical items and services are available to satisfy a Medicaid lien; and any attempt to recover from more of that portion of the settlement is in violation of the Federal Anti-Lien Statute. *See* CMS Memorandum at 1. Moreover, CMS stated that: "A State's lien laws may only operate to recover from that portion of a settlement that is allocated to healthcare items or services, even if it means that Medicaid must forego full recovery of its claim." *Id.* at 2.

44. This presumes that where there is no specific allocation to medical expenses, the State will forego recovery.

45. Going further, the CMS Memorandum encourages States to participate in pending litigation involving liable third parties: "In order to protect the Medicaid program's interest in the allocation of settlement monies to medical items and services it is extremely important for States to be involved in the litigation and settlement process." *Id.* at 3. The Memorandum then went on to make several suggestions for States to comply with *Ahlborn* in their third-party recovery programs.

46. It is clear that States were responsible for modifying their laws and procedures relating to Medicaid recoveries against a beneficiary's personal injury recovery in light of *Ahlborn*.

47. Moreover, upon information and belief, the HMS/DSS here, like all New York State Social Services Districts, operates based upon the guidance given by New York GIS 06 MA/022, the Memorandum from the General Information System Division: Office of Medicaid Management dated September 14, 2006 to Medicaid Directors, Legal Staff, and Local District Commissioners (hereinafter "GIS Memorandum"). A copy of that Memorandum is attached hereto as Exhibit "C". This Memorandum was most likely issued in response to the CMS Memorandum described above, but it is, of course, based upon the United States Supreme Court decision in *Ahlborn*.

48. The September 14, 2006 Memorandum states, in relevant part:

> Effective immediately, as a result of the *Ahlborn* case, when a local department of social services (LDSS) pursues recovery of Medicaid paid on behalf of a recipient who has a lawsuit or other action against a third party as a result of a personal injury, by imposing and enforcing a lien pursuant to SSL §104-b, the LDSS must observe the following requirements:
>
> 1. **Only the portion of the personal injury settlement or award *specifically allocated* to compensate the plaintiff Medicaid recipient for past medical expenses arising out of the personal injury is available to satisfy a §104-b lien**. Any portion allocated to compensate the plaintiff Medicaid recipient for pain and suffering, lost wages, and other non-medical damages is not available to satisfy a §104-b lien. (emphasis added).

49. Prior to *Ahlborn*, New York State operated under the full-reimbursement approach: all proceeds of a personal injury settlement, regardless of allocation, were available to satisfy a Medicaid lien. *See* GIS Memorandum. There has been no change to the statute to reflect the impact of the decision in *Ahlborn*. Likewise, the associated regulations have not been changed to reflect any new policies toward third-party recoveries under Social Services Law

§104-b after the limitation in *Ahlborn*. The regulations still reflect the full-reimbursement approach that New York had taken prior to *Ahlborn*. Section 360-7.2 of Title 18 of the New York Compilation of Codes, Rules, and Regulations still simply states that DSS "will seek reimbursement to the extent of the third party's legal liability unless the amount reasonably expected to be recovered is less than the cost of making the recovery." 18 N.Y.C.R.R. § 360-7.2.

50. The GIS Memorandum makes reference to any allocation of settlements, but it is clear that HMS/DSS is not interested in obtaining an allocation on its own behalf. It simply expects third parties and plaintiffs' attorneys to represent the interests of the State Medicaid program in addition to representing the interests of their own clients. It is clear that HMS/DSS, when it refuses to even entertain the idea of a reasonable allocation, is still operating under the full-reimbursement approach. Under this approach, the entirety of a personal injury settlement, judgment, or award is available to satisfy a Medicaid lien. By merely asserting its lien with no effort to take any action to protect its rights, the social services agency seeks to take advantage of Medicaid recipients by demanding full reimbursement from the entirety of the proceeds of the beneficiary's cause of action.

51. The State of New York, despite recognizing the holding in *Ahlborn*, operates the same third party recovery program as it did prior to *Ahlborn*. It seems that the State of New York and the local Departments of Social Services would prefer to send out a simple letter indicating the amount of medical assistance paid and providing an address for the beneficiary to send a check, rather than take action to bring suit to protect their claim as is called for by the Federal statutes. The State cannot simply sit on its rights and then assert their lien as if it had been involved in the litigation from the outset.

52. The full-reimbursement approach by New York State and the local DSS violates the Federal Anti-Lien Statute. The existence of the possibility of taking a portion of a plaintiff-recipient's settlement that does not represent compensation for past medical expenses is demonstrated by New York's statutory and regulatory scheme both prior to and after the decision in *Ahlborn*. Prior to *Ahlborn*, New York enforced its claims under § 104-b based on the full reimbursement approach—all of the proceeds of a personal injury settlement were available to satisfy the § 104-b claim. Obviously, after *Ahlborn*, this approach is no longer permissible, but, as stated above, the State of New York is still operating its third party recovery program under the full-reimbursement approach. It is obvious that the agencies in New York, which continue to seek full reimbursement, are aware of the prohibitions and limitations; yet nevertheless continue to ignore them.

53. Therefore, New York's Social Services Law §104-b violates the Federal Anti-Lien Statute and the Supremacy Clause of the U.S. Constitution. New York's Social Services Law §104-b, as written, is unconstitutional.

Wos v. E.M.A

54. More recently, irrebuttable presumptions imposed against Medicaid recipients, such as is attempted in N.Y. Social Services Law §104-b, have been declared invalid by the United States Supreme Court in *Wos v. E.M.A.*, 568 U.S. ___ (Slip Op. March 20, 2013).

55. The United States Supreme Court in *Wos* held that North Carolina's Medicaid lien statute was pre-empted by the Federal Anti-Lien Statute because it provided for the *possibility*

that the state could lien a portion of the plaintiff's proceeds that did not represent past medical expenses, and therefore was invalid. *Id* at 7-8.

56. In an effort to comply with *Ahlborn*, the North Carolina statute at issue in *Wos v. E.M.A* attempted to create a statutory presumption that one-third of a settlement represented compensation for past medical expenses, so the Medicaid agency could collect either the amount it paid on the beneficiary's behalf, or one-third of the gross settlement amount, whichever is less. The Court noted that:

> Before *Ahlborn* was decided, North Carolina and the state courts interpreted this statute to allow the State to "recover the costs of medical treatment provided . . . even when the funds received by the [beneficiary] are not reimbursement for medical expenses." Under *Ahlborn*, however, this construction of the statute is at odds with the Medicaid anti-lien provision, which "precludes attachment or encumbrance" of any portion of a settlement not "designated as payments for medical care." *Wos*, Slip Op. at 6 (internal citations omitted).

57. The Court found that the Federal Anti-Lien Statute pre-empted the North Carolina's Medicaid lien statute for the following reason:

> The defect in § 108A-57 is that it sets forth no process for determining what portion of a beneficiary's tort recovery is attributable to medical expenses. Instead, North Carolina has picked an arbitrary number—one-third—and by statutory command labeled that portion of a beneficiary's tort recovery as representing payment for medical care. Pre-emption is not a matter of semantics. **A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect.** *Id.* at 7-8. (Emphasis added).

58. New York Social Services Law § 104-b provides neither of those two safeguards.

59. Again, a State statute was pre-empted by federal law because the possibility existed that the State could take a portion of the Plaintiff's settlement representing his/her personal property. As determined by the Court:

> In some circumstances, however, the statute would permit the State to take a portion of a Medicaid beneficiary's tort judgment or settlement not 'designated as payments for medical care." The Medicaid anti-lien provision, 42 U.S.C. § 1396p(a)(1), bars that result. *Id.* at 15-16.

As was the case in *Ahlborn*, in *Wos v. E.M.A.*, no one asked the Court to apply the Federal Anti-Lien and Anti-Recovery Statutes to the entire settlement in that case and assumed that a lien against the medical portion of the settlement was permissible.

60. Certainly, as previously mentioned, New York Social Services Law §104-b has the same possibility without any of the safeguards attempted by North Carolina to comply with federal law. It does not speak to any allocation to past medical expenses, and the law has remained unchanged since the decision in *Ahlborn*.

61. The New York statute operates in the same manner that the Supreme Court has repeatedly declared that it cannot.

62. New York State is evading the preemptive force of federal law by refusing to negotiate its lien at all. Because the local Departments of Social Services sit silent and wait to be paid, with no effort to determine what part of a settlement constitutes past medical expenses, it is an operation of the statute that is inconsistent with federal law.

63. Moreover, New York State Social Services Law Section 104-b is worse than North Carolina's statute because it provides for the possibility that 100% of a settlement is available to satisfy a Medicaid lien, with no procedures in place to determine otherwise. In a case

such as this, where the social services agency refuses to entertain the idea of a resolution, the *possibility* of an improper taking of the plaintiff's property is unequivocally demonstrated. North Carolina's statute was pre-empted precisely because this possibility existed.

64. Consequently, Social Services Law §104-b is pre-empted and violates the Federal Anti-Lien Statute, and therefore violates the Supremacy Clause of the U.S. Constitution. New York's Social Services Law §104-b is unconstitutional.

NO RECOVERY MAY BE *ENFORCED* AGAINST THE PLAINTIFF'S SETTLEMENT PROCEEDS

65. Social Services Law §104-b(6) states:

> Such lien may be enforced by action against ***those alleged to be liable for such injuries***, as aforesaid, by the local public welfare official in any court of appropriate jurisdiction (emphasis added).

66. Pursuant to the strict reading of that statutory provision, the lien may only be enforced against those "alleged to be liable for such injuries," and no others.

67. The absence of an attempt to create any right of the Social Services agency to enforce the lien directly against a plaintiff Medicaid beneficiary or plaintiff's counsel makes it evident that the legislature did not empower Social Services agencies to enforce any "lien" against a plaintiff's settlement proceeds. Furthermore, no other New York State statute empowers such action.

68. In further support of this argument, Social Services Law §367-a(2)(b) states:

> Any inconsistent provision of this chapter or other law notwithstanding, upon furnishing assistance under this title to any applicant or recipient of medical assistance, ***the local social services district or the department shall be subrogated***, to the extent of the expenditures by such district or

> department for medical care furnished, to any rights such person may have to medical support or reimbursement ***from liable third parties,*** including but not limited to health insurers, self-insured plans, group health plans, service benefit plans, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service (emphasis added).

69. This limitation on the right to reimbursement is consistent with Congress's mandate to the states, limiting recovery of medical expenses paid by the states under the Medicaid program to subrogation rights against responsible third parties and prohibiting collection from beneficiaries.

70. Equally clear is that it was the intent of Congress to allow each state, individually, and as they see fit, in accordance with their respective statutes, to pursue claims for medical reimbursement directly against the responsible tortfeasors, and not the plaintiffs themselves.

71. In an insightful dissertation on the distinction between the subrogation rights conferred upon the States and the attempts by the States to assert "liens" for Medicaid expenses paid, the Supreme Court of Minnesota states, in *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002):

> It is critical to note that the federal scheme reflects the concept that the assigned right to recover for medical expenses is no longer the property of the medical assistance recipient and therefore the anti-lien provision does not prohibit a state from pursuing recovery under this assigned right. Essentially, at the time of the accident, the injured party acquires in tort one or more rights of action or claims against those responsible for the injuries. These rights of actions or claims can be likened to a "bundle of sticks." See *United States v. Ben-Hur*, 20 F.3d 313, 317-18 (7th Cir. 1994) (stating that property rights are likened to "bundle of sticks," each stick separately alienable); *In re Nelson*, 92 B.R. 837, 842 (Bankr.D.Minn. 1988) (reflecting the implicit concept that property rights are divisible). As a condition of receiving medical assistance from a state, a medical

> assistance recipient assigns to the state one stick from that bundle-the specific claim to recover medical expenses from those responsible for the injuries. At this point, the state becomes the sole owner of the claim against any third parties for medical expenses. But the recipient retains ownership of the remaining sticks in the bundle-that is to say, the claims for pain and suffering, emotional distress, disability, disfigurement, loss of earnings, and loss of earning capacity. To the extent that any settlement with the responsible third parties is for this larger bundle of sticks (the original tort action minus the claim for medical care), the settlement proceeds are the recipient's property, and as such are protected by the federal anti-lien provision. *Martin v. City of Rochester*, 642 N.W.2d at 14-15.

72. While the *Martin* case has no formal precedential value in the State of New York, the thorough discussion of the mandate of Congress is tremendously educational in addressing Medicaid "liens."

THERE WAS NO SPECIFIC ALLOCATION IN THIS CASE, SO THERE SHOULD BE NO RECOVERY

73. The only guidance provided by New York State has been the GIS Memorandum of September 14, 2006, which states that only that portion of a Plaintiff's tort recovery that is specifically allocated to past medical expenses is available to satisfy a Medicaid lien. Following these guidelines, there should be no recovery in this action.

74. However, even if the Court finds the numerous arguments set forth above unpersuasive in extinguishing the claimed lien, the lien cannot be collected as there exists no part of the settlement specifically allocated to past medical expenses. Because there was no specifically delineated past medical component to the settlement in this action, and pursuant to the above GIS Memorandum, no lien should apply against any such settlement proceeds not allocated as such.

AHLBORN ALLOCATION HEARING SCENARIO

75. In the event that this Court is not persuaded that the foregoing arguments provide a justifiable basis to vacate and dismiss the claimed lien of HMS/DSS, then, as an alternate argument only, Plaintiff requests an immediate determination (or hearing if necessary) to ascertain the amount of the settlement proceeds, if any, that should be allocated to past medical expenses from which HMS/DSS could be repaid.

76. It is believed the full value of Plaintiff's case was, at a *conservative* estimate, in excess of $2,946,666.00. Based upon a review of similar New York State cases, verdicts and settlements have been awarded in the range of approximately $2,000,000.00 to upwards of $3,340,000.00. A copy of three (3) such verdicts and awards are attached as Exhibit "**D**".

77. Again, it is clear that the application of this *Ahlborn* allocation process violates the Federal Anti-Lien Statute (42 U.S.C. § 1396p(a)(1) and thereby the Supremacy Clause of the U.S. Constitution. Nonetheless, should the Court permit an "*Ahlborn*" allocation computation using a conservative full value of the case of $2,946,666.00, based on an average of the aforementioned awards, would yield a net lien of **$58,840.71** or less, depending on the valuation utilized.

78. By applying such a conservative valuation, the *Ahlborn* allocation calculations would be as follows:

a.	Settlement Amount:	$850,000.00
b.	Estimated Minimum Amount of Full Value of the Case:	$2,946,666.00
c.	Percentage of Settlement allocated to Medical Expenses per "*Ahlborn*" formula:	28.85%

d.	Claimed Lien Amount:	$203,953.95
e.	Multiplied by Percentage in Step 3:	28.85%
f.	Yields Net Lien Amount under "*Ahlborn*" formula:	**$58,840.71.**

79. Thus, even if the lien were enforceable, the amount of **$58,840.71** would appear to be the best case scenario for recovery for HMS/DSS should such a calculation be applied. As mentioned previously, Plaintiff does not consent to the application of the above-referenced formula, as even the GIS 06 MA/022 Memorandum would seem to require a zero-dollar recovery on an unallocated settlement award.

CONCLUSION

80. Therefore, based upon the foregoing arguments, neither HMS/DSS nor Erie County Department of Social Services is entitled to any Medicaid "lien" on the settlement proceeds in this matter for the following reasons:

A. The purported recovery rights here violate the Federal and New York State Anti-Recovery and Anti-Lien laws;

B. New York Social Services Law §§ 104-b, as written, violates the Supremacy Clause of the United States Constitution.

C. Statutory enforcement rights are limited to third parties; and/or

E. The September 14, 2006 GIS Memorandum from the New York State Department of Health limits recovery to specifically identifiable past medical expenses.

81. As such, any such subrogation right, reimbursement claim, or potential lien from the recovery of the Plaintiff by HMS/DSS and/or Erie County Department of Social Services in this action must be extinguished, vacated and/or dismissed.

WHEREFORE, Plaintiff respectfully requests an Order of this Court declaring as null and void and/or extinguishing any claimed subrogation right, lien, or other reimbursement claims alleged to exist in favor of HMS/DSS and/or the Erie County Department of Social Services, against any settlement proceeds received, or to be received, by the Plaintiff in the above captioned matter; together with such other and further relief that the Court deem just, equitable, and proper.

I, Paul K. Isaac, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled cause, affirm the foregoing to be true under the penalties of perjury pursuant to CPLR Rule 2106 on this 16th day of December, 2014.

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