AHLBORN IN FLORIDA AND BEYOND: A SHORT LIVED VICTORY FOR PLAINTIFFS?

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I. INTRODUCTION

The Supreme Court's decision in *Arkansas Department of Health and Human Services v. Heidi Ahlborn*[2] limited a state Medicaid program's ability to assert a lien against the entire recovery from a third party tortfeasor. The United States Supreme Court interpreted federal law authorizing States to recover Medicaid payments in a tort action to be limited to medical payments.[3] Stated a different way, the *Ahlborn* decision forbids recovery by Medicaid state agencies against the non-medical portion of the settlement or judgment.[4] Non-medical portions of a settlement or judgment are damages such as pain and suffering or lost wages. According to the Court in *Ahlborn*:

> . . . [t]here 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). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. 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. See Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U. S. 371, 383–385, and n. 7 (2003). 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 payments for medical care. Beyond that, the anti-lien provision applies.[5]

The holding of *Ahlborn* was a surprising result and has had a significant impact on personal injury litigation. In some instances, it has resulted in a much larger net amount being available to the injury victim at the "expense of the States' ability to recover Medicaid expenditures."[6]

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When the *Ahlborn* decision was published, it was hailed by the Center for Constitutional Litigation (hereinafter "CCL"), associated with the American Trial Lawyers Association (now "American Association for Justice"), as a "significant victory" for injury victims.[7] Other commentators have agreed with the CCL that it represents a major victory for injury victims.[8] However, in practice it has not been as meaningful of a victory as once thought. State courts, including Florida, have limited its application in some instances or found it wholly inapplicable. Recent federal decisions may help in the fight, but it could be a long time before *Ahlborn's* true impact is really understood.

This note will review the *Ahlborn* decision. It will also examine the interpretation of *Ahlborn* by Florida District Courts of Appeal and a Florida Federal District Court. In addition, select decisions from larger jurisdictions will be analyzed along with a recent important federal decision. Finally, the import of the *Ahlborn* decision in Florida moving forward will be analyzed.

II. THE *AHLBORN* FACTS AND PROCEDURAL HISTORY

Heidi Ahlborn was injured in a very serious card accident in January of 1996.[9] At the time, she was a nineteen year old college student pursuing a degree in teaching.[10] She suffered a catastrophic brain injury that left her incapable of finishing college and unable to care for or support herself in the future.[11] Due to her injuries and lack of assets, Ahlborn qualified for Medicaid coverage in Arkansas.[12] Medicaid paid Arkansas healthcare providers $215,645.30 for injury related care on her behalf.[13]

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After the accident, a personal injury action was filed on behalf of Heidi in April of 1997.[14] The damages sought included not only past medical costs but also for her "permanent physical injury; future medical expenses, past and future pain, suffering and mental anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future."[15] During the pendency of the litigation, the Arkansas Department of Health Services (hereinafter "ADHS") sent Ahlborn's personal injury attorneys periodic notices regarding the outlays by Medicaid on behalf of Ms. Ahlborn.[16] The letters indicated that Arkansas law provided ADHS with a claim for reimbursement from "any settlement, judgment or award" that was obtained from "a third party who may be liable" for Heidi Ahlborn's injuries and no settlement "shall be satisfied without first giving [ADHS] notice and a reasonable opportunity to establish its interest."[17]

When suit was filed, ADHS wasn't notified of the suit, as requested. Plaintiff's counsel did inform ADHS of the available insurance coverage in the suit. [18] ADHS intervened in the personal injury action in February of 1998 to assert a lien against any proceeds from a settlement or judgment.[19] The case was ultimately settled in 2002 without, per customary practice, any allocation of the settlement proceeds between categories of damages.[20] ADHS asserted a lien against the settlement for the total amount of the payments made by ADHS for Ahlborn's care which totaled $215,645.30.[21]

In September of 2002, Ahlborn filed suit in the United States District Court for the Eastern District of Arkansas seeking a declaratory judgment that "the lien violated the federal Medicaid laws insofar as its satisfaction would require depletion of compensation for injuries other than past medical expenses."[22] Certain stipulations were entered into by the parties in the

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litigation in the US District Court. First, ADHS and Ahlborn stipulated that Heidi Ahlborn's total claim "was reasonably valued at $3,040,708.18."[23] Second, the parties agreed that the out of court settlement reached represented "one-sixth of that sum."[24] Last, the parties stipulated that if the plaintiff's "construction of federal law was correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made."[25]

On cross motions for summary judgment, the Federal District Court found that Ahlborn, under Arkansas law, assigned to ADHS her right to any tort recovery from third parties to the "full extent of Medicaid's payments for her benefit."[26] The Court held accordingly that ADHS was entitled to its full lien amount of $215,645.30.[27] The ruling was appealed to the Eight Circuit and the judgment of the District Court was reversed.[28] The Eighth Circuit held that ADHS was only entitled to the portion of the settlement attributable to payments for medical care.[29] ADHS appealed to the United States Supreme Court which affirmed the Eighth Circuit's decision.[30]

III. THE *ALHBLORN* DECISION

The heart of the controversy before the Supreme Court was the interpretation of federal law requiring state Medicaid programs to recover from third party tortfeasors amounts paid on behalf of an injury victim.[31] State Medicaid agencies must "take all reasonable measures to ascertain the legal liability of third parties . . . . to pay for care and services available under the plan."[32] Federal law also requires state Medicaid agencies to seek recovery from third parties where the reimbursement the state will receive exceeds the costs of recovery.[33] States are

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required to enact state statutes to facilitate recovery of such claims by providing an assignment from the injury victim to the state Medicaid agency for recovery of third party medical care payments.[34] Finally, the amount collected by the state Medicaid agency "shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of" the Medicaid recipient.[35]

Arkansas had complied with federal law and enacted statutes providing ADHS with the right to recover "the cost of benefits" from third parties.[36] Arkansas law provided that as a "condition of eligibility", Medicaid applicants "shall automatically assign his or her right to any settlement, judgment or award which may be obtained against any third party to [ADHS] to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant."[37] Further, the Arkansas statute provided that ADHS "shall have a right to recover" when medical assistance is provided to the Medicaid recipient due to "injury, disease, or disability for which another person is liable."[38] It was pursuant to this statute that the ADHS claimed an entitlement to recover all of the costs expended on Ahlborn's behalf even though it would be recovered from portions of a settlement that didn't represent medical expenses.[39]

The question squarely before the United States Supreme Court was whether the ADHS could "lay claim to more than the portion of Ahlborn's settlement that represents medical expenses."[40] Justice Stevens said in the opinion that the "text of the federal third-party liability provisions suggests not; it focuses on recovery of payments for medical care."[41] While the State of Arkansas made many legal arguments to the Supreme Court as to why ADHS's lien attached to Ahlborn's entire settlement, each was rejected by the Court. Arkansas' primary legal argument was that the federal statute mandated every state to pass laws that require the assignment of a Medicaid beneficiary's rights to the state and assertion of liens to collect from

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the entire third-party recovery.[42] Justice Stevens addressed this argument by pointing to federal law which says the "State must be assigned 'the rights of [the recipient] to payment by any other part for such health care items or services.'"[43] According to the Court, federal law didn't sanction "an assignment of rights to payment for anything other than medical expenses –not lost wages, not pain and suffering, not an inheritance."[44] This was not the basis of the Court's decision in favor of Ahlborn though.

Instead, the Court's decision rested on its interpretation of the "anti-lien"[45] statute in the United States Code.[46] The anti-lien statute prohibits States from exerting liens against a Medicaid recipient's property prior to death for medical assistance paid on his behalf except in specifically enumerated situations.[47] While the Court found one of the anti-lien statute's enumerated exceptions was relevant to Ahlborn's situation, it was the assignment of a Medicaid beneficiary's rights to the state and assertion of liens to collect from a third-party recovery which it found was limited only to medical care.[48] Accordingly, because the exception that was carved out is limited to payments for medical care, the anti-lien provision bars recovery by ADHS against the portion of Ahlborn's settlement that was non-medical.[49]

Arkansas made several public policy arguments as to why a rule of full reimbursement was needed. The most "colorable" argument was that there was an "inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State."[50] The Court found that this issue was not before them because the ADHS had stipulated that only $35,581.47 of Ahlborn's settlement proceeds were attributable to payment for medical costs.[51] Nevertheless, Justice Stevens pointed out that "[e]ven in the absence of such a post-settlement agreement, though, the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation

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or, if necessary by submitting the matter to a court for decision."[52] He went on to say "just as there are risks in underestimating the value of readily calculable damages in settlement negotiations, so also is there a countervailing concern that a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others."[53]

Since the primary holding in *Ahlborn* is that federal laws that authorize States to assert recoveries against third parties who have provided payments for medical care for Medicaid beneficiaries only applies to the portions of a settlement that represent compensation for past medical, it appeared to invalidate state statutes that require full reimbursement of Medicaid expenditures from a third party recovery. However, that begs the question of how do parties proceed in each state in light of the *Ahlborn* decision? In Florida, how is the *Ahlborn* decision applied to settlements or judgments under Florida's statutory structure for Medicaid liens?

IV. *AHLBORN* IN FLORIDA

Florida's statutory provisions regarding Medicaid recovery when other parties are liable are similar in nature to the Arkansas' statute that was the subject of the *Ahlborn* decision. Section 409.910[54] of the Florida Statutes, prior to *Ahlborn*, had always been interpreted to allow Florida's Agency for Health Care Administration (hereinafter "AHCA") to collect reimbursement from an injury victim's entire settlement.[55] Florida's statute is even more explicit than Arkansas' statute and states "Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid."[56] Further, it says "[p]rinciples of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party

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resources."[57] Obviously the *Ahlborn* decision makes these provisions unenforceable, right? Not so fast!

One unique facet of the Florida statute that was not present in Arkansas' statute is the statutory reduction found at Section 409.910(11)(f). The statutory formula provides "[a]fter attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid."[58] While the statutory formula at first blush prevents harsh results in certain instances, that is not always the case. For example, in *Smith v. AHCA*,[59] the recovery was $2,225,000 and Medicaid could have recovered up to $707,778 after application of the statutory formula. What if in Smith, the total damages were in excess of $7,000,000 and past medical expenses was $700,000? The wage loss and non-economic damages claim far exceed $1.5 million which would be the net after application of the formula. What happens in this situation?

The answer depends on your reading of the Florida's post *Ahlborn* case law. An examination of the *Smith* decision; *Russell v. Agency for Health Care Administration*[60] and also the most recent decision interpreting Florida law, *Scharba v. Everett L. Braden, LTD*[61] are instructive as to how *Ahlborn* applies, if at all, in Florida.

A. The Smith v. AHCA Decision

The *Smith* decision from the Fifth District Court of Appeal was the first decision to address application of the *Ahlborn* decision to Florida's statutory provision regarding third party recoveries by Medicaid recipients. In *Smith*, the personal injury case for Maurice Thomas, represented by his plenary Guardian, Martha Smith was settled for $2,225,000.00.[62] Smith

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appealed an order denying her motion to reduce the Medicaid lien from $122,783.87 to $40,927.96 based upon application of *Ahlborn*.[63] Smith argued on appeal that *Ahlborn* mandated a percentage reduction of the Medicaid lien in proportion to the settlement versus actual damages.[64] Smith asserted that the $2,225,000 recovery represented a third of Maurice Thomas' total damages.[65] Therefore, *Ahlborn* required the trial court to reduce the State's Medicaid lien to one-third of the total lien amount which would be $40,927.96.[66]

The *Smith* majority rejected this argument and held that the reduction argument made by Martha Smith rested on a misreading of *Ahlborn*.[67] According to the court, "*Ahlborn* simply held that under federal law a state's Medicaid lien recovery is limited to the portion of a verdict or settlement representing amounts recovered by a plaintiff for medical expenses."[68] In *Ahlborn* the parties stipulated to an amount representing total recovery for medical expenses and used the method advanced by Smith to reduce the lien.[69] However, the majority found that *Ahlborn* didn't adopt a specific formula or method to determine the medical expense portion of an overall settlement.[70]

The majority then focused on the fact that no evidence was presented as to the value of the medical expense claim. In its discussion of the medical expense evidence issue, the *Smith* court conceded that "a plaintiff should be afforded an opportunity to seek reduction of a Medicaid lien amount by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses."[71] Since there was no showing that the medical expense portion of the recovery was less than the $122,783.87 Medicaid lien, the trial court properly applied Section 409.910 and allowed the State to recover the full value of the lien.[72] In this instance, application of the statutory formula found in Section 409.910 did not reduce the lien amount.

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The *Smith* dissent found major flaws with the majority's opinion. Most importantly the majority did not provide relief even after acknowledging that the *Ahlborn* decision limits Medicaid's recovery to only the portion of the settlement representing medical expenses.[73] Secondarily, the majority refused to consider the *Ahlborn* reduction in spite of the fact that it conceded that a plaintiff should have the right to seek a reduction of the Medicaid lien by providing medical evidence to prove the lien exceeded the medical expense recovery.[74] According to the *Smith* dissent, the appeal was denied on two grounds neither of which was argued by Medicaid. The first reason was "based on the majority's assumption that the Appellant's [injury victim's] actual medical expenses exceeded the amount expended by Appellee [Medicaid]."[75] Since no evidence was presented on this issue by either side, the dissent finds it inappropriate to rest its decision upon such a premise.[76] The second reason was the asserted misreading of *Ahlborn* mandating the use of the same method in the instant case.[77] The dissent pointed out that the majority and Medicaid did not offer any other type of method to resolve these issues.[78] According to the dissent, there "is no other method for solving this problem" and the trial judge should have made a determination regarding the value of the claim in relation to the settlement that was reached.[79] This calculation would provide the reduction ratio under *Ahlborn* which is a valid method according to the United States Supreme Court.

As one author noted, while the outcome for the Medicaid recipient was not good in *Smith*, at least the District Court for the first time acknowledged a limitation in Florida on Medicaid's right to recover from a Medicaid beneficiary's settlement.[80] In so doing, the court departed from pre-*Ahlborn* Florida case law which allowed Medicaid to collect from the beneficiary's entire recovery.[81] The holding did add an extra requirement in regards to the

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application of *Ahlborn* requiring a presentation of evidence to prove the value of the medical expense portion of the claim. Under *Smith*, by presenting evidence regarding the value of the medical claim the *Ahlborn* method of reducing the lien could properly be applied. While *Smith* added complexity to application of *Ahlborn* in Florida, it certainly didn't shut the door.

B. The Russell v. AHCA Decision

The *Russell* decision[82] was the second published opinion interpreting Florida Statute Section 409.910 in light of *Ahlborn*. In *Russell*, the injury victim, by and through his mother and legal guardian, Jeanie Russell, brought a medical malpractice action which ultimately resulted in a settlement.[83] The settlement was for $3 million and a lien was asserted by AHCA in the amount of $221,434.24.[84] The trial court ordered that the full lien amount be repaid to AHCA and rejected the *Ahlborn* method of reduction suggested by the injury victim.[85] The basis for the trial court's ruling was a finding that there was no allocation of the settlement proceeds or stipulation on the issue of what damages were attributable to medical expenses.[86] Accordingly, since the lien amount, which was the undisputed amount of the medical expenses provided by Medicaid, did not exceed fifty percent of the amount recovered, AHCA was entitled to full repayment of its lien under Section 409.910.[87] Russell, on behalf of her son, appealed the trial court's ruling.

On appeal, Russell argued that the formula reduction under Florida Statute 409.910 was limited by the *Ahlborn* decision.[88] Based upon *Ahlborn*, she argued since expert testimony established the full value of her son's claim as $30 million, the settlement of $3 million represented a recovery of only one-tenth of the real damages suffered by her son.[89] Therefore,

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under *Ahlborn*, AHCA could only recover one-tenth of its Medicaid lien. The *Russell* court flatly rejected this argument and concluded it was based on an "untenable reading of *Ahlborn*."[90] In the *Russell* opinion, the court pointed out that the key difference between this case and *Ahlborn* was the lack of a stipulation concerning the portion of the settlement that was attributed to medical related expenses.[91] In *Ahlborn*, it was central to the decision that there was a stipulation regarding the amount attributable to medical expenses according to the *Russell* court.[92] The district court of appeal in *Russell* concluded that there was no such stipulation and no similar basis for calculating the allocation of settlement proceeds.[93]

The court disagreed with Russell's argument that the *Ahlborn* decision established as a rule of law the formula utilized by the state of Arkansas.[94] According to the opinion, the *Ahlborn* "formula simply was part of the facts presented to the court" and it cited to the *Smith* decision.[95] The court went on to point out that when an injury victim settles his case, he does so against the statutory framework and the fifty-percent allocation set forth in Section 409.910.[96] "Here the appellant [Russell] failed to establish any basis for concluding that the lien asserted by AHCA extends to a portion of the settlement 'meant to compensate the recipient for damages distinct from medical costs.'"[97] Based upon the foregoing, the conclusion reached by the *Russell* court was that "Florida's statutory allocation rule must prevail."[98]

Of importance was a discussion by the district court in *Russell* about allocation of tort settlements. The opinion points out that the Supreme Court in *Ahlborn* acknowledged that "some states have adopted special rules and procedures for allocating tort settlements" and left open "the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation."[99] The *Russell* court emphasized that even though it was significant in

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this case that there was no allocation in the settlement agreement, the court was not suggesting that an allocation in a settlement agreement without ACHA's blessing would be dispositive.[100] *Ahlborn*, according to *Russell*, recognized that "the risk that parties to a tort suit will allocate away the State's interest" may justify the use of "special rules and procedures" or submission of "the matter to a court for decision."[101] However, here there was no mandate for a judicial determination since the parties didn't agree on an allocation in the first place.

Finally, in a footnote, the Russell court refused to address the issue of whether the statutory fifty-percent allocation in 409.910 could be displaced by "parole evidence" proving that a lien would extend to the non-medical portion of a settlement. Unlike *Smith*, the *Russell* opinion did not specifically recognize the *Ahlborn* limitation of Medicaid liens to recovered medical expenses as applied to Florida law. It also does not address whether the *Ahlborn* method of reduction would be appropriate.

As in *Smith*, the outcome for Russell was not positive for the injury victim. The *Russell* decision seems to stand for a similar proposition as the *Smith* decision. The injury victim must demonstrate, with evidence, the amount of the settlement attributable to medical expenses before *Ahlborn* would limit the lien. Without that evidence or a stipulation blessed by ACHA, *Ahlborn* would not be applied based upon *Smith* and *Russell*. Instead, the fifty-percent statutory formula from Section 409.910 is applied. With the proper evidence introduced, neither *Smith* or *Russell* tell us what would be the appropriate method of addressing reduction of the lien in light of actual damages versus recovered damages. However, neither decision rejects the use of the *Ahlborn* method for calculating the reduction.

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C. The Scharba v. Everett L. Braden, LTD. Decision

The *Scharba* decision[102] was the first Florida federal district court opinion to address the application of *Ahlborn* to Florida law. Kevin Scharba was injured in an accident in March of 2006.[103] A lawsuit was filed in state court for damages as a result of his injuries.[104] The matter was ultimately removed to federal court. Prior to trial, the case was settled for $440,000.[105] The settlement agreement did not contain an allocation of the damages between the various types suffered by Scharba.[106] Medicaid provided $65,373.55 in Medicaid benefits due to the injuries suffered in the accident.[107] They asserted a lien in that amount and did not agree to any allocation or apportionment when the case settled.[108] Post-settlement, Scharba made a motion to allocate the settlement and determine the amount of the Medicaid lien. ACHA opposed the motion.[109] The federal district court held that ACHA was entitled to one hundred percent reimbursement based upon application of the statutory formula found in Section 409.910 of the Florida Statutes.[110]

Scharba's argument for reduction of the Medicaid lien was based upon *Ahlborn*.[111] His position was that *Ahlborn* prohibited application of the statutory formula in 409.910.[112] According to Scharba, *Ahlborn* necessitated a determination as to what portion of the settlement was for medical expenses which would be accomplished by comparing the full value of the case to the actual settlement amount and then reducing Medicaid's lien by the same ratio.[113] As evidence of the full value of the claim, Scharba presented testimony from an experienced personal injury attorney regarding the full value of the claim which was estimated at exactly two times the recovery.[114] Accordingly, Scharba argued that the lien should be reduced by fifty percent based upon the ratio and by a second reduction of forty percent for attorney's fees.[115]

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AHCA argued that the *Ahlborn* decision didn't compel the use of a "full value formula" or render the Florida statutory formula invalid. Instead, according to AHCA, the Medicaid lien must be paid in full based upon operation of the statutory formula found in Section 409.910.[116]

In reaching its decision, the federal district court in *Scharba* analyzed the *Ahlborn* decision and distinguished the Florida statutory scheme from the Arkansas scheme. This has been a common theme amongst the *Smith*, *Russell* and *Scharba* decisions. In distinguishing Florida's act, the court focused on the fact that the statutory reduction of 409.910 would not obliterate "in whole or substantial part" a personal injury recovery given the limitations in the statute.[117] The *Scharba* court specifically held, citing to *Russell*, that where "as here, 'there is no such stipulation and no similar basis for determining an allocation of the settlement proceeds,' the statutory formula of § 409.910(11)(f) controls to determine the appropriate payment of AHCA's lien from settlement proceeds."[118] The Florida cases post-*Ahlborn*, according to the court, supported the court's holding.[119]

The *Scharba* opinion indicates that the Florida decisions "have rejected claims that *Ahlborn* mandates a full value analysis and have upheld the use of the Florida statutory formula in determining the appropriate amount of settlement proceeds allocable to medical reimbursement."[120] The court concluded by finding that *Ahlborn* didn't proscribe the use of the statutory formula in section 409.910; *Ahlborn* does not compel the use of the "full value formula"; the facts were "materially distinguishable" from *Ahlborn* and section 409.910(11)(f) controlled.[121] Since the Medicaid lien didn't "exceed fifty percent of the amount recovered" the court determined that "AHCA is entitled to recover the full amount of its lien pursuant to section 409.91(11)(f)(1)."[122] Finally, the court held that the Medicaid lien amount constituted the

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"portion of the settlement attributable to the recovery of medical expenses incurred by AHCA."[123]

D. Lessons Learned from Smith, Russell & Scharba

Based upon the holdings in *Smith*; *Russell* and *Scharba*, it is this author's opinion we now have a two step analysis in Florida. The first step would be an allocation of damages in the settlement agreement and release. That allocation would then need to be backed up by competent evidence presented in a hearing before a judge with jurisdiction over the matter to determine equitable distribution. By proving the amount of the settlement attributable to medical expenses, the plaintiff can meet the burden of demonstrating that the AHCA lien, as asserted, extends beyond the medical damages which is limited by *Ahlborn*. The first step is critically important and was overlooked in *Smith, Russell* and *Sharba*. The plaintiff must demonstrate a factual basis for concluding that the lien asserted by AHCA extends to a portion of the settlement meant to compensate the recipient for damages distinct from medical costs. The second step would be to prove, again with competent evidence, a percentage difference between the actual value of the claim and the settlement amount. This would be where the *Ahlborn* method of reduction would be applied to the lien amount against the medical portion of the recovery.

In summary, the Florida appellate decisions make it more complicated to apply *Ahlborn* in Florida. However, if the two step analysis is utilized with appropriate evidence, the statutory formula found in 409.910(11)(F) should not be applied. The case law that has developed to this point in Florida has had a lack of evidence presented on the amount of medical damages which absent that evidence; the courts have simply applied the statutory formula.

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V. *AHLBORN* BEYOND FLORIDA

In light of the *Ahlborn* decision, state courts, like Florida, have had to grapple with application of the Supreme Court's holding to their own state statutes allowing for Medicaid subrogation. The results of the post-*Ahlborn* cases are a mixed bag. Certain jurisdictions such as North Carolina and Idaho have ruled that *Ahlborn* does not apply at all or may be limited in some respects due to their existing state statutes.[124] However, other jurisdictions, for example California and New York, have found that the *Ahlborn* methodology is appropriate even though the Supreme Court's decision didn't mandate the use of an exact formula.[125] Some states have gone so far as to amend their Medicaid subrogation provisions to try to comport with *Ahlborn*.[126] Finally, in what is probably an anomaly, one federal district court recently held that *Ahlborn* prohibits any lien at all by Medicaid against a personal injury recovery.[127]

A. North Carolina and Idaho Case Law

In *Andrews v. Haygood*,[128] the North Carolina Supreme Court addressed the validity of the state's statutory scheme in light of *Ahlborn*. Under North Carolina law, Medicaid is allowed reimbursement "only when 'the amount of assistance' previously paid for medical expenses is one-third of the plaintiff's settlement or less."[129] According to *Haygood*, North Carolina's law "prevents excessive depletion of a plaintiff's recovery to satisfy the State's reimbursement lien."[130] Based upon its state statutory scheme "requiring a specific determination of the medical expense portion of a settlement" the *Haygood* court held that "North Carolina employs an alternative statutory procedure that we believe is permitted by *Ahlborn*."[131] "The one-third limitation of section 108A-57(a) thus comports with *Ahlborn* by providing a reasonable method

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for determining the State's medical reimbursements, which it is required to seek in accordance with federal Medicaid law."[132] Therefore, in North Carolina, according to its highest court, the *Ahlborn* formula was inapplicable.

The *Haygood* dissent was more in line with the case law from California and New York discussed below. While the dissent agreed that *Ahlborn* didn't mandate a specific formula for determining the medical expense portion of a plaintiff's settlement, it did hold that state's can't violate federal anti-lien provisions "by requiring a Medicaid recipient to reimburse it out of settlement funds designated for purposes other than medical care."[133] Accordingly, the dissent concluded that "*Ahlborn* is binding upon this Court, and its reasoning and holding compel the conclusion that the application of N.C.G.S. § 108A-57(a) here, without any further determination of how the settlement proceeds were allocated among the different types of damages alleged by plaintiff, would be contrary to federal law."[134] The dissent would have found that "N.C.G.S. § 108A-57(a) violates the federal anti-lien provisions on its face, as it could be applied to factual situations in which the parties have stipulated, or an evidentiary hearing has determined, how to allocate the settlement proceeds among medical expenses and other damages."[135]

In *Idaho Department of Health and Welfare v. Hudelson*, the Supreme Court of Idaho addressed *Ahlborn* as applied to the Idaho statutory framework. Idaho state Statue, I.C. § 56-209b(6), provided that if "a settlement or judgment is received by the [Medicaid] recipient without delineating what portion of the settlement or judgment is in payment of medical expenses, it will be presumed that the settlement or judgment applies first to the medical expenses incurred by the recipient in an amount equal to the expenditure for medical assistance benefits paid by the department as a result of the occurrence giving rise to the payment or

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payments to the recipient."[136] The *Hudelso*n court ruled that *Ahlborn* didn't overrule Idaho's state statute regarding recovery of Medicaid liens and the presumption it creates.[137] The opinion pointed out that "I.C. § 56-209b(6) creates a procedure for determining a settlement allocation by imposing a presumption that an unallocated settlement will be allocated first to past medical expenses."[138] "*Ahlborn* does not prohibit states from implementing procedures on how to allocate unallocated settlements."

In discussing what should happen on remand, the *Huddelson* opinion did concede that the *Ahlborn* formula may be applied if the presumption from I.C. § 56-209b(6) was rebutted.[139] The *Huddelson* opinion went on to cite *Lugo v. Beth Israel*[140] and detail its holding that the *Ahlborn* formula was "rational."[141] The Idaho Supreme Court approved the *Lugo* decision stating that the "observations of the New York court are reasonable, and therefore, a court *may* apply the *Ahlborn* Formula if the Medicaid recipient is able to rebut I.C. § 56-209b(6) presumption."[142] While the Idaho Supreme Court did find *Ahlborn* inapplicable if the presumption in Idaho law is not rebutted, it did recognize it to some extent in the end with its citing of *Lugo*.[143]

B. California and New York Case Law

The 2008 *Bolanos v. Superior Court*[144] decision in California is illustrative of the application of the *Ahlborn* decision to California's new subrogation provisions. Rebecca Bolanos was the victim of medical malpractice which led to an irreversible coma requiring life support and around the clock nursing care.[145] Her medical malpractice claim was settled for $1.5 million dollars.[146] Medicaid had paid $746,107 towards her care.[147] Post-settlement, Medi-Cal asserted a claim in the amount of $546,651 against the settlement proceeds which amounted to

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one hundred percent of its claim less fees and costs.[148] In response, legal counsel for Bolanos filed a motion pursuant to California statutes to have the trial court determine the amount of the settlement representing payments for medical expenses citing *Ahlborn*.[149] Medi-Cal opposed the motion and contended that the entire settlement was subject to the Medicaid lien. [150] The trial court denied the motion.[151]

In its holding, the *Bolanos* court made the following comments about *Ahlborn*:

> We agree that *Ahlborn* itself does not require the application of the precise formula used in that case, although we do not think this approach, which has the Supreme Court's approval, should be abandoned lightly. We do not agree, however, that *Ahlborn* did not "consider" the formula—its decision in the case was based on the results of the formula—nor do we agree that *Ahlborn* is of no consequence when it comes to a settlement that has not been allocated between past medical expenses and other damages.[152]

The case was remanded back to the trial court for a hearing to determine two things: (1) "the portion of the settlement that represents payment for past medical expenses, or medical care;" and (2) "the maximum amount the director may recover on the Medi-Cal lien."[153] This holding was based on the courts finding that the "fundamental point is that a settlement that does not distinguish between past medical expenses and other damages must be allocated between these two classes of recoveries."[154] The *Bolanos* court went on to say that "[w]ithout such an allocation, the principle set forth in *Ahlborn*, that the state cannot recover for anything other than past medical expenses, cannot be carried into effect."[155] In a 2009 decision, *Lima v. Vous*,[156] a very similar result was reached by another California Court of Appeals which relied heavily upon *Bolanos*.[157]

New York's courts have interpreted *Ahlborn* similarly to California. A good example of this is the *Lugo v. Beth Israel Medical Center*[158] decision. In *Lugo*, the plaintiffs brought a

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medical malpractice action based upon negligence during the labor and delivery of Nyisha Lugo causing severe injury.[159] The case was settled for $3.5 million and court approval was subsequently sought since the claim involved a minor. Counsel for the Department of Social Services of the City of New York (hereinafter "DSS") appeared at the hearing asserting a lien of $47,349.58.[160] The court signed an order approving the settlement of the minor's claim but said three issues were raised that needed to be addressed.[161] The first question was whether DSS could recover its lien from the entirety of the settlement or just from medical damages.[162] Second, if the DSS lien is limited only to the medical damages, how should the court determine the amount of the medical damages?[163] Last, whether the settlement proceeds could be disbursed to the plaintiffs prior to satisfaction of the Medicaid lien.[164]

The *Lugo* Court, addressing the first question, found that *Ahlborn* had a "significant impact on New York Law" and that DSS couldn't recover their lien automatically from the entire settlement proceeds.[165] According to the decision, "the *Ahlborn* court directly addressed that issue, and the decision applies here to bar DSS from recouping its lien from any settlement monies not allocated to past medical expenses."[166] As to the second question, the *Lugo* Court found it had the power to allocate the settlement proceeds.[167] However, the court didn't agree that *Ahlborn* mandated the use of the same formula without a judicial determination.[168] Instead, a "court determination is necessary to confirm the full value of the case and the value of the various items of damages, including plaintiff's injuries and how they compare to verdicts awarded in other cases."[169] Justice Schlesinger, who wrote the opinion, did note that the *Ahlborn* formula was "rational" and that the Supreme Court implicitly sanctioned the formulas use by its holding.[170] As to the final question, the *Lugo* Court determined that the settlement proceeds

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should be released except the entirety of the Medicaid lien should be held in escrow.[171] Post *Lugo*, a number of other New York courts has applied the *Ahblorn* formula to reduce Medicaid liens.[172]

C. The Oklahoma Response to Ahlborn

The Center for Medicare and Medicaid Services (hereinafter "CMS") issued a memorandum to all state Medicaid agencies on July 3, 2006 discussing *Ahlborn* and the states' options for compliance with the U.S. Supreme Court decision.[173] The memorandum contained advice on how to amend state legislation to comport with *Ahlborn*.[174] Oklahoma took the advice offered by CMS and successfully passed legislation to have its state Medicaid agency recover payments from personal injury actions in compliance with the *Ahlborn* decision.[175] The new law only allows Medicaid to recover from the portion of a settlement or judgment that represents payment of medical damages.[176] The legislation has been criticized by at least one author calling it a "halfhearted effort" and a poor template for other states.[177] The criticism is based upon a detailed analysis of federal statutory law and the *Ahlborn* decision. The lack of attention to the use of terms of art in the context of Medicaid recovery by the Oklahoma statute dooms it in the eye of the critical author.[178] In this author's opinion, whether or not a state amends its statute in an effort to comply with *Ahlborn* is immaterial because ultimately the courts will be called upon to make a juridical decision as to whether legislation comports with *Ahlborn* or not. Clearly, *Ahlborn* allows for states to come up with their "special rules and procedures for allocating tort settlements."[179]

D. The Tristani Decision – No Lien at All? An Anomaly?

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In *Tristani v. Richman*,[180] a federal district court in Pennsylvania held that the state Medicaid agency couldn't assert a lien or seek repayment from a medical malpractice recovery where Medicaid had made payments prior to settlement.[181] The *Tristani* case was brought as a class action with two representative plaintiffs, Rita Richman and Joshua Valenta, who represented others similarly situated.[182] Rita Tristani was the victim of medical malpractice suffering catastrophic injuries and reached a settlement to which the Pennsylvania Department of Public Welfare (hereinafter "DPW") asserted a lien for payments made by Medicaid prior to settlement.[183] Joshua Valenta was injured in an automobile accident and subsequently sued the negligent parties that caused his injuries.[184] A settlement was reached and DPW claimed a lien against the settlement for monies spent by Medicaid for his post injury medical care.[185]

Both Tristani and Valenta followed the Pennsylvania laws and paid the amounts sought by Medicaid after DPW provided the amount of the lien to the plaintiffs.[186] After the settlements occurred, an action was brought in federal district court seeking to recover the amounts paid to Medicaid to satisfy the liens and alleging that DPW's liens violated Tristani and Valenta's constitutional rights.[187] The defendants filed a motion for summary judgment and the plaintiffs filed a motion for partial summary judgment which resulted in the published opinion.[188]

The *Tristani* decision tackled the problematical provisions in federal law that was construed by the U.S. Supreme Court in *Ahlborn*.[189] Judge Conti, in rendering the opinion, noted that *Ahlborn* didn't rule on the question of whether the anti-lien provisions found at 42 U.S.C. §1396p(a)(1) would preclude Medicaid from asserting any lien against a recipient's settlement proceeds attributable to payments for medical care.[190] According to the *Tristani* opinion, Heidi Ahlborn didn't argue that the "anti-lien provision precluded the encumbrance of the portion of

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her settlement proceeds attributable to medical expenses."[191] For purposes of the *Ahlborn* decision, the Supreme Court assumed that the "forced assignment" provisions found at Section 1396a(a)(25) and 1396k(a) were an exception to the anti-lien provision that allowed Arkansas to place a lien only on the portion of the Medicaid recipient's settlement award attributable to medical expenses.[192] Accordingly, Judge Conti found that the question of "whether a state can place a lien on the portion of a Medicaid recipient's settlement proceeds attributable to payments for medical care remains an open question" and decided to answer the question.[193]

Tristani and Valenta argued that Section 1396p(a)(1) prohibited the DPW from asserting a lien of any kind against their settlement proceeds and prohibited the DPW from seeking "recoveries" of the medical assistant that had been correctly paid for them.[194] The DPW argued that Sections 1396(a)(25) and 1396k(a) created an exception to the anti-lien and anti-recovery provisions permitting DPW to assert liens against awards or recoveries secured by Medicaid recipients from liable third parties.[195] The court didn't agree with the latter view and noted that a "close examination of the statutory provisions allegedly creating the "exceptions" asserted by [DPW] . . . indicates that Congress contemplated the commencement of direct actions by state entities against liable third parties for the cost of medical assistance furnished to Medicaid recipients."[196] Accordingly, the court held that

> The DPW was not entitled to the "free ride" that it enjoyed with respect to the payments extracted from Tristani and Valenta. Wallace, 972 P.2d at 452 (Durham, J., dissenting). The DPW was free to intervene in the Tristani and Valenta cases. By virtue of the assignments, the DPW was able to represent directly its own interests. *Id.* at 451 (Durham, J., dissenting). Having failed to do so, the DPW was not entitled to impose liens on the settlement proceeds obtained by Tristani and Valenta, or to seek adjustments or recoveries from such proceeds for "medical assistance correctly paid" on their behalf, under circumstances not within the exceptions to the anti-lien and anti-recovery prohibitions specifically enumerated in §§ 1396p(a)(1) and 1396p(b)(1).[197]

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The *Tristani* court went further and held that the Pennsylvania statutes in question which permitted the DPW to impose liens on personal injury awards received by third parties were preempted by Section 1396p(a)(1).[198] In addition, according to the opinion, the application of Pennsylvania law as to Tristani and Valenta was unconstitutional under the Supremacy Clause.[199] Judge Conti did observe that the DPW was not without recourse in terms of recovering monies paid by Medicaid which were the responsibility of third parties.[200] Because Pennsylvania statutes required Medicaid beneficiaries to provide reasonable notice to the DPW when an action seeking recovery of medical expenses was commenced, the DPW could intervene in such an action and prosecute its claim without violating section 1396p(a)(1).[201] "The court holds only that the assignment provisions of Title XIX do not provide the DPW with a license to ignore the clear, unambiguous 474 mandates of the anti-lien and anti-recovery provisions when the DPW chooses to remain on the sidelines in actions commenced by Medicaid beneficiaries against liable third parties."[202]

In this author's opinion, the *Tristani* decision reached an unexpected outcome and is likely not to be followed by other federal or state courts. If the decision were followed, it would effectively end Medicaid's practice of asserting liens on personal injury recoveries from third parties. Instead, according to the *Tristani* opinion, a state Medicaid agency would have to intervene in personal injury actions and assert its claim directly against the third party tortfeasor.[203] The *Tristani* decision is only an interlocutory opinion and is in the process of being appealed so we may very well see a reversal by the federal Circuit Court of Appeals in the future.[204] In the interim, it is an opinion that can be used in by plaintiffs in an attempt to negotiate a Medicaid lien or *Ahlborn* reduction. In addition, the same arguments could be used

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in the right case before either a Florida District Court of Appeal or Florida Federal District Court of Appeal.

VI. THE FUTURE OF *AHLBORN* IN FLORIDA

In the future, the concern is that Florida's statutory lien reduction scheme could preclude application of *Ahlborn* in Florida. The *Haygood* and *Hudelson* decisions from the North Carolina and Idaho Supreme Court illustrate this risk. It is a legitimate fear given the fact that the Florida Supreme Court has yet to rule on any *Ahlborn* cases. In future cases, plaintiff counsel must make the argument that *Smith* recognizes the holding of *Ahlborn* that Medicaid may not assert a lien against the portion of the recovery attributable to non-medical damages. Remember, the *Smith* court conceded that "a plaintiff should be afforded an opportunity to seek reduction of a Medicaid lien amount by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses." Therefore, the plaintiff must be given the chance to prove that the lien amount asserted by AHCA exceeds the amount of the settlement allocated to medical expenses.

Of course, counsel will have to deal with the *Russell* and *Scharba* decisions which seemed to blindly apply the statutory formula and didn't reaffirm the *Smith* court's concession regarding the need of an opportunity for a hearing. The *Lugo* decision from New York can be used to argue that the *Ahlborn* method of reduction, while not mandated, is rational and reasonable. As a backup argument, since Florida law does not limit AHCA's recovery to past medical expenses, it could be argued that it violates the anti-lien law in Section 1396p(a)(1). The *Tristani* decision could be used persuasively to make such an argument.

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VII. CONCLUSION

Ahlborn is certainly not dead in Florida or around the country for that matter. It may ultimately be a short lived victory depending on the outcome of future appellate decisions in Florida. The critical test will come when a Florida appellate court is faced with proper evidence of the amount of medical damages and evidence of actual damages versus recovered damages, the missing evidence from *Smith*, *Russell* and *Scharba*. If, in the face of such evidence, the statutory formula is still applied then *Ahlborn* might just die in Florida. The *Ahlborn* decision created problems in its wake since it didn't mandate a specific formula to be applied in an *Ahlborn* reduction scenario. To make matters even more complicated, some states such as North Carolina and Idaho, have developed case law holding that their state statues which contain limitations on Medicaid's recovery precludes or should preclude application of *Ahlborn*. The viability of *Ahlborn* in Florida will turn on whether Florida courts rule that the statutory reduction scheme is a permissible alternative permitted by the Supreme Court's decision or whether the *Smith* decision's requirement for a hearing on the issue of whether the lien exceeds the amount recovered for medical expense is required.

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[2] 547 U.S. 268 (2006).
[3] *See Ahlborn* 547 U.S. at 290.
[4] *Id.*
[5] *Id.* at 284.
[6] Joseph D. Juenger, *In Light of Ahlborn – Designing State Legislation to Protect the Recovery of Medicaid Expenses from Personal Injury Settlements*, 35 N. KY. L. REV. 103 (2008).
[7] Lou Bograd, Center for Constitutional Litigation, P.C., Memorandum to Interested Parties, *Possible Extension of Ahlborn Ruling to Medicare and Guidance to Plaintiff's Counsel Regarding the Decision* (May 16, 2006).
[8] Juenger, *supra* note 6 at 103.
[9] *Ahlborn*, 547 U.S. at 273.
[10] *Id.*
[11] *Id.*

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 274.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 275.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* (quoting 42 U.S.C. §1396a(a)(25)(A)).
[33] 42 U.S.C. §1396a(a)(25)(B).
[34] 42 U.S.C. §1396a(a)(25)(H); *see also* 42 U.S.C. §1396k(a).
[35] 42 U.S.C. §1396k(a).
[36] *Ahlborn* 547 U.S. at 277 (citing Ark. Code Ann. §§20-77-301 through 20-77-309 (2001)).
[37] *Id.* at 277.
[38] *Id.*
[39] *Id.* at 278.
[40] *Id.* at 280.
[41] *Id.*
[42] *Id.* at 281.
[43] *Id.*
[44] *Id.*
[45] 42 U.S.C. §1396p
[46] *Ahlborn*, 547 U.S. at 284.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 288.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] §409.910, Fla. Stat. (2009).
[55] Floyd Faglie, *Florida District Court of Appeal Addresses Reduction in Florida Medicaid Lien with Disappointing Results* (2009).
[56] §409.910(1), Fla. Stat. (2009).
[57] Id.
[58] §409.910(11)(f), Fla. Stat. (2009).
[59] Smith v. AHCA, 24 So.3d 590 (Fla. 5th DCA 2009).
[60] Russell v. AHCA, 23 So.3d 1266 (Fla. 2nd DCA 2010).
[61] Scharba *v. Everett L. Braden, Ltd.*, 2010 WL 1380121 (M.D. Fla. 2010).
[62] *Smith* at 590
[63] *Id.*

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[64] *Id.* at 591.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 592.
[72] *Id.*
[73] *Id.* at 593.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 594.
[78] *Id.*
[79] *Id.*
[80] Faglie at *supra* note 50 at 3.
[81] *Id.*
[82] *Russell*, 23 So.3d 1266.
[83] *Id.* at 1267.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1268.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* The court also cited to a 2008 North Carolina decision *Andrews ex rel. Andrews v. Haygood*, 669 S.E.2d 310 (N.C. 2008). "The *Ahlborn* holding, limited by the parties' stipulations, did not require a specific method for determining the portion of a settlement that represents the recovery of medical expenses." *Id.* at 313.
[96] *Russell* at 1269.
[97] *Id.*
[98] *Id.*
[99] *Id.* (citing *Ahlborn* 547 U.S. at 288 n. 18).
[100] *Russell* at 1269
[101] *Id.* (citing *Ahlborn* 547 U.S. at 288 n. 18.)
[102] *Scharba*, 2010 WL 1380121.
[103] *Id*.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *See* Andrews v. Haygood, 669 S.E.2d 310 (N.C. 2008); Idaho Department of Health & Welfare v. Hudelson, 196 P.3d 905 (Idaho 2008).
[125] *See* Bolanos v. Superior Court, 169 Cal.App.4th 744 (Cal.App.2 Dist. December 23, 2008); Lima v. Vous, 174 Cal.App.4th 242 (Cal. App. 2 Dist. 2009); Lugo v. Beth Israel Medical Center, 819 N.Y.S.2d 892; 13 Misc.3d 681 (2006); Ferguson v. IHB Realty, 841 N.Y.S.2d 848 (2006); Chambers v. Jain, 839 N.Y.S.2d. 432 (2007); Harris v. City of New York 837 N.Y.S.2d 486 (2007).
[126] Juenger, *supra* note 6 at 105
[127] Tristani v. Richman, 609 F.Supp.2d 423 (W.D. Pa. 2009).
[128] *Haygood*, 669 S.E.2d at 313.
[129] *Id.* at 313.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 314.
[134] *Id.* at 316.
[135] *Id.*
[136] *Hudelson*, 196 P.3d at 909
[137] *Id.* at 911.
[138] *Id.*
[139] *Id.* at 912.
[140] *Lugo*, 13 Misc.3d 681.
[141] *Hudelson*, 196 P.3d at 912
[142] *Id.*
[143] *Id.*
[144] *Bolanos*, 169 Cal.App.4th 744.
[145] *Id.* at 749.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 750.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 761.
[153] *Id.* at 762.
[154] *Id.* at 753.
[155] *Id.*
[156] *Lima*, 174 Cal.App.4th 242.
[157] *Id*.
[158] *Lugo*, 13 Misc.3d 681.
[159] *Id.* at 681.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 683.

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[164] *Id.*
[165] *Id.* at 684.
[166] *Id.* at 685.
[167] *Id.* at 686.
[168] *Id.* at 688.
[169] *Id.*
[170] *Id.* at 687.
[171] *Id.* at 690.
[172] *See* Chambers v. Jain, 839 N.Y.S.2d. 432 (2007) (determining that the plaintiff had recovered 28.3% of his damages and therefore Medicaid was entitled to 28.3% of its lien); Harris v. City of New York 837 N.Y.S.2d 486 (2007) (remanded for a hearing to determine percentage of proceeds to repay medical expenses applying the "*Lugo* factors"). *See also* Wright v. New York Hospital Medical Center, 2007 WL 4229216, N.Y. Slip Op. 33804(U) (N.Y. Sup. 2007) (determining that the plaintiff recovered 40.8% of her total damages therefore the Medicaid lien should be reduced by the same proportion).
[173] Letter from Gale Arden, Director of The Centers for Medicare & Medicaid Services, to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006).
[174] *Id.* at 2-4.
[175] Juenger, *supra* note 6 at 111.
[176] *Id.*
[177] *Id.* at 125.
[178] *Id.* at 126.
[179] *Ahlborn*, 547 U.S. at 288 n. 18.
[180] Tristani v. Richman, 609 F.Supp.2d 423 (W.D. Penn. 2009).
[181] *Id.* at 488.
[182] *Id.* at 438.
[183] *Id.* at 435.
[184] *Id.* at 437.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 438.
[188] *Id.*
[189] *Id.* at 440.
[190] *Id.* at 445.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 467.
[195] *Id.* at 469.
[196] *Id.*
[197] *Id.* at 473.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] Pennsylvania Department of Public Welfare Website, Questions and Answers for Insurers about Tristani v. Richman, http://www.dpw.state.pa.us/PartnersProviders/MedicalAssistance/DoingBusiness/003679462.htm.

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