

# Be Wary of Court-Ordered Settlement Apportionment

*Amundsen Davis Health Care Alert*  
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Recently, the Fifth District Appellate Court in *McKim v. Southern Illinois Hospital Services, d/b/a Herrin Hospital* reviewed a judgment order distributing settlement from a motor vehicle accident and found that such order was contrary to the plain language of the Health Care Service Lien Act. In that case, the circuit court lumped together not only the hospital lien but the liens from Medicare and Medicare Part D in determining the statutory 40% limitation per lien under the Health Care Services Lien Act. Also, the court found that the lienholders were responsible for their pro rata share of costs of suit.

The appellate court began its analysis by looking at the relevant sections of the Health Care Services Lien Act. Section 10(a) of the Health Care Services Lien Act states: "Every health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person [...] shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person." 770 ILCS 23/10(a) (West 2012). The Act provides that the total amount of medical liens pursuant to this Act cannot exceed 40% of the settlement. Section 10(b) of the Act provides that all perfected lienholders shall share proportionate amounts subject to the 40% limit. Finally, Section 10(c) states that if the total amount of medical liens meets or exceeds the 40% limit, then the 40% limit is divided in two halves: 20% of the settlement is to be distributed to health care professionals, and 20% is to be distributed to health care providers.

The Act also defines health care professional and health care provider. The health care professional is defined as "any individual in any of the following licensed categories: licensed physician, licensed dentist, licensed optometrist, licensed naprapath, licensed clinical psychologist or licensed physical therapist." A health care provider is defined as "any entity in any of the following licensed categories: licensed hospital, licensed home health agency, licensed ambulatory surgical treatment center, licensed long term care facilities, or licensed emergency medical services personnel." Also, the Act provides that when medical liens meet or exceed 40% of the settlement, the attorney's lien is limited to 30%.

As we know, the Medicare Secondary Payer Act has priority and "has a right of action to recover its payments from any entity, including the beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has

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Ruth E. Robinson  
Partner

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received a primary payment.” 42 CFR §411.24(g). Further, Medicaid payments also “take priority over all other liens and charges existing under the laws of the State of Illinois with the exception of the attorney’s lien.”

In the *McKim* case, the 5<sup>th</sup> District found that the lower court’s inclusion of Medicare and Medicaid in the overall 40% cap was not proper. Herrin Hospital contended that the hospital and the ambulance bills were the only two providers that were eligible to share proportionately in the 40% amount of the settlement. Based upon the plain language of the Act, the court found that Medicare, Medicare Part D and Medicaid were not subject to the Health Care Services Lien Act. Simply, Medicare and Medicaid are public agencies which do not directly provide medical care to the patient. Thus, Medicare and Medicaid were neither “health care professionals” or “health care providers” under the Health Care Services Lien Act and these public entities are not subject to the Health Care Services Lien Act.

Further, the appellate court in *McKim* found that the lower court had improperly deducted costs from the hospital and ambulance lien contrary to the Act and the Illinois Supreme Court’s decision in *McVey v. MLK Enterprises, LLC*, 32 N.E.3d 1112 (2015).

Accordingly, it is advised to fully evaluate the settlements or awards in determining and calculating liens under the Health Care Services Lien Act and do not assume that the trial court has properly calculated such liens or costs.

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