

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KA YANG, YIA YANG and  
XAI YANG, a minor through  
his guardian ad litem,  
Daniel F. Schmeeckle,

Plaintiffs,

v.

PORTAGE COUNTY, WISCONSIN,

Defendant.

ORDER

12-cv-797-bbc

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After plaintiff Xai Yang was seriously injured in a car accident, defendant Portage County paid \$35,000 in Medicaid assistance benefits on behalf of Xai to pay for his medical expenses. When Xai obtained a \$25,000 settlement from his insurance company, defendant sought reimbursement under Wis. Stat. § 49.89, which grants a lien to a government entity such as defendant that provides assistance to a Medicaid recipient. The lien is “equal to the amount of the medical assistance provided as a result of the injury, sickness, or death that gave rise to the claim.” Wis. Stat. § 49.89(2). Section 49.85(5) describes how the settlement should be allocated: “Reasonable costs of collection including attorney fees shall be deducted first. The amount of assistance granted as a result of the occurrence of the injury, sickness or death shall be deducted next and the remainder shall be paid to the public assistance recipient or other party entitled to payment.” The parties agree that \$12,500

should be allocated to attorney fees, so defendant argues it is entitled to the remaining \$12,500 under § 49.89(5).

In response to defendant's demand, plaintiff Xai and his legal guardians brought this lawsuit for declaratory relief under 42 U.S.C. § 1983. Plaintiffs have filed an early motion for summary judgment in which they contend that § 49.89(5) conflicts with 42 U.S.C. § 1396p, which restricts the circumstances under which state and local governments can impose a lien on property to recover Medicaid expenses. Defendant does not deny plaintiffs' contention that they may bring their claim under § 1983, dkt. #28, so that issue is waived. Bertrand ex rel. Bertrand v. Maram, 495 F.3d 452, 457-58 (7th Cir. 2007) (existence of private right of action is not jurisdictional and therefore is subject to waiver). Under 28 U.S.C. § 2403 and Fed. R. Civ. P. 5.1, the Wisconsin Attorney General is authorized to intervene because plaintiffs are challenging the constitutionality of a state statute, but the court has received a letter from the Wisconsin Department of Justice stating that it does not wish to intervene. Dkt. #23.

The key question in this case is the scope of the holding in Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 280 (2006), in which the Supreme Court interpreted § 1396p as prohibiting a state from imposing a lien except with respect to the portion of the settlement that "represents medical expenses." Plaintiffs say that § 49.89(5) and the lien imposed in this case are inconsistent with Ahlborn because they are not limited to the portion of a settlement that is for medical expenses. Rather, the only limit is that the lien cannot exceed the amount of medical expenses the government paid. When, as in this

case, the settlement is not divided into damages “for” medical and non-medical expenses, plaintiffs argue, the court must determine an appropriate allocation. Defendant argues that Wisconsin is entitled to determine *statutorily* how a settlement allocates medical and nonmedical expenses, at least in the absence of an express allocation in the settlement or a stipulation between the government and the insured. Further, it says that § 49.89(5) represents such a statutory allocation in the sense that it “allocates” all of a settlement for attorney fees and medical expenses unless the settlement is greater than the combination of those two amounts. Because defendant paid more than \$12,500 of medical expenses on behalf of plaintiff Xai, it argues that applying § 49.89(5) in this case does not run afoul of 42 U.S.C. § 1396p or Ahlborn.

Neither the Court of Appeals for the Seventh Circuit nor the Wisconsin appellate courts have had the opportunity to apply Ahlborn but, as the parties note in their briefs, many other courts have and they have reached a variety of conclusions, some favoring plaintiffs and some favoring defendant. This may be why the Supreme Court granted petition for a writ of certiorari in Delia v. E.M.A. ex rel. Johnson, 133 S. Ct. 99 (2012), another case in which the government is arguing that Ahlborn permits a state to allocate medical and nonmedical damages in a statute rather than through individualized determinations. The Court heard oral argument on January 8, 2013, so it will issue a decision on the case some time before the end of the term in June.

Because Delia could be dispositive of this case, it makes little sense to determine now whether § 49.89 is preempted. Regardless how I decide the issue, a decision from the

Supreme Court could moot this court's opinion and require a new determination or complicate the case on appeal. Although it is not this court's general practice to stay cases, in this instance it is appropriate to wait, not only because a decision in Delia is imminent and nearly certain to affect the outcome of this case, but also because federal courts should refrain from addressing unnecessary constitutional questions. Accordingly, I am denying plaintiffs' motion for summary judgment without prejudice. After the Supreme Court decides Delia, the parties may wish to reevaluate their positions and reconsider settlement. If settlement is not possible, plaintiff may have 45 days from the date of the decision to renew their motion for summary judgment and file a supplemental brief addressing Delia.

#### ORDER

IT IS ORDERED that the motion for summary judgment filed by plaintiffs Ka Yang, Yia Yang and Xai Yang, dkt. #5, is DENIED without prejudice to plaintiffs' renewing it within 45 days of the Supreme Court's decision in Delia v. E.M.A. ex rel. Johnson, No. 12-98.

Entered this 7th day of March, 2013.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge