



Oregon

Tina Kotek, Governor



Division of
Financial
Regulation

Department of Consumer
and Business Services

September 5, 2023

To: Oregon Insurers

Re: Legal Updates Affecting Personal Injury Liens

The Division of Financial Regulation is sharing the attached letter from the Personal Injury Liens Unit within the Oregon Department of Human Services (ODHS). ODHS issued the letter to provide notice of recent court decisions and amendments to administrative rules regarding the ODHS personal injury liens Medicaid program that may affect insurance companies that settle personal injury cases for their insureds.

If you have any questions regarding the information contained in the letter, please contact:

Cassie Soucy (she/her)
Property & Casualty Product Regulation and Compliance Manager
Oregon DCBS | Division of Financial Regulation
503-983-3895 | cassandra.soucy@dcbs.oregon.gov

Tina Kotek, Governor

PO Box 14512
Salem, OR 97309-5024
Telephone: (503) 378-4514
Toll-Free: 1-800-377-3841
Fax: (503) 378-2577

September 6, 2023

Email: Personal.injury@odhsoha.oregon.gov
Online portal: www.reportinjury.org

To Whom it May Concern:

The Oregon Department of Human Services, Personal Injuries Unit (ODHS) is sending this letter to notify you of recent developments in court cases and administrative rules that affect the personal injury liens Medicaid program and insurance companies that settle personal injury cases for their insured. Please take note of the following information.

McCallister v. DHS

In McCallister v. DHS, the trial court ruled that neither the common fund doctrine nor ORS 742.536(3) require ODHS to reduce its Medicaid lien by a share of the attorney fees incurred by the injured party. The trial court also held that ODHS' right to demand payment directly from an insurer as consistent with ORS 416.580(1). Those rulings were upheld by the Court of Appeals without opinion, and review by the Oregon Supreme Court was denied. See McCallister v. DHS, Douglas County Circuit Court Case 19CV35869 (judgment entered Nov. 16, 2020), affirmed without opinion, 322 Or App 383 (2022), rev. denied, 370 Or. 822 (2023).

As such, ODHS continues to expect that Medicaid liens be paid prior to disbursement of any funds to the recipient or their representative. ODHS may take action if the lien is not paid directly, including foreclosing the lien against a third party that does not comply with 416.580(1).

Attached to this letter are copies of the original trial court ruling, and the subsequent affirmances.

OAR 461-195-0310

In addition, ODHS recently amended OAR 461-195-0310. Please note that effective April 1, 2023, required notices to the Personal Injury Lien unit must be submitted in the manner described in OAR 461-195-0310. For parties represented by attorneys and for insurance companies, your notice must be submitted through our online portal, which can be accessed at www.reportinjury.org or <https://apps.oregon.gov/OPAR/PIL/>. For other inquiries, you can email to personal.injury@odhsoha.oregon.gov.

If you have any additional questions, please feel free to contact the Personal Injury Liens unit.

Thank you,

Personal Injury Liens Unit,
Office of Payment Accuracy and Recovery
Oregon Department of Human Services
503-378-4514

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DOUGLAS

MATTHEW McCALLISTER,

Plaintiff,

v.

STATE OF OREGON, BY AND THROUGH
ITS DEPARTMENT OF HUMAN
SERVICES, OREGON HEALTH
AUTHORITY, NATIONWIDE INSURANCE
COMPANY OF AMERICA, dba
DEPOSITORS INSURANCE COMPANY,

Defendants.

Case No. 19CV35869

ORDER GRANTING DEFENDANT DHS/OHA'S
MOTION FOR SUMMARY JUDGMENT

ORS 20.140 - State fees deferred at filing

The cross-motions for summary judgment brought by plaintiff Matthew McCallister and defendant State of Oregon, by and through the Oregon Department of Human Services, Oregon Health Authority (“DHS/OHA”) came on for hearing on September 21, 2020, before the Honorable George W. Ambrosini, Circuit Court Judge. Chris W. Peterman appeared for plaintiff; Senior Assistant Attorney General Seth T. Karpinski appeared for the DHS/OHA; and J. Jackson Brannon III appeared for defendant Nationwide.

Based upon the motions, the memoranda of law and the supporting documents submitted by both parties, the oral arguments, and for the reasons set forth in the letter opinion dated November 4, 2020, attached to this order and incorporated herein,

IT IS HEREBY ORDERED that the State’s motion for summary judgment is granted and the plaintiff’s motion for summary judgment is denied. The common fund doctrine is not applicable to the DHS/OHA lien under ORS 416.540, ORS 742.536(3) does not apply to

1 DHS/OHA, the lien does not attach to attorney fees, and DHS/OHA is entitled to the full lien
2 amount of \$34,091.40.

3 IT IS FURTHER ORDERED that Nationwide shall pay \$34,091.40 directly to
4 DHS/OHA, with the balance to be paid to plaintiff's attorney's trust fund for disbursement.

Signed: 11/16/2020 03:12 PM



George W. Ambrosini, Circuit Court Judge

11 Submitted by: Seth T. Karpinski
12 Senior Assistant Attorney General
13 Attorneys for State of Oregon
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Verified Correct Copy of Original 11/4/2020
William Marshall, Presiding Judge
(541) 957-2436
(541) 957-2445 (fax)
George W. Ambrosini, Judge
(541) 957-2422
(541) 957-2461 (fax)
Kathleen E. Johnson, Judge
(541) 957-2433
(541) 957-2445 (fax)
Frances E. Burge, Judge
(541) 957-2420
(541) 957-2461 (fax)



CIRCUIT COURT FOR DOUGLAS COUNTY
Sixteenth Judicial District

Ann Marie Simmons, Judge
(541) 957-2430
(541) 957-2445 (fax)

Jason R. Thomas
Hearings Referee
(541) 957-2408
(541) 957-2445 (fax)

Thomas Maxwell
Trial Court Administrator
(541) 957-2409
(541) 957-2461 (fax)

November 4, 2020

Christopher W. Peterman
Christopher Peterman PC
420 SE Jackson St
PO Box 1146
Roseburg, OR 97470

John Jackson Brannon III
Smith Freed Eberhard PC
111 SW Columbia St Ste 800
Portland, OR 97201

Seth Throop Karpinski
Oregon Department of Justice
1162 Court St NE
Salem, OR 97301

FILED

NOV 04 2020

Time 4:30pm
DOUGLAS COUNTY CIRCUIT COURT

RE: Case # 19CV35869 - Matthew McCallister vs. State of Oregon, By and Through ITS Department of Resources, Oregon Health Authority, Nationwide Insurance Company of America, dba Depositors Insurance Company

Dear Counsel:

Upon review, the court has decided to grant the Motion for Summary judgment filed by the Defendant State of Oregon, by and through its Department of Human Services (DHS/OHA), and to deny Plaintiff's Motion for Summary Judgment. The parties agree that this matter is suitable for summary judgment based upon the cross-motions for summary judgment.

The central issue presented to the court for resolution by the parties is the application of ORS 416.540 to the settlement between Plaintiff and Defendant Nationwide and whether the lien amount is to be reduced by operation of ORS 742.536(3), or by the common law common fund doctrine. In this regard, ORS 416.540(1) provides, in relevant part, that the Department of Human Services and the Oregon Health Authority shall have a lien for all assistance received by a recipient under a settlement. In addition, ORS 416.540(2)

provides that the lien does not attach to attorney fees. In this case, the parties do not dispute the settlement amount of \$100,000. See Plaintiff's complaint paragraph 8; Defendant DHS/OHA's Answer, Paragraph 1; Defendant Nationwide Insurance Company's Answer, Paragraph 4; and Declaration of Daniel Lang in Support of Motion for Summary Judgment, No. 6, pages 2-3. Also, there is no dispute that the State, through the Oregon Health Plan, provided medical assistance to the Plaintiff in the amount of \$34,091.40. In addition, there is no dispute that the amount of Plaintiff's attorney fee is \$33,333.33, and that the lien under ORS 416.540 does not attach to this amount under ORS 416.540(2).

With respect to instant controversy, the court finds that the amount of the lien under ORS 416.540(1) is \$34,091.40. ORS 416.540(1) specifically provides that the Department of Human Services and the Oregon Health Authority shall have a lien upon the amount payable to recipient under a settlement for "all assistance received by such recipient." In this case, under the plain meaning of the statute, the amount of lien in this case is \$34,091.40. Further, the court finds that this lien does not attach to Plaintiff's attorney fees in the amount of \$33,333.33, under ORS 416.540(2).

The next question is whether this lien amount is reduced by operation of ORS 742.536(3), or by the common law common fund doctrine. With respect to ORS 742.536(3), the court finds that 742.536(3) does not apply to Defendant DHS/OHA. As set forth in ORS 742.536(1), Defendant DHS/OHA does not fall within the scope of this statute as it is not an authorized motor vehicle insurer that has furnished personal injury protection benefits, and is not an authorized health insurer under the statute that has furnished benefits to a person who was injured in a motor vehicle accident. The common fund doctrine permits the burden of litigation expenses to be shared among those who benefited from the litigant's efforts by allowing plaintiff's lawyers to be paid from the common fund created or preserved by the litigation. See *Strawn v. Farmers Ins. Co.*, 353 Or. 210(2013). The doctrine is an equitable one and is premised on the theory that those benefited by the common fund would be unjustly enriched if they did not share in the cost of creating or preserving that fund that would otherwise be borne by the party that pursued the litigation. See *Strawn v. Farmers Ins. Co.*, 353 Or. 210(2013). The court finds that this doctrine does not apply in the instant situation as the circumstances do not involve a beneficiary that is unjustly enriched as the amount involves a lien for public assistance to the Plaintiff and is consistent with the terms of ORS 416.540. In summary, the court finds that it is not appropriate to apply the equitable doctrine under these circumstances. Finally, the court finds that Plaintiff's due process rights have not been violated in that Plaintiff has been given an opportunity to be heard at a meaningful time and manner with respect to the issues in dispute.

In summary, the court finds that out of the settlement of \$100,000, that the Defendant DHS/OHA is entitled to a the lien amount of \$34,091.40, and that the lien does not attach

to the attorney fees in the amount of \$33,333.33, with the balance of \$32,575.26 to be paid to Plaintiff.

The remaining issue presented to the court for consideration is the disbursement of the funds under the court's decision. The court finds that direct payment by Defendant Nationwide to Defendant DHS/OHA is consistent with the terms of the ORS 416.580, with balance of the funds to be disbursed to Plaintiff's attorney, Mr. Lang to be disbursed under the court's decision. In summary, the lien amount of \$34,091.40 is to be paid directly to Defendant DHS/OHA, with the balance of \$65,908.60, including the full amount of the attorney fees, to be paid to Plaintiff's attorney's trust fund for disbursement.

Mr. Karpinski to prepare the order and judgment.

Very Truly Yours,



George W. Ambrosini
Circuit Court Judge

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MATTHEW MCCALLISTER,
Plaintiff-Appellant,

v.

STATE OF OREGON, acting by and through its Department of Human Services, Oregon
Health Authority, and NATIONWIDE INSURANCE COMPANY OF AMERICA, dba
Depositors Insurance Company,
Defendants-Respondents.

Douglas County Circuit Court
19CV35869

A175104

APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

George William Ambrosini, Judge.

Argued and submitted on September 12, 2022.

Before Shorr, Presiding Judge; Mooney, Judge; and Pagán, Judge.

Attorney for Appellant: Keith D. Ropp.

Attorney for Respondent, State of Oregon: Kirsten M. Naito.

No appearance for Respondent Nationwide Insurance Company of America.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents.

Costs allowed, payable by Appellant to Respondent State of Oregon.

MONEY AWARD

Creditor: State of Oregon

Attorney: Kirsten M. Naito, 1162 Court St NE, Salem OR 97301

Debtor: Matthew McCallister

Attorney: Keith D. Ropp

Costs: \$491.00

Total Amount: \$491.00

**\$391 filing fee due to State Court
Administrator when costs and
disbursements are collected.
(ORS 20.140)**

Appellate Judgment
Effective Date: May 15, 2023

COURT OF APPEALS
(seal)

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APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

IN THE SUPREME COURT OF THE STATE OF OREGON

MATTHEW MCCALLISTER,
Plaintiff-Appellant,
Petitioner on Review,

v.

STATE OF OREGON, acting by and through its Department of Human Services,
Oregon Health Authority, and NATIONWIDE INSURANCE COMPANY OF AMERICA,
dba Depositors Insurance Company,
Defendants-Respondents,
Respondents on Review.

Court of Appeals
A175104

S069956

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.



MEAGAN A. FLYNN CHIEF JUSTICE, SUPREME COURT 3/9/2023 9:51 AM

c: Christopher W Peterman
Keith D Ropp
Jeffrey D Eberhard
Erin Galli
Kirsten M Naito
Denise G Fjordbeck

tnb

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563