Department of Health Care Services
Trailer Bill Legislation
610—Fifty Percent Rule and Personal Injury Lien Recovery
FACT SHEET

Background: Federal and state laws require the Department of Health Care Services (DHCS) to recover Medi-Cal treatment costs from liable third parties, so that Medi-Cal is the payer of last resort. DHCS’ Personal Injury (PI) Program reviews Medi-Cal expenditures paid for treating a member’s injury and files a request for reimbursement (“lien”) with the liable third party. The PI Program may settle its lien directly with the liable third party or assert the lien against any settlement, judgment, or award (“settlement”) resulting from a member’s claim or action.

In Fiscal Year (FY) 2015-16, the PI Program collected $60.4 million from members’ claims and tort actions. When a Medi-Cal member seeks treatment for an injury, the federal government pays a percentage of the cost of treating the injury known as federal financial participation (FFP). One of many conditions to the receipt of FFP is that DHCS must seek recovery of medical costs caused by a liable third party. When DHCS makes a recovery, federal law requires the State to reimburse the federal government a portion of the recovery equal to the FFP provided for the services to treat the injury. DHCS uses the State’s share of the recovered amounts as an abatement to General Fund (GF) expenses.

California Welfare and Institutions (W&I) Code 14124.70 et seq. was last updated in 2007. Recent court decisions, along with the implementation of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (PL. 111-152), have highlighted weaknesses in existing law that some attorneys are applying in ways that are inconsistent with the Legislature’s original intent and causing lost GF revenue. In addition, the federal Centers for Medicare and Medicaid Services (CMS) has identified some sections of state law that are in conflict with Federal Law. CMS has been recouping lost FFP due to those conflicts, causing lost GF savings.

Justification for the Change: DHCS proposes a series of technical amendments to W&I Code Section 14124.70 et seq. to address the ongoing legal concerns and GF revenue loss.

Clarify the Formula that Defines the State’s Portion of Litigation Costs.

W&I Code Section 14124.72(d), allows for a reduction of the Medi-Cal PI lien so each party pays a proportionate share of litigation costs based on the amount they receive when an attorney facilitates the settlement. Originally, this provision applied only to settlements that were sufficient to pay the Medi-Cal PI lien in full. A recent court decision, Aguilera v. Cal. Dept. of Health Care Services (2015) Cal.App.4th (Aguilera), enables the provision to apply to the medical allocation of the settlement, which may be much smaller than the lien. Hence, instead of paying a proportionate share of litigation costs based on the amount DHCS receives from a settlement, current law now creates situations where DHCS must reduce its lien by amounts greater than the actual litigation costs incurred by the member. This amendment clarifies that each party pays only a proportionate share of actual litigation costs based on the proportion of the settlement received (W&I Code Section 14124.72(d)).
Clarify Code to Director’s Right to Recover When There Are Multiple Settlements.

While many injury claims result in only a single settlement, medical malpractice cases and other severe injuries may result in multiple settlements. However, existing law does not explicitly address the DHCS Director’s rights to recover the costs of treating a member’s injury when there are multiple settlements, and plaintiff’s attorneys have found a way to use W&I Code Section 14124.785 to limit DHCS recovery when there are multiple settlements. The law limits the Director’s recovery to the amount derived from applying the lowest of the three statutory reductions defined in W&I Code 14124.70 et seq. Thus, when a PI action has multiple settlements, some attorneys provide information about only the first settlement, which is often the smallest, and use the Aguilera decision to limit the lien, which often includes the bulk of treatment services, to the medically allocated portion of that first settlement. The attorneys then disclose all subsequent settlements relating to the same injury, but then use the law to omit all services that DHCS could not recover on the first settlement. This results in a loss of GF savings. DHCS proposes making three associated amendments to W&I Code 14124.70 et seq. to stop this loss:

1. Clarify that the limit to the Director’s recovery is based on the aggregated amount of all settlements once the entire action has been resolved, not just a single settlement (W&I Code Section 14124.785).
2. Rename five references to the amount to be collected from “reasonable value of benefits so provided” to “amount of the director’s lien as defined in subsection (d) of Section 14124.70” (W&I Code Section 14124.785).
3. Require the Medi-Cal member or DHCS Director, whoever initiates a claim with a carrier for a member’s injury, to notify the other party, so both parties’ are protected in their rights to recover injury related losses (W&I Code Section 14124.73).

Revise Fifty Percent Rule to Comply with Federal Law and Stop General Fund Losses.

In 1992, an audit from the former Health Care Financing Administration (HCFA), now known as CMS, found W&I Code Section 14124.78, commonly known as the “Fifty Percent Rule,” did not comply with the federal Social Security Act (the Act). The Fifty Percent Rule requires DHCS to take no more than half of a settlement after all attorney’s fees and legal costs are paid. However, Section 1902(a)(25)(b) of the Act requires states to seek recovery from a third party to the extent that it is cost-effective, and Section 1912(b) of the Act requires the federal government’s share of financing for injury-related services in a third party liability action to be fully reimbursed prior to the Medicaid member receiving funds. The former HCFA found DHCS had no valid justification under the Fifty Percent Rule for allowing Medi-Cal members to obtain settlement funds prior to the federal government being fully reimbursed and required DHCS to make the federal government whole in cases settled under the Fifty Percent Rule. DHCS must reimburse CMS for its share for cases settled under the Fifty Percent Rule from the GF.

Prior to the ACA, most Medi-Cal members had a FFP percentage of 50 percent. When a lien is reduced under the Fifty Percent Rule for a member who has a FFP percentage of 50 percent, DHCS reimburses CMS up to 100 percent of the amount recovered, meaning there is not GF reimbursement. The ACA expansion in January 2014 introduced a new ACA group with a FFP percentage of 100 percent. For these members, DHCS reimburses CMS
up to 200 percent of the amount recovered, resulting in a GF loss. The table below provides an example of recovery of a case settled under the current Fifty Percent Rule at 50% FFP and 100% FFP:

<table>
<thead>
<tr>
<th>Member FFP</th>
<th>Settlement After Attorney Costs</th>
<th>Member’s Portion</th>
<th>DHCS’ Portion</th>
<th>CMS’ Portion</th>
</tr>
</thead>
<tbody>
<tr>
<td>50% FFP</td>
<td>$15,000</td>
<td>$7,500</td>
<td>$0</td>
<td>$7,500</td>
</tr>
<tr>
<td>100% FFP</td>
<td>$15,000</td>
<td>$7,500</td>
<td>-$7,500</td>
<td>$15,000</td>
</tr>
</tbody>
</table>

DHCS proposes to limit DHCS’ recovery to no more than the settlement after deducting reasonable attorney’s fees and litigation costs (W&I Code Section 14124.78). This approach conforms to federal law, stops GF losses, guarantees plaintiffs’ attorneys receive their expected fees, and avoids making the member liable for attorney’s fees or litigation costs.

**Summary of Arguments in Support:**
This proposal would: 1) align existing law with the original legislative intent; 2) align existing law with federal law; and 3) reduce GF losses.

**Estimate Issue # and Title:** PC 200. Medi-Cal Recoveries Fifty Percent Rule