HEALTH-CARE LAW

A Thirteen-Year-Old, Catastrophic Injuries, Medicaid and a Fight Over a Lawsuit Settlement

CASE AT A GLANCE

In 2008, then 13-year-old Gianinna Gallardo suffered catastropic injuries when struck by a pickup. Her future medical expenses will likely run into the millions. A lawsuit brought by her parents, as her co-guardians, settled for somewhat less than the $800,000 Florida Medicaid had already paid for Gianinna's care. Florida maintains that Florida Medicaid should receive some $300,000 of the settlement as reimbursement for medical expenses paid by the state. This case calls upon the Court to consider whether the federal Medicaid Act preempts or otherwise prohibits application of aspects of Florida's reimbusement law to the Gallardo settlement and any other state reimbursement laws that purport to take money allocated for future medical expenses.

Gallardo v. Marstiller
Docket No. 20-1263

Argument Date: **January 10, 2022** From: **The Eleventh Circuit**

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Issue

Does the Medicaid Act allow a state to obtain reimbursement of its medical assistance payments from the portion of a settlement (or recovery) that represents payment for future medical care?

Facts

Some 13 years after suffering catastrophic, life-altering injuries when hit by a pickup truck after getting off the school bus, Gianinna Gallardo remains in a vegetative state. On November 19, 2008, when she was 13-years-old, Gianinna's life permanently changed after suffering brain injuries leaving her completely medically dependent. She likely never believed that her name would later appear on a host of Supreme Court filings, other court decisions, documents, and articles about how a lawsuit settlement obtained on her behalf will be divvied up to repay Florida Medicaid for the presettlement medical care she required.

The reason for the divvying: the federal Medicaid Act gives states that make Medicaid payments for medical assistance on an individual's behalf the right to reimbursement for that health care from third-party payments due to the individuals—for instance, from a portion of a settlement paid by someone who caused the injury that necessitated the medical care. In Gianinna's case, the settlement of the claims brought in part to pay for Gianinna's medical care gives Florida an opportunity to recover from Gianinna's settlement the money Florida Medicaid paid for her care. There are acknowledged limits to Florida's rights of recovery. Relevant here, the federal act's assignment provision allows a state to recover only to the extent payment has been made under the state Medicaid plan.

Every state has some type of third-party liability recovery procedure as required by the federal act. Florida has used

its own procedure frequently. According to petitioners, Florida has asserted Medicaid liens to recover third-party liability payments 14,565 times since July 1, 2013. (They also noted in their *certiorari* petition that there are 3.8 million Florida Medicaid beneficiaries and many more millions of Americans who also rely upon Medicaid for health-care coverage throughout the rest of the states and territories.)

What will the Court know about Gianinna when it considers the question of what portion of her recovery is subject to Florida's reach? Woefully little. Next to no information about Gianinna Gallardo, or about her parents, Pilar Vassallo and Walter Gallardo, appears in the Supreme Court briefs that include the names of all three on their cover pages.

U.S. District Judge Mark E. Walker, possibly having barely more information about Gianinna or her parents, wrote this in 2017:

> Imagine this scenario. You're the parent of a thirteen-year-old girl, whom you love dearly. She is your world. Tragically, one day you receive the phone call that every parent fears more than anything; the daughter that you adore was struck by a vehicle, medevacked to a nearby hospital, and is now in critical condition. Medicaid covers around $800,000 for her treatment. Although the hospital staff tries their best, they aren't miracle workers. As a result of the accident, your beloved daughter is now in a persistent vegetative state and can no longer ambulate, communicate, eat, or care for herself in any manner. You try to wake up from this nightmare. But you're not asleep—the nightmare is real.

We do know that Gianinna's parents initiated a lawsuit in Florida state court against the pickup truck's owner, its driver, and the school board. The lawsuit sought damages based in part on Gianinna's past and anticipated future medical expenses, and lost earnings. Her parents also pursued loss of consortium damages, which, in Florida, may recognize a parent's losses, including, among other losses, loss of companionship, society, love, affection, and "solace in the past and in the future" until a child reaches legal age.

The total damages sought by the lawsuit exceeded $20 million. The case settled with court approval for $800,000. Florida Medicaid received notice of the lawsuit and of the settlement. Florida had already paid $862,688 for Gianinna's medical care. The Gallardos' attorney informed Florida that the settlement amounted to 4 percent of the $20 million dollar value of the damages and that only $35,367 of the settlement represented past medical expenses. (The attorneys' number is just a few thousand dollars more than 4 percent of the settlement; the lawyers are essentially maintaining that logically that is all that should be reimbursed to Florida Medicaid for past medical expense.)

Medicaid is a joint federal-state program in which all the states voluntarily participate. The federal government pays a portion of the allowable costs of patient care, and the states pay the remaining allowable costs. It provides health-care coverage to eligible individuals in an effort to make available to them care that they would likely be unable to afford. The third-party liability provisions of Medicaid mean that the amount an injured Medicaid recipient recovers in a lawsuit for personal injuries will likely be shared with the state that paid for the care.

In many instances, the amount paid to the state Medicaid programs is resolved by negotiations between the injured person and the state without a contest. Only about 1 percent of Florida's state agency liens are said to be contested before an administrative tribunal.

Florida's formula to determine how much of a recipient's recovery can be taken by the state for Medicaid reimbursement first reduces the gross recovery by 25 percent to account for the recipient's attorney's fees and "taxable costs." This means that $200,000 of the Gallardo settlement would have been allocated to the attorneys who achieved the settlement. The formula then divides that total by half, with Florida awarded the lesser of the amount it actually paid in medical expenses, or the number resulting from the halving—here, the $300,000 Florida claims it should receive from the Gallardo settlement.

Since Florida's formula limits its recovery to one half of the total remaining after allocating for attorney's fees, it arguably provides an appropriate means of estimating the amount of the recovery representing something other than past medical expenses paid by Medicaid dollars. The Gallardo case presents a good example of why reasonable formulas address the practical necessity of using formulas as a starting point for recovery processes. With already incurred and paid medical expenses exceeding the amount the Gallardos recovered, the likelihood presents itself that the pickup truck driver and company's insurance coverage, or lack of coverage, was of greater importance than other factors to the amount of the settlement.

That Gianinna Gallardo faces millions of dollars in future expenses does not mean that most of her settlement was intended to cover her future expenses. Attorneys who handle these sorts of cases know that the money an injured person may be entitled to, based on actual expenses incurred or expenses to be incurred, is not necessarily there to be had from those legally liable for the injuries. Settlements are sometimes crafted because it becomes apparent that even a successful trial will leave the client no better off financially than even a modest settlement because of the defendant's limited resources.

Florida did not try to set aside, void, or dispute the Gallardo settlement on grounds of inadequacy or on any other grounds. Also, Florida did not employ its authority to seek reimbursement directly from any of the defendants. Florida, prior to the settlement, had already asserted a lien for the full amount it had paid for past medical expenses against the lawsuit proceeds and any settlement. After the settlement, it claimed an entitlement to approximately $300,000 of the settlement based on a formula contained in a Florida statute. The Gallardos had that amount placed in an interest-bearing trust account and filed a petition with the state's Division of Administrative Hearings challenging the lien amount asserted by Florida. They maintained the state had acted contrary to federal law by endeavoring to recover past Medicaid payments from settlement funds that do not represent compensation for past medical expenses. Florida countered in part that, under state law, the Gallardos could successfully challenge the formula-based allocation only if they could prove by clear and convincing evidence that the amount of the settlement representing past medical expenses is less than the formula-based amount.

The Gallardos next brought an injunction and declaratory ruling action in the U.S. District Court for the Northern District of Florida, Tallahassee Division, alleging that Florida's reimbursement statute violates federal law. They maintained that federal law does not allow Florida to satisfy its lien from anything other than the portion of the recovery that represents past medical expenses and that Florida's administrative process for challenging the amount of the lien violates federal law. Florida stayed the state administrative proceeding, a stay agreed to by Florida and the Gallardos.

Judge Walker thereafter enjoined Florida from enforcing portions of its reimbursement statute and declared that the federal Medicaid Act prohibits Florida from requiring the Gallardos to affirmatively disprove that Florida's formula-based allocation amount is an incorrect allocation. The essence of his rulings: the federal act preempts Florida's processes.

Florida attempted to convince Judge Walker that it could satisfy its lien from the portions of the Gallardo settlement that represented compensation for past and future medical expenses. Judge Walker found that the federal Medicaid Act, by its plain language, prohibits Florida from satisfying its lien from anything other than the Gallardo recovery for past medical expenses. The judge reasoned: "Although the Supreme Court has not addressed this precise issue, related cases suggest it would reach the same conclusion." Judge Walker referred to the Supreme Court's decisions in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, a 2006 decision, and *Wos v. E.M.A. ex rel Johnson*, 568 U.S. 627, a 2013 decision. *Ahlborn*, he indicated, limits the right of a state's interest to the portion of a recovery for medical care payments already made. The decision in *Wos*, likewise, emphasizes the recovery of medical expenses that had been paid and interprets the Medicaid Act's "anti-lien" provision to protect a beneficiary's interest in the remainder of a settlement.

The Eleventh Circuit Court of Appeals reversed the district court, concluding Florida's process complies with federal law. The Gallardos' petition asking the Supreme Court to consider the dispute identifies a conflict between the Eleventh Circuit's ruling and a Florida Supreme Court ruling, along with a Fourth Circuit statement limiting recovery to allocations for past medical expenses. The petition further details splits among the highest courts of some states and splits, too, among the federal district courts and among lower state appellate courts. The splits, the petition says, "illustrates the recurring nature of the question and further confirms" the need for the Supreme Court's guidance.

The Eleventh Circuit itself split 2 to 1 in reversing Judge Walker's ruling on the preemption issue. The majority explained its preemption analysis in part by invoking a 1947 Supreme Court statement that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." The majority, in holding that Florida's law is not preempted by the federal Medicaid Act, reasoned that, while the Medicaid statutes clearly prohibit Florida from seeking reimbursement for future expenses, the language does not in any way prohibit reimbursement from settlement monies earmarked for future medical care.

Judge Charles R. Wilson dissented, arguing that the Supreme Court has already rejected the "outcome the majority condones here." Judge Wilson cited *Ahlborn* and that decision's "absurd and fundamentally unjust" characterization of a result that allows a state to "swallow parts of the settlement that have nothing to do with the benefits that the state has fronted…." Judge Wilson also highlighted a recent Supreme Court denial of a petition to review a Utah Supreme Court decision that Judge Wilson cites as persuasive authority for his position that the Eleventh Circuit majority has decided the Gallardo case appeal incorrectly.

Case Analysis

Before the Supreme Court, the Gallardos key in on the *Ahlborn* decision's reasoning and result to press the position that a state may not take funds that compensate for future medical expenses to reimburse a state's payments for past medical expenses. They also argue that the interpretation of the Medicaid Act begins and should end with the interpretation of its text. The text, they maintain, leaves no doubt that the state's right to payments is limited to payment for health-care items and services for which payment has already been made.

The United States, as amicus, also takes the position that Florida's interpretation of the Medicaid Act is incorrect, joining the Gallardos' effort to have the judgement of the Eleventh Circuit reversed. The government further asserts that, since the states are expressly forbidden by the Medicaid Act, specifically its anti-lien clause, from imposing certain liens and expressly required to seek certain payments from third parties, the focus should be on the language of the act and not on generic preemption presumptions.

Florida focuses on Medicaid's payor of last resort status—generally "meaning other sources available to pay medical expenses must be exhausted before Medicaid pays for care." Florida asserts that Medicaid is entitled to priority in obtaining reimbursement from all damages for medical expenses. This approach, Florida says, "fosters the program's fiscal integrity, so that the program will be there for the next beneficiary who needs it." Florida argues the Court should decide the appeal based upon an assumption against preemption of state law if the Court finds that Congress has not spoken clearly and unambiguously on the question of reimbursement from third-party liability payments.

The Gallardo case should not be a hard one to decide. The justices are typically welcoming of the opportunity to engage in statutory interpretation and quick to apply the tools of interpretation they embrace. Unfortunately, even a victory for the Gallardos may not leave Gianinna and her parents much better off. If Florida law is preempted, there remains the prospect of having to address the question of what amount is left for the Gallardos. It's not a given that a decision favorable to them will answer the question. While the Gallardos position may continue to be that the amount of the settlement attributable to past medical expenses is $35,367, that appears to be a number derived arithmetically only. There has not been evidence that the number was ever either a subject of discussion by the parties or more than a mathematical construct. Had there been a court trial with a written decision that included a breakdown of the components of her damages or a jury verdict that included information about the elements of the damages awarded, the Gallardos' number would have a stronger underpinning and more of a likelihood to be the amount that Florida collects once all proceedings are concluded. That not being the case, Florida could lose at the Supreme Court and still collect a number closer to the $300,000 number Florida's formula generates.

Significance

This case presents the Court with an opportunity to settle a practical question that comes without the controversy associated with the higher profile cases that attract intense public attention and, at times, public ridicule of the Court. The role of statutory interpreters is a role that the Court is well suited to serve.

Sadly, the case is significant also as reminder that no amount of money will ever undo the damage done to Gianinna Gallardo and her family by a pickup truck. Safer streets might make it so that others do not experience like tragedies. Safer streets typically fall to legislatures to effectuate, not the courts.

Will Congress legislate a different result should the Court interpret the Medicaid statute in a manner that doesn't accord with Congress's take on the question? It could do that, and the states could legislate differently on the question of the procedures governing third-party liability questions. Will they also craft laws that make our streets safer? We can only hope.

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