By Ruth Baxter

State Medicaid Subrogation Expanded by the United States Supreme Court

Does the federal Medicaid Act allow a state Medicaid program to recover reimbursement for its payment of a beneficiary's medical expenses by taking funds from the portion of the beneficiary's tort recovery that compensates for future medical expenses? Yes, the United States Supreme Court determined in *Gallardo vs. Marstiller*, a 7 to 2 decision issued on June 6, 2022.[1] At issue was Florida's Medicaid subrogation claim for reimbursement of all medical expenses paid to a seriously injured 13-year-old struck by a truck when she exited a school bus. The minor, through her parents, had sued the truck's owner and the driver, as well as the local school board, for negligence for her catastrophic injuries that left her in a vegetative state. Although the lawsuit claimed damages of more than $20 million, the case was ultimately settled for $800,000, with $35,367.52 being designated under the terms of the parties' settlement agreement for the child's past medical expenses. Initial Medicaid expenditures for the child's medical expenses, however, totaled $862,688.77, so the settlement only provided for four percent of the amounts actually paid for the child's past care. The child's parents offered Florida's Medicaid office that $35,367.52 sum toward its subrogation claim since the settlement document only designated that amount for past medical bills, contending that amount would be all that the State would be entitled to receive under its subrogation laws.

However, in addition to the past medical expenses the State had incurred, Medicaid was continuing to pay the child's medical expenses due to her permanent disability. Although the settlement agreement did not allocate any monies for future medical expenses, Florida's Medicaid office took the position that its statutory recovery allowed for *both* "... past *and* future medical expenses" so it was entitled to additional monies than allocated for past medical expenses under the parties' settlement agreement. The Supreme Court agreed.

As the Court explained, Florida's Medicaid Third-Party Liability Act provided that any person accepting medical assistance from state Medicaid resources "automatically assigns" to the agency any right to collect payment for medical care from third-party payments. The Florida statute is unique in that it creates a rebuttable presumption that entitled the state to collect 37.5 percent of the tort recovery of a Medicaid recipient. With Gallardo's settlement, the state would then be presumptively entitled to $300,000 of the $800,000 settlement. Absent "... clear and convincing rebuttable evidence...," the statute details, such payment is automatic.

Gallardo first made her legal arguments in an administrative proceeding challenging the presumptive allocation since the settlement agreement specifically allocated $35,367.52 for past medical bills. Florida's Medicaid office successfully countered that its statute allowed reimbursement not only for past medical expenses, but also for the child's future medical expenses, so that its subrogation claim was not limited to the amount allocated for past medical bills.

Simultaneously, Gallardo brought a federal action seeking a declaration that Florida was violating the federal Medicaid Act by trying to recover from the settlement to compensate Medicaid payments for future medical expenses of the injured child. The United States District Court for the Northern District of Florida sided with Gallardo, granting the parents a summary judgment. Florida then appealed that decision to the Eleventh Circuit which determined that the federal Medicaid statutes did not prevent a state from asserting a lien against any part of a settlement not designated as a payment for medical care.[2] The Supreme Court of Florida came to a conclusion contrary to that of the Eleventh Circuit,[3] so the U.S. Supreme Court granted *certiorari* to consider the issue.

Before the Supreme Court, Gallardo argued that Florida had no entitlement to seek reimbursement for future medical expenses from the settlement amounts and contended that the federal Medicaid statute's anti-lien provision[4] only allowed recovery from those amounts allocated for past medical care paid by Medicaid. The Court disagreed, stating that Florida could seek reimbursement from the Gallardo

settlement for both past and future medical care, citing an exception to the anti-lien provision. "The plain text of (the Medicaid Act[5]) decides this case," Justice Clarence Thomas wrote, "This provision requires the State to acquire from each Medicaid beneficiary an assignment of '… *any* rights … of the individual … to support … for the purpose of medical care … and to payment for medical care from any third party.' Nothing in this provision purports to limit a beneficiary's assignment to 'payment for' *past* 'medical care' already paid for by Medicaid." Referencing the enabling legislation's term of "*any* rights … to payment for medical care," the Court concluded this statutory provision covered not only rights to payment of past medical expenses, but also to rights for payment for future medical expenses.[6] Relying on the clear language of the statute that references "*any* rights," Justice Thomas concluded, the word 'any' had an expansive meaning, and found the only distinction in the recovery statute was between medical and non-medical expenses, but not past medical expenses paid by Medicaid and future medical expenses, which it had not yet paid but anticipating paying.[7]

In the dissent, Justice Sonia Sotomayor called the statutory structure hailed by the majority Court as "… 'fundamentally unjust' for a state agency to 'share in damages for which it has provided no compensation,' citing the Court's prior *Arkansas Dept. of Health and Human Services vs. Ahlborn* decision.[8] With the *Gallardo* decision, she stated, the Court permits "… exactly that. It holds that states may reimburse themselves for medical care furnished on behalf of a beneficiary not only from the portions of the beneficiary's settlement representing compensation for Medicaid-furnished care, but also from settlement funds that compensate the Medicaid beneficiary for future medical care for which Medicaid has not paid and might never pay." Joined by Justice Breyer in the dissent, Justice Sotomayor called the Court's decision "… inconsistent with the structure of the Medicaid program and will cause needless unfairness and disruption."[9]

Trial Lawyers Tried to Explain the Realities of a Settlement in a Personal Injury Case

In a joint *Amicus Curiae* Brief to the Court, the American and the Florida Justice Association explained the shortcomings of Florida's arguments. "Florida's argument is built, in part, on the assumption of there being no harm, no foul," they claimed. "The assumption goes like this—Why does it matter if Florida takes some of the settlement money that has been allocated to future medical care because the Medicaid program will be paying for those medical expenses anyway? This assumption is disproved by variables ignored by Florida."[10] As their Brief set forth, Florida ignored the fact that once the injured person obtains a settlement of the claim, they will no longer be eligible for Medicaid in the future. Like most states, to qualify for Medicaid, Florida uses the same income and resource testing used by the federal Supplemental Security Income (SSI) program. Essentially, this would limit an applicant for Medicaid services to not have more than $2,000 in total countable assets.[11] As most tort settlements result in the injured person receiving more than the $2,000 maximum amount, once the settlement is received, the injured person cannot obtain Medicaid benefits.

Further, their Brief explained, if a person wants to retain Medicaid benefits, then they can do so if the injury renders them disabled, and if they agree to transfer all the settlement monies they receive into a Special Needs Trust.[12] Congress specifically created the Special Needs Trust as a limited exception to the rule of Medicaid disqualifications, they pointed out. This provision allows injured persons to use the Trust funds to pay for expenses that Medicaid would never pay for, giving examples of home health care or a home ramp for a wheelchair. "In litigation," AAJ and FJA stated, "the recovery of future medical expenses is not artificially restricted by Medicaid guidelines. And these expenses include necessary life care items. For people confined to a wheelchair, for example, the tortfeasor must also pay for things like a house ramp and an accessible vehicle. So, there is no even swap. Being on Medicaid means doing without these things and receiving less care than medically recommended. These realities expose the gap in Florida's reasoning. And they highlight why it is important for injured people to retain a proportionate share of the settlement funds to pay for future medical expenses."[13] Their arguments, however, fell on deaf ears.

What Is the Impact of this Decision?

Medicaid expenses continue to rise throughout the United States, with the federal government only reimbursing a state on average approximately one-half on what it spends annually.[14] California leads the way with over $88.69 billion spent per year on Medicaid benefits. Kentucky spent $11.9 billion per year for Medicaid recipients in 2021, but since October of 2013, the state has enrolled 1,556,115 individuals in Medicaid and CHIP, representing a 156.44 percent increase in recipients, so annual expenses are projected to increase proportionately.[15] Currently, Kentucky Medicaid income limits range from

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$18,075 with one in the household to $65,018 for eight in a household.[16]

Adjoining state, Ohio, comes in sixth in the United States with its Medicaid spending topping $27 billion a year, with Illinois spending just under that amount at $21 billion a year.[17]

With the *Gallardo* decision, states may revisit their Medicaid subrogation provisions to revise them to include "any" medical expenses, and not be limited to only those medical expenses paid by the state, to align themselves with Justice Thomas' opinion that "any" medical expenses includes both past and future medical expenses. Some states, such as Kentucky, may create new legislative acts to expand their ability to seek reimbursement for Medicaid expenses in casualty cases. Indeed, Kentucky's current Medicaid statute allows for estate recovery by creating an assignment of rights to the Cabinet for Health and Family Services to the extent of medical assistance paid on behalf of a recipient under Title XIX of the Social Security Act.[18] However, currently "Kentucky does not have any statutes or regulations applicable to casualty recovery," Jennifer Dudinskie, the state's Director of Program Integrity for the Department of Medicaid Services, confirmed.[19]

For personal injury attorneys, because of the *Gallardo* decision, future tort settlements should be authored keeping in mind the provisions of the state law that may entitle the government to reimbursement of all Medicaid medical expenses, both past and future. While attorneys have been cognizant of issues presented by Medicare payments to injured persons, similar consideration now must be given to those victims who have had Medicaid benefits pay for their medical expenses. Again, depending upon a state's law, Medicaid beneficiaries may need to establish medical set-aside accounts to cover the costs of future medical care. While such arrangements are more common in the Medicare context, because a portion of tort settlements may now be allocated for Medicaid beneficiaries' future medical expenses, these arrangements will likely become more common under Medicaid as well. The attorney representing the injured Medicaid beneficiary should, therefore, understand the workings of Special Needs Trusts, and the requirement to educate the beneficiary, and/or the guardian or conservator, about the realities of receiving a tortfeasor settlement and potentially

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Attorneys

Mark Alcott
Harlin Parker
Bowling Green, Ky.

Kendall Boyd
Truman Law
Jeffersonville, Ind.

Lincold Caudill
LINCMARK, LLC
Morehead, Ky.

Jenna Michon Corum
Jenna Corum, Attorney at Law
Manchester, Ky.

Robert W. DeWees III
McClain & DeWees
Louisville, Ky.

Steven Doan
Steve Doan Law
Erlanger, Ky.

Jeffrey Gorski
Gorski Law Office, PSC
Louisville, Ky.

Katie A. Jaggers
Lawrence & Associates
Fort Mitchell, Ky.

Jonathan Kent Kurtz
Spencer Law Group
Lexington, Ky.

Hon. Christopher B. Oglesby
Madisonville, Ky.

Stephen Schwager
Stephen A. Schwager, PLLC
Louisville, Ky.

Nathan Sparks
The Lawrence Firm, PSC
Cincinnati, Ohio

Mason L. Trenaman
Louisville, Ky.

Robert D. Walker, II
Colyer Law Firm, PLLC
Louisville, Ky.

Kenneth Joshua Waters
Eadie Hill Trial Lawyers
Covington, Ky.

Law Students

Kyle Bale
Hance & Srinivasan, PLLC
Louisville, Ky.
Louis D. Brandeis School of Law, University of Louisville

disqualifying the injured party from future government benefits by virtue of accepting the settlement and not utilizing such a trust.

— Ruth H. Baxter is a 25 year Board-Certified Civil Trial Advocate with the National Board of Trial Advocacy. She chairs Lawyers Mutual Insurance Company's Board and is a member of its Claims Committee. Her practice at Crawford & Baxter, P.S.C, in Carrollton, Kentucky is concentrated in civil litigation.

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1 *Gallardo et al. vs. Marstille*r, 596 U.S. _____ (2022) (Case No. 20-1263). Justice Clarence Thomas delivered the majority decision, with Justice Sonia Sotomayor writing a dissenting opinion, with whom Justice Stephen G. Breyer joined.

2 *Gallardo vs. Dudeck*, 963 F.3d 1167, 1176 (2020), citing Ahlborn, 547 U.S. 248.

3 See, *Giraldo vs. Agency for Health Care Admin.*, 248 S. 3d 53, 56 (2018).

4 See Section 1396p of the Medicaid Act.

5 Section 1396 k (a) (1) (A).

6 *Gallardo*, supra at 6.

7 *Id.*

8 547 U.S. 268, 282-286 (2006).

9 Sotomayor, J., dissenting at 2.

10 Brief of American Association for Justice and Florida Justice Association as Amici Curiae in support of Petitioner Gianinna Gallardo et al., dated September 22, 2021.

11 42 C.F.R. Section 435.120; See also, 42 U.S.C. Section 416.1205.

12 42 U.S.C. Section 1396a(a)(18); 1396p (a), (b), (d).

13 Brief at Section II, page 8.

14 "Medicaid Facts and Figures" dated January 30, 2022, CMS.gov.

15 Medicaid.gov report "Medicaid & CHIP in Kentucky" (May 2022).

16 *Id.*; See also, "Medicaid Income Limits by States" Forbes, March 3, 2022, Edition.

17 "Medicaid Facts and Figures," supra.

18 See KRS 205.624.

19 Email from Jennifer Dudinskie, Kentucky Cabinet for Health and Family Services dated September 23, 2022, to the author.