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Gallardo v. Marsteller, The U.S. Supreme Court's New Approach To Medicaid Liens

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I. Introduction:

Since 2006 the United States Supreme Court has issued three decisions concerning reimbursement of Medicaid liens asserted against Medicaid recipient's personal injury settlements, the last of which is the June 2022 *Gallardo v. Marsteller* decision. The *Gallardo* decision is a significant deviation from the prior decisions and a definite broadening of the States' right to recover Medicaid past payments from Medicaid recipients' personal injury settlements. This decision will permit the government to recover its past accident related Medicaid payments from the portion of the Medicaid recipients' settlement representing compensation for past medical expenses and the portion representing compensation for future medical expenses. Because the portion of a personal injury settlement compensating for future medical expenses can be the majority of a personal injury settlement (especially in cases involving catastrophic injuries), Medicaid recipients will have little ability to restrict the payment of the Medicaid lien and the amount of a settlement the Medicaid recipient is permitted to keep will be minimized.

These materials will discuss the statutory basis of Medicaid liens, the history of the U.S. Supreme Court's Medicaid lien jurisprudence and the contours of the *Gallardo* decision.

II. Federal And State Medicaid Lien Law:

Medicaid is a cooperative federal-state program providing medical assistance to needy people. See 42 U.S.C. §1396 et. seq. State participation in the program is voluntary, with each participating State afforded latitude in defining the contours of its particular program. See *Alexander v. Choate*, 105 S.Ct. 712 (U.S. 1985). Still, a State that has elected to participate, must comply with the federal Medicaid statutes and regulations. See *Wilder v. Virginia Hosp. Asso*., 110 S.Ct. 2510 (U.S. 1990).

A. Seeking Reimbursement By Acquiring The Rights Of The Medicaid Recipient To Recover From Liable Third-Parties

The federal Medicaid program, Title XIX of the Social Security Act, requires every participating State to implement a "third party liability" provision which requires the State to seek reimbursement from third-parties to the extent of the third-party's legal liability to pay for care and services provided to a Medicaid recipient through the Medicaid program. See 42 U.S.C. §1396a(A)(25). A State must take all reasonable measures to ascertain the legal liability of a third-

party to pay for care and services, and in the event such a legal liability is found to exist after assistance has been provided through the Medicaid program, the State must seek reimbursement for such assistance to the extent of such legal liability. See 42 U.S.C. §1396a(a)(25)(A) & (B).

To facilitate this direction, the State must have in effect laws under which, "to the extent that payment has been made" under the Medicaid program, the "State is considered to have acquired the rights of" the Medicaid recipient to payment by any other party for "such health care items or services." See 42 U.S.C. §1396a(a)(25)(H). A State plan must also provide that, as a pre-requisite to Medicaid eligibility, a Medicaid recipient must assign to the State "any rights" he may have "to payment for medical care" from a liable third-party. See 42 U.S.C. §1396k(a)(1)(A). (These two provisions are the federal assignment provisions at issue in the three Supreme Court Decisions).

B. Federal Law Protects The Medicaid Recipient's Property From Being Taken By The State

The federal anti-lien and anti-recovery statutes protect the Medicaid recipient's property from being taken by the State. The federal anti-lien statute at 42 U.S.C. §1396p(a) provides that "no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf" [except in enumerated circumstances not relevant here]. Further, the federal anti-recovery statute at 42 U.S.C. §1396p(b) provides that "no adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made" [except in enumerated circumstances not relevant here].

C. State Enactment Of Third-Party Liability Provisions

All States have elected to participate in the Medicaid Program and receive reimbursement for the majority of the expenditures from the federal government. All States have enacted third-party liability statutes or regulations. Prior to the U.S. Supreme Court's 2006 decision in *Ahlborn*, the Center for Medicare and Medicaid Services ("CMS") had interpreted the federal third-party liability provisions to allow a State to seek recovery from a Medicaid recipient's entire third-party liability judgment, award or settlement. This fact is evident in the CMS Memo issued after *Ahlborn* which acknowledged that:

> "Prior to the Supreme Court's decision in *Ahlborn*, CMS had interpreted the Medicaid third party provisions to authorize States to pass laws permitting full recovery of Medicaid assistance from third party liability settlements, regardless of how the parties allocated the settlement. The Supreme Court rejected this interpretation of the Medicaid statute and held that to the extent the State laws permit recovery over and above what the parties have appropriately designated as payment for medical items and services, the State was in violation of federal Medicaid laws."

Third-party liability statutes and regulations enacted by the States prior to *Ahlborn* granted the State Medicaid agencies differing powers. Some States had an absolute right of recovery through subrogation, lien, or assignment. In these States, the Medicaid agency could recover 100% of what it had paid from the entire judgment, award or settlement. Other States enacted statutes and regulations that provided that the Medicaid agency was entitled through subrogation, lien or

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