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High Court's Medicaid Ruling Brings Questions, Not Answers

By **David Farber and Arlene Hennessey** (June 29, 2022, 6:24 PM EDT)

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U.S. Supreme Court decisions are supposed to resolve legal questions and give the regulated community clarity for the future. The Supreme Court's June 6 decision in Gallardo v. Marstiller[1] promises to do the reverse.

Through ambiguity in the majority — and an outright mistake in the parties' briefs incorporated into the dissent — the Medicaid and Medicare regulated community, personal injury litigants and their counsel, and the defense bar are bracing for more uncertainty about whether Medicaid and Medicare can recover past and future medical expenses from settlements, judgments and awards. We offer brief analysis below.

The Decision

In 2008, Gianinna Gallardo, a 13-year-old student, was struck by a truck as she stepped off her school bus. The resulting catastrophic injuries incapacitated her for life, and she remains in a vegetative state.

Gallardo's family brought a $20 million suit for past medical expenses, future medical expenses, lost earnings and other damages, and ultimately settled for $800,000 — 4% of the $20 million demand. As of the settlement date, Florida Medicaid had paid $862,688.77 for initial medical expenses; because Gallardo is permanently disabled, Medicaid continues to pay her medical expenses.

The settlement specified that $35,367.52 — 4% of the amount paid by Medicaid and private insurance — was compensation for past medical expenses. The settlement did not specify an amount to be allocated for future medical expenses, but acknowledged that some of the settlement funds may represent compensation for future medical expenses.

Based upon two prior Supreme Court decisions,[2] Florida accepted that it could only recover 4% of the settlement for its past medical costs, but the state argued that under Florida's Medicaid Third-Party Liability Act, it was presumptively entitled to $300,000 — 37.5% of the $800,000 settlement — from settlement funds for past or future medical care for medical costs it had already paid.

The state contended that the Supreme Court had not limited reimbursement to the portion of the

settlement that was allocated to past expenses, but it was entitled to recover for future care costs as well.

Gallardo argued that Medicaid's anti-lien provision did not allow recovery from settlement funds not allocated for past medical care costs incurred by Medicaid, and as such, the anti-lien provision preempted Florida law from enabling additional recovery.

Litigation filed in both state court and federal court led to opposite conclusions: the Florida Supreme Court agreed with Gallardo that Medicaid had no right to collect future medical payments,[3] while the U.S. Court of Appeals for the Eleventh Circuit agreed with Florida that it could collect future medicals.[4]

In a 7-2 split decision, the Supreme Court agreed with the state that the Medicare Act permits a state to seek reimbursement from settlement payments allocated for future medical care and affirmed the Eleventh Circuit.

In so holding, the court allowed Medicaid to recover from funds in Gallardo's tort settlement that were not specifically allocated for past medical care, permitting the Florida Medicaid program to recover $300,000 — 37.5% of the $800,000 settlement — an amount that represented the portion of the tort settlement for past and future medical expenses under the Florida statutory formula.

The court's rationale was based upon its plain reading of the federal Medicaid statute, which, in the majority's view, did not differentiate between past and future medical claims but allowed State Medicaid programs to recover "any rights ... to support ... for the purpose of medical care" and to seek any "payment for medical care from any third party."[5]

The court emphasized that the phrase "any rights" included both past and future care, permitting Florida to recover the $300,000 under an applicable Florida law allocating amounts in undifferentiated settlements.

The court's decision contrasted the "any" language in the core Medicaid Third-Party Liability Act to one of the Medicaid statute's ancillary provisions requiring states to enact laws assigning to themselves third party recovery actions for any "payment [that] has been made under the State plan for medical assistance for health care items or services furnished to an individual."[6]

The court concluded

> if §1396k(a)(1)(A)'s broad language alone were not dispositive, its contrast with the limiting language in §1396a(a)(25)(H) would be. Had Congress intended to restrict §1396k(a)(1)(A) to past expenses Medicaid has paid, it would have done so expressly as it did in §1396a(a)(25)(H).[7]

Thus, the court allowed Florida Medicaid to take funds for future medical payments out of Gallardo's tort settlement proceeds.

Gallardo's Unanswered Question: What About Actual Future Medicals?

While the decision's reverberating sound bite is that Medicaid recovery for future medicals is now permissible from settlements, Gallardo's reach should be far more limited.

Recall that by the time Gallardo settled for $800,000, the state Medicaid program had already expended

more than the $800,000 tort settlement amount in providing initial medical care. Any recovery by Medicaid of those settlement funds would be reimbursement for Medicare's costs already incurred.

As noted in the court's recitation of the procedural history, the Eleventh Circuit decided that relevant Medicaid Act provisions "d[o] not in any way prohibit [a State] from seeking reimbursement from settlement monies for medical care allocated to future care."[8]

Further, as noted in the dissent, the question presented through the Eleventh Circuit framed the issue in terms of permitting the state to "claim the share of Gallardo's settlement allocated for her future medical expenses as compensation for the State's expenditures for her past medical expenses."[9]

In other words, Medicaid could only recover from amounts allocated in the settlement for future medicals for the amount the state had already paid — not for amounts the state anticipated it might pay in the future. As conceived by the lower courts, the question was whether Medicaid's costs incurred could be recovered from a settlement portion allocated for future medical costs — not the recovery costs that had not yet been incurred.

The Supreme Court's majority decision, however, fails to make that important distinction clear, promising confusion in the future as states attempt to stretch the decision to anticipated but not incurred future medical payments. Recovery is not, and should never be, a prepayment to Medicaid for future care.[10] While both the majority and dissent clearly only permit future medical recovery for reimbursement, the majority's failure to make the point explicitly is regrettable.

As a practical matter, as settlements are further apportioned and whittled down between litigants, their counsel and those due reimbursement (e.g., Medicaid), it remains to be seen if the true impact of Gallardo will be a chilling effect on personal injury litigation.

While there will likely always be monetary, and other, incentive to bring suit for egregious injury like those suffered by Gallardo, smaller claims may not be brought. Ironically, the effect of reduced litigation will leave Medicaid as the primary payor for claims if suits are less likely to be filed that allow Medicaid to recover from third parties.

Gallardo's Application: Extending the Future Medicals Analysis to Medicare Secondary Payer Cases

As decided by the Supreme Court, Gallardo is based upon a very close reading of the Medicaid statute's third-party liability provisions. When this reasoning is applied to the Medicare statute, Medicare should not be allowed to recover future medicals, whether already paid or to be paid in the future.

In contrast to the Medicaid statute, the text of the Medicare statute only addresses past medical expenses, and does not allow the Medicare program to even pay for, much less recover, future medical expenses.

Unlike Medicaid, which is a pay-and-chase program, the Medicare program prohibits Medicare from making any payment to the extent that other payment "has been made, or can reasonably expected to be made."[11]

Further, the government only has rights to recover conditional payments, which are payments for "any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such

item or service."[12]

Under Gallardo, the plain meaning of the phrase "payment made" necessarily excludes payments to be made.[13]

Indeed, following Gallardo, the Medicare program should have to withdraw its pending proposed rule titled Medicare Secondary Payer and Future Medicals.[14] The Supreme Court's textual analysis in Gallardo, when applied to the Medicare statute, explicitly prohibits the government from any recovery of future medicals in Medicare Secondary Payer cases.

Unfortunately, a footnote in the decision's dissent authored by Justice Sonia Sotomayor, joined by Justice Stephen Breyer, somewhat muddies the waters. In advancing a number of arguments in support of Gallardo and against the Florida Medicaid program, Justice Sotomayor suggests that the Medicare program would allow the government to recover for future medicals. The footnote states:

> Much as an insurer might modify this default rule under contract, Congress could do so by statute. The parties agree that Congress did so as to Medicare, which appears to permit a broader scope of recovery for services (both furnished and to be furnished) from a third party's liability in tort. 42 U.S.C. §2651(a); see Brief for Respondent 41; Reply Brief 8–9. But see §2652(c) (providing that "[n]o action taken by the United States ... shall operate to deny to the injured person the recovery for that portion of his damage not covered" under Medicare). Any difference between the two programs reflects Medicaid's focus on the needy, as well as the fact that individuals may lose and regain Medicaid eligibility overtime based on changes in their circumstances, whereas most Medicare enrollees are seniors entitled to coverage for the rest of their lives.[15]

The footnote, and the parties' argument, are wrong. The reference to Title 42 of the U.S. Code, Section 2651(a), is not to the Medicare statute. Instead, the citation is to a different law known as the Medical Care Recovery Act, enacted by Congress in 1963, two years before the Medicare statute, to allow the government a subrogation and recovery right in third-party liability tort cases.

Is the distinction material? The resounding answer: absolutely. In fact, the government's efforts to try and apply the MCRA to Medicare beneficiaries has been explicitly rejected — not only is the MCRA not the Medicare statute, but it does not apply to Medicare claims.[16]

Thus, the more specific language of the Medicare statute, and the Medicare Secondary Payer's limitation on the ability of the government to only recover for payments made, should prohibit Medicare from recovering for future medicals.

Conclusion

While prevailing high-level commentary suggests Gallardo now permits states to recover future medicals from tort settlements involving Medicaid beneficiaries, the holding is actually far more limited to recovery for reimbursement of Medicaid's incurred costs for past medical care only.

Unfortunately, because the majority was not as clear as it should have been, states will claim that the decision leaves open the question of whether the Gallardo holding should have broader application to recovery for future medicals yet to be paid. Further, the court's textual analysis, when applied to the Medicare statute, makes clear that there are no future medical claims under the Medicare program.

Unfortunately, the dissent's mistaken footnote confusing the MCRA for the Medicare statute risks creating further confusion. Time will tell whether the Medicare program will ignore the textual analysis and continue with its view that it has the authority to regulate future medicals under the Medicare Secondary Payer program.

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[1] The decision can be found at: https://www.supremecourt.gov/opinions/21pdf/20-1263_g2bh.pdf.

[2] See Arkansas Dept. of Health and Human Servs. v. Ahlborn, 547 U.S. 268 (2006); Wos v. E.M.A., 568 U.S. 627 (2013).

[3] See Giraldo v. Agency for Health Care Admin., 248 So. 3d 53 (Fla. 2018).

[4] See Gallardo v. Dudek, 963 F.3d 1167 (11th Cir. 2020).

[5] Slip Op. at 2 (citing §1396k(a)(1)(A)).

[6] 42 U.S.C. §1396a(a)(25)(H).

[7] Slip Op. at 7 (citation omitted).

[8] Slip Op. at 5 (citation omitted).

[9] Slip Dis. at 4.

[10] Nothing in the decision, or otherwise, precludes a State from bringing direct actions against tortfeasors to recover anticipated future medicals. Slip. Dis. at 15 (discussing how states prefer to allow tort victims to bring claims, rather than states bringing such actions directly). If a State wants such a recovery, they should bring the action themselves.

[11] 42 U.S.C. 1395y(b)(2)(A)(i) and (ii).

[12] 1395y(b)(2)(B)(ii); see also 1395y(b)(2)(B)(iii) (government right of action permitting suit "[i]n order to recover payment made under this subchapter for an item or service").

[13] Slip Op. at 7 (deriving the meaning of the statue by a plain reading of the text drafted by Congress).

[14] https://www.reginfo.gov/public/do/eoReviewSearch. Note that CMS's impending rulemaking is awaiting OMB clearance before publication.

[15] Slip Dis. at 9, n.3.

[16] See United States v. Philip Morris, 116 F.Supp. 2d 131 (D.D.C. 2000), affirmed on other grounds, 396

F.3d 1190 (D.C. Cir. 2004) (rejecting government Medicare claims under the MCRA, finding "[t]he congressional intent in enacting MCRA in 1962 — at which time Medicare did not exist and the Federal Employees Health Benefits Act (FEHBA) was still in its infancy — was to provide a means for the Government to recover from third-party tortfeasors medical expenses it had furnished for (primarily military) employees. Applying the principles from a recent U.S. Supreme Court decision, FDA v. Brown & Williamson Tobacco Corp., -- U.S. --, 120 S. Ct. 1291 (2000), this Court concludes that Congress did not intend that MCRA be used as a mechanism to recover Medicare or FEHBA costs" (footnotes omitted)).