No. 12-98

IN THE
Supreme Court of the United States

ALBERT A. DELIA, ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

E.M.A. (BY AND THROUGH HER GUARDIAN AD LITEM, DANIEL H. JOHNSON), WILLIAM EARL ARMSTRONG, AND SANDRA ARMSTRONG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND THE NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF RESPONDENTS

Mary Alice McLarty
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street N.W.
Suite 200
Washington, DC 20001
AAJ President

Louis M. Bograd
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION P.C.
777 6th Street N.W., Suite 520
Washington, DC 20001
(202) 944-2803
lou.bograd@cclfirm.com
Counsel for Amicus Curiae American Association for Justice

(Additional counsel listed on inside cover)

Burton Craige
PATTERSON HARKAVY LLP
1312 Annapolis Drive
Suite 103
Raleigh, NC 27608

Carlos E. Mahoney
GLENN, MILLS, FISHER &
MAHONEY, P.A.
P.O. Drawer 3865
Durham, NC 27702

Counsel for Amicus Curiae
North Carolina Advocates for Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice ("AAJ") and the North Carolina Advocates for Justice ("NCAJ") respectfully submit this brief as *amici curiae*.[1] Letters from the parties giving consent to the filing of this amicus brief accompany this filing.

AAJ is a voluntary national bar association whose members primarily represent plaintiffs in civil actions brought under state tort law. NCAJ is AAJ's affiliated state association in North Carolina. Many of the injured plaintiffs represented by AAJ and NCAJ members have received or will receive medical treatment for their injuries paid for by Medicaid. As a result, *amici*'s members and their clients are directly affected by the construction of statutory provisions in the federal Medicaid Act concerning repayment of medical expenses to state Medicaid agencies out of proceeds obtained from liable third parties through litigation.

AAJ participated in this Court's prior consideration of the relevant Medicaid lien provisions in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), as *amicus curiae* under its former name, the Association of Trial Lawyers of America ("ATLA"). And this Court favorably cited to the ATLA *amicus* brief to support the proposition that "some States have adopted special rules and procedures for allocating

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amici Curiae*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

tort settlements . . . [that] might be employed to meet concerns about settlement manipulation." *Id.* at 288 n.18 (citing ATLA Amicus Br. at 20-21, *Arkansas Dep't of Health & Human Serv. v. Ahlborn*, 547 U.S. 268 (2006) (No. 04-1506) (hereinafter "ATLA Amicus Br.")).

Petitioner repeatedly and incorrectly points to that language from the *Ahlborn* decision in support of his argument that N.C. Gen. Stat. § 108A-57 complies with this Court's holding in that case. Pet'r's Br. 19, 23, 27. AAJ and NCAJ therefore submit this brief *amici curiae* in order to correct Petitioner's inaccurate reliance on the prior ATLA brief, to demonstrate that the anti-lien provision of the Medicaid Act requires a fair and reasonable allocation of any settlement among past medical expenses paid by Medicaid and other categories of damage based on the facts of a particular case, and to explain how such an allocation advances the purposes of the Act.

SUMMARY OF ARGUMENT

The federal Medicaid Act generally prohibits states from imposing liens against, or seeking recovery of benefits paid from, a Medicaid recipient. 42 U.S.C. § 1396p. In *Ahlborn*, this Court unanimously concluded that this "anti-lien" provision prohibited state Medicaid agencies from seeking reimbursement for medical expenses they had paid out of any portion of a court judgment or settlement the recipient obtained from a third party apart from that portion of the judgment or settlement that represented payment for past medical expenses. 547 U.S. at 284-85. *Ahlborn* instructed States and Medicaid recipients to determine what portion of a

settlement represented such payments either by mutual agreement or by "submitting the matter to a court for decision." *Id.* at 288.

The North Carolina Medicaid lien statute at issue in this case, N.C. Gen. Stat. § 108A-57, like the Arkansas provision invalidated in *Ahlborn*, asserts a claim for reimbursement of medical expenses paid without regard to the actual portion of a settlement that represents payment for past medical expenses, up to one-third of the total recovery. Petitioner asserts that this statute complies with *Ahlborn* because the Medicaid Act permits states to unilaterally decide how settlements are apportioned, without regard to the facts of a particular case. Pet'r's Br. 16-20. As the Court of Appeals recognized, this argument is contrary to *Ahlborn* and the anti-lien provision of the Medicaid Act. Any settlement must be fairly and reasonably allocated between past medical expenses and other items of damage either by mutual agreement of the parties or by the decision of a court.

The North Carolina statute cannot be upheld as one of the "special rules and procedures" adopted by some states that the *Ahlborn* Court referenced. 547 U.S. 288 n.18. The Court, relying on information provided in the *amicus* brief submitted by ATLA, was referring to procedures for judicial allocation of settlements, not to unilateral "rule[s] of absolute priority" that a state might adopt by statute or regulation.

Petitioner argues that judicial allocation proceedings are "untenable," but many other states have successfully implemented such procedures to comply with *Ahlborn*. Indeed, North Carolina itself

already uses a very similar hearing procedure to allocate settlements subject to workers' compensation liens. While such proceedings undoubtedly place certain burdens on state Medicaid agencies, those costs are necessitated by the anti-lien requirement of Medicaid and are ameliorated by Medicaid recipients' statutory duty to cooperate with the State in pursuing third-party reimbursements. 42 U.S.C. § 1396k(a). And the state Medicaid agency always remains free to pursue its reimbursement claim directly against the potentially liable third party.

A fair and reasonable allocation of third-party recoveries advances important public policy interests, provides incentives for injured Medicaid beneficiaries to pursue potentially liable third parties, and promotes the efficient resolution of lawsuits. Consequently, such allocations likely increase total third-party reimbursements to Medicaid.

ARGUMENT

I. THE NORTH CAROLINA THIRD-PARTY PAYMENT STATUTE, N.C. GEN. STAT. § 108A-57, DOES NOT COMPLY WITH THE ANTI-LIEN PROVISION OF THE FEDERAL MEDICAID ACT, WHICH REQUIRES THAT RECOVERIES FROM THIRD PARTIES BE FAIRLY AND REASONABLY ALLOCATED BETWEEN PAST MEDICAL EXPENSES AND OTHER DAMAGES.

A. This Court's Decision in *Ahlborn* Requires Such an Allocation.

The federal Medicaid Act requires participating states "to ascertain the legal liability of third parties . . . to pay for care and services available under the plan," 42 U.S.C. § 1396a(a)(25)(A), and, where a state Medicaid agency has paid for medical treatment, to "seek reimbursement for such assistance to the extent of such legal liability." *Id.* § 1396a(a)(25)(B). The act also requires that Medicaid recipients "assign the State any rights . . . to payment for medical care from any third party." *Id.* § 1396k(a)(1)(A). At the same time, however, the federal statute "places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf." *Ahlborn*, 547 U.S. at 283. In particular, 42 U.S.C. § 1396p "prohibits States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient." *Id.*[2]

[2] Section 1396p provides, in relevant part:

In *Ahlborn*, this Court addressed the tension between these third-party liability and anti-lien provisions. The Court concluded that the Medicaid Act limited the State's right to reimbursement to that portion of any court judgment or settlement that represented repayment of past medical expenses paid for by Medicaid:

> [T]he State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of

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> (a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan
>
> > (1) 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 under the State plan, [except in certain circumstances not relevant here]. . . . .
>
> (b) Adjustment or recovery of medical assistance correctly paid under a State plan
>
> > (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, [except in circumstances not relevant here].

42 U.S.C. § 1396p.

> Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception carved out by §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.

547 U.S. at 284-85 (citation omitted).

In *Ahlborn*, there was no dispute that approximately one-sixth of Ms. Ahlborn's tort settlement "constitute[d] reimbursement for medical costs." *Id.* at 285. Nevertheless, this Court offered guidance about how the interests of both the State and the Medicaid recipient could be protected in future cases: "either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id.* at 288.[3]

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[3] It was in this context that the Court cited the ATLA *amicus* brief:

> As one *amicus* observes, some States have adopted special rules and procedures for allocating tort settlements in circumstances where, for example, private insurers' rights to recovery are at issue. See Brief for Association

Under either approach sanctioned by this Court, the allocation of a settlement between past medical expenses and other categories of damages is likely to be fair and equitable to all parties. If the State and the Medicaid recipient can agree on an allocation then, by definition, each is satisfied with the outcome. Alternatively, submission of the matter to a court ensures that a neutral adjudicator will determine a rational allocation based on the particular facts in that case.

These two approaches contrast sharply with the two unilateral alternatives that this Court rejected in *Ahlborn*. On the one hand, the Court recognized that it would not be appropriate simply to

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> of Trial Lawyers of America 20-21. Although we express no view on the matter, we leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation.

Id. at 288 n.18. The Court's citation was to a passage in the ATLA brief that discussed post-settlement procedures employed by courts in Minnesota, Wisconsin, and other jurisdictions "to allocate settlement proceeds between categories of damages" for subrogation purposes. ATLA Amicus Br. 20-21. The Solicitor General's brief in *Ahlborn* acknowledged similar "post-settlement hearings to allocate settlements between taxable and non-taxable income categories." *Id.* at 20 (citing U.S. Amicus Br. at 17 n.7, *Arkansas Dep't of Health & Human Serv. v. Ahlborn*, 547 U.S. 268 (2006) (No. 04-1506)).

Thus, there can be no question that this Court's reference to "special rules and procedures" adopted by some States referred to rules and procedures for such post-settlement allocation hearings, not to state statutes that automatically and arbitrarily impose a rule of "absolute priority" for reimbursement of Medicaid payments. *Ahlborn*, 547 U.S. at 288.

allow the plaintiff and the defendant in the underlying litigation to decide—without the State's involvement—how much of a settlement represented past medical expenses reimbursable to the state Medicaid agency; such an approach would run a "risk of settlement manipulation" that could "allocate away the State's interest." *Id.*[4] On the other hand, the Court also recognized that it would be equally inappropriate to allow the State to grant itself "absolute priority" in reimbursement of its Medicaid expenditures; such a rule could "preclude settlement in a large number of cases, and be unfair to the recipient in others." *Id.*

Thus, *Ahlborn* instructs that, where the State and the Medicaid recipient cannot agree on an equitable allocation of a third-party recovery, the matter should be submitted to a neutral adjudicator for resolution. The Court of Appeal's conclusion that this case must be remanded for "a fair and impartial adversarial procedure," Pet. App. 55a, is entirely consistent with this Court's guidance.[5]

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[4] Petitioner's Brief seems to assume throughout that the alternative to N.C. Gen. Stat. § 108A-57 is a regime in which Medicaid recipients and third-party payors can manipulate away the State's interest by structuring settlements to minimize or eliminate the State's interest in reimbursement. Pet'r's Br. 30-33. That is simply not the case. As *Ahlborn* makes clear, such unilateral manipulation of settlements is just as problematic as the State's rule of absolute priority. And, quite obviously, the decision below does not countenance such manipulation; the Court of Appeals remanded this matter "for an evidentiary hearing at which the district court shall determine the proper amount of DHHS's Medicaid lien in this case." Pet. App. 55a.

[5] The vast majority of post-*Ahlborn* decisions have similarly concluded that, absent agreement, the proper

B. N.C. Gen. Stat. § 108A-57 Is Just as Much a "Rule of Absolute Priority" as the Arkansas Statutory Scheme Invalidated in *Ahlborn*.

N.C. Gen. Stat. § 108A-57 does not provide for any "fair and impartial adversarial procedure" to allocate settlements between medical and other damages.[6] Instead, without regard to the facts and circumstances in a particular case, it mandates full repayment of any medical expenses paid by Medicaid up to a fixed statutory cap. In all relevant respects, it is indistinguishable from the Arkansas statutory scheme invalidated in *Ahlborn*. It establishes a "rule of absolute priority," improperly privileging the State's interest in Medicaid repayment over the Medicaid recipient's interest in recovery of her non-medical damages.

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allocation of a settlement between reimbursable medical expenses and other items of damage must be determined by an impartial adjudicator based on the particular facts of the case. *See, e.g.*, *Tristani v. Richman*, 652 F.3d 360 (3d Cir. 2011); *Price v. Wolford*, 608 F.3d 698 (10th Cir. 2010); *Southwest Fudiciary v. Arizona Healthcare Cost Containment Sys. Admin.*, 249 P.3d 1104 (Ariz. Ct. App. 2011); *Lima v. Vous*, 94 Cal. Rptr. 3d 183 (Cal. Ct. App. 2009); *Bolanos v. Superior Court*, 87 Cal. Rptr. 3d 174 (Cal. Ct. App. 2008); *Roberts v. Albertson's, Inc.*, No. 4D10-2313, 2012 WL 5232182 (Fla. 4th DCA Oct. 24, 2012); *Smith v. Agency for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009); *Chambers v. Jain*, 839 N.Y.S.2d 432 (N.Y. Sup. Ct. 2007); *Lugo v. Beth Israel Med. Ctr.*, 819 N.Y.S.2d 892 (N.Y. Sup. Ct. 2006); *McKinney v. Philadelphia Hous. Auth.*, No. 07-4432, 2010 WL 3364400 (E.D. Pa. Aug. 24, 2010); *In re E.B.*, 729 S.E.2d 270 (W. Va. 2012).

[6] Nor, for that matter, does that statue appear to permit the State to reach an agreement with the Medicaid recipient for a lesser reimbursement of medical expenses paid by Medicaid, the other form of allocation sanctioned in *Ahlborn*.

In *Ahlborn*, the state of Arkansas "claim[ed] an entitlement to more than just that portion of a judgment or settlement that represents payment for medical expenses. It claim[ed] a right to recover the entirety of the costs it paid on the Medicaid recipient's behalf." 547 U.S. at 278. This was so "even when the parties to the settlement allocate damages between medical costs, on the one hand, and other injuries like lost wages, on the other. The same rule also would apply, it seems, if the recovery were the result not of a settlement but of a jury verdict." *Id.* at 278-79.

N.C. Gen. Stat. § 108A-57 operates in almost exactly the same way. It does not limit the State's claim for reimbursement to that portion of a settlement or judgment that represents past medical expenses. To the contrary, it provides: "to the extent of payments under this Part, the State . . . shall be subrogated to *all rights of recovery*, contractual or otherwise, of the beneficiary of this assistance, . . . *against any person*." N.C. Gen. Stat. § 108A-57(a) (emphasis added). It orders the beneficiary's attorney to pay the state Department of Health and Human Services ("NCDHHS") "*the amount of assistance paid by the Department* on behalf of or to the beneficiary . . . out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party." *Id.*[7]

[7] The North Carolina statute provides that the Department's claim for reimbursement must be "prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered." *Id.* This provision, which protects not the Medicaid beneficiary but rather other health care providers, reinforces the conclusion

If the State's Medicaid expenses amount to less than one-third of the beneficiary's recovery, North Carolina claims an entitlement to be reimbursed in full, even where the beneficiary had to compromise her claim for a fraction of its worth.[8] And, while N.C. Gen. Stat. § 108A-57 caps the State's reimbursement claim at one-third of any recovery, that limitation in no way represents an appraisal of the value of the beneficiary's other damages. Rather, that provision is primarily intended to ensure that funds are available to pay plaintiff's attorneys' fees and litigation costs, so that the State can take a free ride on the beneficiary's damage claims. Petitioner comes close to conceding as much in its brief. Pet'r's Br. 25 ("This ensures that the recipient has access to the majority of the proceeds to pay attorneys fees and costs . . . .").[9]

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that the State's reimbursement claim is not to be prorated with other, non-medical damages suffered by the beneficiary.

[8] There are many reasons why a plaintiff may decide to settle a case for less than full value, such as the inherent risks of litigation, the increased cost of taking a case to trial, problems of proof, a potential finding of contributory or comparative negligence, or limitations on the defendant's ability to pay full compensation.

[9] Evidence that the reimbursement cap in N.C. Gen. Stat. § 108A-57 was not intended to function as a reasonable allocation between medical care and other damages can be found in the statute's history and structure. To begin, N.C. Gen. Stat. § 108A-57 was enacted prior to *Ahlborn*, when the State believed that the Medicaid third-party recovery provisions entitled it to full reimbursement. Moreover, as Petitioner acknowledges, Pet'r's Br. 22-23 & n.4, section 108A-57 is functionally equivalent to a separate pair of North Carolina statutes governing private medical liens, N.C. Gen. Stat. §§ 44-49 and 44-50; yet, unlike Medicaid liens, such private liens are not limited by the anti-lien provision to recoveries representing

Moreover, nothing in Petitioner's argument turns on the existence of the cap. By its reasoning, an "advance allocation" of full repayment to the State before the beneficiary recovers anything for her non-medical damages with no cap would presumably be an equally valid exercise of the State's purported authority to "define the amount of a damage award representing compensation for past medical expenses." Pet'r's Br. 17.

The only meaningful difference between the present case and *Ahlborn* is that in the former case the state of Arkansas stipulated to the portion of Ms. Ahlborn's settlement that represented repayment of medical expenses, whereas North Carolina has not agreed to an allocation in this case. By Petitioner's reasoning, Arkansas would have prevailed in *Ahlborn* if only it had not foolishly agreed to stipulate to the fair allocation of damages.

But that flawed reasoning cannot be squared with this Court's holding. E.M.A. suffered real and substantial injuries, including but not limited to medical damages, and the settlement of her claims necessarily compromised all of her claimed damages. Under *Ahlborn*, in order to protect her property interest in her other categories of damage, the anti-lien provision of the Medicaid Act requires that the settlement be fairly and equitably allocated among the various "heads of damages," 547 U.S. at 282 n.12,

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repayment of past medical expenses. Finally, by its terms, N.C. Gen. Stat. § 108A-57 applies not just to settlements, but also to judgments; thus, its award of up to one-third of any recovery to the state would seem to apply even in the fact of a contrary judicial determination regarding the proper allocation of a judgment among various items of damages.

either by mutual agreement between the parties or by an impartial adjudicator. *Id.* at 288; *see also In re E.B.*, 729 S.E.2d at 288-91 (rejecting argument that "*Ahlborn* is limited to cases where the parties have stipulated to the value of the plaintiff's claim" and invalidating West Virginia lien statute that, like N.C. Gen. Stat. § 108A-57, capped state Medicaid reimbursements at one third of an unallocated settlement).

Petitioner purports to find support for its position in this Court's footnoted reference to "special rules and procedures" that some States have adopted for allocating tort settlements. Pet'r's Br. 19, 23, 27. But that passage in *Ahlborn* clearly refers to rules and procedures by which a court can allocate damages, not to statutory provisions guaranteeing the state automatic priority. 547 U.S. at 288 n.18 & text accompanying note (footnote accompanies textual reference to "submitting the matter to a court for decision").

As noted earlier, *supra* pp.6-8, the *Ahlborn* court supported its reference to "special rules and procedures" with a citation to the *amicus* brief submitted by ATLA. A review of that passage of the brief is instructive:

> Where the parties cannot agree on an equitable division of the settlement proceeds, the trial court should convene a hearing to undertake such a division. All claimants—including those, like the state Medicaid agency, that have acquired their rights by assignment or subrogation—would receive notice of the hearing and an

opportunity to be heard on the value of various items of damage in the case and a fair distribution of the funds.

Such a post-settlement allocation hearing would not be unusual. As the Brief for the United States acknowledges, courts may "conduct post-settlement hearings to allocate settlements between taxable and non-taxable income categories." Brief for the United States at 17, n.7 (citing cases). Similarly, a number of states already have well-developed procedures in place for allocating the proceeds from a tort settlement. In Minnesota, for example, trial courts can convene a so-called "*Henning* hearing" to allocate settlement proceeds between categories of damages recoverable by a subrogated insurer and non-recoverable damages. *See Henning v. Wineman*, 306 N.W.2d 550 (Minn. 1981). To the same end, the Wisconsin Supreme Court has upheld a trial court's use of a "*Rimes* hearing," a post-settlement "mini-trial" to allocate proceeds. *See Rimes v. State Farm Mutual Automobile Ins. Co.*, 316 N.W.2d 348 (Wisc. 1982).

In the experience of these states, once such a hearing procedure is developed, it is rarely used. Once all of the interested claimants understand the rules that govern the division of settlement proceeds, it is usually possible for them to agree to an

> allocation without the need for the time and expense of an allocation hearing. *See* Sharon L. Van Dyck & Wilbur W. Fluegel, *Determining "Full Recovery" Under the Minnesota Anti-Subrogation Statute,* Minn. Trial Lawyer Mag. 18 (Winter 1999).

ATLA Amicus Br. 20-21 (footnotes omitted).

Amicus recognized, as did this Court, 547 U.S. at 288 n.18 ("we express no view on the matter"), "that it would be inappropriate . . . for this Court to establish specific procedures for state court judicial proceedings to allocate settlement proceeds." ATLA Amicus Br. 21. *Amicus* nevertheless outlined these procedures (1) "to reassure the Court that there are workable procedures for resolving issues of equitable apportionment that need not burden trial courts with onerous satellite litigation proceedings" and (2) "to encourage this Court to articulate standards for equitable allocation of settlement proceeds in cases involving Medicaid in order to guide the orderly development of such procedures in state courts." *Id.* at 21-22.

Thus, this Court's discussion of "special rules and procedures" provides no support for North Carolina's statutory reimbursement scheme. N.C. Gen. Stat. § 108A-57 is just as much a "rule of absolute priority" as the Arkansas statutes invalidated in *Ahlborn*. And it violates the anti-lien provision of the federal Medicaid Act for precisely the same reasons.

II. MANY STATES USE EVIDENTIARY HEARINGS TO ALLOCATE SETTLEMENTS BETWEEN REIMBURSABLE MEDICAL EXPENSES AND OTHER CATEGORIES OF DAMAGES; NORTH CAROLINA ITSELF EMPLOYS A SIMILAR PROCEDURE TO ALLOCATE SETTLEMENTS SUBJECT TO WORKERS' COMPENSATION LIENS.

Even though this Court expressly identified a judicial proceeding as the appropriate forum for allocating a settlement where the parties cannot agree, 547 U.S. at 288, Petitioner argues that such a hearing is "untenable." Pet'r's Br. 27. Of course, that contention ignores the existing judicial procedures for allocating tort settlements that this Court referenced in *Ahlborn*. 547 U.S. at 288 n.18. It also overlooks the fact that other states have successfully used court hearings to implement the allocation that *Ahlborn* requires. Most strikingly, Petitioner's argument is refuted by North Carolina's own statutory procedure for allocating settlements involving workers' compensation liens.

A. Other States Have Successfully Implemented Hearing Procedures to Comply with *Ahlborn*.

California amended its state code provisions governing Medicaid liens in response to the *Ahlborn* ruling. Amended Cal. Welf. & Inst. Code § 14124.76, subd. (a), provides:

> No settlement, judgment, or award in any action or claim by a beneficiary to recover damages for injuries, where the

director has an interest, shall be deemed final or satisfied without first giving the director notice and a reasonable opportunity to perfect and to satisfy the director's lien. *Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary*. All reasonable efforts shall be made to obtain the director's advance agreement to a determination as to what portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided [on] behalf [of] the beneficiary. *Absent the director's advance agreement . . . , the matter shall be submitted to a court for decision*. Either the director or the beneficiary may seek resolution of the dispute by filing a motion, which shall be subject to regular law and motion procedures. In determining what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268 and other relevant statutory and case law.

Id. (emphasis added). The amended statute has been successfully employed to resolve allocation disputes in multiple cases. *See, e.g.*, *Lima*, 94 Cal. Rptr. 3d 183; *Bolanos*, 87 Cal. Rptr. 3d 174.

Missouri similarly amended its state code provision to provide for an evidentiary hearing to allocate damages. Mo. Rev. Stat. §§ 208.215.9-.11. The amended provision expressly authorizes a court to "reduce and apportion the [State's] lien proportionate to the recovery of the claimant." *Id.* at § 208.215.11. It further invites the court to take into account, *inter alia*, "the nature and extent of the injury, economic and noneconomic loss, settlement offers, [and] comparative negligence as it applies to the case at hand." Missouri courts have had no difficulty in using this statutory hearing process to reduce state Medicaid liens. *See, e.g., American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844 (Mo. Ct. App. 1998).

Pennsylvania likewise amended its statutory law in order to authorize courts to allocate damages. After payment of attorneys' fees and litigation costs, a court shall allocate a settlement "between the medical portion and other damages and shall allow the department a first lien against the medical portion of the judgment or award, the amount of the expenditures for the benefit of the beneficiary under the medical assistance program." 62 Pa. Cons. Stat. § 1409.1(b)(1). If a court fails to allocate a settlement, the state will presume that one-half of the settlement (after payment of legal costs and fees) constitutes repayment of medical expenses, but the beneficiary may dispute that presumption in an administrative hearing. 62 Pa. Stat. Ann. § 1409(b)(11); 55 Pa. Code § 259.2(d). The Third Circuit has held that this

administrative review process is required by *Ahlborn*; without it, the presumptive statutory allocation would violate the anti-lien provision of the Medicaid act. *Tristani*, 652 F.3d at 378.

Oklahoma also amended its Medicaid lien provisions in response to *Ahlborn*. The amended statute presumes that a settlement includes full repayment of any expenses incurred by Medicaid, "unless a more limited allocation of damages to medical expenses is shown by clear and convincing evidence." Okla. Stat. tit. 63, § 5051.1(D)(1)(d).[10] In *Price v. Wolford*, 608 F.3d 698 (10th Cir. 2010), the Court of Appeals identified the kind of evidence that would justify a reduction in a lien under the statute:

> [A] reduction in a Medicaid lien can be justified only by showing a reason why the plaintiff would agree to allow the defendant to pay less than the full amount of the Medicaid lien. The usual reasons would be that the liability of the settling defendant is uncertain or that the defendant lacks the money to pay for his full liability (or both); so the plaintiff would be willing to take a proportionate reduction in each component of the damages that she would expect the jury to award if the defendant were found liable.

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[10] *Amici* do not concede that Oklahoma's use of the clear and convincing evidence standard complies with the anti-lien provision as construed in *Ahlborn* or the beneficiary's constitutional right to due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (due process requires consideration of "the risk of an erroneous deprivation of [the Medicaid beneficiary's] interest through the procedures used").

Id. at 707. The Court of Appeals in this case found this discussion helpful. Pet. App. 50a-51a n.12 (relying on this discussion in *Price*).

None of these states appear to find the allocation hearing contemplated by *Ahlborn* "untenable." To the contrary, they all have found a way to fulfill their federal third-party-recovery obligations while respecting and protecting their Medicaid beneficiaries' independent interest in receiving compensation for their injuries.

B. North Carolina Has Long Relied On Similar Evidentiary Hearings to Allocate Settlements Involving Workers' Compensation Liens.

Strikingly, North Carolina already regularly utilizes a hearing procedure that is quite similar to the process it now derides as "untenable" to allocate settlements subject to workers' compensation liens. Under N.C. Gen. Stat. § 97-10.2, where an employer pays workers' compensation benefits to an employee for injuries for which a third party may be liable, the employer—and its insurance carrier—obtain a subrogation interest to reimbursement out of any third-party recovery, much like NCDHHS here. The amount to be repaid out of a settlement with the third party is determined through an evidentiary hearing before the court:

> [I]n the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident

> superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j).

When the injured worker is a state employee, the state is subject to these hearing procedures to determine the amount of worker's compensation payments it will recoup. *See* N.C. Gen. Stat. § 97-7 (state and its employees are covered by workers' compensation law). Petitioner offers no evidence that

these allocation procedures, long employed throughout North Carolina, have proven to be "untenable."

Petitioner's real concern seems to have less to do with "tenability" than with time and expense. North Carolina recognizes that it would have to expend time and effort in judicial allocation hearings. Pet'r's Br. 15, 27-28. The state would much prefer simply to take a free ride on the plaintiff's litigation efforts, recouping automatic lien repayments without any expenditure on its part.

But such a free ride does not comply with Medicaid's anti-lien provision, which protects a beneficiary's independent property interest in her non-medical damages. Indeed, as this Court recognized without deciding in *Ahlborn*, there is a strong argument that the anti-lien provision bars any State lien claim against a judgment or settlement obtained by a Medicaid beneficiary. 547 U.S. at 284 ("Read literally and in isolation, the anti-lien prohibition contained in § 1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payments for medical care."); *see also Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002); *Tristani*, 652 F.3d at 379 (Pollak, J., dissenting); *Wallace v. Estate of Jackson*, 972 P.2d 446, 449 (Utah 1998) (Durham, C.J., dissenting) (all adopting this position). All of the third-party recovery provisions of the federal law seem to presume that it is the state Medicaid agency, not the beneficiary, which will engage in litigation to recoup medical expenses from liable third parties. The beneficiary must assign her interest in a claim for such expenses to the State, which has a subrogation right to pursue that claim in litigation.

42 U.S.C. §§ 1396a(a)(25)(H) and 1396k(a)(1)(A). The State must distribute any excess medical assistance reimbursements it collects to the beneficiary. *Id.* § 1396k(b). And Medicaid beneficiaries must cooperate with the State in obtaining payments and in identifying and providing information to assist the State in pursuing liable third parties. *Id.* § 1396k(a)(1)(B) and (C).[11] Participation in a judicial allocation hearing is ultimately far less burdensome for the State than being compelled to pursue reimbursement claims itself.

III. A FAIR AND REASONABLE ALLOCATION OF THIRD PARTY RECOVERIES CREATES APPROPRIATE INCENTIVES FOR MEDICAID RECIPIENTS TO PURSUE RECOVERY OF MEDICAL EXPENSES PAID BY MEDICAID, ENCOURAGES EFFICIENT RESOLUTION OF LAWSUITS, AND LIKELY INCREASES MEDICAID REIMBURSEMENTS.

As this Court recognized in *Ahlborn*, there are also important public policy arguments against a rule like N.C. Gen. Stat. § 108A-57 that automatically prioritizes the State's claim for reimbursement over the Medicaid beneficiary's claim for other damages. 547 U.S. at 288 ("a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient

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[11] This duty of cooperation also answers Petitioner's concern that the State would be at a disadvantage in an allocation hearing. Pet'r's Br. 28-29. The beneficiary and her counsel are obliged to provide relevant information requested by the State to assist it in asserting its lien.

in others"). *Amici* wish here to briefly emphasize three such concerns, each of which ATLA raised in its earlier brief. *See* ATLA Amicus Br. 9-19.

First, the North Carolina statute discourages injured Medicaid beneficiaries from pursuing recompense for their injuries. Prospective counsel would be obliged to advise a potential plaintiff that any recovery she obtained would be reduced by the full amount of reimbursement due to the state agency up to one third of the total recovery, as well as by the payment of attorneys' fees and costs (to which the State would not contribute). In many cases, these items could amount to close to 75 percent of any potential recovery. If the success of the litigation is in doubt—due to either problems of proof or concerns about the defendant's ability to pay damages—the beneficiary and her counsel might well conclude that the potential reward is not worth the time, effort, and expense of pursuing litigation.[12]

Second, N.C. Gen. Stat. § 108A-57 discourages settlements and impedes the efficient resolution of legal disputes. This Court has long recognized a strong public interest in the expeditious resolution of lawsuits through settlements. *See, e.g.*, *McDermott,*

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[12] Even if the potential plaintiff is willing to proceed with a suit for damages, she may have difficulty in obtaining competent counsel to represent her on a contingent fee basis. Counsel may well be reluctant to represent a client who is unlikely to realize any significant recovery after repayment of a Medicaid lien, regardless of the merits of the litigation. Moreover, because the State does not contribute in any way to the fees and costs of litigation, counsel may be deterred by the potentially uncomfortable, but likely, prospect that her contractual contingent fee might well significantly exceed the plaintiff's actual recovery.

Inc. v. AmClyde, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlements"); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 574 (1976) (Rehnquist, C.J., dissenting) (recognizing "the consistent policy of this Court [to] encourag[e] the parties to settle their differences"). Our state and federal judicial systems would cease to function if all, or even a substantial portion, of cases were litigated to trial. *Cf.* Pet'r's Br. 29 (acknowledging that around 95 percent of all tort and medical malpractice cases are resolved prior to trial).

Yet, under N.C. Gen. Stat. § 108A-57, an injured plaintiff who has received medical treatment funded by Medicaid has little incentive to settle her personal injury lawsuit for an amount that falls far short of her total damages. Any settlement award will immediately be reduced by up to a third to reimburse the state Medicaid agency. Coupled with the plaintiff's obligation to pay attorneys' fees and litigation costs, relatively little will be left to compensate plaintiff for her injuries. Under these circumstances, a plaintiff with a substantial Medicaid reimbursement claim will have a strong incentive not to compromise her claim through settlement, but instead to "roll the dice" in hopes of obtaining a sufficient recovery through trial. *See* 547 U.S. at 288 ("a rule of absolute priority might preclude settlement in a large number of cases"). The consequence will be to impose substantially greater burdens on the legal system, while also increasing the risk of an adverse verdict that would deprive both the plaintiff and the state Medicaid agency of any recovery at all.

The explicit purpose of the third-party recovery provisions of the Medicaid Act is to reduce

Medicaid's costs. Yet, by discouraging injured Medicaid beneficiaries from pursuing injury claims and by deterring settlements, the net effect of a provision like N.C. Gen. Stat. § 108A-57 that prioritizes reimbursement to the State over compensation to the injured plaintiff, may well be to reducethe overall amount of third-party recoveries and therefore, perversely, to increase the Medicaid program's overall expenses. For these public policy reasons as well, this Court should adhere to its holding in *Ahlborn* and continue to require a fair and rational allocation of settlements between past medical expenses and other categories of damages.

CONCLUSION

For the foregoing reasons, *Amici* AAJ and NCAJ urge this Court to affirm the ruling of the United States Court of Appeals for the Fourth Circuit.

Date: December 17, 2012

Respectfully submitted,

Louis M. Bograd
Counsel of Record
CENTER FOR
CONSTITUTIONAL
LITIGATION P.C.
777 6th Street N.W.
Suite 520
Washington, DC 20001
(202) 944-2803
lou.bograd@cclfirm.com

Counsel for Amicus Curiae American Association for Justice

Burton Craige
PATTERSON HARKAVY LLP
1312 Annapolis Drive
Suite 103
Raleigh, NC 27608

Carlos E. Mahoney
GLENN, MILLS, FISHER
& MAHONEY, P.A.
P.O. Drawer 3865
Durham, NC 27702

Counsel for Amicus Curiae North Carolina Advocates for Justice