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SUPREME COURT ALLOWS STATE MEDICAID AGENCIES TO RECOVER FROM "FUTURE MEDICAL EXPENSES" PORTIONS OF SETTLEMENT; ERISA FUNDS NOT AFFECTED

On June 6, 2022, in *Gallardo v. Marstiller*, the United States Supreme Court interpreted the Medicaid Act to allow states to recover Medicaid expenditures from portions of legal settlements allocated for "medical expenses," even those allocated for future medical expenses. *Gallardo* will affect states and litigants significantly, but because the decision relied heavily on Medicaid's statutory text, it will not affect ERISA funds or their recovery efforts.

In *Gallardo*, Florida's Medicaid agency paid $862,688.77 in "past" medical expenses, as well as ongoing care expenses, for Gianinna Gallardo. Gallardo's $20 million claim arising from her injury was settled for $800,000 (4%). The settlement allocated $35,367.52, 4% of all medical payments made, for past medical expenses, and "some portion" for future medical expenses. Florida sought $300,000, its statutory maximum, arguing it could recover from amounts allocated for past and future medical expenses. Gallardo argued that only past expenses could be recovered.

Medicaid requires a beneficiary to assign to the state "any rights … to payment for medical care from any third party," 42 U.S.C. § 1396k(a)(1)(A), when the state paid for that care. But states may only recover from the "medical expenses" portion of a settlement. *Gallardo* asked, is the state limited to <u>past</u> medical expenses, or can it reach past <u>and future</u> medical expenses?

The Court found the latter argument persuasive and ruled in Florida's favor. The Court reasoned that 42 U.S.C. § 1396k(a)(1)(A)'s language, referring to "any rights … to payment for medical care from any third party," contemplates broad recovery without distinction between past and future medical care. The Court also noted that nothing in the statutory text limits recovery to payment allocated to past care. Together, these facts indicate that states may recover from settlement amounts allocated to both past and future medical care. The key distinction was between medical and nonmedical expenses, not past and future medical expenses. The Court cited other Medicaid language in support of its conclusion. For example, 42 U.S.C. § 1396a(a)(25)(H) includes a temporal distinction ("services furnished" (past tense)). By contrast, Congress could have, but did not, include a temporal

distinction in other provisions, including the provision at issue, 42 U.S.C. § 1396k(a)(1)(A). This told the Court that Congress did not want that distinction to be made. Finally, the Court rejected the argument that it would be "absurd" or "unjust" for a state to recover from amounts allocated for future medical services when Medicaid might not pay.

Gallardo helps states recover more on a case-by-case basis. It also hurts beneficiaries, who may stand to lose more significant portions of their settlement to Medicaid. *Gallardo* may even deter some beneficiaries from filing suits, ultimately leading to a decrease in state recoveries.

Gallardo, however, is unlikely to have an effect on ERISA health and welfare plans, for two reasons. First, *Gallardo* was decided based on Medicaid's statutory text. ERISA plans are not governed by that, or any other, statutory text. They are governed by plan documents, which set forth all the plan's rights, including recovery and subrogation rights. Second, unless they limit themselves, ERISA plans have always had a greater right than the right recognized by *Gallardo*. They have always been able to pursue any and all parts of a settlement, no matter how they are allocated, to recover medical expenses. *Accord Montanile v. Bd. of Trustees*, 577 U.S. 136 (2016) (plan pursued recovery from entire settlement, without regard to allocation; plan's recovery attempt failed for unrelated reasons). ERISA funds can and do seek recovery of medical expenses from any part of a settlement, and *Gallardo* does not change that.

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