

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALBERT A. DELIA, SECRETARY, :

4 NORTH CAROLINA DEPARTMENT OF :

5 HEALTH AND HUMAN SERVICES, : No. 12-98

6 Petitioner :

7 v. :

8 E.M.A., A MINOR, BY AND THROUGH :

9 HER GUARDIAN AD LITEM, :

10 DANIEL H. JOHNSON, ET AL. :

11 - - - - - x

12 Washington, D.C.

13 Tuesday, January 8, 2013

14

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United States

17 at 11:16 a.m.

18 APPEARANCES:

19 JOHN F. MADDREY, ESQ., Solicitor General, Raleigh, North

20 Carolina; on behalf of Petitioner.

21 CHRISTOPHER G. BROWNING, JR., ESQ., Raleigh, North

22 Carolina; on behalf of Respondents.

23 GINGER D. ANDERS, ESQ., Assistant to the Solicitor

24 General, Department of Justice, Washington, D.C.; for

25 United States, as amicus curiae, supporting

1 Respondents.
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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-98, Delia v. E.M.A.

5 Mr. Maddrey?

6 ORAL ARGUMENT OF JOHN F. MADDREY

7 ON BEHALF OF THE PETITIONER

8 MR. MADDREY: Mr. Chief Justice and may it
9 please the Court:

10 The Medicaid Act requires States to take
11 reasonable measures to seek reimbursement from liable
12 third parties and that States require recipients to
13 assign their rights for -- to payment for medical care.
14 The Act does not direct how a State must determine what
15 portion of a recipient's third-party recovery is
16 properly attributable to past medical expenses. North
17 Carolina's procedure establishes --

18 JUSTICE SOTOMAYOR: How do you know that ex
19 ante?

20 MR. MADDREY: Excuse me?

21 JUSTICE SOTOMAYOR: How could you ever know
22 that ex ante? I mean, without looking at the individual
23 facts of the case, the 30 percent is going to be
24 underinclusive in some circumstances, overinclusive in
25 others. So how do you deal with our holding that you

1 are not entitled to the overinclusive portion?

2 MR. MADDREY: Justice Sotomayor, the -- the
3 answer to that depends on whether the State has to
4 predict with certainty the amount --

5 JUSTICE SOTOMAYOR: Life is never certain,
6 and so I don't even go to that issue. I go just simply
7 to the question, how can you, ex ante, predict --
8 particularly with a statute that wasn't based on any
9 empirical data -- that 30 percent normally is the right
10 amount?

11 You just picked it out of the air? You
12 could pick 40, 50, 60. How do we draw the line?

13 MR. MADDREY: Your Honor, the -- the statute
14 doesn't predict; it defines. It tells the recipient how
15 much out of a recovery they must allocate to satisfy the
16 repayment obligation. If it were a prediction, that
17 would make it a presumption and you would have to defend
18 it as such.

19 But here the statute defines the portion
20 that the State, as a condition of extending the Medicaid
21 benefits, tells the recipient they must allocate --

22 JUSTICE SCALIA: They must allocate? Is the
23 State saying, You do not own that 30 percent of the
24 recovery, so you never get a property right in it, so
25 that there's never any problem about asserting a lien

1 against it? I thought that's what's going on here. And
2 I think that's sort of disguised by talking about
3 allocation.

4 I thought the State is saying, as to
5 30 percent of the recovery, you have no property right
6 in it. Is it not saying that? Am I wrong?

7 MR. MADDREY: Your Honor, the State is
8 saying that as to the amount of Medicaid benefits
9 provided, the State has a right of recovery. And it
10 says that of any third party --

11 JUSTICE SCALIA: Maybe -- maybe you didn't
12 hear my -- my question. My question is: Is the State
13 saying that you have no property right in the
14 30 percent?

15 MR. MADDREY: The State has the right to
16 recover that portion.

17 JUSTICE SCALIA: Let me ask my question
18 again. Is the State saying that you have no property
19 right in the 30 percent? I think that can be answered
20 "yes" or "no."

21 MR. MADDREY: And -- yes, Your Honor, the
22 position would be there is no property right in that --
23 in that percentage that the State has conditioned the --
24 the extension of benefits on.

25 JUSTICE SOTOMAYOR: Now, how does it have

1 the right to announce that in a FELA case or in a Jones
2 Act case where those injured parties, they have a
3 property right in their protection but this statute
4 applies to that recovery as well?

5 MR. MADDREY: If those -- if those litigants
6 are Medicaid recipients, it applies to them as a
7 condition of having received the State Medicaid
8 benefits.

9 JUSTICE SOTOMAYOR: So they can deny a
10 litigant a property right in that recovery?

11 MR. MADDREY: As a --

12 JUSTICE SOTOMAYOR: I don't know how you can
13 go in and ask for something you don't own. I don't know
14 how the plaintiff can go in and litigate a case if they
15 don't have a property interest that they can then assign
16 to someone else. I've never heard of such a thing, how
17 they would have standing to sue on your behalf if they
18 have no property interest in the recovery.

19 MR. MADDREY: Your Honor, I'm -- I'm
20 confused by the question. I was --

21 JUSTICE SOTOMAYOR: How do you sue for
22 something you have no property interest in?

23 MR. MADDREY: I don't know how you'd sue for
24 something you don't have a property interest in, Your
25 Honor.

1 JUSTICE SOTOMAYOR: So go back to
2 Justice Scalia's question.

3 MR. MADDREY: The inner --

4 JUSTICE SOTOMAYOR: There has to be some
5 interest in the 30 percent by the plaintiff.

6 MR. MADDREY: The -- the 30 percent attaches
7 upon the recovery from a third party. The -- the cause
8 of action is for whatever sources of injury that
9 individual would have. To the extent the recovery is
10 for medical expenses previously paid for by Medicaid,
11 that's what the State's interest could --

12 JUSTICE SOTOMAYOR: Could I just clarify one
13 point? Does this rule preclude parties, as we said in
14 Ahlborn, from stipulating to a settlement at all?

15 MR. MADDREY: No, Your Honor.

16 JUSTICE SOTOMAYOR: Your brief is not clear
17 on that. They can still stipulate. It's only if after
18 the stipulation, it hasn't been allocated that you can
19 recover?

20 MR. MADDREY: Your Honor, the stipulation
21 must include the State as a party to it for it to be
22 binding. That's --

23 JUSTICE SOTOMAYOR: So what you're basically
24 now saying is that there can never be a stipulation.

25 MR. MADDREY: There could be an advance

1 agreement, Your Honor, but --

2 JUSTICE SOTOMAYOR: You're saying that the
3 parties cannot enter into a stipulation.

4 MR. MADDREY: If the parties are private
5 litigants, a plaintiff and a defendant in a medical
6 malpractice action, their -- their stipulation doesn't
7 bind the State. All parties to this case agree that --

8 JUSTICE SCALIA: You can bind the parties
9 for other purposes, I assume. There are other purposes
10 for which the distinction between pain and suffering and
11 medical expenses might make a difference, right?

12 What -- what if the parties agreed that it's
13 50/50? Would the State take 50 percent then, or is the
14 State still limited to 30?

15 MR. MADDREY: Your Honor, the statutory
16 percentage applies in that situation as well. The
17 33 percent cap would apply.

18 JUSTICE SCALIA: Okay.

19 MR. MADDREY: Again, the State's interest is
20 the amount of the Medicaid benefits it provided, capped
21 at 33 percent of the recovery.

22 JUSTICE KAGAN: General, how do you come up
23 with 33? Why 33? Why not 10 or 60 or 90? Why -- how
24 did you come up with the number?

25 MR. MADDREY: The North Carolina General

1 Assembly first enacted it as it relates to Medicaid in
2 1988. It reflects a legislative history in
3 North Carolina going back to 1935 with a -- a statutory
4 lien applicable to medical providers in -- in civil
5 actions. It became specifically applicable to Medicaid
6 scenario in the 1988 provision.

7 JUSTICE ALITO: What if this case is tried
8 to a verdict and there is a special verdict and the jury
9 says that 10 percent was medical expenses? Would the --
10 the statute would override that?

11 MR. MADDREY: Your Honor, I believe the
12 judge imposing judgment following that jury verdict
13 would have to conform the verdict to the law. Just as
14 if the verdict had said, there was 100 -- excuse me,
15 \$1 million in punitive damages when there is a statutory
16 cap of \$500,000 for punitive damages, the judge would
17 have to conform the verdict to the applicable law.

18 JUSTICE ALITO: What's the difference
19 between that case and Ahlborn, where you have -- where
20 the State has agreed that a certain amount is
21 attributable for medical expenses, and then this
22 hypothetical that the jury has determined that a certain
23 amount constitutes medical expenses? What's the
24 difference between those two?

25 MR. MADDREY: In the jury verdict scenario,

1 the State's not a party to that and didn't commit to
2 the -- to the portion that -- that was attributable to
3 medical expenses. The jury doesn't have any authority
4 to countervene the statute, to enter a verdict in
5 violation of -- of the statutory requirement. And --
6 and here the statute tells the Medicaid recipient, in
7 advance, how much of any recovery, whether that be from
8 a settlement or a verdict, has to be allocated and paid
9 back to the State.

10 JUSTICE ALITO: Isn't the reasoning of
11 Ahlborn that when we know to a certainty how much the
12 medical expenses were and what -- what part of the
13 judgment this represents or the settlement represents
14 medical expenses, then only that much can be assigned to
15 the government? And I don't see the difference between
16 that and the verdict situation.

17 MR. MADDREY: The verdict situation would
18 depend upon what -- would be in the hands of the parties
19 to the lawsuit, what evidence was presented, what --
20 what theories were advanced. The State would not have
21 any control over that. It would be --

22 CHIEF JUSTICE ROBERTS: Well, but it can --
23 it can participate in that process, can't it? Its --
24 its money's at issue?

25 MR. MADDREY: The State can initiate a

1 lawsuit on behalf of its -- its medical claim by virtue
2 of the subrogation and the assignment of the right. It
3 could participate in advance or it could participate
4 afterwards. But that doesn't come without costs
5 because, of course, if the State participates on its own
6 in advance, it would be for the full amount of the
7 medical payments. Here --

8 JUSTICE KAGAN: I'm sorry.

9 MR. MADDREY: -- here 1.9 million, and the
10 33 percent cap would have no application. That applies
11 only to amounts recovered by a recipient from -- from a
12 third party.

13 JUSTICE KAGAN: General, you were -- you
14 were telling me a little bit about the history of this
15 statute. But why 30? Is there any indication of why
16 the State picked 30?

17 MR. MADDREY: Your Honor, historically
18 33 percent or three times the medicals was the -- the
19 rule of thumb used in -- in tort actions that -- that
20 parties used that as the -- the methodology, the way to
21 come up with a value to the case, with the theory being
22 33 percent for the medicals, 33 percent for attorneys'
23 fees and 33 percent to the victim. That was -- that was
24 the underlying --

25 JUSTICE KAGAN: If that's where it comes

1 from, then it does relate to a kind of estimate, doesn't
2 it?

3 MR. MADDREY: Historically it does. It's
4 been the policy of the State of North Carolina for
5 almost a century, as I referenced the lien statutes that
6 apply generally to -- to tort actions, to civil
7 recoveries, to protect the providers of medical
8 services, in those cases date back to 1935.

9 JUSTICE BREYER: Can I ask you a somewhat
10 technical -- and I appreciate your paying attention
11 because it's hard for me to keep all this in my mind.
12 All right. It's my understanding of North Carolina,
13 everyone accepts the rule and North Carolina agrees that
14 if you in -- in North Carolina advance to the victim
15 \$50,000 in medical expenses -- now, you're never going
16 to get more than that back and you don't want more than
17 that back.

18 Now, the victim and the tortfeasor enter
19 into a settlement and you have a rule and the rule is
20 you will never get more than 50,000 or 33 percent,
21 whichever is less. That's the rule, whichever is less.

22 So if the settlement is for \$100,000, you
23 are not going to take more than 33, so you have advanced
24 50. Okay. So you have basically three situations. The
25 first situation is where a judge has said -- you know

1 what, I find that only \$10,000 of this settlement is for
2 medical expenses. In that case you take \$10,000, no
3 more. Is that right?

4 MR. MADDREY: No, Your Honor.

5 JUSTICE BREYER: Oh. I got the impression
6 that if there was a judicial -- there are three
7 situations: One is there is a judicial finding that
8 only 10 percent was medical. And the second is the
9 situation where they stipulate that only 10 percent is
10 for medical, and the third situation is this situation,
11 namely there is no stipulation and there is no judicial
12 finding.

13 So my thought, which is wrong I guess, is if
14 the judge says it's 10 percent you won't take more than
15 10 percent, but if in fact it's a stipulation of
16 10 percent North Carolina courts have not yet decided
17 that, and this is a case where there is no stipulation
18 and no judicial finding. Now you're telling me I have
19 that wrong. So you explain what the North Carolina is
20 on that because I think it makes quite a difference.

21 MR. MADDREY: Your Honor, the statute
22 applies to settlements or judgments received by a
23 Medicaid recipient from a third party for --

24 JUSTICE BREYER: I know, but in the
25 settlement they stipulate that 10 percent is for medical

1 and the rest for pain and suffering. Now, I thought
2 North Carolina courts have not yet decided whether North
3 Carolina -- which would like more than 10 percent -- can
4 get it. Is that true or not true?

5 MR. MADDREY: That is not true, Your Honor.

6 JUSTICE BREYER: They have decided?

7 MR. MADDREY: The North Carolina Supreme
8 Court in the Andrews case said --

9 JUSTICE BREYER: Said?

10 MR. MADDREY: -- said that the key point in
11 Ahlborn was the stipulation --

12 JUSTICE BREYER: This has nothing to do with
13 Ahlborn. Ahlborn, we all agree, says you cannot get
14 more than medical -- the medical expense, okay? The
15 question here is how to figure that.

16 So I thought that one way to figure it -- I
17 will just be repeating myself. One way to figure it is
18 how much of this \$100,000 settlement is attributable to
19 medical expenses as a judge would say. Now, you're
20 telling me there is a case in North Carolina which says
21 if the judge himself says that 10 percent of the
22 settlement is for medical, that's not what California --
23 that doesn't matter according to North Carolina law,
24 and I'd like the name of the case, the State case that
25 says that.

1 MR. MADDREY: Your Honor, I'm not aware of
2 any such case.

3 JUSTICE BREYER: Okay. So we don't know the
4 answer to that. We know what you would like, but we
5 don't know the answer.

6 JUSTICE SCALIA: Don't you think the statute
7 may -- may give you the answer? It says: "Any attorney
8 retained by the beneficiary shall out of the proceeds
9 obtained on behalf of the beneficiary by settlement
10 with, judgment against, or otherwise from a third party
11 by reason of injury or death distribute to the
12 department the amount of assistance paid by the
13 department on behalf of...up to 33 percent." It applies
14 to judgments as well as to settlements.

15 JUSTICE GINSBURG: You answered the question
16 with respect to jury verdicts. I suppose it would be no
17 different if it 's the judge that found the 10 percent
18 rather than the jury.

19 MR. MADDREY: I would agree,
20 Justice Ginsburg. The statute --

21 JUSTICE SOTOMAYOR: I didn't hear Justice
22 Ginsburg's question.

23 JUSTICE GINSBURG: The question that
24 Justice Breyer was asking about the 10 percent has
25 already been answered because we were told that if a

1 jury allocated 10 percent to medicals, it would not make
2 any difference, the statute entitles the State to
3 30 percent.

4 JUSTICE SOTOMAYOR: Basically you are saying
5 the judge would be required to give you your one-third
6 regardless of what the jury said.

7 MR. MADDREY: Exactly. As we said, he would
8 either have to conform a jury verdict to the --

9 JUSTICE SOTOMAYOR: So all those States that
10 have jury verdicts, special verdicts that require a
11 certain amount, they could avoid that by just simply
12 passing this law and avoid the anti-lien statute that
13 way?

14 MR. MADDREY: Your Honor, it would -- it
15 would depend how the State could rationally defend their
16 statute under their experience as consistent with their
17 jurisprudence. Of course, tort law being primarily the
18 province of --

19 JUSTICE SOTOMAYOR: 16 States already have
20 something close to a presumption of a percentage. Do
21 you have any evidence that in those 16 States where it's
22 only a presumption and not a fixed amount, that they are
23 falling apart because of it?

24 MR. MADDREY: Your Honor, I -- I don't have
25 any evidence as to the specific performance in those 16

1 States. That would leave 34 States that don't have one.
2 It also would raise the question of how many of those
3 States -- I believe the 16 States were the ones that had
4 some sort of procedure, some post-settlement either
5 hearing or trial to allocate --

6 JUSTICE SOTOMAYOR: In the absence of this
7 statute, what did your State do beforehand?

8 MR. MADDREY: This statute dates back to
9 1988. Prior to 1988 I don't know how -- from the 1965
10 effective date of Medicaid how things were handled. But
11 certainly for the last --

12 JUSTICE KAGAN: General, on your theory am I
13 correct that the North Carolina legislature could amend
14 this statute tomorrow to make it two-thirds?

15 MR. MADDREY: Certainly a statute could be
16 amended. Whether it could be defended under -- under
17 the circumstances --

18 JUSTICE KAGAN: But that's what I mean. I
19 mean, on your theory it seems not to matter whether this
20 statute says one-third or two-thirds. And I'm asking
21 whether that's correct.

22 MR. MADDREY: Two-part answer, Your Honor.
23 As to the anti-lien provision of the Medicaid Act, if
24 the statute defines the amount of medicals as 230 --
25 excuse me -- two-thirds, that would present the same

1 analysis under the anti-lien provision of the Medicaid
2 Act. The difference would be whether the State could
3 show a rational basis in its -- in its tort law, in its
4 jurisprudence.

5 JUSTICE KAGAN: I guess I'm not sure about
6 that. In other words, I'm assuming an amendment that
7 just all it does is it changes one-third to two-thirds.
8 And so your theory it seems to me would work the exact
9 same way. Then you say, well, you need a rational basis
10 for doing that. But I thought you told me that the
11 one-third really doesn't have anything to do with an
12 estimate of how much is medical and how much is not
13 medical. So it seems that you would have the same basis
14 to say two-thirds as you do to say one-third. Am I
15 wrong about that?

16 MR. MADDREY: I would say, Justice Kagan,
17 the reason it's not the same is that it would treat
18 Medicaid recipients decidedly differently than other
19 tort litigants in North Carolina. Given the 1935
20 history of the allocation of -- of tort settlements and
21 the liens in favor of the providers of medical care that
22 preexist the North Carolina Medicaid statute, if you
23 then change the Medicaid statute --

24 JUSTICE KAGAN: But you're saying there's a
25 kind of side constraint, that Medicaid recipients have

1 to be treated like others, but then presumably, the
2 State could change everybody's?

3 MR. MADDREY: I -- I believe that would be
4 the case, yes. The -- the question would be whether
5 there was any disparate treatment, any singling out
6 of -- of a Medicaid recipient. And certainly, we've
7 demonstrated that under the -- the North Carolina
8 experience, that is not the case.

9 JUSTICE GINSBURG: I thought -- I thought
10 your brief said that at some point, if it gets too high,
11 you do have a problem under the anti-lien provision of
12 Medicaid?

13 MR. MADDREY: I -- I believe, Your Honor, in
14 response to the 90 percent or 100 percent scenario or
15 hypothetical, I would certainly posit it would be
16 difficult for a State to defend --

17 JUSTICE SCALIA: Why? I don't understand
18 that. You see, I think the only way you can defend it
19 is that -- is that the recipient never -- never had a
20 property right. Once -- once recovery is given to the
21 recipient, the recovery does not belong to the
22 recipient. And if that's true for 33 percent, it can be
23 through -- true for 100 percent.

24 Has there ever been any litigation since
25 1935 about takings problems, with -- with the State

1 requiring 33 percent to go to the medical provider, even
2 though it may well be that -- that less or more of that
3 amount went to medical damages --

4 MR. MADDREY: Your Honor, under the general
5 lien statutes in Chapter 44 of the North Carolina
6 general statutes, Sections 49 and 50 are the two
7 provisions that we cite. I'm not aware of any
8 takings-related challenges to those laws. I am aware of
9 State supreme court opinions saying that the attorney
10 had to distribute proceeds in accordance with the
11 statute.

12 JUSTICE BREYER: -- can I go back for a
13 second? Because I want to show you where I got my
14 perhaps mistaken idea from.

15 There is a case called Andrews. And there
16 is a statement in Andrews, which is a South --
17 North Carolina case -- which says in certain
18 circumstances, although the statute says just what
19 Justice Scalia says, the lawyer sits there, he takes
20 one-third and pays it to the State. Then this case has
21 this sentence in it: "Ahlborn controls when there has
22 been a prior determination or stipulation as to the
23 medical expense portion of a plaintiff's settlement. In
24 those cases, the State may not receive reimbursement in
25 excess of the portion so designated."

1 Now, having read that sentence, I thought
2 the law of North Carolina was that this statute does not
3 apply, and that when, in fact, the jury or the judge
4 finds that only 10 percent was for medical expenses, the
5 State cannot take more than 10 percent. And the same is
6 true of a stipulation. That's what those words seem to
7 say to me.

8 Now you're telling me I'm not reading
9 those words correctly, that the case of Andrews does not
10 affect our case here, and that you -- that the law of
11 North Carolina is that you get one-third.

12 Now, what is it? Do you see why I am
13 confused?

14 MR. MADDREY: Yes, Your Honor. I will
15 try -- try, if I can, to explain what I believe to be
16 the source of the confusion is.

17 The stipulation in Ahlborn referenced in the
18 Andrews decision was between the Medicaid recipient and
19 the State of Arkansas, the lienholder. It came in the
20 Federal court action to challenge Arkansas's imposition
21 of its lien.

22 JUSTICE BREYER: I see.

23 MR. MADDREY: Therefore, there was a
24 stipulation binding the State, the lienholder, that
25 controlled in Ahlborn.

1 JUSTICE BREYER: They say a prior
2 determination or stipulation. I took prior
3 determination to mean a determination by a judge or a
4 jury. What does it mean, if it doesn't mean that?

5 MR. MADDREY: I think later in the Andrews
6 decision, you will see a reference to the parties
7 certainly had the opportunity to negotiate with the
8 State a lesser amount than -- that the amount of the
9 statutory lien. That would be -- that would be the
10 prior determination, I believe.

11 JUSTICE SOTOMAYOR: Am I correct that what
12 you believe and what the courts have been doing in your
13 State, the lower courts, is that they won't approve a
14 settlement that doesn't have the one-third, and they
15 won't enter a judgment that doesn't have the one-third?

16 Is that correct?

17 MR. MADDREY: Your Honor, when there's a
18 lump sum settlement in -- in these actions, the court
19 directs the attorney for the recipient to enforce the
20 statute to protect the State --

21 JUSTICE SOTOMAYOR: So I'm right. They just
22 won't accept the private stipulation that doesn't do
23 that, and they won't enter into a judgment that doesn't
24 do that, correct?

25 MR. MADDREY: Here, the -- the State court

1 ordered the \$933,000 --

2 JUSTICE SOTOMAYOR: Just answer my question.

3 MR. MADDREY: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: All right.

5 Going back to Justice Alito's. The jury
6 says it's less or more or whatever of -- of the
7 settlement is medical expenses, it doesn't matter what
8 they say, the court can't enter a judgment for that
9 amount, they have to enter a judgment for either the
10 one-third or the full medical expenses.

11 MR. MADDREY: They have to enter a judgment,
12 yes, Your Honor.

13 JUSTICE SOTOMAYOR: And that's what they
14 have been doing.

15 MR. MADDREY: Yes, Your Honor. And -- and
16 that is the rationale behind the statute that the jury,
17 nor the judge, can enter a judgment that's not in
18 conformity with the statute.

19 JUSTICE ALITO: Could I ask you how often
20 this comes up in North Carolina? Do you have any
21 figures where you have a dispute of this nature, during
22 the course of a year?

23 MR. MADDREY: Your Honor, I've tried in the
24 briefs to indicate the dollar amounts involved. The
25 numbers of cases are in the hundreds, it's my

1 understanding because, typically, they involve
2 third-party payments, not just from medical malpractice
3 cases, but insurance coverage and other situations that
4 -- that trigger the repayment obligation.

5 JUSTICE KENNEDY: I don't want to take up
6 too much time talking about Andrews, but it seems to me
7 that what the North Carolina Supreme Court said in
8 Andrews is that in those States where there is a prior
9 determination, that controls, but the -- North Carolina
10 is entitled to adopt a different procedure and have a
11 one-third across-the-board rule.

12 That's the way I read it.

13 MR. MADDREY: Well, certainly, that --

14 JUSTICE KENNEDY: Does -- does that accord
15 with your understanding?

16 MR. MADDREY: Your Honor, I think they were
17 saying two things. Other States have different
18 procedures --

19 JUSTICE KENNEDY: Yes.

20 MR. MADDREY: -- and that in North Carolina,
21 this is the rule, and that the prior determination also
22 could include an action involving binding the State of
23 North Carolina.

24 JUSTICE SOTOMAYOR: I know that was argued
25 before. But I read Ahlborn very carefully, and I don't

1 see it. I read the amici briefs that reference
2 different procedures, and not one of them referenced the
3 North Carolina procedure. So I know that was argued
4 before. You didn't argue it in your brief here, and I
5 assume you didn't because you did what I did, which was
6 to read Ahlborn carefully and read what it cited, and I
7 don't see it cited.

8 MR. MADDREY: I'm sorry. I don't know --

9 JUSTICE SOTOMAYOR: I don't see the North
10 Carolina procedure referenced in Ahlborn as something
11 that States could do. It wasn't referenced directly in
12 the -- in the opinion, and it wasn't referenced
13 indirectly by the amici. The amici were talking about
14 substantially different procedures.

15 MR. MADDREY: Your Honor, the holding in
16 Ahlborn said you can't go beyond the amount
17 represented -- that represents repayment for medicals.
18 It didn't say how a State has to or could determine
19 that, and that's the question that's presented.

20 JUSTICE SOTOMAYOR: But my point is, Justice
21 Kennedy's question was that somehow in that opinion, we
22 approved the North Carolina system.

23 MR. MADDREY: Your Honor, I think --

24 JUSTICE SOTOMAYOR: Is there a direct
25 reference to North Carolina's system --

1 MR. MADDREY: Absolutely not --

2 JUSTICE SOTOMAYOR: -- in that or in any of
3 the amici brief that talked about different State rules?

4 MR. MADDREY: Not that I'm aware of.

5 If there are no further questions, Your
6 Honor, I would like to reserve the remainder of my time
7 for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Browning?

10 ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.,

11 ON BEHALF OF THE RESPONDENTS

12 MR. BROWNING: Mr. Chief Justice, and may it
13 please the Court:

14 The -- General Maddrey has steadfastly
15 argued that the North Carolina statute overrides a jury
16 verdict. I think his argument is well-grounded, given
17 the language of the statute, but that illustrates the
18 very problem here, that this statute takes one-third of
19 a settlement or judgment regardless of the true facts of
20 the case. And that is problematic under Ahlborn.

21 Justice Kagan, you had asked Mr. -- General
22 Maddrey about the basis for the North Carolina statute.
23 General Maddrey had referred to it being a rule of thumb
24 of three times medicals. But if you actually turn to
25 the Fourth Circuit's decision, which is based on the

1 briefs that were filed in the Fourth Circuit, in the
2 petition at page 20A, the rule of thumb is actually
3 three times specials, which of course is different than
4 three times medicals because special damages would
5 include things like lost wages and various other things.

6 JUSTICE KAGAN: Mr. Browning, let me give
7 you a different rationale for this statute. It's
8 different from the one the State suggests, but it would
9 go something like this:

10 There is an allocation that has to be made.
11 In making allocations there are two ways of doing it.
12 We can do it case-by-case, individualized
13 decisionmaking; or we can use some bright-line rules.
14 And the advantage of bright-line rules is that they are
15 cheap and efficient and sometimes they are not more
16 inaccurate than individualized decisionmaking because in
17 individualized decisionmaking you can make errors, too.

18 So this is a reasonable way to make an
19 allocation decision. And nothing that we said in
20 Ahlborn suggests that a State needs to use case-by-case
21 decisionmaking rather than bright-line rules to make the
22 allocation that it needs to make between medical and
23 nonmedical damages. What about that?

24 MR. BROWNING: Well, Your Honor, I would
25 turn to the language of the Ahlborn decision which makes

1 clear that States cannot lay claim to more than a
2 portion of a settlement or judgment that represents
3 payment for medical care or medical expenses.

4 When you have --

5 JUSTICE SCALIA: Yes, but that doesn't
6 answer the question. I mean that portion, according to
7 North Carolina, is one-third.

8 MR. BROWNING: It is the State saying it is
9 one-third even though there is no basis and even though
10 you have cases like this where it's clearly not
11 one-third --

12 JUSTICE SCALIA: Yes, but what the State
13 says is the law. I mean, the State says one-third is
14 for medical.

15 MR. BROWNING: Your Honor, if that is all
16 North Carolina had to do, of course, the Ahlborn
17 decision would have been dramatically different if
18 Arkansas had simply enacted a cap of 100 percent or
19 50 percent or 40 percent because, in the Ahlborn
20 decision, the State of Arkansas was only seeking to
21 recover 39 percent of the tort settlement.

22 And under North Carolina's theory, if
23 Arkansas had simply been bright enough to implement a
24 cap, the Ahlborn decision would have been completely
25 different. And that makes absolutely no sense. I think

1 the Ahlborn decision indicates that there has to be a
2 process in order to fairly and appropriately determine
3 the amount that the State may --

4 JUSTICE SCALIA: So you need, ultimately you
5 need an adjudication. You have to leave it either to a
6 jury to decide what percentage of the total award is --
7 is medical expenses or have a separate proceeding.
8 Let's say where there has been a settlement, you need a
9 separate proceeding to decide how much of it is really
10 for medical. You know, they may say 10 percent is, but
11 who believes that? You -- you need a proceeding.

12 That is awfully time-consuming. And -- and
13 as Justice Kagan suggests, I'm not sure it's going to be
14 very accurate. I don't think a jury determination is
15 going to be -- is going to be accurate on that score.
16 And I don't know how you go about determining how much
17 of a settlement is attributable to -- to medical
18 expenses versus other things, especially when the
19 settlement itself says only 10 percent is medical
20 expenses.

21 MR. BROWNING: Well, Justice Scalia, I think
22 it is very easy for States to follow that and to put in
23 practices or procedures that result in appropriate
24 allocation of medical expenses.

25 JUSTICE SCALIA: How do you do that?

1 MR. BROWNING: Yes. There are a variety of
2 ways that States can do it.

3 JUSTICE SOTOMAYOR: 16 are doing it already.

4 MR. BROWNING: Absolutely. 16 and the
5 District of Columbia have a process for appropriate
6 adjudication. Moreover, it is perfectly appropriate if
7 a State wants to have a presumption. The problem is it
8 can't be an irrebuttable presumption.

9 JUSTICE BREYER: How does it work? Because
10 I would imagine at the negotiation you have the -- the
11 victim's lawyer and the tortfeasor's lawyer and the
12 tortfeasor's lawyer is interested that the bottom line
13 number be as low as possible and the victim's number,
14 that it be as high as possible. And the victim's
15 lawyer, in fact, would like as little as possible to be
16 allocated to a source which is going to take that money
17 away from him.

18 So they can reach agreement. What they will
19 do is say 1 penny is for medical expenses and everything
20 else is for pain and suffering, and that's very good for
21 the victim. And it's irrelevant to the tortfeasor.

22 So -- so when you see that on a piece of
23 paper, what is it you are going to do? What kind of
24 proceeding are you going to have? And it's a proceeding
25 about a proceeding. It's a proceeding about the

1 settlement negotiation. What's it going to look like?
2 What does it look like in the 16 States? We will have a
3 plaintiff's lawyer testify. He will say, Your Honor, I
4 really wanted 1 penny and only 1 penny to be allocated
5 to pain and -- to medical expense. And the defendant's
6 lawyer, he's being very honest, he'll say, I didn't
7 care; if that's what he wants, that's fine with me.

8 CHIEF JUSTICE ROBERTS: Well, but it's worse
9 than that. He does care because the smaller amount
10 means that the victim is going to actually get to keep
11 more and that's all the victim's lawyer is concerned
12 about, and that's fine with the tortfeasor's lawyer
13 because otherwise he would have to pay more.

14 JUSTICE BREYER: Exactly. So what does it
15 look like?

16 CHIEF JUSTICE ROBERTS: Sorry to --

17 MR. BROWNING: Mr. Chief Justice, if I first
18 can turn to your point and then respond to
19 Justice Breyer's question.

20 JUSTICE BREYER: It's the same point.

21 CHIEF JUSTICE ROBERTS: It's the same point.

22 (Laughter.)

23 MR. BROWNING: Well, let me say this at the
24 outset: That first of all, it is our position that the
25 parties simply can't stipulate or reach an agreement

1 that somehow deprives the State of their interest.
2 There has to be an appropriate adjudication. It's
3 worked well in the States that have implemented this
4 process.

5 JUSTICE BREYER: How does it work in those
6 States?

7 MR. BROWNING: Yes, Your Honor, and -- and
8 Justice Breyer, I don't think it's all of that
9 complicated.

10 JUSTICE SCALIA: I don't understand. What
11 do you adjudicate? What is the issue in the
12 adjudication? How much of the award should have been
13 allocated to medical expenses, or how much of the award
14 was, in fact, allocated to medical expenses? Which is
15 the issue?

16 MR. BROWNING: What should be adjudicated --

17 JUSTICE SCALIA: It seems to me it should be
18 the latter, shouldn't it?

19 MR. BROWNING: What should be adjudicated
20 consistent with the Ahlborn decision is the portion of
21 the settlement that represents payment for medical
22 expenses. And that, that is --

23 JUSTICE SCALIA: That's right. How much was
24 allocated, right? It doesn't matter what ought to have
25 been. The issue is what proportion did the parties in

1 fact allocate to medical expenses, right?

2 MR. BROWNING: Your Honor, I don't think --

3 JUSTICE SCALIA: And they say 1 penny. How
4 are you going to contradict that?

5 MR. BROWNING: We would not assert that the
6 parties' subjective belief is necessarily binding.

7 JUSTICE SCALIA: No, no. But that's --

8 JUSTICE BREYER: But I am asking the same
9 question. There are 16 States that have this procedure.
10 How does it work?

11 MR. BROWNING: Yes, and in most of those --

12 JUSTICE BREYER: I don't want to know that
13 they have it. I want to know how it works. We have put
14 the problem as to why it seems it might not work too
15 well, and now I would like you to tell us how it really
16 works.

17 MR. BROWNING: How it really works in those
18 States is the States will -- will generally negotiate
19 with the State Medicaid agency and come to a fair
20 allocation without the necessity for a judicial
21 determination that's appropriate.

22 CHIEF JUSTICE ROBERTS: What about fair?

23 JUSTICE SOTOMAYOR: Is that because they
24 know they are going to be subject to a hearing if they
25 don't reach an agreement?

1 MR. BROWNING: Yes.

2 JUSTICE SOTOMAYOR: So there is an
3 inducement for them to do what this State didn't do.

4 MR. BROWNING: Correct, Your Honor.

5 JUSTICE SOTOMAYOR: When told to come in,
6 they ignored it. In those States, States know they are
7 going to increase potentially their costs, so they come
8 in more often.

9 MR. BROWNING: Exactly, Justice Sotomayor.

10 CHIEF JUSTICE ROBERTS: Exactly what?

11 MR. BROWNING: It levels the playing field
12 so that there is an incentive on both sides to come to
13 an appropriate allocation.

14 JUSTICE ALITO: Well, how is this allocation
15 not happening?

16 CHIEF JUSTICE ROBERTS: I was going to say,
17 how do we know what's fair and appropriate? You come
18 in -- let's say you have \$20,000 in medical expenses and
19 a claim for pain and suffering. And they come in and
20 they recover a million dollars, right?

21 So what's appropriate in that case? The
22 other side will say, well, we settled on a million
23 dollars, pain and suffering was really 20 million and we
24 came down to a million. So what's fair allocation in
25 the case of the medical expenses? It seems to be an

1 entitled -- entirely artificial judgment. To the extent
2 it's not, it depends on the views of the two parties
3 negotiating and I thought we established that that is
4 entirely subject to manipulation.

5 MR. BROWNING: Your Honor, it is a process
6 that the courts can determine based upon the experience
7 of the judge, that who generally would be very
8 experienced in the valuation of cases, can make an
9 appropriate decision, and can consider all the facts,
10 the equities --

11 JUSTICE SOTOMAYOR: Counsel, do judges do
12 this in non-Medicaid cases regularly?

13 MR. BROWNING: Oh, absolutely. They do it
14 in North Carolina in the context of workers'
15 compensation liens, having to come up with an
16 appropriate allocation, and there the court has --

17 JUSTICE SOTOMAYOR: Let's deal with what
18 appears to be many of my colleagues' gut instinct, okay?
19 This is -- it costs too much, it's too burdensome.
20 We've already answered why not, but in the end, they
21 don't believe you could ever figure out the number.
22 That's really their bottom line, that this number's
23 artificial no matter what you do, so you might as well
24 just throw a label on it, reasonable or not, and leave
25 it alone. How do you answer that argument?

1 Because that's the essence of their -- of
2 their belief --

3 MS. BROWNING: Your Honor --

4 JUSTICE SOTOMAYOR: -- that this bottom line
5 allocation is always going to be wrong somehow.

6 CHIEF JUSTICE ROBERTS: It's -- it's a
7 little better than that, but go ahead and answer.

8 (Laughter.)

9 MR. BROWNING: Justice Sotomayor, the -- the
10 concern, of course, is that -- forgive me, I've lost my
11 train of thought here, Mr. Chief Justice.

12 JUSTICE ALITO: Well, this is what I
13 envision happening, if the -- if the parties can't -- if
14 the State and the -- and the recipient of the -- of
15 Medicaid assistance can't come to an agreement.
16 Basically, you have to make an estimate of what the
17 damages would have been if the case had been tried and
18 then you determine that the medical portion of the
19 damages would have been 15 percent and so you reduce,
20 then you take the amount of the settlement, and the
21 amount of the settlement that is attributable to the
22 medical expenses is 15 percent. That would be what I
23 would envision. Is that not correct?

24 MR. BROWNING: Your Honor, that is -- that
25 is certainly an approach similar to Ahlborn, a

1 proportionality sort of review. You -- you -- you look
2 at how much you're able to recover versus the amount --
3 the amount of the total claim versus the amount of the
4 settlement and you come to an appropriate --

5 JUSTICE ALITO: That seems very -- that
6 seems really very complicated.

7 MR. BROWNING: Well --

8 JUSTICE ALITO: How can a judge -- where the
9 case is settled and the judge doesn't really know
10 anything about the proof, how is a judge going to be in
11 a position really to do that?

12 MR. BROWNING: Your Honor, it is a matter of
13 the parties coming forward, presenting evidence as to
14 the damages in the case, perhaps an explanation as to
15 why the case settled for less than full value, and the
16 court using their experience to determine is this
17 appropriate, should there be any reductions and of
18 course --

19 JUSTICE GINSBURG: Is that -- is that what
20 happens? You said you -- that in North Carolina for
21 workers' compensation -- for settlements that are
22 subject to workers' compensation liens, you have this
23 type of system.

24 MR. BROWNING: Yes, in the context of
25 third-party liability.

1 JUSTICE GINSBURG: How does it work for
2 workers' compensation recoveries that have the same
3 thing, they -- they owe the State for the medical.

4 MR. BROWNING: Yes, Your Honor. The -- the
5 statute -- the North Carolina statute directs in -- in
6 that lien situation for the court to consider the
7 likelihood that the plaintiff would have actually
8 recovered on the claim, and various other factors that
9 the court deems appropriate and it puts it in the
10 discretion of the court.

11 What we're saying here is that Ahlborn
12 requires that there must be a determination of the
13 portion of the settlement that represents payment for
14 medical --

15 JUSTICE SOTOMAYOR: Counsel, in those
16 proceedings, are witnesses called or is it usually done
17 on papers?

18 MR. BROWNING: It's usually done in a fairly
19 expedited process, yes, Your Honor.

20 JUSTICE SCALIA: You know, putting --
21 putting it in the discretion of the court, as you say is
22 done in the workmen's compensation, is quite different
23 from what you're proposing here. That seems to me quite
24 workable -- you know. The -- the court hears the
25 evidence and he decides how much should be reimbursed

1 within -- within the court's discretion. But here,
2 you're -- you're asking a court to decide how much of a
3 recovery or how much of a settlement was attributable
4 to -- to the medical portion.

5 MR. BROWNING: I think it needs to be --

6 JUSTICE SCALIA: That's a totally different
7 question.

8 MR. BROWNING: Justice Scalia, I think it's
9 an objective determination. I don't think the parties
10 can skew it one way because of the way they structured
11 the settlement just because -- just as the State can't
12 skew it the other way because they have an arbitrary
13 number, whether it be 100 percent, 90 percent,
14 75 percent, it doesn't allow for the fact that --

15 JUSTICE BREYER: Are you satisfied --

16 CHIEF JUSTICE ROBERTS: You've said several
17 times that the way you do this is based on the judge's
18 experience and so on with -- with the cases. And I
19 think what your -- your friend on the other side is
20 saying is that's pretty much what's going on here except
21 over time -- I mean, would it be all right if over time
22 the judge says, well, typically, sometimes it's
23 25 percent, sometimes it's 35 percent, over time, it's
24 sort of 33 percent. And so we're going to have that as
25 an absolute rule so that we don't have to go through

1 these proceedings every time just to make sure that it's
2 30 percent rather than 33 percent.

3 What's -- I guess it's Justice Kagan's
4 question -- what's wrong with the bright-line rule here?

5 MR. BROWNING: There would be nothing wrong
6 with a rule that creates a presumption. What is the
7 problem is, you have cases that are on the extremes like
8 this case where you have absolutely horrendous injuries
9 and a physician who -- who doesn't have the financial
10 wherewithal to pay for the extent of the damages that he
11 caused.

12 Here, EMA's guardian had no option but to
13 settle the case for the available funds of \$2.8 million.
14 But that is a far cry from how anyone would objectively
15 evaluate --

16 JUSTICE BREYER: So you're -- you're
17 satisfied with the presumption. Is there any law here
18 that gives you a leg-up? I mean, is this like Chevron
19 or Skidmore or something like that?

20 MR. BROWNING: Your Honor, I certainly think
21 in this case the fact that the United States Department
22 of Health and Human Services has filed an amicus brief
23 that points out that this sort of ill rebuttable
24 presumption, this sort of --

25 JUSTICE BREYER: I know that's their

1 position. But my question is, does the law mean that
2 when we decide this case, I see you have a reasonable
3 point, they have a reasonable point, that if both points
4 are reasonable, you get the benefit of some kind of
5 legal presumption like Chevron, Skidmore, et cetera.
6 Maybe you can think of another one, I don't know. Do
7 you or don't you?

8 MR. BROWNING: Your Honor, I think it would
9 be appropriate to give Chevron deference to the
10 arguments of the United States --

11 CHIEF JUSTICE ROBERTS: Well, we're dealing
12 with a North Carolina statute. Don't they get deference
13 along the same lines?

14 MR. BROWNING: No, Your Honor. I don't
15 think -- the starting point has to be the Federal
16 statute, Medicaid's anti-lien provision, which is very
17 clear that no lien may be imposed.

18 CHIEF JUSTICE ROBERTS: Well, it can't be
19 very clear because CMS took the opposite position before
20 this case, right?

21 MR. BROWNING: I don't think that they took
22 the opposite position. With regard to the letter that
23 was sent to Congressman Coble that that was a -- an
24 employee who was not within a policymaking decision, who
25 has to field thousands of these sort of requests for

1 information coming into CMS. So I don't think we can
2 put a whole lot of credence on that particular letter
3 that has been expressly disavowed by the secretary and
4 the director of CMS.

5 JUSTICE ALITO: Could I ask you a question
6 on this different point? Could the -- suppose the North
7 Carolina legislature passed a statute that says
8 something like the following: "In any tort action in
9 which an item of damages sought is medical expenses, the
10 plaintiff may not recover for any other item of damages
11 until the full amount of the medical expenses is
12 satisfied."

13 Now, there they're just restructuring their
14 tort law. Would there be a problem with that?

15 MR. BROWNING: Your Honor, I think in the
16 case of the anti-lien provision, that that would
17 effectively circumvent the anti-lien provision and allow
18 by the backdoor what we would contend would not be --
19 the State could not do directly. So yes, I do see
20 potential problems with that. Obviously, it would be
21 different than the scenario that we have here, but it
22 does -- the starting point has to be the anti-lien
23 provision, which is no lien may be imposed.

24 This Court in Ahlborn assumed without
25 deciding that there would be an implied exception to

1 that statute. But that -- that exception is very
2 limited. It has to be in the context of, as this Court
3 recognized, a State can only lay claim to that portion
4 of the settlement that represents payment for medical
5 care. So until you have --

6 JUSTICE ALITO: Does Federal law -- did
7 Federal law require your client to seek compensation for
8 medical expenses?

9 MR. BROWNING: No, Your Honor, I don't
10 believe that there is a requirement that Medicaid
11 beneficiaries would have to file a suit and try to
12 recover medical expenses.

13 JUSTICE ALITO: So you could have -- could
14 you have filed suit and disclaimed any -- any claim for
15 medical expenses, you only want to be compensated for
16 other things?

17 MR. BROWNING: If -- first of all, there
18 would be some medical expenses that wouldn't be
19 Medicaid, medical expenses that were incurred by the
20 family. But moreover, even in that scenario, I think
21 given the language of the North Carolina statute, the
22 State would still be seeking one-third. So, if one were
23 to take that route, it would be an extremely treacherous
24 route that you would be -- not being able to -- to get
25 full -- full recovery from the defendant, but still

1 having to be paying a third to the State of North
2 Carolina.

3 JUSTICE SCALIA: But it would be the
4 defendant who's -- who's -- who's jiggering the system,
5 I mean, not suing for the medical portion simply because
6 the defendant knows that at least some of that portion,
7 if not all of it, would -- would go -- would go to the
8 State. So, in a situation, such as yours, where the
9 total recovery is -- is not going to suffice to cover
10 both pain and suffering and medical expenses, it'd be
11 very intelligent to do what Justice Alito proposed. And
12 that seems to me a real, I don't know, gaming -- gaming
13 of the system.

14 MR. BROWNING: I don't think it would be a
15 gaming of the system, Justice Scalia, if the State,
16 based upon the statute, based upon its previous
17 directives would expect the Medicaid beneficiary to seek
18 recovery of those claims and to remit one-third to the
19 State. Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Anders?

22 ORAL ARGUMENT OF GINGER D. ANDERS,
23 FOR UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE RESPONDENTS

25 MS. ANDERS: Mr. Chief Justice, and may it

1 please the Court:

2 To start with the types of procedures that
3 States may use to allocate medical damages, I think the
4 States have a broad range of discretion to determine
5 what should be an appropriate allocation.

6 They're not --

7 JUSTICE SOTOMAYOR: Could you move the
8 microphone so it's a little closer to you?

9 MS. ANDERS: Sorry.

10 JUSTICE SOTOMAYOR: Thank you.

11 MS. ANDERS: Is this better?

12 JUSTICE SOTOMAYOR: Yes. Thanks.

13 MS. ANDERS: So the States are not
14 determining, they're not trying to reconstruct what the
15 plaintiff's and the defendant's intent was in entering
16 into the settlement. Often, there will be no shared
17 intent. What -- what the States are doing is
18 determining what the appropriate allocation should be.
19 And the States that have individualized determinations,
20 which is what we think is required here, have developed
21 a number of different procedures for doing that.

22 For instance, a district court in
23 Pennsylvania, in McKinney --

24 JUSTICE SCALIA: Excuse me. I have a -- I
25 have a theoretical problem right at the outset. I mean,

1 what the statute forbids is asserting a lien on recovery
2 that is for medical expenses. And you're telling me
3 that the States aren't even trying to find out what
4 portion of the recovery was for medical expenses.
5 They're looking to determine what proportion should have
6 been for medical expenses.

7 How does that tie in with the -- with the
8 prohibition of the lien?

9 MS. ANDERS: Well, I think this Court
10 established in Ahlborn that the beneficiary and the
11 State, they respectively have interests in the
12 settlement that arises from the fact that in the tort
13 case the plaintiff has asserted claims for medical
14 damages and for nonmedical damages.

15 And so Ahlborn establishes that we need to
16 divide the two in order to determine what the State may
17 recover. Ahlborn also establishes that the beneficiary
18 has an interest in the settlement that arises from her
19 nonmedical claims that can be allocated away by an
20 allocation method, such as one that gives -- that says
21 that 100 percent of the settlement must always be
22 allocated to -- to medical damages.

23 JUSTICE SCALIA: So -- so you're saying that
24 the State can, in making this determination, in fact
25 take away from a plaintiff who has recovered a -- a

1 greater amount in medical expenses, or a lesser amount
2 in medical expenses, can take -- take away that by
3 determining how much should have been allocated to
4 medical expenses, right?

5 MS. ANDERS: The State does have some
6 discretion to determine what the appropriate allocation
7 is --

8 JUSTICE SCALIA: So you're messing up the
9 lien law anyway, no matter which way you play it.

10 MS. ANDERS: Well, I think Ahlborn
11 establishes that we have to make some kind of division
12 of the settlement, and when the parties haven't done it,
13 there's no jury determination. We don't know ahead of
14 time before the allocation has been done what precisely
15 the amount the medical damages should be. But we do
16 know because the plaintiff, the beneficiary, has
17 asserted nonmedical claims and she has compromised them,
18 we do know that she has an interest in the settlement
19 that arises from her nonmedical claims.

20 So for instance, you can imagine the
21 situation in which a plaintiff has a claim -- a claim
22 that is 10 percent medical damages and 90 percent lost
23 -- past lost wages. So they're both equally concrete.
24 In that situation, when the plaintiff settles for
25 pennies on the dollar, I think we -- we would have

1 serious questions about whether a one-third allocation
2 to medical damages in that case would be appropriate.

3 But without an individualized determination,
4 there would be no way to know whether this is a case in
5 which the -- the blanket rule that the State has is
6 actually overestimating the amount that should be
7 appropriately allocated to medical damages.

8 JUSTICE SOTOMAYOR: Ms. Anders, could you
9 please finish your response, when you said various
10 States do various things. Could you describe some of
11 them?

12 MS. ANDERS: Certainly. So for instance, in
13 McKinney v. Philadelphia Housing Authority, this is a
14 district court case in Pennsylvania, what the court did
15 was it said, we have the settlement; we know how much
16 the past medical damages were because we know what the
17 medical bills were; and we can -- we can assume that the
18 jury, had this case gone to trial, would have awarded
19 100 percent of the medical damages because they were
20 provable and because there weren't disputes about --
21 about that.

22 And so the court then said, I'm going to
23 then apply a discount rate for the uncertainty that the
24 defendant would have been held liable at all.

25 CHIEF JUSTICE ROBERTS: Is that a

1 reasonable -- this is the Federal district court?

2 MS. ANDERS: That was the Federal district
3 court.

4 CHIEF JUSTICE ROBERTS: So it's not a State
5 Procedure?

6 MS. ANDERS: Pennsylvania law. That case
7 happened to be in Federal court. Pennsylvania law
8 provided a -- a rebuttable presumption, and so the court
9 determined --

10 CHIEF JUSTICE ROBERTS: What if -- what if
11 the other -- the parties I guess are coming in and
12 saying, well, that's not how juries work. They don't
13 care that this measure of damages is particularly
14 calculable. They come to a general view. You've got
15 medical expenses, you've got pain and suffering. They
16 make a judgment about that. Would that be a good
17 argument to make?

18 MS. ANDERS: I think the Court could take
19 that into account in allocating, yes, so some --

20 CHIEF JUSTICE ROBERTS: So how would it take
21 it into account? You said, well, because the medical
22 expenses are readily calculable, we assume that that's
23 what the jury meant first, and then the other stuff is
24 extra so the State can get it. But maybe sometimes they
25 just come to a -- a total figure and they don't care how

1 it's allocated. You say, well, that's an argument they
2 can make.

3 Well, what's a judge supposed to do in a
4 particular case?

5 MS. ANDERS: Well, I -- this is positing a
6 situation in which there's been a settlement rather than
7 a jury determination. So I think that the -- the court
8 that's doing the allocating has some discretion here.
9 And so one thing it can do is say I'm going to
10 essentially prioritize medical damages because I think
11 juries usually will award them. But a State could also
12 provide that the inquiry should be more equitable and
13 open-ended.

14 So, for instance, Illinois and Missouri have
15 provided simply that -- that the court shall make an
16 equitable allocation. It can take into account the fact
17 that the -- that the plaintiff may receive a double
18 recovery.

19 JUSTICE GINSBURG: Do you agree -- do you
20 agree that the only flaw in the North Carolina statute
21 is that it's a fixed amount, and that if it were a
22 rebuttable presumption it would be okay? If the North
23 Carolina law says 30 percent is the cap, but in a
24 particular case you can show that that's not a fair
25 allocation?

1 MS. ANDERS: That's absolutely right. And
2 -- and to return to one of Justice Kagan's earlier
3 questions, I think a one-third allocation may be in the
4 mine run of cases a reasonable presumption. But there
5 will be some cases, like my 90 percent, 10 percent
6 example, where it isn't a reasonable allocation.

7 JUSTICE KAGAN: And in those rebuttal
8 presumption States, can both sides come in and try to
9 rebut it? So the individual beneficiary can try to
10 rebut it, but the States could as well? Or is it just a
11 right for the beneficiary to try to rebut the
12 presumption?

13 MS. ANDERS: I think in those States, it's
14 just a right for the beneficiary to try to rebut the
15 presumption. Some of those States start with a
16 rebuttable presumption of full reimbursement. So that
17 the presumption starts at the full amount that the State
18 paid.

19 CHIEF JUSTICE ROBERTS: So this is a real,
20 significant increase in the burden on the State under
21 the Medicaid program. You're saying yes, you can try to
22 recover recovery from third-party tortfeasors, but if
23 you do that you've got to set up this apparatus where
24 everybody can come in and you've got to prove what the
25 allocation was and all that.

1 So -- I mean some -- 34 States haven't done
2 that, right?

3 MS. ANDERS: Well, I think what's more
4 significant for our purposes is that 16 States plus D.C.
5 have, and --

6 CHIEF JUSTICE ROBERTS: Well, yes, for your
7 purposes. But I'm interested in -- in my purposes. And
8 I'm trying to figure out whether or not that's a
9 significant financial burden on the State -- if they're
10 going to go about trying to recover this money, that
11 they've got to provide some apparatus, administrative,
12 judicial, whatever, to make a calculation that I still
13 don't understand what it's addressed to.

14 And -- and not only that, but even if you do
15 know what it's addressed to, you just take into account
16 all these things and come up with an equitable.

17 MS. ANDERS: I don't think that these States
18 have found that it's a significant administrative
19 burden. One reason is that once the allocation rules
20 are in place, it's our understanding that most of these
21 cases settle. The beneficiary and the State agree as to
22 what the allocation is, so this doesn't go to a hearing
23 in the first place. But even -- even when there are
24 hearings, I think States can take significant measures
25 to lessen the burden.

1 For instance --

2 JUSTICE SOTOMAYOR: How many States have
3 North Carolina's rule? Do you know?

4 MS. ANDERS: There are -- there are five
5 other States like North Carolina that have an
6 irrebuttable presumption with a cap. There are 10
7 others that have an irrebuttable presumption, we think,
8 of full reimbursement. But -- but I should caveat that
9 by saying that we simply don't know in those States what
10 they do, what their practices are.

11 JUSTICE BREYER: Why isn't -- the missing
12 part here -- maybe I just missed it -- we're
13 interpreting a statute, and the part that trumps the
14 lien provision is the part that says the State is
15 entitled to payment that has been made for medical
16 assistance for health care items -- and some other
17 similar language is in the statute.

18 They think their one-third rule is a good
19 way of measuring that. You think that the one-third
20 rule as a rebuttable presumption is a better way of
21 measuring that. Now normally, or often, I would see
22 government arguments like that where they'd say, and, by
23 the way, we're interpreting very technical language in
24 our statute, and Chevron and/or Skidmore means that you
25 should give us particular weight.

1 Is that part of your argument here, and if
2 it isn't, why isn't it?

3 MS. ANDERS: Well, I think -- we think that
4 -- the position reflected in our brief is HHS's
5 considered position, and we do think that it's -- it is
6 persuasive. Now, HHS presumably could regulate, it
7 could go through notice and comment rulemaking and
8 establish rules that --

9 JUSTICE BREYER: My impression is that you
10 get Chevron deference on the basis of whether
11 Congress -- and there's a lot of rules and so forth, but
12 --

13 MS. ANDERS: We haven't claimed Chevron
14 deference.

15 JUSTICE BREYER: -- you haven't claimed it.
16 And I -- so that puzzles me -- and I don't --

17 MS. ANDERS: -- there aren't regulations on
18 this.

19 JUSTICE BREYER: I'm not -- you argue what
20 you want to argue, but I -- this is awfully technical
21 language. It's a minor interstitial point.

22 JUSTICE SCALIA: I'm not sure that HHS
23 has -- has authority over -- over how a State recovers.
24 I don't see that it's part of the administration of the
25 statute committed to HHS. So I -- you know, I admire

1 you're not citing Chevron.

2 (Laughter.)

3 MS. ANDERS: Well, HHS has -- the statute
4 requires the States to -- to enact reasonable measures
5 for recovery. HHS thinks that a measure that
6 circumvents the anti-lien provision like North
7 Carolina's wouldn't be a reasonable measure, but there
8 aren't regulations on that subject.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 General Maddrey, you have three minutes
11 remaining.

12 REBUTTAL ARGUMENT OF JOHN F. MADDREY

13 ON BEHALF OF THE PETITIONER

14 MR. MADDREY: We have heard a lot about what
15 a State could or maybe should do, but what must a State
16 do under the Medicaid Act to fulfill its obligations?
17 The Fourth Circuit and respondents and apparently the
18 United States say they have to have a post-settlement
19 trial, I guess a trial to settle the settlement. And
20 that, while an available option, is not a mandatory
21 requirement under anything that I can see in the
22 Medicaid Act.

23 JUSTICE KAGAN: Well, General, how about
24 this, and I am having a little bit of trouble here
25 because I think a State could come in, or I think there

1 is a reasonable argument that a State could come in and
2 say -- you know, we've made an estimate, and here's our
3 best estimate, and we don't think there is a need for an
4 individualized decision-making on top of that.

5 But as I understand your argument, that is
6 not what you are saying. You are making a very
7 different kind of argument, suggesting that you can peg
8 this number any place, no matter what the relationship
9 between the number and the actual allocation that
10 cases -- that allocation of medical and nonmedical
11 damages in the real world.

12 So if that's the case, what do I do?

13 MR. MADDREY: Your Honor, the statute --
14 North Carolina's statute defines the amount that must be
15 included for the repayment by the Medicaid recipient.
16 It's not guessing after the fact, but instead providing
17 in advance, the recipe as to how to put the settlement
18 together. It tells the parties what they have to do.
19 And that makes it a bright-line rule, which I think you
20 need to compare to the alternative, which is this --
21 this, what the Fourth Circuit called a true value
22 hearing after the fact, after the settlement, how did --
23 how did they get there? Is it what they did or what
24 they should have done or what they could have done?

25 In this case you've got a \$42 million damage

1 claim settled for 2.8 million --

2 JUSTICE SOTOMAYOR: So how do -- what do we
3 do with the Federal statute that says, You are not
4 entitled to a lien of any amount that is greater than
5 your medical expenses? And using the Solicitor
6 General's Office example, everybody knows that the true
7 value of medical expenses in a particular case was only
8 10 percent, you are still getting 30 percent. How do
9 we -- how do we honor the terms of the Federal statute?

10 MR. MADDREY: Because the State statute says
11 the State never recovers more than its actual medical
12 expenses. If in that hypothetical the medical expenses
13 were 100,000 or 10 percent, the North Carolina statute
14 would say North Carolina gets up to one-third of the
15 settlement but never more than they paid.

16 So by definition it can't be for something
17 that was not medicals. And that's the bright-line rule
18 that the North Carolina statute creates.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 12:17 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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