SC17-297

In the Supreme Court of Florida

MARIA ISABEL GIRALDO, *et al.*,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
Case No.: 1D16-4423

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Session Laws

Regulations

Other Authorities

STATEMENT OF THE CASE AND FACTS

Juan Villa suffered a grave injury when his all-terrain vehicle overturned. Respondent, as administrator of Florida's Medicaid program, paid for "nearly all" of Villa's medical care. Pet. App. A at 2 n.9. As a Medicaid recipient, Villa "automatically subrogated his right to third-party benefits for the full amount of medical assistance provided by Medicaid and automatically assigned to [Respondent] his right, title, and interest to those benefits, other than those excluded by federal law." *Id.* at 2 (citing Fla. Stat. § 409.910(6)(a), (b); 42 U.S.C. § 1396k(a)(1)). Such benefits "also became subject to an automatic lien in [Respondent's] favor 'for the full amount of medical assistance provided by Medicaid.'" *Id.* (citing Fla. Stat. § 409.910(6)(c)).

Villa brought a tort action seeking to recover for his injury, *id.* at 1, and Respondent asserted a $324,607.25 Medicaid lien against any future settlement or recovery in that suit, *id.* at 2. A month later, one of the defendants settled with Villa. The settlement was for approximately 4% of a recited $25 million value of Villa's alleged damages, but the settlement agreement did not itemize separate recoveries for each type of damage that Villa claimed. It did, however, specify $4,817.56 allocated for past medical expenses. Villa's counsel later admitted that he drafted this provision, the amount was the result of his calculation error, and it should have been $13,881.79 (4% of Villa's past medical expenses). *Id.* at 3 & n.4.

Respondent claimed entitlement to $321,720.16 of the proceeds, based on the default formula provided in section 409.910(11)(f), Florida Statutes. *Id.* at 4. Villa then contested that amount before the Division of Administrative hearings. Villa died during the pendency of that administrative proceeding, and representatives of his estate were substituted. *Id.* at 4–5. In the final order, the administrative law judge ("ALJ") rejected Villa's claim and determined that Respondent was entitled to the full $321,720.16 to satisfy its lien.

Critical to the ALJ's analysis were the ALJ's factual findings that "neither the agreed total value of 'alleged' damages nor the agreed allocation of settlement proceeds . . . to compensate for past medical expenses . . . can be credited as reasonable products of arms-length adversarial negotiation," *id.* at 5, and Villa's proffered testimony and evidence were likewise not credible, *id.* at 7–8. The ALJ also rejected Villa's argument that, to meet his burden of proof, he need not put forward evidence regarding the amount allocated to future medical expenses. *Id.* at 6. The ALJ, therefore, found that Villa had failed to present clear and convincing evidence against application of the default statutory formula and rejected his claim.

The First District Court of Appeal affirmed the ALJ's order. *Id.* at 19. The court found no error in the ALJ's factual determinations. *Id.* at 6. Moreover, it agreed with the ALJ that under sections 409.910(11)(f) and 409.910(17)(b), Florida Statutes, Respondent has a right to seek reimbursement from the portion of

the settlement allocated for *all* medical expenses, past and future. *Id.* at 8. And because Villa "intentionally introduced no evidence as to the amount recovered for future medical expenses," the court held that he "failed to satisfy his burden . . . to avoid application of the statutory formula." *Id.* at 9–10.

The First District further concluded that this result did not conflict with, and thus was not preempted by, federal law. *Id.* at 10. It recognized that the U.S. Supreme Court, in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), and *Wos v. E.M.A.* ex rel. *Johnson*, 568 U.S. 627 (2013), construed the anti-lien and anti-recovery provisions of the Medicaid Act to "authorize payment to a state only from those portions of a . . . settlement recovery allocated for payment of medical care." Pet. App. A at 10. But the court observed that those cases did not limit recovery to portions allocated for *past* medical expenses. Rather, those cases allow recovery from portions allocated for "medical care"—portions that, the First District reasoned, must include both past and future medical expenses. *Id.* at 13–14. Petitioners now seek this Court's review.

SUMMARY OF THE ARGUMENT

This Court's review is unwarranted. Congress already has provided a definitive answer to the legal question that Petitioners present, and ongoing federal-court litigation may deprive any guidance from this Court of any residual practical value. At any rate, the inter-district conflict is not as wide as Petitioners

assert, and the State's Medicaid funding is not credibly in jeopardy.

Under the federal Medicaid Act, states are required to seek reimbursement for the medical expenses they make on behalf of Medicaid recipients who recover from liable third parties. At the same time, however, the U.S. Supreme Court has construed the Act's anti-lien and anti-recovery provisions to prohibit states' recovery from portions of a tort judgment or settlement other than those allocated to "medical expenses." *Wos*, 568 U.S. at 1397–98; *Ahlborn*, 547 U.S. at 280–81. Petitioners ask this Court to resolve a newly created conflict between the First and Second Districts over whether this precedent should be expansively read to further limit the State's reimbursement to the amount allocated to *past* medical expenses.

This Court should decline Petitioners' invitation. Contrary to Petitioners' claims, the Fifth District has not taken sides on the conflict. But regardless, the question does not warrant this Court's review. Congress has amended the Medicaid Act to overrule *Ahlborn* and *Wos* and make clear the states have authority to do what Respondent did here (and more), and those statutory changes are scheduled to take effect on October 1 of this year—likely before any ruling from this Court could issue. Moreover, ongoing federal-court litigation has resulted in an injunction against Respondent that adopts Petitioners' view of the law, and should the injunction withstand further proceedings, any guidance from this Court would be either duplicative or practically ineffectual. Finally, Petitioners' assertions of a

risk to the State's Medicaid funding are not credible.

ARGUMENT

I. THE INTER-DISTRICT CONFLICT IS NOT AS WIDE AS PETITIONERS ASSERT.

Petitioners correctly observe that the First District's decision conflicts with the Second District's in *Willoughby v. Agency for Health Care Administration*, 212 So. 3d 516, 525 (Fla. 2d DCA 2017).[1] Petitioners go too far, however, in asserting a conflict between the First and Fifth Districts. In *Davis v. Roberts*, 130 So. 3d 264 (Fla. 5th DCA 2013), the Fifth District did not address whether the State may satisfy its Medicaid lien with settlement amounts allocated for future medical expenses. Rather, the Fifth District addressed whether settling Medicaid recipients must be afforded any opportunity at all to contest full payment of the lien.

In *Davis*, the Legislature had not yet amended section 409.910(17) to provide an administrative hearing procedure for contesting the amount of Medicaid liens. *Id.* at 270 n.8. The trial court in *Davis* viewed the statutory formula set forth in section 409.910(11)(f) as "mandatory," believing it lacked "discretion to limit repayment of the lien." *Id.* at 266. The Fifth District reversed, explaining that under *Wos* and *Ahlborn*, the statutory formula is preempted by the Medicaid Act's anti-

[1] Although *Willoughby* was once before this Court, SC17-660, Respondent has voluntarily withdrawn its notice to invoke this Court's jurisdiction in that case. Respondent did so based on its view, formed during this case's jurisdictional briefing, that the question these cases present does not warrant review.

lien provision "to the extent it creates an irrebuttable presumption." *Id.* at 270. The Fifth District thus remanded the case for the trial court to allow the Medicaid recipient to contest the lien amount in an evidentiary hearing. *Id.* at 270–71.

As the First District explained, *Davis* merely held that Medicaid recipients who settle tort suits for their injuries are entitled to the evidentiary hearing that section 409.910(17) now provides, and that Villa himself received here. Therefore, in mistakenly asserting a conflict between the First and Fifth Districts, Petitioners overstate the extent of the conflict that they ask this Court to resolve.

II. A QUESTION ON WHICH A PENDING CHANGE IN FEDERAL LAW WILL—AND ONGOING FEDERAL-COURT LITIGATION MAY—RENDER THIS COURT'S GUIDANCE SUPERFLUOUS DOES NOT WARRANT THIS COURT'S REVIEW.

For several interrelated reasons, this Court should deny review. First, as author of the Medicaid Act and holder of the preemptive power the Constitution confers on federal legislation, Congress has final authority to answer the question this case presents, and it has provided a definitive answer. Passed by Congress and signed by the President on December 26, 2013, the Bipartisan Budget Act of 2013 amends various sections of the Medicaid Act to empower states to recover from the *full* amount of a Medicaid recipient's tort settlement rather than only the portion designated for medical expenses (much less the portion designated for *past* medical expenses). *See* Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 202, 127 Stat.

1165, 1177 (2013). Entitled "Strengthening Medicaid Third-Party Liability," these changes currently are scheduled to take effect on October 1, 2017,[2] and will overrule *Wos* and *Ahlborn*—the precedents the Second District expansively read in *Willoughby*. *See* 212 So. 3d at 523–25. They do so by repealing the statutory language those cases interpreted—language that, *inter alia*, allows states to recover from third-party payments "for medical care," 42 U.S.C. § 1396k(a)(1)(A), and "for such health care items or services," *id.* § 1396a(a)(25)(H)—and by allowing states to recover from "any payment[s]" made by a third party with a legal liability for care or services. *See* Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 202(b), 127 Stat. 1165, 1177 (2013); *Ahlborn*, 547 U.S. at 280–81.

As the federal Centers for Medicare and Medicaid Services ("CMS") explained, these amendments will allow states "to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses." CMS Informational Bulletin, Dep't of Health & Human Servs. (Dec. 27, 2013), *available at* https://www.medicaid.

[2] The Act originally provided for an effective date of October 1, 2014. *See* Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 202(c), 127 Stat. 1165, 1177 (2013). After two postponements of the effective date, the changes are now scheduled to take effect on October 1, 2017. *See* Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, § 220, 129 Stat. 87, 154 (2015); Protecting Access to Medicare Act of 2014, Pub. L. No. 113-93, § 211, 128 Stat. 1040, 1047 (2014).

gov/federal-policy-guidance/downloads/cib-12-27-13.pdf. Thus, in a few short months, and perhaps even before briefing would conclude if this Court were to grant review, Medicaid Act changes are scheduled to take effect that would definitively establish Respondent's authority to do what it did here. This Court need not answer a question that Congress already has.

Second, even assuming that these changes to the Medicaid Act will have only prospective impact, ongoing federal-court litigation may very well deprive a ruling from this Court of any meaningful residual significance. As Respondent explained in its earlier-filed motion to stay these proceedings, the U.S. District Court for the Northern District of Florida has confronted the same issue Petitioners ask this Court to address and has enjoined Respondent from recovering future medical expenses paid in a tort settlement. In its amended judgment, the court declared that "portions of § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law," and that "the Medicaid Act prohibits [Respondent] from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents [sic] future medical expenses." *See* Motion to Stay at 1–3 & App'x A. If this injunction withstands further proceedings, any guidance this Court provides would prove either redundant or practically ineffectual, as Respondent will remain bound by the injunction.

Finally, Petitioners' assertions that Florida's federal funding is at risk are ill-founded and misconceive the nature of the federal-state Medicaid partnership. Florida spends (and consequently receives) federal dollars in accordance with its state plan and waivers, all of which are approved by CMS. Although CMS has authority to withhold federal funds under certain circumstances, *see* 42 U.S.C. § 1396c, it very rarely does so, and the authority is prospective, occurring only after reasonable notice and opportunity for hearing, *id.* Withholding occurs only if, after CMS's formal written notification, the State does not change its behavior. 42 C.F.R. § 430.35(d). Moreover, CMS can invoke this authority only when (1): "the plan has been so changed that it no longer complies with the provisions of section 1396a" (a circumstance plainly not applicable here); or (2) "in the administration of the plan there is a failure to comply *substantially* with any such provision." 42 U.S.C. § 1396c (emphasis added). Petitioners offer nothing to credit their assertion that debatable questions of Medicaid law that have sparked conflicting lower-court opinions can or will give rise to a loss of federal funds. The statutory standard is *substantial* noncompliance, not *technical* or *debatable* noncompliance. *Id.*

In the end, Petitioners ask this Court to answer a question on which Congress already has provided an answer; that answer is scheduled to take effect in only a few months; and for any of the cases that arise before the impending change in federal law, ongoing federal-court litigation may very well result in a permanent

injunction against Respondent that would duplicate—or render practically ineffectual—any answer that this Court might offer.

CONCLUSION

This Court should deny review.

Respectfully submitted,

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I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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SC17-297

In the Supreme Court of Florida

MARIA ISABEL GIRALDO, *et al.*,

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AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
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Case No.: 1D16-4423

RESPONDENT'S BRIEF ON JURISDICTION

APPENDIX

Appendix A: Respondent's Motion to Stay, dated May 19, 2017.

IN THE SUPREME COURT OF FLORIDA

MARIA ISABEL GIRALDO and
JUAN GONZALO VILLA, as
co-personal representatives of the
estate of JUAN L. VILLA,

Petitioners,

v.

Case No.: SC17-297
L.T. Case Nos.: 1D16-392
15-4423MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

RESPONDENT'S MOTION TO STAY

Pursuant to rule 9.300(a) of the Florida Rules of Appellate Procedure, Respondent, Agency for Health Care Administration (agency), through undersigned counsel, respectfully moves this court for a stay of these proceedings, including further jurisdictional briefing, until after final disposition of *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla. May 3, 2017) (ECF No. 41) (Amended Judgment declaring, *inter alia*, "that the federal Medicaid Act prohibits the [agency] from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses"). The agency has also filed a motion to toll the briefing schedule pending resolution of this motion. In support of this motion, the agency states as follows:

1. Petitioners, Maria Isabel Giraldo and Juan Gonzalo Villa (Giraldo), timely filed a notice invoking this Court's discretionary jurisdiction on February 22, 2017. Petitioners filed their jurisdictional brief on April 5, 2017, arguing that there is direct conflict between the decision of the First District Court of Appeal in *Giraldo*, below,[1] and the decision of the Fifth District Court of Appeal in *Davis v. Roberts*, 130 So. 3d 264 (Fla. 5th DCA 2013), and express and direct conflict with the decision of the Second District Court of Appeal in *Willoughby v. Agency for Health Care Admin*., 42 Fla. L. Weekly D570, 2017 WL 945532 (Fla. 2d DCA Mar. 10, 2017).[2]

2. On April 24, 2017, the agency requested an extension of time to file its jurisdictional brief in this case, noting that the effect on this case of the ruling in *Gallardo* was uncertain, and that additional time was needed to prepare its jurisdictional brief. This Court granted the extension of time to May 25, 2017, noting "[m]ultiple extensions of time for the same filing are discouraged."

3. The central issue in this case concerns whether the agency can recover reimbursement for payments made by Medicaid from the portion of a Medicaid

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[1] *Giraldo v. Agency for Health Care Admin.*,208 So. 3d 244 (Fla. 1st DCA 2016), *reh'g denied* (Jan. 24, 2017).

[2] On April 17, 2017, this Court stayed the proceedings in *Willoughby v. Agency for Health Care Admin*., SC17-660, pending disposition of the instant matter. This Court has also stayed *Mobley v. Agency for Health Care Admin.*, SC17-403, on the same basis as *Willoughby*.

recipient's tort settlement associated with future medical expenses. In *Giraldo*, the First District concluded that section 409.910(17)(b), Florida Statutes, specifically requires such recovery from future medical expenses paid in settlement, and that section 409.910(17)(b) does not conflict with federal law or precedent. *Giraldo*, 208 So. 3d 249.

4. As a separate matter, currently pending before the United States District Court for the Northern District in *Gallardo* is a case which raises, *inter alia*, the same issue: whether the agency's recovery of reimbursement for Medicaid expenses from future medical expenses paid in a tort settlement is consistent with federal law.

5. On May 3, 2017, the District Court in *Gallardo* entered an Amended Judgment against the agency, declaring, *inter alia*, that "portions of § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law," and that federal law prohibits the agency "from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses." [Dkt. 41] A copy of the Amended Judgment is attached as Appendix A.[3] As the District Court determined that these matters are preempted by federal law, the impact of his ruling is not limited to the *Gallardo* matter.

[3] The original Judgment was amended on May 3, 2017, to correct a clerk's error in the statutory citation set forth in Judgment.

6. The Amended Judgment in *Gallardo* is not final. On May 11, 2017, the agency filed a "Motion to Alter or Amend the Judgment and for Relief from Judgment" in the *Gallardo* matter (the "Motion to Alter"), and that motion is currently pending. A copy of the Motion to Alter is attached hereto as Appendix B. If the District Court does not grant the relief sought in the Motion to Alter, then the agency is likely to appeal.

7. Accordingly, should this Court determine it has jurisdiction and exercise its discretion to review this matter, it may be asked to review the same legal issue currently pending in *Gallardo*; that is, whether the agency's application of section 409.410(17)(b), Florida Statutes, is consistent with federal law.

8. The agency is currently prohibited by the *Gallardo* injunction from recovering Medicaid expenses from the portion of a tort recipient's settlement which has been allocated for future medical expenses, and that prohibition will remain until final disposition of *Gallardo.*

9. Although this Court may have jurisdiction to review this matter and may exercise its discretion to do so, the agency respectfully submits that as a matter of prudence and judicial economy, the Court should stay these proceedings until the *Gallardo* matter has been finally disposed. The *Gallardo* matter is likely to provide the court with persuasive guidance on the same matter of federal law raised in this proceeding, and staying the matter will ensure an efficient and

prudent use of judicial resources.

WHEREFORE, the Agency for Health Care Administration moves this Court to stay the proceedings in this case (including further jurisdictional briefing) pending disposition of the proceedings in *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla.), and for such other relief as this Court deems appropriate.

Respectfully submitted this 19th day of May, 2017.

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IN THE SUPREME COURT OF FLORIDA

MARIA ISABEL GIRALDO and
JUAN GONZALO VILLA, as
co-personal representatives of the
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Case No.: SC17-297
L.T. Case Nos.: 1D16-392
15-4423MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

RESPONDENT'S MOTION TO STAY

Appendix Index

Appendix A: Amended Judgment, *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla. May 3, 2017) (ECF No. 41).

Appendix B: Motion to Alter or Amend the Judgment and for Relief from Judgement, *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla. May 3, 2017) (ECF No. 44).

IN THE SUPREME COURT OF FLORIDA

MARIA ISABEL GIRALDO and JUAN GONZALO VILLA, as co-personal representatives of the estate of JUAN L. VILLA,

Petitioners,

v.

Case No.: SC17-297
L.T. Case Nos.: 1D16-392
15-4423MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

RESPONDENT'S MOTION TO STAY

Appendix A: Amended Judgment, *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla. May 3, 2017) (ECF No. 41).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GIANINNA GALLARDO

VS CASE NO. 4:16-cv-116-MW-CAS

ELIZABETH DUDEK

AMENDED JUDGMENT

Gianinna Gallardo, an incapacitated person, by and through her parents and co-guardians, Pilar Vassallo and Walter Gallardo, successfully proved that portions of § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law. The State of Florida Agency for Health Care Administration is therefore enjoined from enforcing that statute in its current form.

It is declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses.

It is also declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from requiring a Medicaid recipient to affirmatively disprove Florida Statutes § 409.910(17)(b)'s formula-based allocation with clear and convincing evidence to successfully challenge it where, as here, that allocation is arbitrary and there is no evidence that it is likely to yield reasonable results in the mine run of cases.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

May 5, 2017
DATE

s/ Chip Epperson
Deputy Clerk: Chip Epperson

IN THE SUPREME COURT OF FLORIDA

MARIA ISABEL GIRALDO and
JUAN GONZALO VILLA, as
co-personal representatives of the
estate of JUAN L. VILLA,

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RESPONDENT'S MOTION TO STAY

Appendix B: Motion to Alter or Amend the Judgment and for Relief from Judgement, *Gallardo v. Dudek*, 4:16-cv-00116-MW-CAS (N.D. Fla. May 3, 2017) (ECF No. 44).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GIANINNA GALLARDO, an incapacitated person, by and through her parents and co-guardians, PILAR VASSALLO and WALTER GALLARDO,

Plaintiff,

No. 4:16-cv-00116-MW-CAS

v.

JUSTIN M. SENIOR, in his official capacity as Secretary of the Florida Agency for Health Care Administration,

Defendant.
_____/

DEFENDANT'S MOTION TO ALTER OR AMEND
THE JUDGMENT AND FOR RELIEF FROM JUDGMENT

Defendant, Justin M. Senior, in his official capacity as Secretary of the Florida Agency for Health Care Administration ("AHCA"), moves the Court to alter or amend the judgment and to grant relief from the judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b)(4) and (5).

INTRODUCTION

This Court recently concluded that federal law preempts portions of section 409.910(17)(b), Florida Statutes. It enjoined AHCA from enforcing the statute in its current form and prohibited AHCA from (i) seeking reimbursement from portions of a Medicaid recipient's recovery that represent future medical expenses, or (ii) requiring Medicaid recipients to affirmatively disprove the formula-based allocation with clear and convincing evidence. ECF No. 41. For the following reasons, the Court should alter or amend the judgment and vacate its entry of declaratory and injunctive relief.

First, the Court's finding of preemption hinged on its determination that the default allocation is "nearly impossible to rebut," and, "in practice," is "quasi-irrebuttable." ECF No. 30 at 24, 30. In reaching this conclusion, however, the Court expressly refused to consider undisputed evidence that, in case after case, recipients routinely rebut the default allocation. *Id*. at 31 n.5. The Court's refusal to consider the practical effect of the statute, and its reliance on a conclusion that is directly at odds with experience, was manifest error and requires reconsideration.

Second, in concluding that Florida's default allocation is "wholly divorced from reality," *id.* at 33, the Court made a factual finding unsupported by the record. By shifting to AHCA burdens that were properly on the movant, the Court applied incorrect standards for challenges to the validity of state statutes and for summary

judgment, and, in doing so, committed manifest errors that require reconsideration.

Third, President Obama signed legislation that amends the Medicaid Act to expand the authority of states to recover the cost of medical assistance from third parties. The amendments, which take effect October 1, 2017, direct and authorize states to recover the cost of medical assistance from *any* payment made by a third party with liability to pay for care and services provided to Medicaid recipients—regardless of whether the payment is allocable to past or future medical expenses or to non-medical expenses. Because federal law will no longer recognize any allocation, the Court's judgment must be vacated.

Fourth, AHCA does not enforce section 409.910(17)(b). The statute itself commits exclusive enforcement authority to the Division of Administrative Hearings ("DOAH")—a separate agency in the executive branch of state government. AHCA has no authority to exclude from DOAH's consideration amounts allocable to future medical expenses, or to compel DOAH to apply a lesser burden of proof. Because AHCA cannot afford the relief sought, Plaintiff had no standing to sue AHCA, and the Court had no jurisdiction. In the alternative, because AHCA is uncertain what acts within its authority the Court's injunction requires or restrains, the Court should vacate the judgment or, at a minimum, state specifically the terms of the injunction and describe in reasonable detail the acts required or restrained.

ARGUMENT

I. THE COURT'S CONCLUSION THAT THE DEFAULT ALLOCATION IS QUASI-IRREBUTTABLE IN PRACTICE IS CLEARLY ERRONEOUS.

The Court's conclusion that the default allocation is nearly impossible to rebut by clear and convincing evidence was pivotal to its finding of preemption. But that conclusion is simply wrong: recipients *routinely* rebut the default allocation. The Court refused to consider these undisputed facts, ECF No. 30 at 31 n.5, and relied on an incorrect conclusion to grant summary judgment in favor of Plaintiff.

Rule 59(e) authorizes requests for reconsideration to correct manifest errors of law or fact. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010). If a "relevant factor deserving of significant weight is overlooked," or the court considers the appropriate factors "but commits a palpable error of judgment in calibrating the decisional scales," a refusal to reconsider is abuse of discretion. *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994).

In *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013), the Court considered whether a state statute that treated one-third of any settlement as payment for medical care complied with federal law. It held that the statute was preempted because (i) the statute did not provide a mechanism for determining whether the statutory allocation was reasonable in any particular case, and (ii) the Court found no evidence that the allocation was reasonable in the mine run of cases. *Id.* at 1399, 1401–02. Because *neither* condition was satisfied, the statute was preempted. *Id.*

Unlike North Carolina, Florida created a mechanism for individualized determination. While Florida established a default allocation, it also permitted recipients to contest the default allocation. § 409.910(11)(f), (17)(b), Fla. Stat. (2016).[1]

This Court recognized that Florida may enact "a rebuttable, formula-based allocation," and "probably" can place the burden on recipients to disprove the allocation. ECF No. 30 at 31–32. But it found that Florida's default allocation is "nearly impossible to rebut," *id*. at 24, and, "in practice," is "quasi-irrebuttable," *id*. at 31. In particular, the Court found that Florida's requirement of clear and convincing evidence—a burden of proof the Court described as "particularly onerous"—rendered Florida's mechanism for individualized decisions illusory. *Id*. at 29–30.

The conclusion that the default allocation is quasi-irrebuttable in practice is manifest error. Recipients routinely rebut the default allocation. Recipients have rebutted the default allocation in the following cases cited in response to Plaintiff's Motion for Summary Judgment (ECF No. 16 at 10): *Haywood v. AHCA*, Case No. 15-6106, 2016 WL 4083865 (Fla. DOAH July 28, 2016); *Bass v. AHCA*, Case No. 16-0388, 2016 WL 3097591 (Fla. DOAH May 27, 2016); *Doheny v. AHCA*, Case No. 15-6465, 2016 WL 1533264 (Fla. DOAH Apr. 8, 2016); *Belinaso v. AHCA*, Case No. 15-6136, 2016 WL 1255776 (Fla. DOAH Mar. 25, 2016); *Gaudio v. AHCA*, Case No. 15-3159, 2016 WL 698430 (Fla. DOAH Feb. 17, 2016); *Bryant*

[1] In this motion, all citations to the Florida Statutes are citations to the 2016 Florida Statutes.

v. AHCA, Case No. 15-4651, 2016 WL 681061 (Fla. DOAH Feb. 12, 2016); *McCray v. AHCA*, Case No. 15-4378, 2015 WL 9267418 (Fla. DOAH Dec. 16, 2015); *Pierre v. AHCA*, Case No. 14-5308, 2015 WL 1781183 (Fla. DOAH Apr. 14, 2015); *Mierzwinski v. AHCA*, Case No 14-3806, 2015 WL 1095841 (Fla. DOAH Mar. 6, 2015).[2]

Recipients have also rebutted the default allocation in the following cases: *Herrera v. AHCA*, Case No. 16-1270, 2016 WL 6068013 (Fla. DOAH Oct. 11, 2016); *Maldonado v. AHCA*, Case No. 16-3696, 2016 WL 5958673 (Fla. DOAH Oct. 10, 2016); *Cardenas v. AHCA*, Case No. 15-6594, 2016 WL 5784135 (Fla. DOAH Sept. 29, 2016); *Weedo v. AHCA*, Case No. 16-1932, 2016 WL 5643668 (Fla. DOAH Sept. 27, 2016); *Osmond v. AHCA*, Case No. 16-3408, 2016 WL 4764941 (Fla. DOAH Sept. 8, 2016); *Thomas v. AHCA*, Case No. 16-0690, 2016 WL 4419743(Fla. DOAH Aug. 15, 2016); *Martinez v. AHCA*, Case No. 06-0851, 2016 WL 3595469 (Fla. DOAH June 30, 2016); *Fourcoy v. AHCA*, Case No. 15-5213, 2016 WL 1733493 (Fla. DOAH Apr. 27, 2016); *Velez v. AHCA*, Case No. 15-4843, 2016 WL 1554263 (Fla. DOAH Apr. 12, 2016); *Hopper v. AHCA*, Case No. 15-5026, 2016 WL 681062 (Fla. DOAH Feb. 12, 2016); *Quesada v. AHCA*,

[2] The only known DOAH case involving the clear-and-convincing evidence standard in which the denial of a third-party liability petition turned on the quality of the evidence was *Jones v. AHCA*, Case No. 14-3250, 2015 WL 762790, at *3–5 (Fla. DOAH Feb. 19, 2015). In *Jones*, DOAH highlighted the unpersuasiveness of the recipient's witness and the recipient's failure to offer evidence into the record.

Case No. 15-3764, 2016 WL 386530 (Fla. DOAH Jan. 28, 2016); *Hunt v. AHCA*, Case No. 13-4684, 2015 WL 13122379 (Fla. DOAH Sept. 10, 2015). The Court's conclusion that Florida's default allocation is nearly impossible to rebut is simply incorrect.

The Court erroneously dismissed these decisions, stating in a footnote that the statute itself—not its application—is before the Court. ECF No. 30 at 31 n.5. The Court's finding of preemption hinged, however, on its finding that the default allocation is quasi-irrebuttable "in practice," and that the mechanism for case-by-case determinations is therefore illusory. *Id*. at 31. But given the fact that recipients routinely rebut the default allocation, the default allocation is *not* "nearly impossible to rebut," *id*. at 24, or quasi-irrebuttable "in practice," *id*. at 31. As this Court noted, a proper preemption analysis "is not a matter of semantics," but "requires consideration of what the state law in fact does." *Id*. at 25 (quoting *Wos*, 133 S. Ct. at 1398). If a state may not rely on semantics to avoid preemption, but must answer for the effect of the statute, *Wos*, 133 S. Ct. at 1398, then the reverse is also true: semantics cannot defeat a statute that does not in fact interfere with federal objectives. Here, however, the Court overlooked the *only* evidence of "what the state law in fact does," and its pivotal conclusion—that the default allocation is quasi-irrebuttable in practice—is directly at odds with "what the state law in fact does."

"Conflict preemption exists where state law actually conflicts with federal law, making it impossible to comply with both, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768 (11th Cir. 1998) (internal marks omitted). To determine whether the state law sufficiently interferes with federal law, "a preemption analysis must contemplate the practical result of the state law." *United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012); *accord Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."). "This inquiry requires [a court] to consider the relationship between state and federal laws *as they are interpreted and applied, not merely as they are written*." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (emphasis added). Thus, the Court correctly stated that the statute is preempted "if and to the extent it operates" contrary to federal law, ECF No. 30 at 19 (citing *Irving*, 136 F.3d at 768), but incorrectly rejected the only evidence of how Florida's statute "operates."

The Court cited two cases to support its facial conclusion that the recipient's burden is "particularly onerous," but neither case is on point. ECF No. 30 at 30. *Gordon v. Dennis Burlin Sales, Inc.*, 174 B.R. 257, 259 (Bankr. N.D. Ohio 1994), merely observed that the clear-and-convincing-evidence standard is "more oner-

ous" than the preponderance-of-the-evidence standard. *Manufacturing Research Corp. v. Graybar Electric Co.*, 679 F.2d 1355, 1360 (11th Cir. 1982), was an action to invalidate a patent. The court noted that a strong presumption of validity attaches to patents approved by the Patent Office, given the Patent Office's expertise and the "recognition that patent approval is a species of administrative determination supported by evidence." *Id*. at 1360. There is little parallel, however, between patent-infringement cases and Medicaid third-party liability determinations.

Far more probative of the actual operation of Florida' statute is DOAH's description of the evidentiary standard that applies under the statute challenged here. DOAH has stated that, under Florida law, clear and convincing evidence requires:

> that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Cardenas, 2016 WL 5784135, at *8 (quoting *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994)). On its face, this standard is not especially onerous. It is apparent why, in case after case, recipients have routinely carried their burden and rebutted the default allocation. This Court, however, did not discuss the evidentiary burden that DOAH applies under the challenged law—only the evidentiary burdens that two federal courts have applied in circumstances quite remote from those at issue here.

The Supreme Court has indicated no disapproval of a clear-and-convincing evidence standard. The Court explained that "States have considerable latitude to design administrative and judicial procedures to ensure a prompt and fair allocation of damages," and quoted a statute that required clear and convincing evidence. *See* 133 S. Ct. at 1401 (quoting OKLA. STAT. tit. 63, § 5051.1(D)(1)(d) (2011)). While the Court declined to hold that the statutes it cited as examples complied with federal law, its choice to highlight a clear-and-convincing-evidence standard is telling.

To buttress its finding that Florida's evidentiary burden is preempted, this Court found fault with two tangentially related features of the statute—features about which Plaintiff never complained and indeed had no standing to complain. Specifically, the Court concluded that (i) Florida does not honor allocations made by courts, juries, or stipulations of all parties, as *Wos* requires, and (ii) in allocating 25 percent of judgments and settlements to attorney's fees, the statute might in some cases understate the amount paid to attorneys. ECF No. 30 at 26–29. The Court acknowledged that these matters were "not before this Court," *id*. at 26—indeed, the parties had not even briefed them—but nevertheless seemingly accorded them weight in holding that Florida's evidentiary burden is preempted. *Id*. at 31 (referring to a "hodgepodge of hurdles" and "obstacle after obstacle"). The Court's apparent reliance on extraneous matters not properly before the Court was erroneous. *See United States v. McKie*, 73 F.3d 1149, 1155 (D.C. Cir. 1996) (noting that

"we generally hesitate to decide non-jurisdictional questions without briefing").

There is no evidence, moreover, that Florida violates *Wos* and disregards allocations made by courts, juries, or stipulations of all parties. On the contrary, if a recipient shows that a binding allocation was made, then the binding allocation will be enforced. Such an allocation would be "considered 'locked in' and binding" in a proceeding before DOAH. *Villa v. AHCA*, Case No. 15-4423, 2015 WL 9590775, at *12 (Fla. DOAH Dec. 30, 2015). In addition, AHCA is authorized to enter into settlements, § 409.910(18), Fla. Stat., and has employed its settlement authority to give effect to binding allocations in satisfaction of its liens, Ex. A at 10:9–12:2.

Similarly, the 25-percent allocation for attorney's fees does not "necessarily strip[]" money from recipients whose attorney's fees exceed 25 percent. ECF No. 30 at 27. In at least two cases, DOAH has rejected AHCA's position and treated the 25-percent allocation as a *default* allocation. It has considered evidence of the actual amount of fees paid—evidence that any recipient should easily be able to furnish—and made adjustments in favor of recipients. *See Maldonado*, 2016 WL 5958673, at *2, *9; *Quesada*, 2016 WL 386530, at *10. By contrast, AHCA may not contest the 25-percent allocation—even if actual fees are *less* than 25 percent.

Thus, the Court's assumption that Florida disregards binding allocations and conclusively presumes attorney's fees to be 25 percent of recoveries is unfounded.

And its consideration of those factors—which Plaintiff did not raise or brief, and had no standing to raise—was clear error.

As shown above, Florida has established a mechanism to assess the reasonableness of the default allocation in individual cases. It is therefore unnecessary to determine whether the default allocation yields reasonable results in the mine run of cases. *Wos* made clear that states may adopt a default allocation if (i) the allocation may be rebutted by individualized facts, **or** (ii) evidence establishes that the default allocation is reasonable in the mine run of cases. *See* 133 S. Ct. at 1399, 1402. *Wos* did not require both. To the extent this Court did, it misconstrued *Wos*.

Because Florida has a mechanism to make case-by-case determinations—a proceeding in which recipients routinely prevail—the Court should reconsider its finding that Florida's requirement of clear and convincing evidence is preempted.

II. THE COURT'S UNSUPPORTED FACTUAL FINDINGS AND BURDEN SHIFTING WERE CLEARLY ERRONEOUS.

This Court not only found that the default allocation is nearly impossible to rebut, but also that the default allocation does not yield reasonable results in the mine run of cases. ECF No. 30 at 25, 33–34. This factual finding—made pursuant to Plaintiff's motion for summary judgment and adversely to AHCA, the non-movant—was supported by no evidence and was neither admitted in AHCA's Answer nor presented as an undisputed fact in Plaintiff's Statement of Undisputed Facts. ECF No. 5; ECF No. 12 at 3–6. Rather, the Court placed the burden on the

non-movant to establish the validity of the statute, and thus committed clear error.

Plaintiff presented no evidence that the default allocation is unlikely to yield reasonable results in the mine run of cases. As this Court noted, "nothing in the record helps explain why Florida chose the precise formula that it did. It is therefore impossible to judge whether it is 'likely to yield reasonable results in the mine run of cases.'" ECF No. 30 at 25 (quoting *Wos*, 133 S. Ct. at 1402)). Though it was "impossible to judge" the default allocation's reasonableness, the Court found that the default allocation is "wildly arbitrary," *id*. at 25, "wholly detached from any rational standard," *id*., and "wholly divorced from reality," *id*. at 33. In doing so, the Court shifted the burden to the non-movant to prove the validity of the statute and then invalidated the statute because the Court found "no evidence [the default allocation] is likely to yield reasonable results in the mine run of cases." *Id*. at 34.

The Court thus applied incorrect standards both for the review of a statute's validity and for summary judgment. Not only did the Court overlook the uncontradicted evidence that recipients regularly rebut the default allocation in individual cases, but the Court also shifted the burden to AHCA to demonstrate the reasonableness of the default allocation in the mine run of cases. The Court made these determinative *factual* findings—the foundation of the Court's finding of preemption—after stating that all issues to be resolved were questions of *law*. *Id*. at 12.

In shifting the burden to AHCA to show whether the default allocation will

yield reasonable results in the mine run of cases, the Court departed from the standard traditionally applied in preemption cases. As Chief Justice Roberts noted in his dissenting opinion in *Wos*, "[w]e have never before, in a preemption case, put the burden on the State to compile an evidentiary record supporting its legislative determination. The burden is, of course, on those challenging the law." 133 S. Ct. at 1409 (Roberts, C.J., dissenting) (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661–62 (2003) (plurality opinion)). "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," *id*. (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213 (1997)), and neither are state legislatures, *id*.

The statements in the majority opinion that suggest otherwise are dicta and do not, therefore, overturn the traditional allocation of the burden of proof to the party that seeks to establish preemption. Clearly, the dissent did not believe that the Court had set aside settled precedents that affirmed the presumptive validity of state statutes and placed the burden of proof on challengers, but rather intended to show that the majority's purpose was to invite states to argue that a mechanism for individualized determinations is unnecessary if a state first conducts valid studies to show that the allocations achieve reasonable results in the mine run of cases. *Wos*, 133 S. Ct. at 1408–09 (Roberts, C.J., dissenting). Nothing in the majority opinion suggests that either the long-standing presumption against preemption—

or the black-letter rule that all reasonable inferences must be drawn in favor of a non-movant that opposes summary judgment—was abrogated with respect to a statute that establishes a default allocation and provides a mechanism for case-by-case rebuttal. Those could not have been holdings in *Wos* because they were not before the Court: North Carolina's statute provided no mechanism for case-by-case rebuttal, and *Wos* was decided on certiorari review of a circuit court's vacatur of a district court's grant of summary judgment *in favor of the state*. 133 S. Ct. at 1396.

This Court therefore erred when, in the absence of evidence, admission, or stipulation, it made a finding of material fact that was adverse to the non-movant on a motion for summary judgment and in conflict with established precedents that presume the validity of state statutes. It erred when it found that AHCA had failed to present evidence, found it was "impossible to judge" whether the statute was valid, and thus granted summary judgment in favor of Plaintiff. ECF No. 30 at 25.

In shifting the burden, the Court also deviated from the accepted standard on summary judgment, which places the burden squarely on the movant to establish the absence of a "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, the movant "must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party," *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Ctys.*, 941 F.2d 1428,

1438 (11th Cir. 1991) (en banc), and a court must "review the evidence and all factual inferences therefrom in a light most favorable to the party opposing the motion," *Thrasher v. State Farm Fire & Cas. Co.*, 734 F.2d 637, 638 (11th Cir. 1984). Here, because Plaintiff bore the burden to prove preemption at trial, she bore that burden on summary judgment. But Plaintiff merely pointed to AHCA's failure to justify the statute, and offered no evidence that the default allocation is unreasonable. *See* ECF No. 12 at 24.

The Court identified not the absence of a genuine dispute of material fact, but a gaping factual hole—a *lack* of evidence—that made it "impossible to judge" whether the statute was valid. ECF No. 30 at 25. What the Court identified was precisely an issue of material fact: whether the default allocation is likely to yield reasonable results in the mine run of cases. Having identified this unresolved issue, the proper course was not to invalidate a duly enacted state statute, but to deny Plaintiff's motion. The entry of summary judgment against the non-movant was manifest error. *See Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n, Inc.*, 136 F. Supp. 3d 1364, 1369 (S.D. Fla. 2015).

III. AMENDMENTS TO FEDERAL LAW WILL REQUIRE VACATUR OF THE INJUNCTION BY OCTOBER 1, 2017.

Effective October 1, 2017, federal law will authorize and require states to recover the cost of medical assistance provided to Medicaid recipients from *any* payments by third parties that are liable for care and services provided to those re-

cipients, regardless of whether the payments are allocable to past medical, future medical, or non-medical expenses. States will no longer be required to allocate judgments and settlements, but instead will be entitled to obtain reimbursement from all or any part of a recovery. Given this change, the Court must vacate its judgment by October 1, 2017.

On December 26, 2013, President Obama signed the Bipartisan Budget Act of 2013, Pub. L. 113-67, 127 Stat. 1165. Among other things, the Act amended the third-party liability provisions of the federal Medicaid Act to expand the authority of states to recover the cost of medical assistance provided to Medicaid recipients. Under the heading "Strengthening Medicaid Third-Party Liability," the Act made the following amendments to the Medicaid Act's third-party liability provisions:[3]

> **42 U.S.C. § 1396a(a):**
>
> A State plan for medical assistance must—
>
> . . .
>
> **(25)** provide—
>
> **(A)** that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan . . . ;
>
> **(B)** that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably ex-

[3] For greater clarity, the amendments are set forth here in full rather than in the descriptive style characteristic of federal legislation.

> pect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance ~~to the extent of such legal liability~~;
>
> . . .
>
> **(H)** that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to ~~payment by any other party for such health care items or services~~ <u>any payments by such third party</u> . . . .
>
> **42 U.S.C. § 1396k:**
>
> **(a)** [A] State plan for medical assistance shall—
>
> **(1)** provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—
>
> **(A)** to assign the State any rights . . . to ~~payment for medical care from any third party~~ <u>any payment from a third party that has a legal liability to pay for care and services under the plan</u> . . . .

Bipartisan Budget Act of 2013 § 202(b)(1)–(2).[4] After two postponements of the effective date, these changes are now scheduled to take effect on October 1, 2017. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. 114-10, § 220,

[4] The same legislation also amends the federal anti-lien provision to make explicit the exception that the Supreme Court recognized in *Ahlborn*. As amended, 42 U.S.C. § 1396p(a)(1) will provide that no lien may be imposed against the property of a living individual on account of medical assistance "except . . . pursuant to . . . rights acquired by or assigned to the State in accordance with" 42 U.S.C. §§ 1396a(a)(25)(H) or 1396k(a)(1)(A). Bipartisan Budget Act of 2013 § 202(b)(3).

129 Stat. 87, 154 (2015); Protecting Access to Medicare Act of 2014, Pub. L. 113-93, § 211, 128 Stat. 1040, 1047 (2014); Bipartisan Budget Act of 2013 § 202(c).

The amendments overrule *Arkansas Department of Human Services v. Ahlborn*, 547 U.S. 268 (2006), and *Wos*. *Ahlborn* and *Wos* construed the third-party liability provisions of the Medicaid Act to allow states to recover the cost of medical assistance only from the portion of a judgment or settlement that represents payment for medical care. The amendments repeal the statutory language on which *Ahlborn* and *Wos* relied—language that allows states to recover from third-party payments "for medical care," 42 U.S.C. § 1396k(a)(1)(A), and "for such health care items or services," *id*. § 1396a(a)(25)(H)—and allow states to recover from "any payment" made by a third party with a legal liability for care or services. Congress is presumed to be aware of judicial interpretations of a statute, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and, when it amends a law, intends the amendment "to have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995).

Thus, effective October 1, 2017, federal law will permit states to recover from the *entire* judgment or settlement, regardless of any allocation between medical and non-medical expenses. As the federal Centers for Medicare and Medicaid Services explained, the amendments to the Medicaid Act allow states "to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses." Ex. B. If a third

party has *any* liability to pay for care and services provided to a recipient, then *any* payment by the third party to the recipient will be subject to recovery by the state. Indeed, the third-party liability provisions of federal law are no mere authorization that states are at liberty to decline; federal law and federal policy *require* states to pursue third-party recoveries to the full extent delineated in federal law. *See* 42 U.S.C. § 1396a(a)(25)(B) (requiring a Medicaid State Plan to provide that the state "will seek reimbursement for such assistance to the extent of such legal liability").

Of course, the same amendments that abolish the distinction between medical and non-medical expenses resolve once and for all the question presented here: whether states may recover from payments allocable to future medical expenses. The amendments make clear that all third-party payments to Medicaid recipients are available to states, regardless of any allocation made by a court or the parties. The amendments do away with the statutory language that this Court concluded confines Florida's recovery to amounts allocable to past medical expenses. *Compare* ECF No. 30 at 14–15, *with* Bipartisan Budget Act of 2013 § 202(b)(1)–(2). Because federal law will no longer recognize *any* allocation between past and future medical expenses, this Court's injunction against recoveries from amounts allocable to future medical expenses—and against the requirement that recipients produce clear and convincing evidence—will no longer comport with federal law.

Rule 60(b)(5) "encompasses the traditional power of a court of equity to

modify its decree in light of changed circumstances." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). Relief is appropriate when the prospective application of a final judgment is "no longer equitable." Fed. R. Civ. P. 60(b)(5). Once the law that an injunction was designed to enforce has changed, continued enforcement of the injunction ceases to be equitable, and a failure to vacate or modify the injunction is erroneous. *Miller v. French*, 530 U.S. 327, 344–36 (2000); *Agostini v. Felton*, 521 U.S. 203, 215 (1997). Indeed, at every stage, "the court must 'stop, look, and listen' to determine the impact of changes in the law on the case before it." *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992) (quoting *Kremens v. Bartley*, 431 U.S. 119, 135 (1977)); *see also Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275, 278 (6th Cir. 2008) ("One predicate for altering an injunction . . . is a change in law—new court decisions or statutes that make legal what once had been illegal."); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 184 (3d Cir. 1999) (explaining that, "when Congress changes the law underlying a judgment awarding prospective injunctive relief, the judgment becomes void to the extent that it is inconsistent with the amended law").

For example, in *System Federation No. 91, Railway Employees Department v. Wright*, 364 U.S. 642 (1961), the district court had approved a consent decree that, consistent with the Railway Labor Act, prohibited union shops. *Id*. at 644–45. Congress then amended the statute to permit union shops in some circumstances,

but the district court refused to modify the consent decree to reflect the change. *Id*. at 645. The Supreme Court reversed, explaining that the court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," and that the court "must be free to modify the terms of the consent decree when a change in law brings those terms in conflict with statutory objectives." *Id*.

Similarly, in *Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1187 (7th Cir. 1994), the court upheld a district court's vacatur of an injunction to enforce section 8 of the Clayton Act, which prohibited a person from serving as a director of two or more competitor corporations if the capital, surplus, and undivided profits of any of the corporations exceeded $1 million. *Id*. at 1186. Years after the injunction was entered, Congress amended the Clayton Act to increase the threshold from $1 million to $10 million. *Id*. at 1187. Because the Act's prohibition on interlocking directorates no longer applied to the enjoined party, the injunction was properly vacated. *Id*.; *see also Fla. Med. Ass'n, Inc. v. Dep't of Health, Educ., & Welfare*, 947 F. Supp. 2d 1325 (M.D. Fla. 2013) (vacating injunction under the Privacy Act after the Eleventh Circuit construed the Privacy Act not to permit equitable relief).

Here too, federal law will soon have "changed so that the enjoined behavior, which once might have been preempted by federal law, may no longer be preempted at all." *Associated Builders & Contractors*, 543 F.3d at 278 (quoting *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (en banc)) (internal marks omitted). A

change in law will remove the basis of the Court's finding of preemption and will require vacatur of the judgment. *See Am. Horse Prot. Ass'n, Inc. v. Watts*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) ("When a change in the law authorizes what had previously been forbidden, it is abuse of discretion for a court to refuse to modify an injunction . . . ."). Where, as here, Congress amends applicable law, "it is those amended laws—not the terms of past injunctions—that must be given prospective legal effect." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1165 (10th Cir. 2004).

IV. BECAUSE AHCA DOES NOT ENFORCE THE STATUTE, THE JUDGMENT MUST BE VACATED OR THE INJUNCTION CLARIFIED.

Finally, because AHCA does not enforce the challenged law, Plaintiff had no standing to sue AHCA, and the Court had no subject matter jurisdiction. The judgment should therefore be vacated. At a minimum, AHCA is uncertain what steps it must or even can take to effectuate the judgment, which should be amended to state in greater detail the objective actions that the Court required or restrained.

A. AHCA Does Not Enforce the Challenged Statute.

Section 409.910(6)(c) grants AHCA an automatic lien in the full amount of medical assistance provided to a recipient. A recipient must provide AHCA notice of (i) any right to payment from a third party, (ii) any legal action against a third party, and (iii) any recovery obtained from a third party. § 409.910(5), (11)(a), (11)(d), Fla. Stat. The statute also establishes a default allocation of the amount due to AHCA from recoveries obtained from third parties. *Id.* § 409.910(11)(f).

To contest the default allocation, a Medicaid recipient must file a petition with DOAH, and DOAH—not AHCA—conducts a proceeding pursuant to the Administrative Procedure Act. *Id*. § 409.910(17)(b). In this proceeding, the recipient must "prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated . . . for past and future medical expenses than the amount calculated by [AHCA] pursuant to the formula." *Id*. DOAH receives and weighs the evidence and applies the legal standards and burdens of proof. DOAH alone has authority to enter a final order that fixes the amount to which AHCA is entitled. *Id*. AHCA has no authority to review DOAH's order, which is final and not a recommended order that is subject to review by the affected agency. *See id*. § 120.57(1)(k)–(m).

AHCA, therefore, does not enforce section 409.910(17)(b). It has the status of a respondent—not a decision-maker. AHCA does not decide what burden of proof applies or whether the recipient has satisfied that burden. It does not decide whether the recipient must prove that a lesser portion should be allocated to *past* medical expenses—or to *past and future* medical expenses—than the default allocation. DOAH alone makes those decisions. Indeed, even Plaintiff recognized that AHCA merely takes positions as a party. ECF No. 12 at 5 ¶ 11 (stating that AHCA has "taken the position that" it may recover from amounts allocable to future medical expenses); ECF No. 1 ¶¶ 27, 50–54 (referring repeatedly to the "position" that

AHCA has "taken" before DOAH). DOAH decides AHCA's rights as well as the recipient's, and AHCA has no more authority than a recipient to enforce the statute or to modify DOAH's orders. As a division of the Department of Management Services, DOAH is independent of AHCA. *See* §§ 20.22(2)(f), 120.65(1), Fla. Stat.

B. Plaintiff Had No Standing to Sue AHCA.

Because AHCA does not enforce the challenged law, Plaintiff lacked standing to sue AHCA, and the judgment must be vacated pursuant to Rule 60(b)(4). *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1129–31 (11th Cir. 1994).

In an action to prohibit enforcement of a statute, a plaintiff lacks standing to sue public officials who have no enforcement authority and thus no authority to redress the injury. For example, in *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244–48 (11th Cir. 1998), two minor political parties challenged a state statute that required them to file a bond. The defendants—the Florida Secretary of State and county Supervisors of Elections—moved to dismiss. The court declined to dismiss the Secretary of State, who had threatened enforcement and presented a credible threat of future enforcement. *Id*. at 1245–48. But it dismissed the Supervisors of Elections: "In a suit such as this one, where the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Id*. at 1248 (citing

Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979)). The court reviewed Florida's election laws but found no reason to conclude that the Supervisors possessed any authority to enforce the challenged law. *Id*. The Supervisors were not proper defendants, and, as to them, the plaintiffs had failed to allege a case or controversy.

Similarly, in *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005), in a challenge to a redistricting plan, the court instructed the trial court to dismiss legislators who had been sued in their official capacities. While it disposed of the case on the basis of legislative immunity, the court found it "extremely doubtful that [plaintiff] could satisfy the third prong of the standing requirements—a substantial likelihood that her injury could be redressed by a favorable decision against these legislator defendants," *id*. at 1256 n.8, explaining that "the legislator defendants have no role in the enforcement or implementation" of the challenged district, *id*. at 1257–58. Judge Jordan, then sitting by designation, explained in a concurring opinion that, "in a suit against state officials for injunctive relief, a plaintiff does not have Article III standing with respect to those officials who are powerless to remedy the alleged injury." *Id*. at 1259. "The legislators in this case do not have enforcement authority and are not involved in conducting elections in DeKalb County. Their role is limited to making law." *Id*. Judge Jordan concluded that an "injunction running against them therefore would do nothing" to redress the alleged injury. *Id*.; *see also Abdullah v. Ala. Sentencing Comm'n*, 386 F. App'x 947, 950 (11th Cir. 2010);

Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1074–75 (9th Cir. 2010); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

For these reasons, Plaintiff had no standing to sue AHCA. Plaintiff sought an injunction prohibiting enforcement of the statute to the extent the statute permits AHCA to recover from amounts allocable to future medical expenses, but AHCA does not enforce or authoritatively construe the statute. Similarly, Plaintiff sought a declaration that the requirement of clear and convincing evidence is preempted, but AHCA does not decide what burden a recipient must satisfy. DOAH alone applies the statute. Because AHCA is merely a party to proceedings under the statute, and neither enforces the statute nor controls the state agency that does, it cannot redress the alleged injuries. Consequently, Plaintiff was without standing to sue AHCA.

C. The Judgment Does Not Describe in Sufficient Detail the Acts Required or Restrained.

Finally, because it does not enforce the statute, AHCA is in doubt about the scope of relief granted by the Court, and is unsure what it must do to comply with the injunction. Rule 65(d), therefore, requires that the injunction be vacated. At a minimum, to avoid unintended violations and the consequences that might follow, AHCA requests that the Court amend the judgment to state the terms of the injunction specifically, and to describe in greater detail the acts required or restrained.

An injunction must state its terms "specifically" and "describe in reasonable detail" the acts it restrains or commands. Fed. R. Civ. P. 65(d)(1). It "must be

framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000); *accord Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (explaining that "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed"). To this end, an injunction "should be phrased in terms of objective actions, not legal conclusions." *SEC v. Goble*, 683 F.3d 934, 950 (11th Cir. 2012).

The mandates of Rule 65(d) are "no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). An injunction is enforceable by the power of contempt—a "potent weapon" indeed, and, when founded on an order "too vague to be understood, . . . a deadly one." *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 389 (1970). The requirements of detail and specificity reflect the severity of these consequences and seek to exclude uncertainty as a cause of non-compliance. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 444 (1974); *Schmidt*, 414 U.S. at 476. And while precision is always essential, it is "absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State." *Gunn*, 399 U.S. at 389.

Here, the injunction incorrectly assumes that AHCA enforces the statute that

the Court enjoined. It states that AHCA is "enjoined from enforcing that statute in its current form" and declares that federal law prohibits AHCA (i) from "seeking reimbursement . . . from portions of a recipient's recovery that represents future medical expenses," and (ii) from "requiring a Medicaid recipient to affirmatively disprove [the] formula-based allocation with clear and convincing evidence." ECF No. 41. AHCA, however, has no authority to enforce or authoritatively construe the statute. *See WHS Trucking LLC v. Reemployment Assistance Appeals Comm'n*, 183 So. 3d 460, 462 (Fla. 1st DCA 2016) ("Florida agencies are creatures of statute and only have the authority and jurisdiction conferred by statutes."). Thus, AHCA is uncertain what steps it must—or even can—take to effectuate the injunction.

To comply with the injunction, AHCA could provide DOAH a copy of the injunction and urge DOAH to (i) disregard amounts allocable to future medical expenses, and (ii) refuse to apply a clear-and-convincing-evidence standard. But AHCA cannot ensure that DOAH will accept either position. While an injunction binds non-parties who have notice of the injunction and are "in active concert or participation" with the parties, *see* Fed. R. Civ. P. 65(d)(2), this provision describes non-parties who are "identified [with the parties] in interest, in 'privity' with them, represented by them or subject to their control," and ensures that enjoined parties do not "nullify a decree by carrying out prohibited acts through aiders and abettors," *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *accord id.* at 13 (ex-

plaining that injunctions do not bind "persons who act independently and whose rights have not been adjudged"). DOAH is not identified in interest with AHCA and is hardly an aider or abettor of AHCA. DOAH might conclude, therefore, that the injunction does not bind it and that, absent a binding injunction, it is bound to apply and enforce state law. AHCA would then be powerless to prevent DOAH's application of those parts of the statute that this Court determined to be preempted.

Other than provide DOAH a copy of the Court's injunction and urge DOAH to comply with it, it is unclear what steps AHCA might take to ensure compliance with the injunction. And it is also unclear what steps AHCA must take if DOAH ignores the injunction, applies the statute as written, and enters a final order that applies a clear-and-convincing-evidence standard or awards AHCA recovery from future medical expenses. In some cases, it might be impossible to determine what amount DOAH would have awarded if DOAH had applied the statute in compliance with the Court's injunction. For example, if DOAH concludes that the petitioner failed to produce clear and convincing evidence, and therefore denies the petition, AHCA would not know whether the same evidence would have satisfied a lesser standard. It is unclear whether, in such cases, AHCA must forego the award altogether and thus risk a violation of federal law for failure to obtain *any* recovery for medical assistance provided to a recipient. *See* 42 U.S.C. § 1396a(a)(25)(B).

Because it does not comply with Rule 65(d)(1), the Court's judgment must

be vacated. While vacatur is required because the judgment cannot be amended to comply with Rule 65(d)(1) while enjoining actions that are within AHCA's statutory control, if the Court declines to vacate the judgment, the Court must at least amend its judgment to describe in greater detail the acts within AHCA's control that the Court required or restrained. *Goble*, 683 F.3d at 950; *see also Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1409–12 (11th Cir. 1998) (concluding that an injunction prohibiting a blood bank from contacting any person who appears on another blood bank's donor lists was vague because the enjoined party "had no way to determine whether a given member of the public might happen to appear on [donor lists] not in [its] possession"). Such necessary detail would enable AHCA to comply with this Court's injunction with certainty, and to avoid the severe consequences that properly attend the violation of an injunction entered by a federal district court.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(K), AHCA respectfully requests oral argument of one hour to further illuminate the complex matters presented in this motion.

WHEREFORE, AHCA moves the Court:

1. For the alternative reasons set forth in Parts I and II, to reconsider the conclusion that federal law preempts Florida's requirement of clear and convincing

evidence, and to alter or amend the Amended Judgment (ECF No. 41) to vacate all declaratory and injunctive relief founded on that conclusion;

2. For the reasons set forth in Part III, to vacate the Amended Judgment (ECF No. 41), including all declaratory and injunctive relief, as applied to settlements and other recoveries obtained by recipients on or after October 1, 2017;

3. For the reasons set forth in Part IV(A) and (B), to vacate the Amended Judgment (ECF No. 41) in its entirety; and

4. For the reasons set forth in Part IV(A) and (C), to alter or amend the Amended Judgment (ECF No. 41) to state the terms of the injunction specifically and to describe in reasonable detail the acts required or restrained.

Respectfully submitted,

/s/ *George N. Meros, Jr.*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

Counsel for AHCA certifies that AHCA has complied with the attorney-conference requirement of Local Rule 7.1(B). Plaintiff opposes the relief sought.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Counsel for AHCA certifies, in reliance on the word-processing system used to prepare this memorandum, that this memorandum contains 8,000 words.

/s/ *George N. Meros, Jr.*
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GIANINNA GALLARDO, an incapacitated person, by and through her parents and coguardians, PILAR VASSALLO and WALTER GALLARDO,	
Plaintiff,	Case No: 4:16cv116
v.	Tallahassee, Florida April 11, 2017
ELIZABETH DUDEK, in her official capacity as secretary of the State of Florida Agency for Health Care Administration,	
Defendant.	

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES DISTRICT JUDGE
(Pages 1 through 50)

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P R O C E E D I N G S

(Call to Order of the Court at 2:00 p.m. on the 11th day of April, 2017.)

THE COURT: Good afternoon. This is Judge Walker.

We are here in case number 4:16cv116. We have cross motions for summary judgment. I noticed this hearing to address some of the -- or part of the case.

Specifically, who's going to speak for the plaintiff?

MR. GOWDY: Your Honor, this is Bryan Gowdy on behalf of the plaintiff. Also with me is Meredith Ross, an attorney in my office. And I believe Mr. Faglie is on the line, but I will be speaking for the plaintiff.

THE COURT: Thank you. Who will be speaking for the defendant?

MR. BOLER: This is Alexander Boler on behalf of the Agency for Health Care Administration.

THE COURT: What we are going to do is, I'm going to -- each time y'all speak, you need to identify yourselves for the court reporter so she can get a good record. What I'm going to do is, I'm going to have a series of questions for counsel. Each time I ask a lawyer a question, I'll give the other side an opportunity to respond at that point, and then once I get through my questions, I'll let each side, to the extent you wish to make some closing arguments, make

some closing arguments. I suspect we'll take a break after I ask my questions and then when we return from the break, I'll give each side an opportunity to sum things up.

I do handle the hearings this way for a reason, which is nobody is entitled to a hearing. I have a hearing when I have questions and I find it useful to have the lawyers have the benefit of my questioning before they sum up their case because that way you know what some of my concerns are and can direct your remarks as is appropriate based on my concerns.

Let me start with sort of a few smaller housekeeping matters. Mr. Gowdy, just out of interest, it has nothing to do with the ultimate resolution of this case, but as I understand it, there's nothing currently before me, which again doesn't alter the -- or I don't think factors in this Court's analysis here about how -- what the insurance limits were, how the settlement was arrived at. All I know is what the medical expenses were and what the total settlements are; is that correct?

MR. GOWDY: Yes, Your Honor.

THE COURT: All right. Just out of curiosity, do you happen to know what the limits were?

MR. GOWDY: I don't, Your Honor. Mr. Faglie may know that, but I don't have that information handy.

THE COURT: Mr. Faglie, do you know?

MR. FAGLIE: Yes, Your Honor. This case involves sovereign immunity of one of the defendants, which naturally would have a limit to recovery, and also insurance policy limits. I'm going off memory, I believe the insurance policy limits were around 50,000, but there was a considerable dispute concerning bad faith and so that yielded a greater settlement, throwing out the bad faith claims; but that issue was never tried.

THE COURT: I get it and that's why y'all probably didn't communicate it. It's not an easy answer about how the figure was arrived at. I just assumed it might have been something as simple as there was a million-dollar policy, folks settled for close to policy limits, everybody -- there is always a risk attendant to litigation and so they took a haircut to settle it for certainty; but that's clearly not the case. It's far more involved which is not unusual. There can be many different moving parts in a case and I understand that.

Again, I just ask that for my own edification given the limited nature in the record. Of course, some of these cases -- particularly the cases out of the Supreme Court that were cited, in some cases the parties stipulated to amounts and losses and apportionment and so forth. That did not occur here, and I'm not suggesting it should have occurred here or that Mr. Boler was obligated to stipulate

to anything. I was just interested in what the underlying facts were and the response is, they are complicated and I get it, so thank you for that.

Let me turn to, I'm going to call -- I call it the first issue and the second issue. It just keeps my life a little bit easier in terms of keeping things organized, for my purposes.

With respect to the argument regarding payment of medical expenses and calculating the amounts; that is, what portions you can go off after whether or not you include not only monies allocated for past medical expenses but future medical expenses as well. Mr. Gowdy, is it -- in terms of preemption, is it specifically that verbiage as it relates to that issue that's contained in the pertinent Florida statute section 409 -- and I'm having a -- it doesn't matter.

-- 409.910, subsection 17(b), it's -- if that were the one issue this Court were addressing, it specifically would preempt that portion of the statute that suggests that it would be calculated out of past and future medical expenses, am I oversimplifying it or is that great as it relates to that narrow issue?

MR. GOWDY: You have it correct, Your Honor. I think you would be striking the "and future medical expenses" from the statute, those three [sic] words.

THE COURT: And that --

MR. GOWDY: I mean, they can recover for past medical expenses that are paid by Medicaid, but it's the future medical expenses. Yes, I think you are not oversimplifying it. Thank you.

THE COURT: And the reason why it's clear why I'm asking that question, I have not ruled and I am not ruling and you're -- I think that's implicit in your arguments. I don't think you explicitly said it in those terms, but in terms of me ruling, if I were to rule in your favor on that issue, that's the relief that would be -- is being sought; correct?

MR. GOWDY: Right. That that part of the statute and those three words I just said should be enjoined from being enforced and declared preempted and unconstitutional.

THE COURT: All right. The other way I could have done this is define the relief, which you've now done that, you seek as it relates to that issue.

So I thought that was the case, but I didn't want to assume something and later on get a motion for reconsideration if that ultimately is what occurred.

MR. GOWDY: I guess the only thing I'd just like to clarify, Your Honor, is I think, you know, we don't really have this in this case, but if you have a case where they were trying to collect on past medical expenses not

paid by Medicaid then, you know, we would -- you might have -- I just think you want to be careful how you word whatever opinion you issue to leave that untouched because --

THE COURT: And we're, of course, getting a little ahead of ourselves because I'm not, again, suggesting or telegraphing I'm ruling one way or the other. I was trying to identify what the relief sought, but at the end of the day, Mr. Gowdy, you are not suggesting that I get to -- I'm not like the statutory czar, I don't get to go through regardless of the facts of this case and weed out any offending portion of this statute that may or may not be preempted and decide what parts are or are not impaired. I can only address those parts that are at issue as it relates to the plaintiff in this case; correct?

MR. GOWDY: That's correct, Your Honor. And I was just trying to clarify.

THE COURT: So your suggestion is, Judge --

MR. GOWDY: What I meant by "striking those three words," that there could be a problem in a future case.

THE COURT: Sure. And isn't that exactly what -- isn't that exactly what the Supreme Court did in -- I don't know if it's Wo or Wos, do you know?

MR. GOWDY: Oh, it's -- the correct pronunciation?

THE COURT: Right.

MR. GOWDY: We say Wos around here. I think but maybe Wos. Mr. Faglie may say it a different way. I don't know.

THE COURT: That's fine. I'll call it Wos.

MR. BOLER: Your Honor?

THE COURT: Yes, sir.

MR. BOLER: This is Alexander Boler for the Agency. The correct pronunciation is "Vos".

THE COURT: "Vos"?

MR. BOLER: It's from Ms. Aldona Wos, who was the Secretary of North Carolina's Health and Human Services Department.

THE COURT: That's helpful. No one will know since we've got a cold record and the court reporter is just going to spell it W-o-s, but I just as soon not mispronounce her name for the next half an hour.

So, of course, in *Wos*, which is part of the problem we have here, is the Supreme Court didn't go through and analyze what is or is not permissible under all circumstances. It just said a nonrebuttable presumption is a problem. And, in fact, the Court went so far to say that while there are these other examples, we are not suggesting they are or are not okay.

I mean, isn't that what the Court did in *Wos*, Mr. Gowdy?

MR. GOWDY: Yes, sir.

THE COURT: And I would need to do the same thing if I ruled in your favor as to that point, and that's "if" being the operative word in that statement, that I would need to make sure that I made plain I was only, which, of course, it seems to me is a legal truism, I'm only addressing the issue before me and no other; correct?

MR. GOWDY: Yes, sir.

THE COURT: All right. And I guess part of the concern is, Judge, this could come back before you and we just want to make sure we are not suggesting that this is the only problem with this statute. So I understand.

So, for example, one thing that seemed to me to be odd, and I don't think it's an issue before me in this case -- well, it's not because there is no judgment. This didn't go to jury trial. And I don't know how this, in fact, works. Maybe, Mr. Boler, this will be another one of those for my own edification. In *Wos* the Supreme Court says, "When there has been a judicial finding or approval of an allocation between medical and nonmedical damages in the form of either a jury verdict, court decree, or stipulation... that is the end of the matter." That's a wonderful statement to make. I don't know where that comes from. I don't know what the legal principle that resulted in that statement, and I don't see anything in the Florida

provision -- I see where the Florida law provides under 17(c) that the agency's processing systems reports are admissible as prima facie evidence in substantiating the agency's claim. But I'm loathed to see anywhere in the Florida provision -- for example, that it says, if a jury reaches a verdict, that it can't be revisited; that is, the apportionment, what the jury gives and medical expenses past, future, and pain and suffering has to be honored by the ALJ, that's really not at issue here, but neither was how we arrived at the $800,000 settlement.

So let me go ahead and hear from Mr. Boler. Just inquisitive minds want to know. That's not at issue here, I'm not going to rule on it, but is there anywhere under the Florida statutory scheme that it suggests what the U.S. Supreme Court said was self-evident in *Wos*; namely, that if there is a verdict, you are stuck with the verdict; that's the end of the inquiry? I don't see anything in the Florida statutory scheme that suggests that's the case. And, again, I'm not ruling on that, I'm just -- am I missing something?

MR. BOLER: Your Honor, I don't think you are missing anything. I do not believe there is anything in the Florida statute that says the jury verdict will control the agency's lien amount. However, in practice, in a few cases we have seen jury verdicts that have been presented to us and we have accepted that amount that has been allocated for

medical expenses by the jury. We have accepted that amount in satisfaction of our lien.

THE COURT: As long as we are there and that answered the question, that is the statutory scheme doesn't account or address that -- and this is exactly the kind of issue that Mr. Gowdy properly notes that the entire structure is not before me, and either this Court or some other Court may have to decide some other issue not currently before me as it relates to this statutory scheme. But you mention in practice, Mr. Boler -- and that was going to be one of my questions for you on my list of questions -- for purposes of determining whether or not the entire statute or a portion of the statute is preempted by federal law, does it make a wit of difference or should it make a wit of difference in terms of under the law and my analysis about what the practice of -- in terms of the application of this provision?

I mean, I understand that the venue lies in Leon County and it's going to be an administrative proceeding with an ALJ. And I've got to say that as a general rule when I've litigated as a lawyer with individuals of the state, I found they tried to proceed in good faith, and I found the times I litigated in administrative proceedings, that the ALJs tried to handle things in good faith and follow the law. But when I'm

evaluating whether something is preempted or not, what legal principle would suggest that if there is something wrong potentially with the language, that I look to see how individual ALJs may or may not apply the provision?

And I'm not being flip when I'm asking that, I'm just -- it seems to me that it's why maybe there is not as much mischief associated with the statutory scheme. But I'm not sure how that fixes the problem, if, in fact, there is a problem and I'm not suggesting there is.

So, that was a rather wordy question, but I think you understand what I'm asking, hopefully.

MR. BOLER: Your Honor, let me try and answer it this way.

THE COURT: That's always a scary start, but go ahead.

MR. BOLER: I think what's before you is a very narrow question and its --

(Pause in proceeding.)

THE COURT: Mr. Boler, did we lose you?

MR. BOLER: I'm here, I'm sorry.

THE COURT: No worries.

MR. BOLER: I'm trying to figure out how to word this. The best way --

THE COURT: This may be chalked up -- and it's a fair statement, Mr. Boler, for you to say, Judge, you don't

have to reach that to rule in our favor in this case, that our arguments do not turn on the application of the statute and we have not in our papers argued that. That instead we've suggested there is no -- it's not preempted because there is no conflict in why, and so, Judge, you don't have to reach that. And that's a perfectly fine answer and that's, as I've indicated with some of the questions I've asked, they may not be determinative of any issue.

The only reason why I ask the question was when we were talking about another issue, which is not before me; namely, whether or not what would happen in the event of a jury verdict and how does that work? You then said, one practice, Judge, we honor it. That's what prompted the question.

And so it's a fair response, Mr. Boler, that you're not relying on practice to sustain this statutory scheme or this particular component of the statutory scheme with respect to medical expenses. I understand that. And so in that sense, the question was unfair and I wasn't suggesting to you that you were relying on that principle or it was determinative.

I'm just trying to find out, based on your reference to practice whether or not -- well, let me do it this way. Number one, are you relying on that in any way in terms of your position with respect to the claims brought by

Mr. Gowdy, one; and number two, if so, what's the legal principle that would cause me to, as the Judge, turn to the actual practice, which may or may not be at issue because you may or may not be suggesting it's relevant for purposes of the issue before me?

MR. BOLER: Your Honor --

THE COURT: Maybe I just muddied the waters worse, but I was trying to make it more direct.

MR. BOLER: Well, I think I can answer it much more clearly now.

No, the agency is not relying upon the practice that it takes to defend what it's doing. Instead the statutes, the federal statutes and the Florida statutes are not in conflict. There is no need for preemption. So, no, we are not relying upon our practice.

THE COURT: I understand. Go ahead.

MR. BOLER: I believe I was a little confused when you first asked the question because you got into the practice of the ALJs, the administrative law judges, and the administrative law judges do different things so I don't believe that the practice of the ALJs is even something that the agency could defend. It goes up through the Florida court system.

THE COURT: Hold on one second. So this is not done in the administrative setting that is then appealed to

the first DCA? That's not how it works?

MR. BOLER: That is how it works.

THE COURT: It's a fair statement, Judge, that there is a difference, potentially -- although I'm not sure it is -- between the practices of the agency in terms of the position it takes vis-à-vis the statute versus those that are applying the statute of the ALJ, fair enough there would be a difference, but it is an administrative law judge that applies the statute and then is subject to review by the first DCAS which translates to their PCA, so there is really no review, but that's who does it; right? Setting aside my commentary on the first DCA, but; correct?

MR. BOLER: Yes, Your Honor.

THE COURT: All right. I didn't make such comments when I was a circuit judge, but it's a little bit easier now. They don't review my work.

MR. GOWDY: Your Honor, could I just briefly respond to those questions or did you want to wait?

THE COURT: Is this Mr. Gowdy?

MR. GOWDY: Yes, sir, Mr. Gowdy. Sorry.

THE COURT: Yes, sir, no worries. Go ahead.

And the court reporter is looking at me. I recognized your voice, but I'll do the same thing with Mr. Boler. I recognize both of your voices, but I just -- again, she just needs you --

MR. GOWDY: I'll be clear. This is Mr. Gowdy on behalf of the plaintiff.

We, of course, agree that the practice shouldn't inform the Court's decision. I do think, though, the Court's question about the jury verdict and your -- the language you are looking at and I'm looking at right now in *Wos* should inform the Court's decision here because I think it demonstrates that the legislature in writing this statute made really no attempt to comply with *Wos*, and we've layed that out in our brief as far as the timing of this statute with the *Wos* decision. But you pointed out an example here where the statute simply doesn't do what *Wos* says, and I think that is informative for, you know, all the arguments in the case.

THE COURT: Let me stay with you, Mr. Gowdy, and ask you -- and again, I want both sides to understand both sides will have a full and fair opportunity to sum things up, excuse me, at the end.

Separate and apart from the preemption argument, and I'm talking about what I'll call issue two now, which is the general scheme and by "scheme" I mean the burden of proof, who bears the burden and so forth -- the statute collectively is preempted. And what's led me to this question, Mr. Gowdy, is your last comment that the -- look at the statute as a whole.

But separate and apart from preemption, you've asserted -- and I understand why you focused your papers on other components. But you in a limited way address due process. Your -- when you say there's a due process problem separate and apart from preemption, I assume you're arguing a procedural as opposed to substantive due process problem?

MR. GOWDY: Correct. Yes, Your Honor. And this is Bryan Gowdy on behalf of plaintiff; yes, Your Honor.

THE COURT: And --

MR. GOWDY: Just to be clear, though, our second argument is based first on preemption and then on due process. We don't think --

THE COURT: I thought that's what I --

MR. GOWDY: -- the statutes and the clear and convincing burden of proof comply with *Wos* and other federal decisional law and the federal statutes.

THE COURT: I thought -- hold on one second. I thought that's what I just said. I was trying to separate out the two. But with the due process, what I need for you to articulate for me, because I'm trying to break this down in small parts for my benefit, and I understand you and Mr. Boler are sophisticated enough to digest it all in one piece, but I'm going to break it down.

Help me to understand with procedural due process with notice, which I understand there to be notice here, an

opportunity to be heard, I'm trying to understand the contours of your procedural due process claim, and I'm familiar with case law that says if you really don't have an opportunity. So, for example, if it was a nonrebuttable presumption, it doesn't matter that you have notice because you don't have a meaningful opportunity to be heard because it doesn't matter what you say.

So I can grasp how there can be a due process claim here, but as it relates to this case now that there is not a nonrebuttable presumption, help me understand the contours of your due process claim.

MR. GOWDY: Bryan Gowdy. Yes, Your Honor.

We are not claiming notice here. What we are pointing out is that this is the plaintiff's property and the state disagreed with that, but it clearly, in our view, is the plaintiff's property. And the state is taking the position that we have to prove by clear and convincing evidence that property in our possession is, in fact, our property. And we cannot find any other statute, federal or state, that has ever imposed such a requirement on a person --

THE COURT: Well --

MR. GOWDY: -- to prove that the property in their possession is their property; not only to prove it, but prove it by clear and convincing evidence. And we, of

course, cite the two citations dealing with -- not property interest, but liberty interest. And those are -- property and liberty interest are protected by the due process clause.

THE COURT: But that begs the question, which is why I'm asking for the contours of the argument: What does the due process clause require other than notice and a meaningful opportunity to be heard? I'm trying to figure out what would be my analysis?

I don't get -- the due process clause as far as I understand it does not give the Court blanket authority to say, I think this is a bad statute. It has to be within the contours of a due process claim. So I just want to make sure I understand, and you articulate for me the contours of this due process claim. I get that it seems wrong to shift the burden, impose a burden -- and I'm going to ask Mr. Boler some questions about that in a minute -- but I just, I'm finding it hard to squeeze it into a due process claim and that's --

MR. GOWDY: Right. And I understand. And, Your Honor, first, I know I said it was procedural. I guess I would just point the Court to the two cases we cited on page 34 of our brief, *Cooper* and *Del Valle*. And I acknowledge those deal with liberty interest under the due process clause, but, you know, liberty interest and property

interest are both protected by the due process clause. And in those cases the Court found that a shifting of the burden of proof to the person with the liberty interest -- and it was a clear and convincing burden of proof that was shifted to that person -- that that violated the due process clause.

THE COURT: And what did the Court --

MR. GOWDY: So we are making the same argument --

THE COURT: I feel like I'm a dog chasing a tail, my tail. Why? What's -- and maybe that's -- I'd asked you to articulate the contours of your claim. Now I'm going to ask you to articulate the analysis of the Court in those cases. Because basically what I now know is, well, Judge, other courts have said there is a due process violation when you shift the burden and could take away somebody's liberty rights.

Other than that declarative statement, why does it violate the due process clause?

MR. GOWDY: Because, Your Honor, the -- it is an inadequate process to force a citizen to prove that they are entitled to liberty or to prove that they are entitled to their property. We don't -- the due process -- that is not giving someone due process. Generally, if the state is going to take your liberty or take your property, due process requires that the state prove that.

And I guess you say that's a declarative

statement, but I see no difference. If I had -- if I had a car in my possession, Your Honor, and the state came and said, We are going to take that car unless you prove by clear and convincing evidence that that is your car, I don't think that's adequate due process. The process should be for the state to prove, by at least a preponderance of the evidence, that that car doesn't belong to you.

I mean, think of a world where the state could come up and take any of you property, take your house, take your shoes, take your clothes, you name it, by saying unless you prove by clear and convincing evidence, we are going to take that property. That's what's going on here. This is property in our possession. We won it in a lawsuit and they are saying unless we prove by clear and convincing evidence, they are going to take it away.

I think it's no different than those analogies. And I think any of those examples I just gave you, if the state came up and said they were going to take your house, Your Honor, if you didn't prove by clear and convincing evidence it was your house, I would be arguing on behalf of that homeowner that that violated due process.

THE COURT: Well, I think you've sort of done what I was asking, which I don't think was an unreasonable request for a Judge to say, articulate your argument other than to just say it's a due process violation because it

violates due process, which is what I sort of heard initially.

And I think what I'm hearing is, Judge, the whole concept of due process, particularly, whereas here you are taking someone's property or in the cases you cited you are taking away somebody's liberty interest, process does not entail we are going to take it and then give you an opportunity to retain what we didn't have a right to take to begin with and it turns its entire process of due process on its head to require somebody to not only prove, but to meet an elevated standard of proof to retain what is already theirs is what I more fully heard you develop as your -- when I asked you to explain yourself.

Is that more of a fair characterization of why it runs afoul of due process?

MR. GOWDY: It's a better articulation than I gave you; yes, Your Honor.

THE COURT: All right. Fair enough.

Let me find out -- and I'm going to have some questions in this regard -- with respect to the preemption argument as it relates to the what I'll call the general statutory framework under subsection 17, just as I asked you with respect to what I called issue one and you said, Judge, we are asking you to enjoin them and declare that the term -- the phrase -- the words, "and future medical

expenses" cannot be -- or are preempted based on the federal law.

Same idea with respect to sort of what I'll call issue two, the burden of proof and so forth, is it the entire statutory scheme under subsection 17 that you are suggesting preempted, or are there parts of it? In other words what I'm asking is, Judge -- or actually, let's reverse this. Mr. Gowdy, you are my law clerk. I'm telling you I find in favor of the plaintiffs. I'm asking you to draft, as my law clerk, to draft a proposed order. And in the relief section as it relates to this aspect of your claim, the relief that I would be ordering as it relates to issue two; namely, the burden of proof and the shifting burden and so forth.

MR. GOWDY: Your Honor, this is Bryan Gowdy.

We would ask you to enjoin the application of the statute insofar as this, one, requires the plaintiff to bear the burden of proof and, two, insofar as that is a heightened burden of proof that is clear and convincing. It's our view that that burden -- if the state wants to take property from the plaintiff, the state should bear the burden of proof.

And at the very least, the burden should not be a clear and convincing one on the plaintiff. So we are asking primarily that the burden of proof be on the state and,

alternatively, that burden not be a clear and convincing one.

THE COURT: What says you to the observations in a number of cases that have dealt with similar statutes, Mr. Gowdy, that if you settle a case? The state has absolutely no information about the case, they're not involved, they weren't involved in the mediation, they don't -- can't possibly know what the minimal impressions of the lawyers on both sides are. And so setting aside any burden or any other issue, we've -- *Wos* says we've got to give you -- it's not a one-size-fits all. We are giving everybody a hearing, but, Judge, it doesn't run afoul of *Wos* or -- in terms of its analysis or due process to say the folks with all the information need to come forward and explain why they did what they did, again, setting aside the heightened burden of proof.

As it relates to preemption, why isn't that a persuasive argument just in terms of the burden shifting?

MR. GOWDY: Sure. Yes, Your Honor. This is Bryan Gowdy.

The -- two responses. One, Your Honor, the state is actually -- has the ability to pursue these claims directly from the tortfeasors. And, in fact, we even suggest that they really have no business coming in at this late stage after not having done that. So they made the

choice to put themselves in this position. The federal statute clearly gives them the right to pursue the tortfeasors directly.

Number two, I think the problem you are constructing, Your Honor, is in almost any type of civil case in that -- and, you know, if we have a personal injury case, for example, the nature of the plaintiff's injuries are going to be solely within the plaintiff's domain, you know, his doctors and his medical records, and he knows how the pain feels and things like that. And yet what -- we don't let that analysis affect the burden of proof. What we do is we allow for discovery.

And it's just -- you know, our position, again, is that the state is taking property and therefore it's just as a matter of due process the state should be required to prove why they are entitled to take that property from us.

THE COURT: And let me ask you this, Mr. Gowdy.

MR. GOWDY: And I understand -- I'm sorry. I didn't mean to interrupt. But if I could --

THE COURT: Go ahead.

MR. GOWDY: -- finish?

My finishing thought is I understand the practical problem you have pointed out, but there's another mechanism to deal with that. And that is to, you know, require the personal injury plaintiff in this case to be subject to

discovery. It's not to shift the burden of proof.

THE COURT: Well, that was going to be my next question. And Mr. Boler may have some insight to this as well.

What is the -- in terms of the application of subsection 17, it suggests that there's a -- the exclusive method for challenging it is with the division of administrative agency. So I'm assuming that agency's rules apply to discovery in the limited time frame. Is there no discovery that's had?

And I maybe wrongfully assumed. I just assumed since they threw it to the Division of Administrative Hearings, the same rules that apply in any DOAH proceeding with respect to discovery applied. But I may have that wrong and may be assuming something falsely.

Mr. Gowdy, do you know?

MR. GOWDY: Your Honor, if you don't mind. I would defer to Mr. Faglie on this. This is really his area of expertise and I think he could answer it better than me.

MR. FAGLIE: Yes, Your Honor. This the Floyd Faglie.

And let me add to Mr. Gowdy's comments. First, concerning the underlying litigation, the Medicaid Statute 409.910 provides numerous opportunities for AHCA to participate in the litigation against the third party,

including requiring the Medicaid recipient to notify AHCA of the action, provide copies of the complaint and relevant pleadings. Those requirements are codified in paragraph 11 of the statute. There is numerous notice requirements.

Further, the Medicaid recipient is required both by federal law and also by 409.910 paragraph 7 to cooperate with the agency in their pursuit of the third party. There are numerous requirements -- a great deal of statutory obligation on behalf of the Medicaid recipient to provide information to AHCA to make assessments concerning the case.

Now, once the case settles and we are in the Division of Administrative Hearings under 17(b), there are discovery procedures in which the agency could easily have depositions, make requests for production of documents so they can make their assessment concerning the value of the damages, the strengths and weaknesses of the case. I don't think there's any way to really hide the facts and not provide AHCA ample opportunity to bring their claim, but the burden should be on them to prove what portion of the Medicaid recipient's property they are entitled to.

THE COURT: Mr. Faglie, is this -- so it's just governed by the Administrative Procedures Act; this is, the discovery?

MR. FAGLIE: The discovery, yes, and the Administrative Procedure. And the Administrative Procedures

Act adopts to great extent the Florida Rules of Civil Procedure.

THE COURT: All right. Mr. Boler, you may have many things that you want to add along these lines, but with respect to the discovery and my question in that regard, it's -- there is a mechanism for discovery; is that correct?

MR. BOLER: Yes, Your Honor.

THE COURT: All right. And is there any dispute, Mr. Boler, in this case that notice was, in fact, provided consistent with Chapter 409 to Medicaid; that is, that the plaintiff had initiated litigation and so forth?

MR. BOLER: There is no dispute regarding that. The plaintiffs did provide notice to the agency.

THE COURT: All right. Let me turn -- well, I don't know that I -- oh, I'm sorry, Mr. Gowdy. I don't know if I cut you off. You had talked about the shifting burden and the heightened burden of proof. You said one and two -- and I have the tendency to interrupt lawyers, which --

MR. GOWDY: No, Your Honor. I had stated what the relief was.

THE COURT: Okay.

MR. GOWDY: Primary relief on this second issue in our secondary relief.

THE COURT: All right. Let me find out something, then, from Mr. Boler. Mr. Boler, if this statute was

written exactly the same -- and I understand this is a hypothetical -- but instead of saying "clear and convincing evidence"; that is, in order to successfully challenge the amount payable to the agency, the recipient must prove by clear and convincing evidence that a lesser portion should be allocated. What if it said "beyond a reasonable doubt"? Would that change this Court's analysis in any way with respect to whether or not there was, A, a due process problem or, B, a preemption issue?

(Pause in proceeding.)

MR. BOLER: I'll start with preemption. I don't believe it would change the question regarding preemption by the federal Medicaid statutes. Obviously, the due process clause could potentially preempt it if there is a due process problem. But regarding the federal Medicaid statutes, if it were beyond a reasonable doubt, I believe the Medicaid statutes would be satisfied.

THE COURT: Well, let me stop you there, Mr. Boler. Help me to understand what the difference between requiring me to prove beyond a reasonable doubt how something was allocated or should have been allocated or what's fair. Is that not a de facto nonrebuttable presumption?

I guess what I'm asking is: At some point, I mean, it may not be a skunk, but it sure smells like a

skunk. It's emitting the same noxious order. So if we are not going to allow there to be a skunk, I mean, it may be some variety or hybrid that was created in a lab, but if it basically walks like a skunk and smells like a skunk, I just find it hard to understand how based on the construction in *Wos* that a -- it would be acceptable for the state to place such a high burden on the plaintiff and it would still square with the federal statute.

Is there a meaningful difference between "beyond a reasonable doubt" versus "nonrebuttable presumption"?

MR. BOLER: Yes, Your Honor, there is. A nonrebuttable presumption is precisely that, it's nonrebuttable. A Medicaid recipient could not overcome that burden because there would be no way to do this.

THE COURT: Setting aside due process, if -- it sounds to me like so long as it's rebuttable, it doesn't mater how high the standard, it doesn't matter what the requirements are, the state could make a challenge to the apportionment as onerous as it wants so long as there is technically a window of opportunity. Is that what AHCA's position is?

MR. BOLER: Setting aside the due process questions -- I mean, we can look at the *Wos* case from the U.S. Supreme Court which found an irrebuttable presumption was not -- I'm trying to remember the word that they used.

It held that an irrebuttable presumption would not go along with the federal anti-lien statute. And so I think they put, you know, sort of the spirit of the anti-lien statute, an irrebuttable presumption will just not work.

I could see that a standard above clear and convincing, such as beyond a reasonable doubt, may not in the minds of the U.S. Supreme Court comply with the anti-lien statute. But we don't know one way or the other based on case law.

THE COURT: Well, and that's why I'm here; right? Isn't that what -- and the reason why I'm asking the question, and again, I'm not being flip -- same thing I said to Mr. Gowdy before. It seems to me that because *Wos* says it can't be an irrebuttable presumption, here's some alternatives, but they say without equivocation in *Wos*. But we are not saying any of these other statutory schemes are okay, we are just saying there are other statutory schemes, so there's other ways of doing it, which left open the possibility of this lawsuit, quite frankly.

And at some point, I guess the question is, isn't -- doesn't a scheme create such hurdles and makes it likely that the state can recover that to which they are not entitled to lien, and at some point the state crosses the line based on the construction -- I mean, the statutory scheme such that it runs afoul of the federal provision

because the -- after all, we start off with the proposition that it's -- there is no lien; right? There's an anti-lien provision.

The fact that the state can get medical expenses back is an exception to the federal rule that says thou shall not lien the money. And so if at some point the scheme is such that it creates such impediments to the plaintiff or the injured party that the government is almost -- is more likely than not to get far more than it's entitled to under the federal -- the exception to the federal anti-lien law -- which is what? Subsection P; right? I think that's right. It doesn't matter. The anti-lien provision I thought was P, but maybe I'm wrong. I thought it was 1396p(a)(a).

And it seems to me that's the issue -- when I say "issue," the second issue. I talked to you and Mr. Gowdy about issue one being future and past medical expenses; it seems to me is the bigger issue. Issue two, whether or not this statutory scheme, the burden -- the shifting of the burden and the burden itself crosses that line; namely, it creates a scheme whereby the government is designed in a statute to get that which it's not entitled to get.

And I know you say, no, and we didn't cross that line. Mr. Gowdy believes that the state crossed that line. But isn't that, in essence, what's before me as it relates

to issue two? And if I'm totally missing the mark, you can let me know. I'm not ruling one way or the other. It just seems to me that's the issue before me.

But, Mr. Boler?

MR. BOLER: Your Honor, yes. First, the anti-lien statute is 1396p(a)(1). You had that correct.

Setting aside preemption -- I'm sorry. Setting aside the due process argument, I believe there could be a standard that is so high that it is tantamount to an irrebuttable presumption and, therefore, would not be in compliance with the federal anti-lien statute.

THE COURT: All right. Fair enough, Mr. Boler. That's what I had asked to begin with.

And so the question becomes for you to articulate to me now on the record -- and I would phrase it that it's a de facto nonrebuttable presumption. You've taken it out, but you've effectively created a nonrebuttable presumption. Explain to my why shifting the burden to the plaintiff and applying a standard that's only generally used in penal statute or quasi penal statutes does not do exactly that, create a de facto nonrebuttable presumption?

And I'm not ruling that; that's not a declaration; that's a question. Why is the practical effect of a clear and convincing standard not exactly that, a de facto irrebuttable presumption?

(Pause in proceeding.)

MR. BOLER: Your Honor.

(Pause in proceeding.)

MR. BOLER: I can point to the great litany of cases that have gone through the ALJ process with the clear and convincing standard and which have candidly exceeded the burden of proof required.

I know that may not be sufficient to answer Your Honor's question.

THE COURT: And that's fine. So you are saying, Judge, we'd just reiterate the cases we've cited that have suggested that the clear and convincing -- you've given them a point of entry, they've got an opportunity to fix it, that's okay and it's consistent with *Wos*; and there certainly are cases that have held that. *Wos* itself recognized that there were statutory schemes that have been upheld by other courts. And while they didn't explicitly sanction all of them, they recognize they existed and it may be okay. And that's a fine answer, Mr. Boler, you don't have to create another answer or something separate.

I just -- the reason why I asked the question is if there is something you want to add to it beyond that, that's fine. But I'm not suggesting that there is something you need to add. It's only if you wish to.

MR. GOWDY: Your Honor, this is Mr. Gowdy. I had

something I can add.

THE COURT: Hold on, Mr. Gowdy. Let me hear if Mr. Boler has anything else he wants to add to that.

MR. GOWDY: Yes, sir.

THE COURT: I understand, Mr. Boler, that there's ample authority that suggests this is fine and one reading of *Wos* and their construction that if you've got a chance to argue your position, and it's not preempted and doesn't run afoul, and I understand -- and I've read your papers, so I follow that reasoning and logic. I just didn't know if there is anything else in addition to that you wanted to add.

MR. BOLER: No, Your Honor, except that the numerous types of cases cited by the U.S. Supreme Court and, indeed, in Pennsylvania putting the burden on -- I'm sorry. The Pennsylvania case is *Tristani versus Richmond*. Putting the burden on the Medicaid recipient was not held to be preempted by the federal Medicaid statutes.

THE COURT: I understand.

And, Mr. Gowdy, I'm going to have another question for Mr. Boler in a second, but you wanted to chime in. Go ahead.

MR. GOWDY: I just didn't want to get lost in this discussion that our argument is not just on the heightened burden of proof. It's also the formula that is used that

is -- creates the presumption. And I think any time you evaluate a presumption, Your Honor, you have to see whether or not --

THE COURT: Mr. Gowdy, Mr. Gowdy. Let me cut you off. And I didn't mean to suggest that it was in a vacuum. I think -- and you are right, I didn't mean to limit your argument.

If you start with the assumption you have a formula that already gives the state more than it clearly would be entitled to based on Supreme Court precedent; that is, something beyond -- they are getting money from something other than medical expenses paid. If you start with that proposition, they're already getting -- starting with this presumption they are going to get more than they could get under the federal statute. And then you create this heightened burden and all these hurdles to counter that presumption that we are starting with them getting more than they are entitled to. It's the combination of the entire framework that makes it run afoul of the federal provision; correct?

MR. GOWDY: Correct. And if I could just articulate it with a little different twist --

THE COURT: Sure.

MR. GOWDY: -- to maybe help illustrate this for Your Honor?

Back on the *Wos* case, it faulted the state there for providing, quote, no evidence to substantiate its claim that the one-third allocation is reasonable in the mine run of cases. So let's suppose in this case, Your Honor, that Mr. Boler and the state had come forward with evidence that their formula is correct in 95 percent or 90 percent of the cases, that they had provided that in the legislative record. And if you had that type of evidence, Your Honor, then I would think that you could have a formula with -- even or beyond a reasonable doubt standard.

Again, we didn't get to brief this because of the page limit, but the common law, I think if you'd look, presumptions were always grounded in some type of empirical evidence or at least some type of empirical common sense. This formula is completely arbitrary which is the starting point. And so to have that as the benchmark when there is no evidence in the legislative record that -- to quote the Supreme Court, that this is reasonable in the mine run of cases, that's what runs afoul of the federal Medicaid statutes in our view. They have to start with a benchmark that is reasonable in the mine run of cases, and then you can put some burden of proof, perhaps, on the plaintiff like you would in any common law presumption.

But we are starting here with something that is unreasonable. There is no basis. There's been nothing

presented in the legislative record or this Court that this formula has any type of rational connection to the allocation for a -- for any series of cases.

THE COURT: Mr. Gowdy, whose burden was it and why to establish that as part of this record? You've challenged the statute and said that it's arbitrary. So by saying it's arbitrary without any support it was up to the government then to come forward with evidence to show it's not arbitrary?

MR. GOWDY: Yes, Your Honor. I mean I can't -- yes.

I think the legislature needed to put that in the legislative record as to where -- what was the basis for this formula that was devised. And there is nothing in the legislative record nor is there anything in this record before the Court. We are not -- we are contending it's a completely arbitrary statute. You know, and absent any evidence supporting it I think our argument is correct.

THE COURT: All right.

MR. GOWDY: And we can't prove a negative, Your Honor. So they've got to come forward with some evidence that this formula applies in a mine run of cases.

THE COURT: Let me turn to Mr. Boler and find out from you, Mr. Boler. And perhaps it's just because this is what I did for a living for a while, I'm a little bit

confused as -- and this stems from Mr. Gowdy's comment about the formula. When I look at the -- give me one moment.

And now I'm turning, I guess, to -- is it section 11 that has -- the formula is 11F; is that right? I think, yes.

MR. GOWDY: Yes, Your Honor.

THE COURT: I'm a little bit confused just from the get-go. We've got the Florida Bar, which regulates the lawyers in the state, and has for decades and decades, said a plaintiff's lawyer can charge a 40 percent fee after an answer is filed, up to a million dollars; then the next million dollars it goes down; and a third -- it goes from 30 to 20 percent; and so forth. And it can go from 33 and a third to 40 percent, all that triggers that is an answer that's filed. So it's essentially in the very beginning of the suit unless you are in federal court where the defendants want to file 87 motions to dismiss and it takes two years to get an answer. But setting that aside, as a general rule you get to an answer in a case pretty quick.

Yet, I can't help but notice under 11F that the state chooses not to intervene; the state chooses not to pursue the claim, which it could itself separate and apart; you piggyback and let a plaintiff do the work; and then the state creates a formula knowing that there is not a pro rata allocation of attorney's fees. But the state's -- not only

are we going to make you do all the work -- meaning the injured party. Not only are we going to make not the state but the plaintiff's lawyer that represents the injured party take all the risk -- and as somebody who has eaten hundreds of thousands of dollars in costs in lawsuits, I'm sensitive to that cost to the Plaintiff's Bar. Not only does all that occur -- so we are going to piggyback off their claim. And I can think of some other words other than "piggyback" that might be less flattering.

So we are going to let them do all the work. And then before we even calculate anything, we've created a formula where we are going to force the injured party to take less in a recovery because we are not going to pay a pro rata share of attorney's fees.

Let me start there. That's the first thing about the formula that struck me as odd. And perhaps it's because I actually practiced law and mechanically know how the fees work. So help me to understand, how does that work and how is that not automatically diminishing the injured party's recovery inconsistent with the federal statute? Because it's got to come from somewhere; they are going to have to make up that 15 percent in fees from somewhere which means it's either going to come out of the medical expenses or, oh, we'll just take it out of the pain and suffering -- which we already know from *Ahlborn* isn't the case.

So we start with a statutory scheme that already requires the plaintiff to take a hit; that is, the injured party, which seems to be inconsistent with the federal anti-lien provision. So how does that survive a challenge? Just from the get-go, setting aside the percentages in terms of we are basically going to set aside a third of what's left, what do we do with the fee?

MR. BOLER: Yes, Your Honor, this is Alexander Boler.

Typically, in a civil action in America a party bears its own attorney's fees. He can sue for his damages and he'll recover -- you know, if he has -- you know, hopefully if he has a million dollars in damages, hopefully he recovers a million dollars. And that represents all his damages --

THE COURT: But the -- Mr. Boler, the injured -- I understand that, that that's the risk as between the plaintiff and the defendant. But you are not the defendant. You didn't run the red light. You are the state that's freeloading off the work of the plaintiff's counsel.

So help me to understand, in terms of paying for the fees -- I mean, there's a reason why you cut out the fees because you recognize that the plaintiff has incurred fees. I mean, the statute clearly is not written or designed to aid the injured party. I mean, the state offers

up, the legislature, in drafting it that they are going to reduce what -- the amount that you can then go and collect from by the fees because there had to be some fees. But it seems if you are going to do that, it seems to me to take out 25 percent is completely arbitrary because it doesn't take cognizance of what every -- and I don't know. Maybe Mr. Gowdy works for free, I never did.

Every plaintiff's contract I've ever seen or any lawyer or firm I've worked with, the fee is 40 percent after an answer is filed. Yet we have a statutory scheme that says we don't care what it is. We are just going to pick a random sum, which means it's coming out of the pot of money. And wasn't that the very issue that was discussed in *Ahlborn*, which is you can't get your -- and in that case it wasn't attorney's fees, but it was that the state can't recover, under this exception to the anti-lien provision, money that they are not otherwise entitled to under the exception which would be for medical expenses.

Yet before we even get to that issue, we've got a statutory scheme that's making the plaintiff take more than their pro rata -- paying more than their pro rata share of their attorney's fees which means you're further reducing some other pot of money, whether it's future medical expenses, past medical expenses, or pain and suffering. Why is that not -- I'm finding it hard to understand why that's

not an issue.

(Pause in proceeding.)

THE COURT: Actually, what we are going to do is -- my court reporter just gave me one of her polite looks, which is we've been talking for over an hour. So I'm going to put y'all on hold and I'm going to take a five-minute break and we'll come back as soon as -- I'm going to take a five-minute break for the benefit of the court reporter. Thank you.

(The telephonic hearing recessed at 3:09 p.m.)

(The telephonic hearing resumed at 3:16 p.m.)

THE COURT: We are back on the record. Thank you very much for holding.

Do I have Mr. Gowdy?

MR. GOWDY: Yes, sir.

THE COURT: Do I have Mr. Boler?

MR. BOLER: Yes, Your Honor.

THE COURT: All right. Mr. Boler, we had left you with a question pending when we took a break.

Go ahead.

MR. BOLER: Your Honor was pointing out that the formula under the Florida statute might require a Medicaid recipient to pay a disproportionate share of his or her attorney fees out of his or her recovery. And if we look at the *Ahlborn* case, we see that the Court was concerned with

what all the damages represent. So in a civil action a Medicaid recipient may recover medical expenses, may recover pain and suffering, may recover lost wages. The Court was concerned with whether or not the Medicaid lien could extend beyond the portion for medical expenses.

So admittedly the *Ahlborn* court did not address how attorney fees factor into it. Attorney fees are not a damage recovered under the American -- you know, in a typical lawsuit, attorney fees are not a damage recovered. There may be statutory cases that allow attorney fees as a damage or allow attorney fees to be recovered. In a typical case that's not true. But in --

THE COURT: So let me -- Mr. Boler, let me have you pause there. So I want to make sure I understand this. So based on the concern only being the allocation for damages, it would be okay for the state to sit back, not intervene, not file it's own action, piggyback off of plaintiffs, and then plaintiffs are going to bear the full attorney's fees. And that would not run afoul of the anti-lien provision at issue?

MR. BOLER: Your Honor, the *Ahlborn* court expressly says that because there are other Medicaid statutes -- and it cites to sections 1396a and 1396k. Because these federal statutes require forced assignment and authorize it, it creates an exception to the anti-lien

statute. So the anti-lien statutes would not bar a lien that just goes after the medical expense portion recovered by the plaintiff.

THE COURT: A couple of things. First, Mr. Boler, don't I have to narrowly construe an exception? So if there's a provision that says you can't -- thou shall not lien property of a Medicaid recipient, but there's a narrow exception, in determining whether or not there's preemption, don't I have to narrowly apply that exception or I apply it in such a way that it effectively undoes the stated purpose of the anti-lien coupled with the narrow exception? I mean is it -- is that not the case?

(Pause in proceeding.)

THE COURT: That's okay. That's more after a rhetorical question.

Let me turn to Mr. Gowdy. Mr. Gowdy, up to this point and you may think it's irrelevant, the attorney's fees, I don't know. But if you wish to weigh in on that, you can.

MR. GOWDY: No, I don't think it is irrelevant. I think Your Honor -- it's consistent with our argument that the -- if you go back to *Wos*, what the Court suggests there is what Mr. Boler said. What we are trying to figure out at the end of the day is what is the reimbursement for the medical expenses paid by Medicaid? And how do we determine

that amount? And if we don't have a stipulation or a jury verdict -- which is where we are at -- how do we determine that amount? And what the -- North Carolina tried to do in *Wos* was to just come up with some formula that was arbitrary and then make it irrefutable.

And now, Your Honor, what you are pointing out about the attorney's fees is -- shows that this formula is arbitrary. Because as you point out, it's not grounded in the reality of what attorneys charge in the state of Florida for the fees. It's not at all. And you can just point to the Florida bar rules that provide, you know, presumptively reasonable amounts and you recited them correctly.

So this is more evidence that there's -- I shouldn't say "more evidence." It's more of a showing that there is no evidence that supports that this formula is grounded in any way to accurately determine the medical expenses paid by Medicaid.

And so in that sense this case is indistinguishable from *Wos*. Now, what Florida tried to do was kind of slightly move the ball slightly down the field, and so while it's not an irrefutable presumption, but it's kind of as close as you can get to one. But the bench -- and if you go back and read *Wos*, they talk about how there should be the use of objective benchmarks. This is not an objective benchmark. This is one pulled out of thin air.

And I think your attorney fee, the things you focus on, is just more of a showing that it's pulled out of thin air.

And so in my mind, any shifting of the burden of proof violates federal law because of the benchmark we are starting with is in no way related to what we are ultimately trying to get to which is the medical -- the reimbursement in the settlement for medical expenses paid by Medicaid.

THE COURT: All right. Let me -- and I know we've got cross motions for summary judgment, but the way I'm going to do this is, Mr. Gowdy, I'm going to start with you and anything you want to add in light of my questioning today, I'll give you a chance to elaborate. I'll then turn to Mr. Boler, anything he wants to add. And you don't need to repeat what's in your papers, but again if there is something you want to add in light of my questioning.

MS. BOLER: Your Honor, I think I've answered all of your questions. So unless the Court has further questions for me, I don't see the need to say anything more.

THE COURT: All right. Mr. Boler?

MS. BOLER: Your Honor, yes. At one point I believe Mr. Gowdy explained that there is an issue not before the Court, and that is beyond whether or not the federal statutes limit the agency to the past only or the past and future medical expense portion of a recovery. There may also be an issue, and I don't believe it's before

the Court in this case, as to whether or not that past only portion should be divided to all past medical expenses or the Medicaid only past medical expenses.

So, although the agency stands by its position that it's entitled to reimbursement from the entire medical expense portion of a Medicaid recipient's recovery, if Your Honor is going to limit it, I don't believe the question can come down to whether it's Medicaid only past medical expenses or all past medical expenses.

THE COURT: Anything further, Mr. Boler?

MS. BOLER: No, Your Honor.

THE COURT: All right. I thank you for your time.

I know, by the way, both -- all of y'all volunteered to come over, but I'm trying to set some things quickly in light of my trial calendar outside of the Tallahassee division. So thank you for appearing by phone with little notice. I hope to have an order out in the next ten days, if not sooner.

It was helpful to hear from counsel for both sides. I appreciate your hard work on the thoughtful papers you filed, as well as your thoughtful arguments today on the record. I'll do my best to get an order out in a timely fashion. I know both sides have been waiting on it, but y'all are at the top of the line at this point. So we'll try to get you it sooner rather than later.

So thank you very much. Is there anything further, Mr. Boler?

MS. BOLER: No, Your Honor. Thank you.

THE COURT: Mr. Gowdy?

MR. GOWDY: No, Your Honor. Thank you.

THE COURT: Y'all have a good day.

Court is in recess.

(The telephonic hearing concluded at 3:26 p.m. on the 11th day of April, 2017.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

__/s/ Megan A. Hague_____ 4/21/2017

Megan A. Hague, RPR, CSR Date
Official U.S Court Reporter

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CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

CMCS Informational Bulletin

DATE: December 27, 2013

FROM: Cindy Mann
Director

SUBJECT: Medicaid Provisions in Recently Passed Federal Budget Legislation

This informational bulletin describes Medicaid provisions in the budget agreement, HJ.Res.59, recently passed by Congress and signed by the President on December 26th. There are several Medicaid provisions included in this agreement.

Section 202 – Medicaid Third-Party Liability

The legislation makes three changes to Medicaid third-party liability law to affirm Medicaid's position as payer of last resort. All three changes would be effective on October 1, 2014.

First, it amends section 1902(a)(25)(E) to allow a state to delay payment for prenatal and preventive pediatric care for 90 days after the date the provider initially submitted a claim to the third party payer, if the state determines doing so is cost-effective and will not adversely affect access to care.

Second, it amends section 1902(a)(25)(F) to allow a state to delay payment for 90 days for services where child support enforcement is being carried out; however, the state could continue to make payment within 30 days, if it found that to be cost-effective and necessary to ensure access to care. These amendments modified mandatory exceptions to the requirement that State Medicaid agencies reject medical claims when another entity is legally liable to pay the claim. A state should reduce expenditures, to the extent that providers are fully compensated by insurance carriers, and should also reduce administrative burden, by having fewer claims to initiate against health insurance carriers.

Third, the legislation makes changes to sections 1902(a)(25), 1912 and 1917. The changes give states the ability to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses, and it establishes an option for states to place liens against Medicaid beneficiaries' liability settlements.

Section 1201 – Temporary Extension of the Qualifying Individual (QI) Program

The legislation extends the QI program through March 31, 2014 and allocates $200 million for that period. The QI program helps pay Medicare Part B premiums for certain low-income beneficiaries. Congress will need to act again before March 31st to ensure funding is in place for the remainder of the year.

Section 1202 – Temporary Extension of Transitional Medical Assistance (TMA)

The legislation extends section 1925 TMA through March 31, 2014. TMA provides continued medical coverage for certain families who become ineligible for medical assistance because of increased earnings. As with the extension of QI, Congress will need to act again to continue TMA beyond March 31st.

Section 1204 – Delay of Reductions to Medicaid DSH Allotments

This section makes two changes to Medicaid Disproportionate Share Hospital (DSH) payments. First, it delays the Affordable Care Act DSH reductions for two years. As originally passed by Congress, DSH reductions were to have gone into effect on October 1, 2013; instead, the legislation delays the reductions until the beginning of FY 2016 (October 1, 2015), but doubles the reduction that would otherwise have applied in that year. In light of the changes to the DSH reduction schedule, CMS will publish updated FY 2014 DSH allotments in the Federal Register early next year. Second, the legislation creates another special rule for calculating DSH allotments in FY 2023. The language included in the legislation is the same as the language in the statute which spells out special rules for calculating the FY 2021 and FY 2022 allotments.

The full text of the legislation can be found here:
http://beta.congress.gov/113/bills/hjres59eah3/BILLS-113hjres59eah3.pdf