No. _____

In the
Supreme Court of the United States

ALBERT A. DELIA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

E.M.A., a Minor, by and through her Guardian ad Litem, DANIEL H. JOHNSON, WILLIAM EARL ARMSTRONG and SANDRA ARMSTRONG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROY COOPER
Attorney General of North Carolina

John F. Maddrey*
Solicitor General

Gayl M. Manthei
Special Deputy Attorney General

Belinda A. Smith
Special Deputy Attorney General

North Carolina Department
of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6900
jmaddrey@ncdoj.gov
* Counsel of Record

July 2012

QUESTION PRESENTED

The Medicaid Act requires participating States to seek reimbursement from third-party tortfeasors for health-care expenditures they made to Medicaid recipients who are tort victims. 42 U.S.C. §§ 1396a(a)(25), 1396k(a) (2006). To enforce that requirement when the recipient and a third-party resolve their tort dispute through judgment or settlement, North Carolina law provides that the State has a subrogation right to, and may assert a lien upon, the lesser of one-third of the recipient's recovery or the State's actual medical expenditures. N.C. Gen. Stat. § 108A-57 (2011).

The question presented is whether N.C. Gen. Stat. § 108A-57 is preempted by the Medicaid Act's anti-lien provision as it was construed in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), an issue on which the North Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit are in conflict.

LIST OF PARTIES TO THE PROCEEDING BELOW

Appellants listed by the court below were E.M.A., a minor, by and through her Guardian ad Litem, William W. Plyler, William Earl Armstrong and Sandra Armstrong. By Order filed May 18, 2012, the United States District Court of the Western District of North Carolina substituted Daniel Johnson for William W. Plyler as the Guardian ad Litem.

Appellee below was Lanier M. Cansler, in his official capacity as Secretary of the North Carolina Department of Health and Human Services. The current Acting Secretary of the North Carolina Department of Health and Human Services is Albert A. Delia. By Order filed May 29, 2012, the United States District Court of the Western District of North Carolina modified the caption of the case below to reflect the substitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND CONGRESSIONAL MATERIAL

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-70a) is reported at 674 F.3d 290. The opinion of the United States District Court for the Western District of North Carolina (Pet. App. 70a-85a) is reported at 722 F. Supp. 2d 653.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 22, 2012. (Pet. App. 1a-70a) On June 14, 2012, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including July 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions are reprinted in an appendix to this petition. (Pet. App. 114a-123a)

STATEMENT

The Medicaid Act imposes two seemingly conflicting requirements upon the States. On the one hand, it requires States to seek reimbursement from third-party tortfeasors for health-care expenditures the States made to tort victims by requiring States to enact assignment laws under which recipients, as a condition to receiving Medicaid, assign to the State any rights they have to payment for medical care from third parties. On the other hand, the Medicaid Act's anti-lien provisions bar States from placing liens

against, and seeking recovery of benefits paid from, a Medicaid recipient.

In *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), this Court interpreted the Medicaid Act in the context of Arkansas' effort to claim a portion of the proceeds of a settlement between a Medicaid recipient and the tortfeasor. Arkansas had stipulated that only one-sixth of the settlement proceeds were payments for medical expenses, but it later sought recovery of its entire Medicaid payment. The Court held that the anti-lien provisions, when read in conjunction with the reimbursement provisions, permitted Arkansas to recover only the portion of the settlement that represented medical expenses.

Neither the Medicaid Act nor the decision in *Ahlborn,* however, specifies how a State should determine what portion of a personal injury damage settlement represents reimbursement for medical expenses. *Ahlborn* recognized that States may have "special rules and procedures for allocating tort settlements," but ultimately "express[ed] no view on the matter" and "le[ft] open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation." *Id.* at 288 n.18. Additionally, while noting that the issue was not squarely before it, the decision acknowledged that one way to avoid manipulation of a settlement by the Medicaid recipient was to obtain the State's advance agreement to an allocation. *Id.* at 288. This case

squarely presents issues that *Ahlborn* left unaddressed.

North Carolina has adopted special rules and procedures for allocating tort settlements when it has paid for medical services for the injured party through its Medicaid program. The relevant statutes provide that the medical expenses component of these settlements equal one-third of the recovery or the amount paid by the Medicaid program on behalf of the recipient, whichever is less. These statutes authorize a reduction of the State's claim to one-third of the recovery when the Medicaid claim would otherwise exceed that amount. N.C. Gen. Stat. § 108A-57 (2011) (Pet. App. 114a-115a); § 108A-59 (2011) (Pet. App. 116a-117a). North Carolina's statutory scheme provides advance guidance to Medicaid recipients and tortfeasors as to how they should address the medical expenses component in their settlement agreements. The State's consent to an allocation of the proceeds is conditioned upon the parties apportioning the settlement to include reimbursement for medical expenses consistent with the statutory provision.

In 2008, the North Carolina Supreme Court upheld North Carolina's statutory procedure, ruling that it was consistent with Medicaid's anti-lien provision as construed in *Ahlborn*. *Andrews v. Haygood*, 362 N.C. 599, 669 S.E. 2d 310 (2008), *cert. denied sub nom. Brown v. North Carolina Department of Health and Human Services*, 129 S. Ct. 2792 (2009) (Pet. App. 86a-113a). *Andrews* concluded that the North Carolina

law provides a reasonable method for determining "the medical expense portion of a settlement," one that "protects [the recipient's] interests while promoting efficiency in Medicaid reimbursement cases throughout North Carolina." (Pet. App. 96a) And in 2009, the federal Centers for Medicare & Medicaid Services ("CMS"), which administers the Medicaid program, stated that it agreed with the North Carolina Supreme Court's conclusion. (Pet. App. 139a-142a)

Here, however, the Fourth Circuit held that North Carolina's statutory procedure violates the Medicaid anti-lien provisions because it allows the State to take a one-third share of a settlement even where the settling parties may have desired to allocate less than one-third of the settlement to medical expenses. The Fourth Circuit ruled that under *Ahlborn* the amount of North Carolina's Medicaid lien "must be subject to adversarial testing" and that States may not statutorily determine how Medicaid beneficiaries must allocate their tort settlements. (Pet. App. 53a)

A. Statutory Background

North Carolina participates in the federal Medicaid program established by Title XIX of the Social Security Act, also known as the Medicaid Act, 42 U.S.C. § 1396 *et seq*. The Medicaid Act provides federal funding to North Carolina and other States to provide payments for medical assistance to qualifying needy individuals who are unable to afford their own medical costs. Funding is conditioned on the adoption of a State plan that complies with specific federal

requirements. 42 U.S.C. § 1396a (2006). The North Carolina Department of Health and Human Services ("DHHS") is the regulatory body charged with establishing and administering the State's Medicaid program. N.C. Gen. Stat. § 108A-54 (2011).

One of the conditions imposed by the federal government is known as the anti-lien law, 42 U.S.C. §§ 1396a(a)(18) (Pet. App. 118a) and 1396p (2006) (Pet. App. 123a), which prohibits states from attaching a lien to a Medicaid recipient's personal property. There is an exception to the anti-lien law for recoveries from third parties that are liable for payment of a recipient's medical expenses. Federal law requires that the State "take all reasonable measures to ascertain the liability of third parties" to pay for services covered by Medicaid and to "seek reimbursement . . . to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25)(A)-(B) (2006).

The State must accomplish this by requiring Medicaid beneficiaries to assign the State their rights to third-party recoveries for medical expenses. 42 U.S.C. § 1396k (2006) (Pet. App. 120a-122a). These provisions are collectively known as the third-party recovery requirements. Congress has articulated the public policy evidenced in these laws: "Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S. Rep. No. 99-146, at 312 (1985).

North Carolina has complied with its federally approved State Plan for Medical Assistance by enacting an assignment statute at N.C. Gen. Stat. § 108A-59, and a subrogation statute at N.C. Gen. Stat. § 108A-57. The assignment statute provides, as a condition of eligibility, that Medicaid recipients are "deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which [the recipient] may be entitled." N.C. Gen. Stat. § 108A-59(a) (2011) (Pet. App. 116a). Implementation of the recipient's statutory assignment is governed by N.C. Gen. Stat. § 108A-57(a) (Pet. App. 114a-115a), which requires the attorney for the recipient to enforce the Medicaid program's subrogation rights. The amount of the Medicaid program's subrogated recovery is the lesser of one-third of the gross amount recovered from the third party or the amount paid by the Medicaid program for medical assistance to the recipient.

North Carolina's statutes therefore designate in advance an allocation of settlement proceeds between medical costs and other damages while capping the State's reimbursement at one-third of the total recovery even if the actual Medicaid payment for medical expenses is far greater.

B. Factual Background

The minor respondent sustained serious injuries at birth allegedly resulting from the negligence of the medical professionals who attended to her delivery. A medical malpractice action was brought in state court

on behalf of E.M.A. by her guardian ad litem and her parents which was eventually settled for a lump sum of approximately $2.8 million. Prior to agreeing to the settlement, the parties were on notice that DHHS had already paid more than $1.9 million for E.M.A.'s medical care. (Pet. App. 7a) The settlement agreement did not specifically allocate separate amounts for past medical expenses and other categories of damages. (Pet. App. 6a-8a)

Because the total medical payments of $1.9 million exceeded one-third of the total recovery, the DHHS claim was reduced pursuant to N.C. Gen. Stat. § 108A-57, resulting in a statutory lien on the settlement proceeds of $933,333.33 (one-third of the $2.8 million lump-sum settlement). The trial court ordered that amount paid into the registry of the state court, pending a determination of the State's lien. (Pet. App. 8a-9a)

C. Proceedings Below

Respondents brought an action in federal district court against Lanier M. Cansler, in his official capacity as Secretary of DHHS, seeking, among other things, that DHHS be enjoined from enforcing the North Carolina third-party recovery statutes. The district court granted summary judgment in favor of DHHS, holding that the North Carolina third-party liability provisions are consistent with the Medicaid Act's anti-lien provisions as construed in *Ahlborn*. (Pet. App. 71a-85a)

The district court distinguished *Ahlborn* by finding that the "Arkansas reimbursement statute [in *Ahlborn*] violated the federal anti-lien provision because it permitted the State to impose a lien beyond the portion of a settlement allocated to medical care." (Pet. App. 82a) By contrast, the North Carolina statute "provides a means of calculating that portion, and then forbids the State from imposing a lien on the remainder of the settlement." (Pet. App. 82a) The district court found the decision of the North Carolina Supreme Court in *Andrews* persuasive, noting that North Carolina's statute prevents a Medicaid recipient from suffering an "excessive depletion of a plaintiff's recovery to satisfy the State's reimbursement lien" because the recovery is capped at one-third of the total recovery. (Pet. App. 82a-83a)

The Fourth Circuit vacated the judgment of the district court, holding that North Carolina's statutory allocation and cap on the State's recovery does not comport with *Ahlborn* because "it permits DHHS to assert a lien against settlement proceeds intended (or otherwise properly allocable) to compensate the Medicaid recipient for other claims, such as pain and suffering or lost wages (i.e., in cases where one-third of the recipient's total settlement recovery is greater than

the amount DHHS expended on the recipient's behalf)."[1] (Pet. App. 42a) The court ruled that § 108A-57(a) could not be upheld as a special rule or procedure for allocating tort settlements, (Pet. App. 45a), and also found that North Carolina's statutory lien conflicted with the relevant guidance published by CMS.

The Fourth Circuit concluded that the amount of a recovery that is allocable to medical expenses must be determined pursuant to an adversarial proceeding that affords the Medicaid recipient an opportunity to rebut the statutory presumption. (Pet. App. 55a) The court therefore vacated the decision of the district court and remanded for an evidentiary hearing to determine the proper amount of DHHS's Medicaid lien.[2]

---

[1] The Fourth Circuit misstates North Carolina law, which provides that the Medicaid lien is the lesser of the amount of assistance paid by DHHS on behalf of the recipient or one-third of the recovery. N.C. Gen. Stat. § 108A-57. The statutory lien would never result in a recovery of more than DHHS expended on medical services for the recipient even if one-third of the recovery exceeds the amount expended by DHHS. The Fourth Circuit did not repeat this misstatement elsewhere in its opinion, and it does not appear to have been the basis for its holding.

[2] The court rejected Respondents' argument that the district court must utilize the same "proportional analysis" that Arkansas stipulated to in *Ahlborn*, a formula which

REASONS FOR GRANTING THE PETITION

Both the North Carolina Supreme Court and the Fourth Circuit have ruled on the question of whether North Carolina's third-party recovery statute is preempted by the federal anti-lien provision as construed by this Court in *Ahlborn*. The former court held it is not preempted; the latter held it is, acknowledging the conflict.

This Court's acceptance of the case for review is necessary to resolve a direct conflict between the North Carolina Supreme Court and the Fourth Circuit, and the post-*Ahlborn* confusion regarding what "special rules and procedures for allocating tort settlements" are permitted by the Medicaid Act. This Court should make clear what *Ahlborn* suggested, but did not hold: that, in the words of CMS, "States have

---

results in a proportional reduction of the medical lien when the settlement does not fully compensate for the "true value" of the case. (Pet. App. 50a) The court approvingly cited the Tenth Circuit's statement in *Price v. Wolford,* 608 F.3d 698, 707 (10th Cir. 2010), that "a reduction in a Medicaid lien can be justified only by showing a reason why the plaintiff would agree to allow the defendant to pay less than the full amount of the Medicaid lien." (Pet. App. 50a-51a)

leeway to develop a reasonable statutory scheme for apportioning medical expenses."[3]

I. THE FOURTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH A DECISION OF THE NORTH CAROLINA SUPREME COURT.

In *Andrews*, the North Carolina Supreme Court specifically found that *Ahlborn* does not require an evidentiary hearing to determine the amount of a settlement that the parties must set aside to reimburse Medicaid. (Pet. App. 95a-96a) The court held that "the *Ahlborn* holding, limited by the parties' stipulations, did not require a specific method for determining the portion of a settlement that represents the recovery of medical expenses." (Pet. App. 93a) The court noted that *Ahlborn* had left open the possibility that special rules and procedures might be employed to meet concerns about settlement manipulation, and determined that North Carolina's procedure was a reasonable method of encouraging complete recovery for past medical payments while preventing excessive depletion of a plaintiff's recovery to satisfy the State's reimbursement lien.

---

[3] The reply memo of the Centers for Medicare & Medicaid Services to the Honorable Howard Coble, Member, U.S. House of Representatives (December 23, 2009) ("Reply Memo") (Pet. App. 141a).

The Fourth Circuit reached the opposite conclusion, holding that *Ahlborn* requires that the share of a settlement designated as recovery for medical expenses be subject to adversarial testing. The Fourth Circuit ruled that § 108A-57(a) could not be upheld as a special rule or procedure for allocating tort settlements, (Pet. App. 45a), because (in its view) *Ahlborn* was actually referring to only one method of combating settlement manipulation – the use of "mini hearings." The Fourth Circuit concluded that application of North Carolina's procedure to an unallocated lump-sum settlement violated the Medicaid anti-lien provision and that the North Carolina Supreme Court's reliance on this Court's "special rules and procedures" language to uphold the statute was "misplaced." (Pet. App.45a) The Fourth Circuit also stated that North Carolina's statutory lien conflicted with the guidance published by CMS, which it described as stating, among other things, that *Ahlborn* bars States from enacting laws that permit recovery beyond what the parties have designated as payment for medical services. (Pet. App.45a-47a (discussing CMS Memorandum, Pet. App.124a-138a))

The Fourth Circuit expressly acknowledged that its decision was in direct conflict with the decision of the highest court of the State of North Carolina. (Pet. App. 5a) As such, the circumstances here present a compelling reason to accept the case for review within the scope of Rule 10(a) of the Rules of this Court.

II. CONTRARY TO THE FOURTH CIRCUIT'S HOLDING, NORTH CAROLINA'S STATUTES COMPORT WITH THE MEDICAID ACT AS CONSTRUED IN *AHLBORN*.

A. States Retain the Authority to Regulate How Tort Recoveries Must Be Allocated.

This Court's decision in *Ahlborn* was limited to the narrow issue of whether Arkansas could recover its Medicaid expenditures from the portion of a settlement that all parties, including the State, agreed represented compensation for matters separate from medical costs. *Ahlborn* did not attempt to define how to identify the portion of a recovery that represents reimbursement for medical expenses. *Ahlborn* did not preclude a State's ability to statutorily assert its priority to recover monies appropriately attributable to medical expenses as a part of the settlement process.

In *Ahlborn*, the parties — specifically including the State of Arkansas — entered into the following critical stipulations, which governed the allocation of the Medicaid recipient's settlement proceeds: (1) the value of the underlying claim (just above $3 million); (2) that the settlement amounted to only one-sixth of the value of the claim ($550,000); and (3) the specific amount representing compensation for medical expenses ($35,581.47). *Ahlborn,* 547 U.S. at 274. Arkansas nonetheless subsequently claimed that it was entitled to recover from the settlement proceeds the full amount of its medical expenditures ($215,645.30). *Id.* Thus, the narrow question presented in *Ahlborn* was

whether Arkansas was limited to recover only that portion of the settlement which the parties, prior to the entry of the settlement, had all acknowledged represented medical expenses. On that narrow question, the Court held that the exception to the anti-lien law that only allowed Arkansas to recover from the portion of the settlement that the state had agreed represented compensation for medical expenditures. *Id.* at 292. Because of the controlling stipulations, the Court had no reason to address any particular method for determining how much of a settlement, in the absence of a stipulation, represents payment for medical expenses.

The *Ahlborn* Court recognized that "some States have adopted special rules and procedures for allocating tort settlements," but ultimately "express[ed] no view on the matter" and "le[ft] unaddressed the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation." *Ahlborn*, 547 U.S. at 288 n.18. And while noting that the issue was not squarely before it, the Court acknowledged that one way to avoid manipulation of a settlement so as to "allocate away the State's interest" was to obtain "the State's advance agreement to an allocation." *Id.* at 288.

North Carolina's statutes utilize both approaches available after by *Ahlborn*: they establish criteria regarding how tort settlements are to be allocated when the Medicaid program has paid a recipient's medical expenses and they provide an advance

agreement that the State will reduce its lien if the amount of the Medicaid claim exceeds one-third of the total recovery. North Carolina law does this by requiring a recipient's attorney who has actual notice of payments made on behalf of the recipient to enforce the Medicaid program's subrogation rights. N.C. Gen. Stat. § 108A-57. Thus, before a settlement is ever reached, the recipient's attorney is aware of the precise amount that must be allocated to satisfy the Medicaid claim; the Medicaid claim is, necessarily, a part of the settlement negotiations. There is no possibility that the parties could be uncertain as to the amount that represents reimbursement for medical expenses, and therefore no reason to hold a hearing to determine the parties' intent. The parties must allocate the settlement in conformity with the statute. Furthermore, because the parties to the settlement agreement know in advance what the medical expenses portion of any settlement will be, the recipient can fully and accurately evaluate the settlement offer. The North Carolina statute "protects [Medicaid recipients'] interests while promoting efficiency in Medicaid reimbursement cases throughout North Carolina." (Pet. App. 79a-80a) As recognized by the North Carolina Supreme Court, "weighing these and other public policy considerations is the province of our General Assembly." (Pet. App. 96a)

The Fourth Circuit erred by reading into *Ahlborn* a requirement that a hearing "must determine the true value of the case" (Pet. App. 50a) and that the amount

of North Carolina's statutory lien "must be subject to adversarial testing." (Pet. App. 53a) *Ahlborn* did not hold that a post-settlement hearing must be conducted to allocate damages. In response to concerns expressed by Arkansas and the United States that private litigants might manipulate settlement allocations, the Court in *Ahlborn* observed that such a risk can be avoided either by obtaining the State's advance agreement to an allocation or, "if necessary, by submitting the matter to a court for decision." *Ahlborn*, 547 U.S. at 288. This mere suggestion of a court review does not support the Fourth Circuit's requirement for an evidentiary hearing to establish what portion of the settlement proceeds are "properly allocable to past medical expenses." (Pet. App. 51a) *Ahlborn* held nothing of the sort, and other language in the opinion leaving open the possible adoption of special rules and procedures confirms that States have other available options that are consistent with the Medicaid Act.

B. The Fourth Circuit Misread the Relevant Guidance of the Centers for Medicare & Medicaid Services.

The Fourth Circuit cited a July 3, 2006 CMS Memorandum, "State Options for Recovery Against Liability Settlements in Light of United States Supreme Court Decision in *Arkansas Department of Human Services v. Ahlborn*," Centers for Medicare & Medicaid Services ("CMS Memorandum") (Pet. App. 124a-138a), as support for its holding that North

Carolina's statute conflicts with the Medicaid Act. (Pet. App. 45a-47a) However, CMS has specifically declared that North Carolina's statute comports with the anti-lien provisions as they were construed in *Ahlborn* as well as in its post-*Ahlborn* Memorandum. That conclusion is entitled to deference.

The CMS Memorandum, after delineating the key findings of *Ahlborn*, listed actions that states may take, including (1) "enact laws which provide for a specific allocation amongst damage[s], i.e., pain and suffering, lost wages, and medical claims;" and (2) "require that cases can only be compromised with the consent of the state." (Pet. App. 129a) The North Carolina third-party recovery statute is a law "provid[ing] for a specific allocation amongst damage[s]" – it provides that up to one-third of a total recovery must be designated as payment for past medical costs. Additionally, North Carolina has put in place a law "requir[ing] that cases only be compromised with the consent of the state." North Carolina's subrogation statute provides the state's consent to compromise by automatically reducing its claim to one-third of the recovery if the recovery does not equal at least three times the amount of the Medicaid lien.

CMS maintains that North Carolina's statutes are consistent with the Medicaid Act and has specifically approved the analysis of North Carolina's procedures in the *Andrews* decision. A December 23, 2009, Reply Memo to North Carolina Congressman Howard Coble

expresses agreement with the *Andrews* decision and specifically states that neither the North Carolina statute nor the *Andrews* decision conflict with the CMS Memorandum. (Pet. App. 139a-142a)

CMS acted under the Medicaid Act's grant of authority when it issued both the CMS Memorandum and the Reply Memo. Therefore, its conclusions regarding North Carolina's law are entitled to deference. The federal Medicaid statutes comprise the prototypical "complex and highly technical regulatory program," and the Secretary of HHS has "significant expertise" in administering it. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). This Court has observed that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). In *Ahlborn*, this Court recognized that Congress has delegated "broad regulatory authority to the Secretary [of HHS] in the Medicaid area," *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496 n.13 (2002), and that deference is therefore generally appropriate. *Ahlborn*, 547 U.S. at 292. *See also Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (deference accorded to CMS letters finding that state legislation complied with federal law).

Ahlborn does not empower parties to a tort settlement to allocate away a State's Medicaid lien nor

does it require that a State's appropriate share of the settlement proceeds must be judicially determined after adversarial testing. Furthermore, the Fourth Circuit relied on a misinterpretation of the guidance from CMS to support the conclusion that North Carolina's statutes are inconsistent with the Medicaid Act. Each of these reasons provide a further compelling basis for the Court to accept this case for review.

III. THE IMPORTANT ISSUES PRESENTED SHOULD BE DECIDED BY THE COURT.

In compliance with the Medicaid Act, all States have enacted some type of third-party recovery statute. Several states other than North Carolina have statutory provisions setting forth a presumptive portion of a Medicaid recipient's tort recovery as reimbursement for the provision of medical services. *See* Conn. Gen. Stat. § 17B-94(a) (Supp. 2011); Fla. Stat. Ann. § 409.910(11)(f)(1) (2009); Mich. Comp. Laws § 400.106(5) (2008); Minn. Stat. § 256.015(5) (Supp. 2011); and Ohio Rev. Code Ann. § 5101.58(G)(2) (Supp. 2011).

Furthermore, it appears that at least twenty-six other states have third-party recovery laws that do not require an "adversarial testing" of the allocation of damages of the type mandated by the decision of the

Fourth Circuit.[4] *See* Ala. Code §§ 22-6-6, 22-6-6.1 (2006); Alaska Stat. § 47.05.070 (2010); Ariz. Rev. Stat. Ann. § 36-2915 (2009); Del. Code Ann. tit. 31, § 522 (2009); Ind. Code § 12-15-8-1 through § 12-15-8-9 (2006); Iowa Code Ann. § 249A.6 (Supp. 2011); Kan. Stat. Ann. § 39-719a (2000); Ky. Rev. Stat. Ann. §§ 205.624, .626 (2006); La. Rev. Stat. Ann. § 46:446 (2010); Md. Code Ann. Health-Gen. § 15-120 (2009); Mont. Code Ann. § 53-2-612 (Supp. 2011); Neb. Rev. Stat. §§ 68-716, -916 (2009); Nev. Rev. Stat. §§ 422.293 to 422.29306 (2009); N.J. Stat. Ann. § 30:4D-7.1 (2009); N.M. Stat. §§ 27-2-23, -28(G) (2007); N.Y. Soc. Serv. Law § 104-b (Supp. 2012); Or. Rev. Stat. § 416.540 (2009); R.I. Gen. Laws § 40-6-9 (2006); S.C. Code Ann. § 43-7-440 (Supp. 2011); S.D. Codified Laws § 28-6-7.1 (2004); Tex. Hum. Res. Code Ann. § 32.033 (2001 & Supp. 2011); Utah Code Ann. § 26-19-7 (Supp. 2011); Wash. Rev. Code §§ 41.05A.060, 41.05A.070, 74.09.180, 74.09.185 (Supp. 2011); W. Va. Code § 9-5-11 (Supp. 2011); Wis. Stat. § 49.89 (2011); and Wyo. Stat. Ann. §§ 42-4-201, 42-4-202, 42-4-203 (2011).

Additionally, the Fourth Circuit's analysis has been relied upon by the Supreme Court of Appeals of West Virginia in its recent decision determining that

---

[4] Some of the listed states may have administratively adopted particular review mechanisms that are not reflected in their third-party recovery statutes. However, it is not clear whether such procedures would comport with the rationale of the Fourth Circuit.

West Virginia's assignment and subrogation statute is in conflict with federal law and is therefore preempted. *See In re: E.B., a Minor*, No. 101537, 2012 W.Va. LEXIS 314 (W. Va. 21 June 2012). On the question of the appropriate method of allocating an unallocated settlement and which post-allocation funds a State's reimbursement claim may reach, the West Virginia Court ruled that the State was "limited to funds allocated solely to past medical expenses in seeking reimbursement." *Id.* at *90. The court then noted:

> It is our hope that the United States Supreme Court will clarify this issue for the benefit of the states' individual Medicaid programs. Unless and until the United States Supreme Court provides clearer guidance on this issue, this Court is persuaded by the Fourth Circuit's interpretation of *Ahlborn* provided in *Cansler*.

Id. at *95 n.35.

Only this Court's decision can resolve the conflict between the North Carolina Supreme Court and the Fourth Circuit as to the viability of North Carolina's statutory procedures, as well as the on-going uncertainty over the viability of other statutory provisions governing a State's recovery for the provision of medical services from third-party settlements involving Medicaid recipients.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

John F. Maddrey*
Solicitor General of North Carolina

Gayl M. Manthei
Special Deputy Attorney General

Belinda A. Smith
Special Deputy Attorney General

July 2012

**Counsel of Record*

INDEX