STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL LEE SMATHERS, II,

Petitioner,

vs.

Case No. 16-3590MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 9, 2017, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Neal W. Hirschfeld, Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUES

On the merits, the issues for determination are, first, whether a lesser portion of Petitioner's total recovery from a third-party tortfeasor should be designated as recovered medical

expenses than the share presumed by statute; if so, then the amount of Petitioner's recovery to which Respondent's Medicaid lien may attach must be determined. Before the merits may be addressed, however, it will be necessary to decide whether, in light of the recent judicial invalidation of portions of the Medicaid Third-Party Liability Act, an administrative remedy remains available to Petitioner.

PRELIMINARY STATEMENT

On June 24, 2016, pursuant to section 409.910(17)(b), Florida Statutes, Petitioner Michael Lee Smathers, II, filed a Petition for Equitable Distribution and/or Determination of Reimbursement of Past Medical Expenses Related to Medicaid Liens with the Division of Administrative Hearings ("DOAH") to contest the amount designated by section 409.910(11)(f) as recovered medical expense damages payable to Respondent Agency for Health Care Administration.

At the final hearing, which took place as scheduled on March 9, 2017, Petitioner presented the testimony of R. Vincent Barrett. Petitioner's Exhibits 1 through 4 were received in evidence without objection. Respondent's Exhibit A was admitted as well. Respondent called no witnesses.

The final hearing transcript was filed on April 4, 2017. The parties timely filed proposed final orders on or before April 14, 2017, the established deadline.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016.

FINDINGS OF FACT

1. On June 1, 2012, Petitioner Michael Lee Smathers, II ("Smathers"), was shot two times while sitting in a vehicle parked outside of Club Lexx, a nightclub in Miami-Dade County. The shooter was a security guard who worked for Force Security, LLC ("Force"), which provided security for Club Lexx as an independent contractor. The guard also shot Smathers's friend, the driver of the vehicle, who died as a result of his injuries. The record is silent as to the circumstances giving rise to this violence.

2. One bullet struck Smathers in the arm, the other in the stomach, which caused life-threatening injuries. Smathers received aggressive emergency medical care and survived, but he is permanently and severely disabled. Bullet and bone fragments damaged his spinal cord, leaving Smathers paralyzed from the waist down. He is incontinent, has serious gastric difficulties, experiences constant pain, cannot have sex or reproduce, and suffers from chronic depression, among other conditions. Because it is undisputed that Smathers's injuries are severe, permanent, and indeed catastrophic, there is no need to catalogue them all here.

3. Smathers requires round-the-clock care and will never return to the workforce due to his impairments and chronic pain. He will incur medical expenses stemming from the gunshot wounds for the rest of his life.

4. At all relevant times, Smathers's health insurance was provided, at least in part, by Medicaid. Medicaid is a program "which provides for payments for medical items or services, or both, on behalf of any person who is determined by the Department of Children and Families . . . to be eligible on the date of service for Medicaid assistance." § 409.901(16), Fla. Stat. Medicaid is jointly funded by the federal government and the states that have elected to participate in the program, which include Florida. Respondent Agency for Health Care Administration ("AHCA") is the agency responsible for administering Medicaid in the state of Florida.

5. It is undisputed that Medicaid provided $206,445.41 in medical assistance on Smathers's behalf as a result of the injuries he sustained in the attack at Club Lexx.

6. Unfortunately for Smathers, the Club Lexx shooting gave him many causes of action but no deep-pocket defendants to sue for damages. He brought suit, nonetheless, against Force and others in the state circuit court (the "Smathers Lawsuit"). Force, it happened, was insured against general liability, but

only up to $1 million per occurrence, which obviously would be woefully inadequate to compensate Smathers.

7. Force's insurer ("Evanston") sought a judicial declaration in the U.S. district court that its policy did not provide coverage for the allegations made against Force in the Smathers Lawsuit. The federal court rejected Evanston's coverage position and held that the insurer had a duty to defend Force. Evanston appealed the decision.

8. While this appeal was pending, Evanston, Force, and Smathers entered into a settlement agreement, pursuant to which Evanston paid the policy limit of $1 million to Smathers in exchange for the usual releases. (Smathers did not release the other defendants in the Smathers Lawsuit.) The settlement is undifferentiated——that is, no attempt was made therein to apportion the proceeds between the various elements of compensatory damages potentially available to Smathers. After deducting attorney's fees and costs, Smathers's net recovery from the settlement was $546,894.15.

9. Upon learning of the settlement, AHCA asserted its rights under the Medicaid Third-Party Liability Act (the "Act"), section 409.910, which grants AHCA an automatic lien upon "collateral" such as settlements and settlement agreements for the full amount of medical assistance provided by Medicaid to a recipient for which a third party might be liable. There is,

however, an important limitation on AHCA's right of repayment from liable third parties: Because federal law prohibits a state from attaching a Medicaid lien to any part of a recipient's tort recovery not designated as payments for medical care, the lien can encumber *only* the portion of a settlement or recovery that represents compensation for medical expenses. As a means of complying with this anti-lien law, section 409.910(11)(f) prescribes a formula for determining how the proceeds of a settlement or other recovery from a third-party tortfeasor should be divided between medical expense damages and all other (i.e., nonmedical) compensatory damages, and it directs that the portion attributable to payments for medical care be paid to AHCA up to the total amount spent by Medicaid.

10. The parties agree that, under this statutory formula, AHCA is entitled to be reimbursed in full for Medicaid's outlays on Smathers's behalf ($206,445.41) because that amount, which represents approximately 20.6% of Smathers's gross settlement proceeds ("GSP"), is less than the portion of his GSP that paragraph (11)(f) otherwise presumptively designates as recovered medical expense damages. Exercising his rights under section 409.910(17)(b), which provides the "exclusive method for challenging the amount of third-party benefits payable to" AHCA, Smathers initiated this proceeding to contest the statutory designation of $206,445.41 as payments for medical care.

Paragraph (17)(b) confers upon DOAH final order authority over this administrative remedy.

11. Smathers presented evidence regarding his total provable damages ("TPD"),[1/] which he asserts are between $16 million and $22 million. Smathers's TPD includes past medical expenses of $2.7 million and future medical expenses of $5.7 million, for a total of $8.4 million in medical expense damages.[2/] Medical expense damages and general damages comprising injury, pain, disability, disfigurement, and loss of capacity for enjoyment of life (collectively, "pain and suffering") constitute, effectively, the entirety of Smathers's TPD.[3/]

12. Smathers contends that the amount of his settlement that should be allocated as reimbursement for medical expense damages, and thus become subject to the Medicaid lien, is $12,903. Smathers arrives at this figure as follows. He reasons that because he recovered just 6.25% of his TPD ($1 million is 6.25% of $16 million), AHCA likewise should be paid just 6.25% of its total expenditures, which works out to $12,903. (That sum is 1.29% of $1 million.) For ease of discussion, this approach will be referred to as the settlement-to-value ratio method, expressed as $\frac{GSP}{TPD}(x)$, where x = actual Medicaid expenditures.

13. The amount payable to AHCA pursuant to the formula set forth in section 409.910(11)(f) (the "Statutory Distribution") is either (a) an amount equal to .75 times the gross settlement, minus taxable costs, divided by 2 (hereafter, the "Presumed Recovered Medical Expense Damages" or "PRMED"); or (b) the total dollar amount of medical assistance that Medicaid actually has provided (hereafter, the "Actual Expenditure"), whichever is lower. The ratio of PRMED to GSP reflects the portion of the GSP that the statutory formula allocates by default as reimbursement to the injured party for both past and future medical expenses (hereafter collectively referred to as "Medical Damages").

14. The statute, it will be seen, presumes that a uniformly calculable percentage (i.e., $\frac{PRMED}{GSP}$) of any recipient's undifferentiated GSP constitutes compensation for Medical Damages. In the run of cases, this percentage likely will be somewhere in the neighborhood of one-third, although in particular cases, as here, the percentage——which cannot exceed 37.5%——can be smaller.[4/]

15. Section 409.910(17)(b), Florida Statutes (2017), provides that "[i]n order to successfully challenge the amount designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future

medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f)."[5/] Thus, the presumption regarding the allocation of the recipient's recovery to Medical Damages is one which affects the burden of proof. See §§ 90.302(2) and 90.304, Fla. Stat. To elaborate, paragraphs (11)(f) and (17)(b) operate in tandem to create the rebuttable presumption that a certain percentage of the recipient's GSP is attributable to Medical Damages (the presumed fact), and paragraph (17)(b) makes plain that the recipient has the burden of proving, by clear and convincing evidence, the nonexistence of the presumed fact. The presumption at issue, according to paragraph (17)(b), is not a "bursting bubble" presumption that vanishes upon the introduction of credible evidence contrary to the presumed fact, see section 90.302(1), Florida Statutes, but rather it imposes upon the recipient the burden to prove that a smaller portion of the settlement is attributable to Medical Damages.

16. On April 18, 2017, the U.S. District Court for the Northern District of Florida entered a Final Judgment in Gallardo v. Dudek, No. 4:16-cv-116, 2017 U.S. Dist. LEXIS 59848 (N.D. Fla. Apr. 18, 2017), which declared that section 409.910(17)(b) is preempted by federal law (and thus unconstitutional under the Supremacy Clause) at least insofar as the statute authorizes AHCA to "seek[] reimbursement of past

Medicaid payments from portions of a recipient's recovery that represents [sic] future medical expenses." Id. at *31. The court enjoined AHCA from "enforcing that statute in its current form" and specifically forbade AHCA from "requiring a Medicaid recipient to affirmatively disprove" the statutory allocation of third-party recoveries as reimbursement for past and future medical expenses "where . . . that allocation is arbitrary." Id. Three months later, on AHCA's motion, the court amended its judgment, slightly, to read as follows:

> [P]ortions of § 409.910(11)(f), Fla. Stat. (2016) and § 409.901(17)(b), Fla. Stat. (2016) are preempted by federal law.
>
> 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 [sic] future medical expenses. The State of Florida Agency for Health Care Administration is therefore enjoined from doing just that: seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents [sic] future medical expenses.
>
> It is also declared that the federal Medicaid Act prohibits the State of Florida from requiring a Medicaid recipient to affirmatively disprove § 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.

Gallardo v. Senior, 2017 U.S. Dist. LEXIS 112448, *24 (N.D. Fla. July 18, 2017).

CONCLUSIONS OF LAW

17. On the face of section 409.910(17)(b), DOAH has personal and subject matter jurisdiction in this proceeding. The decision in Gallardo, however, substantially undermines the superficially available administrative remedy, perhaps to the point of collapse, with the result that DOAH's jurisdiction, dependent as it is on the existence of an administrative remedy, is now under a cloud. The jurisdictional issue will be taken up first, as it must.

18. Section 409.910(1) provides that "[i]f benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, . . . Medicaid [must] be repaid in full and prior to any other person, program, or entity." Further, "[p]rinciples of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources." Id.[6/] As previously stated herein, however, the U.S. Supreme Court has interpreted the anti-lien provision in federal Medicaid law as imposing a bar which, pursuant to the Supremacy Clause, precludes "a state from asserting a lien on the portions of a settlement not allocated to medical expenses."

See, e.g., Mobley v. State, 181 So. 3d 1233, 1235 (Fla. 1st DCA 2015).

19. Although the states do not have unfettered access to tortfeasors' payments when enforcing Medicaid liens, the Court has remarked that the states are not necessarily forbidden from establishing rebuttable presumptions respecting the earmarking of settlement proceeds for medical expense damages, leaving that door open to them. But "a Medicaid beneficiary must be given the opportunity to show that the amount apportioned for medical expenses by the parties is less than the amount of the lien asserted by the state." Id.

20. As we have seen, Florida has opted to take a formulaic approach to the division of settlement proceeds. Section 409.910(11)(f) provides in relevant part as follows:

> (f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.

> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.

21. Section 409.910(17)(b) establishes the exclusive remedy for contesting the Statutory Distribution, which affords the recipient an opportunity in an administrative hearing to rebut the presumptive allocation of settlement proceeds to Medical Damages by proving:

> by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f). Alternatively, the recipient must prove by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

22. The raison d'être of the administrative remedy is to afford the recipient an opportunity to *disprove* (by clear and convincing evidence) the "accuracy"[7/] of the Statutory Distribution, which latter——to remind the reader——is the PRMED or Actual Expenditure, whichever is less. Clearly, the legislature intended that the Statutory Distribution be regarded as a generally reliable, reasonably fair and accurate allocation of a recipient's GSP to Medical Damages for purposes of establishing the Medicaid lien amount, and it no doubt expected

that the Statutory Distribution would survive individual challenges more often than not.

23. The amount of the Actual Expenditure will usually be undisputed. When the Statutory Distribution is contested, therefore, it is the PRMED that the recipient inevitably attacks, of necessity. That being the case, it is significant that the legislature intended the PRMED to include both past and future medical expense damages. See Giraldo v. Ag. for Health Care Admin., 208 So. 3d 244, 248 (Fla. 1st DCA 2016).[8/] That is, the formula in paragraph (11)(f), i.e., $\frac{[(.25)(GSP)-costs]}{2}$, was designed to produce a number that will fairly approximate a recipient's recovery for *all* medical expense damages, past and future.

24. This means, obviously, that the PRMED is a bigger number than the alternative would have been had the legislature not intended to include future medical expense damages in the amount designated as recovered medical expenses. Because paragraph (11)(f) depends upon the presumed power of the State to attach future medical damages, the judicial declaration in Gallardo that AHCA *cannot* enforce its Medicaid liens against future medical expense damages completely discredits the formula. Logically, therefore, in the wake of Gallardo, there is no need for a recipient ever to disprove the accuracy of the Statutory Distribution——it is intrinsically flawed due to the impermissible inclusion of future medical damages in the PRMED.

(At a minimum, to comport with Gallardo, the denominator would have to be replaced with a number greater than 2, to release future medical damages from the formula's grasp.)

25. In an effort to limit the impact of Gallardo, AHCA argues that "resort to the statutory allocation" is unnecessary where, as here, the Actual Expenditure is "significantly" less than the PRMED. This overlooks the fact that the Statutory Distribution is the lesser of two values (Actual Expenditure and PRMED), which means that *both* must be reliable numbers. In this case, the Actual Expenditure is less than the PRMED *as the latter is calculated pursuant to the invalid formula*. Because the formula has been declared unconstitutional, the PRMED it produces is worthless——and thus it is irrelevant that the Actual Expenditure is a smaller number. Contrary to AHCA's contention, moreover, "resort to the statutory allocation" is unavoidable in an administrative proceeding whose sole purpose is to contest the "statutory allocation." What *is* unnecessary, after Gallardo, is for the recipient to prove that the amount which should be allocated as past and future medical expenses is less than the amount that paragraph (11)(f) unlawfully designates as recovered Medical Damages *because future medical expenses are off-limits*.

26. That said, it is true that the Gallardo court, in declaring that AHCA could not require "a Medicaid recipient to

affirmatively disprove § 409.910(17)(b)'s formula-based allocation with clear and convincing evidence," appeared to soften the blow by limiting its holding to cases "where, as [t]here, th[e] allocation is arbitrary and there is no evidence that it is likely to yield reasonable results in the mine run of cases." This language puzzles the undersigned because it seems incongruous with the court's opinion taken as a whole. Ultimately, however, it is unnecessary to explicate this proviso because the court's unconditional holding that future medical expense damages are always beyond the State's reach is the essential feature of Gallardo, as far as the administrative remedy under paragraph (17)(b) is concerned.

27. To explain, paragraph (17)(b) requires, for a successful administrative challenge to the Statutory Distribution, that the recipient "prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f)." § 409.910(17)(b), Fla. Stat. (emphasis added). Yet, in light of Gallardo, it is pointless to require proof by any standard——much less to make a finding of fact——regarding the portion of the recipient's total recovery which should be allocated as past *and future* medical expenses since only a portion of that portion (i.e., the lesser included

amount attributable exclusively to *past* medical expenses) is subject to the Medicaid lien. Thus, in the end it makes no difference whether the Statutory Distribution is arbitrary or can be shown to yield reasonable results in the run of cases. Indeed, one could assume for argument's sake that the Statutory Distribution, as a presumptive allocation of settlement proceeds to past and future medical expense damages, is both nonarbitrary and evidentially defensible, and still proof of what the allocation for past and future medical expenses "should be" would be irrelevant. What matters after Gallardo is the amount of the settlement which should be allocated as past medical expense damages——and *only* such damages.

28. To summarize, then, in light of Gallardo: (i) the Statutory Distribution, i.e., the portion of the total recovery designated by paragraph (11)(f) as past and future medical expenses, is overinclusive as a matter of law and cannot be accepted as a fair reflection of the share of the settlement which should be allocated as past medical expense damages; (ii) there is no reason for a recipient to prove that the amount designated as recovered past and future medical expenses should be less than the Statutory Distribution because the State cannot enforce its lien against future medical expense damages; (iii) there is no need for a recipient to prove that the portion of his recovery attributable solely to past medical expenses

should be less than the Statutory Distribution because (a) this is an apples-to-oranges comparison, (b) logically the former should be less than the latter since past medical expenses are a subset of all Medical Damages, and (c) the Statutory Distribution is the product of an unconstitutional formula.

29. No imagination is necessary to recognize that Gallardo might have dealt paragraph (17)(b)'s administrative remedy a mortal blow. The reason is obvious. The administrative law judge's ("ALJ") primary function——to determine whether, based upon clear and convincing evidence adduced by the recipient, the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f)——is no longer necessary or even relevant. Following Gallardo, the Statutory Distribution is simply not viable. Indeed, because AHCA has been enjoined from seeking reimbursement of past Medicaid payments from that portion of a recipient's recovery which represents future medical expenses, AHCA is arguably precluded from basing its position on the Statutory Distribution, for it (the Statutory Distribution) clearly lays claim to the recipient's future medical expenses recovery. The recipient thus wins the battle over the Statutory Distribution without firing a shot.

30. DOAH, however, was supposed to provide the field on which that particular battle would be fought. If it is over before it begins, what (if anything) is left for DOAH to do? The only task remaining after Gallardo is to decide how much of the recipient's GSP should be distributed to AHCA, up to a maximum of the Actual Expenditure or the portion of the total recovery allocated as recovered past medical expenses ("RPME"), whichever is less. The question thus arises as to whether DOAH has the authority to adjudicate AHCA's lien recovery without the constraining influence of the presumptively correct Statutory Distribution (with its inclusion of future medical expense damages) operating as a check on the ALJ's discretion; or, to restate the question, whether DOAH is authorized to provide an administrative remedy *materially different from* the one prescribed in paragraph (17)(b). Both parties assert that DOAH's jurisdiction is unaffected by Gallardo, but their agreement in this regard does not relieve the undersigned of the obligation to satisfy himself that DOAH's jurisdiction subsists. See Peck Plaza Condo. v. Div. of Fla. Land Sales & Condos., 371 So. 2d 152, 153 (Fla. 1st DCA 1979).

31. AHCA's primary argument on jurisdiction is that the Gallardo court's decision did not divest DOAH of jurisdiction because the final judgment is silent on the matter, which was not at issue there,[9/] and because the portions of section 409.910

invalidated in Gallardo do not relate to the question of administrative jurisdiction. It is true that the district court did not address the question of DOAH's jurisdiction, but then there was no reason for the court to do so, for DOAH's jurisdiction was not at issue in the federal case. This fact, therefore, is not persuasive, much less dispositive. As for AHCA's assertion that the preempted portions of section 409.910 are unrelated to DOAH's jurisdiction, well, that is (in effect) the proposition at issue. Merely to assume this premise to be true, as AHCA does, is to beg the question, which is unpersuasive. Ultimately, AHCA states, correctly, that "[i]n issuing the final order, the ALJ will need to determine the applicability of the *Gallardo* injunction on the relief sought by [AHCA] in this proceeding."

32. Smathers makes two arguments, but these are so intertwined as perhaps to be one. The gist of it is that the provisions of section 409.910 invalidated in Gallardo are severable from the remainder of the Act, whose legislative purposes can still be accomplished without the portions declared unconstitutional because there is really no difference between DOAH's (i) adjusting a Medicaid lien (ante-Gallardo) upon clear and convincing proof that the Statutory Distribution is excessive and (ii) adjusting a Medicaid lien ab initio (post-Gallardo).

33. The severability doctrine is a firmly established principle of constitutional adjudication, which provides as follows:

> [T]he unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp v. Bd. of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962). But "if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional." Eastern Air Lines, Inc. v. Dep't of Rev., 455 So. 2d 311, 317 (Fla. 1984).

34. It is understandable that Smathers would invoke this rule because the question of DOAH's jurisdiction boils down to whether there exists, in the valid provisions of section 409.910 which remain, an administrative remedy that DOAH can provide. This question, however, although somewhat similar, is not the same question as whether the invalidation in Gallardo of some

provisions of section 409.910 means that the entire Act must be declared unconstitutional. The severability doctrine, therefore, is not directly applicable, and in any event, its purpose is to guide a court in determining how much of a statute is unconstitutional, which is a judicial exercise, not a quasi-judicial, administrative function.

35. Nevertheless, the severability doctrine supplies some ideas that are useful in resolving the issue of statutory interpretation at hand. In particular, the undersigned considers pertinent the question of whether the legislature would have given DOAH final order authority to adjust Medicaid liens administratively were it armed with the knowledge that ALJs, being freed of the need to pay heed to the discretion-limiting Statutory Distribution, would be required to make ab initio distributions of funds recovered from third parties. Unless that question can be answered in the affirmative, then the unconstitutional provisions of section 409.910 are inseparable from the administrative remedy provided in paragraph (17)(b), and the administrative remedy should be deemed, not unconstitutional, but inoperative——effectively repealed by judicial decree.

36. A brief history of the Statutory Distribution might shed light on the legislative purposes at stake. From 1990 until the present, the Act has included a formula that creates

for the Medicaid agency (currently AHCA) the right to receive a readily calculable amount of reimbursement from third-party recoveries. See § 409.2665(12)(f), Fla. Stat. (1990 Supp.)(original formula)(transferred and renumbered as § 409.910(11)(f) by Ch. 91-282, § 38, at 2656, Laws of Fla.). The latest version of the formula, which produces the Statutory Distribution, took effect in 1998. See § 409.910(11)(f), Fla. Stat. (1998 Supp.).

37. For nearly two decades, AHCA's right to recover the Statutory Distribution was absolute because the formulaic allocation was consistently deemed incontestable. In 2009, however, the Fifth District Court of Appeal broke ranks, ruling that "a plaintiff should be afforded an opportunity to seek the reduction of a Medicaid lien amount by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses." Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 592 (Fla. 5th DCA 2009). In time, two other district courts followed suit, creating a conflict which in 2014 the Florida Supreme Court resolved——in favor of contestability. Garcon v. Ag. for Health Care Admin., 150 So. 3d 1101 (Fla. 2014). By then, however, the legislature had stepped in.

38. In 2013, seeing the handwriting on the wall in the form of a then recent U.S. Supreme Court decision,[10/] the legislature amended the Act, creating an administrative remedy

for contesting the Statutory Distribution, which removed lien contests from the circuit courts. See Ch. 2013-150, § 2, at 7, Laws of Fla. The legislative staff analysis provides some insight into the reasons behind the decision to give DOAH jurisdiction over these cases:

> From March 2012 to February 2013, AHCA's Third Party Liability (TPL) vendor closed 302 cases based upon calculations derived from the statutory formula. AHCA recovered $4.9 million from these cases, approximately $2 million of which is utilized by the Legislature to fund Medicaid administrative activities. However, AHCA's ability to recover Medicaid medical costs from third parties will likely be reduced as a result [of] the recovery amount hearings caused by the decision in *Wos v. E.M.S.* The amount of this reduction is unknown. However, the amount of any reduction will likely be mitigated by the bill's standard of proof for overcoming the presumption.
>
> In addition to the fiscal impact of reduced collections, AHCA will incur a negative fiscal impact for providing recipients hearings on the recovery amount. The TPL vendor staffed 62 hearings in circuit court contesting the AHCA's entitlement to Medicaid recovery during the last 12 months with a cost of approximately $5,000 per hearing. Although the exact number is unknown, due to the loss of the irrebuttable presumption, AHCA anticipates there will be a substantial increase in the number of hearings to determine the Medicaid recovery allocation. The bill mitigates those costs by requiring the hearings to be brought in DOAH, having venue in Leon County, and setting a burden of proof (clear and convincing evidence). The amount of that mitigation is indeterminate.

Fla. H.R. Subcomm. on Health Innovation, CS/CS/HB 939 (2013) Final Staff Analysis 8 (June 10, 2013)(emphasis added; footnotes omitted).

39. The administrative remedy was intended to comply with the federal anti-lien law without losing all the financial benefits of the formerly incontestable Statutory Distribution. Clearly, the purpose of the stringent standard of proof was to protect, against expected challenges, AHCA's now-conditional right to receive the Statutory Distribution, which would continue to be enforced unless, in a particular case, the recipient were able to carry a heavy evidentiary burden. Simply put, after 2013 the Statutory Distribution was AHCA's by default, as before, except that now the formula could be defeated——but only by a recipient willing to undertake the daunting task of disproving, in a formal hearing, the validity of the presumptively correct statutory allocation. Having DOAH adjudicate these disputes, moreover, would keep a lid on the State's litigation costs because all the hearings would be held in one place (Tallahassee) rather than in every judicial circuit around the state.

40. As Smathers correctly points out, the legislative goal of litigation-cost control is met as long as DOAH continues to exercise jurisdiction over lien contests. But any administrative remedy would be cost effective for the State as

compared to facing lawsuits in every circuit. The question is whether there is enough of the original administrative remedy left in paragraph (17)(b), post-Gallardo, for DOAH to administer without additional legislative authorization. On this issue, Smathers presumes that the legislature would have created an administrative lien contest even if it meant letting ALJs determine reimbursement amounts without a Statutory Distribution anchoring AHCA's recoveries to a predetermined, quasi-guaranteed allotment.

41. Smathers claims support for this presumption in the fact that paragraph (17)(b) does not tell the ALJ how to calculate the proper lien amount in cases where the recipient carries his burden of disproving the Statutory Distribution—— which is true. Indeed, the statute gives no guidance for determining whether the recipient has proved that the proper lien amount is less than that calculated by AHCA. But does this mean, as Smathers implies, that there is no material difference between a remedy that makes every recipient an underdog, forced to prove that AHCA should not receive the Statutory Distribution to which it is conditionally entitled; and one which puts recipients and AHCA on a level playing field where AHCA lacks even a conditional right to a certain amount of reimbursement?

42. The answer is *no*. Let's pause to consider what a lien contest would look like without a statutory formula to determine

the State's presumed share of a third-party recovery. It is not necessary to speculate because, as it happens, there is a case on point, namely Underwood v. Department of Health and Rehabilitative Services, 551 So. 2d 522 (Fla. 2d DCA 1989). Factually, Underwood somewhat resembles the instant case. Like Smathers, the plaintiff there suffered catastrophic permanent injuries (in an automobile accident) for which no one responsible had sufficient assets to cover her total damages, which exceeded $1.5 million. Id. at 523-24. Eventually, she accepted a policy-limits settlement of $105,000 and petitioned the court for an equitable distribution of the funds to satisfy the Medicaid lien, which the State claimed secured repayment in full of the approximately $55,000 in medical assistance the plaintiff had received. Id. at 524. The trial court agreed that the State was entitled to a full recovery on the grounds that "Florida's Medical Assistance Law ma[de] no provision for prorating or allocating any sum less than one hundred percent for [the State's] reimbursement out of any recovery by a recipient even though the recipient has not been able to recover from third parties the full measure of her damages." Id.

43. The appellate court reversed the trial court for failing "to apply traditional equitable subrogation principles and prorate or allocate [the State's] right to reimbursement for . . . its claim based upon the proportionate amount of total

damages [the plaintiff] was able to recover." Id. The court reasoned that although the Medicaid statutes gave the State a lien securing its right to reimbursement from third-party recoveries such as the plaintiff's, they did not create a right to an amount of reimbursement. Id. at 525. It concluded as follows:

> The general rule is that, in the absence of a waiver to the contrary, one is not entitled to be subrogated to the rights of an injured party for damages when that injured party has been required to settle his claim for damages for less than its worth because of the limited financial responsibility of the responsible tort-feasor. That broad rule denying *any* subrogation until *full* recovery by the injured party has been partially waived or modified by the Florida Medical Assistance Law. Under that law, [the State] is entitled to a lien against and to seek reimbursement from amounts received by a medical assistance recipient from third parties. However, that amount to which [the State] is entitled should be determined in each case on a pro rata or proportionate basis according to what percentage of the total damages sustained is recovered by the medical assistance recipient and what percentage of those damages should equitably be characterized as a recovery for past medical services or expenses.

Id. at 526.

44. As noted above, the legislature enacted the original reimbursement formula in 1990, in the next session following Underwood, which was probably not coincidental. The legislature, it seems, did not want trial courts equitably

distributing third-party recoveries to the Medicaid agency on a case-by-case basis as though the State were an ordinary subrogee. So, it created an amount of reimbursement to which the State would be entitled. Many years later, when that absolute entitlement became untenable due to developments in federal law, the legislature strategically retreated (but no more than seemed necessary), creating an administrative remedy for recipients that exposed AHCA's once indefeasible right to a genuine, if controlled, risk of loss. After Gallardo, however, AHCA's right to a protected amount of reimbursement is gone, and it faces the uncontrolled risk of substantially reduced recoveries in equitable distribution proceedings (where the State will often be competing against sympathetic plaintiffs for limited funds).

45. The legal history of the formulaic reimbursement scheme strongly suggests, contrary to Smathers's presumption, that the legislature would not have created an administrative remedy for (in effect) deciding petitions for equitable distribution. Had it known that the Statutory Distribution would be declared invalid, the legislature might still have opted for an administrative remedy, but it almost certainly would have placed limits on DOAH's discretion to divvy up third-party recoveries, for at least two sufficient reasons.

46. The first is that the State is not legally required (at this time, anyway) to put AHCA at the mercy of an unguided equitable distribution. Even Gallardo does not go so far as to prohibit the State from prescribing a formula for determining AHCA's proportionate share of a less-than-complete third-party recovery; rather, the court merely said that AHCA cannot rely upon the *current* formula. Previous enactments compel the reasonable assumption that, if the Statutory Distribution were taken off the table, the legislature, at a minimum, would pass a bill mandating the methodology it wants judges to use in calculating AHCA's share——which might be based, for example, on the actual facts concerning a recipient's particular losses, total damages, and percentage of recovery. In sum, the undersigned believes that the legislature would prefer a disciplined distribution to an equitable distribution.

47. The second reason that the legislature probably would not create an administrative equitable distribution-type remedy is that such an enactment would raise a nontrivial separation-of-powers concern. The rule is that "[w]hile an administrative agency may exercise quasi-judicial power when authorized by statute, it may not exercise power which is basically and fundamentally judicial such as the grant of an equitable remedy." Biltmore Constr. Co. v. Fla. Dep't of Gen. Servs., 363 So. 2d 851, 853-54 (Fla. 1st DCA 1978)(only a court exercising

equitable powers may decree specific performance); see also Broward Cnty. v. La Rosa, 505 So. 2d 422, 423 (Fla. 1987)(quasi-judicial powers may be delegated to administrative agencies, but "the legislature cannot authorize these agencies to exercise powers that are fundamentally judicial in nature"). Although the undersigned cannot say for sure that equitable distribution is exclusively a judicial function (for "the boundary between judicial and quasi-judicial functions is often unclear," id.),[11/] it cannot be denied that the passage of an administrative remedy providing for the equivalent of an equitable distribution might amount to an unconstitutional delegation of judicial authority.

48. All of which leads the undersigned to conclude that the legislative purposes behind the administrative remedy in paragraph (17)(b) cannot be accomplished without the provisions that were struck down in Gallardo. Absent these provisions, the undersigned is left to make a determination that is indistinguishable from an ordinary equitable distribution. But the undersigned has not been granted unrestricted authority to make such an equitable distribution——and probably would not be, for the reasons just discussed. Further, as an ALJ, whose powers are limited to those conferred by statute, the undersigned lacks the authority to fashion a replacement remedy to compensate for the damage done by Gallardo to the one prescribed in paragraph (17)(b).

49. The upshot is that, by deforming the administrative remedy in paragraph (17)(b), Gallardo has pulled the rug out from under DOAH, which as a consequence of the district court's ruling has no remedy to offer recipients, such as Smathers, who had no choice but to come here seeking relief. Lacking the power, now, to provide an administrative remedy, the undersigned must dismiss this case for want of jurisdiction.

50. It is neither necessary nor typically appropriate to examine the merits of a controversy over which the tribunal lacks jurisdiction. Nevertheless, because both sides have urged the undersigned to proceed, a brief discussion follows, the purpose of which is to inform the parties what the undersigned would have done if possessed of jurisdiction, for what it's worth.

51. To review the parties' positions, Smathers——using the settlement-to-value ratio method discussed infra at 8——contends that AHCA's share of the GSP should be $12,903. AHCA argues (based on the Statutory Distribution) that it should be repaid in full, and accordingly seeks an allocation of $206,445.41, i.e., the Actual Expenditure. In contrast, I would calculate AHCA's share using the ratio of past medical expenses ("PME") to GSP as the basis for determining RPME, see infra at 19, as follows: $\frac{PME}{TPD} \times GSP = RPME$. I would have found PME to be $2.7 million and TPD $19 million, so that, on a GSP of $1 million,

RPME would equal 142,105. RPME being less than the Actual Expenditure, AHCA's proportionate share would have been $142,105.

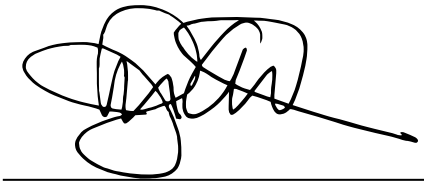
52. Next, I would have determined AHCA's proportionate share of the attorney's fees and costs, for which it should be responsible, given that AHCA will benefit from Smathers's efforts to recover damages (including PME) from the liable third parties. Smathers's net recovery from the settlement, after fees and costs, was $546,894.15. Thus, litigation expenses totaled 453,105.85 in the aggregate. Since I would have found AHCA entitled to a 14.2% slice of GSP, likewise I would have held AHCA liable for 14.2% of the litigation expenses, or $64,341.

53. Accordingly, I would have determined that the amount payable to AHCA in satisfaction of its Medicaid lien for medical assistance provided to Smathers is $77,764, which reflects the net amount that Smathers recovered for past medical expense damages in the settlement of his third-party tort litigation.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that this case is dismissed for lack of jurisdiction.

DONE AND ORDERED this 13th day of September, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2017

ENDNOTES

[1/] TPD includes all components of a plaintiff's recoverable damages, such as medical expenses, lost wages, and noneconomic damages (e.g., pain and suffering).

[2/] These rounded figures are approximations. Greater precision is unnecessary for present purposes.

[3/] There was some evidence regarding Smathers's damages from loss of future earning capacity, but this component is negligible in comparison to his medical expenses and pain and suffering.

[4/] This is because .75 x .50 = .375. The independent variable that changes the percentage from case to case is the amount of taxable costs. The deduction of any taxable costs from the settlement recovery (net of attorney's fees) reduces the portion allocated to Medical Damages to less than 37.5%. Thus, the greater the taxable costs relative to GSP, the smaller the statutory percentage. For example, if GSP were $10,000 in a case having $3,500 in taxable costs, then PRMED would be $2,000, making the statutory percentage 20%. If costs in the same

hypothetical case were $7,500, then the statutory percentage would be zero.

[5/] The legislature amended this sentence, and some other provisions of the Act, during the 2017 regular session. See Ch. 2017-129, § 19, at 99, Laws of Fla. Even if applicable, however, these amendments do not affect the outcome of this case, and thus it is not necessary to undertake a retroactivity analysis.

[6/] Similar language is found elsewhere in the Act, as well. See, e.g., § 409.910(6)(a), Fla. Stat. ("Equities of a recipient, his or her legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights granted under this paragraph."); § 409.910(6)(b)2., Fla. Stat. (same).

[7/] The scare quotes reflect the fact that the Act does not prescribe a standard for measuring the portion of a recipient's total recovery that "should be allocated as" Medical Damages, which means that the "accuracy" of the Statutory Distribution is something of a moving target.

[8/] But see Willoughby v. Ag. for Health Care Admin., 212 So. 3d 516, 521-25 (Fla. 2d DCA 2017)(holding that the Medicaid lien attaches only to the portion of a settlement attributable to past medical expenses). The undersigned is of course aware that courts and ALJs have struggled with (and disagreed over) the question of whether the lien can be satisfied out of the recipient's recovery for *future* medical expense damages. There is no need to relitigate that issue here. Unless the Florida Supreme Court resolves the conflict between Giraldo and Willoughby in favor of Willoughby (or the First District Court of Appeal recedes from its opinion), Giraldo will, as a practical matter, control in administrative proceedings brought under section 409.410(17)(b) due to AHCA's venue privilege. See § 409.910(17)(d), Fla. Stat.

[9/] To be precise, AHCA states that the "constitutionality" of the administrative remedy under paragraph (17)(b) was not at issue in Gallardo, which is true, but the undersigned is concerned only with whether enough of that administrative remedy still exists for DOAH to exercise jurisdiction over it, not with whether such remedy is constitutional.

[10/] Wos v. E.M.A., 568 U.S. 627, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013).

[11/] At any rate, moreover, deciding the constitutionality of a legislative delegation of such authority to DOAH would be a judicial function.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the First District Court of Appeal in Leon County, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.