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IN THE SUPREME COURT OF THE UNITED STATES

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ARKANSAS DEPARTMENT OF HEALTH :
AND HUMAN SERVICES, ET AL., :
Petitioners :

v. : No. 04-1506

HEIDI AHLBORN. :

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Washington, D.C.

Monday, February 27, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 a.m.

APPEARANCES:

LORI FRENO, ESQ., Assistant Attorney General, Little
Rock, Arkansas; on behalf of the Petitioners.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the United States, as amicus curiae,
supporting the Petitioners.

H. DAVID BLAIR, ESQ., Batesville, Arkansas; on behalf
of the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in 04-1506, Arkansas Department of
5 Health and Human Services v. Ahlborn.

6 Ms. Freno.

7 ORAL ARGUMENT OF LORI FRENO

8 ON BEHALF OF THE PETITIONERS

9 MS. FRENO: Mr. Chief Justice, and may it
10 please the Court:

11 The parties agree that Medicaid paid over
12 \$215,000 to cover the costs of medical care provided to
13 Ms. Ahlborn that resulted from an auto accident that
14 she was involved in. The parties also agree that the
15 Petitioner, the Arkansas Department of Health and Human
16 Services, may place a lien on some portion of the third
17 party settlement proceeds that are at issue in this
18 case. They disagree, however, as to what extent that
19 lien may reach into the third party settlement proceeds
20 in this case.

21 The Respondent, without notifying the
22 Department of Health and Human Services, finalized a
23 settlement with the remaining tortfeasor accepting
24 \$550,000 as a compromised settlement for a claim that
25 she had originally valued at over \$3 million.

1 JUSTICE KENNEDY: Can you tell me? It's my
2 -- excuse me. My understanding was that Arkansas had
3 intervened in the suit.

4 MS. FRENO: That is correct, Your Honor.
5 Arkansas did intervene in the lawsuit.

6 JUSTICE KENNEDY: So after the settlement, I
7 take it Arkansas would -- still would have had the
8 right to -- to pursue its claim in the litigation, or
9 am I wrong about that?

10 MS. FRENO: Well, Your Honor, after -- at the
11 point that Arkansas learned about the settlement, the
12 case had already been dismissed out of State court with
13 prejudice, and the Respondent notified the department
14 that if it would not accept -- it would not compromise
15 its Medicaid claim, that they would be filing a
16 declaratory judgment action in Federal court to resolve
17 the anti-lien question. And that is how we ended up in
18 Federal court.

19 JUSTICE STEVENS: But if Arkansas was a party
20 to the case, it didn't get notice of the dismissal?

21 JUSTICE KENNEDY: That's what I don't
22 understand.

23 MS. FRENO: They -- it did not get notice of
24 the dismissal. No, it did not, Your Honor. We do not
25 know what happened, but we did not get notice of the

1 dismissal until after the case was dismissed.

2 JUSTICE BREYER: Well, I don't understand --

3 JUSTICE KENNEDY: How can they do that with
4 -- with a party? I mean, the -- and the reason -- the
5 reason I ask is it seems to me that you still have the
6 cause of action left. Maybe that would be my next
7 question.

8 Suppose there's a settlement and you don't
9 get, in the settlement, even earmarks, medical
10 specialists, plus general damages, and you're -- you're
11 unsatisfied. Don't you still have the right under
12 Arkansas law -- or do you -- to pursue the tortfeasor
13 for the balance that's owed to you?

14 MS. FRENO: Arguably Arkansas could have
15 attempted to get the case reopened in State court, but
16 the Petitioner -- I'm sorry -- the Respondent in this
17 case selected the Federal forum to resolve the issue.

18 JUSTICE BREYER: No, but that's not that issue.

19 That is, I think the question is, why is it that this
20 statute doesn't simply provide the following route?
21 Party A and party B enter into a settlement, and they
22 say \$10,000 is for medical and \$90,000 is for pain and
23 suffering. You, Arkansas, are out \$50,000. Well,
24 fine. You're in the case anyway. Sue the defendant
25 for the remaining \$40,000.

1 MS. FRENO: Well, Your Honor --

2 JUSTICE BREYER: And that's the end of it.

3 MS. FRENO: I'm not familiar with the terms
4 of the settlement agreement, but I would assume that if
5 Arkansas would have sued the defendant for the
6 remainder, that there would have been an
7 indemnification clause in the settlement agreement,
8 which means that the money would have ended up coming
9 right out of Ms. Ahlborn's pocket in any event.

10 JUSTICE BREYER: Well, I have no idea about
11 that. I'm interested in this nest of statutes, and the
12 question I think that I would have is why doesn't the
13 statute propose the route for a State in your -- in
14 your position that I just said. If they have a good
15 faith settlement and they think that \$10,000 of this
16 good faith settlement is attributable to the medical
17 expense and you are out \$40,000 -- \$50,000, you can sue
18 the other party. And if you're in the case, you just
19 proceed with the suit.

20 MS. FRENO: Your Honor --

21 JUSTICE BREYER: They can't settle your claim
22 out from under you.

23 MS. FRENO: That is exactly what happened.
24 They did settle the claim out from under the
25 department.

1 JUSTICE BREYER: No, but the --

2 JUSTICE KENNEDY: But we're asking how that
3 can be.

4 MS. FRENO: We don't -- well, we don't know
5 how that can be. We don't know why the -- we do not
6 know why the State court dismissed the action.

7 JUSTICE KENNEDY: We're asking you as a
8 matter of Arkansas law.

9 MS. FRENO: As a matter of Arkansas law, a
10 claim should not be dismissed until all parties are --
11 the rights of all parties are determined.

12 JUSTICE SOUTER: Why didn't Arkansas --

13 JUSTICE STEVENS: I wonder if you have a
14 claim for incompetent counsel representing you.

15 MS. FRENO: I'm sorry?

16 JUSTICE STEVENS: I'm wondering you -- if you
17 have a claim against counsel for being incompetent in
18 letting a settlement be made without notice to the --
19 to you. It seems to me hard to -- hard to understand
20 how this could happen.

21 MS. FRENO: Well, if -- in fact, there is an
22 Arkansas statute that if monies that belong to the
23 department are distributed in a -- in a manner that is
24 inconsistent, you know, with the interests of the
25 department, that it can pursue either the Medicaid

1 recipient, her guardian, her attorney, or anyone else
2 for that money.

3 JUSTICE SOUTER: Then why don't we just send
4 you back to do that?

5 MS. FRENO: Because --

6 JUSTICE SOUTER: I mean, why are we going
7 through this -- this proceeding here?

8 MS. FRENO: The reason we're going through
9 the proceeding here, Your Honor, is because the issue
10 of the anti-lien provision was raised. That was not
11 raised in State court. It was brought in Federal court
12 as a part of the declaratory judgment action.

13 JUSTICE SOUTER: No. I -- I realize that.
14 But at -- at the end of the day, you want your money,
15 and -- and I don't see why you can't get your money
16 simply by going back into the State court. Maybe --
17 maybe lapse of time bars you at this point. But
18 presumably you could have avoided all of this by simply
19 saying, we didn't agree to the settlement. We're still
20 here. We want our -- the -- the remainder of our
21 money.

22 MS. FRENO: Your Honor, we could have
23 proceeded in State court if we wished. The State, of
24 course, has limited resources, and we learned that the
25 --

1 JUSTICE SOUTER: Well, wouldn't it have been
2 easier to do that than come to the Supreme Court of the
3 United States?

4 MS. FRENO: We never expected to get,
5 frankly, to the Supreme Court of the United States.
6 But we did understand that we would be --

7 CHIEF JUSTICE ROBERTS: You were the
8 Petitioner.

9 MS. FRENO: -- before the Federal district --
10 I'm sorry?

11 CHIEF JUSTICE ROBERTS: You were -- you were
12 the Petitioner.

13 MS. FRENO: Yes.

14 CHIEF JUSTICE ROBERTS: Well, if you're
15 filing a petition, you have to have some expectation
16 that you might end up here.

17 MS. FRENO: Oh, I thought you meant at the
18 time that the State court case was dismissed. I'm
19 sorry. I misunderstood the question.

20 JUSTICE BREYER: I want to go back to the
21 Federal statutes and the State statute.

22 MS. FRENO: Yes.

23 JUSTICE BREYER: Why isn't this discussion
24 just suggest what the answer is to the legal question
25 raised? The answer is, of course, you cannot get a

1 hold of this money in the hands of the victim. The
2 money in the hands of the accident victim is not your
3 money. It is not medical expense money. It was
4 stipulated that it is not. That doesn't leave you
5 without a remedy. The remedy is to go against the
6 causer of the accident and get the extra money that you
7 think is entitled to you. The statutes say that
8 literally, and why not just follow them?

9 MS. FRENO: Your Honor, the third party
10 liability provisions of Federal Medicaid law is what
11 governs this case, and those statutes require that the
12 States seek -- seek reimbursement from liable third
13 parties for medical costs for the full amount of that
14 liability.

15 Now, as a -- a condition of Ms. Ahlborn's
16 eligibility -- or as a condition of eligibility for
17 Medicaid, Ms. Ahlborn had to assign to the State her
18 right to payment for medical costs -- her right to
19 payment for medical costs. Consequently, when she
20 assigned that right to the State, it was synonymous
21 with what the State itself had to do, which was seek
22 full reimbursement from liable third parties to the
23 extent of the third parties' legal liability.

24 JUSTICE STEVENS: But could she -- after that
25 assignment, could she bring a suit in her own right to

1 do that, to recover the medical costs?

2 MS. FRENO: Yes, she could, Your Honor, and
3 in fact, that is what the majority --

4 JUSTICE STEVENS: Even though she's assigned
5 the cause of action to the State?

6 MS. FRENO: Yes, Your Honor. And that is
7 what the majority of the Medicaid recipients in our
8 State choose to do. They prefer to pursue the action
9 on their own and in the end just reimburse the Medicaid
10 program.

11 JUSTICE SCALIA: Why isn't it dismissed on
12 the basis that they -- they don't have a cause of
13 action because they've assigned it?

14 MS. FRENO: Well, they -- she is basically --
15 a recipient is pursuing the cause of action with the --
16 the approval of the State. And also, in the third
17 party liability provisions, it's important to recognize
18 that they provide -- they include a duty of cooperation
19 that the recipient has to cooperate with the State in
20 seeking full Medicaid reimbursement. So the third --
21 the Federal third party liability provisions basically
22 consider the recipient and the State to be a team, a
23 team that is out to get full reimbursement.

24 JUSTICE GINSBURG: You're -- you're talking
25 without reference to the statute, and as I read the

1 statute, the phrase that keeps reappearing is payments
2 made by a third party for health care items or
3 services. So she has to turn over from her recovery
4 what she got for health care, but we know that her tort
5 claim consisted of a lot more. So if the Federal
6 statute says she has to turn over what she received
7 from the third party for health care services, well,
8 she did that, and you agreed that that would be a fair
9 allocation. So I don't see how you get from her the --
10 a much larger share than what she got for health care.

11 MS. FRENO: Your Honor, what the statute
12 requires -- this is in the Petitioners' brief on pages
13 2 and 3 -- at 42 U.S.C. 1396k(a)(1)(A), which is the
14 section that talks about the scope of the assignment,
15 she has to assign her rights to payment for medical
16 care, not payments that she actually receives for
17 medical care.

18 And what are her rights to payment for
19 medical care? If we would take this out of the
20 Medicaid context and put it in a standard tort context,
21 someone who's injured by a third party has a right to
22 receive all the money that she is out due to the fact
23 that she was injured by the third party.

24 JUSTICE SOUTER: Why isn't her response to
25 that argument, look, I've -- I've assigned you my

1 rights? There's no question about that. I'm also
2 willing to give you whatever the amount is that they
3 allocated. If -- if you want the difference, you've
4 got the assignment. Go ahead and sue for it.

5 MS. FRENO: There is nothing, though, in the
6 --

7 JUSTICE SOUTER: I mean, that would be
8 consistent with the -- with the statute. Wouldn't it?

9 MS. FRENO: The third party liability
10 provisions do not require the State to ever seek
11 reimbursement through the direct --

12 JUSTICE SOUTER: No, no, but I -- I'm not
13 saying that it -- it does. The State can do nothing if
14 it wants to. But the statute that you just quoted
15 requires her to assign to the State her right to
16 recover for -- for her medical expenses. She says, I
17 have done that. In fact, I've done that as a matter of
18 law, under Arkansas law. You've got your assignment.

19 Number two, I'm giving you the portion of the
20 recovery that I got with respect to medical payments.
21 You can have it.

22 Now, there's a difference between what you
23 paid and what I got attributable to medical payments,
24 an amount, by the way, which you stipulated was
25 correct. So if you want the difference, sue for it.

1 Go ahead. It's fine with me. Why isn't that the
2 answer?

3 MS. FRENO: Ms. -- first of all, with regard
4 to the stipulation, Your Honor, the parties have always
5 agreed that Medicaid paid over \$214,000 --

6 JUSTICE SOUTER: Right.

7 MS. FRENO: -- for Ms. Ahlborn's damages.
8 The State is in no way trying to take anything from the
9 third party settlement proceeds that represents -- that
10 represents payment for anything other than what is
11 necessary to reimburse the State for that amount of
12 money.

13 JUSTICE SOUTER: But you're -- you're basing
14 your argument on this statute.

15 MS. FRENO: Yes.

16 JUSTICE SOUTER: And let me come back to my
17 question. This statute simply says that she will
18 assign her rights to recover for the medicals. She has
19 done that. She has also given you the portion of the
20 settlement which she and you agree is attributable to
21 the medicals. Why isn't the statute satisfied if she
22 simply says, you've got your assignment? If you want
23 the difference between what I've given you and your
24 out-of-pocket expense, sue. You have the assignment.
25 You have the right. Go ahead and sue for it.

1 MS. FRENO: Because she assigned, Your Honor,
2 her right to recover -- or her right for payments from
3 third parties, she no longer has the right to
4 compromise the State's claim. Ms. -- the Respondent
5 does not have --

6 JUSTICE SOUTER: Well, it seems to me that
7 that is an entirely different argument. The question
8 is what does the statute require her to do and entitle
9 you to do. And I don't see why, under the statute, the
10 statute is not satisfied if you simply sue for the
11 difference under -- under your assignment of her
12 rights.

13 MS. FRENO: There's -- under the statute, her
14 assignment -- she has a duty of cooperation, first of
15 all, to cooperate with the State in receiving these
16 recoveries. The assignment allows her to bring a
17 lawsuit. It does not require her to bring a lawsuit.
18 Primarily the obligation is on the State to sue --

19 JUSTICE SOUTER: Doesn't the assignment allow
20 you to bring a lawsuit?

21 MS. FRENO: Yes, the assignment allows --

22 JUSTICE SOUTER: Then why don't you bring it?
23 I mean, the answer to the -- to the statutory point,
24 it seems to me, is you've got your assignment. If
25 you're not whole yet, sue.

1 MS. FRENO: But she -- she opted to bring the
2 -- she opted to bring the lawsuit on her own. And the
3 point I was making earlier --

4 JUSTICE SOUTER: So what? You can sue too.

5 MS. FRENO: We could sue, but the State has
6 limited resources. Every penny --

7 JUSTICE KENNEDY: Let me -- let me ask you
8 this question so far as the rights of the assignee and
9 the assignor. Suppose it's a very weak case and the
10 litigant says I want to settle for 20 cents on the
11 dollar. Are you saying that there's some kind of duty
12 to notify the State and -- and to consult with the
13 State before this is done?

14 MS. FRENO: Yes, Your Honor, and that is
15 encompassed within State law.

16 JUSTICE KENNEDY: Okay. Suppose the -- the
17 State says, well, we -- we don't -- we don't agree with
18 you. Then -- then what happens? Then they're at
19 loggerheads and you go to Justice Souter's position I
20 suppose.

21 MS. FRENO: In that situation, then the --
22 the case would just have to go forward to litigation.
23 And yes, the State, if it wished to pursue --

24 JUSTICE KENNEDY: Would -- would it -- if --
25 suppose in the instance I put they -- the -- the State

1 has -- has an objection, but the settlement is made,
2 nonetheless, for 20 cents on the dollar. Do you still
3 think you have the right to receive 100 percent of your
4 payment from the proceeds in the case that I put?

5 MS. FRENO: Would you repeat that? I'm
6 sorry.

7 JUSTICE KENNEDY: Assume that it's a very
8 weak case. They settle for 20 cents on the dollar. Do
9 you have the right, as you understand the law, to
10 insist that you receive 100 percent of your payments
11 from the gross settlement?

12 MS. FRENO: The -- the Medicaid recipient can
13 never compromise the claim of the State.

14 JUSTICE KENNEDY: The answer is yes, I take
15 it.

16 MS. FRENO: Pardon me?

17 JUSTICE KENNEDY: The answer is yes, I take
18 it. In the case I put, the answer is you would think
19 that you're entitled to 100 percent of your payments.
20 So that eats into her general damages.

21 MS. FRENO: Well, she -- in that situation,
22 Your Honor, she can -- she can compromise her own
23 claim. She cannot compromise the State's. If she
24 wants --

25 CHIEF JUSTICE ROBERTS: So you think you're

1 -- you're entitled to 100 percent under Arkansas law,
2 but -- and I take it, that would be without regard to
3 what the Federal law required. The Arkansas law can go
4 beyond -- just looking at the assignment provision,
5 beyond what the Federal law requires you do as a
6 condition of participation in Medicaid. Correct?

7 MS. FRENO: No. State law cannot go, Your
8 Honor, beyond Federal law, and Federal law allows the
9 State to receive full reimbursement to the extent of
10 the third party's liability.

11 CHIEF JUSTICE ROBERTS: Well, if we disagree
12 with you on that -- in other words, you're saying we
13 don't even have to reach the anti-lien provision
14 question. If we think the Medicaid condition only goes
15 to the extent payments for medical care, then you would
16 lose without regard to the anti-lien provision?

17 MS. FRENO: I'm sorry. Would you repeat
18 that?

19 CHIEF JUSTICE ROBERTS: Arkansas law, as you
20 understand it --

21 MS. FRENO: Yes.

22 CHIEF JUSTICE ROBERTS: -- requires a -- a
23 full -- full assignment of any expenses the State -- or
24 full recovery of any expenses the State has incurred.
25 It's not -- it's a debate whether Medicaid law requires

1 that. And what you're saying is if we think the
2 Medicaid law does not require it, you would lose
3 without regard to any consideration of the anti-lien
4 provision?

5 MS. FRENO: If Medicaid -- Medicaid law does
6 require full reimbursement. But if this Court
7 determined that Medicaid law did not require full
8 reimbursement from -- to the extent of a third party's
9 liability, well, then there would not be an anti-lien
10 -- there would not be an anti-lien provision question.

11 But Federal law does require the State to seek full
12 reimbursement to the extent of the third party's
13 liability.

14 CHIEF JUSTICE ROBERTS: Well, that's one of
15 the issues, and I'm trying to understand. The
16 Respondent's position is that the Arkansas law goes
17 beyond what the Medicaid assignment provisions require.

18 And I want your position on whether or not, if that's
19 right, again without regard to the anti-lien provision,
20 that you would lose. It seems to me that you can --
21 Arkansas can go beyond what the Medicaid law requires
22 for reimbursement, if it wants.

23 MS. FRENO: No, that is not true, Your Honor.
24 Arkansas law must stay within the scope of the Federal
25 law. Arkansas law cannot require a recipient to assign

1 --

2 CHIEF JUSTICE ROBERTS: Okay. So if we read
3 the Medicaid statute to require something less than
4 what your position is here, then you lose.

5 MS. FRENO: That would be correct.

6 CHIEF JUSTICE ROBERTS: Okay. That's without
7 regard to the anti-lien provision, or is it because of
8 the anti-lien provision?

9 MS. FRENO: It would be because of the anti-
10 lien provision. But because she assigned her right to payment
11 for medical care, that -- the anti-lien provision
12 doesn't operate with regard to that amount of money
13 that is recovered from a third party in a -- in a third
14 party settlement.

15 If there are no further questions, I'd like
16 to reserve the remainder of my time for rebuttal.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MS. FRENO: Thank you.

19 CHIEF JUSTICE ROBERTS: Ms. Millett.

20 ORAL ARGUMENT OF PATRICIA A. MILLETT

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

23 MS. MILLETT: Mr. Chief Justice, and may it
24 please the Court:

25 Excuse me. The problem in this case -- and

1 it's a common one -- is when private parties,
2 beneficiaries, sue first and run the well dry.

3 There's no question in this case that the
4 settlement includes the payment for medical care that
5 she was entitled to and the one she assigned to the
6 State. That is not in dispute. The question is the
7 amount, and the amount is very much in dispute. The --
8 the position of the beneficiary is that the amount that
9 is medical payment is the amount that we unilaterally
10 decide is the share of medical payments in the
11 settlement.

12 JUSTICE ALITO: What should have happened?
13 If, suppose that Ms. Ahlborn had cooperated. Would there
14 have to be an agreement among all of the parties as to
15 the breakdown of the -- of the settlement?

16 MS. MILLETT: No. There are two options.
17 One would, of course, be to have an agreement on
18 resolution of the medical claim, which would require
19 notice and involvement of the State. The State could
20 act here.

21 The other option is if they're at
22 loggerheads, for it to be clear up front amongst all
23 the parties that the -- the settlement isn't resolving
24 all the third party liability. It -- the -- the
25 question of liability for medical care, or at least the

1 State's claim for medical care -- sometimes they have
2 their own -- is still open, and there has to be enough
3 money left in the well. There were two insurance
4 policies here that were paid at their caps.

5 JUSTICE KENNEDY: Well, I mean, why does
6 there have to be enough money in the -- take -- take
7 the -- the case that we -- we put to your co-counsel.
8 Suppose it's a settlement for 20 cents on the dollar.
9 Does the -- does the State have an absolute right to
10 get reimbursement for 100 percent by invading the
11 general damages portion of the settlement?

12 MS. MILLETT: No. The State has -- and the
13 Medicaid statute is quite clear. They have an
14 entitlement to payments for medical care, but --

15 JUSTICE KENNEDY: No, but in my -- can you
16 answer the -- the question? You have the problem.
17 They settle for 20 cents on the dollar. Does the State
18 in that case have the absolute right to a lien or a
19 claim or to a demand for the -- for the proceeds in --
20 for the balance of the 80 -- for the 80 percent balance
21 of the medical costs?

22 MS. MILLETT: No, not straight out, but what
23 they -- they have the right to make their own decision
24 and compromise their own claim. The beneficiary may
25 think it's 20 cents on the dollar. The State may think

1 -- the State can consider two things and two things
2 only.

3 JUSTICE KENNEDY: But that is -- that is as
4 between the State and the third party tortfeasor, not
5 between the State and -- and the Medicare recipient, I
6 should think.

7 MS. MILLETT: Not when -- not -- not when the
8 settlement, as here, involves the complete claim.
9 There's never been a claim by the beneficiaries here
10 that there's something left under State law to do or
11 something left in the well to go get on the part of the
12 State.

13 But let -- if I -- I think it's important to
14 understand why these suits against the -- or a State
15 could decide -- and the anti-lien decision does not
16 compel the State to decide otherwise. A State, with
17 its discretion under Medicaid, could decide that
18 pursuing third parties is not viable. This is not an
19 ordinary assignment. This is an assignment with strong
20 duties of cooperation required on the part of the
21 beneficiary.

22 Now, what does the lawsuit look like when the
23 State goes, after the settlement, against the third
24 party tortfeasor here? The State has no control of
25 evidence. It has a pile of bills, none of the relevant

1 evidence.

2 At the point of this lawsuit, the
3 beneficiary's interests are adverse to the State's.
4 They're not in a cooperative mode. They're interested
5 in --

6 JUSTICE GINSBURG: But the State -- the State
7 could sue in the first instance. In fact, if you just
8 read the text of the statute, it seems like the State
9 is the one envisioned to be suing for reimbursement of
10 the medical expenses.

11 MS. MILLETT: Two answers, Justice Ginsburg.

12 First, a lot of times, the plaintiffs have
13 already started these lawsuits of these claims long
14 before -- when the State has just started getting up
15 the process of paying the medical bills. And car
16 accidents and stuff can get taken care of pretty
17 quickly.

18 And the -- the second point is, is that the
19 State -- the State may -- needs the help of the
20 beneficiary to bring this suit.

21 JUSTICE GINSBURG: But the State was in this
22 case. The State intervened. So it was party to the
23 case.

24 MS. MILLETT: Yes.

25 JUSTICE GINSBURG: And when it -- it found

1 out about the dismissal, why didn't it go right into
2 the Arkansas court and say, you forgot about us? We
3 were a party to this lawsuit.

4 MS. MILLETT: They -- they could have, and
5 they'd be -- they'd be fighting the same anti-lien
6 issue there that they ended up fighting in Federal
7 court.

8 But there's one other thing too. Keep in
9 mind these third party liability provisions --

10 JUSTICE GINSBURG: Why would they be fighting
11 the same anti-lien provision? They would be --
12 wouldn't they be saying we have a claim for all of the
13 medical expenses? And no other party -- the injury
14 victim didn't have authority from us to compromise our
15 claim. It's for us to compromise it.

16 MS. MILLETT: That's right. They would say
17 that, and -- and the -- and where -- where the parties
18 came at loggerheads here was -- their position is
19 medical claim is in here. It's in this pot. That's
20 not in dispute. It's in here. How much do you get?
21 Do you get the amount that we unilaterally designate,
22 or can the State have a default rule that says when you
23 cut us out and we no longer have a means of litigating
24 in cooperation with you to make a reasoned judgment as
25 to what the fair medical payment is in this settlement,

1 can we insist upon 100 percent?

2 Otherwise, there's two things happening. The
3 -- the beneficiary should not be better off for having
4 cut the State out of the process, but that's what's
5 going to happen.

6 JUSTICE KENNEDY: Well -- well, if your rule
7 is just one that you have to pay the 100 percent if
8 there's non-cooperation and a non-notice, that's one
9 thing. But the briefs, it seems to me, indicate that
10 you have an absolute right to 100 percent. And those
11 are two very different propositions.

12 MS. MILLETT: Our position is the 100 percent
13 claim -- the default -- as a default rule, when the
14 State has been cut out and cannot make the reasoned
15 judgment that the Medicaid statute charges the State
16 with making on these claims, that's a 100 percent rule.

17 Quite -- our position, quite
18 straightforwardly, is if the State was involved or if
19 there was a jury finding of 50/50, you know,
20 comparative negligence, then the Medicaid claim gets
21 cut in half because it -- the -- the State can consider
22 two things, extent of liability and cost --

23 JUSTICE KENNEDY: I -- I know in the case of
24 a jury. But our question is what happens if there's a
25 settlement.

1 MS. MILLETT: It's -- no. And -- and if
2 there's a settlement in which the State is not involved
3 but the medical bill is compromised -- so it's not out
4 there to be recovered -- the medical bill --

5 JUSTICE STEVENS: May I ask this clarifying
6 question? If it's 50/50 because of a jury verdict of
7 comparative negligence, then you only get half the
8 money. If it's 50/50 because of a settlement,
9 believing they only have a 50 percent chance of
10 recovery, what -- what is your answer?

11 MS. MILLETT: It depends on whether the State
12 was involved in making that judgment. If the State was
13 cut out of making that judgment, the State can choose
14 to have a default rule.

15 JUSTICE KENNEDY: Suppose the State was
16 involved but disagreed.

17 JUSTICE STEVENS: You're saying the State
18 should sue here.

19 MS. MILLETT: I'm sorry.

20 JUSTICE STEVENS: You're saying here the
21 State should therefore sue, if I understand you.

22 MS. MILLETT: No. The State -- the State
23 should be entitled to a 100 percent rule because -- for
24 two reasons. One, there is no way post hoc -- or no --
25 a State can decide there's no reliable way post hoc to

1 figure out how much of this truly was a payment for
2 medical care. I mean, stop and think. Medical --

3 JUSTICE STEVENS: But here it's stipulated I
4 thought.

5 MS. MILLETT: No, no. What was stipulated --
6 and I think you have to read the stipulation very
7 carefully. There is no stipulation in there that the
8 State agrees that \$35,000 is an accurate assessment of
9 medical liability. The stipulation says --

10 JUSTICE STEVENS: No. It's a compromise.
11 Just as my other example of a 50/50 chance of winning
12 the lawsuit, you compromise for 50 percent. I don't
13 see the difference.

14 MS. MILLETT: No. The -- the difference is
15 it's who makes the compromise decision. And the
16 stipulation is -- from the beneficiary's view, they
17 obviously made a compromise decision. They did an
18 across-the-board sort of mathematical reduction of this
19 claim, and they didn't sort of stop and think about
20 what's more easily proven, medical claims or pain and
21 suffering. What's more easily documented. They didn't
22 do -- it's just a mathematical reduction.

23 The State never said that's accurate. The
24 State said, if you win, your statutory construction
25 argument, which is the amount that you unilaterally

1 designate as medical care, is what we're stuck with.
2 And if we try to take more, it violates the anti-lien
3 provision. That's --

4 JUSTICE KENNEDY: Suppose the State --
5 suppose the State is involved in the negotiations and
6 they disagree. The -- the parties in good faith say,
7 we've got to settle this for 20 percent. The State
8 said, oh, your case is much better than that. Please
9 don't settle. Then what?

10 MS. MILLETT: That --

11 JUSTICE KENNEDY: It has notice. It's
12 involved, et cetera, et cetera.

13 MS. MILLETT: Right. Then at that point,
14 what should happen is there can be a -- the -- the
15 beneficiary can go ahead and resolve her other claims.
16 But everybody has to be on notice. Those third
17 parties, in particular, have to be on notice that this
18 is not the end of the game. You still -- this does not
19 --

20 JUSTICE SCALIA: Ms. --

21 MS. MILLETT: -- cover medical payments.

22 JUSTICE SCALIA: Ms. Millett, you've been
23 trying to tell us the difficulties that the State would
24 have in bringing suit later.

25 MS. MILLETT: Yes.

1 JUSTICE SCALIA: What are they? I see your
2 white light is on.

3 MS. MILLETT: Yes. The --

4 JUSTICE SCALIA: I'd like to hear what they
5 are.

6 MS. MILLETT: The -- the first one,
7 obviously, -- there's three.

8 The first one is evidence control. The State
9 has a pile of bills but no evidence about liability.
10 Now, beforehand, if they're involved, their -- their
11 interests and the beneficiary's are aligned to maximize
12 recovery. After the fact, the State is going to go in,
13 either at a post hoc hearing with the beneficiary or
14 try to sue some third party, and the beneficiary is
15 going to say, oh, I fell asleep at the wheel, I was on
16 my cell phone, I had preexisting conditions, because
17 her incentive is now to reduce your recovery. This is
18 the exact opposite of the duty of cooperation that
19 Federal and State law envisioned for this process.

20 The second --

21 JUSTICE SOUTER: Why is it her incentive to
22 reduce recovery? She may not be getting anything more,
23 but why does she have incentive to reduce it?

24 MS. MILLETT: Because at this -- if -- if
25 we're in a post hoc hearing to sort of allocate the

1 settlement, she wants to keep -- have as much of it put
2 into the pain and suffering and lost wages pile and as
3 little in the medical liability pile because she
4 doesn't go home with that.

5 JUSTICE SOUTER: I -- I thought she and the
6 --

7 MS. MILLETT: And then if -- I'm sorry.
8 There's two -- there's two different post-hearings you
9 could have.

10 JUSTICE SOUTER: Yes, yes.

11 MS. MILLETT: One would be a fight with her.
12 The other one would be they go in to sue the
13 defendants. Now, at this point, she's not necessarily
14 adverse, but she has no interest to help.

15 JUSTICE SOUTER: Yes. Insofar as the suit
16 against the defendant is concerned, she's not -- she
17 does not have an interest in minimizing.

18 MS. MILLETT: But she may if there's an
19 indemnity agreement, which means if they have to pay to
20 us, they will -- I'm sorry. Can I finish? That if --
21 if the defendants have to pay more to us, then they
22 will get to go after her. And that's the concern.

23 CHIEF JUSTICE ROBERTS: Thank you, Ms.
24 Millett.

25 MS. MILLETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Blair.

2 ORAL ARGUMENT OF H. DAVID BLAIR

3 ON BEHALF OF THE RESPONDENT

4 MR. BLAIR: Mr. Chief Justice, and may it
5 please the Court:

6 The problem here, of course, is one where the
7 funds, the proceeds, to resolve a claim are less than
8 the damages of all parties, including the medical bills
9 that have been paid by the State.

10 Now, the Court is correct that not only under
11 the Federal statute did the State have the option of
12 pursuing an independent cause of action, there is a
13 State statute that provides that very thing, our code
14 20-77-301. And in fact, that statute, in effect,
15 allows a splitting of the common law cause of action
16 for personal injury, which otherwise would be
17 prohibited. But --

18 JUSTICE SCALIA: What -- what incentive does
19 she have to cooperate in that later action? And isn't
20 it the fact that she would have a disincentive to
21 cooperate if she's going to have to reimburse the
22 insurance companies for any additional compensation
23 that they pay?

24 MR. BLAIR: She would not have a disincentive
25 to cooperate. She might not have an incentive to

1 cooperate because they're bringing their own lawsuit.

2 JUSTICE SCALIA: Well, it -- but -- but don't
3 some of the insurance policies require that if the
4 insurance company, which has settled the first claim,
5 ends up paying -- paying additional money, that that --
6 that that amount of money would be the -- the
7 responsibility of the -- of the claimant?

8 MR. BLAIR: Correct.

9 JUSTICE SCALIA: So that's a disincentive on
10 her part. She doesn't want the insurance company to
11 lose any more money.

12 MR. BLAIR: That -- that is correct. Had the
13 --

14 JUSTICE SCALIA: Well, it seems to me that
15 that's a very strange system for the Federal Government
16 to set up and to -- to -- I mean, to -- to subsidize --
17 to reward the failure of the -- of the Medicaid benefit
18 -- beneficiary to cooperate. There's a statutory
19 responsibility for her to cooperate, isn't there?

20 MR. BLAIR: Correct.

21 JUSTICE SCALIA: And she didn't do that here
22 because she just went ahead and settled without --
23 without giving the State notice.

24 MR. BLAIR: I disagree, Your Honor. I do not
25 think that the duty to cooperate necessarily included

1 the duty to include the State in the loop in the
2 settlement process.

3 JUSTICE SCALIA: Really.

4 MR. BLAIR: That is --

5 JUSTICE SCALIA: I mean, the State is a party
6 to the proceeding, and she goes ahead and gets the
7 proceeding dismissed without even telling the State,
8 and that -- that isn't included in the -- the
9 responsibility to cooperate?

10 MR. BLAIR: The dismissal, of course,
11 followed the settlement. What the complaint is, is
12 that they were not consulted about the settlement
13 process.

14 And it would have been of no benefit had they
15 been consulted about the settlement process. The
16 defendants were only going to pay a certain amount of
17 money. Had the State shown up at the settlement
18 hearing if -- or the conference, if there was such a
19 thing, no doubt it would have taken the position that
20 it takes here, that it's entitled to be paid in full.

21 JUSTICE SOUTER: And I suppose if the
22 insurance company heard from the State that the State
23 continued to -- would continue to pursue its claim, in
24 the absence either of a more generous assignment or a
25 more generous settlement, there might not have been a

1 settlement.

2 MR. BLAIR: That's correct, Your Honor. Had

3 --

4 JUSTICE BREYER: Well, so why -- why then is
5 it unreasonable for the State to take this position,
6 the one that the government took? They said, of
7 course, we, the governments of State and Federal have
8 only the right to attach the portion of that settlement
9 that is representative of the medical expenditure. And
10 where we're in on the deal, you'll all agree what that
11 portion is, or there won't be a settlement and we'll
12 proceed to trial. But where we're cut out of the deal
13 -- and we shouldn't be because there's a duty to
14 cooperate -- we will assume in that instance that it --
15 every penny of that medical expense is included in the
16 amount that was settled for. And they say, given the
17 statutes, that's a reasonable way of enforcing their
18 Federal obligation to recover the money.

19 Now, whether we agree or disagree with it as
20 a matter of policy, what is wrong with their saying as
21 a matter of law, we choose to interpret the words this
22 way and implement the statute that way and we have
23 every right to do it? Why don't they?

24 MR. BLAIR: Well, first of all, the -- the
25 remedy that the Petitioner here proposes is one that

1 Congress has not proposed, for openers. And secondly,
2 the Petitioner acknowledges at page 33 of their brief
3 that they had no veto power over the settlement. The
4 settlement was a matter for --

5 JUSTICE BREYER: But that's all consistent,
6 of course, with their position. They say Congress
7 delegated to us the authority to interpret the words
8 this way. It is a reasonable interpretation of the
9 words. We don't deny that you can settle for what you
10 want. All we're saying is, where we're cut out, that
11 that pile of money is deemed by us to include every
12 penny of medical expense, and therefore we get it
13 because we're not taking money that isn't medical
14 expense. We are taking money that does represent
15 medical expense according to our deeming rules.

16 MR. BLAIR: Correct. According to their
17 version, they're taking --

18 JUSTICE BREYER: Now, what's legally wrong
19 with that?

20 MR. BLAIR: Because they're -- they're taking
21 money beyond the claim for medical expense, Your Honor,
22 because the claim for medical expense is not measured
23 by the amount of the medical expenses in terms of its
24 value. It is measured by the various factors that
25 affect the value of a claim, of which the payout is

1 only one of the factors. Had they appeared at the
2 settlement proceeding, had we had --

3 JUSTICE GINSBURG: Did -- did they have
4 notice of the settlement proceeding?

5 MR. BLAIR: No, Your Honor. The -- it was
6 actually not a proceeding, and I'd have to go outside
7 of the record to say this, but if the case was settled,
8 as most cases are, by exchange of telephone calls and
9 whether --

10 JUSTICE GINSBURG: But they were -- and they
11 were intervened in this lawsuit. Weren't they entitled
12 to have notice that there was a settlement and that the
13 case was going to be dismissed?

14 MR. BLAIR: I do not -- strictly speaking,
15 no, they were not entitled to notice because the -- the
16 intervention, it was secondary to the plaintiff's claim.
17 That is, they did not intervene and assert the
18 independent cause of action that the statute gave them.
19 They intervened and claimed a lien upon the
20 settlement's recovery. So since their lien, whatever
21 amount that lien is, was derivative of the plaintiff's
22 claim, I do not agree that they had to be notified of
23 the -- that the case had been settled and an order of
24 dismissal was entered.

25 JUSTICE BREYER: Suppose, though, that were

1 the rule.

2 JUSTICE GINSBURG: The plaintiff had -- had
3 no obligation to notify the State? There was some
4 mention of a -- of a obligation to cooperate. Is there
5 any statutory obligation under -- I don't see it in the
6 Medicaid statute, but under Arkansas law for -- for the
7 Medicaid recipient to cooperate with the State?

8 MR. BLAIR: Yes, there -- there is -- there
9 is a general provision in Arkansas law that -- that the
10 Medicaid recipients assign their claim to notify the
11 State of any potential liable parties, the date of the
12 occurrence, the kind of injury they sustained, the
13 information that would enable the State to pursue its
14 claim should it decide to do so. And in this instance,
15 the State decided to do it by asserting a lien upon the
16 -- the common law action asserted in the State court.

17 Now, if the -- if the State had brought an
18 independent action and asserted its -- its right to
19 recover, rather than riding in the wake of the
20 plaintiffs, then the State would have been in control
21 of that claim and been in control of settlements and
22 whether it was dismissed or not, but --

23 JUSTICE SCALIA: The complaint -- the -- the
24 intervention by the State claimed only a lien? Is that
25 what the --

1 MR. BLAIR: Yes, Your Honor.

2 JUSTICE SCALIA: -- document claimed?

3 Intervention --

4 MR. BLAIR: The -- actually -- actually there
5 was never a formal complaint and intervention filed.
6 There was a motion for leave to intervene. It was
7 never followed up on. Again, I'm getting outside the
8 record when I say that.

9 JUSTICE SOUTER: Roughly speaking -- I -- I'm
10 -- there may be a few dollars and cents that -- that
11 aren't accounted for here. But roughly speaking, is it
12 fair to say that the amount that -- that you and --
13 and, for that matter, the State attribute to the
14 medicals out of the total settlement is the same
15 proportion that the claim for medicals bore to the
16 total original claim?

17 MR. BLAIR: It -- it is the same percentage
18 that the total medicals bore to what we agreed was a
19 fair valuation of the claim or what we agreed there
20 would be evidence to support.

21 JUSTICE SOUTER: Okay.

22 MR. BLAIR: In other words, the State --
23 after this dispute broke out, the Respondent and the
24 Petitioner reached an agreement as to the probable
25 value of the claim, absent any considerations of

1 liability or financial responsibility. And, of course,
2 the amount of the medical expenses was a liquidated
3 sum, and that made it real easy to result in a
4 fraction. And the \$35,000 is that fraction times the
5 State's payout.

6 JUSTICE SOUTER: Well --

7 JUSTICE SCALIA: Yes, but the -- the other
8 thing that you're -- you're dividing that against is
9 not liquidated.

10 MR. BLAIR: Correct.

11 JUSTICE SCALIA: And nobody -- I mean, the --
12 where there's room for -- for compromise is certainly
13 in the pain and suffering part of a settlement, not in
14 the medicals. I mean, the medicals are a given in any
15 settlement I've ever heard of. There it is, black on
16 white. This is how much was paid.

17 MR. BLAIR: Your Honor --

18 JUSTICE SCALIA: That's the compromise.
19 Unless there's a -- you know, a compromise on whether
20 there's liability or not, but -- but whether, if there
21 is liability, this amount is owing, that's -- that's a
22 given for the medicals. Isn't it?

23 MR. BLAIR: Your Honor has put his finger
24 exactly upon the problem in this case, and that is that
25 there was a tremendous question of liability. And as a

1 matter of fact, this was a high nuisance value
2 settlement, as lawyers refer to it.

3 JUSTICE SOUTER: Okay. In a case like this,
4 then it would be in the interest of someone like your
5 client to make a claim not of \$3 million but of \$6
6 million. Then if you settle for exactly the same
7 amount of money you settled for here, the percentage of
8 the medicals -- the amount attributed to medicals would
9 be exactly one-half of what it is here.

10 MR. BLAIR: The claim was -- the \$3 million
11 claim was not the amount claimed in the original
12 lawsuit, which never got to the point of a claim being
13 made. It was for damages in excess of diversity
14 limits, the -- for diversity of citizenship limits.
15 There was not a \$10 million lawsuit or a \$20 million
16 lawsuit or an \$8 million lawsuit. The \$3 million
17 figure --

18 JUSTICE SOUTER: Well, in the original State
19 lawsuit, did you have to state an addendum?

20 MR. BLAIR: No. Only -- the only requirement
21 is that there be an allegation that it's in excess of
22 diversity -- the diversity amount.

23 JUSTICE SOUTER: Where did -- then -- then
24 tell me again where we got the \$3 million figure.

25 MR. BLAIR: By negotiation with the

1 Respondents, Your Honor, by -- by looking at the -- the
2 damages, the physical damages, the loss of earnings,
3 impairment of earning capacity, all of those things.
4 And -- and however it's phrased, we essentially agreed
5 that that was a fair value, and if their claim is
6 limited to the medical expense component, they're
7 entitled to \$35,000.

8 JUSTICE SOUTER: And is -- is that in -- is
9 that in writing, along with the allocation --

10 MR. BLAIR: Only to the extent that it is
11 represented by the terms of the stipulation entered
12 before the district court, Your Honor.

13 JUSTICE SOUTER: Well, I mean, is that part
14 of the stipulation?

15 MR. BLAIR: Yes.

16 JUSTICE SOUTER: Okay.

17 MR. BLAIR: The -- the numbers are in the
18 stipulation.

19 JUSTICE STEVENS: Is there a contention that
20 the medical was under-valued in the settlement or -- I
21 thought it was understood that it was the same
22 proportion of the settlement. I mean, if you
23 discounted everything by 50 percent, medical was
24 discounted by the same percentage as everything else.
25 Is that correct?

1 MR. BLAIR: That's -- that's correct, Your
2 Honor.

3 JUSTICE STEVENS: Because there's some -- I
4 -- I wasn't clear on whether the State had stipulated
5 that this is what you agreed with the other side or
6 that this is a fair calculation of the settlement.

7 MR. BLAIR: There was no agreement with the
8 Respondent and the tortfeasor about allocation
9 whatsoever. The idea that we unilaterally came up with
10 a number is -- is not correct. It was a lump sum
11 amount, and when the State -- the Petitioner and
12 Respondents couldn't reach an agreement, ultimately, in
13 order to obviate the necessity for putting on evidence
14 of damages before the district court, so the court
15 would have a factual basis to make this allocation, we
16 entered into a stipulation. And that's where we got to
17 the number that we got to.

18 JUSTICE KENNEDY: Do you think under Arkansas
19 law that the injured party as an assignor has a duty to
20 cooperate with the assignee in pursuing the claim?

21 MR. BLAIR: Has a duty to cooperate with the
22 assignee to the extent that it does not impair the
23 assignor's interest, that is --

24 JUSTICE KENNEDY: Is that duty fulfilled by
25 -- by entering settlement negotiations and not even

1 notifying the assignee?

2 MR. BLAIR: In -- in this particular
3 instance, I think it was fulfilled because settlement
4 negotiations resulted in \$550,000 that the Petitioners,
5 in all likelihood, would have never received --

6 JUSTICE KENNEDY: Well, but what you're
7 saying is that there's no duty to notify the assignee
8 if you think you might get a pretty good result for
9 yourself. I don't understand that as much of -- much
10 of a duty.

11 MR. BLAIR: I think the duty to -- to notify
12 the assignee would be true insofar as proceeding
13 against the third party is concerned. And to the
14 extent that the notification to the assignee would
15 serve any purpose in maximizing the total recovery,
16 there probably is a duty, but notice to the assignee
17 here would have been absolutely of no value insofar as
18 the common interests against the defendants were
19 concerned.

20 JUSTICE KENNEDY: Well, it certainly would
21 have avoided about 20 minutes of questions in this
22 Court.

23 (Laughter.)

24 MR. BLAIR: In retrospect, Your Honor, they
25 would have been plastered with notices.

1 JUSTICE BREYER: Just given your experience
2 -- say, think of the generality of cases like this one
3 -- would it be difficult for you, representing the
4 victims, if the rule were that these statutes give the
5 Government the authority that they want here, as I
6 understand it -- the Federal Government -- which is to
7 say you have an obligation to notify the State of the
8 presence of settlement negotiations. Now, once you've
9 done that, you've given them an opportunity to
10 participate. If they have that opportunity, thereafter
11 they cannot attach more than what are the real medical
12 expenses, which could be a matter for argument in a
13 settlement like this. But if you don't give them that
14 opportunity, they have the right to presume that that
15 settlement, which they knew nothing about, contains the
16 full amount.

17 MR. BLAIR: As a practical matter, yes, it
18 would -- it would --

19 JUSTICE BREYER: Because? What are the
20 practicalities of that? Why would it hurt the lawyers
21 representing victims?

22 MR. BLAIR: It -- it would be a logistical
23 problem, Your Honor, of --

24 JUSTICE BREYER: It would just require a
25 letter, certified.

1 MR. BLAIR: But -- but the certified letter
2 saying that I'm going to stipulate with -- I'm going to
3 enter into settlement negotiations with XYZ
4 corporation, would not really have served any purpose
5 unless they were to be included in every step of the
6 way, because these settlement negotiations sometimes
7 extend over months and years and -- and some of them
8 seem like they go forever. And to have the -- the
9 State at the injured plaintiff's side throughout all of
10 that step would be a logistical problem.

11 And -- and in any event, it -- the plaintiff
12 is in control of the litigation. The State has no
13 right to say, you go to trial or you don't go to trial.
14 We don't agree that you're getting enough. If -- if
15 you go -- if you settle at this figure, we're going to
16 be cut short.

17 JUSTICE SCALIA: Wouldn't -- wouldn't the
18 insurance company have to worry about the same problem?
19 That is to say, even if it's not your problem by
20 reason of our coming out the way you would like us to,
21 wouldn't it remain a problem for the insurance company
22 so they could not enter into any settlement until they
23 knew that the State would go along with -- with the
24 division between medicals and -- and other damages?
25 That -- that's what I don't understand. Doesn't it

1 become a problem for the insurance company to somehow
2 bring in the State in the process of the settlement?

3 MR. BLAIR: The -- the insurance company
4 potentially would have double liability under Arkansas
5 law if -- if the claim is settled and they know the
6 subrogation claim and --

7 JUSTICE SCALIA: Right.

8 MR. BLAIR: -- and if it's -- but that's this
9 unnamed defendant's particular problem.

10 JUSTICE SCALIA: Okay, but once -- once the
11 -- once the -- the foolish insurance company figures
12 out that that is what is going to happen, future
13 settlements will be very difficult I would gather.

14 MR. BLAIR: I -- I cannot comment on that,
15 Your Honor, since that has not been the -- the case --

16 JUSTICE BREYER: Yes, but it's -- it's
17 relevant. And I'm trying to think through the
18 practicalities of it, which you're more familiar with.
19 Suppose that you win this. If you win this, then the
20 defendant's insurance companies know that they're
21 subject to further liability for the medicals in every
22 case. And why won't they sit there and tell you at
23 this settlement, hey, we're not going to enter into
24 this unless you get the State involved so they sign off
25 on it too? We're not going to just compromise some of

1 our liability.

2 MR. BLAIR: That -- that may be the result,
3 Your Honor. I -- I cannot foresee all of the
4 ramifications either if we prevail or don't prevail.

5 JUSTICE BREYER: I mean, it sounds as if
6 we're going to get to the same place, that if -- if you
7 prevail, probably the insurance companies will want the
8 State to be involved or they haven't limited their
9 liability, and if you lose, then we would have said
10 that you have to get the -- the State involved.

11 MR. BLAIR: Right. And -- and perhaps if we
12 prevail and the State elects to pursue its own remedy
13 on its own, we'll have another round of litigation.

14 JUSTICE SCALIA: And your argument is if it
15 is six in one, half -- half a dozen in the other, we
16 should do it your way because that's what the text of
17 the statute says.

18 MR. BLAIR: We ultimately rely upon the text
19 of the statute, Your Honor, irrespective of all of the
20 policy or the political arguments that have been made
21 to the Court. We believe and have maintained
22 throughout that the text of the statute requires --

23 JUSTICE STEVENS: With respect to the text of
24 the statute and whether the anti-lien provision
25 applies, I'd be interested in your view, as a matter of

1 Arkansas law, as to who owned the chose in action first
2 and, secondly, who owned the proceeds of the settlement
3 recovery after the assignment had taken place.

4 MR. BLAIR: First, I think there's no
5 question that Heidi Ahlborn owned the chose in action
6 because under Arkansas law her claim was complete by
7 the time the glass and the metal stopped falling to the
8 highway.

9 Secondly, as to the who owned the proceeds
10 depends upon the extent to which the State was allowed
11 to take an assignment. If the State was allowed to
12 take an assignment from something other than the claim
13 for medical expenses, then they owned the proceeds.
14 Our contention is that the State was only allowed to
15 take an assignment under the language of the statute
16 for the claim for medical expenses, and in that case --

17 JUSTICE SCALIA: You're talking about the
18 Federal statute --

19 MR. BLAIR: Yes.

20 JUSTICE SCALIA: -- not the State statute.

21 MR. BLAIR: The Federal statute --

22 JUSTICE SCALIA: The State statute clearly
23 goes beyond that and says --

24 MR. BLAIR: We lose under the State statute.

25 No question.

1 CHIEF JUSTICE ROBERTS: And the Federal
2 statute provides you, you think, with a defense to the
3 State law claim.

4 MR. BLAIR: That's correct, Your Honor.

5 CHIEF JUSTICE ROBERTS: Why -- why was there
6 Federal jurisdiction in this case in the first place?

7 MR. BLAIR: Because the Federal question
8 involved the preemption issue as to whether the State
9 statute had been preempted by the anti-lien statute.

10 CHIEF JUSTICE ROBERTS: So -- so your view of
11 jurisdiction depends upon the Federal defense.

12 MR. BLAIR: Correct. That is, the -- the
13 jurisdiction of the district court action we believe
14 was a Federal --

15 CHIEF JUSTICE ROBERTS: Is that -- and which
16 of our cases say that a Federal defense supports
17 Federal jurisdiction?

18 MR. BLAIR: A Federal defense does not
19 support the Federal jurisdiction, but the declaratory
20 judgment act gives jurisdiction over Federal questions.

21 CHIEF JUSTICE ROBERTS: Allows you to come
22 into court if the claim that would have been brought
23 against you would have been brought in Federal court,
24 and the claim that would have been brought against you
25 would have been under Arkansas law.

1 MR. BLAIR: The claim that was -- that we
2 were bringing was under Federal law in that we were
3 claiming the Arkansas statute was invalid by reason of
4 a anti-lien statute, and we believed that that
5 presented a question of Federal law and therefore
6 brought it --

7 CHIEF JUSTICE ROBERTS: Sounds like a
8 defense.

9 MR. BLAIR: -- in district court.

10 Which hadn't been raised, Your Honor, and I'm
11 having to wing it. But that's --

12 (Laughter.)

13 JUSTICE GINSBURG: Do you still have a
14 declaration that the Arkansas statute was
15 unconstitutional because it conflicted with the Federal
16 statute?

17 MR. BLAIR: That's correct. That was our --
18 our claim before the district court that ultimately
19 wound up in the Eighth Circuit.

20 CHIEF JUSTICE ROBERTS: It still sounds like
21 a defense to me, counsel, and I think it may make a
22 difference if your argument relies on the anti-lien
23 provision as a defense or perhaps relies on the -- the
24 assignment provisions in the Medicaid statute. That's
25 why I'm just trying to focus on whether it's the

1 assignment provisions that limit what Arkansas can do
2 as a matter of its own law, or if it's the anti-lien
3 provision as a defense.

4 MR. BLAIR: I believe that it is both. I
5 think that the assignment provisions limit the
6 permissible assignment as a matter of Federal law by
7 reason of the anti-lien statute.

8 JUSTICE SOUTER: But there's nothing in the
9 assignment provision as such that limits it, is there?

10 MR. BLAIR: Other than its language as to
11 what it's for.

12 JUSTICE SOUTER: Well, it said -- I'm looking
13 at 1396k(a)(1)(A), which refers to assign to the State
14 any rights to payment for medical care from any third
15 party.

16 MR. BLAIR: Yes.

17 JUSTICE SOUTER: There's no limitation in
18 that.

19 MR. BLAIR: Payments -- the right to payments
20 for medical care, which we believe is the language of
21 limitation in that the State is -- in effect, is
22 seeking an assignment of the entire cause of action not
23 just that that is related to the right to payment for
24 medical care, which is simply a component of the claim
25 that may have 5 cents on the dollar value or 100 cents,

1 depending on what the facts of the case are.

2 CHIEF JUSTICE ROBERTS: Is there any reason
3 that the Federal law would have to act as a limitation
4 on the State law? In other words, if we read the --
5 the Federal law your way, is there any reason it would
6 frustrate the Federal purposes for the State to say,
7 well, we want to get all of the medical expenses? We
8 don't just want to get the proportionate share of the
9 recovery. That -- that's enough for the Feds, but we
10 are also out State money and we want that State money.
11 They can go further, can't they?

12 MR. BLAIR: In the absence of the anti-lien
13 statute.

14 CHIEF JUSTICE ROBERTS: In the absence of the
15 anti-lien.

16 MR. BLAIR: In the absence of the anti-lien
17 statute, the State statute would be, in my opinion --
18 the State would be allowed to take a greater lien than
19 provided by Federal law. But -- and a lien statute is
20 there, and we say that that is the stopping point. The
21 Federal anti-lien statute gives protection to the
22 recipient's property as to which these assignment
23 statutes are an implied exception, but the exception
24 must be limited by the --

25 JUSTICE SCALIA: But I assume the State --

1 the State tries to get around that by saying it never
2 -- never became the property of your client, that by
3 reason of the assignment provision, all choses in
4 action automatically vest in the State, causes of
5 action arising out of transactions in which there's a
6 claim for Medicaid compensation.

7 MR. BLAIR: I -- I --

8 JUSTICE SCALIA: But you say -- you say they
9 can't do that because, at the time the accident occurs,
10 you don't even know that there's going to be a claim --

11 MR. BLAIR: I say -- excuse me, Your Honor.
12 I say that that is a fiction because what it attaches
13 to is the cause of action that existed instantly at the
14 time of the injury, and so say, no, you don't own that
15 because it was assigned to us. Well, we had to have
16 something to assign, otherwise assignment was
17 meaningless.

18 We -- in -- in summation, as I see the white
19 light is on, we believe that this case -- and it is
20 Respondent's position that these three statutes that we
21 have been discussing here are plain and unambiguous and
22 that the case should be resolved upon the basis of the
23 statutory language. And we -- it is further
24 Respondent's position that if the case is resolved on
25 the basis of the statutory language, the Eighth Circuit

1 reached a very correct analysis of the language and the
2 results that that takes place.

3 There is no ambiguity, and under the first
4 step of the Chevron case, we submit to the Court that
5 this is a case of statutory construction within the
6 terms of the statutes which, read together, are
7 unambiguous and plain. They get an assignment for the
8 claim for medical care services. The anti-lien statute
9 shields the rest.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Blair.
12 Ms. Freno, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF LORI FRENO

14 ON BEHALF OF THE PETITIONERS

15 MS. FRENO: Thank you, Your Honor.

16 First of all, the default rule, that rule
17 being that unless the State is invited into the
18 negotiations, that liability -- the extent of the
19 liability of the third party can be considered to be
20 100 -- the full amount that Medicaid had to pay -- that
21 is a very important rule. And it makes sense because
22 money that has to be spent -- there was a suggestion of
23 post-settlement hearings to determine what portion of
24 the money is for -- for medical costs and what is for
25 something else. Such hearings would be incredibly

1 expensive, horribly inconvenient. The State would have
2 to, you know, burden -- shoulder this burden, and this
3 is money that could be going into the Medicaid program.
4 Every dollar that's recovered from liable third
5 parties is put back into the Medicaid program, and if
6 the State has to keep hiring more lawyers and has to
7 have administrative hearings or proceeding in judiciary
8 proceedings to determine what part of a settlement
9 constitutes a payment, then that -- that is just a very
10 inefficient use of -- of very limited Federal -- or
11 State funds.

12 I heard a comment in Mr. Blair's argument
13 that Arkansas law -- I think it was --

14 JUSTICE SCALIA: Excuse me. I really didn't
15 understand that argument. Does the State deduct from
16 its Medicaid funds the amount that it pays lawyers to
17 conduct Medicaid litigation?

18 MS. FRENO: No, it does not conduct --

19 JUSTICE SCALIA: Well, then it doesn't matter
20 as far as the Medicaid funds are concerned. It comes
21 out of general State revenues. Right?

22 MS. FRENO: It comes out of general State
23 revenues, but the amount of general State revenues that
24 are there are what is available to put back into the
25 Medicaid fund.

1 Also, Arkansas law does not require an
2 assignment of a cause of action. Arkansas law is very
3 clear on that point, and that's set forth in 20-77-301,
4 which is at -- in -- at the cert petition appendix at
5 page 38. It specifically states that any action taken
6 by the State cannot be a bar to any action brought on
7 behalf of the recipient.

8 CHIEF JUSTICE ROBERTS: Thank you, Ms. Freno.

9 MS. FRENO: Thank you.

10 CHIEF JUSTICE ROBERTS: The case is
11 submitted.

12 (Whereupon, at 11:01 a.m., the case in the
13 above-entitled matter was submitted.)

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