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Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida

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COMMENTARIES ON FLORIDA'S 1994 MEDICAID THIRD-PARTY LIABILITY ACT

DENYING DUE PROCESS IN THE FLORIDA COURTS: A COMMENTARY ON THE 1994 MEDICAID THIRD-PARTY LIABILITY ACT OF FLORIDA

William W. Van Alstyne ***

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In 1994, the Florida Legislature adopted a unique statute to provide a state agency creditor standing against private parties to whom the agency has furnished no assistance and with whom it has no relation at all as creditor, but from whose assets it wants to reimburse itself for expenses it incurred on behalf of some third party. The statute's centerpiece provision is section 409.910(1)—a legislative enactment that directs the Florida courts to "abrogate" certain principles of law and equity insofar as they would defeat or obstruct the State's claim that it is indeed a creditor to whom is owed the "full recovery" of what it asks

* *Author's Note:* This commentary is adapted from a Memorandum originally prepared in response to an inquiry by the Washington law firm of Covington & Burling.

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the court to order the defendant to pay.¹ By means of section 409.910(1), the State directs its courts to prevent those whom the State sues from contesting its claim and from presuming to quarrel over the amount. Rather, the court is to treat the claim as having a proper legal foundation, and similarly to treat the amount demanded as both due and in default.

The idea of Florida's section 409.910(1), as we shall see in the ensuing pages, however, is like a page taken from the Hans Christian Andersen fable about the Emperor's New Clothes. Through the verbal cellophane of section 409.910(1), a claim merely seeks "full recovery" from "a liable party" who has put the State to some expense for which it straightforwardly wants now to be reimbursed. So long as all agree (i.e., so long as one accepts this description), all is well. To the extent one would want more evidence regarding the particular expense (such as "just what expense is it said the defendant put the state to?" or "would you mind very much explaining why you so declare?"), even as the small child was caused to wonder in Copenhagen despite the curious lack of doubt expressed by anyone else, the statute anticipates this inquiry—and seeks to cut it off. It simply denies the pertinence of any such meddlesome inquiry. How? It does so by directing the courts to suspend principles of law and equity inconsistent with the claim of liability and of presumed entitlement to the sum the State seeks, so to preclude any effective demurrer and any effective defense. We shall see shortly just how this is done.

In the background of this Commentary there are three constitutional clauses that are intertwined. The first is the Fifth Amendment provision against the taking of private property for public use with no compensation (much less "just" compensation) at all. The clause is implicated insofar as, despite the cellophane wrapper, this may be what Florida seeks to do. The second is the Fifth and Fourteenth Amendment provisions that neither shall the State deprive any person of property without due process of law, requiring a showing of just cause, an adequate reason as for some identifiable default on their part, to warrant

1. Florida Statutes § 409.910(1) (Supp. 1994) provides in relevant part:

Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery, by Medicaid from third-party resources; such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section.

Id.

what is sought to be taken from them. The third is likewise in the Fourteenth Amendment—that no State shall deny to any person the equal protection of the laws. All three are directly implicated in the Florida scheme. The third is implicated insofar as persons sued by Florida Medicaid are denied the equal protection of the law of Florida the legislature has presumed to suspend in respect to Florida Medicaid claims. The Due Process and Takings Clauses are implicated insofar as the State seeks to levy takings of massive judgments sought to be recovered from private parties, regardless of how little they did or failed to do contributed to the injuries of anyone whom Florida Medicaid insures. I mean to examine these questions by considering a short series of cases, to illustrate each of these points.

I. *JONES V. ZONE PHARMACEUTICAL CO. AND
FLORIDA MEDICAID V. ZONE PHARMACEUTICAL CO.*

Dr. Peter Smith was called to the scene where James Jones was experiencing acute gastric distress. The explanation of Jones' gastric distress turned out to be fairly simple—Jones had taken two tablets of *Zone Aspirin*, a standard, unbuffered aspirin, like any other brand of unbuffered aspirin.² To be sure, the *Zone* aspirin box clearly stated that it contained unbuffered aspirin (rather than buffered aspirin). Moreover, clear print on the box also stated a straightforward caution, namely, that “unbuffered aspirin may cause some gastric distress in some persons.” And from his own prior experience, Jones was well aware that he was among those who did tend to get gastric distress from unbuffered aspirin. Still, finding buffered aspirin temporarily out of stock at the grocery store where he happened to be shopping a little earlier, Jones had decided to buy (and then use) *Zone* unbuffered aspirin, instead of waiting or looking elsewhere.³ Anyway, when called to the scene, Dr. Smith competently administered effective emergency treatment,⁴ successfully relieving Jones' gastric pains. The charge for Dr. Smith's service was \$85, which Jones promptly paid. From these unprepossessing facts, two pathways of litigation were to follow.

2. The distinction of the *Zone* brand of aspirin being solely in the oblong shape of *Zone* aspirin pills, plus other mere brand-distinguishing insignia (e.g., color and shape of the box, the familiar *Zone* logo, etc.).

3. All these facts were developed in the course of discovery following Jones' suit, the suit he presumed, against the advice of counsel, to file against *Zone*, as described *infra*.

4. In this instance, a dose of Pepto Bismol.

A. *Litigation Pathway #1*

James Jones, having paid Dr. Smith his \$85 fee,⁵ at once made demand for reimbursement from Zone Pharmaceutical Co. (Zone). Jones also requested a sum to compensate him for the physical pain and distress he sustained. Later, after receiving no response from Zone, Jones filed suit against Zone in state court. He sought damages of \$5,000.⁶ His claim against Zone was a claim essentially for "products liability"—for production and marketing of a product known to be unsafe, because it was likely to cause gastric distress in some users, which it did, and for which Jones demanded appropriate compensation.⁷

Zone filed its answer, in which it denied liability. Following discovery (pursuant to which the previously stated facts were established to be true, as fully acknowledged by Jones), Zone moved for summary judgment on the grounds of assumption of risk by Jones and that the aspirin was not defective. In other words, Jones was aware of his susceptibility to unbuffered aspirin and elected to purchase and use unbuffered aspirin nonetheless, knowing it would be unbuffered, but electing to proceed just as he did.⁸ The court, after examining the briefs

5. The reasonableness of the fee is not at issue. Though the only needed treatment was a dose of Pepto Bismol, it was Peter Smith's professional skill that informed his competent judgment that this, rather than anything else, was all that was required to relieve Jones' distress. Moreover, Smith did come to attend to Jones, when requested to do so. Jones has no complaint about the amount he was charged by Smith.

6. In addition to his medical costs (\$85), Jones sought compensation for his pain and suffering incidental to the gastric distress (\$4,915).

7. Smith did not, in this instance, sue on any claim alleging any negligence by Zone, on the other hand, of a different sort. For instance, this is *not* a case where unbuffered tablets were alleged to have been accidentally put in boxes labeled "buffered aspirin"; likewise, it is *not* a case where adulterated materials—e.g., rat feces—allegedly found their way into the product; similarly, it is *not* a case where the label (identifying the aspirin as "unbuffered"), or the cause (that "unbuffered aspirin may cause gastric distress to some users"), were allegedly less conspicuous than Smith could or did claim were required by due care. (The point of these distinctions will be developed in Part III, *infra*.)

8. A common sense alternative locution to saying that Jones "assumed the risk" is to say the following: *Zone did nothing whatever to justify holding Zone responsible for Smith's distress in these circumstances*. Indeed, given what we know, it is no more appropriate to attribute responsibility to Zone for Jones' distress than to do so to Hart, Schaffner, and Marks in the following case.

Suppose Hart, Schaffner, and Marks makes and markets suits for men. Jones buys such a suit, *knowing* it is not a "wrinkle free" suit, but, being in a hurry and preferring it under the circumstances to another that would be wrinkle free (a "wrinkle free" suit being (a) slightly higher in cost, and (b) also having a slightly different feel from an ordinary suit). Some few days later, as Jones is in the process of deciding which suit to wear to work one morning, he is listening to the local weather forecast; he hears that "there's a likelihood of scattered showers today." But he puts on his new suit he knows will wrinkle if he is caught in the rain (he hopes

submitted by both parties, quite agreed with Zone that there was no liability as a matter of law under these circumstances. Judgment was promptly entered for Zone.

B. Litigation Pathway #2

I will now add something to the description of this case, though the “something” consists merely of two altogether minor and extraneous facts that would seem to be without any significance. First, suppose this change: by chance, the physician, Dr. Smith, who attended Jones to relieve his medical distress, was a “qualified” Medicaid provider.⁹ And second, that being so, Smith received \$85 not from Jones but from Florida Medicaid for the treatment Smith provided Jones (Jones qualifying for Medicaid, as it happens in this case). Suppose next that Florida Medicaid, solely on the strength of having paid Jones’ bill (in lieu of Jones paying it himself),¹⁰ at once made demand for \$85 “reimbursement” from Zone. Simultaneously, Florida Medicaid files a lien on property Zone has in Florida. Soon thereafter, it also filed suit against Zone. What claim, if any, does Florida Medicaid have? What result and why?

Depending upon how one is inclined to understand Florida Statutes section 409.910(1), though Zone *is* not (*and never was*) liable to Jones for Smith’s bill,¹¹ it appears that Zone may nonetheless be declared

he won’t be because the forecast was of likelihood, not of certainty—quite akin to Jones’ use of unbuffered aspirin in the case at hand of “likelihood” but not “certainty” of experiencing gastric distress). He also decides to leave both his raincoat and his umbrella at home.

A light sprinkle falls on his walk to work. He arrives at work altogether rumpled. Some time later, he sends a bill to—Hart, Schaffner, and Marks. The bill is for \$5.00 (the sum he paid to the dry cleaners to have his rumpled suit pressed to remove the wrinkles), plus \$800 for humiliation and anguish—he was embarrassed all day at work because of his rumpled suit, he was made the butt of co-workers comments, and he even was made to worry he might be thought to be such a dunce he would lose his job. When Hart, Schaffner, and Marks declines to pay, Smith sues on a products liability claim—namely, the suit he bought was “defective” in not possessing wrinkle-free properties (altogether parallel to Zone aspirin pills being allegedly “defective” in not possessing buffering). Hart, Schaffner, and Marks thinks this is an amazing claim by Smith (chutzpa). No doubt it is, and I shall return to this point later on, also in Part III.

9. There is nothing special meant to be implied by this description; it means merely that Dr. Smith meets whatever ordinary criteria of eligibility any participating physician meets, such that the treatment he or she provides is of a sort qualifying for reimbursement when the treatment is furnished to one eligible for Medicaid.

10. Or, as might happen in some other case (namely, in the case of some person not on Medicaid), where the bill went unpaid, Dr. Smith might attempt to recover from Zone for his bill (but, of course, he will fail).

11. According to Florida law itself, Zone is not liable to Jones. *See* discussion in *supra* Part I.A.

liable to Florida Medicaid—*solely by mere chance of who purchased its aspirin*.¹² Though nothing has changed, save only that Florida Medicaid has presumed to substitute itself for Jones and present itself as plaintiff,¹³ the defense conclusively valid against Jones¹⁴ is to be disregarded insofar as Florida Medicaid would find that defense an impediment to collecting \$85 from Zone, according to (one reading of)¹⁵ the following law:

12. This merely depends on whether the purchaser happened to be eligible for Medicaid rather than ineligible for Medicaid. If this is so, and evidently it is (indeed it is *the* distinction), in my view the Florida statute is unconstitutional pursuant to the due process clause of the Fourteenth Amendment. A law that presumes to measure the liability of another based on such a consideration and nothing other than such a consideration, is utterly arbitrary, or so it seems to me. For whether one who buys aspirin (or any other product) is, or is not, "Medicaid eligible" would seem to have no more relevance in measuring the potential liability, or extent of liability, of aspirin producers in Florida than whether one who buys aspirin is or is not taller, or shorter, than five feet and five inches in height. *Neither characteristic has any more bearing than the other as a rational basis for imputing a particular scope of duties or liabilities to a producer or of a seller of goods.* If either such characteristic does have a more rational basis than the other for such a purpose, what will one (the State, for instance) assert it to be?

Whether one who buys and uses aspirin is taller or shorter than five feet and five inches clearly has no rational bearing as a consideration in determining whether, or the extent to which, an aspirin producer should or should not be required to pay such medical bills as that person may incur, whether as a consequence of buying and consuming aspirin, or whether from falling off a bus. Regardless of what one may hold to be the proper basis for holding an aspirin producer responsible for the medical bills of another, one would readily concede that it is arbitrary to make that liability or responsibility different on any factor such as height.

Similarly, the "medicaid eligibility" (or lack thereof), as a characteristic of an aspirin purchaser, has nothing to say to us by way of determining whose medical bills a producer of aspirin should be held accountable to pay. If, in the circumstances, they are somehow (perhaps for good reason), thought to be appropriately responsible for the medical bills of one such person, the reason that would make it so cannot be said to be less true in respect to the other, *and vice versa as well* (i.e., such reason makes clear that they are not appropriately responsible for the medical bills of one such person, being equally present in respect to the other, must be sufficient against them as well). In all respects, so far as I can see, there can be *no* justification so to measure the liability, or extent of liability, of producers of aspirin on such a consideration, than were it to be made to turn on the mere height of the purchaser instead. The argument here, moreover, is *not* an argument about "equal protection," rather, it is a straightforward consideration of simple "due process of law."

13. It is a substitution asserted solely on the strength of Florida Medicaid having paid Jones' bill to Dr. Smith, and not on the basis of claiming any other relation as such with Zone or any other producer of aspirin or any other goods.

14. And a defense likewise conclusively still valid against anyone else who might seek to recover whatever *they* paid Smith on Jones' behalf (here, \$85), for likewise *none* of them would have any claim over against Zone in this case (e.g., Jones' brother-in-law who paid the bill; Jones' private medical insurer who paid the bill; Jones' employer whose medical plan covered Smith's fee; Jones himself, etc.). Accordingly, the due process point remains entirely intact. *See supra* note 12.

15. We shall consider a different reading in *infra* Part III.

*Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery*¹⁶ by Medicaid from third-party resources; such principles *shall* apply to a recipient's right¹⁷ to recovery against any third party, but *shall not* act to reduce the recovery of the agency pursuant to this section.¹⁸

Defenses "*normally available*"¹⁹ shall *not* be available against the State for such sums as the State expends on Jones' medical bills, if and when it sues Zone to pay Jones' bill? But why should that be so, and wherein is due process of law satisfied?

All that Florida Medicaid can account for, even to explain its presence in court in presuming to sue Zone in the first place, is its evidence of having paid Smith for Jones' bill. Unless it has some other relation with Zone (which it doesn't),²⁰ or unless there is some act or neglect by Zone for which act or neglect Zone might reasonably be deemed to have waived its valid defenses (and no such act or neglect is alleged),²¹ the statutory provision seems on its face to be no better than an arbitrary denial of due process of law. "We paid Jones' medical bill and, because we did, you must pay us, *regardless*,"²² is not consistent

16. "Full recovery" meaning full recovery of such sums as Florida Medicaid may have paid out on behalf of the Medicaid-eligible person, however large or small such sums may be (e.g., whether \$85 or \$850,000, or \$8.5 million).

17. This, of course, applies to Jones, and of course it likewise applies to anyone attempting to claim through him after paying whatever bill he incurred to Smith. For examples of such other persons, see discussion in *supra* note 14. And insofar as that is so (and it is so), the question that appropriately arises at once is this: why do these principles of law *not* apply equally to Florida Medicaid, as to anyone else (i.e., what is so special as to distinguish them)? I suggest that the state has no satisfactory answer to that elementary question. (Try answering for them—what would you say?).

18. FLA. STAT. § 409.910(1) (Supp. 1994) (footnotes supplied).

19. Note this language well, i.e., "normally available" (meaning "normally available according to Florida law").

20. Florida Medicaid appears in court with standing to sue Zone, derived exclusively from the bare fact of its payment to Dr. Smith of the medical bill incurred by Jones, and absolutely nothing else at all. See *supra* note 13. It claims no other relationship whatever with Zone (and there is none) on which it can rely to transfer Jones' bills to Zone.

21. For, indeed, none appears to be required to be shown by Florida Medicaid under this bizarre act, when it is Florida Medicaid that brings the suit, though it would be required to be shown under "normal" Florida law, were the suit to have been brought by anyone else other than Florida Medicaid itself.

22. E.g., "regardless of the fact that you may never have been responsible for the bill, for we admit, to be sure, that it was not your bill, but merely Jones' bill; and we admit, too, that

with due process of law.²³

It is fair enough that when Florida Medicaid might pay a bill for what was in some fair sense, according to Florida law, *Zone's* responsibility, Florida Medicaid might in *that* instance, *unlike* this instance, recover its payments from *Zone*.²⁴ That, however, is not the case here. *Zone* has breached no duty it had to Florida, for *nothing* in the marketing of the product offended any Florida law. Rather, Florida Medicaid purports to bootstrap itself by legislation that describes *Zone* as a "liable party" forbidden, however, to invoke any valid defense (e.g., such as Jones' assumption of the risk) Florida law recognizes, even (as here) to such extent as it would show nonliability in fact. By legislative fiat, an invalid claim or an invalid portion of a claim held by Jones is made a valid claim when Florida Medicaid presents it as its own claim to *Zone*.²⁵

To the extent that "principles of common law and equity as to

not only was it Jones' bill, rather than yours, but that Jones could make out no valid claim to hold you responsible for the bill, either at the time he incurred it, or, for that matter, even now. . . ."

23. See also *supra* note 12 and accompanying text.

24. The familiar model for thus proceeding would be merely the same as that used by various state welfare departments, entitled by statute to proceed against delinquent fathers, to sue to recover child support payments *which were properly their responsibility* (which they failed to discharge), for which the department properly seeks reimbursement from them for amounts they expended on behalf of their children under AFDC. The case stands in useful contrast with this one because this case pretends there is no difference that should matter (when, to the contrary, there is a difference that should matter). If this difference does *not* matter (which is precisely the effect of this statute), the question must be asked: "*why not?*" And, once again, the answer must, to satisfy the Constitution, be somewhat better than "were it to matter, Florida Medicaid would be unable to proceed to make *Zone* pay for Jones' bills." (To which the answer is, and ought to be, straightforwardly to respond: "Yes, and so, what would be in any way strange or odd about that?").

25. Is this a case where "water is made to rise higher than its source"? Exactly, for in essence that is what the Florida Legislature has attempted to do via this statute. For an additionally instructive example, consider also the following case where Florida Medicaid were itself a purchaser of *Zone* aspirin, which it itself then distributes to its employees, or to eligible medicaid recipients, neglecting, however, to advise them that the aspirin they are receiving is unbuffered aspirin (Florida Medicaid having taken the aspirin from the original boxes and distributing them merely as individual tablets). Unwarned employees and recipients suffering gastric distress may have a cause of action against Florida Medicaid for its negligence. Obviously, however, Florida Medicaid has no cause of action against *Zone* (such fault as there was, was exclusively its own—quite like that of Jones in our original case). Suppose, however, one or more of these adversely affected Medicaid recipients has their gastric distress treated by a qualified Medicaid provider whom Florida Medicaid reimburses as such (i.e., for authorized treatment of an eligible Medicaid person). Having done so, may it *now* proceed to "recover" the sums it thus paid from *Zone*? Under one view of § 409.910(1), apparently it could. (And why should that be so?).

assignment" would themselves normally bar a claim of this sort if brought by anyone else,²⁶ Florida Medicaid seeks to free itself of that bothersome impediment as well. It is seemingly much assisted by the new statute which airily directs that all such principles are simply to be ignored ("principles of common law and equity as to assignment . . . are to be abrogated")²⁷ insofar as they would stand in the way of recovery. But why should that be so? For instance, why ought those principles *not be respected in this case as much as in any other*? I do not believe Florida has any satisfactory answer.²⁸ If not, however, the act should be held invalid under the due process provisions of the Florida Constitution²⁹ and the Fourteenth Amendment as well.³⁰

II. *BUS CO. V. JONES, JONES V. BUS CO., AND FLORIDA MEDICAID V. BUS CO.*

Before venturing an additional (and more careful) review of the case we have just examined, however, I think it also may be useful to consider the following case. Doing so may enable one to get a clearer view of what is fundamentally wrong with the proposed Florida provision, a view we may usefully draw on still later on.

Our first case posed facts involving a defendant (*Zone*) to whom Jones was unable to impute any liability for anything. In this second case, that will no longer be true. Jones will be able to impute liability for *something*.³¹ Otherwise, however, the questions will be the same.³²

26. As, indeed, such "principles" clearly would. See *supra* note 25.

27. Note the very irony of the statutory language, that "principles of common law and equity as to assignment are to be *abrogated*," meaning exactly this—"that insofar as there are certain principles of common law and of equity as to assignment that would, if merely respected here as in any other case, necessarily preclude recovery by Florida Medicaid of the amount it seeks from Zone, well, not desiring that result, we hereby direct that such principles are to be abrogated and the courts of Florida are directed to ignore them—to disregard mere principles—insofar as, were they not disregarded, they too would demonstrate that Florida Medicaid has no claim against Zone for such sums as it seeks."

28. For what is the basis of so demanding that these "principles" be "abrogated" if (but only if) Florida Medicaid files suit? What, indeed, if anything, makes it inappropriate for these principles to be respected in the Florida courts with the same evenhandedness the Florida courts would ordinarily observe? Unless the State can provide a satisfactory answer (an answer better, of course, than merely to say that "unless the normal rules are suspended, we'll be unable to prevail"), the courts of Florida should not accede to this directive consistent either with its own constitutional rulings or the Due Process Clause.

29. FLA. CONST. art. I, § 9.

30. U.S. CONST. art. XIV, § 1.

31. The question will become, rather, "how much?"

32. Namely, the extent (if any) to which a defendant is liable to the only party capable of claiming damages in the first instance, and the consequences of the Florida statute when Florida

Herein a review, then, of “comparative negligence,” which (like “assumption of the risk”) is described in the Florida statute as “an affirmative defense,”³³—a defense that although declared valid to the extent of its normal applicability to limit the recovery of the person whose medical bills Florida Medicaid assumed responsibility to pay, is declared to be unavailable when it is not that person, but rather Florida Medicaid, that seeks to assign the full cost of those medical bills “to a liable party” instead. Here, we shall locate a “liable party,” to be sure, but the basic question will not be changed at all.³⁴

Suppose, then, the case of Jones. Jones had been heavily drinking and, even so, was riding his motorcycle at 85 mph on a road posted at a maximum lawful speed of 35 mph, when he collided with a bus. Unsurprisingly under the circumstances, Jones was near-fatally (but not quite fatally) injured.³⁵ The bus was hardly scratched. Though the bus was “hardly scratched,” still the bus company undoubtedly has a cause of action against Jones for the damage thus done to its bus.³⁶ We stipulate this damage to be \$1,000. So, that is the amount the bus company seeks from Jones. As it happened, however, there was some negligence on the part of the bus driver (as well as the far greater negligence—indeed recklessness—of Jones). The negligence of the bus driver was in the fact that a few seconds before Jones came into plain view, the driver took his eyes from the road to change radio channels, even as he was approaching the intersection where Jones was about to appear—barreling through the intersection at 85 mph from the driver’s left.

The driver’s conduct (“negligence”) may have been a contributing

Medicaid, having picked up the medical bills for the injured party, seeks a *greater* amount than that. (Unsurprisingly, our answers will turn out to be the same as those provided by our review of the first case.)

33. Here again is the critical provision of the Florida statute:

Principles of common law and equity as to assignment, lien, and subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources; such principles shall apply to a recipient’s right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section.

FLA. STAT. § 409.910(1) (Supp. 1994).

34. That basic question is, of course, at all times, “liable for *what*?”

35. Had he been “fatally” injured, his medical bills would have been much, much less than they turned out to be. . . .

36. Why? Well, obviously, because the damage sustained by the bus was damage sustained as a direct consequence of Jones’ reckless and drunken driving. (It is utterly unremarkable that the bus company would seek to recover the costs of repairs from Jones.)

factor to the horrendous accident that nearly killed Jones (but instead left him permanently paralyzed, after months of painful and expensive surgery). Whether it was or not, we need not say now. For present purposes, it is enough to stipulate that whether it was a contributing factor is close enough to be a fair question for the jury. It would be up to the jury to decide whether, had the driver not thus been distracted, he might not only have had time to see Jones but also have had time and opportunity to apply his brakes such that Jones, despite his inebriated condition and despite his reckless speed, might have brushed by the bus instead of crashing into the left front bumper of the bus, as he did.³⁷

Oddly, Jones is thus also able to state a *prima facie* case of his own against the bus company:³⁸ duty of reasonable care (owed by defendant toward others on the road); breach as a cause in fact (and proximate cause?)³⁹ of plaintiff's injury. To be sure, plaintiff was far from being without some fault as well (we have already established it to have been considerable). Florida, as it happens, however, does not preclude Jones from recovering something from the bus company even though that is so.⁴⁰ Florida is in fact a "pure *comparative negligence*" state.

Supposing the damage to the bus to be \$1,000 and that Jones'

37. Note: were defendant's evidence clear and utterly convincing that even had the driver been fully attentive, the collision could not have been avoided (or diminished), defendant would be entitled to a directed verdict as a matter of law.

38. Although in some other states (e.g., North Carolina) he would be unable to do at all. See *infra* note 40.

Here, incidentally, the case we suppose is one brought against the bus company, seeking damages for Jones, for injuries caused (or, more accurately, "*causally contributed to*") "by the failure of the bus driver to use due care in the operation of the bus." Alternatively, the case would not be different were the "contributing cause" to be traced not to some behavioral lapse by the driver, but instead to some defect in the bus itself, for which defect the manufacturer were equivalently liable, with Jones bringing his action against them. Such a case would be one differing only in the following way:

The bus driver was never less than fully attentive (he did all that he could have done), and neither was the bus company at fault (in its maintenance of the bus, training of the driver, etc.). However, close inspection of the bus, following the accident, determined that a warning light designed to flash on the dashboard when brake fluid would be needed had failed. The warning light failed because the bulb used by the manufacturer was of such marginal quality that it had burned out. Because the bulb failed, the driver was without warning that the brakes might not stop as effectively, due to the low pressure in the brake lines. The driver, in this scenario, did all that he reasonably could do to avert the collision with Jones, as had (by stipulation) the bus company. Obviously, however, the manufacturer had not done its part to the extent that it should. We shall come back to this version of the case later on. See *infra* note 58.

39. It was, more accurately, a "contributing cause" (Jones' conduct assuredly being a contributing cause as well).

40. In North Carolina, in contrast, Jones' "contributory negligence" would cut off *any* recovery in this same case. In some other states, Jones would receive nothing if he was more at fault than the other party (i.e., "more than 50% to blame" for the accident).

conduct is regarded as a 90% contributing cause of collision (the driver's conduct being regarded as a 10% contributing cause), this means (or so I am informed by a colleague who teaches torts) that in Florida, in the action that might be brought by the *bus company against Jones*⁴¹ for damage sustained to its bus from Jones' reckless driving, the bus company would receive \$900 on its claim (90% of \$1,000). And reciprocally, in the action brought by *Jones against the bus company*, for damages sustained by Jones, supposing the damages to be \$5 million, and the bus company's conduct a 10% contributing cause (*Jones' conduct being 90% responsible*), Jones would receive \$500,000 on his claim (10% of \$5 million).⁴² Indeed, this figure (\$500,000, not less *and certainly not more*) precisely describes Florida's view of the bus company's liability to Jones.

In this scenario, the bus company is regarded by Florida as responsible for ten percent of Jones' damages (\$500,000),⁴³ and assuredly no more. Under Florida's own view, the actionable activities of the bus company were deemed to be a contributing cause of Jones' injuries exactly to this extent, but also *to no greater extent than this*.⁴⁴ To such extent that Jones sustained greater injuries (as indeed he did), in Florida's view, he sustained these *greater injuries in no different way than had he thrown himself off a bridge and struck defendant's bus on the way down* (instead of just much more directly striking the state's own road). In such a case, however, I imagine that all would agree⁴⁵ that it would be a denial of substantive due process if Florida, after picking up a \$5 million medical bill to supply lifetime assistance to Jones, were to presume to sue the *bus company* for \$5 million "reimbursement" for such care as it elected to provide Jones.⁴⁶

Straightforwardly, however, the case we have examined is foundationally no different from this case, once we walk through it again with care. It helps to explain just why the company is liable for no more than ten percent of Jones' injury—and *is not liable*⁴⁷ for any

41. See *supra* notes 36, 38 for a statement of the bus company's case.

42. Jones thus "nets" \$499,100 from the crash (\$500,000 minus \$900).

43. From which it is entitled to offset \$900 (of the \$1000) of its damages for which, by the same law, Jones was responsible to it.

44. Sorry to say this more than once, but the point is so important (and dispositive) I think it can scarcely be repeated often enough.

45. Florida included.

46. "Sue them *for what?*" one would be inclined to ask (i.e., "sue them for damages because their bus happened to be moving along the road at the time Jones decided to jump from the bridge and smashed himself on the bus rather than on the pavement, or on some passing private automobile instead?").

47. And cannot be "deemed" liable.

more than that. The scope of the bus company's fair responsibility to Jones is measured by the extent to which Florida law regards the bus company's conduct (i.e., the driver's conduct in this instance) to have been a contributing cause of Jones' injuries. For just that measure of responsibility, the bus company is fully liable, and, so too, *it is also not liable for anything more.*⁴⁸

Nothing in this assessment is changed, moreover, whether Florida Medicaid is willing (or, indeed, even obliged) by state law to defray such medical expenses as Jones may be unable to sustain on his own, or whether Florida Medicaid is not involved at all.⁴⁹ Whether Florida Medicaid picks up or does not pick up the portion of Jones' injuries for which Jones himself was solely responsible has nothing to say to us, for there is no reason that that datum can *rationally have any effect* at all so to enlarge the responsibility of the bus company *post hoc*. If, indeed, as the State itself conceded (as it must—by force of its own substantive law of torts) that the bus company bore responsibility for but 10% of Jones' injury (Jones himself bearing full responsibility for the rest—as much as though he had thrown himself from a bridge), it at once concedes likewise the arbitrariness of pretending that, somehow, the company's responsibility suddenly became greater than it was, *post hoc*.

Nothing in this understanding is altered, moreover, by the stratagem enacted by the Florida Legislature in the manner attempted in section 409.910(1). To the contrary. The arbitrariness of the statute itself is merely italicized insofar as the act itself acknowledges that the bus company of course has an "affirmative defense," one acknowledged as "normally available," but at once declared *not* to be available here. The unanswerable question remains: *why isn't it available* (i.e., why doesn't it deny due process of law to so declare it "unavailable"), *when there is no more reason to impute to the bus company in this case anything more as within its responsibilities to answer for the extent to which its conduct was a contributing cause to the injuries Jones received, than when Jones' injuries happen not to be eligible for Medicaid assistance?* I know of no satisfactory response the State can provide.⁵⁰

The "normal defense" we have properly identified is merely the "defense" that all persons in Florida are liable to such extent (and not

48. On Florida's *own* view of the matter, for the balance of the injuries Jones sustained, the bus company is no more *appropriately* responsible, than in the case where Jones threw himself off the bridge, doing himself terrible damage upon the bus (terrible damage he would have sustained equally by hitting the road). To hold the bus company responsible, however, would be utterly arbitrary, as Florida (according to its own law) would entirely agree.

49. E.g., as would be the case where Jones' insurance covered the whole \$5 million (or as would be the case were there simply no Florida Medicaid at all).

50. Indeed, one should be eager to hear what Florida will have to say.

beyond such extent) as their conduct can fairly be said to have contributed to the injury of another.⁵¹ And we already know, according to Florida law, to what extent that can be said in respect to the bus company in this case (namely, 10%—Jones' conduct furnishing 90%)⁵² such that if the whole damage to Jones is \$5 million, then the company's share is \$500,000, and *cannot fairly said to be any more*. In the bridge case, the contributing conduct of the bus company was zero (the conduct by Jones himself was 100%). In this case, as we have already determined, according to the very manner a Florida court would adjudge the case by its own law of comparative negligence, the negligent conduct of the driver was a 10% contributing cause to Jones' injuries (Jones' conduct—recklessness verging on virtual suicide—was a 90% contributing cause, and not a bit less than that).

Taking this as a given, whether Florida itself thereafter provides some assistance, no assistance, or complete assistance to Jones, the mere datum can have no effect on the responsibility of the bus company, either to Jones or to Florida (any more than Florida could presume to hold the bus company "responsible" for *any* part of such assistance it—through Florida Medicaid—may provide to Jones who, in throwing himself off the bridge, happened to fall on the bus). The due process analysis remains intact, whether we have a case where the legally answerable conduct of the bus company was "a 0% contributing cause" (Jones' conduct being a 100% contributing cause), "a 1% contributing cause" (Jones' conduct being a 99% contributing cause of his own injuries), a 27%, an 87%,⁵³ or even a 99% (but even so, *not* a 100%)

51. It is really less a "defense" than a simple failure by plaintiff to show any adequate basis for seeking to have the bus company pay all the medical expenses he incurred. I add this note simply to emphasize how much in fact this case has in common with our original case—the case of Jones and *Zone* aspirin. See *supra* Part I.

52. As in the bridge case where Jones furnished 100%, all would agree, accordingly, that the bus company, being entirely irresponsible (not "irresponsible" but *un*responsible) for Jones' injury could not be held liable *at all*.

53. What might be a suitable "87%" example? Perhaps this—that Jones is injured in a collision with a bus, the extent of injury to his head, however, would have been substantially less had he worn a helmet he preferred to leave at home, despite the state's mandatory motorcycle helmet law. (The case in this respect is not a whit different from Jones in our original case, who elected to buy unbuffered good aspirin.) In his successful suit against the bus company, 13% of his overall injuries are deemed to be due to his own conduct (and *not* that of the bus company), exactly in keeping with Florida's "comparative negligence" rule, as we have seen it applied. And, again, insofar as this is exactly what Florida itself regards as proper in order that the bus company *not* be held liable *beyond* its responsible share of Jones' injuries, nothing in the happenstance of how (or by whom) the difference is made up should appropriately affect it *ex post* (e.g., that in the particular case that it may have been made up by funds supplied by Florida Medicaid rather than, say, by Jones' uncle, his friends, or indeed by his own commercial insurer). The bus company's responsibility does not magically become different *ex*

contributing cause.

III. A STATUTORY CODA—A CLOSER LOOK AT THE
FLORIDA LAW:⁵⁴ *FLORIDA MEDICAID V. ZONE
PHARMACEUTICAL CO. (II)*

I now want to go back to the original case, to pick up on a point that could possibly have vexed the sharpest of lawyers as they were following the manner in which that case was treated in our review of the Florida law. The Florida statute, one may well have noted even when we first looked at it, spoke (and of course still speaks) only of the legislative abrogation of “comparative negligence, assumption of the risk, and all other affirmative defenses” otherwise available “to a *liable* third party.”⁵⁵ We took the statute at face value as applying to the case we examined. We did so, quite understandably making little of the reference to “a *liable* third party,” perhaps simply because the statute would make no coherent sense if it spoke of abrogating “affirmative defenses” of “*nonliable* third parties” (for virtually by status of who they are, *nonliable* third parties have no need of “affirmative defenses” at all).⁵⁶

Still, because of what might have troubled a good lawyer in our treatment of the original case,⁵⁷ it may be useful to come back to that case and examine it in light of these words in the Florida statute. Why? Because, according to its own terms, as we have just noted again, the statute applies only when the third party was a *liable* party in at least some minimal and meaningful sense.

post. And again, if it is to be made greater *ex post*, then the question must be answered—*why*, and *why when Florida Medicaid*, but no one else, presumes so to assert? I know of no satisfactory answer Florida can supply.

54. As suggested by Professor James Boyle.

55. Here, once again, for ease of reference, is the key section (note the italicized word):

Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a *liable* third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources; such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section.

FLA. STAT. § 409.910(1) (Supp. 1994) (emphasis added).

56. It would be a virtual oxymoron to speak of a “*nonliable* third party's affirmative defenses.”

57. *Not* the second case—the bus case—but merely the original case (*Jones v. Zone Pharmaceutical Co.* and *Florida Medicaid v. Zone Pharmaceutical Co.*).

On this reading, however, the statute is *not* applicable (indeed, is *never* applicable) to enable Florida Medicaid to make demand on a third party, when this third party never had any liability to begin with. In brief, the statute assumes—and by its own terms only operates when *that assumption is sound*—that there was *some* liability in the original case, even if it was quite limited or quite small, or may not have amounted to much, or, finally, might even have been extinguished altogether by force of the defendant's "affirmative defense." Indeed, the case we were originally considering was one that might have seemed to have been just this last sort—potential liability to Jones, successfully parried by "affirmative defense" of "assumption of risk." In fact, we deliberately described the original case in this fashion just to make it seem clearer exactly how the Florida statute would apply in respect to any such affirmative defense.

But proceeding in this way may have been gratuitous. Or, rather, one may put the matter more emphatically: proceeding in this way may have been premature, just plain wrong. The case, as I described it, assumed that Zone was "a liable third party," subject to avoiding that liability only on the strength of some "affirmative defense." But *was* Zone a "liable party" able to defeat Jones' claim under Florida law by the affirmative defense of "assumption of risk"? Or may it more accurately be said that Jones failed because he was unable to show any legal basis for bringing suit against Zone—a law making Zone a "liable" party (at least provisionally) in some way? If we go back over the original case carefully, the answer may surprise us. And insofar as it does, it also may affect the result when Florida Medicaid sues—and finds the statute to be wholly inapplicable to the particular case.

One way of trying to answer that critical first question is to try to cast Jones' complaint against Zone somewhat more specifically than in the vague general terms of a "product liability" case. On what theory was Jones advancing that claim? As a complaint based on an aspirin producer's strict liability for manufacturing a defective product such that Zone is thus liable for Jones' gastric distress insofar as the product was defective? A "nice try," we might suggest, but almost certainly not applicable here if (as is the case) under Florida law, in respect to aspirin clearly identified as "unbuffered" aspirin, the product is in fact *not* defective because it was reasonably fit for its intended purposes and contained an adequate warning.

Jones might have had a different legal theory (indeed, he would need to have had one), perhaps one alleging liability traceable to a "design defect" in Zone aspirin. But, if so, what is that alleged defect in

design?⁵⁸ One such theory would be this: that by spending just a little bit more money, Zone could in fact have made *all* its aspirin equally safe for *all* users, so, in respect to all "substandard" aspirin Zone presumed to produce and market, it is liable to those who sustain injury from its "wrongful" act.⁵⁹ If the theory is sound, then to be sure Zone may be liable (liable for putting a "defective" product on the market) and liable to Jones who suffered pain and distress from ingesting that "defective" product.

But the difficulty is the same as we already encountered previously—namely, that Florida law may nowhere take this view.⁶⁰ That is, unless by statute or by common law, Florida regards the marketing of any unbuffered aspirin as per se the marketing of a "defectively designed" product, Jones cannot proceed on a claim of this sort at all. This is not a matter of an "affirmative defense." Rather, it is a matter of a failure to state a cognizable claim.

A much more plausible view of what Florida might deem to be a defective product insofar as Zone (and many other companies) market unbuffered aspirin in Florida might not run to the "design" of the aspirin as such (there being no defect), but to the "design" of the container (thus a "defect of *package* design") resulting from the absence of an adequate warning. And in some circumstance, this would be a cognizable claim. On a very standard view, if, virtually without any

58. Compare *supra* note 38, our footnote variation on the bus case, where it was the failed tiny light bulb (in the brake warning light) that we considered, and where failure of the manufacturer to have taken due care to stipulate use of longer-life bulbs in its warning lights could well be a properly alleged "defect" in "design."

59. The "wrongful" act in this case being the "wrongful" act in presuming to produce aspirin without buffering (such aspirin being defined as "defective in design" by being unbuffered rather than buffered). Consider the case of a tobacco products manufacturer who, though having the means (albeit at some slight added cost per cigarette) of insuring that no cigarette it offers for sale contains nicotine, fails to take that step. The "defective products" claim in such a case would run something like this. The "defect" is not in the production of the cigarette (it was well produced). The "defect" is not in the labeling (we may suppose the label discloses the presence of nicotine); the "defect" isn't even in the absence of a suitable caution (e.g., "nicotine may induce dependence"). In the case we suppose here, it is, rather, simply in the fact that the "product" could have been made safer (by removing the nicotine), while still functioning well in ways that make it of positive value to consumer, but was not made safer in this way. It is the manufacturer's failure to take care in this respect, when doing so would not have imposed an undue expense, but would have significantly reduced "tobacco dependency," that constitutes a "defectively designed product" in this view. (But *query* whether Florida law takes this view.)

60. Which is not to say that Florida law could not take this position if, say, by legislation it opted to do so (i.e., there would be no constitutional problem were Florida to take this position). Rather, it is only to say that, currently, it has not. (And accordingly, Jones has no case to bring against Zone based on a theory of this sort.)

added expense to itself, every aspirin producer could furnish a clear indication whether a given container holds unbuffered (rather than buffered aspirin), insofar as it neglects to so design its retail packages, without any indication of what kind of aspirin the particular package contains (namely, unbuffered rather than buffered aspirin), its mere omission to so mark its packages in this more suitable way might very well render the product defective due to inadequate warning. But assuming it to be so, in our case, Jones still had no case that can get off the ground—because in our case, all Zone aspirin containers *were* properly labeled in just this way. As quickly as that fact is admitted or established, Jones' case collapses once again.

And, carrying this process still one step further, it is plausible that Florida law might regard the product as "defective in design" if, despite clear labeling of the aspirin container (as containing unbuffered aspirin rather than buffered aspirin), it failed to go further, for example, also to say why ingesting "unbuffered" aspirin might matter,⁶¹ and to say so, clearly, on the box. But, assuming that there is such a rule of law in Florida's substantive tort law, that very requirement was also no less perfectly fulfilled by Zone than were all of its other obligations (remember, the label clearly said that "unbuffered aspirin may cause gastric distress to some users"). So, again, Jones is unable to state a case on that kind of claim as well.

In fact, to cut through this effort to nail down Jones' theory of Zone liability a bit more swiftly, one may comb through the various relevant sections of the *Restatement of Torts (Second)* (and those also of the most recent A.L.I. drafts of the *Restatement (Third)*), and still find *nothing* sufficient to provide Jones with *any* encouragement to support his hope to make *some* sort of "products liability" claim in this case, just as a competent attorney would have so advised him when he first came to that attorney's office. There was, from this point of view, in brief, never a valid claim statable against Zone by Jones.⁶² And if this

61. This would be akin to a requirement to list not only the various substances cigarettes contain on the box, but also to list why it may matter to alert buyers of such risks they take from the inhalation of these substances.

62. I.e., Jones was unable to state any kind of "duty of care" cognizable under Florida law as a duty that Zone owed to Jones, *and which duty Zone in some way failed to observe*. This is just what distinguishes this case from the bus case, where there *was* such a duty, and admittedly, *that* duty—such as it was—was breached. In contrast, here *all* such "duties of care" as defined by Florida law (as duties owed by Zone to Jones), were at all times faithfully performed by Zone. Looked at this way, Zone wasn't a provisionally "liable party" who, though provisionally liable, was then somehow able to block it out by pointing to some disqualifying behavior by Jones (by way of "affirmative defense"). Zone was never even "provisionally" liable as such.

Whether, or to what extent, tobacco product claims will fit within this approach (and accordingly be dismissable), I cannot say (it will depend upon Florida caselaw; your own

is true, *such that Zone was never a "liable" party*, the statute itself does not allow Florida Medicaid to get into court at all. Arguably, there are a number of "tobacco cases" where that will equally be true, to cut Florida Medicaid off at this first step.

Personally, I would just as soon prefer the statute not be parsed the way I have just struggled to do so in this Coda. I think the due process argument is more convincing if the two cases (the aspirin case and the bus case) are treated alike in the Florida courts (though I also think the due process objection is still entirely sound as developed in the bus case by itself). Even so, the exercise in this statutory coda is extremely useful, and quite possibly useful in three distinct ways.

First, it points up something extremely interesting about the idea of "assumption of the risk" as such (the "defense" on which Zone originally succeeded in having judgment entered in its favor in the original case brought against it by Jones). It does so because, under the more careful review of Jones' original claim we just completed, it has become evident that how the law allocates risks in the *first* instance is itself more subtle than one might have supposed. In the case I just presented, for example, what "the law" says is that "Zone did not fail in respect to the duties it owed." In other words, there was no breach of any duty (of product design, craftsmanship, package design, etc.) and Zone was never a "liable third party" at all. But of course, implicit in that substantive law is also the understanding that Jones is free (i.e., not liable criminally and not liable civilly) to buy and use unbuffered aspirin if he wishes, though under the circumstances in the case I presented, he is "on his own" insofar as he does. A perfectly natural way of capturing the thought is to think of Jones as a person whom the law respects as free to assume certain risks as he may choose, it being understood that this is part of his freedom for which he may not seek to transfer to someone else the costs incidental to his distress (there being no "liable" party for him to sue).⁶³

Second, the point is interesting because it likewise points to a

research is vastly more capable of discovering the answer better than anything I could try to turn up). But the research should assuredly be pursued, for though it may shock the Florida Governor himself, it is quite arguable that many of the supposed (tobacco) cases are not subject to this law (because there never was a "liable" party at step one). It may be, of course, that the Florida Legislature has assumed that there is such liability, such that nearly everything successfully invocable to defeat that liability could only be seen by way of "affirmative defense." But, as my colleague James Boyle suggested, the fact that the legislature may have assumed a great deal of this sort by no means necessarily makes it so (and, in some measure, I agree with Boyle they may well be wrong—at least the subject is worth exploring).

63. And this, of course, was the point in *supra* note 8, of the case involving Hart, Schaffner, and Marks (the case of the wrinkled suit).

subtlety in the Florida statute itself, because it indicates how the statute must be parsed according to its own terms when it speaks of “assumption of the risk” as being “an affirmative defense.” There may be (and doubtless are) cases in which there would be liability by the other party, i.e., cases in which the plaintiff can state a *prima facie* case of liability where the defendant then throws up a shield—a defense—conceding the case of *prima facie* liability, but invoking plaintiff’s “assumption of the risk” to ward off the usual consequence of that *prima facie* liability—the consequence of being responsible for plaintiff’s losses.⁶⁴ But as we have seen, there also are many cases (our *Zone* case was one of them) where risk allocations break out differently *ab initio*—that after scouting the range of “duties” owed by one party to another, and after examining the facts, one concludes that no duty framed by the relevant law applicable to the circumstances was breached, so there never was a “liable” party to begin with.⁶⁵

Third, the point is also useful in the way our earlier review sought to show; namely, the utter arbitrariness of the Florida statute in terms of how it thus would work. In the case where defendant has “zero” liability to begin with, whether Florida Medicaid spend \$10, \$10,000, or \$10,000,000 to reimburse medical support costs for some stricken, eligible person, it concededly has no right to proceed to try to take assets from some nonliable person or company. But it says, somehow, that it is not arbitrary to take all such assets up to whatever amount that might have thus been incurred by it for such services, when defendant had anything larger than zero liability instead (e.g., partial liability instead). The taking *excessive* to the defendant’s original liability,⁶⁶ however, is analytically utterly indistinguishable in its arbitrariness for all such excess the State would thus attempt to claim.

64. Perhaps an example would be one where one signs a contract, after full disclosure of risks associated with skiing (or, in Florida, water skiing), and where, but for the contract, the ski resort would be liable for injuries the skier sustained on the downhill slope—but where, after examining the contract, the fullness of the disclosure of all risks, the adult competence of the signing party, etc., the contract is deemed by the court to be valid and applicable to the particular claim the plaintiff tried to assert. Here, the contract being valid and applicable, it operates straightforwardly as an “affirmative” defense, for conceptually, absent the contract, defendant would have been liable to plaintiff in tort.

65. And, again, therefore, no one for Florida Medicaid itself to sue.

66. As we worked through in the bus case, the motorcyclist, the comparative bridge-jumper case, etc. See the Appendix chart of the recovery matrixes, for an illustration of the phenomenon as I described it in the cases involving Jones and the Bus Company.

IV. THE ORIGINAL PROBLEM REDESCRIBED AS A DENIAL OF EQUAL PROTECTION OF THE LAW

The Florida statute is also subject to objection on the independent ground that it denies equal protection of the law. In the end, I continue to think the basic substantive due process argument is analytically superior. Nevertheless, I have an able colleague who feels somewhat uncomfortable with the analysis provided in terms of substantive due process. So, here, we shall identify that discomfort, and offer an alternative analysis (one of "equal protection") that still comes to the same end—that the Florida statute is invalid under the Fourteenth Amendment.

One reason for this discomfort in using the Due Process Clause might be based on an observation that the state legislature, were it so inclined, could constitutionally change the substance of the tort law of Florida such that whatever features of a plaintiff's own behavior as may previously have been deemed sufficient to make the plaintiff himself responsible for some (or even all) of the injuries he sustained, need no longer be treated by the state as having that effect. An easy example would be a change in its law respecting "assumption of the risk." Nothing in the Constitution requires the use of this idea (i.e., the idea that "no defendant shall be held liable for any risk any plaintiff ought reasonably to have been aware of and also had ample opportunity to avoid"). A state may be free to take a somewhat different view, whether or not others think it wise: it may impose expenses on defendants for injuries sustained by others, even if they were sustained by one who, perhaps in another state, would be regarded as an "unreasonable" risk-taker, such that the injuries they sustain are their own responsibility and not another's. In brief, no one has a "substantive due process" right in the mere common law doctrine of "assumption of the risk" such as it may be (or may have been). Therefore, when the state merely declines to permit it (that doctrine) to be used in a particular kind of case, e.g., to defeat an injured party's claim, it does no constitutional wrong.

But if that is so, then the idea is that the "greater" power to reduce or eliminate the notion of assumption of the risk (i.e., the prerogative of a state legislature to do away with assumption of the risk as a basis for denying plaintiffs recoveries they could receive if they were no longer made to assume certain risks associated with their conduct), must include a "lesser" power (i.e., to do away with it *selectively*)—which one would then try to say is merely what Florida has done. And that if this is so, then some believe it also answers our challenge as we have

thus far tried to present it.⁶⁷ But, in one view at least, it does not succeed in the same way if, instead, the objection to the way the state has presumed to structure its law is recast in terms of "equal protection" of the law. I think in fact this is a weaker and less promising approach. But I have no objection to looking at the problem in this way. Briefly, here is how the "equal protection" analysis works.

Viewed as an equal protection case, the case we suppose is a case involving a statute (or a common law rule) that says something like this: "generally, in this jurisdiction, a person is protected from answering in damages for such injuries as were sustained by another person, which injuries would not have occurred but for a want of ordinary prudence on that person's own part."⁶⁸ So, in respect to "comparative negligence," for example, one can see quite readily how this protective law shields those sued by others.

A very good example of such a rule, we might say, is provided by the case of the person incurring particular head injuries he would not have incurred but for the failure to show ordinary prudence in using a helmet when traveling by motorcycle on the public roads. Notice the useful features of this case, whether it be described as one of "comparative negligence," or whether it be described as "assumption of (one kind of) risk."

Our case is one in which it is conceded that it is not the cyclist's fault that there was a *collision* (rather, the collision resulted from the defendant's oversight, say, for switching lanes without looking to see that the cyclist was virtually alongside when the defendant motorist moved into the adjoining lane). Still, under our law (as here we stipulate it to be), though the cyclist may recover significant damages, including nearly all (but not quite all) of his medical expenses, we also say "he may not include any for the injuries he would not have sustained but for his want of ordinary prudence (indeed, his wrongful act under the vehicle code) in riding helmetless." As to *that* modicum of damages, we do not see them as properly chargeable to the motorist, but chargeable to the rider instead. And there is surely nothing inappropriate in that law, as we see it, whether others choose to copy it or not.

One may fairly characterize this law as one quite suitably providing an example of this state's law respecting "assumption of risk" or

67. I think this is in fact not true (Florida has not in fact altered the "rules of engagement" on assumption of the risk or on comparative negligence; rather, it has attempted to exempt itself from the rules).

68. There are exceptions, but such exceptions are simply reserved for instances where there is some special duty (i.e., responsibility) for the other person, e.g., a parent's support obligations toward his or her child (to pay necessary medical expenses incurred by the child), or an insurer's obligations.

“comparative negligence.” It is a law that protects *others* in respect to potential claims by motorcyclists in a specific way—it protects them from having to answer for injuries which, *in the state’s own view*,⁶⁹ are injuries they ought not have to answer to under the circumstances that characterize this case.

To get to the equal protection question, what we now ask is this: “Is there any case in which one may be denied the equal protection of this law?”⁷⁰ To find out, we merely need plod through the following review: in which of the cases, if any, is one *denied* the protection of the law we stipulated to be the law of this state?

a) *When one is asked by the motorcyclist to accept the cost of such medical expense he incurred and paid in respect to head injuries he would not have sustained had he worn his helmet?*

— No, certainly one is not denied its protection in this case.⁷¹ Well, then, if not denied its protection in this case, what about the following case—

b) *When one is instead asked by the motorcyclist’s physician to pay his bill for having treated those particular injuries?*

— No, the defending driver is equally protected here as well—from any such claim any such physician might presume to assert.

Hmmmm, we say, okay, so the defending driver is equally protected in this case as in the original case. But what about the following case—is the driver still protected in this case, too?

c) *When one is instead asked by the motorcyclist’s insurer to reimburse the motorcyclist’s insurer for such sums as it paid the physician for treating those particular injuries?*

— No, *of course not*,⁷² the driver is no more liable to the

69. Note, we do not say that the State *must* have a law of this kind, i.e., that something in the Constitution or in the Fourteenth Amendment would be violated were it not to have this particular law. We merely observe that this is the law of the state and that all motorists receive its protection.

70. If there is not, all is well. If there is, we want to know why, i.e., “why is one denied the protection of this law in such case(s)—*what suitably distinguishes them so to call for a different rule—what sets those cases apart, in some nonarbitrary way?*” What makes them different, so to hold a defendant liable in a different manner, or to a different extent than otherwise? If the state has no satisfactory answer in terms of some identifiable common characteristic of these “set aside” cases, it may not be able to proceed to take a defendant’s assets in the (excessive) manner it proposes.

71. I.e., the defendant is *not* unprotected by the law in this instance (rather, to the contrary, this is the typical case in which he—the defendant—is protected by this very law).

72. Were the insurer to be able to collect from the driver, it would obviously defeat the

motorcyclist's insurer than to his doctor.⁷³

Well, then, so far, so good. It's beginning to look fairly solid. There are no breaks in the law that refuses to hold the other driver liable for those injuries. The State itself says that "these are *not* injuries attributable to defendant's errors in driving such as they might have been, but injuries attributable to an act or omission on the part of the cyclist." But, well, how about *this* case:

d) *When asked by the motorcyclist's brother who paid the cyclist's doctor's bills for those injuries?*

— No, of course not again.⁷⁴ And let's get on with this before sundown! So let's just quickly address summarily all other cases—*all cases*.

e) through "n" ("n" being all other cases when still other parties, whoever they are, want reimbursement for having paid the bill, and who then similarly ask the motorist to pay them).

— No, no, *no*, *no and NO!*⁷⁵

"n+1") When asked by Florida Medicaid to reimburse them for paying the cyclist's bill to the physician who treated him?

— "Yes."

"Yes?" "Did you say 'yes'?" But on what basis? More specifically, what "new facts" can the State point to (if any), that suddenly make it reasonable to hold the motorist for something more in *this* case than in those we have just now reviewed?⁷⁶ What has the motorist done (or failed to do), for example, such that he should now be made to pay for *the cyclist's* negligence, *as well as* his own, when the State itself concedes (see all the above cases) it would not presume to having him treated that way under its laws and in its own courts? Or, in short, "Why is he denied the equal protection of the law?"

Certainly it cannot be enough to say (the argument would continue),

purpose of the law—by transferring to the driver the costs we have already said are attributable *not* to the driver's negligence (such as it was) but *attributable, rather, to the remissness of the cyclist* (whose remissness was his own and in no respect subject to the driver's power to influence or to control).

73. Again, the defendant is protected from any such claim by the very same law.

74. I.e., here, too, the defendant is equally protected by the very same law.

75. I.e., here, too, the defendant is equally protected by the very same law.

76. Florida Medicaid is merely the cyclist's own default insurer, i.e., responsible for covering such medical expenses he is without means to pay.

for example, "well, eh—the motorist was at least involved in an encounter with the cyclist, while others were not, and, also, he was at fault. . . ." But this response will not do. For, so far as that is true, all that at most can appropriately mean is, that, "yes, so he was thus 'involved,' and therefore he *is* appropriately chargeable with such bills as reflect his full share of those bills, 'fault' and all, such as it was—not by the harm the cyclist endured due to *no* dereliction of the motorist,⁷⁷ but strictly according to the dereliction of the motorist, rather than matched to include the negligence of the cyclist as well." Florida Medicaid may seek such recovery as is appropriate according to *that* standard. Lacking any basis whatever for suddenly "deeming" the motorist's accountability to be a larger one than that,⁷⁸ however, it may not seek recovery for anything more. Florida Medicaid's desire to take the defendant's property to "reimburse" itself for such support the law of the state may oblige it to furnish by way of services to the cyclist is not a distinction according to which it may seek to transfer its insurer's obligations to the motorist—so to require the motorist to pay for the cyclist's negligence as well as for his own. It is, rather, to deny the equal protection of the law whenever it names itself as plaintiff in mere statutory masquerade.⁷⁹

77. But due, rather, from his own dereliction as viewed by Florida law (riding without a helmet, a matter not within the control of others, and the associated risks of which are not to be imputed to them as though it were an incident of their own road-use rather than his neglect).

78. That "unless the motorist is also to be deemed responsible for the cyclist's additional injuries, we will be unable to recover our own expenses as the cyclist's ultimate insurer for treatment of injuries incurred as a consequence of his own risky conduct," merely emphasizes the obvious. Florida Medicaid really just wants to deny its responsibility as ultimate insurer of the cyclist's medical bills he may be unable to pay for lack of suitable savings or means, and instead to have them imputed to someone else.

79. I suggested earlier that I think there may be a weakness in framing the constitutional argument in equal protection terms (rather than in terms of due process and appropriations of private property for public use—"public use" by Florida Medicaid in providing one kind of welfare assistance to those unable to meet their own medical bills). The weakness (such as it is—and it is not necessarily serious) is this, namely, that one alleging a denial of equal protection standardly compares how he does not differ from others not similarly regulated, i.e., that the State is treating him less well than it treats others indistinguishable from himself. Here, however, ironically, all are treated in exactly the same way (*all are equally* denied the protection of the law of Florida regarding comparative negligence when Florida Medicaid presumes to sue them in cases of the kind we have just reviewed; there are no exceptions to the claim made by the State, namely, a claim that if one is a "liable party" *at all*, one's assets can be taken by the State for all that it seeks for such bills as it may have made good on behalf of the party whose distress it relieved as insurer of such bills as that party incurred).

APPENDIX

Jones and bus collide in Florida, a state with both comparative negligence and a “full recovery” statute. Assume Jones’s medical costs are \$1 million, fully paid by Medicaid. Jones also had \$X in other damages. Assume \$1,000 damage.to the bus. Tables show plaintiff’s recovery.

| | | JONES V. BUS CO. | | | |
|--------------------|------|----------------------|-----------------|-----------------|----|
| | | Company’s Negligence | | | |
| | | 100% | 90% | 10% | 0% |
| Jones’s Negligence | 0% | \$1,000,000 ÷ X | | | |
| | 10% | | 900,000 ÷ 90% X | | |
| | 90% | | | 100,000 ÷ 10% X | |
| | 100% | | | | 0 |

BUS CO. v. JONES
Company's Negligence

| | | 100% | 90% | 10% | 0% |
|--------------------|------|------|-----|-----|------|
| Jones's Negligence | 0% | \$0 | | | |
| | 10% | | 100 | | |
| | 90% | | | 900 | |
| | 100% | | | | 1000 |

FLORIDA MEDICAID v. BUS CO.
Company's Negligence

| | | 100% | 90% | 10% | 0% |
|--------------------|------|-------------|-------------|-----------|------------------|
| Jones's Negligence | 0% | \$1,000,000 | | | |
| | 10% | | \$1,000,000 | | |
| | 90% | | | 1,000,000 | |
| | 100% | | | | \$1,000,000 or 0 |