

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Jeanette Delacerda,
n/k/a Jeanette Sanderson,
On Behalf of Herself and All
Others Similarly Situated,

Plaintiffs,

vs.

North Dakota Department of Human
Services; Carol Olson, Individually and
as Director of the North Dakota
Department of Human Services;
Annette Bendish and Galen Hanson,
in their individual and official capacities,

Defendants.

**MEMORANDUM IN SUPPORT
OF JOINT MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Civil No. 1:08-cv-00046

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The parties seek preliminary approval of the settlement of this lawsuit, brought on behalf of Medicaid recipients who remitted a portion of a third-party settlement payment to the North Dakota Department of Human Services (Department) based on alleged improper demands by the Department. The Department denied and continues to deny any wrongdoing or liability of any kind to Plaintiffs, and asserts numerous defenses to the claims asserted by Plaintiffs.

The parties conducted a thorough examination and investigation of the facts and law relating to the claims in the action. Following months of negotiation, including a court-hosted settlement conference, the parties achieved a proposed settlement (the Settlement). Under the Settlement, the Department will refund to eligible Class Members the amount of the third-party payment received by the Department in excess of 40% of the gross third-party settlement. The "gross third-party settlement" is the entire amount of the settlement received by the Medicaid recipient, before any deductions such as attorney's fees or a payment to the Department.

The approval process of a class action settlement is generally a two-step process. The court first reviews the proposed settlement to determine whether it is fair, adequate, and reasonable. Where, as here, a settlement is the product of arm's length negotiations conducted by capable and experienced counsel, the settlement is presumed to be reasonable. After the court finds the settlement reasonable, the terms of the proposed settlement are provided to the settlement class members. Second, the court holds a fairness hearing to fully consider the terms of the settlement and any comment provided by class members.

At every point in this case, the parties have been zealous in their advocacy. Given assessment of the costs and legal and factual risks associated with this litigation, including the risk a class might not be certified, the difficulty of Class Members proving damages, the possibility Class Members could recover nothing, and the potential costs and damages if a class is certified and Plaintiffs prevail, the parties reached a compromise regarding the claims.

Accordingly, the parties request this Court enter an order that (1) preliminarily approves the terms of the Agreement as fair, reasonable, and adequate to the Settlement Class; (2) conditionally certifies the Settlement Class; (3) designates Jeanette Delacerda as the representative of the Settlement Class; (4) designates Class Counsel as counsel for the Settlement Class; (5) approves the form, content, and method of notice to be given to the Settlement Class; (6) approves the procedures and timeline for Class Members to exclude themselves from (opt-out of) the Settlement; (7) enters a protection order protecting confidential information included in the Status Reports, and (8) approves the procedures and timeline for individuals to object to the Settlement or certification of the Settlement Class.

PROCEDURAL BACKGROUND

I. Recovery of third-party payments to Medicaid recipients.

A Medicaid applicant must assign to the Department “any right of recovery the applicant or recipient may have for medical costs incurred under [N.D.C.C. ch. 50-24.1] not exceeding the amount of funds expended by the department for the care and treatment of the applicant or recipient.” N.D.C.C. § 50-24.1-02.1; see also N.D.C.C. § 50-24.1-02(2); 42 U.S.C. 1396a(45); 42 U.S.C. 1396k; 42 C.F.R. §§ 433.145, 433.146, 433.147, 433.148. The assignment is effective as to both current and accrued medical support recovery obligations and takes effect upon a determination that the applicant is eligible for medical assistance. See N.D.C.C. § 50-24.1-02.1.

The Application for Health Care Coverage for Children, Families, and Pregnant Women has a section where the applicant acknowledges an assignment of rights to the Department. It states: “I understand that when a person receives Medicaid, that person gives the state the right to payments from a third party for medical services received and must report within 10 days of receiving payment, any third party payments (example: accident settlement) received for medical care.” The Guidebook to the Application for Assistance states: “You give your rights to support for medical expenses and payments for medical care from any third party payer to the State of North Dakota, to the extent of actual costs of care paid by Medicaid. You must help pursue any third party payer who may have a responsibility to pay for health care services. You must also report any payments you receive for health care services within 10 days of receiving the payment.”

State law provides that a “medical assistance recipient shall inform the department of any rights the recipient has to third-party benefits and shall inform the department of the name and address of any individual, entity, or program that is or may be liable to provide third-party benefits.” N.D.C.C. § 50-24.1-30(3). It further provides

that an “applicant for or recipient of medical assistance shall cooperate in the recovery of third-party benefits.” N.D.C.C. § 50-24.1-30(6); see also N.D.C.C. § 50-24.1-30(9).

North Dakota law requires the Department “seek recovery of reimbursement from a third party up to the full amount of medical assistance paid.” N.D.C.C. § 50-24.1-30(2); see also 42 U.S.C. 1396a(a)(25). It further provides:

The department shall recover the full amount of all medical assistance provided on behalf of a recipient to the full extent of third-party benefits received by the recipient or the department for medical expenses. The department shall recover the third-party benefits directly from any third party or from the recipient or legal representative, if the recipient or legal representative has received third-party benefits, up to the amount of medical assistance provided to the recipient.

N.D.C.C. § 50-24.1-30(5).

North Dakota law provides certain rights to the Department to protect its rights to third-party benefits or payments. N.D.C.C. § 50-24.1-30(7) provides:

To enforce its rights to third-party benefits, the department may institute, intervene in, or join any legal or administrative proceeding in its own name.

- a. If either the recipient or the department brings an action against a third party, the recipient or the department must provide to the other within thirty days after commencing the action written notice by personal delivery or registered mail of the action, the name of the court in which the case is brought, the case number of such action, and a copy of the pleadings. If either the department or the recipient brings an action, the other may become a party to or may consolidate an action brought independently with the other.
- b. A judgment, award, or settlement of a claim in an action by a recipient to recover damages for injuries or other third-party benefits in which the department has an interest may not be satisfied or released without first giving the department notice and a reasonable opportunity to file and satisfy its claim or proceed with any action as otherwise permitted by law.

Furthermore, under North Dakota law a “release or satisfaction of a cause of action, suit, claim, counterclaim, demand, judgment, settlement, or settlement agreement is not valid or effectual as against a claim created under this chapter unless the department

joins in the release or satisfaction or executes a release of its claim.” N.D.C.C. § 50-24.1-30(4).

II. The *Ahlborn* decision.

In *Ahlborn v. Arkansas Department of Human Services*, 397 F.3d 620, 625 (8th Cir. 2005), the Eighth Circuit Court of Appeals held the portion of Medicaid benefits recoverable by states from a Medicaid recipient's personal injury settlement is limited to the past medical expense component of the recovery, rather than the entire third-party payment. The United States Supreme Court affirmed the Eighth Circuit's decision on May 1, 2006. See 547 U.S. 268, 280-82 (2006).

III. The Litigation.

On or about April 23, 2008, Plaintiffs commenced a civil action against the Department. The Complaint alleges the Department “improperly demand[ed] and receiv[ed] recovery from the proceeds of third party benefits obtained by Medicaid recipients.” Compl. ¶ 1. Plaintiff's allegations are based on two undisputed facts. First, the Department sent correspondence to some attorneys representing Medicaid recipients stating that if no documentation is produced indicating what portion of a third-party settlement is for medical care, the Department's position is that the settlement amount includes the amount that was for medical care. Second, the Department sent attorneys representing Medicaid recipients an Attorney's Agreement that was not updated after the Eighth Circuit's decision in *Ahlborn*. The Attorney's Agreement incorrectly stated: “The Department's recovery base is equal to the lesser of the total gross recovery on the recipient's claim or the amount expended by the Department for care and treatment of the Recipient related to the Recipient's claim.” Attorneys for most, if not all, Medicaid recipients from whom the Department received proceeds from third-party settlements received the Attorney's Agreement.

IV. Settlement discussion and mediation.

The parties started discussing settlement as early as February 2009, which included written correspondence, e-mails, and in-person meetings. A settlement conference was held by Magistrate Charles S. Miller, Jr. on July 8, 2009. After the Settlement Conference, the parties continued to discuss settlement until the Settlement was reached.

V. The Settlement.

The Settlement Agreement sets out the terms of the Settlement in detail. The key provisions of the Settlement are:

1. **Refunds to eligible Class Members.** The Settlement provides the Department will refund to eligible Class Members the amount of the third-party payment received by the Department in excess of 40% of the gross third-party settlement. The "gross third-party settlement" is the entire amount of the settlement received by the Medicaid recipient, before any deductions such as attorney's fees or a payment to the Department. To be eligible, a Class Member must timely submit a completed Proof of Claim Form. The Proof of Claim Form requires basic identifying information, information and documentation regarding the amount of the third-party payment, and the Class Member's signature.
2. **Claims administration costs.** Costs of claims administration, which includes preparing and mailing the Settlement Notice and Claim Form; receipt, processing, and payment of claims received from Settlement Class Members; and preparation of a Status Report for Class Counsel, will be paid by the Department.
3. **Class Counsel fees.** Class Counsel fees, in the amount of \$35,000.00, will be paid by the Department.
4. **Class Representative settlement.** Jeanette Delacerda will remit to the Department \$10,000 of her third-party settlement.

LEGAL ARGUMENT

The parties request preliminary approval of the Settlement, conditional certification of the Settlement Class, designation of the Class Representative and Class Counsel, and approval of the Notice of Class Action Settlement (Notice) and Proof of Claim Form (Claim Form).

I. Standards for preliminary approval of a class action settlement.

Generally, when parties reach an agreement in a controversy, their agreement is sufficient to resolve claims. However, in a class action brought under Rule 23 of the Federal Rules of Civil Procedure, in addition to the parties' approval, a Court must also oversee the resolution because the rights of so many individuals are at stake.

A. The class action settlement process.

Under Rule 23(e), settlement of a class action must be approved by the district court. Preliminary approval is the first of a two-step process where the court considers whether the settlement appears to fall within the range of reasonableness and whether the proposed notice plan meets the requirements of due process. The second step is a final settlement approval hearing, at which time argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. See Manual for Complex Litigation (Third) § 30.41 (1995) (Manual). This procedure, commonly employed by federal courts and endorsed by a leading class action commentator, see 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.24 (4th ed. 2002) (Newberg), serves the dual function of safeguarding Class members' procedural due process rights and enabling the court to fulfill its role as the guardian of the class' interests. As a result, the decision to approve or reject a proposed settlement is committed to the court's sound discretion. See In re BankAmerica Corp. Secs. Litig., 350 F.3d 747, 7552 (8th Cir. 2003).

"An initial presumption of fairness attaches to a class settlement reached in arms-length negotiations between experienced and capable counsel after meaningful discovery." Grier v. Chase Manhattan Auto. Fin. Co., No. CIV. A. 99-180, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000) (citation omitted); see also Osby v. Bayh, 75 F.3d 1191, 1200 (7th Cir. 1996). "The court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." In re Employee Benefit Plans Sec. Litig., No. 3-92-708, 1993 WL 330595, at *5 (D. Minn. June 2, 1993);

see also Welsch v. Gardebring, 667 F. Supp. 1284, 1295 (D. Minn. 1987) (giving “great weight” to opinions of experienced counsel); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 659, 667 (D. Minn. 1974) (same).

Similarly, a court considering a motion for preliminary approval neither decides the merits of the underlying case, nor crafts a settlement for the parties. See Grunin v. Int’l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) (“neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute”) (citation omitted); Holden v. Burlington N., Inc., 665 F. Supp. 1398, 1403 (D. Minn. 1987) (recognizing district court’s approval was not expression of its opinion about merits).

Finally, neither formal notice nor a hearing is required for a court to grant preliminary approval of a class action settlement; instead, the court may grant such relief upon an informal presentation by the settling parties, and may conduct any necessary hearing in court or in chambers, at the court’s discretion.

B. The Settlement should be preliminarily approved.

Whether the Settlement falls within the “range of possible approval” necessarily contemplates at least some of the same requirements for final approval. To that end, this Court should begin its analysis with a presumption that the Settlement is fair. A presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation or discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. See 4 Newberg at § 11.41; Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1391 (8th Cir. 1990) (recognizing that settlements are presumptively valid); accord Grier, 2000 WL 175126, at *5-6 (same); Ellis v. Naval Air Rework Facility, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (analyzing above-cited factors), aff’d, 661 F.2d 939 (9th Cir. 1981). From there, “the court determines whether the proposed

settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.” Tenuto v. Transworld Sys., Inc., No. CIV. A. 99-4228, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31, 2001); see In re Employee Benefit Plans Sec. Litig., Civ. No. 3-92-708, 1993 WL 330595, at *4-6 (D. Minn. June 2, 1993) (analyzing factors).

1. *The Settlement is the product of serious, informed, and noncollusive negotiations.*

The parties negotiated the Settlement in good faith and at arm’s length. Before reaching the Settlement, the parties engaged in factual investigation and extensive legal research. Thus, counsel for each of the parties – who are experienced plaintiff and defense attorneys – fully evaluated the strengths, weaknesses, and equities of the parties’ respective positions.

With respect to the Settlement itself, the parties engaged in hard-fought settlement negotiations, the negotiations spanning several months, including a court-hosted Settlement Conference. Counsel for each party considers the Settlement to be a fair resolution of their respective differences based on the costs and risks associated with this litigation. In light of counsel’s experience, the Court should accord their assessment considerable weight. See Grier, 2000 WL 175126, at *5.

2. *The proposed Settlement is approved by counsel for both parties.*

The parties only entered into the settlement after carefully weighing the perceived benefits conferred by the settlement versus the risks associated with proceeding with the case. This was a completely informed decision.

Many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975) (“While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the

proposed settlement.”) (footnotes omitted); United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (holding same); S.C. Nat’l Bank v. Stone, 139 F.R.D. 335, 339 (D.S.C. 1991) (“Finding no indication of any collusion, it is therefore appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole.”) Counsel for the Class have experience in class action litigation, and believe this settlement is fair, reasonable, and adequate. This conclusion should be afforded considerable weight by the Court.

3. *The investigation and discovery was sufficient to allow counsel to make an informed and intelligent decision.*

The Complaint was filed on April 23, 2008. Prior to and during negotiations, the parties engaged in factual investigation and extensive legal research. Counsel for each party – who are experienced plaintiff and defense attorneys – fully evaluated the strengths, weaknesses, and equities of the parties’ respective positions. It was only with this information that the parties decided to settle. This factor supports the fairness and reasonableness of the Settlement.

4. *The parties’ counsel are experienced litigators.*

Plaintiffs are represented by three experienced attorneys: Craig A. Boeckel and Jeffrey S. Weikum of the Pagel Weikum Law Firm, and Thomas A. Dickson of the Dickson Law Office. Plaintiffs’ counsel, on average, have 21 years of experience.

Defendants’ counsel is the North Dakota Office of Attorney General. Lead counsel for Defendants is Douglas A. Bahr, the Director of the Civil Litigation Division, with over 18 years of civil litigation experience at the Office of Attorney General.

5. *There are no grounds to doubt the settlement’s fairness.*

The proposed settlement does not possess any obvious deficiencies, such as unduly preferential treatment of the named Plaintiff or other members of the Class, or excessive attorneys’ fees.

First, the Settlement treats all members of the Class fairly. Subject to Court approval, the Settlement provides that all eligible Class Members will receive a refund of their third-party payment based on the same formula – the amount in excess of 40% of the gross third-party settlement. No factual proof of harm is required; the Class Member simply needs to provide documentation of the amount of the third-party settlement. Class Members are treated equally. Furthermore, all Class members have the opportunity to opt-out of the Settlement should they prefer to pursue an individual claim.

Next, the proposed settlement does not provide for excessive attorneys' fees. Class Counsel will receive \$35,000 in attorneys' fees. Given the amount of work done in this case, the amount of risk and cost associated with the litigation and the benefits provided to the Class, and the prevailing rate in the community, the parties' agreement on fees is well within the range of reasonableness.

Finally, the Settlement is within the range of possible approval in light of the risks faced and the benefits conferred. The Settlement provides Class Members the opportunity of a refund in the face of an otherwise uncertain class certification and without requiring the Class Members to individually prove the elements of their claims. In light of the many legal and factual defenses raised to Plaintiffs' claims,¹ the Settlement falls within the range of possible approval.

As explained in one treatise:

If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

¹ Defendants' legal and factual defenses are not repeated here. They can be reviewed in Defendants' Answer, and are summarized in Defendants' confidential Settlement Statement.

Manual § 30.41. Here, the Settlement meets all of the above criteria. Accordingly, preliminary approval should be granted.

II. The Court should approve the content and distribution of the Notice.

A. The Notice plan fulfills due process requirements.

Due process requires that Class members receive notice plus an opportunity to be heard and participate in the litigation. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Notice must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members. Grunin, 513 F.2d at 122. As such, the class notice should provide enough information to allow class members to decide whether to accept the benefits of, object to, or exclude themselves from the settlement. See Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1153 (8th Cir. 1999). In addition, notice must communicate the required information in a time frame that reasonably provides the opportunity to those interested to make their appearances. See Grunin, 513 F.2d at 120-21.

There is no statutory or due process requirement that all class members receive actual notice by mail or other means; rather, “individual notice must be provided to those class members who are identifiable through reasonable effort.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974); see also Manual § 30.211. The mechanics of the notice process are left to the discretion of the Court, subject only to the broad “reasonableness” standards imposed by due process. Grunin, 513 F.2d at 121.

In this case, Class Members will receive direct mail notice, which will be sent by first-class U.S. mail to the Class Members’ last known address on file with the Department. For the Court’s information, the Department’s mail goes to Presort Plus. Presort Plus runs all mail through “Fast Forward”. Fast Forward is the same program the United States Postal Service uses to check for addresses. Presort Plus receives updates of the Fast Forward files on a weekly basis. If there is a need to forward the mail, the Department receives the mail back from Presort Plus with the forwarding

information on it so it can make a record of the new address. The Department then gives the mail back to Presort Plus and, as long as it remains unopened, Presort Plus re-mails the mail using the same postage initially affixed to the letter. Turnaround time for this process is about one day.

Furthermore, under the Settlement Agreement, if a mailed envelope is returned to the Department without a forwarding address, the Department will make reasonable efforts to locate the Class Member's address and then re-mail the Notice and Claim Form. The Department has a strong incentive to locate the Class Member's address because, under the Settlement, if the Department does not mail a non-returned Notice, the Class Member does not become a "Settlement Class Member," meaning the release provision does not apply to the Class Member.

Furthermore, the notice plan is consistent with class certification notice plans approved by numerous state and federal courts and is, under the circumstances of this case, the best notice practicable. The notice satisfies all due process requirements.

The content of the Notice fully comports with the requirement under Rule 23. The Notice advises Class Members of the Settlement, how to get their refund, of their right to object, of their right to opt-out, and that they will be bound by the judgment. In understandable language, the proposed Notice identifies the purpose of the Notice, explains the lawsuit, summarizes the Settlement, including timelines, and identifies Class Members' options and the consequences of each option.

The Notice offers adequate overview of the settlement, provides important details, and properly advises Class Members where they can receive additional information, including contact by telephone, mail, and internet. The Notice fully meets due process requirements.

III. The Court should set dates for the final approval process.

As set forth in the Notice, the parties contemplate that after notice is distributed and the Class is offered an opportunity to review the terms of the Settlement, the Court

will hold a Fairness Hearing to make a final determination on approving the settlement. Under the terms of the Settlement Agreement, the parties propose that the Fairness Hearing occur on February 12, 2010. The parties ask the Court to enter an Order scheduling the Fairness Hearing on February 12, 2010. The parties therefore propose the following schedule for approval of the Settlement.

ESTIMATED TIMETABLE

Preliminary Approval Hearing	December 10, 2009
Class Notice Mailed	On or before January 8 2010
Opt-out deadline	Within 60 days of mailing or re-mailing the Notice, whichever is later
Objection deadline	February 5, 2010
Fairness Hearing	February 12, 2010
Deadline for Claim Forms	Within 60 days of mailing or re-mailing the Notice and Claim Form, whichever is later
Refund checks issued	Within 30 days of the Final Approval Order becoming final

IV. The preliminary approval order should include a protection order.

The Settlement Agreement contemplates the Department providing Class Counsel status reports. See Agreement ¶ A(5). The status reports provided to Class Counsel will include confidential information under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Regulations, 45 C.F.R. § 164.512(e), and N.D.C.C. § 50-06-15. See Agreement ¶ A(28). So the Department can provide the status reports to Class Counsel, the parties request the Court issue an order that: (1) prohibits Class Counsel from disclosing the status reports and information in the status reports except to individuals certified by Class Counsel as employed by or assisting Class Counsel in monitoring compliance with the Agreement; (2) limits Class Counsel's use of the status reports and information in the status reports to monitoring compliance with the Agreement; and (3) provides for the return of or destruction of the status reports if this Court does not enter an order finally approving the Agreement or after the Agreement has been fully implemented.

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CERTIFICATE OF SERVICE

CASE NO. 1:08-cv-00046

I hereby certify that on November 30, 2009, the following document:
**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL
OF CLASS SETTLEMENT** was filed electronically with the Clerk of Court through ECF,
and that ECF will send a Notice of Electronic Filing (NEF) to Craig A. Boeckel, Jeffrey S.
Weikum, and Thomas A. Dickson.

/s/ Douglas A. Bahr
Douglas A. Bahr
Solicitor General