

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,)

Case No.

Plaintiffs,)

vs.)

**CLASS ACTION COMPLAINT
AND JURY DEMAND.**

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.)

CLASS ACTION COMPLAINT

Plaintiff, Jeanette Delacerda n/k/a Jeanette Sanderson, individually and on behalf of all others similarly situated, hereby states as follows:

NATURE OF ACTION

1. The nature of this case arises from the North Dakota Department of Human Services ("the Department") improperly demanding and receiving recovery from the proceeds of third party benefits obtained by Medicaid recipients.

2. As a result, the State of North Dakota has received monies in violation of federal law, 42 U.S.C. § 1396p(a)(1).

3. Federal Medicaid law does not authorize the Department to recover a Medicaid recipient's third party benefits in an amount exceeding the portion that constituted reimbursement for medical payments made, and the federal anti-lien provision affirmatively prohibits it from doing so.

4. As a result of said practices, the Department has received and is receiving substantial sums of monies to which it is not entitled and it has been unjustly enriched at the expense of the Plaintiff and the Class Members.

5. Plaintiff brings this case on behalf of herself and a class of Medicaid recipients who have received third-party benefits and had a demand asserted and/or monies improperly paid to the Department.

PARTIES

6. Jeannette Delacerda is a resident of the State of North Dakota. Ms. Delacerda was recently divorced and now uses her maiden name: Jeannette Sanderson.

7. The North Dakota Department of Human Services is an agency of the State of North Dakota. The Department administers the Medicaid program which involves the payment of medical expenses for eligible individuals from funds provided by both the State and Federal Government.

8. Carol Olson is the Director of the Department of Human Services and oversees all employees and all responsibilities of the Department.

9. Galen Hanson is an employee of the Department who based upon information and belief is involved in the decision-making process pertaining to third party liability recovery. Based upon information and belief, Galen Hanson is the Third Party Liability Administrator.

10. Annette Bendish is an employee of the Department who based upon information and belief is involved in the decision-making process pertaining to third party liability recovery.

JURISDICTION AND VENUE

11. This is in part, an action for declaratory judgment pursuant to 28 U.S.C.A. § 2201 giving this Court jurisdiction. Pursuant to the other identified actions, this Court also has original jurisdiction under 28 U.S.C.A. §1343(a)(3) and under 28 U.S.C.A. § 1331.

12. Venue is proper in this Court because the actions giving rise to the claims asserted herein took place within this district.

THE CLASS

13. Named Plaintiff brings this action as a class action on behalf of herself and a Class defined to include "All individuals who have received Medicaid from the North Dakota Department of Human Services and who have had monies demanded and/or taken by the department out of their third-party benefits."

14. The Class, as defined above, is identifiable. The definition of the Class is unambiguous. The Class can be identified through records in the control of the Department. The Named Plaintiff is a member of the Class that she seeks to represent. Class Members can be notified through publication and/or direct mailings using contact information maintained in the usual course of business by the Department.

15. Class Members are so numerous that their individual joinder is impracticable. The precise number of Class Members is unknown to the Plaintiff, but it is clear that the number significantly exceeds the number to make joinder

impossible.

16. The Named Plaintiff's claims are typical of the claims of other Class Members.

17. The Injuries sustained by the Class Members flow, in each instance, from a common nucleus of operative facts – the Department's misconduct in demanding and receiving monies in violation of federal law. There are questions of law or fact common to the Class, including at least the following:

- a. whether the Defendants have demanded and/or received monies from Medicaid recipients' third party benefits in violation of federal law;
- b. whether the Department breached its "contract" with the Plaintiff and the Class members;
- c. whether the Department has been unjustly enriched at the expense of the Plaintiff and the Class members by its misconduct;
- d. whether the Department must disgorge any and all monies it has received as a result of its misconduct; and
- e. whether the Defendants should be enjoined from asserting further demands against Medicaid recipients' third party benefits in violation of federal law.

18. The Named Plaintiff will fairly and adequately represent and protect the interests of the Class. The Named Plaintiff is familiar with the basic facts that form the basis of the Class Members' claims. The Named Plaintiff's interests do not conflict with the Interests of the other Class Members she seeks to represent. The Named Plaintiff has retained counsel competent and experienced in class action litigation, and intends to prosecute this action vigorously.

19. The class action device is superior to the other available methods for the fair and efficient adjudication of the claims of the Named Plaintiff and the

Class Members. Plaintiff and the members of the Class have suffered irreparable harm as a result of Defendants' unlawful conduct. The damages suffered by individual Class members may be relatively small, and thus few, if any, individual class members can afford to seek legal redress on an individual basis for the wrongs complained of herein. Absent a class action, Plaintiff and members of the Class will continue to suffer losses as a result of Defendants' unlawful conduct.

JURY DEMAND

20. The Named Plaintiff and the Class Members demand a trial by jury.

FACTUAL ALLEGATIONS

21. Federal Medicaid law requires participating States to "ascertain the legal liability of third parties ... to pay for [an individual benefits recipient's] care and services available under the [State's] plan," 42 U.S.C. § 1396a(a)(25)(A); to "seek reimbursement for [medical] assistance to the extent of such legal liability," § 1396a(a)(25)(B); to enact "laws under which, to the extent that payment has been made ... for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services," § 1396a(a)(25)(H); to "provide that, as a condition of [Medicaid] eligibility ..., the individual is required ... (A) to assign the State any rights ... to payment for medical care from any third party; ... (B) to cooperate with the State ... in obtaining [such] payments ... and ... (C) ... in identifying, and providing information to assist the State in pursuing, any third party who may be liable," 1396k(a)(1). See, *Arkansas Department of Health and Human Services et al. v. Ahlborn*, 126 S.Ct. 1752, 1753-1754 (2006).

22. Further, "any amount collected by the State under an assignment made" as described above "shall be retained by the State ... to reimburse it for [Medicaid] payments made on behalf of the recipient." § 1396k(b). "[T]he remainder of such amount collected shall be paid" to the recipient. *Ibid*.

23. Acting pursuant to its understanding of these provisions, the State of North Dakota passed laws under which "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." NDCC § 50-24.1-30(5)

24. The United States Supreme Court has held that a state cannot claim more than the portion of the Medicaid recipient's settlement that represents medical expenses. *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752 (2006).

25. Federal third-party liability provisions require a Medicaid recipient, as a condition of eligibility, to assign the State any rights to payment for medical care from any third party. 42 U.S. C. § 1396k(a)(1)(A), *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752, 1761 (2006).

26. Federal third-party liability provisions "[do] not sanction an assignment of rights to payment for anything other than medical expenses - not lost wages, not pain and suffering, not an inheritance." *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752, 1761 (2006).

27. Under the federal statutes, the State's assigned rights extend only to recovery of payments for medical care. "§ 1396k(b) requires the State be paid first out of any damages representing payments for medical care." and "the federal

third-party liability provisions require an assignment of no more than the right to recover that portion of a settlement that represents payment for medical care". *Id.*

28. The Department is allowed by federal law to demand as a condition of Medicaid eligibility that the recipient assign in advance any payments that may constitute reimbursement for medical costs.

29. The Department may not however force an assignment or place a lien on any other portion of the Plaintiff's and Class Members' recovery. *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S.Ct. 1752, 1763 (2006).

30. In the overwhelming majority of third-party benefit cases, parties such as the Named Plaintiff and the Class Members do not receive a specifically allocated payment and/or reimbursement for medical expenses as part of their recovery for their damages.

31. The Department has taken the position that when there is no identification or stipulation as to the amount of third-party benefits attributable to medical expenses in any given case, then the third-party benefits recovery is simply presumed to include the full amount of the Department's medical expense claim. In such cases, the Department then demands payment of the full amount of all medical assistance provided up to the full extent of the recovery. Defendants' use of such a presumption violates applicable federal and state law in this matter.

32. Thus, the Department has been wrongfully demanding and receiving recovery in third-party liability cases in violation of federal and state law.

33. As a result of the Defendants' intentional and wrongful conduct, any applicable statutes of limitations have been tolled.

34. As a result of Defendants' intentional and wrongful conduct, Defendants have waived and should be estopped from any claims of immunity, including, but not limited to any claims of sovereign immunity.

COUNT 1

CLAIMS PURSUANT TO 28 U.S.C.A. § 2201

35. The Named Plaintiff re-alleges all paragraphs as if fully set forth herein.

36. Federal law outlines the parties' respective rights and obligations in this matter. Federal law pre-empts any and all state laws and regulations regarding these matters.

37. Federal law provides that the Department is not entitled to third-party benefits in any amount greater than the percentage its reimbursement interest bears to the total loss sustained by the Named Plaintiff and the Class Members.

38. The Named Plaintiff requests that the Court declare the parties' rights in the third party recoveries obtained by the Named Plaintiff and the Class Members.

COUNT 2

CLAIMS PURSUANT TO 42 U.S.C. § 1983

39. The Named Plaintiff re-alleges all paragraphs as if fully set forth herein.

40. The Named Plaintiff and Class members are persons within the meaning of 42 U.S.C. §1983, and have the capacity to sue.

41. As set forth herein, the Defendants have taken the property of the Named Plaintiff and the Class Members without hearing or due process by asserting liens and otherwise demanding and receiving recovery out of third party

recoveries without consideration of the extent to which medical expenses are part of such recovery, all in violation of federal and state law.

42. The acts of the Defendants, as set forth herein, resulted in violation of the Named Plaintiff's and Class Members' civil rights.

43. The Defendants' actions are in violation of federal statutory and constitutional law including but not limited to 42 U.S.C. § 1396(k) and U.S. Constitutional Amendments V and XIV.

44. The acts of the Defendants were under color of state law, and such conduct subjected the Named Plaintiff and the Class Members to a deprivation of rights, privileges, and immunities secured by the Federal Constitution and laws.

45. The Named Plaintiff and the Class Members had a right to receive the amount of their third-party benefits not attributable to medical expenses in accordance with federal and state law.

46. As a result of Defendants' actions, Plaintiffs and the Class Members received less than the full amount of their recovery to which they were entitled.

47. As a result of Defendants' actions Plaintiffs and the Class Members have been damaged.

COUNT 3

UNJUST ENRICHMENT

48. Plaintiff re-alleges all paragraphs as if fully set forth herein.

48. 49. As set forth herein, the Defendants have taken the property of the Named Plaintiff and the Class Members by asserting liens and otherwise demanding and receiving recovery out of third party recoveries without

consideration of the extent to which medical expenses are part of such recovery, all in violation of federal and state law.

50. Thus, the Department has been unjustly enriched in that it received and retained the benefits of the proceeds from third party recovery claims which it would not have received but for their misconduct as alleged herein.

51. These benefits were obtained from, and to the detriment of, the Named Plaintiff and the Class Members.

52. Allowing Defendants to retain the aforementioned benefits violates fundamental principles of justice, equity, and good conscience.

COUNT 4

BREACH OF CONTRACT

53. The Named Plaintiff re-alleges all paragraphs as if fully set forth herein.

54. As set forth herein, the Defendants are allowed by federal law to demand as a condition of Medicaid eligibility that the recipient assign in advance any payments that may constitute reimbursement for medical costs.

55. The Named Plaintiff and the Class Members entered into an agreement with Defendants to assign their third party recovery rights to the extent allowed by federal law.

56. At all relevant times, the Named Plaintiff and the Class Members have complied with their obligations and conditions under their agreements with the Defendants as required by federal law.

57. Defendants have breached their agreement with the Named

Plaintiff and the Class Members by asserting liens and otherwise demanding and receiving recovery out of third party recoveries without consideration of the extent to which medical expenses are part of such recovery, all in violation of federal and state law.

58. To the extent the conditions of the agreements entered into by the Named Plaintiff and the Class Members with the Defendant exceed federal statutory authority those provisions are null and void.

COUNT 5

INJUNCTIVE RELIEF

59. The Named Plaintiff re-alleges all paragraphs as if fully set forth herein.

60. As set forth herein, the Defendant has improperly taken the property of the Named Plaintiff and the Class Members by asserting liens and otherwise demanding and receiving recovery out of third party recoveries without consideration of the extent to which medical expenses are part of such recovery, all in violation of federal and state law.

61. Upon information and belief, Defendant continues its wrongful practices and continues to assert liens and otherwise demand and receive funds in violation of federal and state law and the *Ahlborn* decision causing irreparable harm.

62. As set forth herein, the Named Plaintiff and Class Members have a high probability of success on the merits of this action.

PRAYER FOR RELIEF

WHEREFORE, the Named Plaintiff, on behalf of herself and all others similarly situated, prays for the following relief:

- a. An order certifying the Plaintiff Class as set forth herein, with Plaintiff Jeanette Delacerda n/k/a Jeanette Sanderson as the Class representative and Plaintiff's counsel as lead class counsel for the class;
- b. A declaration of the parties' rights to the third-party proceeds;
- c. An order enjoining Defendant from asserting liens and receiving recovery out of Medicaid recipients' third party recoveries in violation of Federal or applicable law.
- d. An order awarding restitution and disgorgement of all third-party benefits received by the Department as a result of its unlawful practices complained of herein;
- e. Judgment in favor of Plaintiff and the Class against Defendant and awarding damages to Plaintiff and the Class;
- f. An award of reasonable attorneys' fees pursuant to 42 U.S.C.A. § 1988;
- g. An award of reasonable attorneys' fees, costs and expenses as allowed by state and/or federal law; and
- h. Such further relief as this Court deems just and proper.

Dated this 23rd day of April, 2008.

Respectfully Submitted,

/s/ Thomas A. Dickson

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