

JEFF BARBER  
BARBER & SIMS, LLC  
821 N STREET, SUITE 103  
ANCHORAGE, AK 99501  
(907) 276-5858  
Attorneys for the Plaintiff - Appellant

UNITED STATES COURT OF APPEALS  
FOR THE NINTH DISTRICT COURT

ADRIENNE BLATCHFORD,	)	
	)	No. 10-35785
Plaintiff-Appellant,	)	
	)	D.C. No. 3:08-cv-00247-TMB
vs.	)	U.S. District Court for Alaska,
	)	Anchorage
THE ALASKA NATIVE TRIBAL	)	
HEALTH CONSORTIUM, d/b/a	)	
ALASKA NATIVE MEDICAL	)	
CENTER,	)	
	)	
Defendant-Appellee.	)	
_____	)	

**APPELLANT'S BRIEF**

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## STATUTES PRINCIPALLY RELIED UPON

### 25 U.S.C. § 1621e. **Indian Health Care Improvement Act (before amendment enacted 3/23/10)**

(a) Right of recovery Except as provided in subsection (f) of this section, the United States, an Indian tribe, or a tribal organization shall have the right to recover the reasonable expenses incurred by the Secretary, an Indian tribe, or a tribal organization in providing health services, through the Service, an Indian tribe, or a tribal organization, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive reimbursement or indemnification for such expenses if - (1) such services had been provided by a nongovernmental provider, and (2) such individual had been required to pay such expenses and did pay such expenses.

(b) Recovery against State with workers' compensation laws or no-fault automobile accident insurance program Subsection (a) of this section shall provide

a right of recovery against any State only if the injury, illness, or disability for which health services were provided is covered under - (1) workers' compensation laws, or (2) a no-fault automobile accident insurance plan or program.

(c) Prohibition of State law or contract provision impeding right of recovery No law of any State, or of any political subdivision of a State, and no provision of any contract entered into or renewed after November 23, 1988, shall prevent or hinder the right of recovery of the United States, an Indian tribe, or a tribal organization under subsection (a) of this section.

(d) Right to damages No action taken by the United States, an Indian tribe, or a tribal organization to enforce the right of recovery provided under subsection (a) of this section shall affect the right of any person to any damages (other than damages for the cost of health services provided by the Secretary through the Service).

(e) Intervention or separate civil action The United States, an Indian tribe, or a tribal organization may enforce the right of recovery provided under subsection (a) of this section by - (1) intervening or joining in any civil action or proceeding brought - (A) by the individual for whom health services were provided by the Secretary, an Indian tribe, or a tribal organization, or (B) by any representative or heirs of such individual, or (2) instituting a separate civil action,

after providing to such individual, or to the representative or heirs of such individual, notice of the intention of the United States, an Indian tribe, or a tribal organization to institute a separate civil action.

(f) Right of recovery for services when self-insurance plan provides coverage The United States shall not have a right of recovery under this section if the injury, illness, or disability for which health services were provided is covered under a self-insurance plan funded by an Indian tribe or tribal organization.

**25 U.S.C. § 1621e. Reimbursement from certain third parties of costs of health services (after amendment enacted 3/23/10)**

(a) Right of recovery — Except as provided in subsection (f), the United States, an Indian tribe, or tribal organization shall have the right to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party (including a political subdivision or local governmental entity of a State) the reasonable charges billed by the Secretary, an Indian tribe, or tribal organization in providing health services through the Service, an Indian tribe, or tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such

services, would be eligible to receive damages, reimbursement, or indemnification for such charges or expenses if —

- (1) such services had been provided by a nongovernmental provider; and
- (2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

(b) Limitations on recoveries from States — Subsection (a) shall provide a right of recovery against any State, only if the injury, illness, or disability for which health services were provided is covered under —

- (1) workers' compensation laws; or
- (2) a no-fault automobile accident insurance plan or program.

(c) Nonapplicability of other laws — No law of any State, or of any political subdivision of a State and no provision of any contract, insurance or health maintenance organization policy, employee benefit plan, self-insurance plan, managed care plan, or other health care plan or program entered into or renewed after November 23, 1988, shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization under subsection (a).

(d) No effect on private rights of action — No action taken by the United States, an Indian tribe, or tribal organization to enforce the right of recovery

provided under this section shall operate to deny to the injured person the recovery for that portion of the person's damage not covered hereunder.

(e) Enforcement

(1) In general — The United States, an Indian tribe, or tribal organization may enforce the right of recovery provided under subsection (a) by —

(A) intervening or joining in any civil action or proceeding brought —

(i) by the individual for whom health services were provided by the Secretary, an Indian tribe, or tribal organization; or

(ii) by any representative or heirs of such individual, or (B) instituting a separate civil action, including a civil action for injunctive relief and other relief and including, with respect to a political subdivision or local governmental entity of a State, such an action against an official thereof.

(2) Notice — All reasonable efforts shall be made to provide notice of action instituted under paragraph (1)(B) to the individual to whom health services were provided, either before or during the pendency of such action.

(3) Recovery from tortfeasors

(A) In general — In any case in which an Indian tribe or tribal organization that is authorized or required under a compact or contract issued pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.)



to furnish or pay for health services to a person who is injured or suffers a disease on or after March 23, 2010, under circumstances that establish grounds for a claim of liability against the tortfeasor with respect to the injury or disease, the Indian tribe or tribal organization shall have a right to recover from the tortfeasor (or an insurer of the tortfeasor) the reasonable value of the health services so furnished, paid for, or to be paid for, in accordance with the Federal Medical Care Recovery Act (42 U.S.C. 2651 et seq.), to the same extent and under the same circumstances as the United States may recover under that Act.

(B) Treatment — The right of an Indian tribe or tribal organization to recover under subparagraph (A) shall be independent of the rights of the injured or diseased person served by the Indian tribe or tribal organization.

(f) Limitation — Absent specific written authorization by the governing body of an Indian tribe for the period of such authorization (which may not be for a period of more than 1 year and which may be revoked at any time upon written notice by the governing body to the Service), the United States shall not have a right of recovery under this section if the injury, illness, or disability for which health services were provided is covered under a self-insurance plan funded by an Indian tribe, tribal organization, or urban Indian organization. Where such

authorization is provided, the Service may receive and expend such amounts for the provision of additional health services consistent with such authorization.

(g) Costs and attorney's fees — In any action brought to enforce the provisions of this section, a prevailing plaintiff shall be awarded its reasonable attorney's fees and costs of litigation.

(h) Nonapplicability of claims filing requirements — An insurance company, health maintenance organization, self-insurance plan, managed care plan, or other health care plan or program (under the Social Security Act [42 U.S.C. 301 et seq.] or otherwise) may not deny a claim for benefits submitted by the Service or by an Indian tribe or tribal organization based on the format in which the claim is submitted if such format complies with the format required for submission of claims under title XVIII of the Social Security Act [42 U.S.C. 1395 et seq.] or recognized under section 1175 of such Act [42 U.S.C. 1320d-4].

(i) Application to urban Indian organizations — The previous provisions of this section shall apply to urban Indian organizations with respect to populations served by such Organizations in the same manner they apply to Indian tribes and tribal organizations with respect to populations served by such Indian tribes and tribal organizations.

(j) Statute of limitations — The provisions of section 2415 of title 28 shall apply to all actions commenced under this section, and the references therein to the United States are deemed to include Indian tribes, tribal organizations, and urban Indian organizations.

(k) Savings — Nothing in this section shall be construed to limit any right of recovery available to the United States, an Indian tribe, or tribal organization under the provisions of any applicable, Federal, State, or tribal law, including medical lien laws.

28 U.S.C. § 1291. **Final decisions of district courts**

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . .

28 U.S.C. § 1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

AS 09.17.010 **Noneconomic damages**

(a) In an action to recover damages for personal injury or wrongful death, all damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because defendant's claim was made under federal law pursuant to 28 U.S.C. § 1621e(a). This Court has jurisdiction pursuant to 28. U.S.C. § 1291.

Blatchford filed a timely appeal on September 7, 2010 (ER 13) of the district court's Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment dated August 10, 2010 (ER 5) and judgment dated August 11, 2010 (ER 12) which was a final judgment.

### **ISSUES PRESENTED**

1. Did the district court err by allowing Alaska Native Tribal Health Consortium's (ANTHC's) claim of lien under 25 U.S.C. § 1621e(a) to reduce the injured person's damages distinct from medical costs-like pain and suffering and loss of earnings?
2. Did the district court err by failing to reduce ANTHC's claim of lien by its pro-rata share of attorney fees?

### **STATEMENT OF THE CASE**

ANTHC asserted lien claims against an injured Alaska Native's tort recoveries for medical treatment provided at Indian Health Service facilities pursuant to 25 U.S.C. § 1621e(a) (ER 1,2). Blatchford filed a declaratory action

in Anchorage Superior Court disputing ANTHC's right to make its claim because there was not enough insurance to compensate her for all of her damages, and full repayment of ANTHC's claims would deprive her of damages for pain and suffering, inconvenience, loss of enjoyment of life, physical impairment, disfigurement, and loss of earnings. Complaint pages 4-5. ANTHC removed the case to federal district court. Both parties filed motions for summary judgment. Blatchford argued that 25 U.S.C. § 1621e(d) precluded ANTHC from asserting its claim in a way that detrimentally affected her other damages, like when there is not enough recovery to fully compensate her. The district court denied Blatchford's motion and granted ANTHC's motion (ER 5). Blatchford filed a motion to amend the judgment to reduce ANTHC's lien claim by pro-rata attorney fees which the district court denied. Plaintiff's Motion to Amend Judgment pages 1-2.

### **STATEMENT OF FACTS**

Adrienne Blatchford is an Alaska Native who was seriously injured in an auto collision caused by a third-party on July 29, 2007. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 3. She received treatment at Providence Hospital and Alaska Native Medical Center (ANMC) for a head injury, broken right ankle and foot, broken left foot, broken left arm,

permanent scarring and other injuries. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 3. Blatchford had a number of surgeries, and her bill at Providence Hospital was \$53,749.13, plus \$7,698.75 for an emergency helicopter flight. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 3. After treatment at Providence Hospital, Blatchford was transferred to ANMC for further care and treatment which is the subject of ANTHC's claims.

Blatchford sued the tortfeasor, Ronald Fisher, and his auto liability insurer, Geico, paid bodily injury liability policy limits of \$59,636.20 to Ms. Blatchford, on Mr. Fisher's behalf, in exchange for her release of Mr. Fisher on 6/24/08. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 4. Blatchford submitted an underinsured motorist (UIM) bodily injury claim to her auto insurer, Geico, who also paid her the UIM bodily injury policy limits of \$59,636.20. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 4. Geico's policies cover "bodily injury" and pays for all a person's damages including pain, suffering, inconvenience, disfigurement, physical impairment and loss of enjoyment of life, as well as economic damages like medical expenses and loss of earnings, up to the limits of the policies.

Plaintiff's Memorandum in Support of Motion for Summary Judgment page 4; AS 09.17.010(a).

On 9/5/07, ANTHC had filed a "Notice of Health Care Provider Lien (AS 34.35.450-482)" for medical services at ANMC in the amount of \$51,851.31 for treatment between 7/31/07 and 8/24/07 (ER 1).

On 11/6/08, ANTHC filed a "Notice of Federal Health Services Lien (25 USC Sec. 1621e)" for medical services at ANMC in the amount of \$103,480.74 (ER 2).

### **STANDARD OF REVIEW**

This Court reviews the district court's grant of summary judgment as well as its statutory interpretations *de novo*. Pkoto-Medex, Inc. v. Irwin, 601 F.3d 919, 923 (9th Cir. 2010).

### **ARGUMENT**

**I. A lien made under 25 U.S.C. § 1621e(a) cannot be used to reduce the injured person's non-medical damages such as pain and suffering and lost earnings.**

The plain language of the statute prohibits the lien from being used to affect the rights of the injured to recover their damages other than the cost of ANTHC's medical services. Depriving an injured person of damages for pain and suffering, lost wages, and loss of future earnings "affects the right of any person to any

damages (other than damages for the cost of health services)” in violation of 25

U.S.C. § 1621e:

(d) Right to damages No action taken by the United States, an Indian tribe, or a tribal organization to enforce the right of recovery provided under subsection (a) of this section shall affect the right of any person to any damages (other than damages for the cost of health services provided by the Secretary through the Service).

(Before amendment enacted 3/23/10).

Congress made the prohibition against dipping into an injured person’s portion of the recovery even clearer in its later amendment of 25 U.S.C. § 1621e:

(d) No effect on private rights of action — No action taken by the United States, an Indian tribe, or tribal organization to enforce the right of recovery provided under this section shall operate to deny to the injured person the recovery for that portion of the person's damage not covered hereunder.

(Amendment enacted 3/23/10).

The plain language of subsection (d) reasonably balances the rights of the injured person against the institutional right of recovery and states an equitable principle equivalent to the made whole doctrine in insurance subrogation cases.

See Houle v. School Dist. Of Ashland, 267 Wis.2d 708, 711, 671 N.W.2d 395

(Wis. 2003). § 1621e(d) precludes recovery for ANTHC when there is not enough money to adequately compensate the injured person. Finding otherwise is



contrary to the plain language of Subsection (d) and unfairly puts the burden of the shortfall on the most detrimentally affected party.

Congress enacted the Indian Health Care Improvement Act (25 U.S.C. § 1601) to elevate the health status of Indians to the level of the general population based on the Federal Government's special trust relationship with Indians. See McNabb for McNabb v. Bowen, 829 F.2d 787, 792 (9<sup>th</sup> Cir. 1987)(quoting U.S.C. §§ 1601(a) and 1602). Blatchford's medical treatment at ANTHC's hospital was provided under the Federal Government's special trust relationship, and at the outset, "federal law makes clear that [the native] does not personally have to owe [the hospital] anything for a debt arising from his receipt of free medical services. . ." Alaska Native Tribal Health Consort. v. E.R., 84 P.3d. 418, 425 (Alaska 2004). 25 U.S.C. § 1621e provides ANTHC with right of recovery for medical costs against an injured person's recovery, but ANTHC's right is restricted to the portion of damages recovered for medical expense, and must not deprive the injured person of damages for pain & suffering, disfigurement, loss of enjoyment of life, physical impairment, loss of earnings, or other expenses when there is not enough recovery to adequately compensate the injured person, i.e., make him or her whole. 25 U.S.C. § 1621e(d) .

In Alaska, an injured person is entitled to recover non-economic damages for pain, suffering, disfigurement, inconvenience, physical impairment, and loss of enjoyment of life in addition to economic damages like loss of earnings and medical expense. AS 09.17.010(a). When there is not enough money, ANTHC's claims are precluded because its medical expense claim would operate to deny to the injured person the recovery for the portion of the person's non-economic damages like those set forth in AS 09.17.010(a) and other damages besides medical expense like loss of earnings. 25 U.S.C. § 1621e(d). Blatchford was catastrophically injured. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 3. In addition to substantial non-economic damages and loss of earnings, Blatchford also had considerable medical expense at another hospital besides ANTHC's facility. Plaintiff's Memorandum in Support of Motion for Summary Judgment page 3.

When an insurance company's subrogation claim for medical expenses exceeds the injured policyholder's damage recovery, insurance company's claim is barred pursuant to the made whole doctrine. The made whole doctrine is an equitable principle which bars an insurance company from recovering its subrogated claim for medical expenses against the injured person's recovery unless the injured person has been fully compensated. McCarter v. Alaska Nat.

Ins. Co., 883 P.2d 866, 989 (Alaska 1994); Barnes v Independent Auto. Dealers of California, 64 F.3d 1389, 1394 (9th Cir. 1995); and Alaska Ins. Co. v. RCA Alaska Commun., 623 P.2d 1216, 1217 (Alaska 1981) ("Since subrogation is an equitable doctrine, equity principals apply in determining its availability.").

ANTHC's claim on Blatchford's recovery must be precluded because in Blatchford's circumstance, ANTHC's claim operated to deny Blatchford recovery for her portion of damages for pain, suffering, loss of enjoyment of life, physical impairment, and other expenses. 25 U.S.C. § 1621e(d). This equitable provision is no different than the made whole doctrine as applied to insurance subrogation claims for medical expenses. Precluding ANTHC's claim based on equitable considerations is consistent with the special relationship to injured Indians which gave rise to the free medical care in the first place.

The Wisconsin Supreme Court applied the made whole doctrine to a tribal entity's § 1621e claim for medical expenses in Houle v. School Dist. Of Ashland, 267 Wis.2d 708, 711, 671 N.W.2d 395 (Wis. 2003). In Houle, the tribal entity sought to recover health care costs which it paid on behalf of its tribe member by arguing that § 1621e implied statutory subrogation. Houle, 267 Wis.2d at 714. The Wisconsin Supreme Court ruled that the tribal entity's claim on the injured person's settlement was subject to the made whole doctrine and required a hearing

to ascertain the injured person's damages in order to determine whether he was made whole by the recovery. Id.

The United States Supreme Court held that a state's recovery of Medicaid payments out of a tort settlement is limited to the portion of the settlement that represents medical costs paid by Medicaid. Ark. Dept of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 282-84 (2006). A Medicaid lien cannot be satisfied "out of proceeds meant to compensate the recipient for damages distinct from medical costs-like pain and suffering, lost wages, and loss of future earnings." Ahlborn, 547 U.S. 268, 272 (2006). Like in Ahlborn, ANTHC's claim for recovery out of Blatchford's tort settlement must be equitably limited to the portion of the settlement which represents its medical costs. If the plain language of § 1621e(d) does not preclude ANTHC from recovering its medical expenses in a circumstance where its claim would deny Blatchford her portion of damages, then the recovery should be subject to pro-rata allocation as in Medicaid claims based on equity and ANTHC's special relationship to Blatchford.

## **II. ANTHC's claim of lien must be reduced by its pro-rata share of attorney fees.**

ANTHC is required to reduce its claim of lien by the pro-rata share of attorney fees which Blatchford incurred in securing ANTHC's recovery. Alaska Native Tribal Health Consort. v. E.R., 83 P.3d 418, 431-36 (Alaska 2004).

Requiring ANTHC to bear the reasonable share of attorney fees when it simply relies on a claim of lien to secure recovery is equitable and prevents unjust enrichment and free-riding. Id. Blatchford asserted that ANTHC's claim was subject to reduction by one-third according to her one-third contingency fee agreement. Amended Complaint page 4. In its Answer, ANTHC acknowledged the requirement to reduce its claim of lien by Blatchford's attorney fees:

50. WHEREFORE, ANTHC requests . . . full reasonable amount of expenses ANTHC incurred providing medical care to plaintiff from any settlement fund . . . less reasonable attorney's fees to plaintiff's counsel.

Defendant's Answer to Amended Complaint page 7. The district court erred by failing to reduce the amount of ANTHC's claims by one-third.

### **CONCLUSION**

For the foregoing reasons, this Court must reverse the district court's grant of summary judgment to ANTHC and grant summary judgment in favor of Blatchford on the issue of § 1621e(d) precluding ANTHC's claim in circumstances where doing so affects Blatchford's other damages besides the medical expense at ANTHC's facility. This Court should remand for a damage hearing and further proceedings regarding the extent of Blatchford's damages, if ANTHC asserts that she was fully compensated by her portion of the recovery. Otherwise, summary judgment should be granted outright in Blatchford's favor.

Alternatively, the Court should require pro-rata sharing of the recovery. The Court must reverse the district court's denial of Plaintiff's Motion to Amend the Judgment and require the claim of lien by ANTHC to be reduced by the pro-rata share of attorney fees incurred in securing the recovery.

DATED at Anchorage, Alaska this 3rd day of January, 2011.

BARBER & SIMS, LLC  
Attorneys for the Plaintiff

By: /s/ Jeffrey J. Barber  
JEFFREY J. BARBER  
821 N Street Suite 103  
Anchorage AK 99501  
Phone: (907) 276-5858  
Fax: (907) 276-5817  
Email: jbarber@alaskainjury.com  
ABA No.: 0111058

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2011,  
a copy of the foregoing Appellee's Opening Brief  
was served electronically on:

Michael E. Douglas  
Sonosky, Chambers, Sasche,  
Miller & Munson, LLP  
900 West 5<sup>th</sup> Ave., Suite 700  
Anchorage, AK 99501

/s/ Jeffrey J. Barber

Jeffrey J. Barber

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,177 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief has been prepared with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6 ) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12, Times New Roman, 14-point.

/s/ Jeffrey J. Barber

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Jeffrey J. Barber