

**Medicaid's Rights in Third Party Recoveries: 2006 Updates**

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**HISTORY OF MEDICAID**

**In 1965, Congress, through Title XIX of the Social Security Act, provided for a program of medical assistance for certain low income individuals and their families. The Medicaid program is based primarily on need (income and assets), while the Medicare program is based on age and disability. The Medicaid program is jointly financed with federal, state and local funds. In North Carolina, all 100 counties contribute to the non-federal share of costs.**

**The Medicaid program is state supervised and county administered, with most guidelines established by the federal government. Each state administers and operates its own program, and therefore, Medicaid programs vary considerably from state to state regarding coverage and income levels.**

**As mandated by the federal government, a Third Party Recovery Section (TPR) was established in 1977 and placed within the N.C. Division of Medical Assistance. Because medical expenditures and the number of people eligible for medical assistance is increasing exponentially, the purpose of TPR is to assure the maximum collection of third party resources. TPR operates under the authority of N.C. Gen. Stat. §108A-57 and §108A-59.**

### **Federal Financial Participation**

The largest share of Medicaid costs is paid by the federal government. The Federal Financial Participation (FFP) matching rates for medical services are established by the Centers for Medicare and Medicaid Services (CMS) formerly the Health Care Financing Administration (HCFA). CMS uses the most recent three-year average per capita income for each state and the national per capita income in establishing this rate. As North Carolina's per capita income rises, the federal match for Medicaid declines, requiring the state and counties to increase their proportionate share of Medicaid costs.

### **How the Program Works**

Medicaid operates as a vendor provider payment program. Eligible families and individuals are issued a Medicaid identification card. Program eligibles may receive medical care from any of the 48,800 providers who are currently enrolled in the program. Providers then bill Medicaid for their services. In some counties, Medicaid contracts with Health Maintenance Organizations to provide medical services to Medicaid recipients on a full risk capitated basis. HMOs are required to offer a basic set of benefits; however, some out-of-plan benefits will be paid by Medicaid. Attorneys should continue to contact the Third Party Recovery section on all Medicaid HMO recipients.

**Third Party Recovery**

By law, Medicaid is designated as the payer of last resort, with all other resources tapped before Medicaid dollars are spent. As a condition of receiving benefits, recipients agree to allow Medicaid to seek payment from available third-party health care resources on their behalf.

**CURRENT STATUTE (Amended 1996)**

**§ 108A-57. Subrogation rights: withholding of information a misdemeanor**

(a) . . . Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.

The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) It is a Class 1 misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient has a right of recovery, contractual or otherwise.

**Medicaid's Subrogation Rights Under N.C.G.S. §108A-57**

To the extent of Medicaid payments, Medicaid is subrogated to the rights of the recipient to receive any settlement or recovery which is related to those services for which Medicaid has paid. However, this statute limits Medicaid's recovery to one-third of the gross recovery amount.

**This statute expressly states that it is the recipient's attorney who is charged with the responsibility of disbursing to Medicaid any amount due it from the recovery:**

**...an attorney retained by the beneficiary of the assistance (having actual notice (of Medicaid payments)...shall enforce this section. Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary...distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary...**

**Actual notice referred to in this statute has been interpreted to include constructive notice. (See *Johnston County v. McCormick*, 65 N.C. App. 63, 67-69 308 S.E.2d 872, \_\_\_\_\_ (1983).) If an attorney receives a copy of a provider bill that says or implies Medicaid involvement, the attorney is deemed to have sufficient notice to enforce this statute.**

**By the express terms of N.C.G.S. §108A-57, this statute applies in all cases of recovery by a Medicaid recipient against a third party for actions which resulted in injury to the recipient for which the recipient received medical services and for which Medicaid paid:**

**Notwithstanding any other provisions of the law, to the extent of payments under this part, the State...shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance...against any person.**

**This includes, but is not limited to, recoveries under the following theories, without restriction: 1) medical malpractice, 2) civil rights, 3) workers' compensation, and 4) personal injury or other tort.**

**Important Reminders about Notice Requirements:**

Remember that Medicaid does not have to give you a formal written notice of its right to recovery to either you or to your client. Be sure to have your client forward all billing statements received from medical providers so that you can check for any references to Medicaid payments. Also, talk with your client to ascertain if they are a current Medicaid recipient or need to become one.

Also remember to include Medicaid when scheduling any settlement conferences or if any hearings are held where funds will be discussed.

**Funds Medicaid Can Recover Per N.C.G.S. 108A-57 and 108A-59:**

**Liability Proceeds:**

Medicaid is entitled to liability coverage and will reduce its lien by no more than one-third of the gross recovery. See N.C.G.S. 108A-57.

**UM and UIM:**

Medicaid has a right of recovery for payments made by uninsured and underinsured motorist coverage.

**Med Pay:**

Per N.C.G.S. 108A-59, Medicaid may take 100% of medical payments coverage, including payments made by your client's auto insurer. Medicaid argues it is entitled to 100% of med pay under this statute because med pay is paid despite liability.

**Workers Compensation:**

Medicaid will assert their right to recovery from any proceeds made by a

workers' compensation carrier, and will reduce its lien to no more than one-third of the total recovery. See N.C.G.S. 108A-57.

**Wrongful Death Proceeds:**

Be careful here: Although medical providers can only recover \$4,500.00 maximum from wrongful death proceeds as per N.C.G.S. 28A-18, Medicaid is not limited to \$4,500.00. If you have a wrongful death case with a Medicaid lien, Medicaid will cite Cox v. Shalala, 112 F.3d 151 (4<sup>th</sup> Cir. 1997), which is actually a Medicare case allowing recovery of the entire lien.

**Medicaid's Assignment Rights Under N.C.G.S. §108A-59**

Federal authority for Medicaid Assignment resides in 42 U.S.C. §1396a(a)(25)(H), 42 U.S.C. §1396k(a)(1)(A), and 42 C.F.R. 433.135, et seq. (particularly 42 C.F.R. 433.145 through 433.148). N.C.G.S. §108A-59 restates the Federal requirement that assignment of rights be a condition of Medicaid eligibility. In addition, all recipients sign an assignment of rights as part of the Medicaid application process.

Any benefits to which the recipient has a contractual right fall under N.C.G.S. §108A-59. These benefits typically derive from the recipient being an insured on some type of insurance policy. Under this statute, Medicaid is not limited to one-third of the gross recovery amount. Instead, Medicaid is entitled to the full amount of the benefits, to the extent of Medicaid payments made. This includes medical payment disbursements made by the recipient's own car insurance

company.

N.C.G.S. §108A-57 applies to recoveries from third parties who compensate the recipient based upon a theory of liability – either negligence or other similar theory (an admission of liability is not necessary). In these cases, Medicaid is subrogated to the rights of the recipient to the extent of Medicaid payments. Section 108A-59 applies when a recipient is collecting a “benefit” to which he or she is legally or contractually entitled, without a determination of liability. In these cases, Medicaid has the right of assignment, which the recipient has given the State as a condition of Medicaid eligibility.

**DIVISION OF MEDICAL ASSISTANCE (DMA)**

**TWO PROGRAMS: MEDICAID and NC HEALTH CHOICE FOR CHILDREN**

According to current statistics provided on the DMA website (<http://www.dhhs.state.nc.us/dma/>), our state Medicaid office provides coverage to one out of eight North Carolina residents, equating to 1.5 million of elderly, disabled, and minor persons.

As an attorney handling personal injury claims, the odds are high that you will come in contact with a client who receives Medicaid coverage either pre-accident or becomes eligible post-accident.

It is vital that you understand your client’s rights in conjunction with Medicaid’s rights in a third party claim.

We will cover some of the highlights and new developments in 2006

regarding third party recovery so that you will be up to date in handling these types of claims.

**2006 UPDATES:**

**MEDICAID RECIPIENTS MUST NOW SHOW PROOF OF CITIZENSHIP**

Effective September 1, 2006, a child born as an American citizen from an illegal-alien mother must now meet documentation requirements – i.e., certificate of naturalization, original birth certificate, passport – or the child may lose health benefits. An affidavit is allowed only in certain instances.

Those applying for Medicaid must now produce documentation within 45 days; if disabled, 90 days.

Congressional Budget Office's study reveals a projected ten-year savings of over \$700 million, affecting an estimated 50 million nationwide recipients.

This requirement is meeting with disapproval in some communities and will require further review.

**N.C. SUPREME COURT'S 6-30-06 DECISION IN EZELL V. GRACE HOSPITAL**

N.C. Supreme Court's decision in *Ezell v. Grace Hosp. Inc.*, 360 N.C. 529, 631 S.E.2d 131 (June 30, 2006).

1. The State sought to recover 1/3 of a minor beneficiary's \$100,000 settlement as partial payment of its \$86,540.92 Medicaid lien. Trial court concluded that the alleged medical malpractice was causally connected to \$8,054.01 of the State's Medicaid payments.
2. The NC Court of Appeals held that N.C. Gen. Stat. 108A-57 limits the State's right of subrogation to the proceeds resulting from a person's injury or death caused by a third party. However, the Court concluded that the trial court's finding of a causal relation between the malpractice and the Medicaid payments was not supported by competent evidence in the

record. *Ezell v. Grace Hosp., Inc.*, 175 N.C. App. 56, 623 S.E.2d 79, 82-83 (2005).

3. Judge Steelman dissented from the Court of Appeals' majority opinion. In his dissent, Judge Steelman observed that the State's right of subrogation under N.C. Gen. Stat. §108A-57(a) is broad rather than narrow. He noted that "[o]ur cases have consistently rejected attempts by plaintiffs to characterize portions of settlements as being for medical bills or for pain and suffering in order to circumvent [Medicaid's] statutory lien." *Ezell*, 175 N.C. App. at 65-66, 623 S.E.2d at 85 (citing *Campbell and Payne, supra*).
4. Judge Steelman concluded that the State was subrogated to the entire settlement since the settlement arose from the medical malpractice action that allegedly caused injury to the minor. The State was therefore entitled to recover 1/3 of the \$100,000 settlement in partial payment of its lien. *Ezell*, 175 N.C. App. at 64-66, 623 S.E.2d at 84-85.
5. The N.C. Supreme Court unanimously reversed the Court of Appeals's decision and adopted Judge Steelman's dissent. *Ezell v. Grace Hosp., Inc.*, 360 N.C. 529, 631 S.E.2d 131 (2006).
6. On December 15, 2006, the N.C. Supreme Court denied *Ezell's* petition to rehear the appeal in light of the U.S. Supreme Court's decision in *Ahlborn*.
7. Under *Ezell*, "no [Medicaid] lien would attach to proceeds of a settlement from an automobile accident for Medicaid payments for unrelated cancer treatments." *Ezell*, 175 N.C. App. at 65, 623 S.E.2d at 84.
8. However, *Ezell* suggests *in dictum* that the State can assert its right of subrogation under G.S. §108A-57 against portions of a settlement that compensates a Medicaid beneficiary for non-medical damages (i.e. pain and suffering, lost earnings, scarring, permanent injury).

**U.S. SUPREME COURT'S 5-1-06 DECISION IN *ARKANSAS DHHS V. AHLBORN***

**U.S. Supreme Court's Decision in *Arkansas Department of Health and Human Services vs. Ahlborn*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1752 (May 1, 2006)**

1. **Arkansas claimed an entitlement (through an automatic assignment and a statutory right of reimbursement) to Medicaid payments totaling \$215,645.30 from a settlement that all parties stipulated provided \$35,581.47 in compensation for medical expenses.**
2. **Arkansas law allowed the State to recover all Medicaid payments made on behalf of a beneficiary even when the settlement did not cover all of these medical costs.**
3. **The U.S. Supreme Court unanimously held that the Federal Medicaid statutes did not allow Arkansas to assert a lien on the beneficiary's settlement in an amount which exceeded the compensation for medical expenses and that the Federal Anti-lien provision, 42 U.S.C. §1396p, affirmatively prohibited it from doing so. *Ahlborn* at \_\_\_, 126 S.Ct. at 1767.**
4. **The Arkansas Medicaid third party recovery provisions were declared unenforceable to the extent that they allowed a lien on non-medical damages. *Id.***

#### **LITIGATING MEDICAID LIEN DISPUTES**

- A. **North Carolina's Medicaid third party recovery laws do not comply with Federal law**
  1. **Federal Medicaid Anti-Lien provision, 42 U.S.C. §1396p prohibits the State from asserting a lien (whether denominated as a right of subrogation or an assignment) upon the portion of a settlement that does not compensate a beneficiary for medical expenses.**
  2. **N.C. Gen. Stat. §§108A-57 and 108A-59 are not authorized by the Federal Medicaid statutes and violate the Federal Anti-Lien provision to the extent that they allow the State to impose a lien upon compensation for non-medical damages.**
  3. **The N.C. Supreme Court's opinion in *Ezell* conflicts with the U.S. Supreme Court's opinion in *Ahlborn* to the extent that it permits the State to recover its Medicaid payments from the portion of a settlement that does not compensate the beneficiary for medical expenses. *Accord*, John L. Saxon, *Medicaid "Liens" on Personal Injury Judgments and Settlements: The Ahlborn and Ezell Decisions*, Social Services Law Bulletin, Number 41, July 2006 at 11.**

**B. Federal cause of action**

1. **42 U.S.C. §1983 authorizes declaratory and injunctive relief by a Medicaid beneficiary against the State for depriving the beneficiary of civil rights granted under the Federal Medicaid statutes. *Blue v. Craig*, 505 F.2d 830, 833-36 (4<sup>th</sup> Cir. 1974); *Antrican v. Odom*, 158 F.Supp.2d 663, 669-73 (E.D.N.C. 2001), *aff'd by Antrican v. Odom*, 290 F.3d 178 (4<sup>th</sup> Cir. 2002).**
2. **The United States district courts have jurisdiction over a §1983 claim pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343(a)(3), and 28 U.S.C. §1343(a)(4).**
3. **The Federal Medicaid laws are considered to be the “supreme” law of the land when a State, like North Carolina, elects to participate in the Medicaid program. *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 2680 (1980); *Antrican v. Odom*, 290 F.3d 178.**
4. **The Supremacy Clause allows the Federal courts to invalidate State Medicaid laws which conflict with Federal Medicaid laws. *Id.*, *Ahlborn* at \_\_\_, 126 S.Ct. at 1767.**
5. **A lawsuit to contest the validity of a Medicaid lien should be asserted against the Secretary of the Department of Health and Human Services in his or her official capacity.**
6. **The lawsuit must allege that the State official is engaged in an ongoing and continuing violation of Federal law in order to avoid Eleventh Amendment immunity. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908); *Booth v. State of Maryland*, 112 F.3d 139, 142 (4<sup>th</sup> Cir. 1997); *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4<sup>th</sup> Cir. 2001).**
7. **Attorney’s fees may be assessed against the State for violating Federal law in bad faith. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463 (1989).**
8. **A sample complaint challenging a Medicaid lien and a brief in response to the State’s motions to dismiss are attached hereto.**

**C. Litigating Medicaid lien disputes in Federal court vs. State court**

1. **Advantages of Federal court:**

- Fully develop legal and factual issues through pleadings and discovery
  - Jury trial on contested issues of fact
  - Favorable U.S. Supreme Court precedent and judiciary that is familiar with Federal law
  - Decision of federal judiciary will be binding upon North Carolina courts
  - Intermediate appeal to Fourth Circuit
2. Disadvantages of Federal court:
- Unfamiliar procedural requirements
  - Extensive briefing requirements
  - Delay in rulings and final determination
3. Advantages of State court:
- Simplified process via motion before trial court
  - Familiar trial and appellate procedures
  - Quicker appellate review
4. Disadvantages of State court:
- Poorly developed legal and factual record
  - Unfavorable N.C. Supreme Court precedent and judiciary that is not as familiar with Federal law
  - Appeal from N.C. Supreme Court is directly to U.S. Supreme Court

**KEEPING MEDICAID ELIGIBILITY AFTER RECEIVING A PERSONAL INJURY SETTLEMENT**

**FEDERAL REGULATIONS PROVIDE THAT YOUR CLIENT CANNOT HAVE MORE THAN \$2,000.00 IN A BANK ACCOUNT AT ANY TIME**

**There are a number of ways your client can maintain Medicaid eligibility when receiving a personal injury settlement. Your client can spend the settlement money on a burial policy, a burial plot, clothes, furniture, a vacation, or an automobile purchase.**

**It is important that you advise your client to spend the entire amount of the settlement the same month it is received.**

**You client should call the assigned social worker to discuss the matter. Contact Legal Aid of North Carolina to discuss the matter further and the specifics of your case.**

#### **CHANGES IN MEDICAID ELIGIBILITY RULES**

**This Fall, public hearings were conducted on changes in Medicaid eligibility and transferring assets.**

**The changes would affect the elderly and disabled who made gifts within five years before the Medicaid application process.**

**Groups attending the hearings and currently lobbying against the changes include Elder Law Section of our State Bar and the AARP.**

**Marjorie Morris, the current chief of the Medicaid eligibility unit, is available to answer your questions regarding the proposed changes being considered. You should contact her if you have any questions.**

#### **HOW ARE CASES HANDLED WHEN THERE IS A MINIMUM LIMITS POLICY OF \$30,000 AND MEDICAID'S CLAIM AND OTHER MEDICAL LIENS EXCEED THAT AMOUNT?**

**N.C.G.S. 108A-57 states that recovery by Medicaid is limited to one-third of**

the gross settlement, “as prorated with the claims of all others having Medicaid subrogation rights or medical liens against the amount recovered.” This applies to medical providers that did not file any portion of their claim with Medicaid. The pro-rata formula used by the State is outlined below:

**EXAMPLE:** Total settlement is \$30,000  
 Total available for liens and Medicaid recovery is \$10,000

<b>BILLS:</b>	<b>MEDICAID</b>	\$ 5,000
	<b>DR. SMITH</b>	\$ 3,000
	<b>HOSPITAL</b>	\$ <u>6,000</u>
	<b>TOTAL</b>	\$14,000
	<b>MEDICAID</b>	\$5,000/\$14,000 x \$10,000
	<b>DR. SMITH</b>	\$3,000/\$14,000 x \$10,000
	<b>HOSPITAL</b>	\$6,000/\$14,000 x \$10,000
	<b>MEDICAID</b>	\$5,000/\$14,000 = 36% x \$10,000 = \$3600
	<b>DR. SMITH</b>	\$3,000/\$14,000 = 21% x \$10,000 = \$2100
	<b>HOSPITAL</b>	\$6,000/\$14,000 = <u>43%</u> x \$10,000 = <u>\$4300</u>
	<b>TOTAL</b>	100% \$10,000

**HOW DO MEDICARE CLAIMS AND MEDICAID CLAIMS WORK TOGETHER AND IN ADDITION TO OTHER MEDICAL LIENS?**

**Medicare claims take precedence over Medicaid’s claims:**

**EXAMPLE:** \$30,000 settlement  
 \$10,000 available  
 Medicare claim is \$15,000, so Medicaid receives no reimbursement.

**EXAMPLE:** \$30,000 settlement  
 \$10,000 available (1/3)  
 Medicare claim is \$6,000  
 Medicaid claim is \$8,000

Medicaid can receive only the balance left after Medicare receives its \$6,000. Medicaid would receive a reimbursement of \$4,000 and pro rate that amount with other medical liens, if necessary.

**THIRD PARTY RECOVERY SECTION CONTACTS AND FORMS**

**Geoff Elting is the current division manager of the Third Party Recovery Section Unit. He can be reached at [Geoff.Elting@ncmail.net](mailto:Geoff.Elting@ncmail.net), or by telephone (866) 677-7220. His office fax number is (919) 715-4725. We have attached the most current Third Party Recovery forms for your review. These forms may also be found at <http://www.dhhs.state.nc.us/dma/tpr.html>. There is also a great Question and Answer section at this website.**

*Portions of this paper have been re-printed from the 2005 Medicaid Reimbursement seminar manual paper co-authored By Frances Knox and Kara McIvor.*

*Many thanks to Chris Nichols for his contributions to this paper and his review.*

*Elizabeth B. Wilson, legal assistant with Attorney Frances Knox's office, assisted in the research for this seminar presentation.*

**INSTRUCTIONS FOR MEDICAID PAYMENT INFORMATION  
REQUEST**

**ALL INITIAL REQUESTS FOR THE LIST OF MEDICAID PAYMENTS MUST BE  
IN WRITING TO:**

THIRD PARTY RECOVERY SECTION  
DIVISION OF MEDICAL ASSISTANCE  
2508 MAIL SERVICE CENTER  
RALEIGH, NC 27699-2508

◆OR◆

**YOU MAY FAX YOUR REQUEST TO (919) 715-4725**

**PLEASE USE ONLY ONE OF THE ABOVE OPTIONS (EITHER BY FAX OR  
MAIL). SENDING TWO REQUESTS MAY CREATE DUPLICATE FILES AND SLOW DOWN  
THE PROCESS. OUR POLICY ALLOWS 20 (TWENTY) WORKING DAYS TO RESPOND TO  
REQUESTS.**

Attached is the Request for List of Medicaid Payments (DMA 2073). Please photocopy a supply of this form and submit one for each recipient that you suspect may have Medicaid coverage. Accurate completion of this form (including providers, service dates, and release date) furnishes us with helpful information in completing your request.

Unless settlement occurs immediately following the receipt of a response to your initial request of Medicaid payments, you must call us at (919) 647-8100 for updated payment information prior to settlement or disbursement of any funds.

**DO NOT SUBMIT A SECOND REQUEST FORM FOR UPDATES.**

The Third Party Recovery Section will attempt to provide your office with prompt and courteous service. However, due to the large number of payment requests, please allow us adequate time to respond to your request before calling for status information. Payment requests are responded to on the "first come, first served" basis. It will not be possible to provide Medicaid payment amounts on the same day of your request.

**REQUEST FOR MEDICAID PAYMENT INFORMATION**

RECIPIENT'S NAME:	
DATE OF BIRTH:	
RECIPIENT'S MEDICAID ID# (IF KNOWN):	
RECIPIENT'S SOCIAL SECURITY NUMBER:	
COUNTY OF RESIDENCE:	
DATE OF ACCIDENT:	
INJURY SUSTAINED:	
LAST DATE OF TREATMENT:	
TYPE OF ACCIDENT:	<input type="checkbox"/> Auto <input type="checkbox"/> Home <input type="checkbox"/> School <input type="checkbox"/> Work <input type="checkbox"/> Medical Malpractice <input type="checkbox"/> Product Liability <input type="checkbox"/> Other
ATTORNEY OR INSURANCE COMPANY:	
CONTACT PERSON:	
MAILING ADDRESS:	
PHONE NUMBER:	
FAX NUMBER:	
NAME OF INSURED (POLICYHOLDER):	
POLICY/CLAIM NO:	
RECIPIENT'S MEDICAL PAYMENTS INSURANCE:	
INSURANCE ADJUSTER:	
NAME OF INSURED (POLICYHOLDER):	
POLICY/CLAIM NO:	
ADDITIONAL INFORMATION:	

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

**Case No. 1:06CV700**

**RAY KLINE as Guardian *Ad Litem* for )  
D. J. M., a Minor, )**

**Plaintiff, )**

**vs. )**

**AMENDED COMPLAINT  
(Jury Trial Demanded)**

**CARMEN HOOKER ODOM, in her )  
official capacity as Secretary of the )  
North Carolina Department of )  
Health and Human Services, )  
and CHRISTOPHER JOHN ROWE, )**

**Defendants. )**

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NOW COMES Plaintiff, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and before the filing of a responsive pleading, complaining of Defendants, and alleges and says as follows:

**INTRODUCTORY STATEMENT**

1. This is a civil rights action brought pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief as a result of the deprivation of the minor Plaintiff’s rights as secured by 42 U.S.C. §1396p (known as the “Federal Medicaid Anti-Lien Provision”) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. In particular, Defendant Carmen Hooker Odom, in her official capacity as Secretary of the North Carolina Department of Health and Human Services (“Defendant DHHS”), has asserted a lien upon the proceeds arising from the minor Plaintiff’s personal injury action against Defendant Christopher John Rowe. Defendant DHHS is not authorized to assert a

lien because the minor Plaintiff's personal injury action only seeks compensation for her personal damages including pain and suffering, scarring, and permanent injury, and not for the recovery of medical expenses.

3. Defendant DHHS's assertion of a lien under the circumstances of this case violates 42 U.S.C. §1396p and denies the minor Plaintiff equal protection under the law.

4. Plaintiff seeks a judgment declaring that Defendant DHHS does not have a lien on any of the proceeds arising from the minor Plaintiff's personal injury action against Defendant Rowe. Plaintiff also seeks a judgment declaring that North Carolina General Statutes ("G.S.") §108A-57 and §108A-59 are unconstitutional under the Supremacy Clause in Article VI of the United States Constitution to the extent that they allow Defendant DHHS to assert a lien on compensation for damages other than medical expenses in violation of 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 U.S.C. §1396p.

5. Finally, Plaintiff seeks a judgment enjoining Defendant DHHS from asserting a lien on the minor Plaintiff's proceeds and from enforcing North Carolina General Statutes §108A-57 and §108A-59 in a manner that violates 42 U.S.C. §1396, *et seq.*, *Arkansas Dep't of Health and Human Services v. Ahlborn*, 547 U.S. \_\_\_\_, 126 S.Ct. 1752, 164 L.Ed.2d 459 (May 1, 2006) (hereinafter referred to as "*Ahlborn*"), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## **JURISDICTION AND VENUE**

6. Plaintiff's case arises under the laws and Constitution of the United States, specifically, 42 U.S.C. §1396a, 42 U.S.C. §1396k, 42 U.S.C. §1396p, the Supremacy Clause in Article VI of the Constitution, and the Equal Protection Clause of the Fourteenth Amendment.

7. This court has jurisdiction over Plaintiff's claims under 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 28 U.S.C. §1343(4).

8. Plaintiff's lawsuit is authorized by 42 U.S.C. §1983 and 28 U.S.C. §2201.

9. Defendant Christopher John Rowe resides in Orange County and all of the events giving rise to this civil action occurred in Durham County.

10. Under 28 U.S.C. §1391, venue is proper in the United States District Court for the Middle District of North Carolina.

## **PARTIES**

11. D. J. M. (hereinafter referred to as the minor Plaintiff) was born in 1995 and she is presently eleven (11) years old.

12. The minor Plaintiff's legal custodian is her grandfather Leon Moore (hereinafter referred to as "Mr. Moore").

13. Mr. Moore was appointed the minor Plaintiff's legal custodian by the Honorable Elaine M. O'Neal, District Court Judge Presiding, in Durham County, North Carolina in file number 96 CVD 3598.

14. The minor Plaintiff resides with Mr. Moore in Durham County, North Carolina.

15. Plaintiff Ray Kline (hereinafter referred to as "Plaintiff") is a citizen and resident of Wake County, North Carolina.

16. Plaintiff presently serves as the guardian *ad litem* for the minor Plaintiff in the case of *Leon Moore and Ray Kline as Guardian Ad Litem for D.J.M., a Minor vs. Christopher John Rowe*, file number 06 CVS 125 (Durham County, North Carolina) having been duly appointed by the Clerk of Superior Court of Durham County.

17. Plaintiff Ray Kline (hereinafter referred to as “Plaintiff”) has been appointed guardian *ad litem* for the minor Plaintiff in this civil action.

18. Plaintiff is appearing in this action in his capacity as guardian *ad litem* for the minor Plaintiff.

19. Defendant Carmen Hooker Odom is sued in her official capacity as the Secretary of the North Carolina Department of Health and Human Services.

20. Defendant DHHS is an agency of the State of North Carolina, established pursuant to North Carolina General Statute §143B-136.1.

21. The North Carolina Division of Medical Assistance is a division of Defendant DHHS, established pursuant to G.S. §108A-54.

22. Defendant DHHS, by and through its Division of Medical Assistance, is responsible for administering and enforcing North Carolina’s Medicaid program in accordance with 42 U.S.C. §1396, *et seq.*

23. Defendant DHHS is responsible for administering and enforcing liens or other rights of recovery which may arise by reason of a medical payment made to or on behalf of a Medicaid beneficiary in accordance with 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 U.S.C. §1396p.

24. At all times relevant to this civil action, North Carolina's Medicaid program received funding from the United States government and Defendant DHHS was required to administer the program in accordance with Federal law.

25. At all times relevant to this civil action, the minor Plaintiff was a Medicaid beneficiary and received medical assistance from Defendant DHHS.

26. Defendant Christopher John Rowe (hereinafter referred to as "Defendant Rowe") is a citizen and resident of Orange County.

27. Defendant Rowe is a necessary party to this civil action and has an interest in determining whether or not Defendant DHHS is entitled to assert a lien upon the proceeds from the minor Plaintiff's personal injury action.

#### **FACTUAL ALLEGATIONS**

28. On the morning of June 25, 2005, the minor Plaintiff was hit by a motorcycle driven by Defendant Rowe in Durham, North Carolina (hereinafter referred to as the "Collision").

29. As a result of the Collision, the minor Plaintiff suffered serious personal injuries including but not limited to fractures of her skull, hemorrhaging and swelling in her brain, permanent partial loss of hearing in her right ear, temporary loss of hearing in her left ear, a 15 centimeter laceration to her right thigh, and abrasions, bruising, and trauma to her neck, legs, feet, elbows, back, and right buttock.

30. As a result of the Collision, the minor Plaintiff experienced significant pain and suffering, headaches and fatigue, and she has a permanent scar along her right thigh.

31. The minor Plaintiff received medical treatment for her injuries from the Durham County EMS and various healthcare providers at the Duke University Medical Center resulting in payments by Defendant DHHS in the total amount of \$11,190.45.

32. All of the payments by Defendant DHHS, as alleged in the preceding paragraph, were for the costs of the minor Plaintiff's medical care as a result of the injuries she suffered in the Collision.

33. Under North Carolina law, two separate claims arose as a result of the Collision: (1) Mr. Moore, as the legal custodian for the minor Plaintiff, was entitled to pursue a cause of action to recover the costs arising from the minor Plaintiff's medical care; and (2) the minor Plaintiff was entitled to pursue a cause of action, through her guardian *ad litem*, to recover her damages for pain and suffering, scarring, and permanent injury.

34. Under North Carolina law, the minor Plaintiff was not authorized to pursue a claim for medical expenses, unless Mr. Moore waived or assigned that claim to her.

35. Mr. Moore has never waived or assigned his claim for medical expenses to the minor Plaintiff or to her guardian *ad litem*.

36. On January 10, 2006, Mr. Moore and Plaintiff, as guardian *ad litem* for the minor Plaintiff, filed a Complaint for negligence against Defendant Rowe in the Superior Court of Durham County, North Carolina in file number 06 CVS 125.

37. In the Complaint, Plaintiff asserted, on behalf of the minor Plaintiff, claims for pain and suffering, scarring, and permanent injury.

38. In the Complaint, Mr. Moore asserted a claim for medical expenses.

39. On or about March 14, 2006, Defendant Rowe filed an Answer which denied the allegations of negligence and asserted various affirmative defenses including contributory negligence by the minor Plaintiff and the doctrine of sudden emergency.

40. On March 20, 2006, Mr. Moore and Plaintiff filed a Reply which denied that the minor Plaintiff was negligent and asserted the doctrine of last clear chance.

41. On April 13, 2006, Mr. Moore provided Defendant Rowe with a statement of monetary relief which indicated that he was seeking \$65,000 in compensatory damages from Defendant for the medical expenses that he had incurred and would incur in the future due to the injuries suffered by the minor Plaintiff.

42. At the same time, Plaintiff, on behalf of the minor Plaintiff, provided Defendant Rowe with a statement of monetary relief which indicated that he was seeking \$300,000 in compensatory damages from Defendant for the minor Plaintiff's pain and suffering, scarring, and permanent injury.

43. On or about May 15, 2006, Defendant DHHS was notified by letter of Plaintiff's pending lawsuit in Durham County file number 06 CVS 125.

44. On or about June 15, 2006, Defendant DHHS informed Plaintiff by letter that it had made medical payments in the amount of \$11,190.45 for the minor Plaintiff.

45. Defendant DHHS's letter further stated that "The Division of Medical Assistance is subrogated to all rights of recovery of the Medicaid beneficiary. In accordance with N.C.G.S. §108A-57, the Division is entitled to know the terms of the third party recovery and must receive written documentation of the settlement amount so that the Division may confirm that it has been or will be properly reimbursed from the settlement proceeds."

46. Defendant DHHS's letter improperly asserted a lien upon all of the minor Plaintiff's rights of recovery.

47. On July 25, 2006, a mediated settlement conference was held in Durham, North Carolina in Durham County file number 06 CVS 125.

48. Prior to the mediation, Plaintiff discovered that the only available insurance was an automobile liability policy issued to Defendant Rowe with limits in the amount of \$30,000.00.

49. On or about the date of the mediation, Plaintiff discovered that Defendant Rowe had personal assets of approximately \$80,000.00 which were possibly subject to collection under North Carolina law in the event of a judgment in Plaintiff's favor in excess of the available insurance.

50. Due to the limited insurance and the limited assets of Defendant Rowe, the minor Plaintiff's claims were the only claims that were negotiated at the mediation.

51. At the conclusion of the mediation, the following agreement was reached: Defendant Rowe agreed to pay Plaintiff the sum of \$75,000.00 in exchange for the execution of an appropriate release and a voluntary dismissal with prejudice.

52. The agreement further provided that the settlement was subject to court approval, that Defendant will pay the mediation costs, that no part of the settlement was for the minor Plaintiff's medical expenses, and that Mr. Moore will waive his claim for medical expenses.

53. On July 28, 2006, Plaintiff notified Defendant DHHS by letter of the agreement that was reached at the mediated settlement conference and provided Defendant with copies of the agreement, the Complaint in file number 06 CVS 125, and the United States Supreme Court's decision in *Ahlborn*.

54. At said time, Plaintiff asked Defendant DHHS to disclose its position regarding its purported claim for subrogation in light of the Supreme Court's decision in *Ahlborn*.

55. On August 1, 2006, Defendant DHHS verbally informed Plaintiff that its claim for subrogation needed to be paid in full from the minor Plaintiff's settlement proceeds.

56. On or about August 4, 2006, Defendant DHHS filed a Motion to Intervene in Durham County file number 06 CVS 125.

57. Defendant DHHS's Motion stated that "[u]nder N.C. Gen. Stat. §§ 108A-57 and 108A-59, Medicaid is subrogated to [the minor Plaintiff's] rights to recovery for injuries sustained up to \$11,190.45...."

58. On or about August 25, 2006, Defendant DHHS filed a Response in Durham County file number 06 CVS 125 to the agreement that was reached at the mediated settlement conference.

59. Defendant DHHS's Response reiterated its position that "Medicaid is subrogated to [the minor Plaintiff's] rights to recover against the tortfeasor....".

60. On or about August 31, 2006, Defendant DHHS filed a Trial Brief in Durham County file number 06 CVS 125.

61. Defendant DHHS's Brief stated that it was entitled to recover "its full claim for \$11,190.45 from the [minor Plaintiff's] settlement."

62. In its Motion, Response, and Brief, Defendant DHHS has continued to improperly assert that it has a lien upon all of the minor Plaintiff's rights of recovery.

63. Plaintiff disagrees with Defendant DHHS's position that it is subrogated to, or has been assigned, any of the minor Plaintiff's rights of recovery in Durham County file number 06 CVS 125 since the minor Plaintiff has no claim for medical expenses and Defendant's claim is therefore barred by Federal law.

64. In particular, Defendant DHHS is asserting a lien (denominated as a "right of subrogation" or an "assignment") on the minor Plaintiff's settlement proceeds in a manner that violates 42 U.S.C. §1396p, the U.S. Supreme Court's decision in *Ahlborn*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

65. An actual and justiciable controversy exists between the parties as to whether Defendant DHHS is entitled to a lien on the proceeds arising from the minor Plaintiff's personal injury action.

**FIRST CLAIM FOR RELIEF:  
DECLARATORY ACTION TO DETERMINE  
WHETHER DEFENDANT DHHS HAS A LIEN ON  
THE PROCEEDS ARISING FROM THE MINOR  
PLAINTIFF'S PERSONAL INJURY ACTION**

66. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

67. Defendant DHHS has asserted a lien on the proceeds arising from the minor Plaintiff's personal injury action against Defendant Rowe.

68. 42 U.S.C. §1396, *et seq.* does not authorize Defendant DHHS to assert a lien on these proceeds because the minor Plaintiff is not seeking any compensation for the medical expenses arising from the Collision.

69. By asserting a lien on the proceeds from the minor Plaintiff's personal injury action, Defendant DHHS has deprived the minor Plaintiff of her rights under 42 U.S.C. §1396p and under the Equal Protection Clause of the Fourteenth Amendment.

70. Plaintiff requests that the Court issue a judgment which declares that Defendant DHHS does not have a lien on the proceeds from the minor Plaintiff's personal injury action.

71. Plaintiff further requests that the Court permit Defendant Rowe to distribute the proceeds to Plaintiff in the event of a settlement or judgment in Durham County file number 06 CVS 125.

**SECOND CLAIM FOR RELIEF:  
DECLARATORY ACTION TO DETERMINE  
WHETHER G.S. §108A-57 AND §108A-59 ARE  
CONSTITUTIONAL UNDER FEDERAL LAW**

72. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

73. Defendant DHHS has asserted a lien on the minor Plaintiff's proceeds under G.S. §108A-57 and §108A-59.

74. On their face, G.S. §108A-57 and §108A-59 allow Defendant DHHS to impose a lien (denominated in the statutes as a "right of subrogation" and an "assignment" respectively) on all compensation received by the minor Plaintiff, even though the proceeds will not include any compensation for medical expenses.

75. G.S. §108A-57 and §108A-59 are unconstitutional under the Supremacy Clause of the United States Constitution to the extent that they allow Defendant DHHS to assert a lien on compensation for damages other than medical expenses in violation of 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 U.S.C. §1396p.

76. Plaintiff requests that the Court issue a judgment which declares G.S. §108A-57 and §108A-59 unconstitutional under the Supremacy Clause to the extent that these statutes allow Defendant DHHS to impose a lien on compensation for damages other than medical expenses.

**THIRD CLAIM FOR RELIEF:  
INJUNCTION AGAINST DEFENDANT DHHS**

77. The allegations set forth in the preceding paragraphs are incorporated herein by reference.

78. On May 1, 2006, the United States Supreme Court issued its decision in *Ahlborn*.

79. On or about May 26, 2006, the U.S. Supreme Court's mandate in *Ahlborn* was issued.

80. Since May 26, 2006, Defendant DHHS has engaged in an ongoing and continuing violation of Federal law by claiming that it has a lien, under G.S. §108A-57 and §108A-59, on the minor Plaintiff's personal injury action even though the proceeds will not include any compensation for medical expenses.

81. Upon the issuance of a declaration that G.S. §108A-57 and §108A-59 are unconstitutional to the extent that they allow Defendant DHHS to assert a lien on proceeds for damages other than medical expenses, Plaintiff requests that the Court enjoin Defendant DHHS from imposing a lien on the minor Plaintiff's proceeds and from enforcing these statutes in a manner that violates 42 U.S.C. §1396, *et seq.*, *Ahlborn*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays the Court for the following relief:

1. A judgment declaring that Defendant DHHS does not have a lien on the proceeds from the minor Plaintiff's personal injury action with Defendant Rowe and allowing Defendant Rowe to disburse to Plaintiff the funds upon settlement or judgment;
2. A judgment declaring that G.S. §108A-57 and §108A-59 are unconstitutional under the Supremacy Clause of the United States Constitution to the extent that these statutes allow Defendant DHHS to impose a lien on compensation for damages other than medical expenses in violation of 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 U.S.C. §1396p;
3. A judgment enjoining Defendant DHHS from imposing a lien on the proceeds from the minor Plaintiff's personal injury action and from enforcing G.S. §108A-57 and §108A-59 in a manner that violates Federal law;
4. That Plaintiff have and recover his costs of court, including a reasonable attorney's fee, from Defendant DHHS;
5. That all issues of fact be tried by a jury; and
6. For such other and further relief as may be deemed just and proper.

This the 5<sup>th</sup> day of October, 2006.

/s/ Carlos E. Mahoney  
Carlos E. Mahoney  
N.C. State Bar No. 26509  
Counsel for Plaintiff  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

**Case No. 1:06CV700**

**RAY KLINE as Guardian *Ad Litem* for** )  
**D. J. M., a Minor,** )  
 )  
**Plaintiff,** )  
 )  
**vs.** )  
 )  
**CARMEN HOOKER ODOM, in her** )  
**official capacity as Secretary of the** )  
**North Carolina Department of** )  
**Health and Human Services,** )  
**and CHRISTOPHER JOHN ROWE,** )  
 )  
**Defendants.** )

**BRIEF IN RESPONSE  
TO DEFENDANT ODOM’S  
MOTION TO DISMISS**

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NOW COMES Plaintiff, pursuant to Local Rules 7.2 and 7.3, M.D.N.C., and hereby submits this Brief in response to Defendant Carmen Hooker Odom’s Motion to Dismiss.

**MATTER BEFORE THE COURT**

On August 21, 2006, Plaintiff, as guardian *ad litem* for D.J.M. (hereinafter referred to as “minor Plaintiff”), filed a Complaint against Defendant Carmen Hooker Odom, in her official capacity as Secretary of the North Carolina Department of Health and Human Services (hereinafter referred to as “Defendant DHHS”), and Defendant Christopher John Rowe.

On October 5, 2006, Plaintiff filed an Amended Complaint, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, before Defendants had served a responsive pleading.

Plaintiff’s Amended Complaint alleged that Defendant DHHS improperly asserted a Medicaid lien upon the minor Plaintiff’s personal injury action against Defendant Rowe in violation of 42 U.S.C. §1396p (known as the “Federal Medicaid Anti-Lien Provision) and the

Equal Protection Clause of the Fourteenth Amendment. (*Amended Complaint* at ¶¶1-3, 62-64)  
Plaintiff sought declaratory and injunctive relief against Defendant DHHS pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201 for the deprivation of her rights under Federal law and the United States Constitution. (*Amended Complaint* at ¶¶ 1, 8, 66-81)

On October 12, 2006, Defendant DHHS filed a Motion to Dismiss Plaintiff's claims pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure. In its Motion and accompanying Memorandum, Defendant DHHS contends that (1) an actual case or controversy does not exist in this matter, (2) Defendant DHHS has Eleventh Amendment immunity, and (3) the minor Plaintiff has failed to state a claim for relief under 42 U.S.C. §1983 for the violation of her equal protection rights. (*Memorandum in Support of Motion to Dismiss* at pp. 4-14)

Plaintiff requests that the Court deny Defendant DHHS's Motion to Dismiss. First, an actual case or controversy exists because Defendant DHHS presently has a Medicaid lien on the minor Plaintiff's personal injury action in violation of the Federal Medicaid Anti-Lien Provision. *Infra* at pp. 7-14. Second, Defendant DHHS is engaged in an ongoing and continuing violation of Federal law and does not have Eleventh Amendment immunity under the *Ex Parte Young* exception. *Infra* at pp. 15-18. Third, Plaintiff's Amended Complaint sufficiently alleges a claim that Defendant DHHS is denying the minor Plaintiff her right to equal protection of the law by refusing to comply with the Federal Medicaid Anti-Lien Provision as well as the Supreme Court's decision in *Arkansas Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. \_\_\_\_, 126 S.Ct. 1752 (2006). *Infra* at pp. 18-20.

## STATEMENT OF THE FACTS

The minor Plaintiff is an eleven-year-old girl who was born in 1995. (*Amended Complaint* at ¶11) She lives in Durham, North Carolina with her grandfather and legal custodian, Leon Moore. (*Id.* at ¶¶12-14)

On the morning of June 25, 2005, the minor Plaintiff was hit and seriously injured by a motorcycle driven by Defendant Rowe. (*Id.* at ¶¶28-30; *Affidavit* at ¶7)<sup>1</sup> That morning, she was standing on the side of Mineral Springs Road, a two-lane street in Durham, waiting to cross the road to join her aunt and cousin on the other side. A female motorist saw her on the side of the road, stopped her sports utility vehicle (“SUV”), and waved twice for the minor Plaintiff to cross. Since there were no vehicles approaching from the other direction, she began walking across the street in front of the SUV. (*D.J.M. Dep.* at 38-43, 80, Pl. Ex. 1)

At that time, Defendant Rowe was driving a motorcycle and approaching the SUV from behind. Rather than stopping his motorcycle, Defendant Rowe crossed the solid center-line, passed the SUV, and accelerated into the minor Plaintiff as she was crossing the street. Following the collision, Defendant Rowe plead responsible to a safe movement violation for improper passing. (*Rowe Dep.* at 16-17, 35-39, 45-49, Pl. Ex. 1)

On January 10, 2006, Plaintiff, in his capacity as guardian *ad litem* for the minor Plaintiff, and Mr. Moore filed a Complaint for negligence against Defendant Rowe in the Superior Court of Durham County, North Carolina in file number 06CVS125 (hereinafter

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<sup>1</sup> Contemporaneous with this Brief, Plaintiff has filed an Affidavit and excerpts from the depositions of the minor Plaintiff and Defendant Rowe in the underlying personal injury action. Plaintiff has filed these materials in response to Defendant DHHS’s Motion to Dismiss for lack of subject matter jurisdiction.

referred to as the “State Lawsuit”). (*Amended Complaint* at ¶36) Plaintiff asserted, on behalf of the minor Plaintiff, claims for pain and suffering, scarring, and permanent injury. (*Affidavit* at ¶9) Mr. Moore asserted a claim for the medical expenses that he had incurred and would incur due to the minor Plaintiff’s injuries. (*Id.* at ¶¶10, 12)

The minor Plaintiff is a Medicaid beneficiary. (*Amended Complaint* at ¶25) Following the collision with Defendant Rowe, \$11,190.45 of her medical expenses, which total approximately \$65,000, was paid by Defendant DHHS, the administrator of the State Medicaid program. (*Id.* at ¶¶22, 25, 31-32, 41)

On May 15, 2006, Plaintiff notified Defendant DHHS of the State Lawsuit. (*Id.* at ¶43) In response, Defendant DHHS informed Plaintiff by letter dated June 15, 2006 that it had a lien on the minor Plaintiff’s personal injury action and was “subrogated to all rights of recovery of the Medicaid beneficiary [minor Plaintiff].” (*Id.* at ¶¶44-46; *Affidavit* at ¶¶15-16, Ex. 1)

On July 25, 2006, a mediated settlement conference was held in the State Lawsuit. (*Amended Complaint* at ¶48) Defendant Rowe had minimum automobile insurance coverage (\$30,000) and limited personal assets (approximately \$80,000). As a result, the parties only negotiated the minor Plaintiff’s personal injury claims, which had a potential value of \$300,000. (*Affidavit* at ¶¶11, 18-19) At the conclusion of the mediation, a settlement was reached subject to court approval. In particular, Defendant Rowe agreed to pay the minor Plaintiff \$75,000 in exchange for the execution of an appropriate release and a voluntary dismissal with prejudice of the State Lawsuit. (*Id.* at ¶¶20-22, Ex. 2) The parties further agreed that none of the settlement was for the minor Plaintiff’s medical expenses and that Mr. Moore would waive his claim for medical expenses. (*Id.* at ¶21, Ex. 2)

On July 28, 2006, Plaintiff notified Defendant DHHS by letter of the tentative settlement and provided Defendant DHHS with copies of the settlement agreement, the complaint, and the U.S. Supreme Court's opinion in *Arkansas Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. \_\_\_, 126 S.Ct. 1752 (2006). (*Id.* at ¶23) Plaintiff's letter informed Defendant DHHS that it did not have a lien on the minor Plaintiff's personal injury action and asked Defendant DHHS to disclose its position regarding the lien in light of *Ahlborn* and the terms of the tentative settlement. (*Amended Complaint* at ¶54; *Affidavit* at ¶24) On August 1, 2006, Defendant DHHS told Plaintiff that under State law its Medicaid lien had to be paid in full from the minor Plaintiff's settlement. (*Affidavit* at ¶25)

On August 4, 2006, Defendant DHHS filed a Motion to Intervene in the State Lawsuit. (*Id.* at 26) In its Motion, Defendant DHHS stated that “[u]nder N.C. Gen. Stat. §§ 108A-57 and 108A-59, Medicaid is subrogated to [the minor Plaintiff's] rights to recovery for injuries sustained up to \$11,190.45....” (*Id.* at ¶27) On August 8, 2006, Defendant Rowe notified Plaintiff by letter that “[i]n light of the discrepancy between the North Carolina cases and the U.S. Supreme Court's recent holding [in *Ahlborn*] regarding the Medicaid lien, please understand that we will not be disbursing settlement proceeds until this [Medicaid lien] issue is resolved by the Court.” (*Id.* at ¶28, Ex 3)

On August 25, 2006, Defendant DHHS filed a Response which objected to the terms of the minor Plaintiff's tentative settlement and reiterated that it had a Medicaid lien on her personal injury action. (*Id.* at ¶¶30-31)

On August 29, 2006, Plaintiff filed a Petition to Approve the minor Plaintiff's settlement. (*Id.* at ¶32) In the Petition, Plaintiff requested that the disputed Medicaid lien amount

(\$11,190.45) be held in trust pending resolution of this action, which had been filed on August 21, 2006. (*Id.* at ¶33) In reply, Defendant DHHS filed a Trial Brief on August 31, 2006 which contended that *Ahlborn* did not apply to North Carolina's Medicaid lien statute. The Brief further stated that it was entitled to recover "its full claim for \$11,190.45 from the [minor Plaintiff's] settlement." (*Id.* at ¶¶34-35, Ex. 4)

On September 8, 2006, the Honorable Robert H. Hobgood, Superior Court Judge, issued an Order granting Defendant DHHS's Motion to Intervene in the State Lawsuit. (*Id.* at ¶37, *Memorandum in Support of Motion to Dismiss* at Ex. 1) In the Order, Judge Hobgood determined that as a condition of Medicaid eligibility, Defendant DHHS had been assigned a cause of action for medical expenses against Defendant Rowe and could independently pursue the claim in the State Lawsuit. (*Id.*)

Judge Hobgood then began a hearing on the Petition to Approve the minor Plaintiff's settlement. Judge Hobgood recessed the hearing in light of Defendant DHHS's objections to the settlement and agreed to reconvene the hearing if a global settlement could be reached.

(*Affidavit* at ¶¶38, 40)

Plaintiff has conferred with Defendant DHHS about whether it will rescind its Medicaid lien in light of Judge Hobgood's Order allowing it to intervene in the State Lawsuit. However, Defendant DHHS has neither rescinded nor retracted its claim that it has a Medicaid lien on all of the minor Plaintiff's rights of recovery in the State Lawsuit. Defendant DHHS has also refused to give Plaintiff any written assurances that it has changed its position that it has a lien on the minor Plaintiff's personal injury claims. (*Id.* at ¶¶44-47, Ex. 5)

A second mediation is scheduled to occur in the State Lawsuit on November 2, 2006. If the case cannot be resolved, then a trial will occur during the week of January 22, 2007. (*Id.* at ¶¶41-42)

### QUESTIONS PRESENTED

- I. **Whether Plaintiff has established subject matter jurisdiction in this Court by offering sufficient evidence of an actual case or controversy?**
- II. **Whether Defendant DHHS is entitled to Eleventh Amendment immunity in this action?**
- III. **Whether Plaintiff's Amended Complaint alleges sufficient facts to state a claim for relief under 42 U.S.C. §1983 for the deprivation of her equal protection rights?**

### ARGUMENT

**I. DEFENDANT DHHS'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION SHOULD BE DENIED BECAUSE AN ACTUAL CASE OR CONTROVERSY EXISTS IN THIS ACTION.**

In the Amended Complaint, Plaintiff has alleged claims for declaratory and injunctive relief against Defendant DHHS under 42 U.S.C. §1983 ("Civil action for deprivation of rights") and 28 U.S.C. §2201 ("Declaratory Judgment Act / Creation of remedy"). Plaintiff's first claim for relief seeks a declaration that Defendant DHHS has deprived the minor Plaintiff of her rights under 42 U.S.C. §1396p and the Equal Protection Clause of the Fourteenth Amendment by asserting a lien on her personal injury action. (*Amended Complaint* at ¶¶66-71) Plaintiff's second claim for relief seeks a declaration that North Carolina General Statutes §108A-57 and §108A-59 are unconstitutional under the Supremacy Clause of the U.S. Constitution to the extent that they allow Defendant DHHS to impose a lien on compensation for damages other than medical expenses in violation of 42 U.S.C. §1396a, 42 U.S.C. §1396k, and 42 U.S.C. §1396p. (*Id.* at ¶¶72-76) Finally, Plaintiff's third claim for relief seeks an injunction against Defendant

DHHS from continuing to assert a lien on Plaintiff's personal injury action and from enforcing N.C. Gen. Stat. §§108A-57 and 108A-59 in a manner that violates Federal law. (*Id.* at ¶¶77-81)

It is well-established that 42 U.S.C. §1983 authorizes declaratory and injunctive relief by State Medicaid beneficiaries against Defendant DHHS for depriving them of civil rights granted under the Federal Medicaid laws. *Blue v. Craig*, 505 F.2d 830, 833-36 (4<sup>th</sup> Cir. 1974); *Antrican v. Buell*, 158 F. Supp.2d 663, 669-73 (E.D.N.C. 2001), *aff'd Antrican v. Odom*, 290 F.3d 178 (4<sup>th</sup> Cir. 2002). When a §1983 claim is asserted, as in this case, the United States District Courts will have original jurisdiction of the action pursuant to 28 U.S.C. §1343(a)(3) and 28 U.S.C. §1343(a)(4). *Blue* at 836-845; *see*, 28 U.S.C. §§1343(a)(3-4)(2005). In addition, the District Court will have original jurisdiction over a claim under 42 U.S.C. §1983 pursuant to 28 U.S.C. §1331 ("Federal question").

In its Motion to Dismiss, Defendant DHHS contends that the Court lacks subject matter jurisdiction over Plaintiff's claims because an actual case or controversy does not exist. In particular, Defendant DHHS asserts that Plaintiff lacks standing to litigate this action because the minor Plaintiff's personal injury case has not been resolved and she has not received any proceeds. Defendant DHHS also asserts that the matter is moot and not ripe. (*Memorandum in Support of Motion to Dismiss* at pp. 4-8)

Defendant DHHS's arguments are misplaced. First, under North Carolina law, Defendant DHHS's Medicaid lien has already vested and is presently encumbering the minor Plaintiff's cause of action in the State Lawsuit. Second, North Carolina's Medicaid lien statutes (N.C. Gen. Stat. §§108A-57 and 108A-59) are still in effect and Defendant DHHS has not given Plaintiff any written assurance or guarantees that it is no longer asserting a lien on the minor

Plaintiff's rights of recovery.

**A. STANDARD OF REVIEW.**

When a Rule 12(b)(1) motion is raised challenging the factual basis for subject matter jurisdiction, the burden of proving jurisdiction is on the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4<sup>th</sup> Cir. 1982). In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Id.* The district court should apply the standard applicable to a motion for summary judgment. The motion should be denied unless the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4<sup>th</sup> Cir. 1991)(*citations omitted*).

**B. REVIEW OF THE LAW CONCERNING AN ACTUAL CASE OR CONTROVERSY.**

Article III of the U.S. Constitution limits the judicial power of the United States to the resolution of "cases" and "controversy." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 757 (1982). In determining whether an actual case or controversy exists, the court must determine "whether the 'conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309 (1979) (*Quoting, Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1387 (1945)). "The difference between an actual question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Id.* at 297, 99 S.Ct. at 2309 (*citation omitted*).

An actual case or controversy will not be present if (a) the matter has become moot, *Kennedy v. Block*, 784 F.2d 1220 (4<sup>th</sup> Cir. 1986); (b) an administrative decision has not been formalized and its effects felt in a concrete way by the challenging party (“ripeness doctrine”), *Abbot Labs. Inc. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507 (1967); or, (c) the plaintiff lacks standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). With regard to standing, a plaintiff must establish three elements: (1) injury in fact, (2) traceability, and (3) redressability. *Lujan* at 560-61, 112 S.Ct. at 2136. A plaintiff satisfies the injury-in-fact requirement if he or she has suffered an invasion of a legally protected interest that is concrete and particularized as well as actual or imminent. *Id.* at 560, 112 S.Ct. at 2136. With regard to the redressability element, a plaintiff must show that it is likely, and not merely speculative, that a favorable decision will remedy the injury. *Id.* at 561, 112 S.Ct. at 2136. In addition, “[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. [citation omitted] But ‘one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.’” *Babbitt* at 298, 99 S.Ct. at 2308 (Quoting, *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663 (1923)).

**C. REVIEW OF THE LAW CONCERNING THE VALIDITY OF DEFENDANT DHHS'S MEDICAID LIEN UNDER STATE AND FEDERAL LAW.**

Under North Carolina law, an accrued cause of action, such as a negligence claim for personal injury, is a property interest.<sup>2</sup> *Mizell v. Atlantic Coast Line R.R. Co.*, 181 N.C. 36, \_\_\_, 106 S.E. 133, 135 (1921); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 177, 594 S.E.2d, 12 (2004)(Citing, *Duckworth v. Mull*, 143 N.C. 461, 466-67, 55 S.E. 850, 852 (1906)). When an un-emancipated minor is injured by the negligence of another, two claims arise. The minor has a claim for his or her losses (i.e. pain and suffering, scarring, permanent injury), and the parent has a claim for the medical expenses which are reasonably necessary to treat the minor's injuries as well as the loss of the child's services. *Bolkhir v. North Carolina State Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988)(*citations omitted*). The minor's claims must be pursued through a personal representative, a next friend, or a guardian *ad litem*. N.C. Gen. Stat. §1A-1, Rule 17(c)(2005).

When a Medicaid beneficiary is injured by the negligence of a third party, Defendant DHHS has a lien upon the beneficiary's cause of action pursuant to N.C. Gen. Stat. §108A-57 ("Subrogation rights") and N.C. Gen. Stat. §108A-59 ("Acceptance of medical assistance constitutes assignment to the State of right to third party benefits"). Defendant DHHS's lien vests at the time when the beneficiary accepts the Medicaid benefits, not at the time when the proceeds are actually recovered. *Payne v. Department of Health and Human Servs.*, 126 N.C. App. 672, 677, 486 S.E.2d 469, 471 (1997). Since the lien vests upon the receipt of benefits, it

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<sup>2</sup> The Federal Medicaid regulations define "property" as "the homestead and all other personal and real property in which the recipient has a legal interest." 42 C.F.R. §433.36(b) (2005).

attaches and encumbers the cause of action before any recovery is received.

With regard to the scope of the lien, under North Carolina law, Defendant DHHS has a lien upon “all rights of recovery, contractual or otherwise” of the Medicaid beneficiary. N.C. Gen. Stat. §108A-57(a). The North Carolina appellate courts have interpreted this statute to allow Medicaid to assert and recover its lien even if the beneficiary did not have a claim for medical expenses, as in the case of a minor beneficiary (like the minor Plaintiff). *Ezell v. Grace Hosp., Inc.*, 360 N.C. 529, 631 S.E.2d 131 (2006); *Campbell v. North Carolina Dep’t of Human Res.*, 153 N.C. App. 305, 307, 569 S.E.2d 670, 672 (2002)(Holding that G.S. §108A-57 does not restrict defendant’s right of subrogation to a beneficiary’s right of recovery for medical expenses). However, the North Carolina Medicaid recovery statutes are inconsistent with the Federal Medicaid law in this regard.

In *Arkansas Dep’t of Health and Human Servs. v. Ahlborn*, 547 U.S. \_\_\_, 126 S.Ct. 1752 (May 1, 2006), the United States Supreme Court addressed the issue of whether the Arkansas Department of Human Services (“ADHS”) could assert a lien on the portion of a recovery which did not compensate the beneficiary for medical expenses.<sup>3</sup> The Supreme Court held that the Federal Medicaid laws did not authorize ADHS to assert a lien on the beneficiary’s settlement in an amount which exceeded the compensation for medical expenses, and that “the federal anti-lien provision [42 U.S.C. §1396p] affirmatively prohibits it from doing so.” *Id.* at \_\_\_, 126 S.Ct. at 1767. The Court declared that the Arkansas Medicaid recovery provisions are unenforceable

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<sup>3</sup> In the *Ahlborn* decision, ADHS’s lien arose from an automatic assignment and a right of reimbursement. *Ahlborn* at \_\_\_, 126 S.Ct. at 1759.

to the extent they allowed the State to assert a lien on non-medical damages.<sup>4</sup> *Id.*

**D. DEFENDANT DHHS IS STILL ASSERTING A MEDICAID LIEN AS TO THE MINOR PLAINTIFF'S PERSONAL INJURY ACTION.**

Under North Carolina law, Defendant DHHS's Medicaid lien attached to the minor Plaintiff's personal injury action when her medical expenses were paid by Medicaid following the collision on June 25, 2005. Since providing Medicaid benefits to the minor Plaintiff, Defendant DHHS has steadfastly maintained that it has a lien on all of her rights of recovery, even though the minor Plaintiff has no claim for medical expenses. Defendant DHHS's lien continues to encumber the minor Plaintiff's property (her cause of action) unless the North Carolina Medicaid recovery statutes are abrogated or Defendant DHHS rescinds its lien in writing. As of the date of this Brief, the recovery statutes remain in effect and "Defendant DHHS has neither retracted nor rescinded its earlier letters and judicial admissions that it has a Medicaid lien on all of the minor Plaintiff's rights of recovery in the State Lawsuit." (*Affidavit* at ¶¶46-47)

The outstanding and unresolved Medicaid lien issue has and will continue to cause injury to the minor Plaintiff. Plaintiff is informed and believes that Defendant Rowe is still willing to pay the minor Plaintiff \$75,000 to settle her claims in the State Lawsuit. (*Id.* at ¶43) However, before any resolution can occur, Defendant Rowe's attorneys want the Medicaid lien issue to be

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<sup>4</sup> The University of North Carolina at Chapel Hill's School of Government has commented that N.C. Gen. Stat. §§108A-57 and 108A-59 are partially invalid under the Federal Medicaid statute and the *Ahlborn* decision since they allow Defendant DHHS to recover its lien from compensation for damages other than for medical expenses. John L. Saxon, *Medicaid "Liens" on Personal Injury Judgments and Settlements: The Ahlborn and Ezell Decisions*, Social Services Law Bulletin, Number 41, July 2006, at 13-14 (Attached hereto as Exhibit #1).

resolved by the Court.<sup>5</sup> (*Id.* at Ex. 3) Likewise, in order to properly exercise his judgment as guardian *ad litem*, Plaintiff needs the Court to declare whether Defendant DHHS in fact has a Medicaid lien on the minor Plaintiff's cause of action. (*Id.* at ¶50) The Court's decision in this regard will affect the Plaintiff's assessment of settlement prospects as well as the likelihood of recovering a court judgment from Defendant Rowe.

Defendant DHHS's Medicaid lien is not authorized by Federal law. By asserting, and continuing to assert, a lien on the minor Plaintiff's cause of action, Defendant DHHS has unlawfully invaded a legally protected property interest of the minor Plaintiff. The injury to her is concrete, particularized, and ongoing. A decision in the minor Plaintiff's favor will release the lien from her claim and will ensure that when she receives a settlement or judgment, Defendant DHHS will not have an interest in it. Moreover, the evidence shows that a reasonable jury will likely find Defendant Rowe negligent in the State Lawsuit and will award compensation to the minor Plaintiff. (*Id.* at ¶49; *D.J.M. Dep.* at 38-43, 80, Pl. Ex. 1; *Rowe Dep.* at 16-17, 35-39, 45-49, Pl. Ex. 1)

In sum, a real and substantial controversy exists between Plaintiff and Defendant DHHS regarding its Medicaid lien. The dispute is definite and concrete, not hypothetical or abstract, and is ripe for judicial determination. Plaintiff has proffered sufficient evidence to establish that the Court has subject matter jurisdiction over this action. The Court should therefore deny Defendant's Motion to Dismiss in this regard.

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<sup>5</sup> A liability insurance carrier can be held liable to Defendant DHHS if it distributes compensation to a Medicaid beneficiary without satisfying the Medicaid lien, provided that the carrier has actual or constructive notice of the lien. *See, Johnston County v. McCormick*, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

**II. DEFENDANT DHHS'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD BE DENIED BECAUSE DEFENDANT DHHS DOES NOT HAVE ELEVENTH AMENDMENT IMMUNITY UNDER THE *EX PARTE YOUNG* EXCEPTION.**

In addition to subject matter jurisdiction, Defendant DHHS has moved to dismiss Plaintiff's Amended Complaint, under Rule 12(b)(2), on the grounds of lack of personal jurisdiction. Defendant DHHS asserts that it is entitled to Eleventh Amendment immunity and that the *Ex Parte Young* exception does not apply in this case. Defendant DHHS's arguments are erroneous because Plaintiff is seeking prospective injunctive relief to prevent an ongoing and continuing violation of the Federal Medicaid laws by Defendant DHHS.

**A. STANDARD OF REVIEW.**

In considering a Motion to Dismiss for lack of personal jurisdiction, the court may decide the motion on the basis of pleadings and affidavits. *Rich v. KIS California, Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988). Plaintiff bears the burden of proof and must make a *prima facie* showing of personal jurisdiction. *Combs v. Bakker*, 886 F.2d 673, 676 (4<sup>th</sup> Cir. 1989). In deciding whether a plaintiff has made the requisite showing, the court must construe all disputed facts and reasonable inferences in favor of the plaintiff. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.2d 56, 59-60 (4<sup>th</sup> Cir. 1993).

**B. PLAINTIFF'S CLAIMS AGAINST DEFENDANT DHHS ARE SUBJECT TO THE *EX PARTE YOUNG* EXCEPTION.**

Under the Eleventh Amendment, States may not be sued in Federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907 (1984). The case of *Ex Parte Young*, 209 U.S.

123, 28 S.Ct. 441 (1908), created an exception to Eleventh Amendment immunity by holding that a suit challenging the constitutionality of a state official's action in enforcing state law is not an action against the State. The theory of *Young* was that an unconstitutional statute is void and therefore does not give the official any immunity from suit in Federal court. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426 (1985)(Citing, *Ex Parte Young* at 159-60, 28 S.Ct. at 453-54).

The Supreme Court in *Young* further “held that the Eleventh Amendment does not prevent the Federal courts from granting prospective relief [like an injunction] to prevent a continuing violation of Federal law.” *Id.* (Citing, *Ex Parte Young* at 155-56, 159, 28 S.Ct. at 452-53) The Supreme Court later observed in *Green*, cited *supra*, that “the availability of prospective relief ... gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.” *Id.* The Federal Medicaid laws are considered to be “supreme” law when a State, like North Carolina, elects to participate in the Medicaid program. *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 2680 (1980); *Antrican v. Odom*, 290 F.3d 178 (2002). The Supreme Court has therefore invalidated conflicting State Medicaid laws under the Supremacy Clause. *Id.*; see, *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478, 116 S.Ct. 1063 (1996); *Ahlborn* at \_\_\_\_, 126 S.Ct. at 1767.

The *Ex Parte Young* exception is applicable when a plaintiff alleges an ongoing violation of Federal law. *Booth v. State of Maryland*, 112 F.3d 139, 142 (4<sup>th</sup> Cir. 1997). The requirement of an ongoing violation of Federal law “is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent.” *Waste*

*Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001); *see, CSX Transp. Inc. v Board of Public Works*, 138 F.3d 537 (4<sup>th</sup> Cir. 1998).

In this case, Defendant DHHS has asserted a Medicaid lien on the minor Plaintiff's personal injury action pursuant to N.C. Gen. Stat. §§108A-57 and 108A-59. (*Amended Complaint* at ¶¶73-74) These North Carolina statutes allow Defendant DHHS to impose a lien on the minor Plaintiff's case even though she will not receive any compensation for medical expenses. (*Id.* at ¶74) The North Carolina statutes therefore conflict with the Federal Medicaid laws and are partially unconstitutional under the Supremacy Clause. (*Id.* at ¶¶3-4, 64, 75-76)

Despite the apparent unconstitutionality, “[s]ince May 26, 2006, Defendant DHHS has engaged in an ongoing and continuing violation of Federal law by claiming that it has a lien, under G.S. §108A-57 and §108A-59, on the minor Plaintiff's personal injury action....” (*Id.* at ¶80) Although Plaintiff has given Defendant DHHS the opportunity to rescind or retract the lien, Defendant DHHS has refused to give any written assurances that it has changed its position. (*Affidavit* at ¶¶44-48, Ex. 5) In addition, the North Carolina Medicaid recovery statutes have not been amended and there have been no State appellate decisions which would release the lien from the minor Plaintiff's case.<sup>6</sup>

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<sup>6</sup> In fact, on June 30, 2006 [nearly two months after *Ahlborn* was issued], the North Carolina Supreme Court issued an opinion which reiterated that Defendant DHHS's Medicaid lien is not restricted under State law to compensation recovered for medical expenses. *Ezell v. Grace Hospital, Inc.*, 360 N.C. 529, 631 S.E.2d 131 (2006), *adopting per curiam the dissenting opinion in* \_\_\_ N.C. App. \_\_\_, 623 S.E.2d 79, 84 (2005).

In order to remedy the ongoing violation of Federal law, Plaintiff has sought declaratory and injunctive relief against Defendant DHHS.<sup>7</sup> In particular, Plaintiff's Amended Complaint seeks a declaration that Defendant DHHS does not have a Medicaid lien on the minor Plaintiff's cause of action and that N.C. Gen. Stat. §§108A-57 and 108A-59 violate Federal law and the Supremacy Clause. (*Amended Complaint* at ¶¶4, 70, 76; *Prayer for Relief* at ¶¶1-2) Plaintiff also seeks an injunction against Defendant DHHS to prevent it from continuing to assert a lien on the minor Plaintiff's case and from enforcing the State Medicaid recovery statutes in a manner that violates Federal law. (*Amended Complaint* at ¶¶5, 81; *Prayer for Relief* at ¶3)

Plaintiff's claims have been asserted against Defendant DHHS for prospective non-monetary relief to remedy an ongoing and continuing violation of Federal law. Plaintiff has sufficiently alleged facts and presented evidence that this matter is subject to the *Ex Parte Young* exception to Eleventh Amendment immunity. This Court has personal and subject matter jurisdiction over Defendant DHHS.

### **III. DEFENDANT DHHS'S MOTION TO DISMISS PLAINTIFF'S EQUAL PROTECTION CLAIM SHOULD BE DENIED.**

#### **A. STANDARD OF REVIEW.**

In reviewing a motion to dismiss, the court must accept the well-pled allegations of the complaint as true and construe the facts and the reasonable inferences drawn therefrom in the light most favorable to the plaintiff. *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 334 (4<sup>th</sup> Cir.

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<sup>7</sup> In its argument concerning Eleventh Amendment immunity and the *Ex Parte Young* exception, Defendant DHHS also contends that the Court should deny Plaintiff's request for declaratory relief under 28 U.S.C. §2201. (*Memorandum in Support of Motion to Dismiss* at 11-12) A declaratory judgment is an appropriate prospective remedy for an ongoing conflict concerning Federal law. Moreover, declaratory relief is an available remedy under either 28 U.S.C. §2201 or 42 U.S.C. §1983.

1996). The court must be mindful that the Federal Rules of Civil Procedure only require “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957). A motion to dismiss under Rule 12(b)(6) should be denied unless the plaintiff cannot prove any set of facts which would entitle him or her to relief. *Mylan Labs. Inc. v. Matkari*, 7 F.3d 1130, 1134 (4<sup>th</sup> Cir. 1993). Moreover, when a motion to dismiss concerns a civil rights action, the court must be “especially solicitous of the wrongs alleged” and “must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.” *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4<sup>th</sup> Cir.1988).

**B. PLAINTIFF’S AMENDED COMPLAINT PROPERLY STATES A CLAIM UNDER 42 U.S.C. §1983 FOR THE DEPRIVATION OF THE MINOR PLAINTIFF’S EQUAL PROTECTION RIGHTS.**

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amendment XIV, § 1. The equal protection requirement “keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, \_\_\_ (1992)(*citation omitted*). “To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny.” *Morrison v. Garraghty*, 239 F.3d 648, 654 (4<sup>th</sup> Cir. 2001)(*citations omitted*). A plaintiff alleges a colorable

claim of denial of equal protection if he or she has been deprived of a Federal Medicaid right on account of membership in a class. *Blue v. Craig*, 505 F.2d 830, 844-45 (4<sup>th</sup> Cir. 1974).

Defendant argues that the Plaintiff has failed to state a claim for relief because an actual case or controversy does not exist. (*Memorandum in Support of Motion to Dismiss* at pp. 13-14) Plaintiff's response to this argument is addressed *supra* at pp. 7-14.

In addition, the allegations in Plaintiff's Amended Complaint establish a claim under the Equal Protection Clause. In particular, Plaintiff has alleged that Defendant DHHS has deprived the minor Plaintiff of her rights under the Federal Medicaid laws by asserting a lien on her personal injury action. (*Amended Complaint* at ¶¶5, 62-64, 67-69, 81) While it may be appropriate for Defendant DHHS to impose a Medicaid lien on an adult beneficiary's rights of recovery, it is improper to do so in a case involving a minor beneficiary. Defendant DHHS is treating the minor Plaintiff differently because of her age and therefore denying her equal protection of the Federal Medicaid laws. Defendant's Motion to Dismiss under Rule 12(b)(6) should also be denied.

### **CONCLUSION**

WHEREFORE, Plaintiff requests that the Court deny Defendant DHHS's Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure.

This the 1<sup>st</sup> day of November, 2006.

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