IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:15-CV-509-RJC-DCK

AMY WORLEY HAGY, as Personal Representative of the ESTATE OF JESSE JAMES WORLEY,	)	
Plaintiff,	)	
v.	)	**MEMORANDUM AND RECOMMENDATION**
ADVANCE AUTO PARTS, INC.; ACE AMERICAN INSURANCE COMPANY; SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,	)	
Defendants.	)	

THIS MATTER IS BEFORE THE COURT on "Defendants' Motion To Dismiss" (Document No. 12). This motion has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §636(b), and is now ripe for disposition. Having carefully considered the arguments, the record, and the applicable authority, the undersigned will respectfully recommend that the motion be granted.

I. BACKGROUND

This action arises out of injuries Jesse James Worley ("Worley") sustained on October 31, 2009, during the course of his employment with Advance Auto Parts, Inc. ("Advance Auto"). (Document No. 1, p.2). Advance Auto admitted responsibility under the North Carolina Workers' Compensation Act and provided some medical and disability benefits for Worley. Id. Advance Auto was either self-insured or had insurance coverage with Ace American Insurance Company ("Ace"), Indemnity Insurance Company of North America ("Indemnity"), or Sedgwick Claims

Management Services ("Sedgwick") (collectively with Advance Auto, "Defendants"). (Document No. 1, p.3). Sedgwick at least acted as a third-party administrator. Id. Following the injury, Worley's employment relationship with Advance Auto ended. Id.

A dispute later arose between Worley and Defendants regarding his need for additional medical treatment/benefits. Id. The Full North Carolina Industrial Commission heard the dispute, and issued an Opinion and Award in Worley's favor on December 27, 2012. Id. The Opinion and Award determined that Worley had medical needs related to his injury for which Defendants had not paid in the worker's compensation claim. Id.

The parties worked out a "Partial Compromise Settlement Agreement" on January 17, 2014. (Document No. 1, p.4). Worley died in March 2014. Worley's daughter, Amy Worley Hagy, was appointed as the personal representative of Worley's estate by the Superior Court of Johnston County, North Carolina. Id.

On November 10, 2014, the Centers For Medicare and Medicaid Services ("CMS") advised in writing that Medicare had not yet been reimbursed $37,033.87 for Medicare conditional payments made on Worley's behalf between 2009 and 2013. Id.

Based on Defendants' alleged failure to reimburse Medicare, Amy Worley Hagy as personal representative of the Estate of Jesse James Worley ("Plaintiff" or "Hagy"), initiated this action by filing of a "Complaint" (Document No. 1) on October 22, 2015. The Complaint asserts causes of action for: (1) Medicare Private Right of Action, 42 U.S.C. § 1395y(b)(3)(A); (2) Unfair and Deceptive Practices, N.C.Gen.Stat. § 75-1 *et seq.*; and (3) Unjust Enrichment, North Carolina Common Law. (Document No. 1). The Medicare Secondary Payer Act establishes "a private cause of action for damages (which shall be in an amount double the amount otherwise provided)

in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement)." 42 U.S.C. § 1395y(b)(3)(A).

"Defendants' Motion To Dismiss" (Document No. 12) and "Brief In Support…" (Document No. 13) were filed on December 14, 2015. Defendants seek dismissal pursuant to Fed.R.Civ.P. 12(b)(6) of Plaintiff's second and third causes of action for violation of the Unfair and Deceptive Practices Act ("UDPA" or "UDTPA") and unjust enrichment. (Document Nos. 12 and 13). At this time, Defendants do not seek dismissal of Plaintiff's claim under the Medicare Secondary Payer Act, 42 U.S.C. § 1395(y)(b) (the "MSPA"). (Document No. 13, p.4).

Plaintiff filed a "Response To Defendants' Motion To Dismiss" (Document No. 19) on December 30, 2015; and a "Reply Brief In Support Of Defendants' Motion To Dismiss" (Document No. 22) was filed on January 18, 2016. As such, this matter is ripe for review and a recommendation to the Honorable Robert J. Conrad, Jr.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the "legal sufficiency of the complaint" but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992); Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. Partnership, 213 F.3d 175, 180 (4th Cir. 2000). A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also, Robinson v. American Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

The Supreme Court has also opined that

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (quoting Twombly, 550 U.S. at 555-56).

"Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). The court "should view the complaint in the light most favorable to the plaintiff." Mylan Labs, Inc. v. Matkar, 7 F.3d 1130, 1134 (4th Cir. 1993).

III. DISCUSSION

Defendants present three main arguments for dismissal of Plaintiff's second and third causes of action: (1) the subject matter of the "lawsuit is pervasively and intricately regulated by a federal statutory scheme and application of the UDTPA would create overlapping enforcement, supervision, and remedies;" (2) the Complaint fails to allege facts showing that Plaintiff sustained an actual injury pursuant to the UDPA proximately caused by Defendants; and (3) the Complaint fails to allege facts showing that Plaintiff conferred a benefit on any Defendant that would be unjust for a Defendant to keep. (Document No. 13, p.2).

A. UDPA Claim

Defendants note that to allege a cause of action under the UDPA, "a plaintiff must allege facts that establish the existence of three elements: '(1) the defendant committed an unfair or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff.'" (Document No. 13, p.5) (quoting Ellis v. Louisiana Pacific Corp., 699 F.3d 778, 787 (4th Cir. 2012)).

1. Statutory Application

First, Defendants contend that North Carolina courts have declined to extend the UDPA to cover matters that are already "pervasively and intricately regulated by other statutory schemes that contain separate enforcement, supervisory, and remedial provisions." (Document No. 13, pp.6-8) (citing Skinner v. E.F. Hutton & Co., Inc., 314 N.C. 267, 275 (1985) ("securities transactions are beyond the scope of N.C.G.S. 75.-1.1")). Defendants further contend that North Carolina courts have applied the Skinner analysis to hold that other matters, in addition to securities transactions, also fall outside the scope of the UDPA. (Document No. 13, pp.8-10) (citing Buie v. Daniel Int'l Corp., 56 N.C.App. 445, 448 (1982); State ex rel Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C.App. 613 (2008); Wake County v. Hotels.com, LP, 2007 NCBC 35, 2007 WL 4125456 (N.C.Sup.Ct. Nov. 19, 2007)).

Defendants argue that for the same reasons the UDPA does not apply to other matters already governed by statutory schemes, it should not apply to the issues in this case. (Document No. 13, p.10). Defendants assert that applying the UDPA here, to a matter governed by the MSPA, would make little sense and would lead to problems of statutory interpretation and application. (Document No. 13, p.13). Defendants also suggest that there is a glaring absence of court decisions applying the UDPA or other statutes, in a MSPA private-cause-of-action case. Id.

In response, Plaintiff argues that the UDPA covers insurance disputes - that Medicare is insurance - and so, the UDPA applies to this action brought pursuant to the MSPA. (Document No. 19, pp.6-8). Plaintiff then cites multiple cases involving UDPA claims in the context of an insurance case. Id.

Defendants' reply brief effectively notes that they have not found, and Plaintiff has not cited, *any* case applying state UDPA laws to a party seeking recovery under the MSPA, as Plaintiff is attempting to do here. (Document No. 22, pp.3, 5). Defendants further note that none of the cases Plaintiff relies on involve Medicare, much less payments made under MSPA. (Document No. 22, p.5).

2. Factual Support

In addition, Defendants persuasively note that the Complaint fails to allege facts showing an actual injury to Plaintiff proximately caused by Defendants' acts or omissions. (Document No. 13, pp.14-16). Rather, the Complaint alleges Defendants shifted costs *to Medicare*. (Document No. 13, pp.14-15) (citing Document No. 1, pp.4-5). Defendants argue that alleging costs were shifted to Medicare does not suggest that Defendants injured Plaintiff or Worley. (Document No. 13, p.15).

Defendants acknowledge that the Complaint does assert that Defendants:

> [c]ompelled Plaintiff to file the current action to recover from Defendants the value of (1) the Medicare conditional payments, (2) Mr. Worley's out-of pocket exposure in the form of copays, deductibles, and other expenses otherwise covered through the North Carolina workers' compensation system, and (3) any miscellaneous damages and costs, fees, or expenses, all of which are subsumed in and represented by the full billed charges by Mr. Worley's medical providers, despite an award by the North Carolina Industrial Commission in Plaintiff's favor on these issues.

(Document No. 13, p.15) (quoting Document No. 1, p.6). However, Defendants argue that these "conclusory allegations" fail to show that Plaintiff or Worley sustained any actual injury. Id.

Defendants contend that "Medicare conditional payments" were made by Medicare, not Plaintiff or Worley. Id. Next, Defendants assert that the Complaint fails to identify any particular co-payment, or other specific expense, incurred by Plaintiff or Worley, as a result of any act or omission by Defendants. Id. Moreover, the Complaint fails to explain how Defendants' alleged failure to reimburse Medicare could cause Worley or Plaintiff to pay any co-payment, or other expense, that would not have been otherwise paid. (Document No. 13, p.16). Defendants state that there is no allegation that Worley's medical providers sought any additional amounts from him after they were paid, nor is there any identification of a deductible Worley was charged – much less one that resulted from Defendants alleged actions. Id. Defendants conclude that Plaintiff has made no more than bare assertions that are inadequate to support a claim. (Document No. 13, pp.16-17).

Plaintiff contends the Complaint sufficiently lists ways Defendants' alleged cost-shifting to Medicare violates N.C.Gen.Stat. § 58-63-15 (11) and N.C.Gen.Stat. § 75-1 *et seq.* (Document No. 19, p.8). Plaintiff goes on to suggest that the "injury" element of the UDPA claim here is based on the MSPA claim. (Document No. 19, p.10). Plaintiff contends there is standing for the MSPA claim, and therefore, an actual "injury." Id.

Plaintiff relies heavily on the O'Connor v. City of Baltimore, 494 F.Supp.2d 372, 374 (D.Md. 2007) decision for support. See also Woods v. Empire Health Choice, Inc., 574 F.3d 92, 98 (2nd Cir. 2009). While O'Connor and Woods might lend support for Plaintiff's *standing* to bring an MSPA claim, neither indicates that by bringing an MSPA claim a plaintiff has thus suffered an *injury* supporting a state law UDPA claim. See (Document No. 22, p.8).

As Defendants argue, the issue before the Court on the pending motion to dismiss is not whether Plaintiff has standing to assert a MSPA claim. Id. Defendants further argue that a UDPA claim is not assignable from Medicare to Plaintiff, because the recovery of trebled damages would result in a windfall for Plaintiff, who did not suffer an actual loss. (Document No. 22 p.9). The amounts allegedly paid here to Worley's medical providers, were paid by Medicare, not Plaintiff or Worley. Id.

The undersigned finds Defendants' arguments most persuasive. Even reading the Complaint in the light most favorable to Plaintiff, it does not plausibly allege that Defendants proximately caused injury to Plaintiff pursuant to the UDPA. Moreover, Plaintiff has failed to cite a single case showing that a plaintiff may bring a state UDPA claim along with a MSPA claim, or showing that standing to bring an MSPA claim equates with an "injury" supporting a supplemental state law claim.

Defendants also raise a compelling argument that Plaintiff's MSPA claim and UDPA claim create a problematic overlap between a federal statutory and regulatory scheme, and relief pursuant to a state statute. (Document No. 13, pp.12-14). Just one example involves the possible remedy here. MSPA provides for a doubled damage recovery, while UDPA provides for treble damages. (Document No. 13, pp.12-13). Defendants' citation to a decision by the Honorable Albert Diaz is instructive: "permitting Plaintiffs to pursue treble damages on these facts, where there already exists an extensive regulatory regime to address the violations, would improperly 'create overlapping supervision, enforcement, and liability in this area.'" (Document No. 13, p.10) (quoting Wake County v. Hotels.com, LP, 2007 NCBC 35, 2007 WL 4125456, at *11 (N.C.Sup.Ct. Nov. 19, 2007) (quoting HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 593 (1991)).

Based on the foregoing, the undersigned will recommend that Plaintiff's UDPA claim be dismissed.

B. Unjust Enrichment Claim

"'In order to recover on a claim of unjust enrichment' under North Carolina law, 'a party must prove that it conferred a benefit on another party, that the other party consciously accepted the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the other party.'" (Document No. 13, p.17) (quoting Southeastern Shelter Corp. v. BTU, Inc., 154 N.C.App. 321, 330 (2002) (citing Booe v. Shadrick, 322 N.C. 567, 570 (1988)).

Defendants contend the Complaint does not allege that Plaintiff or Worley conferred any benefit on any Defendant. Id. "Instead, the Complaint alleges that *Medicare* conferred a benefit *on Worley's healthcare providers* by making payments for services rendered and items provided by those healthcare providers." Id. Defendants conclude that because the payments were not made by Plaintiff or Worley, and they were not made to or accepted by Defendants, the Complaint fails to state a claim for unjust enrichment. (Document No. 13, p.17-18).

Plaintiff contends that its claim for unjust enrichment is adequate, and suggests that Plaintiff need not show a benefit was directly or personally conferred on a Defendant. (Document No. 19, pp.12-13) (citing New Prime, Inc. v. Harris Transp. Co., 222 N.C.App. 317, 2012 WL 3192718, at *4 (Aug. 7, 2012)). Plaintiff seems to suggest that an indirect transfer of a benefit, from a third party (Medicare) to another third party (Worley's medical providers, whom Defendants allegedly should have paid) is sufficient to support a claim. (Document No. 13, p.19). Plaintiff further contends the Complaint states that Defendants benefitted financially, and that this is a textbook example of unjust enrichment.

In addition, Plaintiff asserts that it "inserted the third cause of action for unjust enrichment" to prevent a Defendant from reimbursing Medicare during the pendency of this action. (Document No. 19, pp.13-14) (citing Estate of McDonald v. Indemnity Ins. Co. of North America, 46 F.Supp.3d 712 (W.D.Ky. 2014) and Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487 (1992). "This claim does not change the amount of the recovery sought in the current action, but it does place a constructive trust over any attempts by Defendants to do what one of them tried to do in Estate of McDonald." (Document No. 19, p.14).

Plaintiff concludes that because Medicare made payments for Worley's injury-related expenses, Defendants benefitted by withholding money it otherwise would have paid. (Document No. 19, p.15).

In reply, Defendants re-assert that the unjust enrichment claim is deficient because it "fails to allege *facts* that show that Worley or Hagy conferred a benefit on the Defendants." (Document No. 22, p.10).

Defendants go on to argue that the New Prime decision relied on by Plaintiff is not helpful. (Document No. 22, p.11). First, Defendants note that New Prime is an unpublished opinion. Id. Next, Defendants argue that they have cited six (6) cases holding that "to allege an unjust enrichment claim, a plaintiff must allege, among other things, facts showing that he or she conferred a benefit on the defendant." Id. (citations omitted). Defendants also contend that New Prime is factually distinguishable and fails to save Plaintiff's unjust enrichment claim. (Document No. 22, p.12).

Finally, Defendants assert that Plaintiff's stated purpose for filing this claim, to create a constructive trust, is irrelevant to the issue before the Court on a 12(b)(6) motion: whether Plaintiff has actually pleaded facts that support an unjust enrichment claim or show entitlement to the

remedy of a constructive trust. (Document No. 22, p.14). Again, Defendants conclude that the Complaint fails to allege facts indicating that Plaintiff or Worley conferred a benefit on any Defendant, and thus, Plaintiff fails to state a claim for unjust enrichment *or* to impose a constructive trust. Id.

Based on Defendants' arguments, the undersigned is persuaded that Plaintiff's third cause of action for unjust enrichment should also be dismissed.

IV. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that "Defendants' Motion To Dismiss" (Document No. 12) be **GRANTED**.

V. TIME FOR OBJECTIONS

The parties are hereby advised that pursuant to 28 U.S.C. § 636(b)(1)(C), and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact, conclusions of law, and recommendation contained herein may be filed within **fourteen (14) days** of service of same. Responses to objections may be filed within fourteen (14) days after service of the objections. Fed.R.Civ.P. 72(b)(2). Failure to file objections to this Memorandum and Recommendation with the District Court constitutes a waiver of the right to *de novo* review by the District Court. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005). Moreover, failure to file timely objections will preclude the parties from raising such objections on appeal. Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Snyder v. Ridenhour, 889 F.2d 1363, 1365 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 147-48 (1985), reh'g denied, 474 U.S. 1111 (1986).

IT IS SO RECOMMENDED.

Signed: June 8, 2016

David C. Keesler
United States Magistrate Judge

General Information

Topic(s)	Civil Procedure; Antitrust & Trade
Industries	Auto Parts & Repair
Parties	AMY WORLEY HAGY, as Personal Representative of the ESTATE OF JESSE JAMES WORLEY, Plaintiff, v. ADVANCE AUTO PARTS, INC.; ACE AMERICAN INSURANCE COMPANY; SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendants.
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