IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION

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| J. MICHAEL DEMPSEY, M.D.<br>Plaintiff and Appellee,<br>vs.<br><br>THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, STATE OF MONTANA,<br>Defendant and Appellant. | Cause No. AP 93-213-CV<br><br><br><br>OPINION |

Argued October 23, 1995

Decided April 30, 1996

James A. Manley, Manley Law Office, Polson, Montana, for J. Michael Dempsey, M.D.

Harley R. Harris, Assistant Attorney General, Office of the Attorney General, Justice Building, 215 North Sanders, P.O. Box 201401, Helena, Montana 59620-1401, for the Department of Public Health and Human Services of the state of Montana.

Daniel F. Decker, Tribal Legal Department, Confederated Salish and Kootenai Tribes, P.O. Box 278, Pablo, Montana 59855, submitted a brief amicus curiae without argument.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, William J Moran, Tribal Judge Presiding.

Before: BROWN, GAUTHIER, AND WHEELIS, Associate Justices.

WHEELIS, Justice:

## INTRODUCTION

This cause arose out of a dispute between the plaintiff and appellee, J. Michael Dempsey, M.D., (Dempsey) and the defendant and appellant, the department of public health and human services of the state of Montana (the PHHS), in its role as the administrator of the state's Medicaid program.

Dempsey, a physician licensed to practice medicine by the state of Montana, is an enrolled member of the Confederated Salish and Kootenai Tribes (the Tribes). In

November, 1993, Dempsey and the department of social and rehabilitation services of the state of Montana (later reorganized as part of the PHHS by an act of the Montana legislature) entered into a contract in which Dempsey agreed to be a Medicaid provider. Many of his patients were enrolled members of the Tribes. The contract, which was the usual form agreement between a provider and the PHHS, required that a provider abide by the Montana Medicaid Program as regulated by federal statutes and administrative rules and Montana statutes and administrative rules.

In July of 1992, the PHHS notified Dempsey that it had found errors in his past billings in the amount of $35,719.27. After some discussion between the parties during which Dempsey generally disputed the PHHS's audit results, on July 27, 1992, the PHHS formally notifed Dempsey that it considered him in arrears of the disputed amount. Dempsey requested an administrative hearing under the department's administrative rules and the state's administrative hearing statutes. In a motion addressed to the hearing officer, Dempsey moved to dismiss the overcharge claim for want of subject matter jurisdiction. The hearing officer denied the motion, and Dempsey appealed the denial to the appeals board, an internal administrative panel that reviews the decisions of hearing officers and provides the final stage of administrative review. The appeals board dismissed the appeal on December 30, 1993, having determined the hearing officer's denial of Dempsey's motion to dismiss was not an appealable order.[1] Dempsey then filed the instant case with the Tribal Court of the Confederated Salish and Kootenai Tribes, requesting both declaratory and injunctive relief.

The Tribal Court concluded that it had subject matter jurisdiction to the extent that matters of contract were involved, because it found that the contract between the parties in which Dempsey agreed to provide medical services for the Medicaid program

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[1]The appeals board is the final stage of Montana's administrative hearing process within the Department of Public Health and Human Services or its predecessor agencies. Appeals from the panel are taken to state district court through filing a petition for judicial review under the Montana Administrative Procedures Act, Montana Code Annotated § 2-4-101 *et seq*.

was to be performed on the Flathead Reservation. Inasmuch as Dempsey was a member of the Confederated Salish and Kootenai Tribes, the Tribal Court concluded that Tribal Ordinance 36-B gave it general civil jurisdiction. The Tribal Court determined that the issue of "regulatory authority over that portion of the State Medicaid program which provides services on the Flathead Reservation" was not before it. (Declaratory Judgment on the Issue of Subject Matter Jurisdiction, page 6.) It denied Dempsey's request for injunctive relief, finding that moot, and denied the PHHS's motion for summary judgment.

We reverse.

DISCUSSION

The Tribal Court concluded that it had subject matter jurisdiction because the issue was one of contract between the state of Montana and a tribal member that was to be performed on the Flathead Reservation. Also, the Tribal Court found that the Tribes had an interest in the subject matter of the litigation because of their concern for the health of their people, many of whom would be affected by the Medicaid program.

On initial consideration, given that an Indian is one of the parties to a contractual transaction performed at least in part on an Indian reservation, jurisdiction would seem to lie with the Tribal Court. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed.2d, 251, 254, 79 S.Ct. 269 (1959). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 76 L.Ed.2d 611, 103 S.Ct. 2378 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). A Tribal Court would have jurisdiction if "the exercise of state jurisdiction would undermine the authority of the Tribal Courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S., at 223, 3 L.Ed.2d, at 255. Following *Williams*, the Tribal Court noted that, given the nature of the parties and the transaction

between them, the Tribal Court would have jurisdiction "absent a governing Act of Congress." *Williams*, 358 U.S., at 220. *See also National Farmers Union Ins. Cos. v. Crow Tribe*, 472 U.S. 845, 85 L.Ed.2d 818, 105 S.Ct. 2447 (1985). We disagree with the Tribal Court because we believe the federal statutes establishing the Medicaid program foreclose the Tribal Court from review of state administrative procedures within the agency that houses the Medicaid program.

The state has argued that it is a sovereign and hence immune from suit in Tribal Court unless its sovereignty is waived. We reach our decision without fully considering that question. The state of Montana, through the agency that administers its Medicaid program, is regularly one of the parties in administrative hearings and actions for judicial review of those administrative hearings in state court in accordance with the Montana Administrative Procedures Act, Montana Code Annotated § 2-4-101 *et seq.* Accordingly, it is at least arguable that its sovereignty has suffered a limited waiver by the state's undertaking a Medicaid program.

Moreover, providers may maintain a private cause of action in federal courts under the Civil Rights Act of 1871, 25 U.S.C. § 1983, which supplies both injunctive and declaratory relief as well as damages to insure compliance with federal Medicaid statutes (including the question of whether particular fee schedules are reasonable). *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

The more persuasive argument by the PHHS is that the federal statutes creating the Medicaid program envision a single state agency for the administration of Medicaid in any state that establishes such a program. In short, under *Williams*, there is "a governing Act of Congress" that serves to defeat Tribal Court jurisdiction in this instance. Congress, in creating the Medicaid program, established a system that depends upon *state* administration. Although a state is not required to provide Medicaid, if it elects to do so a large body of federal statutory and regulatory law comes

into play. At the heart of that statutory scheme is 42 U.S.C. § 1396a, and subsection (a)(5) requires that a participating state "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan...." To comply with this Congressional statutory requirement, Montana has enacted an array of statutes and regulations, including those establishing a hearings process.

Both Dempsey and the Tribes argue that creating an administrative hearing procedure for the grievances of providers is not *required* under 42 U.S.C. § 1396a: the states *must* provide only *recipients* of medical assistance with an administrative hearing in the event of an unfavorable determination. 42 U.S.C. § 1396a(a)(3). No authority or persuasive argument, however, has been brought to bear that would require us to conclude that the procedure followed here was invalid. *See Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 300; *Shady Acres Nursing Home, Inc., v. Canary*, 39 Ohio App.2d 47, 68 Ohio Ops.2d 210, 316 N.E.2d 481 (1973).

We agree with the PHHS that 42 U.S.C. §1396a explicitly requires a single-agency administration of Medicaid within a state. Its statutory intent is sufficiently clear to qualify as an expression of Congressional will that the states have sole jurisdiction of administrative questions in their Medicaid programs. In administering the program, disputes will inevitably arise on eligibility, extent of coverage, and other matters—the list of possible questions would be very long if not actually limitless.

When he became a medical services provider with reimbursement rights under the program, Dempsey signed a contract with the state that included an agreement to abide by federal law, state law, and state administrative rules, including those rules that govern coverage, eligibility, fees, and other obligations and rights afforded providers and recipients. The question about whether Dempsey indeed owes money to the PHHS cannot be viewed solely as an isolated contract dispute between two parties. Determining such issues is simply one portion of a complex administrative and statutory scheme that Congress has required for the administration of the Medicaid

program. From the language of the statutes enacted by Congress, it is evident that Congress intended that there would be only one Medicaid program in each state—to be administered by the state. Had Congress intended that Indian tribes participate, Congress would have made that intent obvious. Consider, for example, the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1987 & 1995 Cum. Supp.). The Clean Water Act was enacted by Congress to restore and maintain the quality of water in the United States. It was amended by the Water Quality Act of 1987, which added a new provision, section 518, allowing the Environmental Protection Agency to treat Indian tribes as states for certain purposes of the Act. 33 U.S.C. § 1377(e). *See Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 480 (1989).

The analysis by the Montana Supreme Court in another administrative case is useful here. In *First v. State Dept. SRS ex rel. LaRoche*, 247 Mont. 465, 471-472, 808 P.2d 467 (1991), the Child Support Enforcement Division (CSED), then an administrative agency within the predecessor of the PHHS, levied upon the unemployment compensation benefits of James First for his unpaid child support. Mr. First was an Indian, a member of the Fort Peck Tribes, who had earned unemployment benefits while employed on one or more Indian reservations. The CSED was established by the state of Montana in accordance with an Act of Congress. Following the requirements of federal law, it sought to intercept the employment benefits of Mr. First, who argued that the CSED and the state courts did not have subject matter jurisdiction. The Montana Supreme Court decided that the state agency, the CSED, had jurisdiction to enforce unpaid child support obligations through its unemployment compensation intercept program since collection of child support was both mandated and regulated by federal statutes. In so doing, the Court relied upon *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), which established three tests to decide whether a federal statute is one of general application, governing all citizens and their property, or whether its scope excludes Indian tribes:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if:
> (1) the law touches "exclusive rights of self-governance in purely intramural matters";
> (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or
> (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ...." [Citations omitted.]
> *Donovan*, 751 F.2d, at 1116.

None of the three *Donovan* tests applies to the case at bar.

Although the Tribes have an interest in the welfare of their people who are affected by the program, they have not shown developed intent to assume the operation of the program. Indeed, under existing federal law, as interpreted by this Court, the Tribes could not assert control or management of the Medicaid program through some mechanism analogous to that provided, for example, by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a. *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 943 L.Ed.2d 244, 107 S.Ct. 1083 (1987); *Rice v. Rehner*, 463 U.S. 713, 77 L.Ed.2d 961, 103 S.Ct. 3291 (1983). We reject, therefore, the argument that the Tribes have asserted an interest in the administration of the Medicaid program.

We conclude that the Tribal Court does not have subject matter jurisdiction over the adjudicatory proceedings with the Medicaid program under its administrative rules. Our holding is limited to this narrow issue, however. Were the PHHS to attempt collection of any obligation occasioned by a judgment in state court, execution against the property of a tribal member would be governed by other authority. *Williams v. Lee, supra; Iron Bear v. District Court*, 162 Mont. 335, 512 P.2d 1292 (1973).

The declaratory judgment issued by the Tribal Court is vacated, and the matter is remanded with instructions to grant summary judgment to the Defendant and Appellant. Each party will bear its own costs.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

IT IS SO ORDERED THIS 30th DAY OF APRIL, 1996.

James Wheelis
Associate Justice

We concur:

Margery Brown
Margery Brown
Associate Justice

CONFEDERATED SALISH & KOOTENAI TRIBES COURT SEAL OF APPEALS FLATHEAD RESERVATION

Robert Gauthier
Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 7th day of May, 1996.

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