

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re: Guidant Implantable Defibrillators
Products Liability Litigation

MDL No. 05-1708
(DWF/AJB)

This Document Relates to:

Tamela Ivens

v. Case No. 05-cv-1491

GUIDANT CORPORATION
and GUIDANT SALES CORPORATION.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION
FOR CERTIFICATION UNDER 28 U.S.C. §1292(b) AND RULE 54(b)**

INTRODUCTION

On April 16, 2007, the Court issued an Order granting Guidant's Motion to Dismiss the Medicare Secondary Payer Claims and then subsequently issued an Amended Memorandum and Order on May 9, 2007. The Court's Orders address important issues important for United States government, Medicare, and plaintiffs throughout the Eight Circuit in determining who has standing under the MSP to bring a claim on behalf of Medicare. As this Court has previously considered, Plaintiff respectfully asks the Court for permission to appeal its April 16, 2007 Order and the May 9, 2007 Amended Memorandum and Order through two separate procedural avenues, 28 U.S.C. § 1292(b) and Fed.R.Civ.P. 54(b).¹

¹ On May 14, 2007, Plaintiff Tamela Ivens filed a Notice of Appeal to the Eight Circuit with regard to the April 16, 2007 Order. On June 12, 2007, Defendants filed a Motion to Dismiss the

First, Plaintiffs ask the Court to certify its Orders under 28 U.S.C. § 1292(b), which allows interlocutory appeal when the “order involves a controlling question of law as to which there is substantial ground for difference of opinion” which will advance the outcome of the litigation. Here, the Court’s Orders fit the § 1292(b) criteria. Because of the complexity of the issues the Court considered in its Orders, including the interpretation of the MSP, there is “substantial ground for difference of opinion” on their proper resolution. An immediate appeal could advance the outcome of the litigation as to date, Guidant has denied any liability for the MSP claims and refused to participate in any mediation with respect to the MSP claims.

Second, Plaintiffs request the Court to direct entry of judgment on Plaintiff’s MSP claims under Fed.R.Civ.P. 54(b), because “there is no just reason” for delaying it. The Court’s Orders conclusively resolves the independent claims under the MSP. That claim is distinct from other claims in the litigation, including Plaintiff’s personal injury claims. The Eight Circuit can consider the issue now, with no concern that it will have to consider it again on an appeal from the merits of the other claims in the litigation.

ARGUMENT

It is appropriate to ask the Court to certify these Orders under both 28 U.S.C. §1292(b) and Rule 54(b). *Restaura, Inc. v. St. Louis Concessions*, 52 F.3d 189, 190 (8th Cir. 1995). In fact, this Court recently considered motions by Guidant to certify Its Orders under both of these procedural mechanisms in another matter. *See Pagliolo v. Guidant Corp.*, 2007 WL 1567617 (D.Minn 2007). Moreover, it is appropriate for Tamela Ivens to appeal the Orders as she is the named plaintiff in the Master Complaint with respect to the MSP claims.

appeal for lack of jurisdiction. Plaintiff is opposing Defendant’s motion; Plaintiff now files this Motion to ensure the 8th Circuit has jurisdiction to hear the appeal.

I. THE COURT SHOULD CERTIFY ITS APRIL 16 AND MAY 9 ORDERS REGARDING THE MSP CLAIMS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292 (b)

Section 1292(b) of the Judicial Code gives district judges the discretion to certify their orders for interlocutory appeal:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. §1292(b).

To certify an order, a district court must thus determine that the order involves: 1) a controlling question of law, 2) a substantial ground for a difference of opinion, and 3) the decision will advance the outcome of the litigation. *Paschall v. Kansas City Star Co.*, 605 F.2d. 403, 406 (8th Cir. 1979). *See also TCF Banking & Sav., F.A. v. Arthur Young & Co.*, 697 F.Supp. 362, 366 (D. Minn. 1988).

a. The Court's Order involves controlling questions of law on the MSP statute

The Court's Orders turn on a controlling question of law and therefore satisfy the first requirement under §1292(b). A "controlling questions of law" means "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1258 (11th Cir. 2004) (internal quotation marks omitted). If the court's interpretation of the statute and its regulations controls the decision (rather than the facts of the case) then there is a controlling question of law at issue. *See Pagliolo v. Guidant Corp.*, 2007 WL 1567617 (D.Minn 2007). Here, the Court has issued an Order stating that Plaintiff cannot show that MSP grants her standing as an assignee of the United States to bring her MSP claims.

As Plaintiff's MSP claims and the Court's Order focuses on interpretation of the MSP statute as opposed to the facts of the case, there is a controlling question of law at issue and this prong is satisfied.

b. There are substantial grounds for difference of opinion on the MSP issues that the Court addresses.

There is substantial ground for difference of opinion on the MSP issues addressed by the Court's Orders. The present issue is of substantial policy importance. There is presently pending in the Eighth Circuit the case of *Stalley v. Triad Hospitals*, No 06-4121 (8th Cir.). This case was argued in May, 2007, and is currently under submission to the Court. The argument before the Court, which is available online, indicated the Court's significant concern with the standing issues, as decided by this Court. As such, there is a substantial possibility that the Eighth Circuit will render a decision that could have substantial impact on the present litigation. As such, this prong is satisfied as well.

c. A decision by the 8th Circuit may materially advance the litigation by resolving the questions of standing for an MSP claim.

An immediate appeal could enhance the outcome of the litigation. The parties have engaged in mediation since September, 2006. While limited progress has been made on the personal injury claims, Guidant has clearly indicated it would not entertain payment of Medicare claims unless and until the Court indicates it has liability therefore. Thus, this appeal, if successful, would change the landscape of any mediation in progress. This prong of the analysis is thus satisfied as well.

II. THE COURT SHOULD DIRECT THE ENTRY OF JUDGMENT ON PLAINTIFF'S CLAIM FOR MSP UNDER RULE 54(B) BECAUSE THERE IS NO JUST REASON FOR DELAY

The Court should direct entry of judgment on Plaintiff's MSP Claims (Counts XVIII-XXX) under Rule 54(b), because the Court's Order satisfies the criteria of the rule, and all the reasons for allowing review under §1292 (b) support the entry of final judgment.

For all practical purposes, there is a final judgment here as Rule 54(b) requires. The Court dismissed all of Plaintiff's MSP claims in the Orders dated April 16, 2007 and May 9, 2007. The Court's decision is also "final" in the sense that it is an "ultimate disposition of an individual claim entered in the court of a multiple claims action." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980). Plaintiff Ivens has no remaining MSP claims.² No other Plaintiff has remaining MSP claims and, as a result of these Orders, no future MSP claims will be filed. Therefore, the Court has no MSP claims before it and there will be no further proceedings on these claims.

There is also no just reason for delay in the entry of final judgment on Plaintiff's claim. Rule 54(b) leaves it to the "sound judicial discretion of the district court" to determine whether there is a just reason for delay. *Curtiss-Wright*, 446 U.S. at 8. In exercising its discretion, a court must consider the judicial interests as well as the equities involved and consider other factors, including "whether the claims infer review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court [will] have to decide the same issues more than once even if there are subsequent appeals." *Id.*; see also *In re Flight Transp. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987) (considering whether there is a "significant relationship between the adjudicated and unadjudicated claims).

² Plaintiff Ivens does have remaining personal injury claims; these claims, as addressed below, are separate and distinct from the MSP claims and should not be the basis for prohibiting an appeal.

Here, the MSP claims are clearly separable from the personal injury claims. The Eight Circuit will only have to consider the MSP claims on this appeal and will not have to reconsider it even if there is are subsequent appeals on the personal injury actions in this litigation. As discussed above, there are numerous reasons why the Court's Orders should be appealable and the interest of judicial determination strongly favors an immediate appeal.

CONCLUSION

The complex legal issues involved in the Court's April 16, 2007 and May 9, 2007 Orders make it appropriate for interlocutory review. Plaintiffs respectfully requests the Court to amend its Orders to include certifications under both §1292(b) and Rule 54(b), and to expressly direct the entry of judgment on Plaintiff Ivens' MSP claims, Counts XVIII-XXX ,of the Master Complaint.

Dated: June 22, 2007

Respectfully Submitted,

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