IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

JACKIE ABBOTT; ROBERT BERGANSKY; RAYMOND BROWN; NICHOLAS BIGLER; RICHARD CAMPUZANO; DALTON GORMEY; TRACY JAMES; JOHN JAMES; STEPHANIE KRUEGER; ZAINAB MOHAMED; ROBERT PIERSON; LUCAS SMITH; ROBERT VAN STEENBURGH; AMBER WINTERS; CHRISTINA YERKEY, and STEPHEN YOUNG,

Plaintiffs/Appellants,

v.

BANNER HEALTH NETWORK, fka Banner Health Inc., an Arizona corporation; DIGNITY HEALTH fka Catholic Healthcare West, a California corporation; SCOTTSDALE HEALTHCARE CORP., an Arizona corporation; NORTHWEST HOSPITAL LLC, a Delaware corporation; NORTHERN ARIZONA HEALTHCARE CORP., an Arizona corporation; JOHN C. LINCOLN HEALTH NETWORK, an Arizona corporation; UNIVERSITY MEDICAL CENTER CORP., an Arizona corporation; CARONDELET HEALTH NETWORK, an Arizona corporation; TUCSON MEDICAL CENTER, an Arizona corporation; ORO VALLEY HOSPITAL, LLC, a Delaware corporation,

Defendants/Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Case No. 1 CA-CV 13-0259

Maricopa County Superior Court
Case No. CV 2012-007665, Hon. J. Richard Gama

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Legal Argument

1. Accord and satisfaction is unavailable when it contravenes the "letter or spirit" of federal law or when it violates a governmental policy.

Appellees invite this Court to hold that, with accord and satisfaction, "[i]t does not matter . . . if the underlying claim was precluded by federal law."[1] They repeat this argument on pages 5, 6, 12, 16, and 18, and in other guises throughout their Responsive Brief. This is incorrect.

The law is—quite logically—to the contrary. "Though settlements in accord and satisfaction are favored in law, they may *not* be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress."[2] The same holds true when the federal law at issue is the official *policy* of a federal agency charged with enforcing federal statutes.[3]

In this case, the practice of balance billing or demanding payments from Medicaid patients is prohibited by both the letter and spirit of an Act of Congress as well as the policy of the various state and federal agencies charged with enforcing the federal law. Addressing this very issue, the United States Supreme Court has held: "Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws

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[1] Responsive Brief ("RB") at p. 16.

[2] *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991); *see also Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944).

[3] *In re Smith* at 1029.

and we would be depriving the public of the protection which Congress has conferred."[4] It is, therefore, incumbent upon this Court to similarly avoid sanctioning an infected bargain that would deprive a vulnerable public of significant protections which Congress has conferred.

Appellees' claim to the contrary is not correct or persuasive. One of the two Arizona cases upon which Appellees base much of their Responsive Brief flatly holds that accord and satisfaction arising out of illegal actions are unenforceable. In *Brecht v. Hammons*, 35 Ariz. 383, 390, 278 P. 381, 383 (1929), the Court held that "the surrender of a claim which is known to be entirely without foundation either in law or at equity does not afford a sufficient consideration for a compromise."[5]

This, of course, is merely a restatement of the first prong of the Arizona test for accord and satisfaction, which has stated for a century that no accord and satisfaction may be upheld if it involves actions which are not "a proper subject matter" for a legal agreement.[6]

Appellees confidently assure this Court that no Arizona published decision has ever struck down an accord and satisfaction on the basis of illegality or public

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[4] *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563 (1961).

[5] *Brecht v. Hammons*, 35 Ariz. 383, 390, 278 P. 381, 383 (1929).

[6] *Best Choice Fund v. Low & Childers, P.C.*, 228, Ariz. 502, 510, 269 P.3d 678, 686 (App. 2011) (accord and satisfaction requires: 1) a proper subject matter; 2) competent parties; 3) meeting of the minds; 4) consideration); *see also Vance v. Hammer*, 105 Ariz. 317, 319, 464 P.2d 340, 342 (1970).

policy, arguing that this only occurs in cases involving fraud.[7] This too is false. In *Smith v. Smith*, 227 P.2d 214, 71 Ariz. 315, 318-19 (1951), the Arizona Supreme Court, following the same principles discussed above, struck down an accord and satisfaction involving a property settlement because it required a party to obtain a divorce and such an agreement was illegal and against public policy.

The same principles are, of course, applicable in this case. A party cannot shield an unlawful agreement with the cloak of an accord and satisfaction.[8] If the legality of the underlying agreement were truly irrelevant, one would expect to see accord and satisfaction used to enforce agreements for slavery, prostitution or theft. This is precisely why the Court must look at the underlying agreement and the conduct it contemplates.

2. The court must evaluate the conduct which the underlying agreements contemplate.

Appellees concede that "it may be" that Arizona courts would refuse to enforce an accord and satisfaction arising "from a contract for murder."[9] This straw-man simply proves the point—namely, the court must consider the nature of the underlying agreement and, where the agreement is unlawful, engage in some

[7] RB at p. 11.

[8] *E.g., Spectrum Health v. Anne Marie Bowling*, 410 F.3d 304, 317-18 (6th Cir. 2005) (concluding that accord and satisfaction would not allow a hospital to retain a Medicaid patient's funds under a voluntary agreement where federal law prohibited the collection of funds).

[9] RB at p. 25.

familiar balancing to determine if accord and satisfaction is appropriate.

The factors courts consider when deciding whether to strike down an accord and satisfaction because the underlying agreement was illegal are: 1) any special public interest in enforcement; 2) the strength of the public policy that the agreement violates, as shown by legislation or court decision; 3) the likelihood that refusal to enforce will further that policy; and 4) the seriousness of the misconduct.[10]

As set forth in this Section and in Section 4, these factors all weigh against the application of accord and satisfaction herein. In this case, Congress has stated there is a well-established public interest in prohibiting balance billing or collecting from Medicaid patients as shown by legislation, regulation, record of Congressional intent, policies of regulatory agencies, and numerous court decisions.[11] It is also clear that—from the plethora of courts striking down similar misconduct in other jurisdictions and from the length of time Appellees' misconduct has avoided judicial scrutiny in Arizona—the refusal to enforce

[10] *Jackson Purchase v. Local Union 816*, 646 F.2d 264, 267 (6th Cir. 1981).

[11] This is also why *Shelton v. Grubbs*, 116 Ariz. 230, 568 P.2d 1128 (App. 1977), which Appellees spend pages 16-20 of their Responsive Brief discussing, is totally inapposite. The case at bar involves several large corporations taking financial advantage of a vulnerable indigent population—in the amount of millions of dollars per year—in precisely the way Congress intended to prohibit and with a strong record of Congress' intent to prohibit. *Shelton*, *supra*, involved a person trying to weasel out of paying a well-driller after getting the well drilled by raising licensure issues. To liken the public policies (if any) implicated in *Shelton* to the case at bar is ludicrous.

Congress's prohibition will continue to advance this prohibited practice at the expense of a uniquely vulnerable class of persons.

A. The public interest in protecting vulnerable persons along with the well-established public policy against collecting money from Medicaid patients weigh against applying accord and satisfaction.

Appellees are harming Medicaid patients in the precise manner that Congress has sought to prevent. Federal courts have noted that litigants such as Appellants herein, as well as other members of the certified class, are particularly vulnerable because they must simultaneously be: 1) so extremely financially distressed so as to qualify for government assistance; and 2) sufficiently injured to require hospital care.[12]

Congress has stated that, because of the particular vulnerability of this group of people, "[a]s a matter of public policy, it would be best for all concerned . . . if the reimbursement made by the State" constituted the full compensation received by Medicaid providers.[13] As a result, courts around the nation have uniformly and without exception recognized Congress' intent to protect these vulnerable individuals from the precise "infected bargain" advocated by Appellees–a bargain that Congress has outlawed.

These courts note that "Congress passed the balance billing prohibition in order to protect eligible patients from having to pay additional sums for services

[12] *Mallo v. Pub. Health Trust,* 88 F.Supp.2d 1376, 1377 (S.D. Fla. 2000).
[13] Senate Report No. 744, 90th Cong., 1st Sess. at 187-188 (1967).

already compensated by Medicaid."[14] The courts explain that "someone was bound to receive a windfall in these circumstances and Congress decided it should be the recipient of medical care, not the hospital."[15] And, "[s]ince Medicaid patients are the intended beneficiaries of such a windfall, health care providers are not entitled to prey on an otherwise poor patient's change in economic status."[16]

These are not isolated cases. To be sure, there is not a court in the nation that, when presented with the issue, has agreed with Appellees' arguments or their practice of balance billing or collecting money from Medicaid patients' personal-injury settlements. To the contrary, court after court in jurisdiction after jurisdiction has concluded that Appellees' conduct violates Congress' intentions, policy, and law protecting Medicaid patients from "having to pay additional sums for services already compensated by Medicaid." *Lizer*, 308 F.Supp.2d at 1009.

As shown by these decisions, the public policy to protect these people is necessarily strong since they are by definition so easily exploited. As a result, it is in the public's interest for our courts to provide these vulnerable persons with protection from particular conduct prohibited by law—that is, protection extended to them by law—and policy-makers who determined that payment from Medicaid should be "payment in full." *See* 42 C.F.R. § 447.15.

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[14] *See, e.g., Lizer v. Eagle Air Med. Corp.*, 308 F.Supp.2d 1006, 1009 (D. Ariz. 2004).

[15] *Evanston Hosp. v. Hauck*, 1 F.3d 540, 544 (7th Cir. 1993).

[16] *Mallo v. Pub. Health Trust,* 88 F.Supp.2d 1376, 1387 (S.D. Fla. 2000).

B. A policy which Congress takes very seriously is directly contravened by these agreements.

The seriousness of Appellees' unlawful conduct is underscored by HHS and AHCCCS, who have similarly outlawed Appellees' collecting from an indigent and injured population that Congress sought to protect.

AHCCCS could not be more plain in their view—the official policy of AHCCCS characterizes precisely what Appellees are doing as "fraud."[17] There is also unrebutted testimony in the record from the former General Counsel of HHS that HHS considers asserting a lien against a Medicaid patient's personal injury recovery, after billing Medicaid, to be a violation of 42 C.F.R. § 447.15. IR-24 at Exh. 3.

It is not just that Appellees are taking advantage of destitute and injured persons—they are "defrauding" these persons, according to AHCCCS. So inasmuch as Appellees concede that "it may be" that Arizona courts would refuse to enforce an accord and satisfaction arising "from a contract for murder," it should also be true that Arizona courts would refuse to enforce an accord and satisfaction arising "from a contract to defraud." That is the issue in this case, will this Court

[17] The AHCCCS official, publicly-stated policy on this point appears at http://www.azahcccs.gov/fraud -- select "Fraud Awareness for Providers" and forward to page 4, then select the "balance billing" heading. The Court may take judicial notice of AHCCCS' publicly stated policies. *Mack v. South Bay Beer Dist.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *Interstate Natural Gas v. So. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953).

sanction—by way of accord and satisfaction—a party fraudulently collecting money from an indigent class, when Congress sought to prevent precisely that activity?

3. The issue of whether the conduct contemplated by these agreements is legal has been properly placed before this court.

Appellees are collecting millions of dollars a year from injured Medicaid patients while engaging in their unlawful collections practice, so it is in their interest to delay any potentially adverse holding. In the service of that goal, Appellees throw out a large "grab bag" of arguments, none of them elaborated or supported by citation to the record, in order to delay this Court's consideration of whether collecting sums from a Medicaid patient's personal injury recovery, after billing Medicaid, is illegal.[18]

By way of brief rejoinder, however, there is no Constitutionality issue. Appellants are claiming that Appellees are violating a federal statute, a federal regulation, the policies of corresponding administrative agencies and the contracts Appellees signed with AHCCCS, not the state or federal Constitution.

Likewise, whether the practice at issue is legal was placed squarely before

[18] Appellees incorrectly argue: 1) challenging an accord and satisfaction as concerning illegal subject matter is not allowed; 2) the issue was not briefed; 3) the court should avoid alleged Constitutional issues; 4) the record is inadequate; 5) it is "illogical" to address this issue; and 6) similar arguments under other headings, making the same points. RB at 23, 28-29.

the trial court by Appellants[19] and the trial court directly addressed legality in its ruling.[20] Appellees felt sufficiently confident about the record on appeal that *they* moved for Rule 54(b) judgment on this issue, over Appellants' opposition.[21]

Finally, Appellees cite a case from 1877 for the proposition that opposing an accord and satisfaction theory on grounds of legality is simply not allowed in the law.[22] The dozens of published cases cited by both parties in their briefs indicate this was probably not the law in 1877 and has certainly not been the law for the last century.

In light of the foregoing, this Court is free to address whether collecting money or asserting a lien against a Medicaid patient's personal injury recovery, after billing Medicaid, violates 42 C.F.R. § 447.15.

4. Collecting money or asserting a lien against a Medicaid patient's personal-injury recovery, after billing Medicaid, is illegal.

While arguing that "[i]t does not matter . . . if the underlying claim was precluded by federal law,"[23] Appellees also argue repeatedly that a hospital asserting a lien against a Medicaid patient's personal injury recovery, after collecting the full amount from Medicaid, is legal because: a) a state statute purportedly authorizes the practice; and b) two Arizona cases purportedly allow the

[19] IR-24.
[20] IR-40 at p. 1.
[21] IR-91.
[22] RB at p. 23.
[23] RB at p. 16.

practice.[24] This is incorrect.

A. Without exception, every jurisdiction holds that balance billing a Medicaid patient is prohibited by 42 C.F.R. § 447.15.

Florida,[25] California,[26] Arizona,[27] Tennessee[28] and Louisiana[29] all enacted state laws purporting to allow a hospital to assert a lien against a Medicaid patient's personal injury recovery after the hospital received payment from Medicaid. Courts in all five states have now struck these laws down as preempted by 42 C.F.R. § 447.15 and there is no contrary authority.[30]

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[24] RB at pp. 2-3, 22, 26-27.

[25] Fla. Reg. 59G-7.055(6), which stated that funds from a Medicaid patient's personal injury settlement "are permitted to be applied to provider charges that exceed Medicaid payment."

[26] Cal. Welf. & Inst. Code 14124.74, which gave the provider a lien "against any judgment, award or settlement obtained by the (Medicaid) beneficiary..."

[27] A.R.S. § 36-2903.01(G)(4) (cited incorrectly in the Responsive Brief as (G)(5)) allowed a hospital to "collect any unpaid portion of its bill (from Medicaid patients)...in situations covered by title 33, chapter 7, article 3." Title 33, chapter 7, article 3 is the health care provider lien statute.

[28] Tenn. R. & Reg. 1200-13-1-.04(17)(d), which allowed providers to refund Medicaid money "in an attempt to recover a larger payment..." from a personal injury recovery.

[29] La. Admin. Code 50:l.8341, which had allowed balance billing after collecting full payment from Medicaid.

[30] *Lizer, supra* at 1009-10; *Public Health Trust v. Dade County School*, 693 So.2d 562, 566 (Fla. App. 1996); *Olszewski v. Scripps Health*, 135 Cal.Rptr.2d 1, 69 P.3d 927, 938-42 (Cal. 2003); *West v. Shelby County Healthcare*, No. W2012-00044-COA-R3-CV, 2013 WL 500777 at 23 (Tenn. App. 2013); *Taylor v. Louisiana Dept. of Health*, 09-1068-BAJ-DLD, Ruling at 4-5 (3/19/13) (M.D. La. 2013). The Tennessee and Louisiana district-court decisions were handed down in just the last few months and subsequent inquiries indicate an intent to publish, but notwithstanding this, the Court should reject any argument that *West* or *Taylor* have not yet been "published" and therefore should be ignored. As the District

These decisions were compelled by the fact that all of these laws directly conflict with the plain wording of federal law,[31] the clearly stated intent of Congress,[32] the official policy of HHS[33] and the official policy of AHCCCS, which characterizes what Appellees are doing as "fraud."[34]

B. *LaBombard* and *Andrews* do not support Appellees' argument that the practice at issue is somehow legal in Arizona.

In *LaBombard v. Samaritan Health Sys.*, 195 Ariz. 543, 991 P.2d 246 (App.

Court explained in *Carmichael Lodge No. 2103, Benevolent and Protective Order of Elks of the United States of Am. v. Leonard*, 2009 WL 1118896 (E.D. Cal. Apr. 23, 2009):

> [T]here is no prohibition in citing "unpublished" district court opinions (unless a local rule so provides). They are either persuasive to the issue at bar, or they are not. District court opinions, published or not, do not set binding precedent for other cases . . . Circuit court cases are, of course, differently viewed.

District Court opinions all carry the same "persuasive" weight—whether or not they are chosen for publication by Thomson West, the entity responsible for making that determination–and there is no distinction between published versus unpublished district court opinions. *E.g.*, *Lebron v. Sanders*, 557 F.3d 76 n.7 (2nd Cir. 2009) ("We do not suggest that published district court opinions are more persuasive than unpublished district court opinions; nor do we discourage . . . citing to an unpublished opinion that is, for any reason, more appropriate than a published one.").

[31] 42 C.F.R. § 447.15 limits participation to providers "who accept, as payment in full, the amounts paid by" Medicaid.

[32] "As a matter of public policy, it would be best for all concerned . . . if the reimbursement made by the State" constituted the full compensation received by Medicaid providers. Senate Report No. 744, 90th Cong., 1st Sess., at 187-188 (1967).

[33] *See* discussion previously.

[34] *See* discussion previously.

1998), a provider lien was asserted against an AHCCCS patient's personal injury recovery. The Court documented in its opinion that no party ever raised the issue of preemption and preemption was never considered by the trial or appellate courts.[35]

Andrews v. Samaritan Health Sys., 201 Ariz. 379, 36 P.3d 57 (App. 2001), decided three years later, had nothing to do with AHCCCS patients and only commented approvingly on the *LaBombard* holding in *dicta.*[36]

The issue of preemption under 42 C.F.R. § 447.15 was first raised in Arizona in *Lizer, supra*. *Lizer* discussed the holdings in *LaBombard* and *Andrews,* explicitly stated that neither court ever had the issue of preemption presented to it and that "this issue [preemption] is one of first impression."[37]

Lizer then held that a lien against a Medicaid patient's personal injury recovery was a collection from the patient, not a collection from a third party, because the recovery belonged to the patient once a settlement was reached.[38]

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[35] The plaintiff argued at trial and on appeal only that: 1) she had been told the balance would be waived; 2) appellee had not offered evidence of its customary charges; and 3) it was inequitable for appellee to get 100% recovery, while she got 2% of her stipulated damages. *Id.* at 546. Moreover, as of 1998, only two cases in the country had considered the issue of preemption in this context.

[36] *Id.* at 384.

[37] *Lizer, supra,* at 1009.

[38] *Id.* Throughout their Responsive Brief (*e.g.*, RB at pp. 3, 29), Appellees seek to confuse the Court by repeatedly stating that the "lien can only be enforced against the tortfeasor" and suggesting that, as a result, they are not collecting from the Medicaid patient. This is not a unique argument. The same argument was

Because the lien constituted a collection from the patient, the lien violated 42 C.F.R. § 447.15, which stated that payment from Medicaid was "payment in full" and that no additional collection was to be sought from the patient.[39]

In reaching this conclusion, *Lizer* cited *Palumbo v. Myers*, 197 Cal. Rptr. 214, 149 Cal.App.3d 1020 (Cal. App. 1983), *Evanston, supra; Public Health Trust, supra* and *Mallo, supra*, all of which are directly on point and all of which reached the same conclusion. *Olszewski, supra*, decided a year before *Lizer*, is also on point and also reached the same conclusion.

Appellees do not want this Court to look at *Lizer* (or these other cases), but *Lizer* is a "published case"[40] and is good law today, with no negative citing authority whatsoever in the decade since it was published.[41] Both the Sixth

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made to four other courts and each rejected it outright. *Lizer, supra* at p. 1009; *Spectrum Health v. Anne Marie Bowling*, 410 F.3d 304, 317-18 (6th Cir. 2005); *Olszewski, supra* at p. 22; *Bynum v. Magno*, 101 P.3d 1149, 1152 (Haw. 2004). Every court that has considered this argument has concluded that lien enforcement is collecting property otherwise belonging to the injured person. This is because the health care provider has no right to enforce a lien until a settlement or judgment in favor of the injured person comes into existence, and once that happens, that money belongs to the injured person.

[39] *Id.*

[40] Whether or not *Lizer*, 308 F.Supp.2d 1006, is "published" is a red-herring since it is a distinction without a difference. *Supra* at Note 29. Notwithstanding this, Appellees argue at 27, n. 58, that counsel conceded *Lizer* was "unpublished" at oral argument in another court. This is false. Counsel referred to Appellees' rather desperate argument and then argued to the federal judge for several pages that *Lizer* was obviously "published" and "good law." IR-32, Exhibit B, p. 16.

[41] Shepards Digest at 308 F.Supp.2d 1006 (citations).

Circuit[42] and the Federal District Court for the Middle District of Louisiana[43] have cited *Lizer* in concluding that 42 C.F.R. § 447.15 preempts any attempt to assert a lien against a Medicaid patient's personal injury recovery after billing Medicaid.

West, supra, and *Smallwood v. Central Peninsula General*, 151 P.3d 319 (Alaska 2006), which were decided after *Lizer*, are directly on point and adopted its holding in full. No case has ever held otherwise.

C. Appellees offer no substantive response to the plain language of the statute and supporting regulation, the written policies of the administering agencies and a dozen, published, on-point cases.

On the issue of legality, Appellees have shown nothing to support their meritless contention that their collection practice is anything short of "fraud." Their response brief does not even cite 42 C.F.R. § 447.15, and does not mention Congressional intent, the policy of HHS, the policy of AHCCCS, or literally a dozen directly on point cases. They are reduced to:

1) misrepresenting the status of *Lizer;* and

2) pointing the Court to two cases that never even considered preemption, one of which is not even good law anymore.[44]

Appellees' asserting a lien against Appellants' recoveries and pocketing some of the proceeds after billing Medicaid, is clearly illegal.

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[42] *Spectrum*, *supra* at 318 (6th Cir. 2005).

[43] *Taylor*, *supra* at 5-7.

[44] Much of *Andrews*, *supra*, was subsequently disapproved by *Blankenbaker v. Jonovich*, 205 Ariz. 383, 71 P.3d 910 (Ariz. 2003).

5. Other arguments.

A. Appellees cannot rewrite the trial-court record on appeal.

Appellees argue that, even if the Court does not find for them on accord and satisfaction, this Court should find for them on compromise, release, waiver, estoppel and/or the voluntary payment rule.[45]

1. Appellees failed to raise these issues.

Appellees chose to file a motion to dismiss before making their record on compromise, release, waiver, estoppel and/or the voluntary payment rule.[46] They focused the entire argument of their motion to dismiss on accord and satisfaction and did not make even a rudimentary attempt to discuss compromise, release, waiver, estoppel, the voluntary payment rule and/or how the facts support these theories.[47] They also failed to address these theories in their reply.[48] Consequently, the trial court did not address these issues in its Minute Entry.[49]

Over Appellants' objection,[50] Appellees then moved for Rule 54(b) judgment[51] and the trial court entered Rule 54(b) judgment in their behalf.[52]

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[45] RB at p. 9.
[46] IR-18.
[47] *Id.* at 4-8. The same cannot be said of Appellants, who articulated to the trial court how the facts support their contention that the practice at issue is illegal, thus preserving that argument for appeal. See, IR-24.
[48] IR-32.
[49] IR-40.
[50] IR-103.
[51] IR-91.

2. Appellees cannot first raise these issues on appeal.

In order to preserve an issue for appeal, a party must articulate how the facts in the record support a particular legal argument advanced by the party, it cannot expect the Court to do its work.[53]

3. These issues are not properly before the court.

Because of Appellees' actions, no record was made in the trial court on how the facts support a finding of compromise, release, waiver, estoppel and/or the voluntary payment rule. There is therefore no basis to rule in Appellees' favor on compromise, release, waiver, estoppel and/or the voluntary payment rule.

B. Appellants' request for attorney's fees.

The recurring problem that arises when asking for an award of reasonable attorney's fees and costs is not whether the request is early, but whether it is late. Appellants made a timely request and respectfully ask the Court to grant it, for the reasons provided in the opening brief.

6. Appellees cannot accomplish by private agreement that which the law prohibits.

One other court has considered the precise issue in this case–namely, whether a hospital can retain money collected from a Medicaid patient's injury settlement, which was "voluntarily paid" at the time, under an accord and

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[52] IR-113.

[53] *Best Choice Fund*, *supra* at 508 fn. 3.

satisfaction theory. The court was *Spectrum Health v. Anne Marie Bowling*, 410 F.3d 304, 317-18 (6th Cir. 2005), and the answer was "no."

Like this case, *Spectrum,* involved an accord and satisfaction claim where a Medicaid patient voluntarily paid off an alleged lien against the Medicaid patient's personal injury recovery after the hospital had already billed Medicaid. "[T]he Supreme Court of the State of New York approved the settlement in the malpractice suit which included '[p]ayment of Anna Bowling's outstanding healthcare liens.'. . . . Specifically, the court allocated the lump-sum amount to the various healthcare liens, including $575,000 to [the hospital] . . . . On February 23, 2003, pursuant to the settlement agreement, [the hospital was sent a] check for $575,000."[54]

The plaintiff later brought suit and asserted that the hospital's lien was preempted pursuant to 42 C.F.R. § 447.15. The 6th Circuit rejected the hospital's argument that it was allowed to keep the money pursuant to an "accord and satisfaction," even one approved by a state court. The Court of Appeals held that "[o]nce it accepted the Medicaid payment, [the hospital] had been paid in full for the services provided to [the patient]. The mere fact that a prior voluntary agreement existed is without consequence."[55]

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[54] *Spectrum, supra,* at pp. 308-09.

[55] *Spectrum, supra*, at p. 316. This Court should also consider *Mallo, supra*, at p. 1378, in which a Medicaid patient who had paid $10,000 to settle a hospital

This case is no different. This Court cannot allow Appellees to contravene federal law and financially harm an indigent group in the precise way Congress intended to prevent under the guise of a "private agreement." Congress has a strong public interest in prohibiting this practice, as shown by legislation, regulation, record of Congressional intent and numerous court decisions.

Conclusion

Appellants respectfully move the Court to vacate the judgment against them and remand this case to the trial court for further proceedings.

DATED this 29th day of October, 2013.

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Certificate of Compliance

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lien against his personal injury recovery was allowed to bring a class action against the hospital to recover the money. The class was certified and the case ultimately settled. *Id.*

Certificate of Service

The below-signing lawyer certifies that he electronically filed this document with the Clerk of the Court, Arizona Court of Appeals, on the above date, and mailed two copies of this document to each of the following:

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