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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BANNER HEALTH NETWORK, *et al.*,

Defendants.

Civil Case No. CV2012-007665

REPLY SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON BREACH OF CONTRACT CLAIM AND RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

(The Honorable J. Richard Gama)

Plaintiffs' Motion for Summary Judgment should be granted and Defendants' Cross-Motion for Summary Judgment should be denied. Plaintiffs submit the following reply and response in connection with the respective motions.

I. DEFENDANTS BREACHED PARAGRAPH 15 OF THE PROVIDER PARTICIPATION AGREEMENTS BY "ATTEMPTING TO COLLECT" FROM AHCCCS ELIGIBLE PERSONS

A. The Court Has Decided This Issue.

First, the Court has observed that Defendants have all signed Provider Participation Agreements ("PPAs"). *See* Minute Entry (1/21/14) at n.7. Second, the parties all agree that Paragraph 15 of the PPAs "prohibit the provider from charging, collecting or attempting to collect payment from an AHCCCS eligible person."[1] And third, throughout this litigation and even in

[1] *E.g.*, Defendants' Response to Plaintiffs' Motion for Summary Judgment on Breach of Contract and Cross-Motion for Summary Judgment (hereafter "Response") at 10 and 11:16-17.

their Response, Defendants have argued that their lien collections are not a breach of Paragraph 15, because lien collections are "not a collection from the AHCCCS patient," they are only collections from third parties. *E.g.*, Separate Supplemental Statement of Facts and Response to Defendants' Statement of Facts at ¶8 (referring to a portion of Defendants' Rule 26.1 Disclosure Statement); Response at 10:11-11:16 (arguing that "lien enforcement is collection from third-party tortfeasors, not patients.").

This issue, however, is decided. This Court has held that, consistent with every other court that has examined the issue, imposing liens against the recoveries of AHCCCS or Medicaid eligible patients ***is*** "collecting . . . from the Medicaid patient." Minute Entry (1/21/14) at pg. 7; *see also id.* at pg. 3 (quoting *Lizer v. Eagle Air Med. Corp.*, 308 F.Supp.2d 1006 (D.Ariz. 2004) ("Congress passed the balance billing prohibition in order to protect eligible patients from having to pay additional sums for services already compensated by Medicaid.")). Accordingly, inasmuch as the Court already concluded that the imposition of liens by the Defendant hospitals against the recoveries of AHCCCS eligible patients is "collecting . . . from the Medicaid patient," Defendants' imposition of the foregoing liens breached Paragraph 15 of the PPAs by "charging, collecting or attempting to collect payment from an AHCCCS eligible person."

B. Arizona Law Has Always Been Preempted.

Defendants argue they did not breach the PPAs because *"then existing law"* permitted the practice. This is false. As noted above, this Court has ruled that Arizona law, to the extent it ever permitted balance billing AHCCCS patients, is preempted by federal law that prohibits the practice. But, whether Arizona law ever permitted the practice is irrelevant, as Arizona law has *always been* preempted by federal law and, importantly, there's not been any "intervening change" in the applicable federal law.

Defendants, of course, knew federal law would preempt Arizona law. In fact, eight years before this lawsuit was ever filed, Defendants discussed in writing a case that held this very practice in Arizona was preempted by federal law and chose to ignore its holding. *See* Gammage & Burnham Memorandum, attached as Exhibit 2 to Plaintiffs' Second Amended Complaint. They

were wrong–but Defendants' incorrect and unsupported decision to continue this unlawful practice cannot be used as a basis to assert they did not know federal law preempted Arizona law.

Indeed, as early as 1993, in *Evanston Hosp. v. Hauck*, the Seventh Circuit held that a hospital could not balance bill a Medicaid patient after receiving payment from the Medicaid agency by asserting a lien against a third-party recovery. *See Hauck*, 1 F.3d 350 (7th Cir. 1993). Every other court since then has followed suit and found preemption of similar state laws by the very same federal law and regulations at issue in this case. *E.g.* Plaintiffs' Motion for Summary Judgment (filed 6/27/13).

The mere fact Defendants refused to recognize federal preemption does not mean there has been "an intervening change in the law." Defendants cannot find protection by claiming the practice was legal under "then existing" Arizona law by deliberately burying their heads in the sand and ignoring federal law or the enormous wall of case law prohibiting the practice.

C. Defendants Bargained Away Any Third-Party Billing Rights.

Assuming Defendants actually believed that balance billing Medicaid patients was permissible, however, they bargained away their right to do so under Arizona law. In their Response, Defendants make a new argument never before raised–namely, that because A.R.S. § 36-2903.01(G)(4) purported to *allow* conduct which the Court determined violates federal law, Defendants could not be in breach of Paragraph 15 of the PPAs. This is wrong.

It is well-established a private party may knowingly bargain away certain rights purportedly granted by statute. *E.g., U.S. v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *U.S. v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *U.S. v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990); *see also Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9th Cir. 1994). Indeed, Arizona law specifically provides that freedom of contract is a constitutionally protected right and is given extreme weight and deference. *See American Fed'n of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 27, 189 P.2d 912, 916 (1948); *see also Consumers International, Inc. v. Sysco Corp.*, 191 Ariz. 32, 34, 951 P.2d 897, 899 (App. 1998) ("If there is one thing which more than another public policy requires it is that [people] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be

held sacred and shall be enforced by Court of justice."). Thus, to the extent state law may have permitted the balance billing procedure used by Defendants in this case, they "bargained away" the use of this procedure by entering into PPAs prohibiting the practice. This is true irrespective of whether the state statute is preempted.

A.R.S. § 36-2903.01(G)(4) purported to grant Arizona hospitals the right to use the balance billing procedure provided by A.R.S. § 33-931, *et seq*. Even if federal law did not prohibit the practice, by agreeing to Paragraph 15 and receiving as consideration the opportunity to be a provider in the AHCCCS program, Defendants knowingly and voluntarily agreed *not* to employ this optional procedure.

Defendants allege that A.R.S. § 36-2903.01(G)(4) supercedes Paragraph 15 of the PPAs relying on *State ex rel. Romley v. Gaines*, 205 Ariz. 138, 67 P.3d 734 (App. 2003). Defendants' reliance on *Gaines* is meritless. *Gaines* holds "where a contract is *incompatible* with a statute, the statute governs." *Gaines*, 205 Ariz. at 142, 67 P.3d 738 (emphasis added). Such is not the case here. The statute here provided, in pertinent part: "A hospital ***may*** collect any unpaid portion of its bill from other third-party payors or in situations covered by title 33, chapter 7, article 3." A.R.S. § 36-2903.01(G)(4) (emphasis added). As such, the balance billing procedure alleged by Defendants to be permitted by the statute is purely optional, and there is nothing in the statute providing a hospital cannot "bargain away" its alleged rights. The PPAs are therefore not incompatible with the statute, and the language of the PPAs should control. *See Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 473, 421 P.2d 318, 321 (1966) ("[E]quity respects and upholds the fundamental right of the individual to complete freedom of contract or decline to do so, as he conceives to be for his best interests, so long as his contract is not illegal or against public policy.").

Having contracted in Paragraph 15 to waive a procedure purportedly available under A.R.S. § 36-2903.01(G)(4), Defendants were able to become AHCCCS providers and make hundreds of millions of dollars. Defendants then exercised the statutory procedure they bargained away, in clear breach of Paragraph 15, and collected tens of millions of *additional dollars* in violation of the PPAs and federal law.

An analogy is instructive. Arizona law allows judicial and non-judicial foreclosures.[2] It is well-known that parties to a real estate loan will sometimes contractually agree to a particular type of foreclosure in the event of default because this has implications for deficiency judgment rights and other matters. Defendants are effectively arguing that a lender could contractually limit themselves to a non-judicial foreclosure in the event of default, then initiate a *judicial* foreclosure after default and that this would not breach their contract to limit themselves to a non-judicial foreclosure, because Arizona law allows judicial foreclosures.

This is not the law. Private parties may knowingly contract away certain rights if they believe it is in their best interest to do so and that is what Defendants did here. *See Goodman*, 101 Ariz. at 473, 421 P.2d at 321.

II. THE BREACH OF CONTRACT CLAIM IS NOT MOOT

A. Defendants' Mootness Argument Directly Contradicts the Court's Ruling of Barely Two Weeks Ago.

On February 19, 2014, Defendants argued that entry of a Rule 54(b), Ariz.R.Civ.Proc., judgment on the *preemption claim* for the Open Lien Plaintiffs was inappropriate.[3] This Court agreed that entry of a Rule 54(b) judgment was premature. Minute Entry (2/27/14).

As a result, the Court's Minute Entry ruling on the Open Lien Plaintiffs' *preemption claim* is–by definition–not final and is "subject to revision at any time." Rule 54(b), Ariz.R.Civ.Proc. Eight days later, however, Defendants argue that the Court's provisional Minute Entry ruling on the Open Lien Plaintiffs' preemption claim, which is "subject to revision at any time," renders all other causes of action moot and prohibits the Court from even *considering* Plaintiffs' pending breach of contract claim. Response at 3:12-6:6. In other words, Defendants argued a few weeks ago that the Court may not enter final judgment on the preemption claim, because the breach of

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[2] See, A.R.S. § 33-721 and A.R.S. § 33-807.

[3] Defendants' Response to Plaintiffs' Motion for Entry of Rule 54(b) Judgment at 3:20.

contract claim still needed to be adjudicated,[4] and they now argue that the Court is wholly prohibited from adjudicating the pending breach of contract claim.[5]

The mootness argument Defendants are making is absurd in light of the argument Defendants made and the Court accepted barely two weeks ago – namely, that Rule 54(b) judgment was inappropriate because the breach of contract claim still needed to be adjudicated by the Court. Moreover, the Court has already rejected any mootness contention, making it clear in the Court's Minute Entry of February 27, 2014 that the Court intended to adjudicate the breach of contract claim.

B. No Case Law Supports Defendants' Contention.

No case cited by Defendants and indeed–no case *anywhere*–supports the contention that entry of a non-final ruling (which is subject to revision) on one claim, somehow renders all other declaratory judgment claims moot and prevents the Court from resolving any of them.

In *Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210 (App. 1991), plaintiffs won, obtained a final and appealable Rule 54(b) judgment, and then initiated an appeal to obtain an advisory opinion on the constitutionality of certain statutes. The Appeals Court declined to provide said advisory opinion. *Id.* In contrast, Plaintiffs herein:

a) have not obtained any final judgment; and

b) seek a ruling that past and continuing conduct of Defendants is actionable, not an advisory opinion on the constitutionality of certain statutes.

Thomas has zero application to this case. Neither do any of the other cases cited by Defendants in support of their mootness argument.[6]

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[4] Defendants' Response to Plaintiffs' Motion for Rule 54(b) Judgment at 3.

[5] Response at 3:12-6:6.

[6] In *Moore v. Bolin*, 70 Ariz. 354, 358, 220 P.2d 850 (1950), and *Progressive Specialty v. Farmers Ins.*, 143 Ariz. 547, 548, 694 P.2d 835 (App. 1985), there was no contention defendants had done something actionable in the past, such as breach a contract thousands of times, as is the contention here. In those cases, plaintiffs wanted an advisory opinion in case defendants did something *in the future* and the courts refused to grant such an opinion. In *Arizona State Board v. Phoenix Union*, 102 Ariz. 69, 73, 424 P.2d 819 (1967), the Court found that a justiciable controversy existed.

C. The Breach of Contract Claim is Independent of the Preemption Claim.

And finally, it bears repeating that, even if federal law did not prohibit the Defendants' practice of balance billing, by agreeing to Paragraph 15 and receiving as consideration the opportunity to be a provider in the AHCCCS program, Defendants knowingly and voluntarily agreed *not* to employ the procedure. *Supra*, Part I.C. In other words, the breach of contract claims against Defendants stand wholly-alone from the request for injunctive relief based upon preemption. While it's true that similar *logic* applies to adjudicating the breach of contract claim (*e.g.*, assertion of a lien against an AHCCCS patient's tort recovery is an attempt to collect from the AHCCCS patient), the breach of contract claim itself provides a completely independent basis to declare that Defendants' lien collection activities are unlawful.

III. PLAINTIFFS ARE THIRD PARTY BENEFICIARIES OF THE PROVIDER PARTICIPATION AGREEMENTS

Defendants next argue that Plaintiffs have no third-party standing to bring suit under Paragraph 15 of the PPAs. Response at 6:7-7:15. This too is incorrect.

To establish third-party standing, Plaintiffs must show that: 1) Paragraph 15 was clearly intended to benefit them; 2) the benefit was intentional and direct; and 3) the parties to the contract recognized plaintiffs as the primary beneficiaries of the provision.[7]

Paragraph 15 of the PPAs prohibits a provider from "charging, collecting or attempting to collect payment from an AHCCCS eligible person." SOF at ¶ 1. In their Motion, Plaintiffs cited three published decisions, the Congressional Record, and a sworn statement from the General Counsel of the Department of Health and Human Services, all of which evidence that there was a clear intent to make the Medicaid recipients the primary beneficiaries of the contractual provisions contained in Paragraph 15.[8]

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[7] *Nahom v. Blue Cross/Blue Shield,* 885 P.2d 1113, 180 Ariz. 548, 552-53 (App. 1994).

[8] Motion at 5:4-25, citing *Lizer v. Eagle Air Med. Corp.*, 308 F.Supp.2d 1006 (D.Ariz. 2004), *Mallo v. Public Health Trust of Dade County*, 88 F.Supp.2d 1376 (S.D. Fl. 2000), *Evanston Hosp. v. Hauck*, 1 F.3d 540, 544 (7th Cir. 1993); Senate Report No. 744, 90th Cong., 1st Sess., at pp. 187-188 (1967) and SOF at ¶ 6.

Plaintiffs also cited three on-point cases, including an Arizona appellate decision and the federal district court in *Mallo*, in which courts held that patients had third-party standing to bring suit under very similar or identical provisions in provider contracts.[9] And, as this Court has already observed, "*Mallo* held that plaintiffs were third-party beneficiaries of PPAs between the providers and Medicaid." See Minute Entry (filed 1/21/14) at n. 22.

Notwithstanding the foregoing, common sense would lead to the same conclusion: Paragraph 15 reduces the amount collected by AHCCCS providers and does not change the amount collected by AHCCCS, so neither party to the contract is a beneficiary of Paragraph 15. Defendants do not address any of this and offer no contrary authority of their own.[10]

Plaintiffs have third-party standing to bring suit, pursuant to Paragraph 15 of the PPAs in place during the relevant time period and the authorities previously cited.

IV. OTHER MATTERS

In yet another shotgun-argument, Defendants argue for the first time that A.A.C. R9-22-702(D)(2) authorizes them to bill tortfeasors. Response at 11:6-15. This is "more of the same" type of argument Defendants unsuccessfully made in the last motion for summary judgment where they hoped the Court would fail to see the distinct difference between rights belonging to AHCCCS *itself* and rights belonging to *providers*.

A.A.C. R9-22-702(D)(2) explicitly limits itself to transferring payments "as required by the statutory assignment of rights *to AHCCCS*." To be abundantly clear—these payments are collected pursuant to the assignment of rights "to AHCCCS" and ***not*** an assignment of rights "to AHCCCS *providers*."

V. CONCLUSION

Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Summary Judgment on the Breach of Contract Claim and deny Defendants' Cross-Motion for Summary Judgment.

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[9] Motion at 4:23-5:25, citing *Nahom, supra, Mallo, supra* and *Smallwood v. Central Peninsula General*, 151 P.3d 319, 324-26 (Alaska 2006).

[10] *Cf.* Response at 7:1-15.

RESPECTFULLY SUBMITTED this 19th day of March, 2014.

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