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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, et al., Plaintiffs, vs. BANNER HEALTH, INC., et al., Defendants.	NO. CV2012-007665 **REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Hon. J. Richard Gama)

Plaintiffs' Contract Claim is plainly moot. The Court's prior rulings already entitle Plaintiffs to all of their requested relief. Prevailing on the Contract Claim would not permit or require the Court to grant any additional or further relief. How could a ruling on the merits of the Contract Claim be anything but an advisory opinion? On this ground alone, the Court should grant Defendants' cross-motion for summary judgment.

Even on the merits, the Contract Claim fails. Defendants could not have violated the provider agreements by enforcing rights under a statute that was valid until this Court's ruling of January 17. That ruling cannot retroactively cause Defendants to breach the provider agreements.

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I. The Contract Claim is moot.

Plaintiffs wholly failed to address the key reason that the Contract Claim is moot: no further relief is available even if the Court rules in their favor on the merits. Plaintiffs did not—and nor could they—point to any additional relief that they can obtain by prevailing on the Contract Claim. The Contract Claim is therefore moot, and any decision on that claim would be an advisory opinion only. Though the doctrine of mootness often concerns the effect of events that occur *outside* the litigation itself, the doctrine also applies when some event *within* the litigation obviates the need to adjudicate a claim.[1]

Plaintiffs instead advance a multitude of meritless arguments. First, they claim that the Contract Claim is "independent" from the Preemption Claim and that the Contract Claim "stand[s] wholly alone from" the Preemption Claim.[2] But that is a red herring. The test for mootness is not whether a party's claim "stands wholly alone" (whatever that means) from its other claims. Rather, a claim is moot if it cannot make any difference in the relief that is available to the prevailing party.[3] Without some sort of relief being available, as is the case here, a ruling on the merits of a claim is an advisory opinion.[4]

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[1] *Cf. Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1131 (9th Cir. 2005) (settlement of underlying dispute rendered claim for declaratory relief moot).

[2] Reply Supporting Pl's Mot. For Summ. J. and Resp. to Defs' Cross-Mot. for Summ J. ("Response") at 7 (March 19, 2014).

[3] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th Cir. 2013); *accord Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548, 694 P.2d 835, 836 (App. 1985) (a question is moot when it "cannot have any practical effect in settling the rights of litigants").

[4] *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010) (addressing this concept in the context of claims pleaded alternatively); *Ferreira v. Dubois*, 963 F. Supp. 1244, 1262 (D. Mass. 1996); *In re Allied Artists Pictures Corp.*, 71 B.R. 445, 448-49 (S.D.N.Y. 1987).

Second, Plaintiffs try to distinguish *Thomas v. City of Phoenix*, stating that the plaintiff in that case initiated an *appeal* to obtain an advisory opinion.[5] That is incorrect: the plaintiff in *Thomas* first sought the advisory opinion on his declaratory claim from the *trial court*, and then appealed the *trial court's* ruling that the claim was moot.[6] And even if *Thomas* was distinguishable on that ground, Plaintiffs never explain why that distinction is relevant to the mootness inquiry.

Next, Plaintiffs claim that the Contract Claim is not moot because the Court's ruling on the Preemption Claim is an interlocutory order that is subject to revision.[7] This is a *non sequitur*—the interlocutory status of the Court's January 17 ruling does not bear on whether the Contract Claim is justiciable. And if this Court were to rule for Defendants on the Preemption Claim at some later date, Plaintiffs could potentially obtain relief by prevailing on the Contract Claim—the Contract Claim would no longer be moot.[8]

Plaintiffs also complain that Defendants' mootness argument is inconsistent with their opposition to the motion for Rule 54(b) judgment on the ground that the Contract Claim remained to be adjudicated.[9] Not so. In opposing the entry of a separate Rule 54(b) judgment, Defendants stated the following:

> Defendants believe that the Contract Claim is moot. ***But so long as Plaintiffs continue to litigate the claim***, they must show that partial judgment is appropriate under Rule 54(b). They have not done so.[10]

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[5] Response at 6.

[6] *Thomas v. City of Phoenix*, 171 Ariz. 69, 72, 828 P.2d 1210, 1213 (App. 1991).

[7] Response at 5.

[8] Moreover, this complaint is an issue of Plaintiffs' own creation. The parties could be proceeding to a final judgment right now on the Preemption Claim, but Plaintiffs have inexplicably chosen to prolong this matter by pursuing the Contract Claim.

[9] Response at 5-6.

[10] Defs.' Obj. to Pls.' Amended Form of J. & Resp. to Pls.' Mot for Entry of Rule 54(b) J. (Feb. 19, 2014) (emphasis added).

Defendants' position was very simple: Plaintiffs' decision to litigate a moot claim forced them to show that a Rule 54(b) judgment was appropriate with respect to the Preemption Claim. These positions are neither inconsistent nor a tacit concession that the Contract Claim was justiciable.

Plaintiffs next contend that this Court "already rejected any mootness contention" in denying the motion for Rule 54(b) judgment.[11] Plaintiffs are again incorrect. The Court simply ruled that Rule 54(b) relief on the Preemption Claim was inappropriate because "the preemption claim and contract claim turn[] on the same operative facts and issues of law."[12] The Court never discussed mootness at all, much less rejected Defendants' mootness argument.

Finally getting to the heart of the matter, Plaintiffs assert that "[n]o case . . . supports the contention that entry of a non-final ruling . . . somehow renders all other declaratory judgment claims moot."[13] Admittedly, no court has considered whether a claim is moot in the precise situation presented here.[14] But that is because prevailing parties typically do not try to establish a second, duplicative basis for the relief that they have already won. Almost without exception, litigants are willing to "accept victory" and do not bother to continue litigating alternative and fallback theories.

Examples of this abound. A plaintiff who prevails on a claim for breach of contract does not then litigate his claim for unjust enrichment. A plaintiff in a products liability action who prevails on a strict liability claim does not then litigate his negligence

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[11] Response at 6 ("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.").

[12] Minute Entry at 2 (Feb. 27, 2014).

[13] Response at 6.

[14] *Thomas* is the closest case on point—the only possible difference is that the administrative order reinstating the plaintiff's use permit was not interlocutory. But once

claim. When the court dismisses a plaintiff's claim, a defendant does not then litigate his affirmative defenses to that claim.[15] Indeed, the principle of "constitutional avoidance" rests entirely on the recognition that resolving a statutory claim in the claimant's favor moots a parallel constitutional claim—and thus relieves the Court of any need to address or resolve the constitutional issue.[16] The same should be true here: once Plaintiffs won the Preemption Claim, they should not then litigate the Contract Claim.

Plaintiffs' insistence on litigating the Contract Claim is ironic since Plaintiffs have repeatedly—and wrongfully—accused Defendants of raising collateral issues and delaying this litigation.[17] Yet it is ***Plaintiffs*** who refuse to accept their victory on the Preemption Claim and proceed to final judgment. Instead, they want to enjoin Defendants from the same conduct twice, for reasons that remain mysterious.

Plaintiffs have won this case and will obtain relief. This litigation should be in its final stages, not prolonged even further because Plaintiffs' want an advisory opinion on the Contract Claim. The Contract Claim is moot.

II. Even if the Court reaches the merits of the Contract Claim, Defendants are entitled to judgment as a matter of law.

Arizona's statutes are incorporated into contracts by operation of law—a contract must therefore be construed and applied in light of the Arizona law *at the time of the*

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again, Plaintiffs never explain how the interlocutory status of the January 17 order distinguishes *Thomas* and makes the Contract Claim justiciable.

[15] *See Pedalino v. Pitre*, 431 So. 2d 20, 21 (La. Ct. App. 1983) (dismissal of a claim moots affirmative defenses to that claim).

[16] *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S. Ct. 2504, 2513 (2009); *R.L. Augustine Const. Co., Inc. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370, 936 P.2d 554, 556 (1997).

[17] Pls.' Reply in Supp. of Mot. for Entry of Rule 54(b) J. at 2, 5 (Feb. 24, 2014).

contract's execution.[18] At the time these provider agreements were executed, A.R.S. § 36-2903(G)(4) was valid and enforceable. The AHCCCS Administration was fully aware that hospitals enforced health care provider liens after accepting payment from AHCCCS.[19] The parties to the provider agreements plainly intended to permit lien enforcement—that intent cannot change because of a later court ruling. Defendants cannot violate the provider agreements by exercising rights under a statute that was, by operation of law, incorporated into those agreements. Simply put, Defendants could not *breach* contracts by performing actions that the contracts expressly *authorized*.

Plaintiffs mount four attacks on that position, all of which are meritless. First, they inaccurately contend that this Court has already "decided this issue."[20] The Court's minute entry of January 17 decided, *as a matter of federal law*, that lien enforcement is collection from the patient, not from a tortfeasor.[21] The Court did ***not*** decide anything relating to the provider agreements, much less conclude that Defendants breached the agreements by enforcing liens after accepting payment from AHCCCS. Indeed, if the Court has already decided this issue, why did Plaintiffs file another motion?

Second, Plaintiffs inaccurately claim that A.R.S. § 36-2903(G)(4) "has always been preempted."[22] A statute is presumed to be valid and constitutional—and retains full

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[18] *Ward v. Johnson*, 72 Ariz. 213, 216, 232 P.2d 960, 962 (1951); *Higginbottom*, 203 Ariz. at 142, ¶ 11, 51 P.3d at 975 (a contract must be construed and applied "in the light of the statute, of the law then in force").

[19] *See* A.A.C. R9-22-1007 (requiring hospitals to copy AHCCCS on their health care provider liens).

[20] Response at 1.

[21] Minute Entry at 7 (Jan. 17, 2014) ("The Court finds that A.R.S. § 36-2903.01(G)(4) is preempted *because it violates federal Medicaid law* that prohibits a health care provider from collecting the balance of its bill from the Medicaid patient." (emphasis added)).

[22] Response at 2.

force and effect until actually repealed by the Legislature or stricken by a court.[23] No court had held that federal law preempted A.R.S. § 36-2903.01(G)(4) until this Court's ruling on January 17. The Court's ruling is akin to an amendment to the statute—it is an intervening change to the law that does not apply retroactively for purposes of deciding whether the provider agreements were breached.[24]

Next, Plaintiffs claim that Defendants "knew that federal law would preempt Arizona law."[25] This is both incorrect and insulting. Defendants certainly knew that the ***Plaintiff's bar*** would argue that federal law preempted Arizona law, but those arguments do not have the force of law.[26] In this case, Defendants presented almost 45 pages of briefing that explains why the arguments advanced by the plaintiff's bar were wrong. This Court did not agree, but that fact hardly establishes that Defendants "knew" that Arizona law was preempted.[27] Moreover, Defendants' supposed "knowledge" that federal law preempted Arizona law is entirely irrelevant to (1) whether A.R.S. § 36-2903.01(G)(4) is incorporated into the provider agreements as a matter of law and (2) whether Defendants retroactively violated the provider agreements by enforcing liens.

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[23] 2 Sutherland Statutory Construction § 34:1 (7th ed.) ("A basic principle of law requires that, unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature.").

[24] *E.g., Fla. E. Coast Ry. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129-30 (7th Cir. 1994) (subsequent changes to the law do not "retrospectively alter the parties' agreement"); *Fla. Beverage Corp. v. Div. of Alcoholic Beverages*, 503 So. 2d 396, 398-99 (Fla. Dist. Ct. App. 1987) (repeal of a statute does not apply retroactively to existing contracts).

[25] Response at 2.

[26] Plaintiffs claim that Defendants knew about decisions such as *Lizer v. Eagle Air Medical Corp.* and *Evanston Hospital v. Hauck*. Those cases, however, are not a part of the law that is incorporated into the provider agreements. Neither decision is controlling authority—and neither decision cited A.R.S. § 36-2903.01(G)(4). Although this Court certainly extended the *logic* from *Lizer* to preempt A.R.S. § 36-2903.01(G)(4), *Lizer* did not itself preempt the statute.

[27] Plaintiffs' argument is a backhanded accusation that Defendants' arguments in this action were frivolous and made in bad faith. Of course, the Court made no such finding.

Finally, Plaintiffs contend that Defendants "bargained away" any rights they had under A.R.S. § 36-2903.01(G)(4).[28] They rely upon Paragraph 15 of the provider agreements, which states:

> The Provider shall not bill, nor attempt to collect payment directly or through a collection agency from a person claiming to be AHCCCS eligible without first receiving verification from AHCCCSA that the person was ineligible for AHCCCS on the date of service, or that services provided were not AHCCCS covered services. The Provider agrees to abide by Arizona Administrative Code R9-22-702 prohibiting the Provider from charging, collecting, or attempting to collect payment from an AHCCCS eligible person.[29]

As an initial matter, Paragraph 15 does not prohibit lien enforcement at all for the reasons Defendants have already explained—reasons that Plaintiffs did not refute.[30] This term simply requires providers to obey A.A.C. R9-22-702. Thus, Plaintiffs are effectively claiming that A.A.C. R9-22-702 prohibits exactly what A.R.S. § 36-2903.01(G)(4) permits: enforcement of health care provider liens after accepting payment from AHCCCS. Statutes trump regulations—a regulation cannot prohibit what a statute permits.[31] Plaintiffs cannot construe Paragraph 15 (through A.A.C. R9-22-702) to prohibit lien enforcement without running afoul of A.R.S. § 36-2903.01(G)(4).

Moreover, Paragraph 15 does not clearly and unmistakably waive Defendants' statutory lien rights. Waiver is "the voluntary and intentional relinquishment of a known right," which "require[s] the concurrence of act and intent."[32] A party can waive a

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[28] Response at 3-5.
[29] *See* PSOF ¶ 1 and exhibits thereto (Mar. 4, 2014).
[30] Resp. to Pls.' Mot. for Summ. J. & Defs.' Cross-Mot. for Summ. J. at 10-11 (Mar. 7, 2014).
[31] *E.g.*, *Begay v. Graham*, 18 Ariz. App. 336, 339, 501 P.2d 964, 967 (App. 1972).
[32] *City of Tucson v. Koerber*, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957).

statutory right in contract terms, but the language of those terms must clearly and unmistakably reveal the party's intent to renounce the statutory right.[33]

Paragraph 15 falls far short of clearly and unmistakably waiving the hospitals' statutory right to enforce liens. The term neither cites A.R.S. § 36-2903.01(G)(4) nor mentions health care provider liens or tortfeasors. The term lacks any clear statement that would (1) put Defendants on notice that Paragraph 15 was effecting a waiver of their statutory lien rights or (2) clearly indicate Defendants' intent to waive their statutory lien rights.[34] Without clear language, Paragraph 15 cannot validly waive Defendants' lien rights under A.R.S. § 36-2903.01(G)(4).

Defendants did not breach the provider agreements by enforcing health care provider liens. The Contract Claim must be dismissed.

III. Conclusion.

The Contract Claim is clearly moot because no relief is available even if Plaintiffs prevail; accordingly, the Court need not reach the merits. Should the Court disagree, however, Defendants are entitled to summary judgment—Defendants could not have breached the provider agreements by enforcing lien rights under a valid statute at the time those agreements were executed.

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[33] *E.g.*, *In re Miller*, 253 B.R. 455, 459 (Bankr. N.D. Cal. 2000); *U.S. ex rel. Trans-Colo. Concrete, Inc. v. Midwest Const. Co.*, 653 F. Supp. 903, 906 (D. Colo. 1987); *Cargill, Inc. v. Cementation Co. of Am., Inc.*, 402 So. 2d 213, 214 (La. Ct. App. 1981); *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.*, 773 A.2d 665, 670 (N.J. 2001); *Ass'n of Or. Corr. Employees v. State*, 295 P.3d 38, 46 (Or. 2013).

[34] Paragraph 15 does not contain a statement, for example, that "The Provider shall not attempt to enforce a health care provider lien against a tortfeasor that injures a person claiming to be AHCCCS eligible" or "'Attempting to collect payment' shall include the enforcement of health care provider liens."

RESPECTFULLY SUBMITTED this 7th day of April, 2014.

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