Cameron C. Artigue #011376
Christopher L. Hering #028169
GAMMAGE & BURNHAM, P.L.C.
ATTORNEYS AT LAW
TWO NORTH CENTRAL AVENUE
15TH FLOOR
PHOENIX, AZ 85004
TELEPHONE (602) 256-0566
FAX (602) 256-4475
EMAIL: CARTIGUE@GBLAW.COM

Attorneys for Defendants

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) (Oral Argument Requested)

Plaintiffs constantly assert that hospitals cannot "balance bill" patients, *but never explain* how or why lien enforcement is unlawful collection from the patient. They fail to cite ***a single federal law*** that (i) expressly prohibits lien enforcement against third-party tortfeasors or (ii) classifies lien enforcement as collection from the patient. They never explain, or even cite, the U.S. Supreme Court's *Douglas* decision, which requires this Court to defer to CMS' approval of the provision in Arizona's Medicaid Plan that permits hospitals to pursue third-party payments after accepting payment from AHCCCS.

Plaintiffs must *substantiate* their theory that federal law bans providers from enforcing liens against third parties. Repeating their own say-so is not enough. They must demonstrate *why* CMS and AHCCCS wrongly sanctioned lien enforcement for 30 years. Because Plaintiffs did not do so, they cannot prevail on their preemption claim.

I. CMS' EXPRESS APPROVAL OF ARIZONA'S STATE MEDICAID PLAN IS DISPOSITIVE OF PLAINITFFS' PREEMPTION CLAIM.

Arizona's Medicaid Plan provides that AHCCCS' hospital reimbursement rates constitute "***payment in full*** for covered services ***excluding . . . third party payments***." CMS approved that provision and certified that all AHCCCS-participating hospitals are in compliance with 42 C.F.R. § 447.15. Tortfeasors are third parties under federal law—lien enforcement thus necessarily falls within the scope of this State Plan provision.[1]

The Court is not considering the merits on a clean slate. To the contrary, the situation is much like an appeal of an agency decision under the Administrative Review Act.[2] CMS approved Arizona's Plan and, in the process, construed the federal laws at issue here. A court cannot overturn CMS's approval unless it was arbitrary and capricious.[3] The label of "preemption" is not an end-run around that standard. And most critical for purposes of this case, a court reviews an agency's interpretations of federal statutes and regulations under the standards in *Chevron* and *Auer*, respectively.[4]

Plaintiffs' whole theory has crumbled in the wake of *Douglas*. Just one week ago, the Third Circuit became the fourth federal appellate court to apply *Chevron* deference to the federal government's approval of a State Medicaid Plan.[5] A group of nursing facilities argued that HHS acted arbitrarily and capriciously under the Administrative Procedures Act by approving a Pennsylvania state plan amendment ("SPA") that adjusted

---

[1] *See* authorities cited in Defs.' Resp. to Pl.'s Mot., 10 n.30 (Aug. 19, 2013).

[2] Because the Plaintiffs are effectively challenging CMS' approval of Arizona's Medicaid Plan, they are arguably required to join the federal agency as a party to this litigation. *See* Defs.' Mot. For Leave to Amend Answer (Sept. 26, 2013).

[3] *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1209-10 (2012).

[4] *Id.* at 1210.

[5] *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 12-3401, ___ F.3d ____, 2013 WL 5273117 at *9-10 (3d Cir. Sept. 19, 2013).

nursing home reimbursement rates.[6] The providers' challenge "implicitly [took] issue with HHS's interpretation of the Medicaid Act"—by approving the SPA, "HHS evidently concluded" that it satisfied federal law.[7] Thus, at the threshold, the court had to evaluate "whether to accord *Chevron* deference to agency interpretations of the Medicaid Act inherent in HHS approval of a state plan amendment."[8]

The Third Circuit first noted that the U.S. Supreme Court has "strongly suggest[ed]," that *Chevron* deference applies to SPA approvals.[9] Congress "delegated to the agency the responsibility to make interpretive decisions regarding which state plans satisfy the Act's requirements."[10] The agency's "decisions carry the force of law, as HHS is prohibited from making payments to states whose plans do not comply with the Act."[11] Consequently, state plan approvals "warrant[] *Chevron* deference."[12]

Here, by approving Arizona's State Plan, CMS necessarily concluded that the State Plan complied with federal law. CMS could not have reached that conclusion without first determining that lien enforcement does not conflict with 42 C.F.R. § 447.15 and 42 U.S.C. § 1396a(a)(25)(C). Defendants' cross-motion explained in detail why the agency's approval of Arizona's Plan and interpretations of federal law are entitled to deference under *Douglas, Chevron* and *Auer*.

---

6 *Id.* at *1, 9. The providers claimed that the SPA violated 42 U.S.C. § 1396a(a)(30)(A), which governs a state's methodology for determining reimbursement rates. *Id.* at *1.

7 *Id.*

8 *Id.*

9 *Id.* (citing *Douglas*, 132 S. Ct. at 1210).

10 *Id.* at *10.

11 *Id.*

12 *Id.*

Plaintiffs, in response, adopt the strategy of "Second verse, same as the first."[13] That is, the Plaintiffs make no effort to deal with anything that Defendants actually said; Plaintiffs merely restate their original assertions. They do not argue that *Douglas* is inapposite. They do not argue that *Chevron* and *Auer* do not supply the appropriate standards of review for interpreting the federal laws at issue here. And they do not argue that CMS's interpretations of federal law do not merit deference from this Court.[14]

In short, the Plaintiffs wholly fail to explain why this Court should not defer to CMS' judgment that federal law does not prohibit lien enforcement.[15] CMS's approval of Arizona's Plan is fatal to the Plaintiffs' preemption claim.

II. PLAINTIFFS CANNOT PREVAIL BY RELYING ON UNPERSUASIVE AND INAPPOSITE OUT OF STATE CASES.

Plaintiffs' original motion cited multiple cases that purport to strike various states' lien statutes as preempted. Defendants' cross-motion explained, in painstaking and precise detail, why those cases were incorrect, inapposite, and unpersuasive, based on a careful examination of federal law. Rather than refute that analysis, the Plaintiffs simply cite the same cases again.

That will not do, any more than if the Defendants filed a one-sentence response stating "preemption is disfavored."[16] Plaintiffs bear the legal burden. They cannot overcome the presumption against preemption *without carefully analyzing the federal laws they claim preempt Arizona law*. Citing out-of-state cases which have been shown

---

[13] Herman's Hermits, "*I'm Henry VIII, I Am*" (1965).

[14] Plaintiffs have waived all of these arguments. A conclusion that Attachment 4.19-A permits lien enforcement ends this matter and entitles Defendants to summary judgment.

[15] Plaintiffs act as if Arizona courts do not evaluate federal agency action using federal standards of review. But just this month, the Court of Appeals considered whether an agency letter was entitled to *Chevron* deference. *Kobold v. Aetna Life Ins. Co.*, 1 CA-CV 12-0315, ___ Ariz. ___, 2013 WL 4766295, at *4, ¶ 15 (Ariz. Ct. App. Sept. 5, 2013).

[16] *Id.* at *3, ¶ 9.

to be wrong does not create an irreconcilable conflict between Arizona law and federal law. And citing out-of-state cases certainly does not explain why the Court should not defer to CMS's approval of Arizona's Plan—courts must defer to an agency's interpretation of federal law, *even if that interpretation conflicts with existing case law*.[17]

Defendants are ready to discuss whether federal Medicaid law preempts Arizona's lien statutes. Plaintiffs have not shown up for the debate.

III. THE ARGUMENTS PLAINTIFFS DO PRESENT ARE INVALID.

Plaintiffs offer three assertions that warrant brief discussion.

First, the Plaintiffs contend that Attachment 4.19-A to the state Plan is irrelevant because it does not use the precise phrase "personal-injury settlement" or "lien."[18] That fact, while true, is meaningless. Attachment 4.19-A spells out AHCCCS' methodology for setting hospital reimbursement rates. Those rates constitute "***payment in full*** for covered services ***excluding . . . third party payments***." That only means—it can only possibly mean—one thing: the hospital must accept the AHCCCS rate as payment in full on the account, ***except for payments from third parties***. In other words, Attachment 4.19-A ***expressly permits*** the hospital to collect additional monies from third parties.

---

17 *Nat'l Cable & Telecommun. Ass'n v. Brand X Internet*, 545 U.S. 967, 982 (2005).

18 Pl's Resp. to Defs.' Cross Mot. ("Response") at 2-3 (Sept. 6, 2013). Plaintiffs contend that the Defendants' view of Attachment 4.19-A is "contrary to all authority," but, tellingly, cite no authority of their own. *Id.* at 1. Plaintiffs also claim that Attachment 4.19-A "say[s] [no]thing about 42 C.F.R. § 447.15." *Id.* at 3. But both provisions are nearly identical. The regulation limits participation in Medicaid to providers "who accept, as payment in full, the amounts paid by the agency, plus any deductible, co-insurance or co-payment." Similarly, Attachment 4.19-A requires hospitals to accept the AHCCCS reimbursement rate as "payment in full for covered services except for quick pay discounts, slow pay penalties, and third party payments."

Under federal law, the definition of third parties ***includes tortfeasors***.[19] Liens are simply the method by which hospitals recover from tortfeasors.

What else could Attachment 4.19-A possibly mean? What is the purpose of excluding "third-party payments" from the Plan's payment-in-full term if not to explicitly permit hospitals to collect additional payments from third parties—including tortfeasors? A court cannot interpret any written document, be it a statute, regulation or contract, so as to render it null or meaningless.[20] Yet that is precisely what the Plaintiffs do—strip "excluding . . . third party payments" of any and all meaning.

Second, the Plaintiffs misrepresent HCFA's 1997 Policy Statement, claiming that it "specifically limits itself to situations 'where a State has a waiver.'"[21] This is false. The Policy Statement referred in passing to 42 C.F.R. § 433.139(d)(1), a regulation that "relat[es] to circumstances *where a State has a waiver (of cost avoidance)*, [and] provides that the State . . . must seek recovery of reimbursement from the third party to the limit of legal liability." Nothing in the Policy Statement suggests that lien enforcement is permissible only if CMS grants a waiver. Indeed, that would be nonsensical—HCFA explained in detail how and why lien enforcement is ***consistent*** with federal law.[22]

Plaintiffs ultimately have no response to the fact that the Policy Statement is fatal to their claim. The Policy Statement conclusively demonstrates that federal law does not categorically prohibit lien enforcement. CMS, the federal agency in charge and cloaked in all the expertise that the law acknowledges, had said that Plaintiffs are wrong.

---

19 *See* authorities cited in Defs.' Resp. to Pl.'s Mot. at 10 n.30 (Aug. 19, 2013).

20 *Ariz. Dep't of Revenue v. Action Marine, Inc.*, 218 Ariz. 141, 143, ¶ 10 (2008).

21 Response at 15.

22 A Section 1115 waiver would be necessary only if federal law actually prohibits lien enforcement. *See* Defs.' Resp. to Pl.'s Mot. at 19 n.56 (Aug. 19, 2013).

Third, the Plaintiffs claim that the regulatory history "nicely illustrate[s]" why Arizona's lien statutes are preempted.[23] One would expect them to back up that statement with material that explains why federal law prohibits lien enforcement against tortfeasors. But instead, the Plaintiffs quote passages that support the same tired assertion that providers cannot balance bill patients. Indeed, the Plaintiffs ignore the Defendants' point entirely—that the regulatory history shows that the payment-in-full regulation's policy ("don't bill the patient") does not conflict at all with the policy of maximizing third-party liability ("do chase tortfeasors").

Plaintiffs' entire case rests on a chimera: that lien enforcement against tortfeasors is equivalent to billing the patient. That view is unsupported by federal statute, federal regulation, Arizona's Medicaid Plan, CMS's administrative guidance, and 30 years of administrative practice by CMS and AHCCCS.

IV. THE RESPONSE VIOLATES VARIOUS RULES OF CIVIL PRACTICE.

In a bid to rescue their claims, Plaintiffs resort to violating the Rules of Evidence and other rules of civil litigation. First, Plaintiffs produce an email from a Cheryl Young, which states that Attachment 4.19-A "does not provide a waiver of balance billing to providers." The email is clearly inadmissible hearsay—an out-of-court statement offered to support the assertion that Attachment 4.19-A does not permit lien enforcement.[24]

Moreover, Plaintiffs fail to lay even the most basic foundation for this out-of-left-field email. Who is Cheryl Young?[25] Is she a ***current*** CMS employee?[26] What are her

---

[23] Response at 15.

[24] The email also recites statements to the same effect that were allegedly made by Mark Wong and Brian Zolynas. This is inadmissible hearsay within hearsay. *See* Resp. to PSOF ¶ 9.

[25] Plaintiffs counsel asserts that Young is the "Regional Administrator for the Centers for Medicare and Medicaid Services." Response at 3. But they introduce ***no evidence*** in support of that assertion. "A party may not resist a motion for summary judgment by

responsibilities? Does she review state plans? Has CMS authorized Young to speak on its behalf and set forth the agency's official interpretations of federal law and Arizona's Plan? Without any of this information (not to mention the chance to cross-examine her), one cannot assess whether the email is even relevant.[27]

Next, the Plaintiffs double-down on their defective affidavits. They submit yet another affidavit from David Botsko, which backfills his first affidavit by stating that AHCCCS considers lien enforcement to be a violation of 42 C.F.R. § 447.15. Similarly, the Plaintiffs again cite Thomas Barker's affidavit for the proposition that Arizona's Plan does not permit lien enforcement. But courts do not interpret statutes by polling lawyers. Plaintiffs cite no authority that permits a witness to opine on the proper interpretation of the law.[28] Further, the Plaintiffs cite no authority that permits a ***former employee*** of an agency to speak on that agency's behalf.[29] The affidavits are plainly defective.

---

general statements or allegations of counsel." *In re Est. of Kerr*, 137 Ariz. 25, 29 (App. 1983) *disapproved on other grounds by In re Est. of McGathy*, 226 Ariz. 277 (2010).

[26] The email is dated July 22, 2011.

[27] Even if the email is somehow admissible, it does not help the Plaintiffs' case. Young stated only that Attachment 4.19-A "does not provide a waiver of balance billing to providers." This statement is completely unclear—what exactly is a "waiver of balance billing," and how does it relate to lien enforcement? More importantly, Young did not state that lien enforcement is, in fact, prohibited balance billing. She did not state that lien enforcement is unlawful collection from the patient. And she did not disagree with the view that hospitals can pursue *third-party payments* after accepting payment from AHCCCS. Finally, any reference to a "waiver" is a red herring. Once again, a waiver is not necessary because federal law does not prohibit lien enforcement. *See* n.7 *supra*.

[28] According to the Plaintiffs, the Defendants cannot "point to any contrary witness testimony . . . because—quite simply—none exist." Response at 4. Defendants did not proffer any "contrary witness testimony" because it would plainly be improper to do so.

[29] The affidavits also lay no foundation suggesting that Barker and Botsko are authorized to speak on behalf of CMS and AHCCCS.

Finally, the Plaintiffs cite numerous unpublished opinions, violating Rule 111(c), Ariz. R. Sup. Ct.[30] For nearly 30 years, our Supreme Court and Court of Appeals have prohibited litigants from citing unpublished decisions from federal courts or other states.[31] Plaintiffs cannot flout these clear rules of practice—the Court should strike all citations to unpublished decisions, including *Lizer* and *Taylor v. Louisiana DHH*.

V. CORRECTING THE RECORD.

Plaintiffs also try to salvage their defective preemption claim through distortions and misstatements, a few of which are corrected here:

- "This tradition of coercing unlawful payments from AHCCCS patients . . . ."[32]

A.R.S. § 36-2903(G)(5) has been on the books since 1985. The healthcare-provider's lien statutes have been on the books since at least 1966. Defendants are not "coercing unlawful payments from AHCCCS patients"—they are simply enforcing the rights granted to them *against third-party tortfeasors* under longstanding Arizona law.

- "The hospitals have gotten away with this unlawful practice due to a combination of financial coercion, the lack of enforcement resources, and the hospitals' strategy of keeping the practice away from the courts."[33]

The hospitals enforce liens because Arizona's State Medicaid Plan, the explicit terms of the Arizona Revised Statutes, and various Arizona court decisions, all permit

---

30 Response at 8-11, 14-15 & nn. 25-27.

31 *E.g.*, *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 (1985) ("We will treat memorandum decisions from the federal district court the same as memorandum decisions of our state courts."); *Hall v. Smith*, 214 Ariz. 309, 313, ¶ 9 n.3, (App. 2007) ("It is improper to cite out-of-state, unpublished memorandum decisions.").

32 Response at 7.

33 Response at 6.

them to do so. Plaintiffs improperly accuse the Defendants of nefarious activity without producing a shred of evidence. The Court should not consider this statement.[34]

- "Defendants' alternative argument is that the phrase 'payment in full' . . . should be construed to mean: (a) payment in full, except from third parties; (b) Plaintiffs' personal injury awards constitutes 'third parties,' and therefore, (c) 42 C.F.R. § 447.15 allows Defendants to pocket all or a portion of the Plaintiffs' awards . . . ."[35]

A "personal injury award" is not a party—tortfeasors and patients are parties. Defendants' position is simple: Arizona law requires Defendants to enforce their liens against tortfeasors, not patients. Under federal Medicaid law, tortfeasors are third parties.[36] Federal law, including 42 C.F.R. § 447.15, deems the Medicaid payment "payment in full" as to the state agency and the patient, but not third parties.

- Defendants "even contend—with astonishing *chutzpah*—that Plaintiffs' counsel conceded" that *Lizer* . . . was unpublished. "Plaintiffs' counsel joked with Judge Bolton about *Lizer* being 'accidentally published' . . . [and] then argued that this was in fact *not* the case and *Lizer* was good law . . . ."[37]

The transcript is crystal clear. Plaintiffs' counsel stated: "In *Lizer v. Eagle Air Medical Corp.*, which we now discover was published accidentally and not corrected for eight years . . . ."[38] This is not a joke; this is a concession. Plaintiffs never once argued to Judge Bolton that *Lizer* was published or good law. Indeed, they could not have—

---

34 *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) ("As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment.").

35 Response at 8.

36 *See* authorities cited in Defs.' Resp. to Pl.'s Mot. at 10 n.30 (Aug. 19, 2013).

37 Response at 10 n.30.

38 *See* DSOF ¶¶ 28-29 & Ex. M-N (Aug. 19, 2013).

Judge Broomfield expressly *denied* the request to publish his decision. Plaintiffs cannot continue citing an unpublished decision by calling their own prior statements a joke.[39]

VI. CONCLUSION.

The Court now has over 70 pages of briefing on the merits of the Plaintiffs' preemption claim. Yet only the Defendants have analyzed the "Byzantine"[40] statutes and regulations that govern Medicaid. Only the Defendants have shown that CMS and AHCCCS have known about—and approved of—lien enforcement for nearly three decades. In contrast, the Plaintiffs repeat the same statement over and over again: that federal law prohibits balance billing.

But there is no such thing as preemption by slogan. Arizona's lien statutes are presumptively valid. Plaintiffs must show an actual, irreconcilable conflict between Arizona law and federal Medicaid law, and they have not done so. The Court must defer to CMS's approval of Arizona's state Plan, which permits hospitals to pursue third parties—including tortfeasors—for payment after billing AHCCCS. Under federal law, lien enforcement against tortfeasors is neither prohibited "balance billing" nor unlawful collection from the patient. The Court should grant the Defendants' cross-motion for summary judgment and enter judgment in favor of the Defendants.

/ / /

/ / /

/ / /

/ / /

/ / /

---

[39] Plaintiffs contend that the "Motion to Publish *that was ultimately denied* was moot because [*Lizer*] had already gone to publication." Response at 10 (emphasis added). This is speculative—nothing suggests that Judge Broomfield denied the motion as moot.

[40] *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640 (1981).

RESPECTFULLY SUBMITTED this 26th day of September, 2013.

GAMMAGE & BURNHAM, P.L.C.

By /s/ Christopher L. Hering
Cameron C. Artigue
Christopher L. Hering
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004
Attorneys for Defendants

E-FILED and COPY of the foregoing mailed this 26th day of September, 2013, to:

B. Lance Entrekin
The Entrekin Law Firm
One East Camelback Road, #710
Phoenix, AZ 85012
Attorneys for Plaintiffs

Geoffrey Trachtenberg
LEVENBAUM TRACHTENBERG, PLC
362 N. Third Avenue
Phoenix, Arizona 85003
Attorneys for Plaintiffs

L. Eric Dowell
Kerry S. Martin
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2415 East Camelback Road, Suite 800
Phoenix, Arizona 85016
Attorneys for Defendant Kingman Regional Medical Center

By: /s/ Anne Diamos