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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

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| AMBER WINTERS, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>BANNER HEALTH, INC., et al.,<br><br>Defendants. | NO. CV2012-007665<br><br>**RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**<br><br>(Assigned to the Hon. J. Richard Gama)<br><br>(Oral Argument Requested) |

Plaintiffs appear to believe that the Court's prior ruling on the merits of the preemption issue automatically translates into "breach of contract" by the defendant hospitals. Plaintiffs are wrong for a variety of reasons—substantive, procedural, and technical. As an initial matter, the "contract" claim is legally moot. By prevailing on their claim for declaratory relief, Plaintiffs will obtain all of their requested relief.

Next, the AHCCCS provider agreement only prohibits "billing" AHCCCS patients—a precise term that does not include assertion of a lien against a third party, as AHCCCS regulations demonstrate. In any event, individual AHCCCS patients have no

standing to enforce an agreement to which they are not parties, and in which they are not designated as beneficiaries.

On the merits, we will of course assume the correctness of this Court's ruling that federal law preempts Arizona's lien statute. Even so, that does not place Defendants in breach of a contract that presupposed the validity of Arizona's statutes, incorporated those Arizona statutes by reference, and expressly required compliance with those statutes. This Court's ruling does not "relate back" to the time the provider agreements were executed.

The Court should deny Plaintiffs' motion on these grounds and grant Defendants' cross-motion for summary judgment.[1]

## I. Background

Plaintiffs pleaded two "causes of action." The heart of the matter is the so-called "Preemption Claim," which sought (1) a declaration that federal law preempted Arizona statutes that permit hospitals to assert lien rights on the personal-injury recoveries of AHCCCS beneficiaries and (2) an injunction enjoining Defendants from enforcing liens on AHCCCS accounts.[2]

Though styled as a second "cause of action," Plaintiffs' "Contract Claim" was not freestanding. Plaintiffs alleged that Defendants breached their provider agreements with AHCCCS due to the *same preemption argument* presented in the first cause of action.[3]

A provider may not participate in the AHCCCS program unless it signs a Provider Participation Agreement (a "provider agreement") with the AHCCCS Administration.

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[1] No separate facts are necessary for Defendants to support their cross-motion for summary judgment. Defendants adopt Plaintiffs' Statement of Facts ("PSOF") ¶¶ 1-4 and the exhibits thereto, to the extent those facts are not disputed by Defendants.

[2] Complaint, ¶¶ 131-140 & VII(E)-(F).

[3] Complaint, ¶¶ 24, 150.

42 CFR § 431.107. The AHCCCS Administration and the provider are the only parties to the provider agreement.[4]

Two terms from the provider agreements are relevant here. First, Paragraph 15 requires providers to abide by Arizona Administrative Code R9-22-702, which "prohibits the [hospital] from charging, collecting or attempting to collect payment from an AHCCCS eligible person" ("Paragraph 15"). Second, providers must "comply with all applicable Federal and State laws and regulations" (the "Compliance Term").

According to Plaintiffs, Defendants breached both provisions by enforcing health care provider liens against third-party tortfeasors. Of course, the assertion of those liens was expressly *authorized* by A.R.S. § 36-2903.01(G)(4); it's just that (as this Court has ruled) federal law preempted that Arizona statute.[5]

## II. The Contract Claim is moot because, even if Plaintiffs prevail on it, it would not authorize or require any additional relief

The Court's prior ruling already entitles Plaintiffs to declaratory and injunctive relief on the merits. Though the details remain to be sorted out, Plaintiffs have already won the right to all of the non-monetary relief they sought in this action.

The Declaratory Judgment Act does not make courts "a fountain of legal advice."[6] In order to be justiciable, a claim for declaratory relief must present an actual, live controversy. Declaratory relief is not available "to obtain a judgment which is advisory

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[4] *See* PSOF ¶¶ 2-3 and exhibits thereto.

[5] Minute Entry, Jan. 21, 2014.

[6] *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192-93, 507 P.2d 113, 117-18 (1973).

only or which merely answers a moot or abstract question,"[7] or "when no beneficial result would follow."[8]

A question is moot when "it is impossible for a court to grant any effectual relief whatever to the prevailing party."[9] One way a claim can become moot is when a party obtains "[c]omplete and tangible satisfaction of the relief" requested on another claim.[10] Because no relief is available, the claim cannot impact the court's disposition of the matter, making any ruling on that claim an advisory opinion.[11]

These principles are illustrated in a case that is exactly on point, *Thomas v. City of Phoenix*.[12] There, the plaintiff sought reinstatement of a use permit and a declaratory

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[7] *Ariz. State Bd. of Directors for Junior Colleges v. Phoenix Union High Sch. Dist. of Maricopa Cnty.*, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967); *Moore v. Bolin*, 70 Ariz. 354, 356, 220 P.2d 850, 851 (1950).

[8] *United States v. Jones*, 176 F.2d 278, 280 (9th Cir. 1949).

[9] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097 (9th Cir. 2013); *accord Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 464 (1937) (justiciable controversy must "admit[] of specific relief through a decree of a conclusive character"); *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").

[10] *See McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1138 (D. Idaho 2013) (citing *Troiano v. Supervisor of Elections in Palm Beach,* 382 F.3d 1276, 1283 (11th Cir.2004)); 13 Wright & Miller, *Fed. Prac. & Proc.* § 3529.1 (3d ed.) (courts may "refuse to give an 'advisory opinion' on questions rendered unnecessary by the balance of its decision").

[11] *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) (claim for declaratory relief is moot when question presented seeks adjudication of a matter "which, even if the sought judgment were granted, could not have any practical effect upon the parties"); *In re Allied Artists Pictures Corp.*, 71 B.R. 445, 448-49 (S.D.N.Y. 1987) (same).

[12] 171 Ariz. 69, 828 P.2d 1210 (App. 1991).

judgment that a zoning statute was unconstitutional.[13] The trial court remanded the matter for further administrative proceedings on whether to reinstate the use permit.[14] On remand, the City reinstated the use permit.[15] The plaintiffs then returned to the trial court and moved for summary judgment declaring the statute unconstitutional.[16]

The trial court concluded that the declaratory claim was moot and dismissed the action.[17] The Court of Appeals affirmed. Once the City reinstated the use permit, the plaintiff had attained the primary relief it sought.[18] The statute's constitutionality became a moot question—the plaintiff had no more than a "desire" to know whether the statute was constitutional.[19] As such, the declaratory claim was not justiciable.

As in *Thomas,* Plaintiffs have already obtained all of their requested relief by prevailing on the Preemption Claim, so that the Contract Claim no longer matters for any real-world purpose. Specifically, Plaintiffs have won relief to the effect that (1) federal law preempts A.R.S. § 36-2903.01(G)(4), (2) the open liens are invalid, and (3) Defendants may not enforce liens on the personal-injury recoveries of the class members.

Plaintiffs may want to know whether Defendants breached the provider agreements. But that desire does not create a justiciable question, because a declaratory judgment "must serve some purpose in resolving a dispute."[20] No purpose is served by

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13 *Id.* at 71, 828 P.2d at 1212.
14 *Id.*
15 *Id.* at 72, 828 P.2d at 1213.
16 *Id.*
17 *Id.*
18 *Id.* at 75, 828 P.2d at 1216.
19 *Id.*
20 *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 168 (9th Cir. 1997).

adjudicating the Contract Claim when the Court cannot grant any further relief even if Plaintiffs win.[21]

The Contract Claim has no practical effect in settling the rights and obligations of the parties. Plaintiffs' motion is essentially a request for an advisory opinion on whether Defendants breached the provider agreements. The Contract Claim is moot, and the Court need not consider its merits.

## III. Plaintiffs are not third-party beneficiaries of the portions of the provider agreements they seek to enforce.

A person cannot enforce a contract as a third-party beneficiary unless (1) the parties to the contract intended to directly benefit that person (2) that intent is expressed in the contract itself, and (3) the parties recognize the third-party as "the *primary* party in interest and as privy to the promise."[22] Importantly, this analysis is performed on a term-by-term basis—the third party must show that it is the intended beneficiary of each provision it seeks to enforce.[23]

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[21] Contrary to Plaintiffs' assertion, the Complaint *did not* request "an order, pursuant to A.R.S. § 12-1833, enjoining Defendants from continued breach." Mot. at 4. And in any event, such an injunction would be superfluous. The "continued breach" refers to lien enforcement against tortfeasors who injured AHCCCS beneficiaries. By prevailing on the Preemption Claim, Plaintiffs will obtain an order enjoining that exact practice. Plaintiffs can enjoin Defendants from lien enforcement only once—courts do not issue duplicative injunctions. *McCully v. Radack*, 340 A.2d 374, 380 (Md. App. 1975). (affirming trial court's denial of injunctive relief when requested injunction was duplicative of relief already obtained).

[22] *Armbruster v. WageWorks, Inc.*, 953 F. Supp. 2d 1072, 1076 (D. Ariz. 2013); *Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, 567, 38 P.3d 1229, 1232 (App. 2002).

[23] *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1117-18 (1st Cir. 1986); *MBIA Ins. Corp. v. Royal Indem. Co.*, 519 F. Supp. 2d 455, 464 (D. Del. 2007) ("A party can be a beneficiary of some promises in a contract and not of others."); *Hardware Ctr., Inc. v. Parkedge Corp.*, 618 S.W.2d 689, 693 (Mo. Ct. App. 1981); *Nw. Airlines, Inc. v. Crosetti Bros., Inc.*, 483 P.2d 70, 72 (Or. 1971) ("Third parties may be beneficiaries of some . . . promises and not of others . . . .").

Plaintiffs wholly fail to show that they are the third-party beneficiaries of either the Compliance Term or Paragraph 15. The Compliance Term could hardly be more generic; it obligates providers to "comply with all applicable Federal and State laws and regulations." The term does not mention AHCCCS members at all, much less express any intent to directly benefit AHCCCS members or recognize AHCCCS members as the primary party in interest. To the extent that Plaintiffs benefit from Defendants' promise to comply with the law, the benefits are purely incidental. Plaintiffs plainly do not have standing to enforce the Compliance Term.

More generally, there can be no claim that plaintiffs are the "primary" beneficiaries of the agreements in question. The State of Arizona made this agreement for its own benefit, to assure a secure and continued flow of federal funding for the AHCCCS program. Such "compliance with law" provisions are practically universal in public contracts. Arizona's restrictions on third-party-beneficiary status would become a nullity if every such provision vested the general public with standing to enforce any public contract.

## IV. Defendants did not breach the provider agreements by enforcing liens against third-party tortfeasors as Arizona statutes expressly authorized.

Plaintiffs contend that the Court's ruling on the Preemption Claim establishes *ipso facto* that Defendants breached their provider agreements. But that is not so. Plaintiffs are trying to use hindsight to make the provider agreements mean the precise opposite of what they actually meant at the time they were executed. Under basic and longstanding principles of contract law, the parties' intent must be determined as of the time the contracts were executed. That "intent" cannot be recreated after the fact, a decade or more later, in light of a judicial ruling that was never contemplated at the time the contracts were made.

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### A. Defendants vindicated rights conferred by A.R.S. § 36-2903.01(G)(4), which was incorporated into the provider agreements by operation of law.

The statutes of the State of Arizona are automatically incorporated into all contracts.[24] These laws become part of every contract "as fully as if they had been expressly referred to or incorporated in its terms."[25] Contracts must therefore be construed and applied in light of Arizona law as it existed "*at the time of [the contract's] execution.*"[26] Moreover, Arizona's statutes are presumed to be valid and constitutional (that is, not preempted) unless and until a binding ruling is made to the contrary.[27]

Here, the provider agreements were executed between 1994 and 2010. During that entire period, A.R.S. § 36-2903(G)(4) allowed hospitals to enforce liens after receiving payment from AHCCCS to collect "any unpaid portion" of their bills. That statute said what it said, for almost 30 years, and has been routinely applied and enforced in literally thousands of cases.

Throughout that entire time, AHCCCS was fully aware of this lien enforcement. An AHCCCS regulation, A.A.C. R9-22-1007, specifically contemplated that hospitals would enforce liens after receiving payment from AHCCCS, by requiring hospitals to copy AHCCCS on their health care provider liens.

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[24] *E.g., Yeazell v. Copins*, 98 Ariz. 109, 113-14, 402 P.2d 541, 544 (1965); *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007); *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 11, 51 P.3d 972, 975 (App. 2002).

[25] *Farmers' & Merchants' Bank of Monroe, N.C. v. Fed. Reserve Bank of Richmond, Va.*, 262 U.S. 649, 660, 43 S. Ct. 651, 655 (1923).

[26] *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")

[27] *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 330, ¶ 20, 972 P.2d 658, 663 (App. 1998).

Simply put, when the provider agreements were executed the statute and regulation were valid, applicable, and fully enforceable. No court had ruled that these authorities were preempted, unconstitutional, or otherwise invalid. Thus, by operation of law, A.R.S. § 36-2903(G)(4) and A.A.C. R9-22-1007 were incorporated into the provider agreements.

Plaintiffs' Contract Claim fails because the contract cannot be construed in hindsight. Contracts must be construed to ascertain the parties' intent *at the time of contract execution*, not after the fact.[28] Lien enforcement cannot violate the provider agreements because these agreements, construed in light of then-existing Arizona law, all *permitted* Defendants to enforce health care provider liens after accepting payment from AHCCCS. And construed in light of A.A.C. R9-22-1007, the provider agreements specifically *contemplated* lien enforcement. Defendants could not have breached the provider agreements following the letter of a statute that was, by operation of law, a part of those agreements.

Moreover, the Arizona statute supersedes any contrary provisions in the provider agreements.[29] Therefore, any conflict between the statute and the contractual terms cited by Plaintiffs is necessarily resolved in favor of the statute. The Court's ruling does not change how the provider agreements are interpreted because subsequent changes to the law do not "retrospectively alter the parties' agreement."[30] Contracts are interpreted "in

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[28] *Malad, Inc. v. Miller*, 219 Ariz. 368, 372, ¶ 20, 199 P.3d 623, 627 (App. 2008) ("We interpret a contract based on the parties' intent upon entering the agreement, not their intent after the fact.")

[29] *State ex rel. Romley v. Gaines*, 205 Ariz. 138, 142, 67 P.3d 734, 738 (App. 2003).

[30] *Fla. E. Coast Ry. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129-30 (7th Cir. 1994); *accord Tx. Workers' Comp. Ins. Facility v. State Bd. of Ins.*, 894 S.W.2d 49, 54 (Tex. Ct. App. 1995) ("[A] contractual obligation, which includes the relevant law in force at the time the contract is made, cannot be impaired by a subsequent change in the law that applies

accordance with existing judicial decisions as to the law *and not in accord with subsequent contrary decisions*."[31]

At the time the provider agreements were executed, the existing case law *acknowledged* the hospitals' right to enforce liens after receiving payment from AHCCCS.[32] The Court's ruling to the contrary will certainly be incorporated into future provider agreements. But it cannot retroactively alter Defendants' obligations under the existing provider agreements here—and retroactively place Defendants in breach of the provider agreements.

Defendants did not breach the provider agreements because they do not prohibit lien enforcement. Plaintiffs' Contract Claim fails.

**B. By its terms, Paragraph 15 does not prohibit lien enforcement.**

Paragraph 15 prohibits providers from "bill[ing] . . . 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." Additionally, Paragraph 15 requires providers 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."

Defendants did not breach Paragraph 15 for two reasons. First, the provision is silent about health care provider liens, and for good reason. Arizona law is well settled

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retroactively."); *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 431-32 (Wis. 2006) ("Subsequent changes to a law will not interfere with an existing contract.").

[31] *E.g., Brown v. Utica Mut. Ins. Co.*, 53 N.Y.S.2d 760, 768-69 (Sup. Ct. 1945); *accord New Jersey Mfrs. v. O'Connell*, 692 A.2d 51, 53-54 (N.J. Super. Ct. App. Div. 1997).

[32] *LaBombard v. Samaritan Health System,* 195 Ariz. 543, 991 P.2d 246 (App. 1998); *Andrews v. Samaritan Health System*, 201 Ariz. 379, 36 P.3d 57 (App. 2001); *see Samsel v. Allstate Ins. Co.,* 204 Ariz. 1, 7, n.2, 59 P.3d 281, 287 n.2 (2002) (recognizing that *Andrews* gave the provider "a statutory lien against a claimant's tort recovery for the full charges made by a provider.").

that lien enforcement is collection from third party tortfeasors, not patients.[33] The contract, moreover, must be interpreted as a whole, and (as just discussed) the provider agreement presupposed the existence and enforceability of A.R.S. § 36-2903(G)(4), which authorizes lien enforcement. Paragraph 15 cannot be interpreted in a manner that contradicts the rest of the contract.

Second, even if lien enforcement is collection from the patient, it is nevertheless permitted by A.A.C. R9-22-702. Under A.A.C. R9-22-702(D) a provider *may* "recover from a member that portion of a payment made by a third party to the member for an AHCCCS covered service if the member has not transferred the payment to the Administration or the contractor as required by the statutory assignment of rights to AHCCCS."[34] The regulation specifically *permits* providers to recover amounts paid to AHCCCS beneficiaries by third parties—which include tortfeasors. Thus, even if one views lien enforcement as collecting from the patient, the practice is specifically sanctioned by the very regulation Paragraph 15 incorporates.

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

## V. Conclusion.

The Court should deny Plaintiffs' motion for summary judgment and enter summary judgment in favor of Defendants on the Contract Claim.

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[33] *LaBombard,* 195 Ariz. 543, 991 P.2d 246; *Andrews,* 201 Ariz. 379, 36 P.3d 57.
[34] A.A.C. R9-22-702(D)(2).

RESPECTFULLY SUBMITTED this 7th day of March, 2014.

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