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MEMORANDUM

November 22, 2022

TO: Contract Support Cost Clients

FROM: Hobbs, Straus, Dean & Walker, LLP /s/

RE: ***Ninth Circuit Rules that Indian Health Service Owes Contract Support Costs on Third-Party-Funded Portion of Tribal Health Care Program***

On November 21, 2022, the Ninth Circuit Court of Appeals ruled in favor of the San Carlos Apache Tribe on a critical contract support cost (CSC) funding issue: whether health care services funded by third-party revenues, such as Medicare, Medicaid, and private insurance, generate CSC. Recent court decisions have favored the Indian Health Service (IHS) on this issue, holding that only funds appropriated to, and transferred by, IHS require the agency to add CSC. In ruling for the Tribe, the Ninth Circuit departed from the D.C. Circuit in *Swinomish Indian Tribal Community v. Becerra*,[1] creating a circuit split that may induce the Supreme Court to take the case should the Government petition for review. Hundreds of millions of dollars per year in CSC funding are riding on the outcome of the litigation on this issue.

The Ninth Circuit opened its analysis on a promising note: "This case presents a question of Native sovereignty in the context of a health care dispute." The Court interpreted the Indian Self-Determination and Education Assistance Act (ISDEAA) in this spirit, mindful of the interpretive rule that the ISDEAA, and any agreements entered under the ISDEAA, must be interpreted liberally in favor of tribes. The Defendants—collectively referred to here as IHS—would need to show that their interpretation was unambiguously correct in order to prevail.

The Court first addressed IHS's argument that the four corners of the ISDEAA contract foreclosed the Tribe's claims. IHS argued that it paid the amount specified in the funding agreement and could not possibly be liable for more. The court pointed out, however, that the agreement also required the amount to be adjusted as a result of increased program bases and CSC need—for example, if inclusion of third-party expenditures in the base were required.

[1] 993 F.3d 917 (D.C. Cir. 2021).

The Court therefore turned to whether the additional CSC was required by the ISDEAA, which says that CSC must be paid "for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract."[2] The Contract incorporated the ISDEAA, which requires the Tribe to use third-party revenues to provide additional health care services.[3] Such services are therefore activities required for compliance with the contract and, as such, are eligible for CSC, the Court concluded.

A separate part of the CSC provisions reinforced this reading. The ISDEAA defines CSC as expenses "incurred by the tribal contractor in connection with the operation of the Federal program."[4] Whether the additional services were part of the "Federal program," as the Tribe argued, or not, the Court found they were required by the contract and thus incurred "in connection with" that program and thus eligible for CSC.

The Ninth Circuit recognized that its reading conflicted with the D.C. Circuit in the *Swinomish* case, but identified several problems with the *Swinomish* analysis. The *Swinomish* court "ignore[d] the plain language of the statute" by refusing to include third-party-funded activities in the "cost of complying" with the IHS contract, when the contract itself requires those activities, the Ninth Circuit said. These activities and associated costs can be read to be part of "the Federal program" that generates CSC, the Ninth Circuit continued, and the Federal program certainly does not unambiguously exclude them, as *Swinomish* held. The District Court also followed *Swinomish* in holding that since the program income provision of the ISDEAA, § 5325(m), does not mention CSC, Congress could not have intended to provide CSC for third-party-funded activities. The Ninth Circuit called this reading "erroneous," reading the silence as an ambiguity favoring the Tribe.

Finally, the Ninth Circuit rejected IHS's argument that 25 U.S.C. § 5326 precludes payment of CSC for third-party-funded health care. That section of the ISDEAA requires that CSC cover only costs "directly attributable" to ISDEAA agreements and prohibits IHS from paying CSC for any agreements with "any entity other than the [IHS]." The District Court held that the additional administrative costs associated with third-party-funded activities are "undoubtedly 'attributable' to [the Tribe's] contract with IHS" but not "directly attributable" to it. The Ninth Circuit did not agree, noting that the contract required the Tribe to bill third parties and to spend the resulting revenues on further program services under the contract. The Court concluded that these additional expenditures were not unambiguously excluded from CSC by § 5326.

The Ninth Circuit therefore reversed the District Court's dismissal of the claims and remanded to that court for further proceedings. The Government could request rehearing by the three-judge panel or by the full Ninth Circuit en banc within 45 days of entry of

[2] Slip op. at 8, quoting 25 U.S.C. § 5325(a)(2).
[3] *See* 25 U.S.C. § 5325(m).
[4] 25 U.S.C. § 5325(a)(3)(A).

judgment. Alternatively, the Government could forgo requests for rehearing, which are rarely successful even when granted, and petition the U.S. Supreme Court to review the Ninth Circuit's decision. Although the Supreme Court accepts only a small percentage of such petitions every year, the circuit split with the Government as petitioner would increase the odds of acceptance. Complicating the landscape is the fact that a third appeals court, the Tenth Circuit, is currently considering this issue in the *Northern Arapaho* case and could rule any day. The loser of that decision will also likely seek review, perhaps increasing the odds of Supreme Court involvement even further.

Conclusion

The Ninth Circuit's ruling underscores that claims for unpaid CSC on third-party expenditures are very much alive, even though the litigation may continue for months or years. **The statute of limitations for such claims, under the Contract Disputes Act, is six years, running from the end of the Tribe's contract year. Thus, Tribes can still file claims for as far back as calendar year 2016 or fiscal year 2017 and should strongly consider doing so if they have not already.** Please let us know if you would like more information or assistance in filing claims.[5]

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster (jwebster@hobbsstraus.com or 202-822-8282), Geoff Strommer (gstrommer@hobbsstraus.com or 503-242-1745), or Steve Osborne (sosborne@hobbsstraus.com or 503-242-1745).

[5] For more information on these claims and the filing process, please see our memorandum of August 22, 2022.