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# MEMORANDUM

October 20, 2014

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: *Second Alaska Federal Court Decision Interpreting Section 206 of the Indian Health Care Improvement Act*

In January, 2013, we reported that the United States District Court for the District of Alaska issued a decision interpreting the language in Section 206(a) of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1621e(a), regarding the amount that a tribal health care provider is entitled to recover from a third-party insurer for health services provided.[1] The Court just issued a second decision in the case on October 15, 2014, explaining when Section 206(a) allows a third-party insurer to deduct cost-sharing and other charges from the amount paid to a tribal health care provider. A copy of the court's opinion, in *Alaska Native Tribal Health Consortium v. Premera Blue Cross*, No. 3:12-cv-0065-HRH (D. Alaska, Oct. 15, 2014), is enclosed. We explain these decisions and their potential impact on tribal health programs below.

***Background and the 2013 Decision***

The case arose because the Alaska Native Tribal Health Consortium (ANTHC) had been contracting with Premera Blue Cross (PBC) for approximately 10 years (2001 – 2011) at rates substantially below ANTHC's normal charges. ANTHC terminated the contract effective April 15, 2011, and sued PBC alleging that the contract rates were far below what ANTHC was entitled to receive under § 206(a) of the IHCIA. ANTHC further alleged that after the contract was terminated, PBC began paying its patients rather than ANTHC in order to get around § 206(a). However, ANTHC contended that PBC was independently liable to ANTHC under § 206 even though PBC may have reimbursed its covered patients for the services provided by ANTHC.

Section 206(a) of the IHCIA as reauthorized states in relevant part as follows:

> (a) RIGHT OF RECOVERY.—Except as provided in subsection (f), . . . an Indian tribe, or a tribal organization shall have the right to recover

[1] *Alaska Native Tribal Health Consortium v. Premera Blue Cross,* No. 3:12-cv-0065-HRH (D. Alaska, Jan. 24, 2013).

> from an insurance company, health maintenance organization, employee benefit plan, third-party tort-feasor, or any other responsible or liable third party . . . the reasonable charges billed by . . . an Indian tribe, or a tribal organization in providing health services, through . . . an Indian tribe, or a tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive damages, reimbursement, or indemnification for such charges if—
>
> (1) such services had been provided by a nongovernmental provider and
>
> (2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

In the Court's January, 2013 decision, it concluded that in the absence of a contract with PBC, ANTHC was only entitled to be paid its reasonable charges billed or the Alaska Usual, Customary, and Reasonable (UCR) rate, whichever is higher. The Court found that ANTHC was not entitled to be paid the highest contract rate that PBC would pay to another nongovernmental provider with whom PBC has a contract.[2]

In our prior report on this case, we noted that while the Court did not adopt ANTHC's interpretation of the statute, the result has positive aspects for tribal providers in Alaska: health insurers have no leverage to contract with tribal providers for rates less than billed charges or the state UCR rates, whichever is higher. Furthermore, health insurers may not circumvent § 206(a) by paying their insured patients rather than the tribal provider.

***The October 2014 Decision***

Unresolved in the Court's 2013 decision was the question of the amount PBC must pay to ANTHC under Section 206(a) for the period after ANTHC terminated its contract with PBC. ANTHC alleges that PBC has not been paying ANTHC's reasonable billed charges or the Alaska UCR rate—but something less because PBC reduces the bill to an "allowed amount" and then subtract co-payments, deductibles and co-insurance (collectively "cost sharing"). The Court thus considered whether Section 206(a) of the

[2] In Alaska, the Court said, not all nongovernmental providers are eligible to receive PBC's highest contract rate, but all nongovernmental providers are eligible by law to receive the Alaska UCR rate. 3 AAC 26.110. The Court found that "Section 206(a) does not require insurers, like [PBC], to pay their best rate to Tribal health providers." Additionally, the Court rejected ANTHC's argument that it was entitled to collect a higher rate of payment under Section 206 of the IHCIA during the time ANTHC had a contract in place with PBC—notwithstanding whatever rates were set out in the contract—and granted summary judgment on that issue and its interpretation of Section 206(a) to PBC. Thus, the Court determined that the right of recovery under Section 206(a) does not apply to contracted rates.

IHCIA allows PBC to reduce what it pays to ANTHC to an allowed amount, and then further reduce it by subtracting cost-sharing amounts.

The court clarified that it has interpreted Section 206(a) to unambiguously give a "tribal organization the right to recover the higher of its 'reasonable charges billed' or the Alaska UCR rate." Under what the Court describes as being the "two avenues of reimbursement under Section 206(a)," it ruled as follows:

1. If the third-party insurer is reimbursing the tribal organization pursuant to the "reasonable billed charges" clause of Section 206(a), the insurer ***cannot*** deduct cost sharing amounts from what it pays.

2. If the third-party insurer is reimbursing the tribal organization pursuant to the "if higher" payment clause of Section 206(a) (in Alaska, meaning the Alaska UCR according to the court), the insurer ***can*** deduct cost sharing amounts from what it pays.[3]

The Court makes this distinction based on its interpretation of the use of a comma and the location of the word "or" in the statutory language in Section 206(a), finding that the "if higher" clause is subject to the proviso "to the same extent [an] individual or any non-government provider of services would be eligible to receive . . . reimbursement," but that the "reasonable charges billed" clause is not subject to that same limitation. As in the 2013 decision, the Court finds the statutory language unambiguous, so the Court did not consider (nor address in the decision) the Indian canons of construction, which require ambiguous statutory provisions of Indian law to be liberally construed in favor of Indian tribes.

***Conclusion***

The Court's holdings in this case—in both the January, 2013 and October, 2014 decisions—are for now limited to application within the State of Alaska. Whether another court might rely on it for guidance, in similar circumstances, remains an open question at this time. We will continue to monitor this case and keep you informed.

If you have any questions or if you would like to discuss the Court's decision or Section 206 of the IHCIA generally, please contact Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstraus.com; Starla Roels at (503) 242-1745 or sroels@hobbsstraus.com; or Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstraus.com.

[3] Because the Court previously found that the "if higher" provision in Alaska means the Alaska UCR rate, the Court considered whether the Alaska UCR rate permits cost sharing deductions, and determined that it does. However, the Court clarified that "exactly what types of cost sharing will apply under Section 206(a) . . . when UCR rates are the basis for reimbursement to [ANTHC] has yet to be determined by the parties or the court."