

## **MEMO**

**To:** Kansas Hospital Association  
**From:** Lathrop & Gage LLP  
**Date:** November 10, 2015  
**Subject:** **Patient Billing Dispute**

The Kansas Hospital Association (“KHA”) requested information and guidance regarding letters its members are receiving from an out of State law firm related to the accounts of certain patients insured through a Benefit Plan (“Plan”) which does not contract with the hospital members.

### **1. Executive Summary**

KHA members hospitals have inquired regarding the ability to pursue collection from these patients for balances not covered by the Plan. Also relevant to this issue is whether KHA members hospitals have a remedy available to prevent the Plan’s interference with its patient collection efforts. KHA members hospitals are entitled to collect the remaining balance due from the patient and may have a cause of action to prevent further interference by the Plan or its plan fiduciary.

#### **(a) Collection of the Patient Balance**

Upon admission to a KHA members hospital, each patients typically sign a financial agreement accepting responsibility for payment of the amount billed by the hospital. So long as the KHA member hospital has not contracted with or otherwise agreed to be bound by the terms of the Plan, partial payment by the Plan does not prevent a hospital’s further collection activity with the patient. KHA members hospital’s should not appeal any determinations to the Plan as this is a legal trap and will result in waiver of the ability to collect from the patient.

#### **(b) Prevention of Further Interference**

The Plan is providing free legal services to its members to defend collection efforts by KHA members hospitals. This activity by the Plan and its plan fiduciary may be considered tortious interference with KHA members hospitals right to collect from the patient for services rendered. KHA members hospital should evaluate the merit of pursuing a potential tortious interference claim with hospital counsel as it may include injunctive relief to prevent future interference in addition to damages for actions already taken by the Plan and/or its plan fiduciary.

### **2. Summary of Facts**

KHA members hospitals have provided medical services to individuals who are insured through the Plan. KHA members hospital do not contract with the Plan related to medical services. Patients involved typically have signed an assignment of benefits for KHA members hospital which states:

**“Financial Agreement:** . . . The undersigned understands and agrees that [HOSPITAL] is not responsible for collecting insurance or for resolving any disputed insurance or other third party payor claim and to pay [HOSPITAL] all costs and charges incurred in connection with the patient’s hospitalization. It is agreed that if full payment is not made by insurance or other third party payors, the patient/guardian assumes responsibility for all remaining charges. Accounts not paid within 30 days of insurance payment and final bill may be charged interest at a rate not to exceed the maximum permitted by law.

**Assignment of Benefits:** I hereby assign to [Hospital] any medical benefits arising out of any policy of insurance insuring the patient or any other person liable for the patient’s care to be applied to the charges for services rendered. I understand I am financially responsible to the hospital for charges not covered by this agreement.”

Following submission of the claim to the Plan, KHA members hospitals received a letter from a third party administrator (“TPA”) with an explanation of benefits (“EOB”) and partial payment for services. On the EOB, the TPA indicates that “20% added to Medicare allowed amount in accordance with the terms of the Claim Review and Audit Program provisions of the Plan.” The EOB states “Appeal rights under this plan also apply to providers of services.” On some, but not all of the EOBs, the summary of charges lists the remaining balance as “ineligible charges” and indicates that the amount due to the provider from the patient is zero. However, neither the EOB nor the check indicate that the amount billed is in dispute or that the payment issued is considered “payment in full.”

The letter notifies the KHA members hospital of its right to appeal on behalf of the patient and details the appeals process. The letter also states that “When you, as the provider of service, exercise your right of appeal under the terms of this Plan, you are agreeing to the terms and conditions through which this right is granted, including your agreement to pursue recovery of certain denied expenses directly from the Plan and waiving any right to recover those certain expenses from the Plan participant.”

KHA members hospital’s typically apply the payment from the Plan and submit a balance bill to the respective patient for the remaining balance due. In response to the patient billing, KHA members hospitals have received identical letters from the law firm of Lewis, Brisbois, Bisgaard, & Smith LLP based in Atlanta, Georgia (“Attorney”). In these letters, the Attorney 1) instructs for all communication to be made to the attorney and not the patient, 2) instructs the KHA member hospital to follow the ERISA appeals process, and 3) states that the patient revokes any waiver of HIPAA rights or prior

HIPAA authorization for the KHA member hospital to disclose medical records or information of the patient.

### 3. Ability to Collect from the Patient

Upon admission, a hospital typically obtained an assignment of the patient's right to collect from the Plan. However, in that assignment, the hospital will often clearly communicate that the patient/guardian retains responsibility for any charges not paid by the Plan. The Plan is an employer benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA requires the Plan to make certain payments for services consistent with the Plan documents. However, "nothing in ERISA prevents medical professionals from submitting – and state courts from enforcing – bills for services that are not covered by welfare benefit plans."<sup>1</sup>

#### (a) Potential Waiver of Right to Collect

Kansas courts generally enforce contracts between hospitals and patients for medical services, even when an insurance company has covered a portion of the bill.<sup>2</sup> Thus, a Kansas hospital is only prevented from collecting the balance of the bill from the patient if it has entered into a contractual agreement that prevents such collection. Here, if the Kansas hospital does not have a provider contract with the Plan it is not bound by the terms of the Plan. **HOWEVER, if the hospital files an appeal to the Plan regarding the allowed amount, then, pursuant to the letter from the TPA, the hospital will waive its right to collect from the patient.** The opportunity to appeal on behalf of the patient as promoted by the Plan is a legal trap that should be avoided by Kansas hospitals. Hospitals should **not** file any appeals if they wish to pursue collection from the patient.

The other opportunity for the patient or the Plan to avoid additional payment to hospital would be to mark "payment in full" on a payment by check. If any of the payments that have been accepted by the hospital from the Plan or the applicable patient have been marked as "paid in full" or similar language, the hospital may have agreed to settle the debt for the payment amount by cashing the check.<sup>3</sup> **We have received some documentation from KHA members hospital which indicates that the patient or the Plan have offered, or hospitals has accepted, any payment marked with language similar to "paid in full." If a hospital inadvertently deposits that check a court may determine that no further payment is due.** Some of the EOBs indicate that additional payment due from the patient is zero and that the remaining balance is "ineligible charges," but this is unlikely to be sufficient language to trigger a full waiver of collections by KHA member hospitals. Further, none of the letters from the TPA or the Attorney assert that KHA member hospitals have already acted to accept terms of the Plan or payment in full.

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<sup>1</sup> *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Pathology Laboratories of Arkansas, P.A.*, 71 F.3d 1251, 1253 (7<sup>th</sup> Cir. 1995).

<sup>2</sup> *See, e.g., Stormont-Vail Hospital v. Spurling*, 331 P.3d 834 (2014).

<sup>3</sup> *See, e.g., Weidensaul v. Greenhouse Restaurant of Lawrence, Inc.*, 13 Kan. App. 2d 95 (1988).

If KHA member hospitals have not agreed to the terms of the Plan or accepted payment in full, they are entitled to continue collection efforts under their agreement with the patient. For future services, KHA member hospital seeing patients with these Plans may consider refusing to accept any assignment, submit any claims or process any payment from the Plan to avoid inadvertently waiving the right to collect from the patient.

(b) Impact of Attorney Communications

The Attorney's instruction for KHA member hospitals to direct all future communications to the attorney and not the patient does not have any direct impact on a Kansas hospital's ability to submit bills to the patient. However, the Fair Debt Collections Act prohibits "debt collectors" from communicating directly with a debtor when they are aware that the debtor disputes the debt and has retained an attorney.<sup>4</sup> The term "debt collector" means any person who uses interstate commerce in any business for the collection of any debts owed or due or asserted to be owed or due another.<sup>5</sup> It does not include any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.<sup>6</sup> **Thus, a Kansas hospital's staff acting on behalf of the hospital is not subject to this limitation, but a collection agency, billing company, attorney, or other individual acting on behalf of a Kansas hospital is required to communicate through the Attorney and not directly to the patient.**

If the patient does not submit payment for the balance due, consistent with the demand from the hospital, litigation against the patient to collect the balance is permitted.

#### 4. Additional Remedies Available

In addition to collection of the balance due from the patient, Kansas hospitals may have a cause of action against an employer or its plan fiduciary. The documents we received do not specifically identify the plan's fiduciary, but the Attorney, TPA documents, and approach of the Plan is identical to that promoted by ELAP Services, LLC ("ELAP"), providing us reason to believe that ELAP is involved in the decisions.

ELAP has promoted articles asserting its approach to payment of hospital bills. The articles promote ELAPs success in the courts; however, the promoted cases were all related to the healthcare provider's attempt to collect from the benefit plan under ERISA following loss of an appeal to the plan.<sup>7</sup> Further, ELAP's website advises plan members "In the event that a provider sends you an Invoice for the unpaid balance, ELAP will handle this "balance bill" and assign an attorney to defend you if necessary. There is no

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<sup>4</sup> 45 U.S.C. 1692c(a)(2).

<sup>5</sup> 15 U.S.C. 1692a(6).

<sup>6</sup> 15 U.S.C. 1692a(6)(A).

<sup>7</sup> See, e.g. *Floyd Medical Center v. Warehouse Home Furnishings Distributors, Inc.*, 2012 WL 1438470 (2012).

cost to the employee for ELAP's services or for any legal representation.”<sup>8</sup> ELAP alleges on its website that pursuit of collection by a hospital is improper and “ELAP will defend the plan and the member to assure plan assets are protected against unfair billing and collection practices.”<sup>9</sup>

In other situations where an employer, separate from denying payment under a plan, has discouraged employees from paying medical bills and otherwise interfered with a healthcare provider's right to payment, courts have denied application of ERISA and allowed the cases to continue on the basis of alleged tortious interference with a contract under state law.<sup>10</sup> A claim for tortious interference requires: (1) a contract; (2) the wrongdoer's knowledge of a contract; (3) the intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom.<sup>11</sup> Here, a Kansas hospital would take the position that it entered into a contract with the patient for the provision of medical services, as evidenced by the intake documents. ELAP and the employer are aware of the contract and have publicized, through articles and ELAP's website, that they recognize the medical bills may be substantial. ELAP and the employer have discouraged the patient from paying the bill and have gone so far as to provide free legal fees to dispute the bill. ELAP and the employer have no right or duty to interfere with the patient's payment as no additional payment is being requested of the plan. Lastly, Kansas hospitals are suffering damages related to ongoing collection costs.

ELAP has promoted that it contracts with over two hundred (200) employers, insuring over one hundred fifteen thousand (115,000) workers and dependents and defends collection efforts for one (1) out of every five (5) patients using a hospital. KHA member hospitals are not alone in the harm caused by ELAP. As such, Kansas hospitals may wish to evaluate with their legal counsel pursuit of a tortious interference claim.

## Conclusion

When presenting for services, the patients involved here have typically signed financial agreements which clearly accept responsibility for any payment of charges not reimbursed by their insurance plan. Under ERISA and Kansas law, acceptance of a partial payment from an insurance plan does not impact a Kansas hospital's ability to collect the remaining amount due from the patient. Hospital's should **not** file an appeal to the plan. Hospitals should engage local counsel to 1) send a letter in response to the Attorney asserting the Hospital's rights and, 2) if the remaining balance is not paid in a timely manner, file suit for collection against the patient(s).

Kansas hospitals should evaluate the potential tortious interference claim against the Plan and/or ELAP, either on its own behalf or as a representative class member.

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<sup>8</sup> See ELAP Services, LLC Website “for Covered Plan Members” available at <http://www.elapservices.com/covered-plan-members>.

<sup>9</sup> See ELAP Services, LLC Website “Balance Bill Response Team,” available at <http://www.elapservices.com/services/balance-bill-response-team>.

<sup>10</sup> *E.g., Grand Park Surgical Center Inc. v. Inland Steel Co.*, 930 F. Supp. 1214 (N.D. Ill. 1996).

<sup>11</sup> *Cohen v. Battaglia*, 296 Kan. 542, 546 (2013).