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MEMORANDUM

November 14, 2013

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker LLP

Re: *Tribal Clinics' Status as Federally Qualified Health Centers for Purposes of Recovering Expenses for Osteopathy, Dentistry, Podiatry, Optometry, or Chiropractic Services*

On September 23, 2013, the Ninth Circuit Court of Appeals issued its decision in *California Association of Rural Health Clinics v. Douglas*, 2013 WL 5184355 (Ninth Cir. 2013). The court rejected California's 2009 elimination of nine "optional" benefits: adult dental services, acupuncture, audiology and speech therapy services, chiropractic services, psychology services, and incontinence creams and washes. The court ruled that the Medicaid Act requires California's Medi-Cal program to provide payment to Rural Health Clinics (RHCs) and Federally-qualified Health Centers (FQHCs) for the services of "six classes of professionals:" doctors of medicine or osteopathy, dentistry, podiatry, optometry, or chiropractic services. RHCs and FQHCs in California now have the right to seek reimbursement for those services dating back to 2009.

In rendering its decision, the court stated that the Medicare Act "requires participating states to cover certain services in their state plans" and reasoned that both the provision of "physician services," as defined under the Medicaid Act, and RHC and FQHC services are mandated. Because the Medicaid Act cross-references the Medicare Act in defining RHC and FQHC services, 42 U.S.C. § 1396d(l)(1)-(2), the court applied the Medicare Act's comparatively broad definition of "physician" to determine that the state is required to cover RHC and FQHC costs for the services of doctors of medicine or osteopathy, dentistry, podiatry, optometry, or chiropractic services. *See* 42 U.S.C. § 1395(r)(1)-(5).

The Medicaid Act's definition of FQHCs includes certain tribal health care centers: "the term 'Federally-qualified health center' means an entity which ... includes an outpatient health program or facility operated by a tribe or tribal organization under the Indian Self-Determination Act ... or by an urban Indian organization receiving funds under title V of the Indian Health Care Improvement Act ... for the provision of primary health services." 42 U.S.C. § 1396d(l)(2)(B)(iv). However, most tribal clinics have not met the regulatory requirements for FQHC status, such as the registration and reporting requirements. Although one might argue that tribal clinics, as one category of FQHCs, should be eligible for reimbursement at the OMB rate for the Medicaid-mandated

services identified by the Ninth Circuit, if a tribal clinic has not been confirmed as an FQHC by the Centers for Medicare and Medicaid Services (CMS) and has not entered into a related agreement with CMS, the likelihood of such an argument being accepted by the Department of Health Care Services and CMS is unclear.¹ Additionally, it is unsettled whether tribal clinics, if reimbursed, could be reimbursed at the OMB rate. One option for tribal clinics is to determine whether *prospective* status as an FQHC would better serve a tribal clinic's interests and, if so, begin the process to achieve that status.

Additionally, since the Ninth Circuit includes, in addition to California, the states of Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, tribes in these other states may be able to argue that their states must provide payment for the non-optional services of doctors of medicine or osteopathy, dentistry, podiatry, optometry, and chiropractic services. In other words, based on the court's ruling, these services are no longer considered optional when provided by RHCs and FQHCs, including tribal and Urban Indian organizations certified as FQHCs.

Please let us know if you would like us to explore these issues further, including guidance regarding the pros and cons of seeking certification as an FQHC. Please contact Elliott Milhollin (202)822-8282 or emilhollin@hobbsstrauss.com; or Stephen V. Quesenberry (916)442-9444 or squesenberry@hobbsstrauss.com.

¹Even if the tribal clinics could be reimbursed as FQHCs, it appears that, based on the California statute of limitations, they would have only until November 25, 2013, to submit reimbursement claims.