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## Indian Health Service Recovery Efforts Against Commercial Health Plans

Health plans across the country are increasingly receiving demands for payment from the Indian Health Service (“IHS”), tribal health programs (collectively “Indian Organizations”) and the U.S. Department of the Treasury for services provided by Indian Organizations to commercial health plan members. These claims for recovery are premised on the fact that Indian Organizations are generally considered a “payor of last resort.” 25 U.S.C. § 1623(b); see also, 42 C.F.R. § 136.61. To effectuate this principle, federal law provides Indian Organizations with a right of recovery against certain third parties, including health insurers, for services provided to a health plan’s members by an Indian Organization provider. 25 U.S.C. § 1621e(a). However, some Indian Organizations have apparently interpreted that right as unlimited.

A broad, unlimited interpretation of the recovery right does not appear to be supported by the plain language of the recovery statute, which specifically states that Indian Organizations can only recover “to the same extent” that the member or a nongovernmental provider would be eligible to receive reimbursement if a nongovernmental provider had provided and the member was required to pay for the medical services. The central question is the extent to which the statute’s “to the same extent” provision limits an Indian Organization’s recovery right, particularly in cases where a nongovernmental out-of-network provider would not be eligible to receive payment from a commercial health insurer due to a member’s coverage restrictions.

Case law supports the position that certain health insurance policy limitations are enforceable against Indian Organizations that attempt to recover under 25 U.S.C. § 1621e(a). Courts that have applied this and other similar recovery statutes have found that enforceability hinges on whether the plan limitation is substantive or procedural. Generally, enforceable substantive plan limitations are those that limit the type, quantity or location of services covered under the plan. Examples include: out-of-network or prior authorization requirements, visit limitations, and coverage exclusions. Conversely, unenforceable procedural plan limitations are those that effectively preclude any ability for recovery by an Indian Organization, such as a requirement that a claim is only payable if submitted by the member.

Although the IHS, the Department of Health and Human Services and other regulators may argue otherwise, there is no known legal support for the position that 25 U.S.C. § 1621e(a) preempts all plan limitations on Indian Organization recovery claims, or that the statute was intended to provide unabated coverage for services provided by an Indian Organization. If true, it would effectively allow a health plan member to access Indian Organization facilities and providers without limitation, including for services or treatments not otherwise covered under the plan, including non-covered cosmetic or experimental services. But when the statute is strictly construed in accordance with its intent, substantive health plan coverage limitations (e.g., out-of-network, prior authorization) are permissible for Indian Organizations, just as they would for any other nongovernmental provider.

Before any private federal contractor attempts to collect against a health plan, the Indian Organization that provided medical services will typically send a demand for payment to the plan. It is critical for a

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health plan to address any recovery demand at the outset, and not just hope the issue will go away. Ignoring the demand may lead to debt collection efforts by the Department of the Treasury, and limit the health plan's options for disputing the attempted recovery.

*This document is intended to provide you with general information regarding the Indian health service recovery efforts. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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