

MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Ed Flanagan
Commissioner
Department of Labor & Workforce
Development

DATE: August 16, 2001

A.G. FILE NO: 661-01-0269

TELEPHONE NO: (907) 269-5178

SUBJECT: Requests for Payment
under the Indian Health
Care Improvement Act
Submitted to the
Fishermen's Fund

FROM: Toby N. Steinberger
Assistant Attorney General
Governmental Affairs Section
Civil Division

You have asked for a legal opinion regarding whether the Fishermen's Fund has an obligation to pay the cost for medical services that an Alaskan Native commercial fisherman receives under the Indian Health Care Improvement Act (the "Act"). It is our opinion that if the Indian Health Service, an Indian tribe, or a tribal organization treats an Alaska Native for injuries occurring as a result of commercial fishing, the Fishermen's Fund is not responsible for paying the cost for medical treatment. However, if a private or public health provider under contract with the Indian Health Service treats the same fisherman, the Indian Health Service is the payor of last resort and consequently the Fishermen's Fund is responsible for the first \$2,500 that the private or public health provider charges for medical treatment.

ANALYSIS

I. THE FISHERMEN'S FUND IS NOT REQUIRED TO PAY FOR MEDICAL TREATMENT PROVIDED BY THE UNITED STATES INDIAN HEALTH SERVICE, AN INDIAN TRIBE, OR A TRIBAL ORGANIZATION.

A. The Commercial Fishermen's Fund Act is not a workers' compensation law.

Under AS 23.35.070, the Fishermen's Fund will pay for medical treatment if a commercial fisherman is injured or disabled as a result of an accident directly connected with the fishing endeavor. Except for compelling reasons, the Fishermen's Fund allows no more than \$2,500 for any injury. AS 23.35.140.

The Indian Health Service and authorized Indian tribes and tribal organizations provide direct medical treatment to Alaska Natives at no cost to them. Indian Health Care Improvement Act, 25 U.S.C.A. §1601 *et.seq.* Under 25 U.S.C.A. §1621e, if a Native American or Alaska Native has private health insurance, the Indian Health Service, an Indian tribe, or a tribal organization has a right of recovery against that insurance company for the reasonable cost for medically treating that patient as though each were a private health care provider.¹

25 U.S.C.A. §1621e further provides that the Indian Health Service, an Indian tribe, or a tribal organization has a right of recovery against a state when the state provides health services for an injury, illness, or disability that is covered under a workers' compensation law. 25 U.S.C.A. §1621e provides in pertinent part:

¹ Congress recognized that some Native Americans and Alaska Natives were covered by employer or other private health insurance policies but that most standard insurance policies do not provide coverage for expenses the insured is not legally obligated to pay. In effect, insurance companies were receiving premiums for nothing. Section 1621e was meant to increase the resources available for Indian health care by preventing insurance companies from avoiding payment on the grounds that the insured was eligible for Indian Health Service benefits and therefore not financially responsible for the cost of the services. Congress concluded: "Given the well-documented insufficiency of resources that are available to tribal governments and Indian citizens, expenditures for insurance coverage that provides no benefits to the insured constitute an obvious waste of scarce resources." S. Rep. No. 508, 100th Cong., 2d Sess. 15 (1988), *reprinted in* 1998 U.S.C.C.A.N. 6183, 6197.

Sec. 1621e. Reimbursement from certain third parties of costs of health services.

(a) Right of recovery. Except as provided in subsection (f) of this section, the United States, an Indian tribe, or a tribal organization shall have the right to recover the reasonable expenses incurred by the Secretary, an Indian tribe, or a tribal organization in providing health services, through the Service, an Indian tribe, or a tribal organization, to any individual to the same extent that such individual, or any non-governmental provider of such services, would be eligible to receive reimbursement or indemnification for such expenses if -

- (1) such services had been provided by a non-governmental provider, and
- (2) such individual had been required to pay such expenses and did pay such expenses.

(b) Recovery against State with workers' compensation laws or no-fault automobile accident insurance program. Subsection (a) of this section shall provide a right of recovery against any State only if the injury, illness, or disability for which health services were provided is covered under -

- (1) workers' compensation laws, or
- (2) a no-fault automobile accident insurance plan or program.

(Emphasis added.)

Section 1621e(b) does not give the Indian Health Service, an Indian tribe, or a tribal organization a right of recovery for health care against the Fishermen's Fund because the Commercial Fishermen's Fund Act is not a state workers' compensation law. The purpose of a workers' compensation law is to efficiently resolve disputes between employers and their employees regarding work injuries. *Gordon v. Burgess Const.*, 425 P.2d 602 (Alaska 1967). It is in lieu of a tort remedy. The Commercial Fishermen's Fund Act is not a workers' compensation law because it does not resolve personal injury disputes between employers and employees. It covers all commercial fishermen, regardless of their employment status. AS 23.35.010. Furthermore, a state cannot resolve workers' compensation claims between employers and their injured commercial fishermen since their claims fall exclusively under the federal maritime remedies of the

Jones Act and general federal maritime law. *Anderson v. Alaska Packers Ass'n.*, 635 P.2d 1182, 1184 (Alaska 1981) (Injured commercial fisherman fishing in navigable waters could not seek remedy under Alaska's workers compensation law; fisherman's claim was subject to the exclusive jurisdiction of the United States).²

B. The Fishermen's Fund is not a state self-insured program.

Even assuming that the Commercial Fishermen's Fund Act is a workers' compensation law, §1621e(b) has no relevance to commercial fishermen. Section 1621e(b) only applies when a state is acting as a self-insurer in limited situations: under a workers' compensation law or under a no-fault automobile insurance program – and not when it otherwise insures the individual, such as under a group health plan. The Fishermen's Fund does not insure the state from liability for workers' compensation claims or no-fault automobile insurance claims.

During the debate on the 1988 amendments to the Indian Health Care Improvement Act, Senator Inouye emphasized that the Indian Health Service's right of recovery against a state applies only when a state insures a person under (1) a workers' compensation program or (2) a no-fault automobile accident insurance program. The Congressional Record reads as follows:

Mr. MURKOWSKI. Mr. President, I have an inquiry of the committee chairman regarding reimbursement for health care services provided to Alaska Natives and Indians by the IHS. It is my understanding that the intent of section 204(b) is to limit such reimbursement from States and State political subdivisions to services provided for injury or illness covered by workers' compensation or no-fault insurance programs and not to seek reimbursement of IHS medical expenses for injury or illness when the State or political subdivision **otherwise insures the individual receiving the care.**

Mr. INOUYE. That is correct. Subsection (b) of section 204 of the bill limits the authority of the IHS to recover from a State or any political subdivision thereof only medical expenses incurred by

² The Workers' Compensation Act has historically excluded commercial fishermen. AS 23.30.230(a)(6).

Alaska Natives and Indians which are covered by no-fault auto insurance and workers' compensation programs. The Federal Government cannot otherwise seek reimbursement if that individual receives IHS medical care. Thus, if a State or political subdivision of a State self-insures its employees for health care, the Federal Government is not authorized under this bill to seek reimbursement for the services rendered.

Mr. MURKOWSKI. I thank the chairman for his succinct explanation of the intent of section 204(b) of the Indian health care amendments.

134 Cong.Rec. S13,557, S13,568 (daily ed. Sept. 28, 1988) (emphasis added).

The 1992 amendments to the Indian Health Care Improvement Act demonstrate that §1621e(b) was intended to apply only when a state insures itself from claims. The Report by the Senate Select Committee on Indian Affairs reads in pertinent part:

Tribal health contractors have informed the Committee that certain insurance companies refuse to reimburse the contractors for services provided to Indian and Alaskan Native policyholders. Under the Indian Health Care Improvement Amendments of 1988, there is a right of recovery against private insurers with respect to expenses incurred by the Secretary in providing health services. Congress intended this right to include tribal governments that contract with the government to provide health care as well as the Secretary. . . . The Committee has received reports from several tribal governments and tribal organizations regarding the refusal of some states and political subdivisions of states to pay for health care provided by tribal contractors. The Committee intends this right of recovery to extend to all private insurers, including self-insurance plans developed and maintained by states or political subdivisions of states.³

S.Rep. No. 102-392, 102 Cong.2d Sess. (1992), *reprinted* in 1992 U.S.C.C.A.N. 3943, 3962-63; 138 Cong.Rec. S18314-02 (Oct. 29, 1992) (emphasis added).

³ In 1992, Congress deleted the reference to “political subdivision” in §1621e(b).

The Fishermen's Fund is not private insurance or a self-insurance plan developed or maintained by the state to protect the state from liability for workers' compensation claims or for no-fault accident claims. It is simply a dedicated fund, funded solely by commercial fishermen licensing fees, to reimburse injured commercial fishermen for a limited amount of their cost for medical care.

II. UNDER THE FEDERAL REGULATIONS, THE INDIAN HEALTH SERVICE, AND NOT THE FISHERMEN'S FUND, IS THE PAYOR OF LAST RESORT FOR PRIVATE OR PUBLIC HEALTH CARE PROVIDED TO ALASKA NATIVES.

In addition to providing health care services directly to Native Americans and Alaska Natives at Indian Health Service (or Indian tribe or tribal organization) facilities, the Indian Health Service also contracts with public and private health care facilities to provide health care to Native American and Alaskan Natives. 42 C.F.R. §§36.11(b), 36.21-36.25 (1999). When the Indian Health Service enters into contracts with private or public health care facilities ("contract health services") to provide health care, the Indian Health Service is not the health care provider but is the payor for the services.

Under federal law, when the Indian Health Service contracts with private or public health care facilities, the Indian Health Service is the "payor of last resort." Pursuant to 42 C.F.R. § 36.61, if there are alternate resources to pay for the health services, those alternate resources must pay the medical bills for the contract health services before the Indian Health Service is required to pay. The Indian Health Service's obligation to pay for contract health services⁴ only arises when all alternate resources have been exhausted. "Alternate resources" include "health care programs for the payment of health services including . . . State or local health care programs." 42 C.F.R. § 36.61 provides in pertinent part:

§ 36.61 Payor of last resort. (a) The Indian Health Service is the payor of last resort for persons defined as eligible for contract health services under the regulations in this part, notwithstanding any State or local law or regulation to the contrary.

⁴ 42 CFR § 36.21(e) defines "contract health service." It reads in pertinent part: "*Contract health services* means health services provided at the expense of the Indian Health Service from public or private medical or hospital facilities other than those of the Service."

...

(c) *Alternate resources* means health care resources other than those of the Indian Health Service. Such resources include health care providers and institutions, and health care programs for the payment of health services including but not limited to programs under titles XVIII or XIX of the Social Security Act (i.e., Medicare, Medicaid), State or local health care programs, and private insurance.

(Emphasis added.)

The Fishermen's Fund is an "alternative resource" because it provides for the payment of health services.

The issue that arises is who is the payor of last resort when an injured Alaskan Native commercial fisherman is treated by a contract health service provider: the Indian Health Service or the Fishermen's Fund. Under 8 AAC 55.010(e) the Fishermen's Fund is also the payor of last resort. 8 AAC 55.010(e) provides that "Compensation from the fund is limited to medical expenses that are not otherwise covered by public or private insurance."

We need not reach the issue of whether the Indian Health Service is "public insurance." Assuming that the Indian Health Service provides public insurance, it is our opinion that the Indian Health Service, and not the Fishermen's Fund, is the payor of last resort for "contract health services." The federal and state regulations are in direct conflict, since both the Indian Health Service and the Fishermen's Fund cannot be the payor of last resort.

Federal law preempts state law "if the state law conflicts with the federal law to the extent that (a) it is impossible to comply simultaneously with both or (b) the state regulation obstructs the execution of the purpose of the federal regulation." *Interior Regional Housing Authority v. James*, 989 P.2d 145, 149 (Alaska 1999). *See also, State v. Kalve*, 9 P.3d 291, 294 (Alaska 2001). The intent of the federal regulation is to conserve the limited amount of federal funds that the Indian Health Service has available to pay for third party services. The regulation governs priorities among payors. Thus, to the extent that both the Fishermen's Fund and the Indian Health Service claim to be the payor of last resort, 8 AAC 55.010(e) is preempted by federal regulation since 8 AAC 55.010(e) is in direct conflict with federal regulation.

CONCLUSION

In summary, the Indian Health Service, an Indian tribe, or a tribal organization do not have a right of recovery against the Fishermen's Fund under 25 U.S.C.A. §1621e(b) when they are the health providers. However, the Indian Health Service is the payor of last resort under 42 C.F.R. § 36.61 when it contracts with private and public health providers to provide health services to Alaskan Natives and Native Americans.

TNS:kmh

cc: Renee Howell, Fishermen's Fund Project Coordinator