

K&L GATES

TRIAGE: RAPID LEGAL LESSONS FOR BUSY
HEALTH CARE PROFESSIONALS



Segment 3

Reference-Based Pricing

Gary S. Qualls

NO ACCORD & SATISFACTION

- For multiple reasons, RBAs' positions may sometimes be untenable.
 - First, the letter from RBA is provided after payment had already been received by the Provider and deposited.
 - However, accord and satisfaction language must be included at the time payment is received.

NO ACCORD & SATISFACTION

- Second, accord and satisfaction is available as a defense only when a claim is unliquidated or subject to a bona fide dispute.
 - If a quantifiable amount is owed by the patient from the remaining balance, the claim is not unliquidated.
 - Plus, when the Provider receives payment from the RBA, there must be a dispute with the patient regarding the remaining balance due.

NO ACCORD & SATISFACTION

- Third, the RBA is not in a position to settle what is ultimately a dispute between the Provider and the patient for the remaining amount owed.
 - The RBA likely can demonstrate no legal authority to act as an agent or representative of the patient with respect to these amounts.

NO ACCORD & SATISFACTION

- Finally, in any event, no “legal consideration” is being provided in connection with the accord and satisfaction letters.
 - The only payment from RBA is the exact amount otherwise dictated by the RBA under the terms of the Plan.
 - The RBA is not providing consideration to the Provider to settle the remaining amount owed by the patient to the Provider.

NO ACCORD & SATISFACTION

- Thus, an RBA often cannot preclude a Provider from balance billing the patient on a theory of accord and satisfaction.
- Thus, the RBA should not be asserting otherwise on behalf of patients.

TORTIOUS INTERFERENCE WITH CONTRACT

- Do RBAs' practices tortiously interfere with the Provider's patient contracts?
- Once the RBA makes its partial payment to the Provider, the Provider is permitted to seek the remainder of its owed charges from the patient pursuant to the patient responsibility agreement that patients sign with the Provider at the time of services.

TORTIOUS INTERFERENCE WITH CONTRACT

- However, RBAs are often taking an active role in attempting to induce the patient not to perform their contract with the Provider (i.e., not to pay the owed contractual balance) by, among other things:
 - employing “advocates” who provide false and misleading information to patients;
 - drafting demand letters on the patient’s behalf; and
 - sending accord and satisfaction letters to providers incorrectly stating that accepting the insurer’s partial payment was a full accord and satisfaction of the patient’s bill.

UNFAIR TRADE PRACTICES

- **North Carolina Unfair and Deceptive Trade Practices Claims and Federal Lanham Act Claims.**

- RBA activities may constitute conduct actionable under:
 - the North Carolina Unfair and Deceptive Trade Practices Act (“UDTPA”), N.C. Gen. Stat. § 75-1.1; and
 - the U.S. Lanham Act, 15 U.S.C. § 1125(a).

UNFAIR TRADE PRACTICES

- RBAs' acts may **constitute “unfair or deceptive acts or practices”** under the UDTPA and false or **misleading statements of fact that have a tendency to deceive** under the Lanham Act.
- Because of the direct impact to Providers resulting from RBAs' practices, Providers may have standing to sue RBAs under both statutes.
- Both statutes provide opportunities for “enhanced damages.”

CHAMPERTY AND MAINTENANCE

- To the extent that the RBA's are intermeddling in a contractual dispute between a patient and a Provider by providing financial or other assistance to the patient to defend against a possible suit, those actions potentially violate the North Carolina doctrine of champerty and maintenance.
- See *Oliver v. Bynum*, 163 N.C. App. 166, 170–171, 592 S.E.2d 707, 711 (2004) (a party engaged in champerty and maintenance when an individual not party to a suit “facilitated the financing” of the suit “for the purposes of stirring up strife and continued litigation.”).

Today's Presenter



Gary S. Qualls

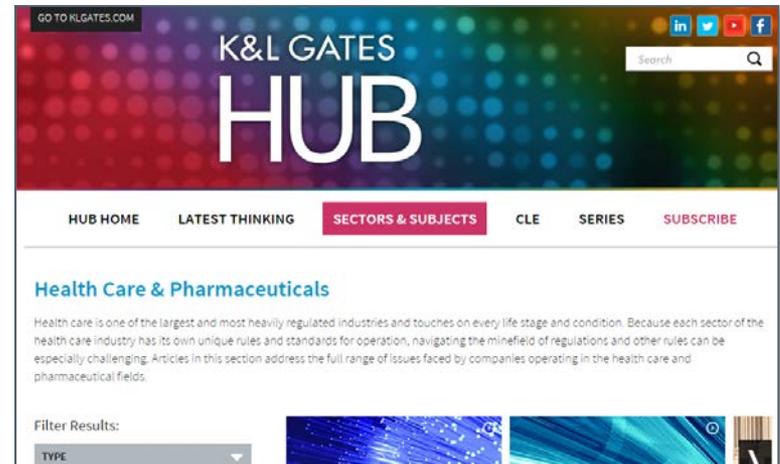
Research Triangle Park

1.919.466.1182

gary.qualls@klgates.com

For more information on our Health Care Practice Group please visit our [website](#).

For additional insights into Health Care Law please visit [K&L Gates HUB](#).



K&L GATES