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**ALLISON M. MYERS, PARALEGAL**

**MEMORANDUM**

**TO:** Town Board, Town of Ulysses

**FROM:** Mariette Geldenhuys, Esq.  
Attorney for the Town of Ulysses

**RE:** Options for EMS contracts and billing

**DATE:** November 9, 2010

**I. BACKGROUND AND QUESTION PRESENTED**

The following issues were addressed in my October 11, 2010 memorandum:

- A. The Town can contract with another entity to provide ambulance service in the Town. This includes a private entity.
- B. An ambulance district can contract with another entity to provide ambulance service within the district.
- C. A town or ambulance district can charge a per call fee for users of the ambulance service.

Another copy of my October memorandum is distributed with this memorandum.

The question addressed in this memorandum is whether the Town can bill only residents or users who have health insurance for ambulance services (also known as “insurance-only” billing). A related question is whether a Town can pay or absorb co-pays and deductibles.

**II. ANALYSIS**

As outlined in my Memorandum of October 11, 2010, the Town has the authority to fix a schedule of fees and charges for ambulance services provided pursuant to a contract with the municipality. The Town may provide for the collection of the fees and charges or may formulate rules and regulations for the collection thereof by the entity which furnishes the services. Therefore, any billing scheme must be separately approved by the Town.

The “insurance-only” billing program proposed by the Village would involve billing only residents

who have health insurance coverage for ambulance services. Residents without insurance would not be billed.

Two provisions of the New York State Constitution are relevant to this analysis. The first is Article I, §11, which provides for equal protection under the law. The second is the prohibition against gifts in Article VIII, §1.

**A. Equal Protection**

If a governmental entity treats residents unequally, it must be able to demonstrate that there is a rational basis for such unequal treatment and that it serves a legitimate governmental purpose.

If the Town adopts a program whereby only Town residents who have health insurance coverage are billed for ambulance services, it will treat its residents unequally. The criterion for this unequal treatment would be whether a resident has health insurance coverage. A resident may lack insurance for a variety of reasons: that it is not provided by an employer, that the resident cannot afford the coverage, or that the resident has sufficient resources to be self-insured. Conversely, two similarly-situated residents may make different choices. One may choose to spend limited resources on obtaining insurance, while another may choose to spend those resources elsewhere. In this scenario, an insurance-only billing policy would penalize the person who obtained insurance while benefiting the one who chose not to do so.

If the Town adopts an “insurance-only” billing program, it risks a challenge from residents because it is treating residents unequally on the criterion of insurance coverage status. Due to this unequal treatment, one resident would receive ambulance service for free, whereas another is expected to pay, solely based on their insurance status. It would be problematic for the Town to successfully maintain that insurance status is a rational basis for unequal treatment and serves a legitimate governmental purpose.

Such a challenge could also come from a health insurance company or a group of such companies, on the basis that the program has the effect of requiring health insurance companies to subsidize ambulance service for all residents. Individuals with insurance pay for their coverage, whether as a contribution to an employer-sponsored plan or by purchasing such insurance as an individual or business owner. The contract for insurance is between the insured and the insurance company and is not intended for the benefit of the Town or other, uninsured users.

**B. The Constitutional prohibition against gifts**

Article VIII, §1 of the New York State Constitution prohibits gifts of money or property to or in aid of any individual, private corporation or association, or private undertaking.

Some “insurance-only” billing programs provide for payment of co-pays and deductibles by the municipality on behalf of a resident. This is in contravention of the constitutional prohibition against gifts.

There is a Comptroller’s Opinion (2005-1) which clarifies that any kind of “soft billing” system also violates the prohibition against gifts. For example, a Town cannot bill everyone and only pursue collection against those who have insurance coverage. Also, if a Town bills for services, the Town (directly, or through the entity with which it contracts to bill and collect fees) must pursue the collection of all unpaid user fees and take all reasonable steps to do so.

Another related issue is raised in the New York State Office of General Counsel Opinion No. 10-06-06. This opinion holds that an ambulance service provider that operates under the direction of a municipality may not waive co-payments, co-insurance or deductibles for non-Medicare recipients that live in the municipality without the insurer's knowledge. The opinion holds that such a business practice may constitute insurance fraud.

I have discussed the issues related to equal protection and the constitutional prohibition against gifts with Mitchell Morris, an attorney with the Office of the State Comptroller. He shares these concerns and many of the points raised above are based on my lengthy discussions with him on two separate occasions.

### **C. General Municipal Law §122-b and Opinion of the State Comptroller 91-20**

General Municipal Law 122-b and State Comptroller's Opinion 91-20 have been cited as authority for an insurance-only billing process. GML 122-b authorizes municipalities to contract for ambulance services and bill for such services, but does not address or authorize insurance-only billing.

State Comptroller's Opinion 91-20 addresses the provision of supplemental ambulance services in a municipality which already has contracts for fire protection service (and provides for ambulance services within the fire protection district). The Opinion holds that a town may contract for supplemental services over and above the services provided by the fire protection districts, provided that the service is offered on a town-wide basis.

The opinion notes that an insurance carrier's obligation to pay for services provided to its insured is governed by the insurance contract. Where the insurance contract provides for direct payment, the municipality (or the entity who handles billing for the municipality by contract) may accept payment from the insurance carrier in satisfaction of the claim against the user for fees and charges. At the request of a user, the municipality may send a copy of the bill for fees to the insurance carrier. However, the opinion emphasizes that the underlying liability for the fee or charge remains with the user and the user remains responsible for the charge if it is not paid by the carrier. It also directs that a copy of the bill be sent to the user, who is ultimately responsible for the bill. The opinion does not address "insurance-only" billing, where only insured users receive a bill, and does not authorize this practice. It only addresses whether the Town (or its contractor) can send the bill directly to the insurance company.

I also do not interpret this Opinion as addressing or authorizing waiver of any applicable deductibles or co-payments from the user. These payments are the responsibility of the user and would remain due and payable to the service provider pursuant to the terms of the insurance contract. I have contacted the State Comptroller's Counsel's Office to verify this point and will report on this as soon as I have had an opportunity to discuss it with their legal counsel.

### **D. Billing requirements**

The Opinion of the State Comptroller 2005-1 makes it clear that, if the Town does not handle the billing itself, but contracts with another entity to do it, that entity collects the fees on behalf of the Town and the funds need to be paid over to the Town. The Town must record the income as revenue. State Comptroller's Opinion 2005-8 provides that a municipality may not set fees for the provision of EMS service in an amount in excess of the projected cost for providing such services. A municipal fee for a service must be reasonably related to the municipality's cost of providing the particular service.

A contract with an ambulance service provider could provide for payment of a fixed fee, plus fees collected (possibly with a cap); and then provide that the fees will be paid over to the Town and then remitted to the service provider periodically. Another possible structure would be that the ambulance service provider bills the Town a set amount for the service. The Town receives the collected fees from the service provider and applies them towards the next year's fixed payment, thereby lowering the cost to the Town and the taxpayer. The exact details of such a contract are not the main focus of this Memorandum, but any such contract would have to be carefully structured to comply with the guidelines outlined in the State Comptroller's opinion.

### **III. CONCLUSION**

An "insurance-only" billing program exposes the Town to possible challenges under the equal protection and unconstitutional gift provisions of the New York State Constitution.

This memorandum does not address the choice of the entity with which the Town could contract for provision of ambulance services. Any contractual service provider would need to be authorized by its ambulance service certificate or statement of registration to operate in an area that includes the Town.

Please let me know if you have any questions or need further information.