

From the Battlefield: The War Against “Balance Billing”

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Any reader of the *CSA Bulletin* must be familiar with the battles being waged by the California HMO insurance industry and its physician group (CAP-G) minions against non-contracted physicians who provide emergency care to HMO beneficiaries. Our legislative and legal consultants, Messrs. Barnaby, Goldberg and Willett, have been engaged consistently in this struggle and have provided day-to-day information and guidance. CSA has worked closely with CMA in efforts to achieve a solution to the “balance billing” problem that is fair to physicians. Several things have emerged from this experience. Most interesting to me is that this struggle is being played out in many other states of the nation besides California, although we probably have the longest history of managed health care, dating back to the 1930s with Henry J. Kaiser’s innovation of contracting with physicians to provide exclusive care to Kaiser’s employees (then one of the country’s largest defense contractors). A comparison of how the “balance billing” fight has been shaped in different states reflects the fact that the statutory governance of the practice of medicine, as well as the health insurance industry, rests substantially with each individual state.

The California Department of Managed Health Care was created by the legislature in 2000 to regulate HMOs and some PPO health insurance plans, but it now appears that it feels empowered to extend its perceived authority to include the regulation of physicians as well. Earlier this year, in its fourth attempt to promulgate regulations banning “balance billing” and, in so doing, to allow health plans to pay whatever they see fit to non-contracted physicians, the DMHC declared “balance billing” an “unfair billing pattern.” This prohibition would apply to out-of-network hospitals as well as physicians providing emergency care, effectively removing any incentive for these health plans to negotiate fairly with practitioners. A minor detail overlooked in its zeal “to take patients out of the middle,” the DMHC has absolutely no statutory authority to impose such a regulation on either hospitals or physicians, a point that was made repeatedly at required public hearings across the state, and in voluminous written statements submitted by CMA, CSA, and many other physician organizations. The Office of Administrative Law (OAL) will examine this testimony and render an opinion as to the legality of the regulation. Given the

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rhetoric of the Schwarzenegger administration, it is likely that a finding by the OAL that is unfavorable to the DMHC would be overridden by the Governor and the regulation would be adopted. Should that come to pass, physician organizations, led by the CMA, will turn to the courts to uphold the law.

At the same time, the California Chapter of the American College of Emergency Physicians (CAL/ACEP) crafted its own legislative vehicle to end “balance billing.” It was introduced by Senate Pro Tem Don Perata (SB 981), and at the time of this writing has just passed the State Legislature and is sitting on the Governor’s desk. While the provisions of this bill may be favorable to emergency room physicians, it has been opposed, for a variety of reasons, by CSA, CMA, and many other groups including, ironically, CAP-G and the health plans. If the Schwarzenegger administration remains consistent with its previous position, a veto is very likely. Aside from this bill, CSA has also taken a lead role, through the collaboration of the Barnabys with the CMA legislative team, in developing new legislation that would solve the “balance billing” problem equitably by requiring fair payment and an arbitration mechanism that would reward the most reasonable payment based on the marketplace. This legislation is in the wings, awaiting optimal timing (hopefully next year) for its introduction. The pending appeal of the *Prospect v. Northridge* case is to be heard by the State Supreme Court on this coming November 5. It should be recalled that this important case established that health plans and their contracted physician groups must pay the charges of non-contracted physicians for emergency care. The appeal, of course, is being sought by the health plans and CAP-G.

How does our experience in California compare with that of physicians in other states over the issue of billing patients for underpayment by HMO plans? Texas physicians are dealing with a situation very similar to ours and are currently engaged with their state legislators and insurance regulators in much the same manner. The State of Florida prohibits billing of HMO patients and requires HMOs to pay non-contracted providers reasonable and customary charges or an amount agreed upon by the two parties. In New Jersey, HMO patients are protected similarly by law from being billed by non-contracted physicians, and HMOs are required to “pay the non-participating provider a benefit large enough to insure that the non-participating provider does not balance bill the member for the difference between his billed charges and the ... payment.” Maryland has perhaps the most egregious regulations, which prohibit the billing of HMO patients “under any circumstance,” including the insolvency of the health plan or any other failure of payment. The HMO is required to pay non-contracted physicians only 125 percent of what they pay their contracted network providers. Maryland anesthesiologists tell us that this law has had a crippling effect on their ability to attract and retain partners in

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their groups and for hospitals to find adequate coverage for anesthesia services. The “balance billing” war is being waged on many fronts other than just our California turf. However, as with many socio-political issues, how the “balance billing” issue is resolved in California will have far-reaching national implications.

Update:

SB 981 Vetoed by Governor Schwarzenegger: S.B. 981 (Perata), which would prevent emergency physicians who provide non contracted emergency services from billing HMO patients directly, **was vetoed by the governor** in the final hours of the bill signing/veto period.

Even if CSA ultimately prevails in the defeat of the DMHC regulations and in spite of the governor's veto of SB 981, the current perception in Sacramento remains that this issue will not simply go away, and that anesthesiologists will be far better served by being seen as part of a solution to the problem rather than as simply opposed to any limitations whatsoever. CSA Legislative Counsel William Barnaby Sr., and William Barnaby Jr., have been working closely with CSA LPAD Chair Kenneth Pauker, M.D., on CSA's plans to introduce its own legislative solution to this problem. Legal Counsel Phillip Goldberg has prepared draft legislation calling for baseball-style arbitration of fees for emergency services to HMO patients between physicians and insurers in return for an agreement not to bill the patients directly. Current plans call for introduction of the legislation early next year. CSA will continue to keep its members abreast of developments with this issue. (*CSA Gasline*, Volume 10, No. 4, September 30, 2008.)

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