

## **The Battle Over Balance Billing Comes to a Head in California**

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In terms of health policy, California is often one of the first states to take a firm stance on an issue of controversy. Balance billing seems to be no exception, as state lawmakers and health systems are soon to collide in court to decide whether the practice is legal in California.

Balance billing comes in two types – regular balance billing and facility-based balance billing. Regular balance billing involves a provider billing a patient for any amount of the provider's bill not covered by insurance, i.e. the balance of the bill is sent to the patient. In most cases, if the provider has an agreement with the insurance company and/or the patient is covered by a governmental program, balance billing is illegal. The typical facility-based balance billing case involves patients who obtain care at a hospital that is considered in-network under their insurance plan and, while at the hospital, are seen by providers – typically anesthesiologists, emergency room physicians, or pathologists – who are not in-network under the plan. These out-of-network providers bill patients directly for the amount not reimbursed by the plan. Generally the patients are unaware that the physicians treating them at the hospital are not necessarily in-network just because the hospital is until they receive these bills. While this practice offends many people, its legality is not clear.

Facility-based balance billing must be examined by both sides. From the patient perspective, expectations are that by seeking care at an in-network hospital, only in-network co-pays, deductibles, and co-insurance will be required out-of-pocket for the patient. The surprise bills from out-of-network providers not only violates these expectations but make the patient feel helpless. How is a patient supposed to abide by in-network requirements when seeking in-patient care if going to an in-network hospital is insufficient? Understandably patients are frustrated and confused.

From the provider perspective, merely being on staff at a facility should not require the provider to accept the in-network rates of each and every plan for which the facility is considered in-network. Not only would this complicate the physician's practice – possibly requiring different in-network/out-of-network status depending on where the patient is seen – but it leaves the provider with no negotiating power. If a provider has to be in-network if the hospital is, the insurance company has no incentive to negotiate rates with the provider – it can merely dictate rates, even ridiculously low ones, since the provider must accept them.

Facility-based balance billing, therefore, remains controversial since the obvious solutions – either allow it or completely ban it – create vast inequities for whichever side of the equation loses. And, to add insult to injury, it appears that the insurance companies that have arguably contributed to if not created the problem win either way. It is with this backdrop that the current legal debates over facility-based balance billing must be viewed.

California courts looked at this issue originally in 2006. The case, *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group*, involved payments made by Prospect to Northridge physicians and whether Northridge physicians could balance bill Prospect clients.<sup>1</sup> Prospect, an independent physician association that managed health service plans, paid what it viewed as reasonable amounts for the services provided by Northridge physicians, but this amount was often less than the actual amount billed. Prospect argued that the physicians were entitled only to reasonable compensation and that 100 percent of the Medicare reimbursement rate was per se reasonable.<sup>2</sup>

The court reviewed the relevant California statutes, the Knox-Keene Health Care Service Plan Act of 1975, with particular focus on Section 1379. The court found that Section 1379 prohibited balance billing if there was a voluntarily negotiation contract between the plan and the provider, but that the prohibition would not apply in the case of an implied contract, such as the one Prospect argued existed between it and all emergency service providers. The court also noted that the Department of Managed Health Care (DMHC) had promulgated a regulation regarding balance billing, thus indicating that the practice was not universally prohibited.<sup>3</sup>

The court then turned to Prospect's argument regarding Medicare rates being per se reasonable. It found that any across-the-board rate mechanism would be inappropriate and noted that Medicare rates were generally considered low.<sup>4</sup>

The court did agree with Prospect that plans should be allowed to litigate the reasonableness of rates charged by providers just as providers could litigate that reasonableness of rates paid by plans.<sup>5</sup>

At least partially in response to the *Prospect* case and other balance billing discussions, Governor Schwarzenegger issued Executive Order S-13-06 on July 25, 2006, directing the DMHC to establish a Provider Complaint Unit to address the prompt and proper payment of emergency physicians, to develop an Independent Dispute Resolution Process for payment disputes between out-of-network providers and plans, and to "take all steps necessary to protect Californians from balance billing."<sup>6</sup> Despite this order, the DMHC was unable to promulgate the necessary rules as it could not successfully negotiate a compromise between providers and plans.<sup>7</sup>

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<sup>1</sup> *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group*, 44 Cal.Rptr.3d 361 (Cal.App.4<sup>th</sup> 2006).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Exec. Order No. S-13-06 (Cal. July 25, 2006), available at: <http://gov.ca.gov/index.php?print-version/executive-order/2615> (last accessed August 19, 2008).

<sup>7</sup> *California Regulators Try Again To Write Ban on Balance Billing*, CALIFORNIA HEALTHLINE, May 19, 2008, available at: <http://www.californiahealthline.org/articles/2008/5/19/California-Regulators-Try-Again-To-Write-Ban-on-Balance-Billing.aspx?topicID=37> (last accessed August 26, 2008).

The DMHC is not deterred, however, from the mission of fighting balance billing. A July 1, 2008 press release announced that the DMHC had filed suit against Prime Healthcare Services alleging improper balance billing of HMO patients for services received at the hospitals. The DMHC director was quoted as saying that balance billing puts the consumer in the middle of disputes that should remain between providers and the plans,<sup>8</sup> an statement often used in opposition to balance billing. Additionally, the DMHC drafted regulations banning balance bills for emergency services; the regulations are expected to go into effect October 15 if approved by the Office of Administrative Law and not delayed by any lawsuits. The issue is also being debated at the state legislature.<sup>9</sup>

Prime Healthcare was an easy target for the DMHC. The system cancels most insurance contracts when it acquires a new hospital and has sent as many as thousands of patients balance bills. Also, Kaiser Permanente had already obtained a temporary restraining order from the Los Angeles County Superior Court prohibiting Prime from collecting balance bills from patients or reporting the bills to credit agencies pending the resolution of a lawsuit between Kaiser and Prime.<sup>10</sup> However, the likelihood of success appears limited. The DMHC is arguing the same implied contract concept<sup>11</sup> that failed for Prospect in 2006. Unless the DMHC finds a more sympathetic court or public pressure leads Prime to settle, it appears that the battle over balance billing will live on in California, regulations notwithstanding.

Whatever the next step in this saga turns out to be, expect officials from other states to be watching closely. Balance billing is a nationwide area of concern, and any proposal – whether more provider or more consumer friendly – is likely to meet resistance and potentially be bogged down in litigation. By letting California go first, other states may be hoping to learn how to avoid some of the bigger potholes on the road to a balance billing solution. Given the amount of money and political pressure involved in balance billing, such a hope is likely in vain, but you can't blame the other states for trying.

*Health Law Perspectives* (August 2008), available at:  
<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

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<sup>8</sup> Press Release, Department of Managed Health Care, *DMHC Seeks Court Action to Prevent Prime Healthcare from Balance Billing any HMO Member* (July 1, 2008), available at: [www.hmohelp.ca.gov/library/reports/news/prprimehealth.pdf](http://www.hmohelp.ca.gov/library/reports/news/prprimehealth.pdf) (last accessed August 26, 2008).

<sup>9</sup> Kathy Robertson, *New rules may stop hospitals from billing insured patients*, SACRAMENTO BUSINESS JOURNAL, August 11, 2008, available at: <http://www.bizjournals.com/buffalo/othercities/sacramento/stories/2008/08/11/story10.html> (last accessed August 19, 2008).

<sup>10</sup> Daniel Costello, *California sues Prime Healthcare over balance-billing practice*, LOS ANGELES TIMES, July 2, 2008, available at: <http://www.latimes.com/features/health/la-fi-prime2-2008jul02,0,209518,print.story> (last accessed August 19, 2008).

<sup>11</sup> Amy Lynn Sorrel, *California courts to sort out balance-billing issues*, AMNEWS, August 18, 2008, available at: <http://www.ama-assn.org/amendnews/2008/08/18/prsa0818.htm> (last accessed August 18, 2008).