

No. S142209
(Court of Appeal Nos. B172737, B172817)
(Los Angeles County Super. Ct. Nos. BC300850, SC076909)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

PROSPECT MEDICAL GROUP, INC., ET AL.,
Plaintiffs and Appellants,

v.

NORTHRIDGE EMERGENCY MEDICAL GROUP, ET AL.,
Defendants and Respondents.

PROSPECT HEALTH SOURCE MEDICAL GROUP, INC., ET AL.,
Plaintiff and Appellant,

v.

SAINT JOHN'S EMERGENCY MEDICINE SPECIALISTS, INC., ET AL.,
Defendants and Respondents.

After a Decision By the Court of Appeal,
Second Appellate District, Division Three

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Respondents respectfully submit this supplemental brief, pursuant to Rule 8.520(d), to apprise the Court of several legislative developments since the filing of the parties' briefs on the merits. Each of these developments supports Respondents' contention that balance billing is not prohibited by existing law.¹

ARGUMENT

I.

THE LEGISLATURE'S PASSAGE AND THE GOVERNOR'S VETO OF SB 981 AND AB 2220 DEMONSTRATE THAT SECTION 1379 DOES NOT PROHIBIT BALANCE BILLING.

A little over a month ago, the Legislature approved two statutes, SB 981 and AB 2220, which in different ways address the exact subject of this case: the use of balance billing by emergency room physicians who provide care to a patient whose health plan has no contract with the physicians providing care. While the Governor vetoed both bills, both their approval by the Legislature *and* their veto by the Governor demonstrate that balance billing is not prohibited by existing statutes.

SB 981 dealt with balance billing in a carefully calibrated manner, typical of the compromises that emerge from the legislative process.² On the one hand, it prohibited emergency room physicians from billing patients for unpaid charges. SB 981 §4, 2007-2008 Reg. Sess., proposed HEALTH & SAFETY CODE §1379.1(a) ("The noncontracting emergency room physician shall not seek payment

¹Respondents had also intended this brief to discuss a new regulation addressing balanced billing issued by the Department of Managed Health Care. However, because the Court has requested the parties to file supplemental letter briefs addressing the potential relevance of that regulation to this case, Respondents will not discuss that issue here.

²A copy of SB 981 will be found as Exhibit A to the accompanying Respondents' Second Motion For Judicial Notice ("MJN"), filed simultaneously with this brief.

from individual enrollees for . . . covered emergency medical services, except for allowable copayments and deductibles”). On the other hand, it adopted a series of procedures intended to ensure that such physicians would receive prompt and sufficient payment for the care they provide. In particular, SB 981 required health plans to pay emergency room physician charges in the first instance at the lesser of the physician’s full charge or an “interim payment standard,” which the bill set as 250 percent of the January 1, 2007 published Medicare rates for services provided by emergency room physicians in California, adjusted for inflation by the Department of Managed Health Care (“DMHC”). *Id.* §2, proposed HEALTH & SAFETY CODE §§1371.42(b), (h)(2)(A), (h)(2)(B). It also directed DMHC to contract with an “independent dispute resolution organization” to administer an “Independent Dispute Resolution Process” (IDRP) that would resolve billing disputes between noncontracted emergency room physicians and health care plans or their “contracting risk-bearing organizations.” *Id.* §1(a); §3, proposed HEALTH & SAFETY CODE §§1374.40(b), 1374.415(a). However, the bill provided that its prohibition of balance billing would become effective *only* when DMHC (1) adopted the interim payment standard (*i.e.*, adjusted the published Medicare 2007 rates for inflation), and (2) established the IDRP required by the statute. *Id.* §8(a). Finally, SB 981 provided that its prohibition of balance billing would *never* become effective if DMHC did not take these steps by July 1, 2009. *Id.* §8(b). SB 981 thereby made its prohibition of balance billing conditional on the adoption of means by which noncontracted emergency room physicians would receive both a legislatively defined—and reasonable—“interim” payment for their services *and* a nonjudicial means of resolving their billing disputes with health plans.

Despite the Governor’s veto, the Legislature’s approval of SB 981 is relevant to the issue before this Court. As the Court stated in *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, 6 Cal. 4th 821 (1993), the “Legislature’s adoption of subsequent, amending legislation that is

ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute." *Id.* at 832.

The issue in *Freedom Newspapers* was whether a standing committee of a local legislative body was subject to the open meeting requirements of the Brown Act. *Id.* at 823-24. The case turned on the meaning of a provision of the Brown Act that dealt with committees comprising less than a quorum of a local governing body. The plaintiff contended that this provision only exempted such committees from the particular section of the Brown Act in which the exemption appeared, and that such committees were therefore subject to the Act's remaining open meeting requirements. *Id.* at 826. In contrast, the defendant contended that the provision exempted such committees from the entire statute. *Id.*

The year before the Court decided *Freedom Newspapers*, the Governor had vetoed a bill, approved by the Legislature, which would have provided that this exemption applied only to *ad hoc* advisory committees, and not to "standing" (*i.e.*, permanent) committees. *Id.* at 832. The bill made sense if the exemption applied to the Brown Act as a whole; however, it would have led to a "bizarre result" had the exemption applied only to the specific section in which it appeared. *Id.* at 833. The Court therefore held that the vetoed "legislation is the *strongest indication* that the current version of [the exemption] excludes less-than-a-quorum advisory committees from the Act's open meeting requirements, rather than merely from the less-stringent procedural requirements of [the specific statute in which the exemption appeared]." *Id.* at 832 (emphasis added).

Remarkably, the Courts of Appeal have applied the same rationale in cases addressing the payment of charges by emergency medical care providers. In *Ochs v. PacifiCare of California*, 115 Cal. App. 4th 782 (2004), the court cited *Freedom Newspapers* and held that vetoed legislation that would have required health plans to reimburse emergency care physicians if the plan's medical practice group refused to pay indicated that such reimbursement was not required under existing law. *Id.* at 791-92. Another Court of Appeal

reached the identical conclusion in *California Emergency Physicians Medical Group v. PacifiCare of California*, 111 Cal. App. 4th 1127, 1132 (2003).

Precisely the same logic applies here. To paraphrase *Freedom Newspapers*, the passage of SB 981 is the “strongest indication” that the Legislature does not believe that balance billing by noncontracted emergency room physicians is banned by existing law. Otherwise it would not have prohibited balance billing in the bill, much less made that prohibition contingent on future regulatory actions by DMHC.

The same conclusion flows from AB 2220, another bill approved by the Legislature but vetoed by the Governor. *See* MJN, Ex. B. This bill would have required emergency room physicians and health plans engaged in contract negotiations to engage in mandatory mediation at the option of either party. AB 2220 §2, 2007-2008 Reg. Sess., proposed HEALTH & SAFETY CODE §1371.395(a). As the Legislature explained in the bill’s findings, it imposed this mediation requirement “to encourage the successful negotiation of contracts between emergency physicians and health care service plans or risk-bearing organizations.” *Id.* §1(d). Moreover, the Legislature went on to say that the creation of more contracts between emergency room physicians and health care plans would *avoid balance billing*:

Mutually agreed-upon contracts between emergency physicians and health care service plans or risk-bearing organizations *avoid the problem of balance billing* where customers are placed in the middle of payment disputes between emergency physicians and health care service plans or risk-bearing organizations. (*Id.* §1(b) (emphasis added))

The premise of the Legislature’s express statement that contracts between emergency room physicians and health care plans are necessary to “avoid the problem of balance billing” is that existing statutes do *not* prohibit balance billing where the emergency room physicians providing care have *no* contract with a patient’s health care plan. Thus, like SB 981, the Legislature’s approval of AB 2220

demonstrates its belief that balance billing is not prohibited by existing statutory law.

The Governor's message accompanying his veto of SB 981 likewise reflects his understanding that balance billing is not prohibited by existing law: "*Until the Legislature can send me legislation that removes [the] patient from all disputes regarding these parties, I direct my Department of Managed Care to aggressively continue its efforts to identify unfair payment practices and keep patients from being caught in the middle.*" MJN, Ex. C (emphasis added).³ Similarly, his message vetoing AB 2220 stated that while the statute was "a good starting point," it was not a "comprehensive solution" to the problems posed by balance billing. *See* MJN, Ex. D. Moreover, the Governor made clear that any "comprehensive solution" to balance billing would have to be fashioned by both the legislative and executive branches:

I believe the author and Administration can work together to solve this issue next year. I look forward to our combined efforts that will take the patient out of the middle of these payment disputes. (*Id.*)

Thus, while the legislative and executive branches disagree (at least for now) as to how balance billing should be prohibited, they agree that it is not prohibited by existing law.

Finally, the Legislature's approval of these statutes indicates that any solution to the policy issues raised by balance billing must balance the important goal of protecting patients against the need to ensure that noncontracted emergency room physicians are reasonably and timely compensated for their services. SB 981 sought to balance these interests by making its prohibition of balance billing contingent on the assurance to noncontracted emergency room physicians that they would receive adequate payment for their

³The "efforts" to which the Governor referred was the proposed DMHC regulation, now purportedly in effect, that prohibits balance billing by emergency room physicians. As noted above, that regulation will be addressed in the letter briefs requested by the Court. *See* n.1, *supra*.

services by requiring that their claims be paid in the first instance according to a legislatively defined "interim payment standard," and that an adequate nonjudicial forum would be available to resolve billing disputes. AB 2220, a more modest approach, sought to minimize balance billing by providing a mechanism that would encourage emergency physicians and health plans to enter into contracts that would minimize (but not eliminate) balance billing. In contrast, the flat prohibition on balance billing that Appellants urge in this case contains none of the safeguards that the Legislature found necessary in SB 981 to accompany a total ban on the practice. The Court should not short-circuit further attempts to address these problems by the Legislature and the Governor by adopting the blunderbuss approach urged by Appellants.

CONCLUSION

For the reasons set forth herein, and those contained in Respondents' prior briefs, the judgment should be affirmed.

DATED: October ~~17~~ 2008.

Respectfully,

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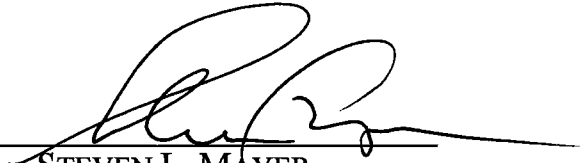

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.520(c)(1)**

Pursuant to California Rule of Court 8.520(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached Respondents' Supplemental Brief contains 1,737 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

DATED: October 12, 2008.



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PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

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On October 17, 2008, I served the following document(s) described as follows:

RESPONDENTS' SUPPLEMENTAL BRIEF

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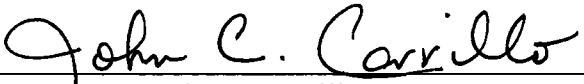
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on October 17, 2008.



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