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VIA HAND DELIVERY

The Honorable Chief Justice of California  
and Honorable Associate Justices  
California Supreme Court  
350 McAllister St.  
San Francisco, CA 94105

Re: Prospect Medical Group, Inc., et al. v. Northridge Emergency Medical  
Group, et al. (No. S142209)

Dear Chief Justice George and Honorable Associate Justices:

Pursuant to the Court's order of October 16, 2008, Respondents hereby submit this reply brief in response to the letter briefs submitted by Appellants and the Department of Managed Health Care ("DMHC") regarding the balance billing regulation ("Regulation") recently adopted by DMHC.

I.

**APPELLANTS' RELIANCE ON *McCALL* IS UNTIMELY AND MISPLACED.**

Using the opportunity to comment on a new regulation as a pretext to discuss a case that Appellants didn't find when filing their opening and closing briefs, their letter cites several old cases that could have been cited in their prior briefs and that have nothing to do with the legal effect of the new regulation—the only issue the Court's order invited the parties to address. Among others, they cite a 1934 case (*McCall v. Superior Court*, 1 Cal. 2d 527 (1934)) which they say establishes a rebuttable presumption that the term "contract" whenever used in a statute refers to *quasi-contracts* as well as to true contracts. This abuse of the Court's invitation to address the regulation is inappropriate. In any event, Appellants' reliance on *McCall* is misguided.

*McCall* recognizes and approves the central point in our analysis (see AB 16-18 and authorities cited; Consolidated Answer to *Amici Curiae* Briefs (“Answer to *Amici*”) 6-8)—namely, that

implied contracts are usually subdivided into contracts implied in fact and contracts implied in law. The first, it is needless to say, is a true contract, the agreement of the parties being inferred from the circumstances; the latter but a duty imposed by law, and *treated as a contract for the purposes of a remedy only*. (1 Cal. 2d at 531-32 (emphasis added))

The holding in *McCall* is unremarkable. Plaintiff sued for fraud in connection with his purchase of real property, seeking rescission of the transaction and restitution of the money he had paid. *Id.* at 529-30. The Court characterized the cause of action as *quasi-contract*, and held that even though a “*quasi-contract*” cause of action is not a “true contract” claim, plaintiff was entitled to the statutory remedy of prejudgment attachment under a statute authorizing attachments “in an action upon a contract, express or implied, for the direct payment of money.” *Id.* at 531. The holding makes perfect sense: having held that the law treats *quasi-contracts* “as a contract for the purposes of a remedy only,” it follows that a remedial statute such as prejudgment attachment would be available in such actions. That has been the consistent view of the California courts. See *Landry v. Marshall*, 243 Cal. App. 2d 170 (1966); *Samuels v. Superior Court*, 276 Cal. App. 2d 264 (1969).

That is a far cry from imposing substantive limitations—such as a prohibition against balance billing applicable *only* to contracting physicians—on emergency care providers who have never entered into a true contract based on actual or even implied intent. *McCall* allowed a remedy originally imposed against parties who breach actual contracts—wrongdoers—to be applied against an even more blameworthy wrongdoer: a party who obtained money through fraudulent misrepresentations. Here, in contrast, Appellants ask the Court to impose a limitation on emergency room doctors who have done nothing more than bill a patient for the reasonable value of emergency medical services, a bill for which the patient would be traditionally liable under *quantum meruit/quasi-contract* principles. In short, these physicians, unlike the defendant in *McCall*—have engaged in no “wrongdoing” of any kind.

Appellants contend that *McCall* “adopted a *rebuttable presumption* that the legislative use of the term ‘contract’ encompasses contracts implied by law.” Appellants’ Letter 8 (emphasis in original). Not true: the language relied on by Appellants is found in a lengthy quotation from a federal case from Utah. Nothing in the Court’s own analysis in *McCall*, or its holding, adopts any such presumption. Nor does any other California case of which we are aware. And many cases can be found that refuse to apply statutes applicable to “contracts” to actions seeking a quasi-contractual remedy. See, e.g., 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §1014 (10th ed. 2005); *Mayborne v. Citizens Trust & Sav. Bank*, 46 Cal. App. 178, 190 (1920) (statute of frauds applicable to contracts not applicable to quasi-contractual claims); *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657, 1670 (1992) (statute of limitations applicable to suits for breach of contract inapplicable to quasi-contract action for fraud); *Ajaxo, Inc. v.*

*E\*Trade Group, Inc.*, 135 Cal. App. 4th 21, 56 (2005) (benefit of the bargain measure of damages for breach of contract—which is prescribed in Civil Code Section 3300—inapplicable to quasi-contract action, for which the remedy is restitution); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (federal statute authorizing suit against the United States based on any “express or implied contract” does not authorize “claims on contracts implied in law”).

These decisions reflect the long-established understanding—which, as noted above, was recognized in *McCall*—that “[t]he so-called ‘contract implied in law’ in reality is not a contract.” *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 794 (1953); *accord, McBride v. Boughton*, 123 Cal. App. 4th 379, 388 n.6 (2004); *Arcade County Water Dist. v. Arcade Fire Dist.*, 6 Cal. App. 3d 232, 236 (1970) (“An ‘implied-in-law’ contract is actually not a contract at all, but merely an obligation imposed by the law to bring about justice”); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §1013 (quasi-contract “is an *obligation* (not a true contract . . .)” (emphasis in original)); RESTATEMENT (SECOND) OF CONTRACTS §4, cmt. b (1981); 1 A. CORBIN, CORBIN ON CONTRACTS §1.20, at 64(1993) (“Contracts are formed by expressions of assent. Quasi contracts quite otherwise”). Accordingly, when the Legislature used the words “contract” and “contracting provider” in Section 1379, it would have used those terms in accordance with their well-established legal meaning, as *excluding* quasi- or “implied in law” contracts. *See, e.g., Arnett v. Dal Cielo*, 14 Cal. 4th 4, 19 (1996) (“when a word used in a statute has a well-established *legal* meaning, it will be given that meaning in construing the statute”) (emphasis in original); CIV. CODE §13. Moreover, the Legislature would have had no reason in 1975 to include quasi-contracts within the scope of Section 1379 because none of the elements of the claimed “implied-in-law” contract—the emergency physician’s statutory duty to treat and the plan’s statutory duty to pay—existed at the time Section 1379 was enacted.<sup>1</sup>

Appellants assert that “[t]here is *no reason* to distinguish between providers whose rights of recourse against plans arise from implied in fact contracts and those whose rights arise from implied by law contracts.” Appellants’ Letter 9 (emphasis in original). Nonsense. A doctor who expressly, or impliedly, *agrees* to a contractual rate schedule or other system for payment in return for inclusion in an HMO’s list of approved providers has bargained for a detriment

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<sup>1</sup>The other cases cited by Appellants have nothing to do with their contention that statutes applicable to “contracts” are presumed applicable to quasi-contractual remedies. *County of San Luis Obispo v. Gage*, 139 Cal. 398 (1903), involved a state statute specifying an annual payment to counties that maintained orphans. An unpaid county sued the state under a statute waiving sovereign immunity for “claims on contract.” The Court held that the statute was in effect an “offer upon condition, and upon the performance of the condition by any county the offer became a promise, and binding as such upon the state.” *Id.* at 407. Accordingly, the Court’s holding that this was a claim upon a contract under the consent-to-suit statute (*id.* at 408) was based on its finding that the parties had entered into an actual contract, not a *quasi-contract*.

*Philpott v. Superior Court*, 1 Cal. 2d 512 (1934), dealt with whether a suit to recover \$625 paid under an express contract to purchase stock that was induced by false representations was an action in law or equity. It, too, is irrelevant to the question at hand.

(discounted rates) in return for the benefits of inclusion on the HMO's approved list (presumably more patients). A doctor who complies with a legal requirement to treat patients needing emergency care has done nothing to subject himself to restrictions applicable to those who have voluntarily agreed to them, and has obtained no benefits comparable to the doctor who voluntarily contracts with an HMO. The difference between the two is night and day.

Appellants and DMHC also use this Court's invitation to address the Regulation as a means of rehashing their policy arguments that balance billing is bad for health care consumers. Appellants' Letter 3-4, 8-9; DMHC Letter 3-4. However, as Respondents demonstrated in their Answer Brief, these arguments are addressed to the wrong forum: it is the Legislature, not this Court, that must balance the competing interests at stake. *See* AB 23-28; *People v. Cole*, 38 Cal. 4th 964, 991 (2006); *Grafton Partners v. Superior Court*, 36 Cal. 4th 944, 965 (2005). And what the Legislature has said on this subject is, to say the least, inconsistent with Appellants' position.<sup>2</sup> Accordingly, the only conceivable relevance of the Regulation to this case is whether it sheds any light on the proper interpretation of Section 1379. That issue is addressed in Part II, below.

## II.

### THE REGULATION DOES NOT SUPPORT APPELLANTS' INTERPRETATION OF SECTION 1379.

DMHC promulgated the Regulation because it believes that prohibiting balance billing will further the goals of the Knox-Keene Act. It purported to adopt the Regulation pursuant to the rule-making procedure contained in the Administrative Procedure Act. But neither the Department's view of wise policy nor its claim of adherence to formal rule-making makes the Regulation relevant to this case.

#### A. The Regulation Is Irrelevant Because It Neither Interprets Nor Implements Section 1379.

The only issue on which review has been granted is whether a single statute—Health and Safety Code Section 1379—prohibits balance billing. The Regulation does not address that

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<sup>2</sup>The recent passage of SB 981 shows that the Legislature's preferred solution to the issues raised by balance billing is not the unconditional prohibition that Appellants favor. Rather, it is a limitation on balance billing that would go into effect *only* if and when the DMHC put in place (1) an effective independent dispute resolution process, *and* (2) a minimum interim payment schedule requiring HMOs and IPAs to pay emergency care providers 250% of the applicable Medicare rate. *See* Respondents' Supplemental Brief 5-6. By contrast, the flat prohibition on balance billing that Appellants seek contains *none* of the safeguards that the Legislature found necessary in SB 981 before a total ban could be imposed.

issue. It does not purport to interpret Section 1379 or any of the terms—such as “contract” or “contracting provider”—contained therein. It does not list Section 1379 as an authorizing statute. See DMHC Letter 3 n.5.<sup>3</sup> Nor is any discussion of Section 1379’s meaning found in DMHC’s statement of reasons for the Regulation. See Register 2008, No. 13-Z Cal. Regulatory Notice Reg. 486 (March 28, 2008). Indeed, while that statement expressly acknowledged that “contracting providers” were required by Section 1379(b) to “look solely to the health plan for amounts due the provider by the health plan” (*id.* at 489), it did not assert that the same statute also applied to *noncontracted* providers (or that noncontracted providers were included within the definition of “contracting providers” due to a purported “implied-in-law contract”).<sup>4</sup>

These omissions were not accidental. As Appellants acknowledge, DMHC promulgated the Regulation “after and in light of the lower court’s . . . ruling in this case.” Appellants’ Letter 1. DMHC therefore wanted to promulgate a regulation which it hoped would prohibit balance billing even if this Court affirmed the Court of Appeal’s decision. That may have been an understandable tactical choice, but DMHC’s decision *not* to base the Regulation on Section 1379 alone prevents that Regulation from having any relevance to the issue presented in this case.

In *People v. Cole*, 38 Cal. 4th 964 (2006), the Court refused to defer to administrative interpretations of the Knox-Keene Act (the same statutory scheme at issue here) where, *inter alia*, “none of the documents” offered to show the agency’s construction of the statute “discusses the relevant statutory language or reflects ‘careful consideration’ of the precise issue before us.” *Id.* at 987. The same logic applies here. Nothing in the Regulation or its administrative history discusses the relevant language of Section 1379, much less gives “careful consideration” to “the precise issue” of whether providers of emergency medical services who do not have a contract with a patient’s health plan are nevertheless “contracting providers” within the meaning of that statute. The Regulation is therefore not entitled to deference as an interpretation of Section 1379.

To be sure, the documents offered in *People v. Cole* to show the agency’s interpretation of the Knox-Keene Act were not formal regulations, and DMHC asserts that a duly promulgated

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<sup>3</sup>Indeed, DMHC’s initial statement of reasons described the Regulation as “intended to implement, interpret, and/or make specific” five listed provisions of the Health and Safety Code—but not Section 1379. See Register 2008, No. 13-Z Cal. Regulatory Notice Reg. 486, 488 (March 28, 2008); *id.* at 490 (“the Department has identified Section 1371.35, 1371.39 and 1371.4 as crucial statutes requiring further implementation and clarification to address these continuing serious problems”). While Section 1379 was listed as a “reference” for the Regulation, the Department has neither asserted that the Regulation actually implements that statute nor explained how it could do so.

<sup>4</sup>Indeed, DMHC’s letter tacitly acknowledges that the purported prohibition of balance billing at issue in this case and its attempt to prohibit balance billing in the Regulation are based on different statutes and run on parallel tracks. See DMHC Letter 6 (“Balance billing can be prohibited by section 1379 at the same time it is an unfair billing pattern under section 1371.39(b)(1), while doing no offense to the enforceability of the other”).

regulation is entitled to “great weight.” DMHC Letter 4. But this does not change the indisputable fact that the Regulation neither interprets nor applies Section 1379. While a duly promulgated regulation may be entitled to deference under some circumstances as to matters that were *actually considered* by the promulgating agency, no case holds that a regulation is entitled to deference on an issue that was *not* considered. After all, even “an appellate court’s opinion is not authority for propositions the court did not consider or on questions it never decided” (*People v. Braxton*, 34 Cal. 4th 798, 819 (2004)), and an administrative decision is surely entitled to no greater deference than an appellate opinion in this regard.

**B. Even If The Regulation Had Embodied A Carefully Considered Administrative Interpretation Of Section 1379, It Still Would Not Be Entitled To Deference.**

In *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal. 4th 1 (1998), this Court held that how much “judicial deference to an agency’s interpretation is appropriate and, if so, its extent—the ‘weight’ it should be given—is thus fundamentally *situational*.” *Id.* at 12 (emphasis in original). In other words, “[w]here the meaning and legal effect of a statute is the issue, an agency’s interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth.” *Id.* at 7-8. Consequently, DMHC errs in asserting that formally adopted interpretive rules are automatically entitled to “great weight.” DMHC Letter 4.

In *Yamaha*, the Court listed two sets of factors that govern the degree of deference owed by a court to an interpretive rule: whether the agency has “a comparative interpretive advantage over the courts” and whether there are indications “that the interpretation in question is probably correct.” 19 Cal. 4th at 12 (citations and internal quotation marks omitted). Both factors demonstrate that the Regulation would not be entitled to deference even if it had been based on an administrative interpretation of Section 1379.

As this Court held in *People v. Cole*, the agencies charged with interpreting the Knox-Keene Act have no “comparative interpretive advantage over the courts in interpreting the relevant statutes.” 38 Cal. 4th at 987 (citation and internal quotation marks omitted). That is particularly true here. There is nothing about Section 1379 that is “technical, obscure, complex, open-ended or entwined with issues of fact, policy, and discretion.” *Yamaha*, 19 Cal. 4th at 12. To the contrary, the statutory issue turns on the meaning of the word “contract,” an issue that the courts—not DMHC—have centuries of expertise in interpreting. And to the extent that this definitional issue turns on legislative intent, DMHC has less experience than the courts in discerning such intent. See *Interinsurance Exch. of the Auto. Club v. Superior Court*, 148 Cal. App. 4th 1218, 1236-37 (2007) (Department of Insurance “did not have any special expertise that we or other courts lack in construing the underlying legislative intent”); *Farmers Ins. Exch. v. Superior Court*, 137 Cal. App. 4th 842, 859 (2006) (courts, not agency, have greater expertise in determining whether voters intended in initiative to create private right of action). In short, while an agency may have “an interpretive advantage with respect to matters within the agency’s expertise and technical knowledge” (*id.*), nothing about the statutory interpretation issue presented by this case turns on health plan economics or other specialized expertise.

Consequently, there is no “comparative interpretative advantage” in this case that requires deference to the Regulation.

Nor do other factors in this case suggest that the Regulation’s interpretation of Section 1379 is “probably correct.” See 19 Cal. 4th at 12. No deference is warranted where the interpreting regulation was not “contemporaneous with’ enactment of the relevant statutes.” *People v. Cole*, 38 Cal. 4th at 987 (citation omitted). Obviously, a regulation promulgated in 2008 is not contemporaneous with a statute enacted in 1975. Indeed, DMHC’s position on the general issue of balance billing has neither been longstanding nor consistent. DMHC itself distinguished between contracted and noncontracted physicians in its claims settlement practices. See AB 35-36. Similarly, its brief in the *Bell* case is inconsistent with the Regulation. See Answer to *Amici* 12-14. These changes of position matter because a “vacillating position is entitled to no deference.” *Yamaha*, 19 Cal. 4th at 13 (ellipses, internal quotation marks and citation omitted). Consequently, *all* the other factors identified by the *Yamaha* Court as supporting deference militate against any such presumption in this case.

Finally, the Regulation is irrelevant for two additional reasons. *First*, even an interpretive rule that is entitled to maximum deference cannot overcome contrary evidence of legislative intent. For example, in *Green v. State*, 42 Cal. 4th 254 (2007), a majority of this Court held that even if the administrative agency’s interpretation of the relevant statute, embodied in a regulation, supported the plaintiff’s position, that position could not prevail because it was contrary to the Legislature’s intent. *Id.* at 266; see *N. Gualala Water Co. v. State Water Res. Control Bd.*, 139 Cal. App. 4th 1577, 1590 (2006) (agency regulation entitled to no deference where it was inconsistent with legislative intent). Here, there is *no* evidence that the Legislature which enacted Section 1379 in 1975 meant to include in its sweep a “contract” created by statutes that were not enacted until many years later. See Answer to *Amici* 9. Moreover, the Legislature’s recent approval of SB 981 and AB 2220 demonstrates its belief that balance billing is not prohibited by existing law. See Respondents’ Supplemental Brief 4.

*Second*, the law is settled that “[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void.” *Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n*, 43 Cal. 3d 1379, 1389 (1987) (citation and internal quotation marks omitted). The Regulation violates this rule because it enlarges the balance billing prohibition contained in Section 1379 far beyond the statute’s scope. Moreover, the Regulation is also invalid for the other reasons asserted in the lawsuit filed by the California Medical Association. See Appellants’ Third Motion for Judicial Notice, Ex. D (Petition/Complaint); Respondents’ Third Motion for Judicial Notice, Ex. A (Memorandum). Because a void regulation is not entitled to deference (*Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 563, 574 (2007); *Tidewater Marine W., Inc. v.*

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*Bradshaw*, 14 Cal. 4th 557, 572 (1996)), at the very least the Court should refrain from relying on the Regulation while litigation attacking its validity is pending.

Respectfully,

HOWARD RICE NEMEROVSKI CANADY  
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JEROME B. FALK, JR.

cc: All Counsel (per attached POS)

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I, Phyllis M. Montoya, declare:

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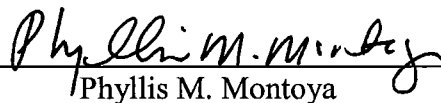
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Phyllis M. Montoya

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