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October 27, 2008

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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, I am writing on behalf of Respondents to address the balance billing regulation ("Regulation") recently adopted by the Department of Managed Health Care ("DMHC").¹ The Regulation defines "the practice, by a provider of emergency services . . . of billing an enrollee of a health care service plan for amounts owed to the provider by the health care service plan or its capitated provider" as an "unfair billing pattern." As we show below, the Regulation neither supports Appellants' interpretation of Section 1379 of the Health and Safety Code ("Section 1379") nor alters the need for this Court to decide whether that statute prohibits balance billing by noncontracted emergency room physicians.

The issue on which the Court granted review is, of course, whether balance billing by non-contracted emergency room physicians is prohibited by Section 1379. The Regulation does not directly address that issue. Nor does it purport to interpret Section 1379. To the contrary, the fact that DMHC adopted the Regulation implicitly presupposes that balance billing is not yet prohibited by statute. Accordingly, to the extent that it is relevant at all, the Regulation supports Respondents' interpretation of Section 1379.

Moreover, the Regulation does not itself prohibit balance billing. Instead, it merely defines balance billing as an "unfair billing pattern" within the meaning of Health and Safety Code Section 1371.39. *See* Ex. A. But neither that statute, nor any regulation adopted pursuant to its authority, prohibits conduct that DHMC labels an "unfair billing pattern."

¹A copy of the Regulation is attached hereto as Exhibit A. Appellants have asked the Court to take judicial notice of the regulation. *See* Appellants' Third Request for Judicial Notice, Ex. A. Respondents do not oppose this request.

That omission cannot be accidental. The prior version of the Regulation, proposed in 2006 but withdrawn in 2007, contained a provision that is substantively identical to subparagraph (a) of the new Regulation, defining balance billing as an “unfair billing pattern.” See Request for Judicial Notice of *Amicus Curiae* California Association of Health Plans, Ex. D, §(b).² But the 2006 version of the regulation *also* contained a provision expressly providing that “[u]nfair billing patterns and practices as defined in Section 1371.39 and this section are prohibited.” *Id.* §(a). *No corresponding prohibition occurs in the adopted Regulation.* Nor does the regulatory history of the new regulation explain why it omits the prohibition contained in the prior version.³ DMHC may well have concluded that it has no power to prohibit conduct it identifies as an “unfair billing pattern.”

What then is the purpose of a regulatory determination that a practice should be viewed as an “unfair billing pattern”? The answer is that the Legislature intended such a determination to be merely one step toward enacting legislation in the future. Indeed, Section 1371.39 envisioned a multi-stage process leading to the ultimate definition *by the Legislature* of “unfair billing patterns” and, possibly, the enactment of a future prohibition against engaging in such practices:

- First, Section 1371.39(b)(1) defined an “unfair billing pattern” as “engaging in a demonstrable and unjust pattern of unbundling of claims, upcoding of claims, or other demonstrable and unjustified billing patterns, as defined by the department.” *It did not, however, prohibit conduct within this definition.* Accordingly, the Legislature defined *some* billing patterns—but *not* balance billing—as “unfair,” but left the door open for that definition to be expanded as circumstances warranted and for future legislative consideration of whether such practices should be prohibited and the consequences of a violation.
- Second, the statute authorized health care plans to report to DMHC “instances in which the plan believes a provider is engaging in an unfair billing pattern.” *Id.* §1371.39(b).
- Third, the statute directed DMHC, on or before December 31, 2001, to “report to the Legislature and the Governor information regarding the development of the definition of ‘unfair billing pattern’ as used in this section. This report shall include . . .

²Section (b) of the regulation proposed in 2006 read as follows: “Except for services subject to the requirement of Section 1367.11 of the Act, ‘unfair billing pattern’ includes the practice, by a provider of emergency services, of billing an enrollee of a health care service plan for amounts owed to the provider by the health care service plan for the provision of covered services.” *Id.*

³The notice initiating the rule-making process for the new regulation states that the 2006 rule-making action had been “withdrawn,” but did not compare the text of the 2006 regulation to its 2008 successor or otherwise explain why the prohibition contained in the 2006 regulation was not contained in the 2008 version. See Register 2008, No. 13-Z Cal. Regulatory Notice Reg. 486, 487 (March 28, 2008). Nor did the withdrawal notice explain the reason for DMHC’s action. See Register 2007, No.33-Z Cal. Regulatory Notice Reg. 1373 (Aug. 17, 2007).

recommendations for statutory adoption.” *Id.* §1371.39(c) (emphasis added).⁴ So while giving DMHC the first crack at identifying additional practices as “unfair billing patterns,” based presumably on the information obtained from health plans, the statute made clear that the only consequence of any new definition was submission to the Legislature for consideration of whether it should be made the subject of a statutory prohibition.

Accordingly, under Section 1371.39 DMHC’s decision in the Regulation to define balance billing as an “unfair billing pattern” is at most a recommendation for legislative action made by DMHC almost seven years after the statutory deadline. It does not of its own force prohibit that practice.⁵ Nor, of course, has the Legislature enacted such a prohibition.⁶

The recognition in Section 1371.39(c) that further legislative action would be needed to prohibit conduct viewed as an “unfair billing pattern” by health care providers is perfectly understandable. DMHC’s regulatory powers arise under the Knox-Keene Act and extend only to *health care plans*. Accordingly, it has no jurisdiction to regulate the billing practices of *physicians*, particularly physicians who have no contractual relationship with such plans.⁷

For these reasons, the need for the Court to determine whether Section 1379 prohibits balance billing by noncontracted emergency room physicians is unaffected by the adoption of the Regulation. If, as Appellants contend, Section 1379 itself prohibits balance billing by such

⁴While Section 1371.39(c) required DMHC to report to the Legislature “regarding the development of the definition of ‘unfair billing pattern’” by December 31, 2001, it neither authorized nor prohibited follow-up reporting if the DMHC subsequently added to the list of “unfair billing patterns.”

⁵Even if the Regulation had directly prohibited balance billing by noncontracted emergency room physicians and expressly purported to interpret Section 1379, it would be entitled to little weight. A regulation adopted decades after the statute it purports to interpret, and only after the administrative agency that promulgated the regulation has taken a position in litigation, is entitled to little, if any, deference. *See Dyna-Med, Inc. v. Fair Employment & Hous. Comm’n*, 43 Cal. 3d 1379, 1389 (1987) (agency’s interpretation of statute adopted more than twenty years after statute enacted not entitled to deference); *Jones v. Tracy Sch. Dist.*, 27 Cal. 3d 99, 107 (1980) (administrative position taken after agency became an *amicus curiae* not entitled to deference).

⁶The Legislature did approve a bill prohibiting balance billing when it passed SB 981 (2008). However, as discussed in Respondents’ Supplemental Brief, that statute was much more nuanced than a flat prohibition: it made elimination of balance billing contingent on the adoption by DMHC of both a defined—and reasonable—“interim payment standard” that emergency service providers would receive in the first instance and a nonjudicial means of resolving billing disputes between such providers and health plans. That bill did not become law because the Governor vetoed it.

⁷DMHC’s assertion of jurisdiction to regulate emergency physicians and their billing practices is entitled to no deference. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 n.4 (1998) (“A court does not . . . defer to an agency’s view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature”).

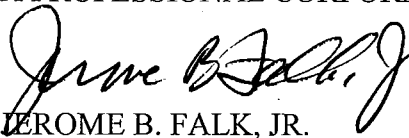
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physicians, that will resolve the matter. If, as Respondents contend, the statute does not have that effect, then balance billing by noncontracted emergency room physicians is not prohibited by any statute or regulation.

In all events, the Regulation's validity has been questioned in a lawsuit filed by the California Medical Association and other Petitioners in Sacramento County Superior Court. *See* Appellants' Third Motion for Judicial Notice, Ex. D (Petition/Complaint); Ex. A to Respondents' Third Motion for Judicial Notice, filed herewith (Memorandum).⁸ A hearing on the merits of that case is presently scheduled for November 21, 2008. At that hearing DMHC will have to prove that it had the power to prohibit a practice that the Legislature has not seen fit to proscribe. Of course, whether it can make that showing is beyond the issues presented in this case.

Respectfully,

HOWARD RICE NEMEROVSKI CANADY
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A PROFESSIONAL CORPORATION



Jerome B. Falk, Jr.

TEROME B. FALK, JR.

cc: All Counsel (per attached POS)

⁸Appellants have asked the Court to take judicial notice of the Petition/Complaint filed in the action challenging the Regulation's validity. *See* Appellants' Third Motion for Judicial Notice, Ex. D. Respondents do not oppose that request.

EXHIBIT A

**STATE OF CALIFORNIA
DEPARTMENT OF MANAGED HEALTH CARE**

**TITLE 28, CALIFORNIA CODE OF REGULATIONS
DIVISION 1. THE DEPARTMENT OF MANAGED HEALTH CARE
CHAPTER 2. HEALTH CARE SERVICES PLANS
ARTICLE 8. SELF-POLICING PROCEDURES**

ADOPTION OF SECTION 1300.71.39

Adopt new section of 1300.71.39 as follows:

§ 1300.71.39 Unfair Billing Patterns

(a) Except for services subject to the requirements of Section 1367.11 of the Act, "unfair billing pattern" includes the practice, by a provider of emergency services, including but not limited to hospitals and hospital-based physicians such as radiologists, pathologists, anesthesiologists, and on-call specialists, of billing an enrollee of a health care service plan for amounts owed to the provider by the health care service plan or its capitated provider for the provision of emergency services.

(b) For purposes of this section:

(1) "Emergency services" means those services required to be covered by a health plan pursuant to Health & Safety Code sections 1345(b)(6), 1367(i), 1371.4, 1371.5 and Title 28, California Code of Regulations, sections 1300.67(g) and 1300.71.4.

(2) Co-payments, coinsurance and deductibles that are the financial responsibility of the enrollee are not amounts owed the provider by the health care service plan.

(3) "The plan's capitated provider" shall have the same meaning as that provided in section 1300.71(a).

Authority: Sections 1344, 1371.39, 1371.4, Health and Safety Code.

Reference: Sections 1317.1, 1317.7, 1342, 1345, 1346, 1362.8, 1367, 1371, 1371.1, 1371.35, 1371.36, 1371.38, 1371.39, 1371.4, 1371.5 and 1379, Health and Safety Code.

PROOF OF SERVICE

I, Phyllis M. Montoya, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024. On October 27, 2008, I served the following document(s) described as:

LETTER BRIEF TO CALIFORNIA SUPREME COURT DATED OCTOBER 27, 2008

X by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery to the address(es) set forth below.

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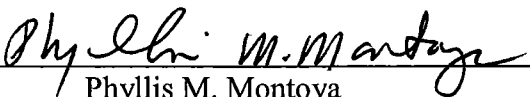
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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on October 27, 2008.



Phyllis M. Montoya

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