

HLB

HOOPER, LUNDY & BOOKMAN, PC
HEALTH CARE LAWYERS



HEALTH LAW PERSPECTIVES

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Sixth District California Court of Appeal Affirms Ruling Precluding Class Action by Patients Alleging the Hospital Allowed Emergency Room Physicians to Balance Bill

By Jennifer Hansen, Esq. and Glenn Solomon, Esq.

On May 9, 2013, in a lawsuit defended by Hooper, Lundy & Bookman, PC (HLB), the Sixth District Court of Appeal in California (Sixth District) affirmed judgment in favor of Watsonville Hospital Corporation (the Hospital) in *Leon, et al., v. Watsonville Hospital Corporation* (H037288) (*Leon*), finding that patients could not proceed in a purported class action lawsuit against the Hospital for alleged failure to prevent the independently contracted emergency room physicians from balance billing or charging “other than regular rates” for services rendered to out-of-network patients.

According to the California Supreme Court’s decision in *Prospect Medical Group, Inc., et al. v. Northridge Emergency Medical Group, et al.* (2009) 45 Cal.4th 497 (*Prospect*), when a health plan or capitated payor pays less than the amount billed for emergency services governed by the Knox-Keene Act, the provider cannot directly bill the patient for the difference if the health plan or capitated payor is obligated to pay. Unlike *Prospect*, which considered the responsibilities of emergency medical providers not to balance bill the patients, *Leon* involved the asserted liability of a hospital for the alleged balance billing by someone else.

The underlying facts in the *Leon* case involved the patients receiving emergency room services from physicians employed by the Emergency Medical Group of Watsonville (“Medical Group”), for a number of emergency room visits at the Hospital in 2006 and 2007. The Hospital was a participating provider in the patients’ health plan, but the Medical Group was not a participating provider in the their health plan. The health plan only reimbursed a portion of the physician bills, asserting that the physician bills were higher than the “usual and customary” fee for the kind of services provided. The Medical Group allegedly “balance billed” the patients for the remainder of their fee that was

not compensated by the payments made by the health plan. .

At the trial court level, the Hospital successfully eliminated at the pleading stage the claims for alleged breach of contract, breach of the implied covenant of good faith and fair dealing, unfair business practices, and violation of the Consumers Legal Remedies Act; after which the trial court granted summary judgment on the one remaining claim, for declaratory relief. The court ruled that the Hospital had no duty to warn or limit physician’s rates, and that the Hospital was not responsible for any allegedly unfair business practices of a third party on their premises, including the contracted Medical Group.

The Sixth District agreed. In doing so, the court noted that the Hospital’s Conditions of Admission form specifically warned that services may be performed by independent contractors not employed by the “facility,” and that physicians at the Hospital are responsible and liable for their own acts and omissions. The Sixth District rejected the patients’ contention that the term “facility” included facility-based physicians like the Medical Group who treated patients on the Hospital’s

- **HLB Again Achieves Top Tier Health Law Ranking by Chambers**
- **Ruling Affirmed Precluding Class Action by Patients Charging Hospital With Allowing ER Physicians to Balance Bill**
- **HLB Sues to Halt DME Competitive Bidding Expansion**
- **HLB Sues BCBS Affiliate for Hospital Breach of Contract**

premises. The court concluded the Hospital had no duty to ensure the Medical Group charged reasonable rates, to require the Medical Group to contract with the patients' health plans, or to advise the patients that the Medical Group did not accept their health plans.

The Sixth District further held that the patients could not enforce their claim against the Hospital as third-party beneficiaries to the Hospital's contract with the Medical Group. The patients did not point to any language in the Medical Group contract that could be construed as a separate promise by the Hospital to (i) monitor or enforce the Medical Group's agreement to participate in all third-party payment or managed care programs in which the Hospital participates, (ii) render services to those patients covered by such programs, or (iii) accept payment amounts provided for under these programs as payment in full for services of the Medical Group.

The *Leon* decision is an important victory for hospitals in the litigious field of balance billing lawsuits against hospitals that took on new vigor starting in 2009 after the Supreme Court's decision in *Prospect*. Although hospitals challenging various balance billing lawsuit theories have had several successes in the past few years, the complexities of California law regarding balance billing continue to create potential pitfalls for hospitals, and thus, likely will be the subject of future lawsuits.

HLB has successfully represented many California hospitals defending against balance billing lawsuits, and more generally, providing regulatory advice on what the law does and does not permit in this field.

For additional information about balance billing issues or updating your conditions of admissions forms, please contact Jennifer Hansen in San Diego at (619) 744-7310; Glenn Solomon in Los Angeles at (310) 551-8111; or Katie Miller in San Francisco at (415) 875-8500.

HLB Again Achieves Top-Tier Ranking in Chambers Review of Leading Health Law Firms

HLB has once again been named one of the top three health care law firms in California, according to the latest edition of Chambers USA. The directory is published by Chambers & Partners, which produces

law firm directories of top-rated law firms throughout the United States and Europe, ranking law firms primarily based on outside interviews with General Counsel, high-profile entrepreneurs and other significant purchasers of legal services.

In addition to the firm ranking, the following nine HLB attorneys were recognized as top performers in California, more than any other Chambers top-ranked firm: Lloyd Bookman, John Hellow, Patric Hooper, Steven Lipton, Robert Lundy, Charles Oppenheim, Paul Smith, Clark Stanton, and Bradley Tully. Three California attorneys – Lloyd Bookman, Steven Lipton and Patric Hooper – were recognized as top performers in the nation. In addition, Robert Roth was recognized as a top performer in Washington, D.C.

HLB Sues CMS to Halt July 1 DME Competitive Bidding Expansion

On June 19, 2013, HLB filed a lawsuit in Washington, D.C. federal court against the Secretary of the U.S. Department of Health and Human Services (HHS) seeking to halt the July 1, 2013 expansion of the Medicare competitive bidding program for durable medical equipment (DME) because of serious irregularities relating to the failure of certain successful bidders to have required State licenses. *AMERICAN ASSOCIATION FOR HOMECARE et al v. SEBELIUS*, Case No. 13-cv-00922 (D.D.C.).

HLB filed this lawsuit on behalf of the American Association for Homecare (AAHomecare), a Maryland DME supplier, and a Tennessee DME supplier. On June 24, 2013, HLB filed an application for a temporary restraining order to prevent the scheduled July 1 expansion from going forward as planned.

Specifically, the complaint initiating the lawsuit charges that the Centers for Medicare and Medicaid Services (CMS) accepted bids from DME suppliers that lacked proper state and local licenses and later unlawfully awarded contracts to those suppliers. The complaint alleges that these bids were improperly used in calculating the Medicare payment amounts for DME products and services and to determine successful bidders.

"We have uncovered several states where these licensing irregularities exist," said HLB Attorney Robert Roth, lead attorney representing the plaintiffs

For more information, please contact Robert Roth in Washington, D.C. at 202.580.7700 or Pat Hooper in Los Angeles at 310-551-8110.

HLB Sues Blue Cross Blue Shield Affiliate for Breach of Contract with Hospitals

HLB filed a complaint against Blue Cross Blue Shield of Mississippi (BCBS), on behalf of 10 Mississippi hospitals on June 18, 2013, charging that BCBS reduced reimbursement rates without agreement from the hospitals, as required in the contracts between the hospitals and BCBS.

The complaint was filed on behalf of hospitals owned by Naples, Florida-based Health Management Associates and charges BCBS with breach of contract and tortious breach of contract. The complaint was filed in the Mississippi Circuit Court of Hinds County (No. 25113-556CIV).

“These contracted hospitals will collectively be denied more than \$13 million in reimbursement by the end of 2013 as a result of BCBS’ attempt to reduce reimbursement rates without agreement by the hospitals,” said Glenn Solomon, lead attorney representing the hospitals. “The tactics being used by BCBS not only violate its contracts with the hospitals, they are also clearly attempting to hide rate reductions under the guise of amending policies and procedures.”

At issue are alleged efforts by BCBS to unilaterally reduce reimbursement rates without agreement by contracting hospitals.

The Contracts

Each of the plaintiff hospitals has a contract with BCBS, that contains two key items for purposes of this complaint:

- Each of the contracts states that it can be amended only “by mutual written consent.” Each contract also states that “Any changes to Attachment A Policies and Procedures or Attachment B payment Program shall be made know to the Hospital in writing at least 30 days before the changes are to become effective. Said changes must be mutually

agreed upon prior to implementation.”

- Attachment B of each contract states that “In the event of a conflict between the provisions of this Attachment B Payment Program and the Participating Hospital Agreement or Attachment A Policy Procedures Manual or Attachment C APC Policies and Procedures Manual, the provisions of this Attachment B shall prevail.”

The Charges

According to the complaint filed by HLB on behalf of the hospitals, when BCBS proposed amendments to Attachment B of hospital contracts, it also typically proposed amendments to the Attachment As. Although Attachment As are identified as Policies and Procedures, BCBS began inserting into Attachment As a number of provisions that would contradict and undercut agreed upon compensation outlined in Attachment Bs.

“This includes, without limitation, the tactic of injecting both different rates in the Attachment As than the rates set forth in the Attachment Bs; and the tactic of slipping rate adjustment factors into the Attachment As that would change the compensation stated in the Attachment Bs.” According to the complaint, BCBS proposed six unilateral reductions in compensation. The hospitals did not agree to any of the proposed unilateral compensation reductions made by BCBS.

The hospitals estimate the total amount of the proposed reductions would reach more than \$13 million, if implemented. The complaint seeks compensatory and punitive damages.

“These hospitals are dedicated to providing appropriate care to each of their patients. It is imperative that they are reimbursed fairly and as agreed in their contracts with health plans,” said Mr. Solomon. “No health insurer should be permitted to undercut the contracting process.”

For more information, or to report health plan attempts to undercut reimbursement, please contact Glenn Solomon in Los Angeles at 310.551.8111.

HLB BRIEFS

- HLB is proud to announce that attorney Tracy Jessner has been named one of AHLA’s Pro Bono Champions for the pro bono services she provided for the Los Angeles County Bar Association’s AIDS Legal Services Project and UCLA Mobile Clinic. Ms. Jessner has provided pro bono services to the AIDS Legal Services Project since 2009 and for the UCA Mobile Clinic since 2010.
- HLB Economic Policy Advisor Alex Brill and HLB Attorney Brett Leitner have published *Sequestration’s Uniform Medicare Cut Will Yield Disparate Impacts Across Providers* in the June, 2013 issue of *The Health Lawyer*.
- HLB is pleased to announce that attorneys Amanda Hayes-Kibreab and Devin Senelick have been selected as 2013 Southern California Rising Stars in Health Law. Attorneys are selected through a polling process conducted by *Law & Politics*.

CALENDAR

- July 17, 24 **Hospital Council of Northern & Central California & Hospital Council of Southern California Joint Webinar**
Stephen Phillips, Joseph LaMagna and Amy Joseph present a 2 part webinar on *Social Media Use by Hospitals*.
- July 24 **Asian Health Care Leaders Association 2013 National Conference, San Diego**
Katrina Pagonis participates in a panel on *ACA Rollout and Outreach to AAPI Communities*. Felicia Sze co-presents *ACA and its Financial Impact on Hospitals and Health Systems*.
- September 17 **HFMA Northern California Fall Conference, Concord, CA**
Felicia Sze and Katrina Pagonis present *Cal MediConnect: California's Dual Eligible Program*.

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