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November 3, 2008

File No. 3489.3

Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Prospect Medical Group v. Northridge Em. Med. Group*,
Supreme Court No. S142209; Ct. of Appeal Nos. B172737; B172817
Reply Letter Brief Concerning Balance Billing Regulations

Dear Chief Justice George and Associate Justices:

This letter brief is submitted on behalf of Plaintiffs and Appellants Prospect Medical Group, Inc., *et al.*, in reply to Respondents' October 27, 2008, letter brief.

The October 27, 2008, letter briefs reveal a disconnect between the parties on whether the new regulations are relevant to this case. Respondents' focus is on issues unrelated to Appellants' arguments. Respondents contend that (1) the Balance Billing Regulations are not an interpretation of Health and Safety Code Section 1379 ("Section 1379") and are therefore irrelevant to an interpretation of Section 1379; (2) the Regulations define balance billing by emergency physicians as an "unfair billing pattern" but that definition does not authorize agency action against providers unless and until the Legislature amends the Knox-Keene Act; (3) even if the Balance Billing Regulations were relevant to an interpretation of Section 1379, they would be entitled to little weight because the statute was enacted long before the Regulations were promulgated; and (4) the DMHC's jurisdiction to regulate emergency room physicians is an issue now before the Sacramento Superior Court, which is not properly considered in this case.

Respondents' contentions are addressed seriatim.

First, Appellants do not contend that the Balance Billing Regulations are an interpretation of Section 1379. Rather, Appellants argue that the DMHC's determination -- through the formal procedures of the Administrative Procedures Act -- that balance billing for emergency medical services is "unjustifiable" and therefore properly defined as an "unfair billing

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pattern” demonstrates that Respondents cannot rebut the *McCall* presumption that the contractual relationships referenced in Section 1379(b) encompass all types of non-written contractual relationships, including contracts implied by law. Similarly, an interpretation of Section 1379(b) that excludes contracts implied by law – and therefore permits balance billing for emergency services – would be antithetical to the statute’s consumer-protection purposes, including the Knox-Keene Act’s expressly-stated policy to “ensure the best possible health care for the public at the lowest possible cost by transferring the financial risk of health care from patients to providers.” *Health & Safety Code Section 1342(d)*.¹

Second, the significance of the DMHC’s regulatory action for purposes of this case is that the agency has *defined* balance billing for emergency services as an “unfair billing pattern,” based on its determination that the practice is “the epitome of unfair.” Respondents’ contention that the DMHC lacks authority to take enforcement action against providers for engaging in unfair billing practices is irrelevant to the significance of the agency’s definition of balance billing for emergency services as an unfair billing pattern.²

The DMHC has broad statutory authority to *define* any term as necessary to carry out the provisions of the Knox-Keene Act. *Health and Safety Code Section 1344(a)*. And the agency has *express* authority to define as “unfair” billing practices employed by providers that the DMHC finds to be unjustifiable: “Unfair billing pattern’ means engaging in a demonstrable and unjust pattern of unbundling of claims, up-coding of claims, or other demonstrable and unjustifiable billing patterns, as defined by the department.” *Health & Safety Code Section 1371.39* (emphasis added). This statutory delegation of authority to *define* the phrase “unfair billing patterns” is *not* conditioned upon legislative approval of the definition or amendment of the

¹ The DMHC’s definition of balance billing as an “unfair billing pattern” is also relevant to Appellants’ contention that balance billing for emergency services constitutes unfair competition under Bus. & Prof. Code Section 17200, which encompasses unlawful, unfair and deceptive business acts or practices.

² Respondents also contend that the DMHC’s definition of balance billing for emergency services as an unfair billing pattern is of no practical significance because the Knox-Keene Act does not expressly prohibit unfair billing patterns. According to Respondents, a legislative amendment is necessary to prevent providers from engaging in unfair billing patterns. But no such amendment is necessary because conduct defined by the DMHC as an “unfair billing pattern” can serve as the predicate for a claim under the Unfair Competition Law, Bus. & Prof. Code Section 17200.

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statute. The DMHC's regulatory definition of balance billing as an unfair billing pattern is significant to an interpretation of Section 1379 based on its determination that such conduct *unjustifiably* undermines the managed health care bargain by forcing consumers to pay twice for emergency medical services. This regulatory determination demonstrates that Respondents' interpretation of Section 1379, which would permit this grossly unfair practice, is antithetical to the consumer-protection purposes of the Knox-Keene Act. In sum, there is no good reason to condition the prohibition against balance billing for emergency services based on whether the plan's underlying contractual obligation to the provider stems from an oral or implied in fact contract, on the one hand, or one implied by law. The practice is equally unjustifiable, regardless of the distinctions between express/implied-in-fact/implied-by-law contracts. Respondents' interpretation, which results in this absurd result, must therefore be rejected.

Third, the DMHC's definition of balance billing for emergency services as unfair, based on a finding that the practice is unjustifiable and contrary to the Act's consumer protection purposes, is entitled to substantial deference – despite the passage of time since Section 1379 was enacted. This Court has emphasized that promulgation of formal regulations is a strong factor weighing in favor of deference: “If an agency has adopted an interpretative rule in accordance with Administrative Procedures Act provisions (*e.g.*, notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative ‘product’ – that circumstance weighs in favor of judicial deference.” *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13. While the passage of time between statutory enactment and regulation is *a* factor to consider (*id.*), it is an insignificant factor in this case because the problem addressed by the Balance Billing Regulation is new.³ The agency, in pursuit of its administrative duties, has accumulated considerable administrative experience with the implications of balance billing for emergency medical services under the current statutory regime, which now includes the provider's statutory duty to treat patients on an emergency basis and the plan's obligation to reimburse providers at a reasonable rate. The DMHC, in defining balance billing for emergency services as unfair, utilized the APA rulemaking procedures in making its determina-

³ As demonstrated by the legislative history to Health & Safety Code section 1371.4, enacted in 1994, the emergency physicians expressed no intention of balance billing patients for amounts beyond the reasonable fee paid by the health plan. Nor was any such intention expressed during the Legislature's consideration of AB 1455 (which includes H.& S. Code 1371.39) when that statute was adopted in 2000.

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tion, which was also based on its accumulated and substantial “body of experience and informed judgment,” to which “courts and litigants may properly resort for guidance.” *Yamaha*, 19 Cal.4th at 14 (quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140).

Fourth, Appellants’ contention that the DMHC’s formal definition of balance billing for emergency services as an unfair billing pattern is relevant to an interpretation of Section 1379 is *not* dependant upon the agency having enforcement jurisdiction over providers. As described above, the Regulations are relevant to an interpretation of Section 1379 because they define balance billing for emergency services as an unfair billing pattern, which is the epitome of unfair to consumers. Respondents’ contention that the agency lacks direct enforcement authority over providers is therefore immaterial to Appellants’ position.

For these reasons, in addition to those raised in Appellants’ October 27, 2008, letter brief, the recently-effective Balance Billing Regulations and the DMHC’s supporting determination that balance billing for emergency medical services is the epitome of unfair further establish that Section 1379 must be construed as prohibiting balance billing for emergency medical services.

Very truly yours,



Thomas R. Freeman

cc: See Proof of Service (attached)

254758.1

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over the age
4 of 18 and not a party to the within action; my business address is 1875 Century Park East,
23rd Floor, Los Angeles, California 90067-2561.

5 On November 3, 2008, I served the following document(s) described as **REPLY**
6 **LETTER BRIEF CONCERNING BALANCE BILLING REGULATIONS** on the
interested parties in this action as follows:

7 **BY MAIL:** By placing a true copy thereof in sealed envelopes addressed to the parties
8 listed on the attached Service List and causing them to be deposited in the mail at Los
Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am
9 readily familiar with our firm's practice of collection and processing correspondence for
mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary
10 course of business. I am aware that on motion of party served, service is presumed invalid
if postal cancellation date or postage meter date is more than one day after date of deposit
for mailing affidavit.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed on November 3, 2008, at Los Angeles, California.

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16 _____
Sandy Palmieri

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SERVICE LIST

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Case No. S142209**

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