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Balance Billing Ban Triggers Lawsuits

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It was January 2009 when the California Supreme Court prohibited emergency physicians from balance billing the several million patients covered under that state's HMOs and Blue Cross and Blue Shield PPOs.

But now that the dust has settled, class action attorneys are moving in--both to file lawsuits against illegal balance billing that is still taking place and to have the state court's ruling applied retroactively.

For example, Derek Emge, a consumer class-action attorney at the law firm Emge & Associates, said his firm is investigating two possible cases of balance billing that occurred after the Supreme Court's ruling. (No lawsuits have been filed thus far.)

His firm's Web site warns former emergency department patients that "a hospital or physician group may not bill or contact you about bills arising from emergency medical services. They may not threaten you with debt collection and/or ruining your credit. Any contact about your bill is prohibited."

(See the law firm's Web page at www.emgelawfirm.com/CM/Custom/Illegal-charges-for-Emergency-Rooms.asp.)

But that's not really true, said Dr. R. Myles Riner, the past president of CAL/ACEP.

Ads like the one from Mr. Emge's firm seem to imply that all balance billing is illegal, that patients should never receive any bill from an emergency care provider, and that the Supreme Court decision applies to all insured patients, he said.

In reality, by one estimate, the ruling applies to less than half of all commercially insured patients.

"But just the existence of these [ads] is likely to discourage patients from paying legitimate bills from emergency care providers that do not fall under the balance billing prohibition," such as coinsurance payments and deductibles, said Dr. Riner, who is also the director of provider relations for CEP America, an emergency physician staffing and management company.

Mr. Andrew Selesnick, an attorney who is the director of the health care department at the law firm Michelman & Robinson, LLP, agreed.

"You're putting out this false information, inaccurate information, and patients don't need much of an excuse not to pay the bill in the first place," said Mr. Selesnick. "Now they can say, 'You were never allowed to send me a bill.' "

Mr. Selesnick has been either lead or co-counsel for the defendants on just about all of the nearly half a dozen lawsuits that have taken place so far.

Mr. Emge responded that the Web page simply is intended to point out that "there may be an issue" for any patient who went to an emergency department, received emergency care, and was billed for it.

"It maybe raises a question, and it's good for consumers to question their rights," he said.

So far, Mr. Selesnick said that most of the cases he has worked on have been dismissed. A couple more are on their way to dismissal, mostly on technicalities, he added.

But the essential question for lawsuits that do have standing will be whether the ruling may be applied retroactively, Mr. Selesnick said.

Both attorneys agreed that, typically, these types of rulings are--and that could be very bad news for California emergency physician groups, said Mr. Selesnick.

"If the court ordered the return of monies, it would be another blow to an already fragile safety net," he said.

There are also privacy concerns. "How would the court presume to contact potential class members?" Mr. Selesnick asked. "Do they send a letter to the minor who went to the ED but never told her parents? Or do they send a letter to the husband who never informed his wife about a visit to the ED?"

In any case, even if the balance-billing ruling is not given retroactive application, the damage may already be done to emergency care in California, Dr. Riner said.

"The overall effect is to significantly increase the burden on ED physician groups to dispute these underpayments--often to no avail--and to adjust to the substantial decrease in revenues," said Dr. Riner. That will happen by either cutting back on EP staffing, abandoning EDs with payer mixes that cannot support them, or seeking subsidies from hospitals.

"Longer term, the result will likely be longer waits for care in our EDs, poorer quality of care, closure of more EDs in poorer neighborhoods, and more frequent use of nonphysician practitioners to manage even the sickest patients in our EDs," he said.

Read the full text of the January California Supreme Court ruling at www.calacep.org/spaw2/uploads/files/legal%20advocacy/Prospect_v_Northridge_Supreme_Court_Opinion.pdf.

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