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California Supreme Court Denies Petition for Review in Children's Hospital Case

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In a potential windfall for payers, on October 15, 2014, the California Supreme Court denied Children's Hospital's petition for review (and depublication) of the Fifth Circuit Court of Appeal's published decision in *Children's Hospital v. Blue Cross of California*.

In the case, the Court of Appeal overturned the trial court's jury verdict of $6.6 million in favor of Children's Hospital. At issue, was payment for post-stabilization emergency medical services provided to nearly 900 Blue Cross Medi-Cal beneficiaries over a 10-month period where there was no contract between the hospital and the health plans. During this off-contract period, Blue Cross paid only a little over $4.2 million. Subsequently, the hospital filed an action seeking the total reimbursement amount, arguing that under Title 28, section 1300.71 (a)(3)(B) (also known as the "Gould" regulations), Blue Cross was required to pay "the reasonable and customary value for the health services rendered." Title 28, section 1300.71 (a) (3) (B) provides that, for non-contracted providers, the reimbursement of a claim means:

"The payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case…" (§1300.71(a) (3) (B)).

Blue Cross argued that evidence of payments accepted by the hospital from health insurers or health plans for post-stabilization services is relevant in determining reimbursement rates. The trial court disagreed with Blue Cross on the grounds that the evidence sought was irrelevant. It found that "fees usually charged," one of the "Gould Factors", does not mean "payments accepted." The trial court also confirmed that 1300.71(a) (3) (B) was the exclusive standard for calculating the reasonable and customary rate that Blue Cross had to pay the Children's Hospital for

post-stabilization services. The trial court therefore awarded the hospital an additional $6.6 million.

On June 10, 2014, however, the Court of Appeal overturned the decision, stating that Blue Cross had not been given a chance to put on a complete defense. In the appeal, Blue Cross argued that in addition to the factors outlined in Title 28, section 1300.71 (a)(3)(B), a provider's contracts with other payers, as well as what the government reimburses for Medi-Cal and Medicare beneficiaries, could be considered in determining the "reasonable value" of post-stabilization emergency services. It argued that, under quantum meruit principles, the hospital was required to demonstrate the reasonable value, i.e. market value, of the post-stabilization care it provided. Therefore, although the hospital's full billed charges were relevant to the issue of the reasonable and customary value of the services, they were not determinative. The Court of Appeal agreed with Blue Cross. It held that the trial court erred in using the *Gould* factors as the exclusive standard for determining the reasonable and customary value of post-stabilization emergency services.

Multiple amicus asked the Supreme Court to review, because the Court of Appeal decision did not follow regulations and established case law, while others argued the decision as it stands will have a chilling effect on the provision of emergency care in California, and will also create a disincentive for providers to contract.

For out of network providers who provide post-stabilization care to enrollees covered by the Department of Managed Health Care (DMHC), *Children's* now could be read to allow juries to consider contract and government rates when considering fair and reasonable reimbursement. However, *Children's* does not mandate that juries must follow the rates, only that they are factors to be considered or rejected.

For out of network providers who provide pre-stabilization emergency services to enrollees covered by the DMHC, we have already seen HMOs argue that *Children's* applies. While we believe the Supreme Court should have granted review, the Court of Appeal's holding should ultimately be limited in scope. *Children's* dealt exclusively with the payment of services to hospitals for post-stabilization services. It did not deal with pre-stabilization services which are subject to EMTALA. The decision itself indicates that the Court was specifically considering post-stabilization services. Providers of pre-stabilization emergency services are required to provide care to all patients regardless of their ability to pay. Further, both the Courts and the DMHC have rejected the use of Medicare in determining the value of pre-stabilization emergency services. For these reasons, *Children's* should be read to be limited to post-stabilization services. In our view, the decision does not allow HMO's to consider contracted rates, Medicare, or Medi-Cal rates in determining the reasonable and customary value of pre-stabilization emergency services.

Damaris L. Medina represents a diverse array of health care clients in complex litigation, contracting, and risk management. She also advises health care providers on managed care contracting, employment, compliance, breach of contract and other related business matters, in addition to defending them against government investigations and audits, including by the Office of the Inspector General (OIG). Ms. Medina has successfully litigated numerous large exposure cases on behalf of health care providers, including those involving major health plans, as well as many independent practice associations. Additionally, seasoned in class action matters, she has successfully opposed motions for class certification and counseled both plaintiffs and defendants on class action employment issues.

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