

Surprise ER Bills: A California Consumer Perspective

Existing California law prohibits surprise bills (or “balance billing”) for emergency room care and sets standards for reimbursement to doctors and hospitals for most state-regulated health insurance plans.

Protections against emergency room balance billing were created through two key California court cases:

1. *Prospect* in 2009: Banned surprise bills for emergency care.
2. *Children’s* in 2014: Medicare, Medicaid and commercial payments made, along with billed charges, are to be considered when determining reimbursement.

These court decisions protected most (but not all) Californians from surprise emergency room bills. Left unresolved was issue of surprise bills from out-of-network doctors at in-network facilities. This was the focus of AB 72 from 2016 (See Health Access’ fact sheet). The pending state proposal, AB 1611 (Chiu), seeks to fill in remaining gaps in law specifically on emergency room surprise bills. However, the most ideal and comprehensive solution requires federal action.

Emergency Room Care: Surprise Bills Banned, Payment Factors Set

Prospect, 2009: Surprise Bills Banned for Most California Consumers

In 2009, in a unanimous 7-0 decision, the California Supreme Court concluded:

For HMO members, it is always clear in advance who has to provide emergency services — any emergency room doctor to whom the member goes in an emergency — and who has to pay for those services — the HMO. The conflict arises when there is no advance agreement between the emergency room doctors and the HMO regarding the amount of the required payment...The resolution of such disputes can create difficult problems.

Interpreting the applicable statutory scheme as a whole — primarily the Knox-Keene Health Care Service Plan Act of 1975, Health and Safety Code section 1340 et seq. (Knox-Keene Act) — we conclude that billing disputes over emergency medical care must be resolved solely between the emergency room doctors, who are entitled to a reasonable payment for their services, and the HMO, which is obligated to make that payment. A patient who is a member of an HMO may not be injected into the dispute. Emergency room doctors may not bill the patient for the disputed amount.

Due to this decision, since 2009, California consumers with most state-regulated coverage¹, including both HMOs and most PPOs, have been protected from surprise medical bills for emergency care, for both physicians, hospitals, and ancillary services.

This court decision ended years of efforts in the California Legislature to ban surprise emergency room medical bills. In the years since, millions of Californians have received emergency care and most are happily

¹ California has two regulators of health insurance: The California Department of Insurance regulates coverage for about one million Californians; the Department of Managed Health Care, responsible for enforcing the Knox-Keene Act referenced by the California Supreme Court, regulates coverage for about 25 million Californians, including both HMOs and PPOs. In a footnote, the Court noted that they used the term “HMO” for convenience.

FACT SHEET: Surprise Emergency Room Bills

unaware that surprise bills for that care are illegal. Disputes between health plans and doctors and hospitals over payment in non-contracted situations continued in the regulatory process and in state litigation.

Children's Hospital, 2014: Payment Considerations in Non-Contracted Situations

In a subsequent case in 2014, *Children's Hospital*, a California appellate court found that in determining the amount of payment to non-contracted emergency care providers, health plans could consider the contracted amounts for commercial coverage as well as amounts paid by Medicare and Medicaid (Medi-Cal in California) and other factors including the education and training of the physician, the provider's billed charges, the nature of the treatment provided, and extenuating circumstances.

In that case, the hospital insisted that only billed charges be considered, not Medicaid payments, even though the overwhelming majority of the children treated at the hospital are covered by Medicaid. The court found the hospital's position unreasonable and held that payments actually made for commercial coverage as well as public programs, including both Medicare and Medicaid, are legitimate considerations in non-contracted or quantum meruit cases.

No Surprise Bills for Emergency Care for Most Californians

Taken together, *Prospect* banned surprise bills for emergency care for most Californians and *Children's* outlines factors for consideration for payment in non-contracted emergency care situations. In the decade since *Prospect*, millions of Californians have received emergency care, emergency rooms continue to operate, and doctors and hospitals provide needed care every day in California with fair compensation. This is despite dire prediction from emergency room doctors that care would not be available or accessible due to minimum payment standards.

The Gap

While most Californians are protected from surprise bills for emergency care, about 7 million Californians are not. This includes one million Californians with coverage regulated under the California Insurance Code and almost six million with self-insured coverage regulated under ERISA where federal law pre-empts state regulation of the health plan.

This was evident when a series of articles in *Vox* and the *San Francisco Chronicle* in early 2019 exposed the practice by Zuckerberg San Francisco General Hospital that balance billed insured patients for out-of-network emergency care. It was revealed that ZSFGH, the only level-I trauma center in the city, did not have any contract with any insurance provider for their hospital emergency room. Many insured patients whose coverage appears to fall into the gap in law where balance billing protections did not apply, received emergency care and were hit with surprise bills for tens of thousands of dollars. While a pending state bill, AB 1611 (Chiu), would help close this remaining gap for surprise emergency room bills, federal legislation is ultimately needed to resolve the issue more comprehensively.

Action by the US Congress could give these seven million Californians the same protections against surprise emergency bills that 26 million other Californians already have. Consumers can't afford surprise emergency room medical bills, nor can they afford premiums inflated by unfair provider charges.