

ER Patients Use Court Ruling to Push for Billing Refunds

By **Evan George**
Daily Journal Staff Writer

LOS ANGELES—Ariel Sabban wants a \$57,83 refund for a medical bill he paid more than a year ago. And he has the attention of the state's multibillion-dollar hospital industry.

The San Diego man sued Scripps Memorial Hospital and its emergency physician group last month, claiming they broke the law by billing him for the difference between what his insurer would pay and the full \$521 bill for treating a cut on his son's head.

That controversial business practice, known as "balance billing," was deemed illegal by regulators and the state Supreme Court in a January ruling.

Now, health care providers reeling from that decision could suffer a new financial blow if this and other suits proceed. Hospitals and ER doctors could be on the hook for hundreds of millions of dollars in collective refunds to patients they billed several years ago, particularly if plaintiffs' lawyers file a wave of class actions over the issue. The court opinion last month left open the question of whether the ban would apply retroactively.

Doctor groups have railed against the lawsuit as unfair and unwise. But lawyers for Sabban argue he and other emergency room patients should be refunded all the money they paid under the now-illegal billing scheme.

"It is not fair for [providers] to

keep that money if they are not lawfully collecting it," said Vincent Slavens, a partner at Krause Kalfayan Benink and Slavens in San Diego, who represents Sabban. "Not only will it benefit people who had been charged, but going forward it will also stop the hospitals from doing this to people in the future."

The proposed class action asks for compensation and some damages.

A lawyer for Scripps, which has four hospitals in Southern California, said the chain does not balance bill and that the bill at issue could be from La Jolla Emergency Physicians Groups, which runs the hospital's ER.

The case is the second lawsuit in recent months seeking retro-

active refunds due to allegedly unfair billing. An Orange County couple has sued Mission Hospital, owned by St. Joseph's Health System, claiming balance billing was at play in overcharging them for services. Attorney Ron Bochner is representing the couple.

In both cases, the emergency room physicians have also been sued. That has doctors throughout California nervously watching the cases.

"Everyone is calling and asking," said Elena Lopez-Gusman, director of governmental affairs for the California chapter of the American College of Emergency Physicians. "There is a fear that we're next."

Lopez-Gusman said doctors

See Page 4 — ER

ER Patients Use Ruling to Demand Refunds

Continued from page 1

only billed insured patients when it was the last way to recoup expenses. "Balance billing was legal," Lopez-Gusman said. "To say that [the law] was retroactive is requiring physicians to have had a crystal ball four years ago."

Many believe forcing doctors to give refunds could further fray an emergency system already in deep financial trouble. Since 1996, 70 emergency departments have closed statewide, according to the California Hospital Association.

"Do they want their \$50 back or do they want the system to stay in place?" Lopez-Gusman said.

Many patients with health care coverage might never receive medical bills directly from a hospital or doctor because health plans contract with providers to set pay rates. But when no contract exists, a financial tug of war often ensues.

Emergency care has spurred much of the balance billing in California because ER doctors are required by law to treat all patients, regardless of their health care coverage or whether a hospital contracts with that insurer.

Involving the patient in the dispute was outlawed on Oct. 15 when the state's Department of Managed Health Care implemented a new regulation banning balance billing.

One industry study found as many as 1.7 million insured Californians were hit by balance billing after visiting an emergency room since 2007. The California Association of Health Plans study reported that the average bill was \$300, for a total of \$528 million in extra bills for patients.

Lawyers watching the class actions said they expect to see more complaints for refunds and damages.

"Certainly the trial bar will be looking at these cases to see if there's an opportunity there," Francisco Silva, general counsel for the California Medical Association, said. "We may participate to make

sure that doesn't happen."

Emergency physicians could file cross complaints against the health plans for the low rates they pay, Silva added.

Indeed, the controversy over sticking insured patients with the bill stems from the raging, nationwide feud between health providers and the insurance industry over what medical care should cost. Doctors say they are routinely stiffed by HMOs that fix reimbursement levels too low. Insurers meanwhile claim that doctors inflate their bills, driving up the price of health care.

At the heart of the dispute lies one legal question that will continue to be fought over: What is "fair and reasonable" compensation for emergency medical care?

That's a question the California Supreme Court chose not to answer in its ruling last month. The court found that the state's Health and Safety Code does not allow balance billing but refused to dictate what health plans should pay. *Prospect Medical Group v. Northridge Emergency Medical Group, 2009 DJDAR 347.*

Hospital representatives said they are still grappling with how to ensure they are paid fully. "Our world turned upside down when the court ruled, and we're just trying to figure out what it means," said Dietmar Grellmann, senior vice president of the California Hospital Association. Key to the new lawsuits is whether the court ruling applied retroactively. The Department of Managed Health Care has said its regulation started Oct. 15. But the Supreme Court ruling was less clear.

"To say 'give them back the money' because there might have been technical questions about who was supposed to pay is absolutely wrong," said Andrew Selesnick, a partner at Michelman & Robinson in Encino.

Selesnick heads the firm's health care office and argued the *Prospect* case on behalf of emergency room doctors at the trial court level. He

said he had reviewed both of the recent lawsuits. "I think there are several questions about the retroactivity of the *Prospect* decision that courts are going to have to deal with," Selesnick said.

Other cases, including several brought by California physicians against Blue Cross and Blue Shield, are winding their way through the appeals process.

The issue of fair pay is also playing out in federal courts nationwide. The American Medical Association sued insurers Aetna Inc. and Cigna Corp. Monday in a New Jersey District Court, claiming that the two health plans routinely under-reimburse physicians. That follows a massive settlement with UnitedHealth over its fixing of reimbursements.

Pay rates were not part of the picture as Sabban rushed his young son to Scripps Memorial Hospital in La Jolla on June 24, 2007. His son had fallen and cut open his head.

Sabban informed doctors that his son, who was admitted to the ER, had health insurance with Blue Cross. After surgery, the emergency department submitted a bill to Blue Cross for \$521, according to the complaint.

Blue Cross agreed to pay only \$463.71.

Then, on Oct. 15, 2007 — exactly one year before California banned balance billing — Sabban received a bill for the remaining \$57,83 with a letter that said "responsibility for payment is yours." Two months later, Sabban mailed a check for that \$57,83.

Slaven, the lawyer for Sabban, said he sympathized with doctors who feel they are underpaid by health plans like Blue Cross. But he said that did not change the law.

"They can pursue their claim against the HMO," Slaven said.

"They do have recourse. They just don't have the recourse against the patient."

even_george@dailyjournal.com