

Daily Journal

San Francisco Enters Hospital Billing Fray

By Amy Yarbrough

SAN FRANCISCO - A suit recently filed by the San Francisco City Attorney's Office against two medical insurers adds a new twist to the tug-of-war over unpaid emergency room fees.

In a rare move, City Attorney Dennis J. Herrera announced in late May he had sued two affiliates of Blue Cross of California Inc. and Health Net of California Inc. for "systematically" underpaying for emergency services provided to their policyholders at San Francisco General Hospital and other public hospitals. Herrera's lawsuit appears to mark the first time a local government has stepped in to help recoup a hospital's costs after it was underpaid by insurers.

Even so, a dispute over those bills - in which patients accuse San Francisco of wrongfully sticking them with the same unpaid balances the city is now seeking from insurers - had already been simmering in San Francisco County Superior Court. Both suits hinge on interpretation of California's Knox-Keene Act, which governs hospital billing.

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While Herrera's suit is unique, private lawyers have been suing insurers for years, accusing them of undercutting providers on emergency room bills. Andrew H. Selesnick, a partner at Michelman & Robinson LLP who represents providers in such suits, estimates between 50 and 100 cases have been filed in California in the last two years alone.

Selesnick said he believes the city attorney's suit has a good chance of succeeding and may inspire other counties to take action.

"The fact that you see so many private providers who are using the court system when all else has failed could be a motivating factor for the city attorney's office," he added.

Los Angeles Chief Assistant City Attorney Jeffrey B. Isaacs, whose office sued Blue Cross' parent company WellPoint Inc. over the separate issue of rescission - when patients' policies are cancelled after they file claims - applauded Herrera's efforts.

"It looks like a solid lawsuit," he said.

Pleased for slightly different reasons is Nicholas A. Carlin, one of the attorneys behind the proposed class action against San Francisco. Filed in 2009, his suit accuses the city and county of illegally "balance billing," or charging emergency room patients for the remainder of their bills that their insurers were unwilling to pay. Two of the name plaintiffs in Carlin's suit had coverage through the Anthem Blue Cross Life and Health Insurance Company, and Health Net, which are defendants in the city attorney's suit. *Combrisson v. City and County of San Francisco*, 489400 (filed June 12, 2009).

Carlin, a partner with Phillips, Erlewine & Given LLP in San Francisco, said he believes the city's suit was triggered by his case.

"We are gratified to see them file this lawsuit," he said. "That is what we have been encouraging them to do for two years."

Danny Chou, chief of complex and special litigation for the city attorney's office, said the city's suit wasn't a reaction to *Combrisson* but instead arose from information his office gleaned while investigating that case. San Francisco has denied the allegations in Carlin's suit.

"We believe that the city hasn't balance billed patients," Chou said.

The city attorney's office accuses Health Net and the Blue Cross affiliates of shortchanging hospitals and violating California's Unfair Competition Law. It asks for an injunction to halt the companies' actions, full restitution plus interest for the underpayments - estimated in the millions of dollars - and civil penalties of up to \$2,500 for each violation. *People of the State of California v. Blue Cross of California Inc., et al.*, 511181 (S.F. Super. Ct., filed May 24, 2011)

Generally, medical providers and insurers avoid such disputes around non-urgent care because they have contracts between them in which the cost for services has been pre-negotiated. But things get trickier when they involve emergency services.

Under the state's Knox-Keene Act, insurers must pay the costs of emergency care for their policyholders, even at hospitals they don't have contracts with. San Francisco General Hospital does not have contracts with the defendants in its case. Insurance companies point to the fact that the law only requires they pay the "reasonable" cost of the services. That amount is often at odds with what medical providers say their services are worth.

According to the city's complaint, San Francisco General Hospital's bills are reasonable and were calculated based in part on an analysis done by Phase 2 Consulting, a health policy consulting firm familiar with what major hospitals charge. The defendants are accused of making "arbitrary" reductions to bills.

Health Net spokeswoman Amy Sheyer said her company does not discuss pending litigation. Anthem Blue Cross did not respond to calls seeking comment.

The California Association of Health Plans, an industry trade group, also declined to comment.

Passed in 1975, the Knox-Keene Act is also at the heart of the proposed class action against San Francisco. The suit relies on a 2009 California Supreme Court case, which held that Knox-Keene prohibits emergency medical providers from going after patients to recover hospital costs their insurers refuse to pay. *Prospect Medical Group Inc. v. Northridge Emergency Medical Group*. 45 Cal. 4th 497

But the city distinguishes between what is prohibited by Knox-Keene and its actions against one of the plaintiffs in the *Combrisson* case.

In documents recently filed asking the court to dismiss part of the *Combrisson* lawsuit, the city attorney's office argues that Knox-Keene and *Prospect* only apply to health maintenance organizations, or HMOs, which are under the authority of the California Department of Managed Health Care. The city argues name plaintiff Gilles Combrisson has no standing to sue because he was covered by a preferred provider organization, or PPO, through Anthem Blue Cross Life and Health Insurance Company.

In its complaint, the city attorney's office also maintains that Knox-Keene doesn't apply to Anthem Blue Cross Life. But it argues the company "nevertheless has an implied in law duty to pay for the emergency medical treatment provided to its insured based on the full cost of treatment charged by [San Francisco General Hospital] and other public hospitals."

Carlin argues that Knox-Keene does apply to PPOs. He said that the city is "trying to draw a very fine distinction," and being inconsistent by going after Anthem Blue Cross in its suit while saying one of its policy holders has no standing in his.

In any case, Carlin's chances of recovery have now increased.

Should San Francisco prevail in its suit against the insurers, Carlin said he'd expect his clients to be reimbursed for whatever they paid for emergency services that was above and beyond what their insurance companies were willing to cover.

"The whole point of [our] lawsuit was to say, 'The plaintiffs shouldn't have to pay for that,'" he said.

Chou said it is likely they would be reimbursed for those costs, although he noted that in many cases patients paid none, or only some, of the balance.

"So, usually we are just left holding the bill," he said.