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October 27, 2008

File 3489.3

Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Prospect Medical Group v. Northridge Em. Med. Group*,
Supreme Court No. S142209; Ct. of Appeal Nos. B172737; B172817
Opening Letter Brief Concerning Balance Billing Regulations

Dear Chief Justice George and Associate Justices:

This letter brief is submitted on behalf of Plaintiffs and Appellants Prospect Medical Group Inc., et al., in response to the Court's October 16, 2008, order requesting the filing of letter briefs concerning the relevance of the recently effective California Code of Regulations, title 28, section 1300.71.39, the "Balance Billing Regulations."

The Department of Managed Health Care ("DMHC") promulgated the Balance Billing Regulations after and in light of the lower court's erroneous ruling in this case that Section 1379 of the Knox-Keene Act ("Section 1379") does not prohibit non-network health care providers from balance billing for emergency medical services. The new regulations make clear that emergency medical service providers, whether network providers or not, are not permitted to balance bill managed health care plan enrollees. *Appellants' Third Request for Judicial Notice, Exh. A*. The DMHC took this regulatory action to clarify existing law and protect consumers from uncertainty created by the lower court's erroneous ruling. The new regulations are based on an administrative determination that balance billing in the emergency-services context constitutes an unfair billing pattern, which is antithetical to the managed care bargain that DMHC is charged with enforcing. *Appellants' Second Request For Judicial Notice, Exh. B, pages B-3 to B-8; Exh. D, pages D-2 to D-4*.

One of the main issues before this Court is whether out-of-network medical providers are *statutorily* precluded from "balance billing" managed care enrollees for emergency medical services under Section 1379. The Balance Billing Regulations are highly relevant to

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the question of whether Section 1379 prohibits balance billing for emergency services. Indeed, there are two separate and independent ways in which the regulations influence the proper judicial construction of the statute.

First, the agency's determination that balance billing in the emergency-services context is "unfair" and therefore antithetical to the managed care bargain, which is the basis for its promulgation of the new regulations, demonstrates that an interpretation of the existing statute that would permit balance billing would subvert the Act's consumer-protection purpose – an absurd result that must be avoided. This absurd interpretation is easily avoided by interpreting the term "contract" as used in Section 1379(b) to encompass contracts implied by law.¹

Second, this Court has established a framework for determining whether statutory use of the term "contract" extends to contracts implied by law. The *McCall* rule holds that statutory references to a contractual relationship presumably encompass contracts implied by law (so-called quasi-contracts) unless there are strong reasons for adopting a narrower interpretation. *McCall v. Superior Court* (1934) 1 Cal.2d 527, 531-532. The DMHC's determination that balance billing for emergency services is antithetical to the consumer-protection purpose of the Knox-Keene Act (the "Act") establishes that the *McCall* presumption applies because (1) there are no "strong reasons" to depart from the general rule of broad construction and (2) the narrow construction would permit balance billing, which, as the expert agency has determined, would subvert the Act's consumer-protection purposes.²

¹ Prospect also contends that the contractual relationship between plan and provider is implied in fact. Respondents, however, concede that an implied in fact contract constitutes a "contract" under Section 1379(b), so this letter brief focuses on the contract implied by law.

² The DMHC's determination that balance billing in the emergency-services context is "unfair" is *also* relevant to the question raised by the complaint of whether balance billing constitutes an unfair business practice under the Unfair Competition Law, Bus. & Prof. Code Section 17200. Clearly, the regulatory determination that balance billing is an unfair and therefore impermissible billing pattern conclusively establishes that it is an unfair business practice.

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A. The Agency's Determination That Balance Billing Is Unfair And Contrary To The Statute's Pro-Consumer Purposes Renders Respondents' Statutory Interpretation Absurd

The DMHC's determination that the practice of balance billing health care plan enrollees for emergency medical services is both unfair and contrary to the Knox-Keene Act's consumer-protection purposes is entitled to great respect and deference. The Balance Billing Regulations formally address a matter within the agency's expertise and delegated regulatory authority in a manner consistent with its long-established interpretation of the statute. As such, the DMHC's interpretation of the statute and its determination that the conduct is unfair and contrary to the Knox-Keene Act's animating consumer-protection purposes is entitled to great respect and deference. *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

The DMHC proposed the Balance Billing Regulations in order to "clarify" that non-network emergency medical providers are not permitted to balance bill health care plan enrollees. *Appellant's Second Request For Judicial Notice, Exh. D, p. D-1*. Although the DMHC has long held the view that such practices violate Section 1379, the clarifying regulations were necessary because of confusion caused by the lower court's decision in this case and an aggressive campaign by the emergency physicians' trade association to encourage balance bill for emergency medical services. *Id. at pp. D-3 to D-4*. Formal and immediate regulatory action was necessary because plan enrollees faced immediate, increasing, long-lasting and often irreparable financial harm, medical dangers, and legal inequities as a result of balance billing. *Id., p. D-2*.

To interpret Section 1379 as permitting balance billing in emergency situations would produce an *absurd* result. It would allow a practice that the state agency charged with responsibility for protecting the integrity of managed health care and consumers has found to be "the epitome of 'unfair'" to consumers. *Third Request for Judicial Notice, Exh. B (DMHC Director Statement On Balance Billing Regulations)*. Balance billing for emergency medical services is unfair because health care plan enrollees have already paid their plans for emergency medical services. That upfront payment for all needed medical services is the essence of the managed health care bargain. Yet when balance bills are sent, enrollees often pay the bills not knowing that doing so is the plan's responsibility. *Second Request For Judicial Notice, Exh. D, p. D-2*. Because there is no express written agreement between the plan and provider, the enrollee is billed as if uninsured, which translates into much more expensive bills: The "differences between what doctors charge insured and uninsured patients are eye-popping," with one study calculating that "physicians overall charge 79% more than they receive from insur-

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ers.” Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, And The New Medical Marketplace*, 106 Michigan Law Rev. 643, 662 (Feb. 2008).

“If [consumers] do not pay [the balance bills], they suffer great economic harm from provider billing practices that include aggressive collection activities, the destruction of the enrollee’s credit, and, in rare instances, foreclosure on the enrollee’s home.” *Second Request For Judicial Notice, Exh. D, p. D-2*. “Aggressive collection activities or the fear of substantial financial liability may cause an enrollee to forgo emergency medical care in the event of a life-threatening injury or illness, and may cause enrollees to make medical decisions based on financial considerations that are the legal obligation of their health plans.” *Id.* The end result of delaying or forgoing treatment will often cause irreparable harm as medical conditions “will often worsen and can end with death.” *Id.*

Statutes must be interpreted to avoid *absurd* consequences whenever the statutory language permits such an interpretation. *Western Oil and Gas Assoc. v. Monterey Bay Unif. Air Pol. Control Dist.* (1989) 49 Cal.3d 408, 425-426. And consumer protection statutes in particular require great liberality in interpretation whenever necessary to achieve the statute’s broad remedial purposes. *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 493. The DMHC’s determination that balance billing for emergency medical services is the “epitome of unfair” demonstrates the anti-consumer consequences of Respondents’ statutory interpretation, which necessitates a pro-consumer interpretation of Section 1379.

Fortunately, the absurd, anti-consumer consequences of Respondents’ interpretation can be averted simply by construing the Section 1379(b) reference to “contract” as encompassing contracts implied by law. This interpretation is not merely linguistically permissible, which is all that the interpretive rule disfavoring absurd consequences requires, it accords with the ordinary understanding of the term “contract” under California law (*McCall v. Superior Court* (1934) 1 Cal.2d 527, 531-532), as described below.

B. The Balance Billing Regulations Are Consistent With The *McCall* Framework, Which Holds That Statutory References to Contractual Relationships Generally Include Those Implied By Law

The significance of the DMHC’s expert determination that balance billing for emergency services is antithetical to the rights of managed care subscribers is of *heightened* importance in this case. A critical question here is whether the statutory reference to a plan-provider *contract* that is not in writing (§1379(b)) encompasses contracts implied in either fact

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or law, as Prospect and the DMHC contend, or just to contracts implied in fact, as Respondents contend.³

This Court's ruling in *McCall v. Superior Court* (1934) 1 Cal.2d 527, 531-532, provides the analytical framework for determining whether a statutory reference to a "contract" should be interpreted broadly to encompass both types of implied contracts or narrowly to encompass only contracts implied in fact. *McCall* and its predecessors establish a *rebuttable presumption* that legislative references to *contractual* relationships encompass those arising out of both implied in fact *and* implied by law contracts.

This presumption that the statutory term *contract* encompasses all types of contracts, including those implied by law, can only be defeated if there are *strong reasons* for believing that in the particular case the Legislature intended to exclude contracts implied by law. The Balance Billing Regulations, which reflect the agency's determination that balance billing for emergency medical emergencies violates the consumer-protection purpose of the Knox-Keene Act, establishes the *absence* of strong reasons for narrowly construing Section 1379 to exclude contracts implied by law. In that manner, therefore, the DMHC's promulgation of Balance Billing Regulations mandate an interpretation of Section 1379 that prohibits balance billing in the emergency-services context.

1. A contract implied by law is essentially contractual

The question in *McCall* was whether a statute authorizing an attachment for actions upon "a contract, express or implied,"⁴ authorizes an attachment when the contract is implied by law. *McCall*, 1 Cal.2d at 529. In addressing the issue, this Court relied upon its concurrently-entered opinion in *Philpott v. Superior Court* (1934) 1 Cal.2d 512, in holding that an action implied by law is *contractual* under the statute because an "implied promise supplied by law is *ex contractu* in its nature." *McCall*, 1 Cal.2d at 531. *McCall* therefore holds that a contract implied by law, as an essentially contractual right (*ex contractu*), falls within the scope of

³ Respondents have effectively abandoned the lower court's even narrower interpretation that Section 1379's references to "contract" extend "only to freely and voluntarily negotiated contracts based upon a meeting of the minds." *Typed opinion. at p. 11.*

⁴ Under former Code of Civil Procedure Section 537, which was examined in *McCall*, an attachment was authorized ". . . in an action upon a contract, express or implied, for the direct payment of money . . ." *McCall*, 1 Cal.2d at 531 (quoting statute).

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the term “contract” absent very strong reasons for narrowing it to exclude implied by law contracts. In this case, not only are such strong reasons absent, but the state agency charged with responsibility for administering the field has found that the consequence of such an interpretation – to allow the practice of balance billing for emergency services – is “the epitome of ‘unfair’ for consumers” who would have “to pay for emergency services twice.” *Appellant’s Third Request for Jud. Notice, Exh. B.*

The contractual nature of an action based on quasi-contract was assumed by this Court in *McCall* based on its analysis in *Philpott*, which was entered on the same day. *McCall*, 1 Cal.2d at 531. In *Philpott*, the Court examined the “nature” of an implied by law contract claim, comparing it to and distinguishing it from a claim based on an actual promise (whether express or implied in fact). *Philpott*, 1 Cal.2d at 517-518. These types of contract claims are distinguishable on the ground that the implied by law contract (or quasi-contract) lacks the element of an actual (express or implied) promise to perform. *Id.* at 517. The modern law of quasi-contract is derived from the action of *indebitatus assumpsit*, which holds that a person whose money is taken by false or unfair pretenses may waive the tort (*ex delicto*) and sue on implied contract, a right “which does not in truth rest upon a contract at all.” *Id.* at 520. In that manner, the action for return of money paid, which originated under the common law as an action of tort (*ex delicto*), was “transformed” into an action of contract (*ex contractu*). As a result of this expansion of *assumpsit*, an action based upon a promise implied by law is therefore “in form *ex contractu*; but, the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and defendant, and no privity is necessary.” *Id.* at 523. Thus, it was “clear” by 1934 that a cause of action arising out of quasi-contract, “although originally sounding in tort, has now become fully *ex contractu* by a process of slow but steady development.” *Id.* at 525.

Similarly, in *County of San Luis Obispo v. Gage* (1903) 139 Cal. 398, this Court considered whether a claim based on an implied by law contract constitutes a “claim on contract” under an 1893 statute authorizing suit upon the state. As in *Philpott*, this Court examined the common law origin of an action founded upon an implied by law contract to determine whether the legislative use of the term “contract” extended to quasi-contract actions. *Id.* at 405. The Court recognized that at common law “there were many cases where *assumpsit* was allowed, although there was in fact no contract made, nor any dealings whatsoever between the parties, the law implied a contract out of necessity, and because without such fictitious creation none of the legal forms of action would apply and the party would be remediless.” *Id.* at 407. While there is “a clear distinction between such a case and one where the making of a contract or agreement is implied as a matter of evidence,” the two were usually treated as “arising upon a contract,” that is, *ex contractu*. *Id.* The Court did recognize the possibility

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that, under a particular statute, “there might be *strong reasons* in favor of the proposition that the legislature, in referring to ‘claims on contract’ meant real contracts, not fictitious ones.” *Id.* at 407 (emphasis added). But *absent* such “strong reasons” – and no strong reasons were present in *Gage* – the term “contract” must be interpreted as encompassing both real (express and implied in fact) and fictitious (implied by law) contracts. *Id.*

2. *McCall* applies a rebuttable presumption that statutory references to contractual relationships encompass contracts implied by law

In *McCall*, as in *Gage*, this Court recognized that “the implied promise supplied by law is *ex contractu* in its nature.” *McCall*, 1 Cal.2d at 531. The statutory term “contract” must therefore be read to generally include all “three classes of promises” – express, implied in fact, and implied by law – unless there are *strong reasons* for adopting a narrower construction.

This Court recognized that implied by law promises usually fall within the scope of a statutory reference to a contractual relationship or contract despite the fact such quasi-contracts are frequently imposed against the intention of the parties. That is because the “usual meaning” of the word *contract* encompasses *implied by law* contracts even if a more “scientific” dissection of the term would not. *McCall*, 1 Cal.2d at 531 (quoting *Nevada Co. v. Farnsworth* (D. Utah 1898) 89 F. 164, 165). This Court explained its conclusion that contracts implied by law are generally within the scope of a statutory reference to “contract” through a lengthy quotation from the Federal Circuit Court’s decision in the *Nevada* case:

“The whole theory of contracts implied in law was originated for the purpose of giving a remedy *ex contractu* for certain wrongs, and it does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties. But, however unscientific such a classification is, simple implied contracts are usually subdivided into contracts implied in fact and contracts implied in law. The first, it is needless to say, is a true contract, the agreement of the parties being inferred from the circumstances; the latter but a duty imposed by law, and treated as a contract for the purposes of a remedy only. This classification of implied contracts makes it difficult to interpret a statute where the term is used. In each case it becomes a question whether the general meaning, or the more limited, if more accurate, meaning, was, by the legislature, intended. This legislative intent must be sought in the particular statute in question, but, in the absence of any light thrown thereon by the language or object

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of the statute, or of other statutes *in pari materia*, it must be held, I think, that the legislature intended that meaning which is commonly assigned to the words, even if such definition be less accurate or scientific.” *McCall*, 1 Cal.2d at 531-532 (quoting *Nevada*, 89 F. at 165).

This Court has thereby adopted a *rebuttable presumption* that the legislative use of the term “contract” encompasses contracts implied by law: “There is nothing in the wording of the [attachment] statute which would warrant a holding that the legislative use of the term ‘implied contract’ in other than its usual meaning, or that contracts implied by law were not intended to be included.” *McCall*, 1 Cal.2d at 532 (quoting *Nevada*, 89 F. at 166). Thus, absent *strong reasons* for limiting implied contracts to implied in fact (but not implied by law) contracts, the legislative use of the term contract must be interpreted to encompass contracts implied in fact and by law.

3. There are no “strong reasons” for excluding contracts implied by law from Section 1379 because doing so would subvert the Act’s consumer-protection purposes – as the DMHC has concluded

The presumption that the Legislature intended to use the term “contract” to encompass all three type of contracts, including contracts implied by law, can *only* be rebutted by “strong reasons” for adopting a narrower reading. *McCall*, 1 Cal.2d at 531-533; *Gage*, 139 Cal. at 407. The DMHC’s promulgation of the Balance Billing Regulations, based on its expert determination that balance billing defeats the Act’s consumer-protection purpose, demonstrate that no such justification exists.

The animating purpose of the Knox-Keene Act is to “ensure the best possible health care for the public for the lowest possible cost by transferring risk of health care from patient to provider.” *Health & Safety Code §1342(d)*. The DMHC determined that this statutory purpose would be sacrificed if balance billing was permitted in the emergency-services context. Section 1379 confirms that contracting providers with *direct legal recourse against plans* for reimbursement of costs have no right to also seek reimbursement from enrollees. As a consequence of the Legislature’s passage of Sections 1317(d) and 1371.4, providers have (1) a duty to provide emergency medical services to anyone (regardless of ability to pay) and (2) a corresponding right of reimbursement against the enrollees’ plans. This implied-by-law contractual right of reimbursement between provider and plan confers upon providers a *direct right of recourse* for reimbursement against plans. *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 221. The Act’s animating purpose of transferring the risk of health care from patient to provider is effectuated only if the provider’s implied by law contract consti-

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tutes a *contract not in writing* under subsection (b) of Section 1379. Otherwise, patients, not physicians, would bear the risk of health care costs. There is *no reason* to distinguish between providers whose rights of recourse against plans arise from implied in fact contracts and those whose rights arise from implied by law contracts. In either case, the provider has direct legal recourse for reimbursement against plans, which is the basis for precluding balance billing under the statute.

The incompatibility of the Act's purpose with Respondents' interpretation of Section 1379 is made clear by the DMHC's action in promulgating the Balance Billing Regulations. The agency's regulatory action was necessitated by its finding that balance billing for emergency medical services is "the epitome of 'unfair'" to HMO enrollees, who already pay their plans for the cost of emergency services. Thus, Respondents' interpretation of the statute is not only lacking a reasoned basis for justifying disparate treatment based on the provider's implied in fact/implied by law right to legal recourse, the consequences of its overly constricted interpretation would subvert the Act's consumer-protection purposes.

In summary, the *McCall* interpretive framework establishes a presumption that the statutory use of the term "contract" refers to all types of contracts, including contracts implied-in-law. This presumption applies unless there are strong reasons not to apply it to a particular statute. Here, the statutory scheme creates an implied-in-fact contract between emergency service providers and health care plans. There is no reason to interpret the term "contract" as used in Section 1379 to exclude contracts implied by law. Indeed, as demonstrated by the DMHC's action in promulgating the new regulations, there are compelling reasons for interpreting the statute to cover contracts implied by law and thereby prohibiting balance billing, which would subvert the Act's consumer-protection goal. The statute must therefore be read to encompass contracts implied by law, thereby holding emergency physicians to their end of the managed care bargain created by the Knox-Keene Act.

* * * * *

The recently-effective Balance Billing Regulations, which are based on DMHC's determination that balance billing for emergency medical services is the epitome of unfair,

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require that Section 1379 be interpreted to prohibit balance billing for emergency medical services.

Sincerely,

A handwritten signature in black ink that reads "Tom Freeman". The signature is written in a cursive, slightly slanted style.

Thomas R. Freeman

cc: See Proof of Service (attached)

254635.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1875 Century Park East, 23rd Floor, Los Angeles, California 90067-2561.

On October 27, 2008, I served the following document(s) described as **OPENING LETTER BRIEF CONCERNING BALANCE BILLING REGULATIONS** on the interested parties in this action as follows:

BY MAIL: By placing a true copy thereof in sealed envelopes addressed to the parties listed on the attached Service List and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 27, 2008, at Los Angeles, California.


Sandy Palmieri

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**Prospect Medical Group, Inc. v. Northridge Emergency Medical Group, et al.
Case No. S142209**

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