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The National Congress on the Un and Under Insured

Uninsured Patient Pricing Litigation

I. Introduction

In mid-2004, a consortium of law firms, including my firm, Lieff, Cabraser, Heimann & Bernstein LLP ("LCHB"), filed a series of lawsuits in federal court challenging the pricing of care to uninsured patients by not-for-profit hospitals.[1] Plaintiffs alleged that the hospitals charged uninsured patients exponentially more money than patients with private insurance or government assistance for the same treatment. These cases were covered widely in the media. Although the first wave of cases experienced set backs in the federal courts, many of the state court cases have progressed successfully and resulted in major settlements for uninsured patients.

II. Litigation

The first-filed federal complaints advanced the federal theory that the hospitals had breached their government charitable contracts (obligating them to provide indigent services) and that patients could sue for relief as third-party beneficiaries to those contracts. Many federal courts did not like this "third-party beneficiary" theory. Over the next 12 months, many of those early cases were dismissed. This was considered a setback to some, but the early decisions overwhelmingly avoided addressing the

[1] In 2002, LCHB filed earlier litigation against for-profit hospital Tenet, challenging Tenet's practice of overcharging uninsured patients. That lawsuit, *Tenet Healthcare Cases II*, J.C.C.P. No. 4289 (Los Angeles Superior Ct.), settled in 2005 on a nationwide basis for all uninsured patient treated at Tenet between June 1999 and December 2004.

viability of state law claims. Most of these early cases were subsequently (if not simultaneously) re-filed in state court.[2]

In California, LCHB filed a state court case against Sacramento-based Sutter Health ("Sutter") in September 2004, *Pollack v. Sutter Health*, Case No. RG 04-17376 (Alameda County Superior Ct.), and against San Francisco-based Catholic Healthcare West ("CHW"), *Dancer v. Catholic Healthcare West*, Case No. CGC 05-445624 (San Francisco County Superior Ct.), in October 2005. Before filing these cases, we spoke extensively with public health advocates, including at Health Access California and the Service Employees International Union (SEIU) in California. In 2006, LCHB filed additional cases against Scripps Health in San Diego, California, *R.M. Galicia v. Franklin; Franklin v. Scripps Health*, Case No. IC859468 (San Diego County Superior Ct.), and John Muir/Mt. Diablo Health System in Walnut Creek, California, *John Muir/Mt. Diablo v. Redding; Redding v. John Muir/Mt. Diablo*, Case No. 06-11-01442 (Contra Costa County Superior Ct.).[3]

A. Viable Legal Theories

In the state cases, plaintiffs alleged that the hospitals charged uninsured patients unreasonable and unconscionable prices, exponentially more than the prices charged patients with private insurance or Medicare for the same treatment. They also alleged that the hospitals charged more for their services than comparable hospitals in the

[2] The hospital defendants attempted to keep these cases in federal court even when they were filed in state court. Defendants removed them to federal court arguing for jurisdiction under the new Class Action Fairness Act (CAFA), which allows certain state-court class actions to proceed in federal court, or under the far-fetched theory that these cases must involve an implicit challenge to federal tax exemptions due to references to the hospitals' tax-exempt status in the complaints. LCHB's case against Mercy Hospital was removed and remained in federal court in Miami, Florida under CAFA. LCHB fought removal based on the tax-exempt challenge theory in the Sutter case, and that case was remanded to California state court for lack of federal jurisdiction.
[3] Only months ago, a different set of lawyers sued Sharp Hospital in San Diego, California, for the same practices.

marketplace. Throughout the country, plaintiffs brought their claims under two primary theories: (1) that the hospitals breached their contracts with uninsureds – that is, the hospitals failed to charge the "usual and customary" or "regular" rates promised in their admission contracts and/or charged unconscionable rates; or (2) that the hospitals engaged in unfair and deceptive business practices under a state unfair business practices statute – such as California Business & Professions Code §§ 17200 *et seq.* or Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. §§ 501.201 *et seq.* – by charging unreasonable and unfair rates to uninsureds.

In general, hospital defendants opposing these types of claims have argued that hospitals were legally entitled to give volume discounts to certain large payors, that uninsureds were not "injured" by their practices because most uninsureds did not pay (or did not pay 100%) for treatment received, that truly vulnerable uninsureds could avail themselves of hospital charity care policies, and that the courts should not address the claims because hospital pricing should be left to the Legislature to resolve. Fortunately, these arguments did not find traction in most jurisdictions.[4]

B. Status of Cases

The cases against Sutter, CHW, and John Muir became California coordinated actions (combining multiple cases against the same company). Sutter was coordinated in Sacramento County Superior Court (before Judge David Abbott) as *Sutter Health Uninsured Pricing Cases*, J.C.C.P. No. 4388, CHW was coordinated in San Francisco County Superior Court (before Judge Richard Kramer) as *Catholic Healthcare West Cases*, J.C.C.P. No. 4453, and John Muir was coordinated in Contra Costa County Superior Court (before Judge David Flinn) as *John Muir Uninsured Healthcare Cases*,

[4] A notable exception is the Georgia state courts, which have been disdainful of these claims.

J.C.C.P. No. 4494. LCHB's cases against Mercy Hospital in the Southern District of Florida (Judge Patricia Seitz), *Colomar v. Catholic Health East and Mercy Hospital*, Case No. 05-22409-Civ (S.D. Fla.), and Scripps Health (Judge Steven Denton), *R.M. Galicia v. Franklin; Franklin v. Scripps Health*, Case No. IC859468 (San Diego Superior Ct.), involved only the original cases filed. Two of the cases – against Scripps and John Muir – began as individual collections lawsuits against uninsured patients to which the patients filed class action cross complaints against the hospitals.[5]

The litigation against hospitals across the country has progressed largely in one of two ways: extremely adversarial or extremely cooperative and solution-seeking. In the cases LCHB filed, Sutter, Mercy and Scripps have all been very adversarial, with Sutter being particularly aggressive, filing multiple demurrers (motions to dismiss), a class action cross-complaint (suing all uninsureds for the full amounts outstanding on their medical bills), an amended class action cross-complaint (same), and numerous discovery motions. By contrast, CHW and John Muir quickly expressed a desire to resolve the cases.

As of November 2007, Sutter and CHW have settled and John Muir is in on-going settlement talks. The court in Mercy issued a strong order denying Mercy's motion to dismiss in November, 2006, *see Colomar v. Mercy Hosp., Inc. et al.*, 461 F. Supp. 2d 1265, 1269 (S.D. Fla. 2006), but subsequently granted summary judgment on the individual plaintiff's claim without any finding that Mercy's prices were reasonable. The Scripps court likewise overruled Scripps' demurrer (motion to dismiss) and, in June

[5] Many other cases filed by other firms are still pending across the country, including in Alabama, Illinois and Missouri.

2007, granted class certification. This ruling now allows the Scripps case to proceed forward to trial on behalf of over 50,000 uninsured patients at Scripps.

Other cases challenging uninsured pricing have also been certified around the country. Recently, for example, on March 2, 2007, the Missouri Circuit Court certified an uninsured pricing class in *Quinn v. BJC Health System d/b/a BJC Healthcare*, Case No. 22052-0821A; and on October 29, 2007, the Circuit Court of Barbour County, Alabama certified an uninsured pricing class in *Lawrence v. Lakeview Community Hospitals and Community Health Systems*, Civil Action No. CV-04-160.

III. Settlements

The key components of uninsured pricing settlements are: (1) monetary refunds or bill reductions for the class; (2) new across-the-board discounts for all uninsureds (regardless of charity eligibility) that ensure required reimbursements from uninsureds are comparable to those required of commercial payors (that automatically receive discounts off chargemaster); (3) improved charity discounts (up to 400% of the federal poverty guidelines of better) to allow low and moderate income uninsureds to receive affordable care; (4) enhanced communications to uninsureds about pricing discounts, financial assistance, and payment plans; and (5) limitations on collections to prevent uninsureds from being financially ruined due to their medical emergency.

The Sutter and CHW settlements are illustrative.

A. Sutter Settlement

The Sutter case resolved in 2006. Under the Sutter settlement, Sutter will provide refunds or bill reductions of between 25-45%, depending on the hospital at which patients were treated (as different hospitals were relatively costlier than others and

patients at those hospitals will receive higher discounts). This relief attempted to bring class member bills within or near the range of commercial payor pricing during the class period.

The Settlement also includes a 3-year settlement period during which: (1) Sutter must maintain a new pricing policy under which all uninsureds, regardless of income, receive an automatic discount off their bills in an amount that would place the uninsured pricing within the range of the hospital's commercial payors (to end any price discrimination against uninsureds going forward); (2) Sutter must significantly limit its collections practices, including severely limiting the lawsuits it will file; (3) Sutter will maintain a charity care policy of free or discounted care for patients up to 400% of the Federal Poverty Level; and (4) Sutter will substantially enhance its communications with uninsureds about its charity care, pricing discount, and collections policies. The class in Sutter totals approximately 385,000 uninsureds. The expected value of this relief in terms of refunds and bill reductions is approximately $276 million.

B. CHW Settlement

The CHW case resolved in January 2007. Initially, the CHW settlement was crafted differently than the Sutter deal. CHW agreed to provide retroactively (through refunds of bill reductions) free care or care discounted to the level of the most favored commercial payor across its system for all patients with incomes up to 500% of the federal poverty level. It offered to provide discounts of 10% for all patients above 500% of the federal poverty level. This settlement would have ensured that the overwhelming majority of the class – low- and middle-income Californians – would have had dramatic relief (in some cases receiving *more than 100%* of their potential

damages if likely damages were measured as the difference between what they were charged and what commercial payors paid).

Unfortunately, at the initial presentation of the settlement, an outside group of lawyers, purporting to represent some class members, complained that the settlement "unfairly" gave more benefits to low income people. Although we fought this objection vigorously, the court was concerned with this issue. As a result, we met again with CHW and negotiated a settlement that largely mirrored the relief in Sutter – except that CHW is simply providing refunds or bill reductions of 35% across the board (due to CHW's average cost-to-charge ratio as compared to Sutter). The court thereafter approved the revised settlement. The class was estimated to total nearly 900,000 people. The expected value of this relief in terms of refunds and bill reductions is approximately $423 million.

C. Claims Process

In both settlements, class members are required to submit very simple claim forms. We are working now with class members and patient advocates to assist the class in getting this relief. In addition, nothing in these settlements prohibits Sutter or CHW from making individual humanitarian adjustments for those class members who fell through the cracks and should have been declared charity eligible at the time of billing. Accordingly, for patients who would have satisfied the charity criteria at either hospital, we are asking the class member to add a notation to their claim forms. This notation should set forth both their income in the year of treatment and the number of members in their household (so that charity eligibility can be determined), along with a request that the hospital recalculate their bill along charity guidelines. We are hopeful

that many vulnerable class members will thus receive further assistance as a result of the claims process.

IV. Future Trends

Fortunately for uninsured patients, some hospitals have changed their policies in the absence of litigation. Sadly, many have not. Even in California, where at least six hospitals or hospital systems (CHW, John Muir, Scripps, Sharp, Sutter, and Tenet) have been sued in class action cases, it does not appear that hospitals have changed their practices across the state. This is a tragedy for uninsureds and will surely invite more lawsuits. Many of the recent filings have more pointedly addressed overreaching collections practices as part of the unfair pricing system. Given the large number of collections filings against uninsureds, those challenges appear likely to continue.