

MEDI-CAL LITIGATION UPDATE

Jordan B. Keville

HLB

HOOPER, LUNDY & BOOKMAN, INC.
HEALTH CARE LAWYERS

GENERAL OVERVIEW

- Numerous cases pending that continue to have implications for various providers, including hospitals
- Making progress in terms of the development of the law
- Some of these cases likely will result in additional reimbursement for hospitals, but not very soon

MISSION HOSPITAL

- About 100 hospitals challenge limit on Medi-Cal reimbursement for inpatient hospital services not under CMAC contract for State FY 2004-05
- Payments limited to audited cost per diem for hospital fiscal year ending in 2003
- Trial court rules against hospitals, ruling that Medicaid Act provisions do not impose procedural requirements where the state legislature adopts the rates
- Trial court holds rate freeze invalid to extent applied retroactively -- about 6 weeks of relief

MISSION HOSPITAL (cont.)

- Court of Appeals reverses in November 2008
 - Holds freeze enacted in violation of Medicaid Act because no public process, rather enacted as part of a budget trailer bill without meaningful public participation
 - Holds that compliance with Medicaid Act required even where the state legislature adopts the rate
 - “The trial court shall issue a writ of mandate enjoining the Department from utilizing section 32 in its calculations of plaintiffs' reimbursement rates for the state fiscal year 2004-2005.”

MISSION HOSPITAL (cont.)

- State unsuccessfully asks state Supreme Court to review
- But, state is refusing to pay retroactively, argues “sovereign immunity”
- Hospitals move to enforce writ and are successful, but trial court order is now under appeal

DP/NF RATE CASE

- In 1996, Department changes way median cost per day computed by excluding low Medi-Cal utilization facilities from median computation
- CHA successfully challenges under old Boren Amendment for 1996 rate year
- State continues to use method. CHA sues for 1997 rate year. Court holds state is “collaterally estopped” by 1996 rate year decision

DP/NF RATE CASE (cont.)

- State continues to apply exclusion methodology
- CHA sues regarding application of exclusion methodology for 2001 to 2006 rate years
- Lawsuit also includes challenge to a rate freeze for 2005 rate year
- Trial court rules against CHA
- CHA has appealed; briefing in process

AB X3 5 — MEDI-CAL CUTS

- January 10, 2008 -- Governor declares fiscal emergency
- Calls legislature into special session
- Governor proposes \$668 million in General Fund savings by reducing Medi-Cal provider reimbursement (\$1.336 total including federal funds)

AB 5

- February 16, 2008, Legislature enacts AB X3 5 (“AB 5”) in special session
- Section 14 adds W & I Code sec. 14105.19
 - Reduces most Medi-Cal payments by 10%
 - Applies to services provided on and after July 1, 2008

AB 5 (cont'd)

- Section 15
 - Adds W & I Code sec. 14166.245
 - Reduces payments to noncontract hospitals by 10% for inpatient hospital services on and after July 1, 2008
 - Reduces interim payments by 10%
 - Limits final reimbursement per day to 90% of the hospital's audited allowable cost per day

AB 5 (cont'd)

- Affected hospital services
 - Noncontract acute inpatient services
 - Outpatient hospital services
 - DP/NF services
 - Subacute

AB 5 LITIGATION

- CHA, CMA, CAPH, and other Associations sue to challenge the 10% reduction -- *CMA v. Shewry*
- Filed in Los Angeles County Superior Court as a Petition for Writ of Mandate
- Removed by State to Federal Court
- Remanded to State Court

CMA V. SHEWRY

- Superior Court denies Motion for Preliminary Injunction
- Petition amended to clearly allege Supremacy Clause and claim for retroactive relief
- Case is on hold pending federal proceedings

ILCSC v. SHEWRY

- Challenge by beneficiaries and pharmacies to AB 5 10% reduction
- Filed in state court
- Removed to federal court -- no request to remand
- Dismissed by district court

ILCSC v. SHEWRY (cont.)

- Emergency Appeal filed
- Ninth Circuit reverses and remands to district court, holds plaintiffs can state a Supremacy Clause claim even if they do not have a 1983 claim
- State seeks Supreme Court review; request for review denied

ILCSC v. SHEWRY (cont.)

- District Court on remand issues preliminary injunction for services on and after 8/18/2008
- Injunction protects physicians, dentists, ADHCs, pharmacists and others, but does not protect hospitals
- Court holds there is no showing hospitals would be irreparably harmed
- Focuses primarily on access for harm
- Rules 10% cut probably violates Medicaid Act because neither legislature nor Department considered efficiency, economy, quality of care, or access, or cost studies before enacting the rate cut

ILCSC v. SHEWRY (cont.)

- State appeals
- Decision issued on July 9, 2009. Affirms trial court with respect to everything but effective date of the order
- Ninth Circuit rules retroactive relief from the rate cut is available; currently working on how to obtain relief for hospitals from 10% cut

AB 1183

- Enacted September 16, 2008
- Sunset most 10% cuts in AB 5 on March 1, 2009
- Replaced with different cuts
 - DP/NF and Hospital subacute -- 5%
 - Hospital outpatient -- 1%
- Retained 10% cut on noncontract inpatient hospital services

AB 1183 (cont.)

- Added new limit on noncontract inpatient hospital services
- Effective 10/1/08, reimbursement limited to 95% of the regional average CMAC rates of tertiary or non-tertiary hospitals, as applicable
- Small and rural hospitals are excepted from the 10% reduction on inpatient reimbursement effective 11/1/2008, and completely excepted from other AB 1183 reductions
- Hospitals in HFPA's that were open areas on October 1, 2008 are exempt from CMAC – 5% unless the HFPA was closed at any time on or after July 1, 2005, or the open HFPA has three or more hospitals with licensed general acute care beds.

AB 1183 LITIGATION

- *Managed Pharmacy Care v. Maxwell-Jolley*
 - District Court issues preliminary injunction enjoining 5% cut on pharmacy services
 - State has appealed

AB 1183 LITIGATION (cont.)

- *California Pharmacists Association v. Shewry*
 - CHA, CPHA, ADHCs, CMA, CDA and individual providers sue to challenge AB 1183 cuts
 - Hospitals, pharmacies, and ADHCs seek preliminary injunction
 - District Court enjoins ADHC cut, holds pharmacy motion is moot because cut enjoined in *Managed Care Pharmacy*
 - Denies hospital injunction, finds no irreparable harm, although finds strong likelihood of success on merits

AB 1183 LITIGATION (cont.)

- *California Pharmacists Association v. Shewry (cont'd)*
 - Hospitals seek emergency order from Ninth Circuit
 - Argue that there is irreparable harm because 11th Amendment prohibits retroactive relief against state in federal court, so there is no possibility of hospitals being made whole later
 - Court agrees, enjoins AB 1183 hospital cuts effective 4/6/2009
 - State seeks “en banc” review

AB 1183 LITIGATION (cont.)

- State does not stop 10% reduction on non-contract inpatient services, contends order does not apply because it was enacted pursuant to AB 5, not AB 1183
- Hospitals seek clarification from Ninth Circuit
- May 28, 2009, Ninth Circuit rules order is limited to cuts enacted or amended by AB 1183, does not include 10% cut

RECAP

- AB 5 10% cuts preliminarily enjoined for physicians, pharmacies, dentists, ADHCs, non-emergency medical transportation providers, home health agencies, not for hospitals, in *ILC* and related cases
- Based on Ninth Circuit's recent ruling, hospitals may be able to obtain retroactive relief from the 10% cut through federal court proceedings; but repayment will not be immediate
- Challenge to AB 5 reduction for hospital services is pending in state court, but not active
- AB 1183 reductions to hospital services temporarily enjoined by Ninth Circuit for services on and after 4/6/2009

CHA Suit Challenging Emergency and PostStabilization Rates

- CHA files suit on May 22, 2009 in federal court in Los Angeles
- Seeks to prevent DHCS from enforcing implementation of emergency and poststabilization rates
- Seeks to invalidate Rogers Amendment and AB 1183 provisions
- Case is just getting underway, so there will not be any ruling until well into 2010

QUESTIONS