

HEALTHCARE

Clawing back

LI practice wins ER billing case with far-reaching impact

By **CLAUDE SOLNIK**

A Long Island-based law firm representing Long Island doctors prevailed in a lawsuit in which UnitedHealthcare sought to recoup payments for what it views as excessive out-of-network emergency room charges.

Minnesota-based UnitedHealthcare Services filed a lawsuit against East Setauket-based Long Island Laparoscopic Doctors in the commercial division of Suffolk County Supreme Court.

Uniondale-based Ruskin Moscou Faltischek, which represented the practice, prevailed in the decision in favor of the physicians by Suffolk County Supreme Court Justice Jerry Garguilo.

The insurer sought to claw back what it viewed as excessive charges from Long Island Laparoscopic Doctors, which provides gastrointestinal emergency services such as emergency gall bladder removals and appendectomies.

Cases involving claw-backs have become more common as regulations make it easier to obtain funds related to public companies' compensation of executives.

This case could have created a new norm for claw-backs involving health insurance for out-of-network charges and emergency rooms in particular.

Hospitals routinely contract with physicians and other providers to staff emergency rooms. As a result, patients at hospitals in their network often find many services were provided by out-of-network physicians who engage in balance billing, charging patients more than insurers will pay.

Balance billing has turned into a major financial battleground, leading to new laws, including the Surprise Billing law as of March 2015, and litigation.

The law requires physicians to notify patients before treatment if they don't take their insurance and, in situations such as emergencies, sets procedures for insurers to contest and determine fair rates.

UnitedHealthcare's case, which applies to billing before that law went into effect, argued Long Island Laparoscopic Doctors overcharged members on more than \$1 million in out-of-network services.

The insurer based its claims on rates that

a nonprofit known as FAIR Health determines to be average for a region.

Ruskin Moscou argued UnitedHealthcare was seeking to set rates and the retroactive effort to review and contest paid claims could open a Pandora's box.

"If it had gone United's way, there would have been a potential avalanche of similar claims going back in time," said Mark Mulholland, a senior member of the litigation department at Ruskin Moscou. "Why they even paid them out in the first place, if this was going to be their position, is anybody's guess."

He called UnitedHealthcare "a sophisticated insurance carrier" armed with data that should have given it a sense of rates.

UnitedHealthcare spokeswoman Maria Gordon Shydlo, however, said she is "disappointed with the court's decision" because "out-of-network billing by some care providers is posing significant challenges to patients."

Physicians saw UnitedHealthcare as seeking to clamp down on rates in ways that could add uncertainty to practices and give insurers more power.

"I think it supports the notion that physicians should set their own fees," Charles Rothberg, vice president of Westbury-based Medical Society of the State of New York and an ophthalmologist in Patchogue, said. "As a practicing physician, I think that's a good thing."

At least on the surface, a victory by UnitedHealthcare seems as if it could benefit patients.

But Mulholland said the insurer's effort to suppress rates could hurt providers and lead groups to exit emergency rooms, damaging hospitals and care.

"I think it helps patients," he said of the decision. "Patients have an interest in their local hospitals being well staffed with seasoned physicians who are expert in all the critical areas that need to be covered on an emergency room 24/7 basis."

UnitedHealthcare argued physicians shouldn't be allowed to charge what they want, particularly in emergency rooms.

"It's not whatever they want. It's what the market will bear," Mulholland continued. "If the rate is too high, the hospital is free to find another physician who will be given credentials."

The case is the latest skirmish in what's turning into a major issue known as surprise bills from emergency rooms as insurers try to hold down costs and providers seek to sustain profits and avoid ending up



Photo by Bob Gigliano

MARK MULHOLLAND: Ruskin Moscou Faltischek staved off UnitedHealthcare's efforts to claw back payments to a healthcare provider that it argued were excessive.

in the red.

UnitedHealthcare earlier lost a case in which physicians argued it worked with a subsidiary known as Ingenix to determine fair out-of-network rates.

Physicians argued, and the courts agreed, that Ingenix seemed to act in ways designed to benefit insurers rather than reach "fair" rates.

"That case established the FAIR Health database," Rothberg said. "Anybody can put a procedure code in and look up the range of fees charged in your zip code."

He said rates up to the 80th percentile are typically seen as fair.

Although there is now a process to handle protests, Rothberg said only a handful have been filed.

"The idea is that people should play nicely with each other and not go to dispute resolution," Rothberg continued.

He worried that reopening old billing, as UnitedHealthcare sought to do, could lead to more unfairness.

"After they pay it, they have second thoughts," he said. "I find that distasteful." This isn't the only case in which United-

Healthcare tried to recoup funds regarding bills paid before the new law went into effect.

In a Westchester case pertaining to a time before the new law, UnitedHealthcare argued out-of-network physicians unfairly charged \$41,000 for services typically costing \$13,000.

UnitedHealthcare didn't prevail in that suit either, leading to greater legal obstacles to its efforts to reopen the books on old balanced billing.

Shydlo didn't say whether UnitedHealthcare would appeal the Long Island suit, but said it will "continue to push back on excessive bills."

Other states have struggled with ways to handle out-of-network costs. Maryland bans out-of-network billing for some services and Colorado compels insurers, not patients, to pay bills.

While New York's new system may be working, it may be too new to know.

"It's too soon to tell," Rothberg said. "Have too few cases wended their way through the system? Or is the system working and very few people are disputing?"

State wins more disclosure

In a case pertaining to a new health insurance law, the New York State attorney got four urgent care providers to improve out-of-network service disclosure.

New York State Attorney General Eric Schneiderman said the state is seeking to enforce new disclosure obligations regarding out-of-network status and fees as part of the Surprise Bill law.

That legislation went into effect March 31, setting new obligations regarding disclosure.

"At a time when many New Yorkers are feeling squeezed by rising health-care costs, consumers deserve to know whether a provider is in-network or out-

of network so that they know the costs before they choose a medical provider," Schneiderman said.

The state found problems regarding disclosure on the Internet after reviewing urgent care center websites.

Cure Urgent Care, with three locations in Manhattan and Long Island, was among those to sign the agreement to improve disclosure.

In addition, 181st Street Urgent Care in Manhattan; Brookdale Urgent Care, affiliated with Brookdale Hospital in Brooklyn; and New York Doctors Urgent Care with two locations in Manhattan agreed to better disclosure.