

July 10, 2019

The Honorable Anna Eshoo
Chairwoman
Energy and Commerce Committee
Health Subcommittee
U.S. House of Representatives
Washington, D.C 20510

The Honorable Michael Burgess, MD
Ranking Member
Energy and Commerce Committee
Health Subcommittee
U.S. House of Representatives
Washington, D.C. 20510

RE: H.R. 3630 The "No Surprises Act"

**CMA Position: Support Protecting Patients from Surprise Medical Bills
but Oppose the Surprise Medical Billing Framework**

Dear Chairwoman Eshoo and Ranking Member Burgess,

On behalf of the 45,000 physician and medical student members of the California Medical Association (CMA), I am writing to support many of the bills that will be marked-up by the Energy and Commerce Health Subcommittee on Thursday, July 11, including the reauthorization of public health programs and the Teaching Health Center Graduate Medical Education Program. CMA also supports the legislation to curb escalating prescription drug prices that have made it so difficult for our patients to afford their medications. Regarding H.R. 3630 The "No Surprises Act," CMA supports your efforts to protect patients and end surprise medical bills. We agree that patients should not be afraid to go to the doctor because of a potential surprise medical bill. However, based on our difficult experience with the California surprise billing law, we have grave concerns with the surprise billing framework in H.R. 3630 which is similar to California's law. The California law is reducing access for patients to in-network physicians and jeopardizing access to on-call physician specialists needed in medical emergencies. **Instead, we urge the Committee to support the Ruiz-Roe legislation, H.R. 3502 which is based on New York state's extremely successful law.**

The "No Surprises Act" mirrors California's failing law in that physicians and insurers are not incentivized to contract and offer an appropriate network of physicians to ensure access to care. Both the California law and H.R. 3630 establish an extremely low payment benchmark for out-of-network physicians and do not have an effective dispute resolution process with an independent database of rates. **While California patients were successfully protected from surprise medical bills, the rest of the California law has not worked. As a result, insurers are terminating long-standing contracts with physicians or mandating significant rate cuts, and therefore, patient access to physicians is diminishing and patient costs will increase. The California Department of Managed Health Care recently reported that there was a 48% increase in patient access to care complaints 2016-2018 - after the passage of California's surprise billing law. And finally, California premiums have continued to rise.**

States have been the laboratories on surprise billing. We urge the Committee to heed the cautionary tale from California and adopt the more proven model in New York. The New York system is a more balanced model that encourages physicians and insurers to be more reasonable, resolve their disputes

and enter into contracts to ensure patients have an appropriate choice of physicians in their insurance company networks. There has been a 34% drop in out-of-network billing because networks have stabilized. The independent baseball arbitration system has been easy to administer, inexpensive (~\$300) and swift. It does not involve the government or patients. However, few cases even reach arbitration. For example, only 849 out of 7.5 million New York ER cases went to arbitration because it motivates both insurers and physicians to resolve their disputes ahead of time. When cases do go to arbitration, final decisions have been evenly split between insurers and providers. Moreover, the New York law has not increased costs. FAIR Health reports that physician charges have declined by 13% and the surprise billing law was **not** cited as a reason for insurance company premium increases since the law's passage. In fact, New York premiums are rising more slowly than the national average.

CALIFORNIA'S 2016 SURPRISE BILLING LAW: The Unintended Consequences

- **Insurance Company Physician Networks Diminishing**
- **Patient Access to In-Network Physicians Declining**
- **Patient Access to Emergency Physicians and "On-Call" Surgeons/Anesthesiologists for Emergency Conditions In Jeopardy**
- **Patient Deductible Costs for Out-of-Network Care Will Increase**
- **48% Increase in Patient Complaints about Access to Care**

California's 2016 surprise billing law has successfully protected patients from the financial hardship and emotional stress of surprise medical bills. Therefore, we strongly support Congressional efforts to eliminate surprise billing. However, we caution the Committee to heed the warning signs from the rest of the California law when adopting a surprise billing solution. We urge the Committee to develop a more balanced approach that ends balance billing but does not give insurers unilateral control of the market that causes more out-of-network care.

Unlike the surprise billing law in New York, California's law did not appropriately incentivize insurers and physicians to enter into contracts to protect adequate physician networks and patient access to care. Insurers across the state are now refusing to renew longstanding (20 plus years) contracts, suddenly initiating contract terminations or demanding significant reductions in physician reimbursement rates to discourage physicians from contracting. California insurers have decided that they can just pay the low benchmark payment rate in the law and forego contracts with physicians. (The benchmark rate is the greater of 125% of Medicare or "in-network" rates.) These insurance company actions are a direct result of the California surprise billing laws.

Overall, the California law is eroding patient access to physicians and will subsequently increase patient out-of-pocket costs. As more physicians are forced out-of-network, patients will encounter greater difficulty finding an in-network physician to care for them. Patients will be forced to seek more care out-of-network which substantially increases their deductibles and out-of-pocket costs.

Moreover, we are concerned that as more physicians are forced out-of-network without contracts and paid the very low rates in state law, fewer hospital-based physicians, such as surgeons, obstetricians, and anesthesiologists, will be able to cover their practice costs and respond to emergencies. California's low payment benchmark could destroy access to emergency and "on-call" safety net physicians for patients facing a life and death emergency or delivering a baby in the middle of the night. Insurers are

unnecessarily profiting from inadequate physician networks and the related out-of-network patient deductibles. It is important to note that physicians want the certainty of a contract with insurers.

Furthermore, the California dispute resolution process is not working. It is not mandatory for emergency services so few insurers are willing to engage in the process and many claims end up in litigation. For non-emergency physicians, the process has been costly, administratively burdensome and difficult. The last case took six months and the arbitrator did not consult the additional documentation submitted by the physician. The insurance companies use their proprietary databases to determine “in-network” payment rates. The database is a non-transparent black box controlled by the insurance company and there is no independent verification of the rates. Compare this to the New York baseball arbitration process that takes 30 days, costs an average \$300, and uses an independent, transparent database of both in-network and charge rates.

Finally, one of the most important unintended consequences of a surprise billing law that harms the viability of independent physician practices, is that hospitals will be further encouraged to acquire negatively impacted physician practices which will lead to additional consolidation of the health care market, reduce competition and drive up costs. Health care economists report a substantial increase in prices in the private sector, a \$411 million increase in Medicare patient copayments, and at least a \$2.7 billion increase in Medicare spending.

California’s experience should be a warning to Congress and patients across the country and should not be duplicated. We believe that H.R. 3630 makes the fundamental problems of the current system worse. CMA is committed to protecting patients from surprise medical bills but we must do so in a way that ensures patients have continued access to physicians. Please see the more detailed California examples attached. The CMA contact is Elizabeth McNeil, Vice President, Federal Government Relations, emcneil@cmadocs.org; 415 310 2877.

Sincerely,



David H. Aizuss, M.D.
President



SPECIFIC EXAMPLES OF THE CALIFORNIA SURPRISE BILLING LAW EXPERIENCE

Since the passage of California's surprise billing law in 2016, CMA has received multiple reports from physicians of health plans, insurers and their delegated entities taking advantage of the law by threatening or initiating terminations of long-standing contracts with physicians or demanding significant reductions in their reimbursement rates.

Additionally, while the intent of the legislation was to incentivize contracting to ensure robust provider networks and patient access to care, CMA has received multiple reports of large insurers closing their networks to new physicians soon after the bill was passed. Further, there appears to be an erroneous belief among some insurers, that they aren't required to include hospital-based physicians, such as anesthesiologists, in their provider networks.

Below is a detailed summary of unintended consequences in the health care marketplace since the passage of California's surprise billing law.

1. ONE OF CALIFORNIA'S LARGEST INSURERS SUDDENLY IMPOSING SIGNIFICANT PAYMENT CUTS ON HOSPITAL-BASED PHYSICIANS

In June 2019, the largest insurer in California sent its annual fee schedule notice to at least half of its PPO network of physicians. Historically, the changes in the fee schedule payment rates have been relatively minor. However, this year the insurer notified thousands of hospital-based physicians of significant payment cuts. This is a direct result of California's surprise billing law because this insurer has never imposed such large payment reductions and to hospital-based physicians who are largely the target of the surprise billing law.

As reported to CMA by physician members, this insurer is cutting rates for the following physician specialists and services, among other physician specialists.

- OB Anesthesia: Up to -45% cut for women's labor epidurals; 30% C-section anesthesia;
- General Anesthesia: Up to -45% cut for procedures, such as monitoring lines for live-saving heart surgery.
- Radiologists: -19%;
- Pathologists -20-50%;

These are take-it-or-leave-it contracts. If these hospital-based physicians cannot afford to absorb these substantial payment cuts from their largest payer, they will be forced out of the insurance company's network. They will also be forced to accept the very low out-of-network payment rates established by California's surprise billing law. The law requires insurers to pay out-of-network physicians the greater of 125% of Medicare or in-network contract rates. The actions of this insurer are the direct result of California's inadequate surprise billing laws that do not incentivize insurers to contract with physicians. Most of these physicians will no longer be able to contract under these unfair terms. This insurer has clearly decided it doesn't need to contract with physicians because it can just pay the low rates in California law. Access to "in-network" care is in jeopardy. Patients in California will be forced to wait even longer to see primary care and specialty physicians. As patients wait to see their physicians, they

may be forced to seek care in emergency departments when their conditions have worsened and become more expensive.

Congress and patients should be extremely concerned. One of the largest California insurance company physician networks is diminishing now. Even fewer physicians will be “in-network.” Moreover, these new “out-of-network doctors” will not be able to afford to be “on-call” in the middle of the night to handle emergencies, emergency surgeries, or deliver babies. The payment cuts for obstetrical anesthesia for women’s labor and delivery epidurals, and C-sections is an assault on women’s access to care.

Rural areas of California already impacted by physician shortages will be particularly hard hit. Some emergency physicians in California’s rural areas have discussed the difficult possibility of transferring emergency patients if they can’t get enough in-network, on-call panels of specialists because of the surprise billing law. Forcing such transfers could be life-threatening for many patients. Patients in rural areas are also disproportionately enrolled in Medicaid and Medicare. Many remain uninsured. If these areas lose their private insurer payments, they may not be able to sustain community physician practices and a hospital.

This is a clear example that California’s benchmark payment rate is too low and therefore, insurers are not incentivized to contract. This action also demonstrates the insurer’s intent to lower its average “in-network” contracted rate in order to pay both contracted and non-contracted physicians less under the surprise billing law.

2. ADDITIONAL PAYER-INITIATED CONTRACT TERMINATIONS OR THREATS TO TERMINATE PHYSICIAN CONTRACTS WITH SOLE INTENT TO NEGOTIATE LOWER CONTRACTED RATES

REPORT #1 – Large Southern California Anesthesia Practice – 20 Year Contract Terminated because of a 40% Payment Reduction

Just six months after California’s surprise billing law became effective, a payer approached a large Southern California anesthesia practice to renegotiate to a lower rate. Eight months later, the payer issued a contract termination notice to the physician group, indicating its intent to renegotiate the reimbursement rates. The contract had been in place for 20 years and for the last 10 years of the contract, reimbursement rates had gone unchanged.

The payer then requested a **40 percent reduction in reimbursement rates**. During the contract discussions the payer repeatedly referenced its ability to simply rely on the surprise billing law benchmark rate if the physician group did not agree to the 40 percent reduction in contracted rates.

There is a direct correlation to the passage of California’s surprise billing law. This contract had been in place for 20 years, and for the last 10 years the payment rate had not changed until six months after the passage of the California law. Moreover, the payer repeatedly referred to the rates in the new law during negotiations.



REPORT #2 – Large Southern California Anesthesia Group – Contract Terminated 2018

In mid-2018, a large Southern California anesthesia practice entered into contract renegotiations with a payer. Ultimately, the two parties agreed to stick with the current terms and simply sign an amendment extending the existing agreement. The anesthesia practice signed the amendment and returned to the payer for countersignature. However, the payer then refused to sign and instead issued a termination letter. The payer verbally told the physician group it was seeking a reduction in reimbursement rates. The payer terminated the agreement retroactively, in breach of the 90 day advance notice requirement. The anesthesia practice made several attempts to achieve a new, lower contract proposal from the payer, however the payer never responded. The physician practice remains out-of-network with this payer.

REPORT #3 – Los Angeles Anesthesia Groups – Substantial 28-35% Payment Cuts Proposed

Following the passage of California's surprise billing law, several anesthesia groups experienced problems with two large payers in the greater Los Angeles area threatening to terminate their contracts if the physician groups did not agree to significant reductions in their reimbursement rates. One payer requested a **28 percent** decrease in contracted rates and the other requested a **35 percent reduction**. The negotiations are still outstanding.

REPORT #4 – Anesthesia Group – 21%-30% Payment Cut for Obstetric Anesthesia Services

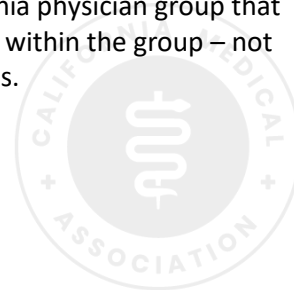
When negotiations stalled in 2016 it resulted in the termination of a contract between a large health plan and an anesthesia group. Following the termination, the physician group requested that the payer extend the prior contract terms for a period of one year. The payer refused and instead required the physician group to take a **21 percent reduction in rates for anesthesia services and a 30 percent reduction for obstetric anesthesia, rates comparable to those in place in 2004**, in order to get back in-network.

REPORT #5 – Southern California Payer Terminates Long-standing Contract with a Physician Group that Covers Multiple Hospitals

Directly after the passage of California's surprise billing law, a Southern California payer terminated a long-standing contract with a very large group of anesthesiologists. The physician group reached out to the payer to try to maintain the contract. However, the payer declined to enter into discussions. The physician group remains out-of-network with this payer.

REPORT #6 – Payer Substantially Reducing Northern California Physician Group Payments

While in negotiation discussions, a large health plan advised a Northern California physician group that the plan was targeting major reimbursement rate reductions to some practices within the group – not payment increases. Historical contract negotiations involved payment increases.



3. PAYERS CLOSING PROVIDER PANELS AND REFUSING TO CONTRACT WITH NEW PHYSICIANS

REPORT #7 – Five Payers Refusing to Contract with New Physician Group That Staffs Multiple In-Network Hospitals

In May 2017, a large Southern California anesthesia practice began outreach to a large health plan to express their strong interest in becoming contracted with the plan. After scheduling two different in-person meetings, the plan cancelled both. The practice continued outreach for several months in an effort to reschedule without success. The physician practice remains non-contracted with this plan even though the physicians have an exclusive contract to staff several hospitals that are in-network with the plan. The same scenario has played out for this same anesthesia group with five other large payers.

REPORT #8 – Anesthesia Group in Northern California Unable to Contract with Payers

After the passage of California's surprise billing law, a small anesthesia group in Northern California attempted to contract with several major payers it was not previously contracted with. The physician group reached out to a large health plan on several occasions in writing and by phone to initiate contract discussions. However, the plan refused to return the physician group's inquiries.

REPORT #9 – Four large health plans closing their networks to NEW physicians immediately following the passage of California's surprise billing law.

REPORT #10- Several plans reported to CMA physicians groups that they are not required to maintain in-network hospital-based anesthesia services. These plans are refusing to add new physicians to their networks despite growing enrollment. CMA received these reports after the passage of the surprise billing law.

