

The Louisiana Balance Billing Act: An Analysis from the Trenches

By J. Lee Hoffoss, Jr.



On Jan. 1, 2004, the Health Care Consumer Billing and Disclosure Protection Act (La. R.S. 22:1871 *et seq.*) became law in Louisiana. In particular, La. R.S. 22:1874 prohibits health care providers from “discount billing”¹ and “dual billing”² patients if the provider has contracted to be in the patient’s health insurers’ network.³ These terms are interchangeably defined as “balance billing.”

Despite the passage of La. R.S. 22:1874, it was not unusual for contracted providers to balance bill patients injured in accidents caused by the fault of a third party. In fact, it was the norm, not merely the exception. For many years, there was no jurisprudence on the Balance Billing Act. However, recently, there has developed a wealth of case law strongly favoring insured patients over contracted health care providers.

What the Act Prohibits

La. R.S. 22:1874(A) prohibits contracted providers from billing, collecting or attempting to collect from an insured patient any amount in excess of the applicable co-payment, deductible or co-insurance. La. R.S. 22:1874(B) makes the provider liable for attorneys’ fees and all costs if the provider maintains “any action at law” attempting to collect a prohibited amount. The term “any action at law” is not defined in the Act.

The Medical Lien Statute vs. The Balance Billing Act

Louisiana’s Medical Lien Statute, La. R.S. 9:4752, allows health care providers to assert a lien against an injured patient’s third-party tort claim. After the passage of

the Balance Billing Act, the question arose as to whether there was a conflict between it and the Medical Lien Statute. In 2005, the Attorney General issued an opinion stating there was no conflict.⁴

Development of Case Law

Anderson v. Ochsner Health System — Private Right of Action

*Anderson v. Ochsner Health System*⁵ dealt with whether an individual consumer has a private right of action for a violation of the Balance Billing Act. At issue was the statutory language at La. R.S. 22:1877, which provides that an aggrieved patient *may* file a complaint with the Attorney General seeking an administrative remedy. Ochsner averred that La. R.S. 22:1877 provided an exclusive administrative remedy, and, thus, Anderson could not maintain a private direct action against Ochsner.

The Louisiana Supreme Court based its holding that consumers have a private right of action on principles of statutory interpretation, as well as the constitutional guarantee of open courts and access to justice. The Court found that while the Act gave consumers the option to file a claim with the Attorney General, there was nothing in the Act that prohibited a private right of action. With regard to legislative intent, the Court stated:

The title of the statute, La. R.S. 22:1871, *et seq.*, is the “Health Care Consumer Billing and Disclosure Protection Act.” This language makes clear that the legislature enacted this statutory scheme with the protection of the consumer in mind. Accordingly, *it is difficult to envision a law denying recourse to individuals when that law’s principal aim is individual protection.*⁶

Anderson v. Ochsner Health System — “Maintaining Any Action at Law”

In addition to considering whether consumers have a private right of action, the Court considered whether the assertion of a medical lien constitutes “maintaining any action at law.” Noting that legal con-

sequences attach when a medical lien is ignored, the Court held that asserting such a lien constitutes “maintaining any action at law,” mandating the recovery of attorneys’ fees and costs.

Emigh v. West Calcasieu Cameron Hospital — Promesse de Porte-Fort and Health Insurers

In *Emigh v. West Calcasieu Cameron Hospital*,⁷ the issue was whether insureds have a cause of action against health insurers when their contracted providers balance bill. Agreeing with plaintiffs, the Supreme Court held that, as the very least, insureds have such a cause of action under La. Civ.C. art. 1977, which provides:

The object of a contract may be that a third person will incur an obligation or render a performance.

The party who promised that obligation or performance is liable for damages if the third person does not bind himself or does not perform.

One of the objects of health insurance contracts is that a third person, *i.e.*, the contracted provider, will limit the insureds liability to only their copay, deductible and coinsurance. Having promised that the provider will so perform, the insurer is liable for any non-performance by the provider. This is the essence of the ancient civilian concept of *promesse de porte-fort*.

Baker v. PHC-Minden, L.P. — Class Action is Superior Vehicle for Balance Billing Cases

In *Desselle v. Acadian Ambulance Service, Inc.*⁸ the Louisiana 3rd Circuit Court of Appeal approved class certification of a balance billing case, with the Supreme Court denying writs. In *Baker v. PHC-Minden, L.P.*,⁹ the 2nd Circuit reversed the trial court’s certification of balance billing case as a class action finding novel issues of law existed prohibiting certification.

The Louisiana Supreme Court granted writs in *Baker* and unanimously reinstated class certification.¹⁰ In reversing the 2nd Circuit, the Supreme Court highlighted that class certification is purely procedural in nature. The Court considered all of the

factors for certification and concluded that a class action was the superior method for resolving these types of balance billing cases.

Rabun v. St. Francis Medical Center, Inc. — Consent and the Medical Lien Statute

Another turn in the labyrinth was in *Rabun v. St. Francis Medical Center, Inc.*¹¹ In *Rabun*, the health care provider argued that the injured patient consented to being balance billed. The trial court had granted the provider's motion for summary judgment, which decision was reversed by the 2nd Circuit. In doing so, the court held that the patient had not, and could not, consent to being balance billed.

The 2nd Circuit went on to consider the provider's argument that the Medical Lien Statute allowed it to collect its full undiscounted charge from the patient's tort recovery. The 2nd Circuit, quoting from Justice Guidry's dissent in *Anderson v. Ochsner*,¹² noted that the Medical Lien Statute limits the lien to "reasonable charges and fees." The court concluded, in passing the Balance Billing Act, the Legislature had determined that a contracted provider's reasonable charges and fees may not exceed the contracted rate for its services. What makes *Rabun* particularly noteworthy is its terse disapproval of the longstanding practice of balance billing through the use of medical liens:

By alleging that the medical lien statute authorizes it to collect more than the contracted rate from the third party, St. Francis is circuitously stating that it can avoid the strict bans imposed by the BBA by simply crafting its bill as a medical lien instead of as a claim filed with the medical insurance company. Not only does this court reject this notion but we also *find this practice to be disingenuous and somewhat deplorable*. If such methods were permissible, there would be no need for the BBA.¹³

Vallare v. Ville Platte Medical Center — Prescription

In *Vallare v. Ville Platte Medical*

*Center*¹⁴ the provider filed an exception of prescription, arguing that a one-year prescriptive period applied.¹⁵ The trial court denied the exception, and the provider filed a writ application with the 3rd Circuit. The 3rd Circuit denied that writ application, issuing an opinion explaining why the trial court's denial of the exception was correct.

The court agreed with plaintiffs that there is a contract between the patient and provider which, in accordance with La. Civ.C. arts. 2054 and 2055, incorporates a provision prohibiting balance billing. The court agreed that the prohibition on balance billing contained in La. R.S. 22:1874 is founded upon contractual relationships, and since it is contractual or quasi-contractual in nature, a 10-year prescriptive period applies.

In *Vallare*, the health insurer named as a defendant, Blue Cross Blue Shield of Louisiana, also filed an exception of prescription. Blue Cross argued that the 15-month limitation on filing legal actions contained in its policy applied. The trial court rejected that argument, and the 3rd Circuit agreed that the 15-month limitation did not apply to balance billing litigation. The Louisiana Supreme Court denied writs on both issues.

Conclusion

The courts' strong disapproval of health care providers' utilization of medical liens to ignore the plain language of the Balance Billing Act has led to a virtual sea change in favor of injured patients seeking to use their health insurance to cover medical expenses resulting from a third-party liability accident. Through the private right of action, patients can now seek to enforce their rights instead of relying on elected officials to use their discretion.

The threat of total reimbursement and complete forfeiture of charges, along with costs and attorneys' fees, has become a considerable deterrent against contracted providers circumventing the Balance Billing Act. Now, patients with health insurance who have already been traumatized due to their injuries can avoid the additional distress caused by balance billing. They can have the peace of mind in using

their health insurance and not worrying about whether the contracted provider will seek to collect more than they are owed from the patient's third-party liability claim — the precise way the Legislature intended the system to work.

FOOTNOTES

1. "Discount Billing" means any written or electronic communication issued by a contracted health care provider that appears to attempt to collect from an enrollee or insured an amount in excess of the contracted reimbursement rate for covered services, as defined by La. R.S. 22:1872(9).

2. "Dual Billing" means any written or electronic communication issued by a contracted health care provider that sets forth any amount owed by an enrollee or insured that is a health insurance issuer liability, as defined by La. R.S. 22:1872(10).

3. La. R.S. 22:1872(6) defines "Contracted Health Care Provider" as a health care provider that has entered into a contract or agreement directly with a health insurance issuer or with a health insurance issuer through a network of providers for the provision of covered health care services.

4. La. Atty. Gen. Op. No. 05-0056, 2005 WL 1429238 (La. A.G. 5/17/05).

5. 13-2970 (La. 7/1/14), 172 So.3d 579.

6. *Anderson*, 172 So.3d at 584.

7. 13-2985 (La. 7/1/14), 145 So.3d 369.

8. *Desselle v. Acadian Ambulance Service, Inc.*, 11-742 (La. App. 3 Cir. 2/1/12), 83 So.3d 1243.

9. 49,122 (La. App. 2 Cir. 8/31/14), 146 So.3d 921.

10. *Baker v. PHC-Minden, L.P.*, 14-2243 (La. 5/5/15), 167 So.3d 528.

11. 50,849 (La. App. 2 Cir. 8/10/16), 206 So.3d 323.

12. See footnote 7.

13. *Rabun*, 206 So.3d at 328.

14. *Vallare v. Ville Platte Med. Ctr., L.L.C.*, 16-863 (La. App. 3 Cir. 2/22/17), 214 So.3d 45, *writ denied*, 17-049 (La. 5/12/17), 221 So.3d 73, and *writ denied*, 17-0513 (La. 5/12/17), 221 So.3d 73.

15. Prior to the issuance of the opinion in *Vallare*, the U.S. District Court in *Stewart v. Ruston Louisiana Hospital Co.*, 2016 WL 1715192 (W.D. La. 2016), on an *Erie* guess, found prescription on Balance Billing Act claims to be one year, being delictual in nature rather than contractual or quasi-contractual. Since that unpublished ruling was issued, no Louisiana court has followed it as precedent and all have rejected its analysis.

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