

# KOEHLER FITZGERALD

## | REFERENCE-BASED PRICING NEWSLETTER |

### **Koehler Fitzgerald**

Koehler Fitzgerald LLC provides highly specialized legal services to TPAs, HCSMs and Plan Sponsors offering reference-based medical plans.

Central to those services are the defense of balance billing claims, from provider billing to jury trial, utilizing the firm's highly rated trial lawyers, nationally recognized experts and affiliated local counsel throughout the U.S.

Koehler Fitzgerald's multilingual services are supported by the use of proprietary and customized software to track and support group calendaring, task management, contact management, conflicts checking, integrated document assembly and customized weekly reports of the status of claims and activity.

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## **Drug Reimbursement Rule Sparks Litigation**

On November 1, 2017, the Centers for Medicare & Medicaid Services ("CMS") released its final 2018 Medicare Outpatient Prospective Payment System rule. The rule decreases payments to hospitals under the 340B Drug Pricing Program and authorizes Medicare to reimburse for knee replacement surgeries performed in outpatient facilities. The 340B Drug Pricing Program was enacted in 1992 and operates to lower the cost of drugs purchased by certain public and not-for-profit hospitals and federally funded clinics serving large numbers of low-income patients.

The final rule will pay hospitals 22.5 percent less than the average sales price for drugs purchased through the 340B program compared to the current payment rate of average sales price plus 6 percent. The current payment rate will continue for vaccines, and sole community hospitals in rural areas and children's hospitals.

On November 13, 2017, The American Hospital Association and five additional plaintiffs filed an action in the U.S. District Court for the District of Columbia against The Department of Health and Human Services ("HHS") and its Acting Secretary<sup>1</sup> under the Administrative Procedure Act. The Complaint says





## Balance Billing Laws

A June 2017 study by The Commonwealth Fund<sup>1</sup> concludes, "Most states do not have laws that directly protect consumers from balance billing by an out-of-network provider for care delivered in an emergency department or in-network hospital. Of the 21 states offering protections, only six have a comprehensive approach to safeguarding consumers in both settings, and gaps remain even in these states. Because a federal policy solution might prove difficult, states may be better positioned in the short term to protect consumers."

California, Connecticut, Florida, Illinois, Maryland and New York were viewed as having a comprehensive approach, applying to both emergency care and in-network hospital visits, applying to both HMOs and PPOs, containing hold harmless provisions and prohibitions on balance billing, and containing payment standards or dispute resolution procedures.

Many of the others only apply to services supplied by out-of-network providers in emergency department settings. Some only apply to HMOs, not PPOs. Some laws contain a hold harmless provision, but do not prevent balance billing itself.

There is virtually no protection for members of RBP plans without provider agreements or which do not constitute insurance.

<sup>1</sup><http://www.commonwealthfund.org/publications/issue-briefs/2017/jun/balance-billing-consumer-protections-states>

"[t]he portions of the rule being challenged in this case would reduce by nearly 30% Medicare reimbursements to certain public and not-for-profit hospitals and clinics for prescription drugs purchased by those institutions on a discounted basis under section 340B of the Public Health Services Act (the '340B Program')." Plaintiffs estimate the reduction in reimbursement rates will cause \$1.6 billion in lost savings, in contravention of the authority of the HHS to reimburse hospitals for outpatient drugs under the Social Security Act and the purposes of the 340B program.

Henry Ford Health System, one of the plaintiffs, is a non-profit healthcare system in Detroit, MI with 30,000 employees, 26 medical centers, six acute care hospitals, and a total of 2,405 inpatient beds. The complaint alleges the "340B Provisions of the OPSS Rule would severely threaten Henry Ford's, including HFH and HF Allegiance's, ability to provide critical healthcare programs to their communities, including the underserved populations in those communities, by depriving it of millions of dollars of savings currently generated from the differential between Medicare reimbursements and 340B discounts."

Another plaintiff is Park Ridge Health, a non-profit healthcare system based in Hendersonville, NC. It employs 119 doctors, nurses and other healthcare professionals who practice at 30 locations across Henderson, Buncombe, and Haywood Counties. The communities Park Ridge serves contain a large percentage of elderly and retired persons, including numerous Medicare beneficiaries. In 2016, Medicare contributed approximately 52% of Park Ridge's gross revenues.

<sup>1</sup> Case No. 1:17-cv-02447.



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