

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
JOINT HEALTH, LONG TERM CARE, AND HEALTH RETIREMENT ISSUES
COMMITTEE – AIR AMBULANCE TASK FORCE
INTERIM COMMITTEE CONFERENCE CALL
OCTOBER 13, 2017
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) Health, Long Term Care and Health Retirement Issues Committee, and Air Ambulance Task Force held an interim joint meeting via conference call on Friday, October 13, 2017, at 10:00 A.M.

Assemblyman Kevin Cahill of New York, Chair of the Health, Long Term Care, and Health Retirement Issues Committee, presided over the Health Committee.

Representative Jeff Greer of Kentucky, Chair of the Air Ambulance Task Force, presided over the Task Force.

Other members of the Committees and Task Force present were:

Asm. Ken Cooley, CA
Rep. George Keiser, ND
Aswm. Maggie Carlton, NV

Asm. Will Barclay, NY
Sen. James Seward, NY
Sen. Bob Hackett, OH
Rep. Bill Botzow, VT

Other legislators present were:

Rep. Peggie Mayfield, IN

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

INTRODUCTORY REMARKS

Assemblyman Ken Cooley (CA) made a Motion to waive the quorum requirement. Representative Bill Botzow (VT) seconded the Motion, which passed unanimously.

Senator James Seward (NY) thanked everyone for joining and provided some introductory remarks. Sen. Seward stated that he, along with NCOIL at an organizational level, believes that a good piece of Model legislation should be a generalized legislative framework – the States that choose to adopt the Model can then modify it as they wish and further develop it through the promulgation of more specific regulations.

Sen. Seward further stated that he views his proposed Model as an effort to expand and improve upon NCOIL's "Healthcare Balance Billing Disclosure Model Act," originally adopted in 2011, and the re-adoption of which has been pending upon completion of this draft Model. The senator commented that a drafting note in the 2011 Model states that "States may wish to consider using an existing mediation process or establishing a

mediation process to manage disputes that may arise regarding balance bills.” Accordingly, proposed language in Sen. Seward’s Model includes the requirement that such a process be established by the State Insurance Department to resolve disputed out-of-network charges, including balance bills, similar to what some States have implemented, including New York. Sen. Seward noted that he has heard promising things about the dispute resolution program and it has been working well in New York. Sen. Seward stated that he believes that this approach, if set up and executed properly, can be more streamlined and help consumers more than other offered approaches because if each party knows there is a distinct possibility that they can lose outright, a strong incentive is created for the parties to negotiate and settle – that is what has occurred in New York and the program has been running smoothly.

Additionally, Sen. Seward noted that something happened with the redlining in the version of the draft Model that has been distributed and posted on the NCOIL website, so that it inadvertently appeared as if the “balance billing” section is being stricken; it is not, and has been corrected on the website.

DISCUSSION ON SENATOR SEWARD’S DRAFT OUT-OF-NETWORK BALANCE BILLING TRANSPARENCY DRAFT MODEL ACT

Barry Ziman, on behalf of the Coalition of Medical Specialties (Coalition) stated that a definition of “usual and customary” should be established in the definitions section of the Model in order to standardize its use throughout the Model. Specifically, the terminology should be “rate” and not “cost” in accordance with the traditional and widely understood use of the term by the insurance industry in order to reflect the general market value for the service. Moreover, the “UCR” should be calculated by entities that have no legal or financial affiliation with health insurance carriers.

Dianne Bricker of America’s Health Insurance Plans (AHIP) opposed the Coalition’s statement and stated that to use “usual and customary cost” is not in keeping with the industry standard which has long held that “usual, customary, and reasonable” is the amount paid for a medical service in a geographic area based on what providers in the area usually charge for the same or similar medical service. Accordingly, to avoid discouraging enrollees from choosing in-network providers, AHIP has suggested that carriers be required to provide at least one option for coverage for services provided by an out-of-network provider that is at least eighty percent of the “allowed amount” paid to in-network providers for the same services after imposition of a deductible or any permissible benefit maximum.

Mr. Ziman disagreed and stated that New York law, which serves as the basis for several provisions of Sen. Seward’s Model, was designed to guard against past improper business practices by the health insurance industry. Ms. Bricker strongly disagreed. Asm. Cahill stated that when this issue was being debated in New York several years ago, it was one of the most difficult issues to decide on. Accordingly, Asm. Cahill recommended that the UCR issue be addressed later after further debate, and perhaps be resolved by using a drafting note in the Model.

Assemblywoman Maggie Carlton (NV) stated that in Nevada’s balance billing legislation, the definition of “health care facility” was drafted to include only those facilities with more than 100 beds because Nevada wanted to ensure smaller facilities in rural areas had the flexibility to provide the care that they needed to. Commissioner Tom Considine, NCOIL

CEO, stated that such a definition could open up the opportunity for 95-bed facilities to become popular in an effort to avoid being regulated. Sen. Seward stated that he thinks this issue is one that could be resolved by including a drafting note in the Model under the definition of “health care facility.” Asm. Cahill and Asm. Cooley agreed.

April Beane of Quest Analytics then stated that with regards to Section 5 of the Model, Determination of Network Adequacy, the frequency with which a State Insurance Commissioner reviews a health care provider’s network for adequacy should be less than the proposed three years, due to the changing composition of networks and to help ensure continuity of care. Quest Analytics recommends reviewing networks at least annually, and noted that some States are moving towards a quarterly review. Ms. Bricker stated that AHIP believes a period of every 3 to 5 years for such review is better, and questioned the capacity that State Insurance Departments would have to conduct quarterly or annual reviews. Mr. Ziman urged the Committee to look to California regulations on this issue.

Mr. Ziman, Ms. Bricker, and the Emergency Department Practice Management Association (EDPMA) stated they stand by their written comments regarding Section 7 – Emergency Services Provided by Out-of-Network Providers. Aswm. Carlton stated that when Nevada worked on similar legislation, they started with the premise that patients, through no fault of their own, that ended up in an emergency room and received treatment from an out-of-network physician should only be required to pay their normal co-pays. The two sophisticated parties to the matter should then resolve the dispute and leave the patient out of the middle.

Mr. Ziman then stated that they have strong concerns with Section 9 – Provider Notice to Enrollees – because of its potential to impact the practice of medicine and fundamentally harm patients by delaying medical services to patients. Mr. Ziman noted that similar language was previously considered by NCOIL and NAIC in prior Model drafting efforts and both organizations decided against its inclusion. Cmsr. Considine questioned how the provisions in the section could delay medical services to patients if they only apply to elective procedures. Dr. David Gang, on behalf of the Coalition, stated that there are numerous instances when a doctor may not know what will be required next when treating a patient for a disease, and it is not feasible, particularly when referring the patient to a specialist, to provide the information to the patient that the Model requires in a timely manner. Asm. Cahill stated that he thinks there is middle ground on this issue and that language can be drafted in such a way to reflect such. Sen. Seward agreed. Mr. Ziman noted that beginning on January 1, 2018, the Federal regulations will require the health insurance payor to provide notice to the patient 48 hours before an elected procedure. Moreover, the prior NCOIL version places the obligation on the facility, not the provider – Mr. Ziman urged NCOIL to remain within that paradigm.

Mr. Ziman then stated that it has not had time to review the Model’s provisions on Independent Dispute Resolution (IDR). Ms. Bricker stated that AHIP is still reviewing those sections but noted that AHIP is generally supportive of IDR programs. Cmsr. Considine noted that the Model will be included in the 30-day materials but that interested parties are free to continue to submit comments leading up to the meeting. Sen. Seward agreed and requested that interested parties submit such comments as soon as possible to allow for proper review prior to Phoenix.

Rep. Bill Botzow (VT) suggested that Section 11(A)(2) be amended to clarify who the Department of Insurance can “charge fees as necessary to cover its cost of implementation and administration.” Sen. Seward agreed.

Asm. Cooley then asked Sen. Seward if New York administered its IDR program through its Department of Insurance or through a third party. Sen. Seward stated that the NY DOI administered the program – as does the Model. Cmsr. Considine clarified that the independent reviewers themselves, however, are not employees of the DOI.

Robert Holdman of the American Association of Payers Administrators and Networks (AAPAN) stated that AAPAN will be submitting written comments on the IDR program but noted that they believe that there should be a provision permitting enrollees to initiate an IDR proceeding.

Mr. Ziman stated that regarding Section 13 – Balance Billing – they would like to see a provision included that would enable the patient to contact the physician to discuss having a charge waived based on economic necessity.

Mr. Ziman then stated regarding Section 16 – Provider Directories – they are concerned that health insurers are misrepresenting products to consumers by suggesting that a hospital is in-network when they have not contracted with in-network specialties within that hospital. Fundamentally, they believe that is a deceptive trade practice and urged the Committee to clearly define it in the Model as such. Ms. Bricker strongly disagreed with the Coalition’s characterization of the issue and looked forward to further discussing it with the Coalition and members of the Committee. Senator Bob Hackett (OH) agreed that there is a problem in this area and it has been prevalent in Ohio. Asm. Cahill noted that this issue could get worse due to the recent issuance of President Trump’s Executive Order. Ms. Beane of Quest Analytics stated that the term “periodic” when referring to required audits of a carrier’s provider directories is open to interpretation and suggested establishing an actual review period - review should occur at least quarterly and directories should be updated by the plans on a weekly basis.

Asm. Cahill stated that he thinks the Committee should go forward with a modified version of Sen. Seward’s Model, based on the discussion today, and then separate amendments can be offered afterwards. Sen. Seward agreed and hoped that the Committee could vote on a Model at the Phoenix meeting so that States could have the Model in their States for consideration as legislative sessions will start again soon. Asm. Cahill stated that it is important to note that this Model is intended as guidance to States, and stressed to Committee members that it should proceed with Sen. Seward’s Model as best it can and perhaps include drafting notes and/or footnotes in section where a consensus has not been reached. Rep. Botzow and Asm. Cooley agreed. Asm. Cooley stated that he thinks the Model is a very strong, constructive framework and can at the very least be a starting point for productive debate in State legislatures.

DISCUSSION AND CONSIDERATION OF AIR AMBULANCE MODEL ACT

Representative Jeff Greer (KY), Chair of the Air Ambulance Task Force, stated that the Task Force began its work with the goal of improving the total air ambulance system to where people who have to utilize air ambulances can have coverage for it. That proved too difficult, particularly due to Federal preemption issues. Rep. Greer stated that he is appreciative of the compromise that has taken place and noted that those in rural areas know just how important the services are – it is truly a matter of life or death.

Will Melofchik, Legislative Director, NCOIL Support Services, LLC, then briefly summarized the Model sponsored by Assemblyman Will Barclay (NY), which requires a State Department of Insurance to establish and administer an IDR program to resolve disputed air ambulance service charges. Air ambulance service providers wishing to participate in the IDR program must then register with the respective DOI. Cmsr. Considine then noted that as a condition of participation in the IDR program, the registered air ambulance provider agrees to (a) publish the air ambulance transport rates charged by it in that State and (b) provide de-identified, itemized billings for each of its transports in that State. Cmsr. Considine stated that the air ambulance industry has shown good faith in its discussions with NCOIL staff on this issue, and that the industry has come a long way since the Task Force was formed.

Cmsr. Considine further noted that while participation in the IDR program is not mandatory (and it couldn't be due to Federal preemption concerns) – once an air ambulance service provider registers with the IDR program, it waives its ability to challenge the IDR program based on being Federally preempted by the Airline Deregulation Act (ADA).

Cmsr. Considine then noted that AHIP had submitted a proposed Air Ambulance Model Act which required a State Attorney General to conduct a study regarding the business practices of air ambulance companies operating in their State and issue a report containing findings and recommendations to their Governor, appropriate legislative committees, and regulatory agencies. Cmsr. Considine stated that NCOIL believes that when a new program is being administered by an Insurance Department, it would like to see momentum in the beginning, and the Department would not want a separate cabinet agency, particularly a prosecutorial agency, conducting a study. Nonetheless, Cmsr. Considine noted that Asm. Barclay was open to the idea of such a "study" and therefore amended the Model to require the Insurance Department to:

- keep and maintain records of each IDR proceeding;
- analyze the results of the IDR proceedings;
- analyze the information submitted by the air ambulance companies each year; and,
- issue a report annually, the contents of which must include, but not be limited to:
 - the overall aggregate statistics of the IDR program for the year;
 - the de-identified results of all disputes decided by each independent reviewer through the IDR program;
 - the number of disputes settled between the parties;
 - an analysis of financial and market trends of the air ambulance service provider claims; and,
 - recommended changes to improve the IDR program.
 - The report shall also be made public through, at a minimum, posting on the website of the DOI.

Asm. Barclay agreed with Cmsr. Considine's statements and stressed that no one is against studying the issue, which is why an amendment was made, but noted that it was important for the Task Force to move forward on the issue as best it could in the form of a legislative framework.

Asm. Cahill stated that he thinks Asm. Barclay's Model is a workable solution – one that would permit NCOIL to provide immediate guidance to the States on these issues, and also agreed with the amendment to include the requirement that the DOI issue an annual report. Asm. Cahill also stated that the participation of air ambulance providers in the IDR program is critical, and that depending on what happens in the next year or so with the ADA, and the information that States continue to gather on these issues, the Task Force and Committee might need to reconvene.

Ms. Bricker stated that AHIP plans on submitting more detailed comments on Asm. Barclay's Model, and noted that AHIP continues to believe that amending the ADA is the best possible way to resolve these issues. Ms. Bricker further stated that she was surprised to hear that Asm. Barclay's was the result of compromise between both sides because she did not hear any response from the air ambulance providers when she reached out to discuss these issues. Ms. Bricker also noted that there is no incentive for air ambulance providers to participate in such a voluntary IDR program, and that State Attorney Generals are becoming more aware and interested of the issues surrounding the air ambulance industry. Ms. Bricker further noted that the inclusion of self-funded health benefit plans within the scope of the Model raises serious ERISA preemption issues. Lastly, Ms. Bricker stated that AHIP would like to know how an adequate network of air ambulance service providers in a State would be determined because it is AHIP's understanding that there is no such standard currently existing.

Asm. Cahill then stated that the Attorney General of a particular State already has the authority to conduct a study on issues it deems necessary of addressing. Asm. Cahill further stated that, regarding Ms. Bricker's note of the IDR program being voluntary for air ambulance service providers, there appears to be no other solution at this point in time unless the ADA is amended, which the Task Force and Committee made clear is the ultimate solution through its passage of the Resolution in July urging such Congressional action.

Asm. Barclay then made a Motion for the Task Force to adopt the Model Act Regarding Air Ambulance Insurance Claims. Rep. Botzow seconded the Motion. The Air Ambulance then voted to adopt the Model Act, without objection.

Asm. Cahill then asked Rep. Greer to make a brief presentation on the Task Force's activities during the Health Committee in Phoenix, rather than having the Task Force meet separately. Rep. Greer agreed and Asm. Barclay offered to participate in that presentation. Rep. Greer then made a Motion to adjourn the Air Ambulance Task Force. Asm. Barclay seconded the Motion.

Asm. Barclay then made a Motion to offer his Air Ambulance Model Act to the Health Committee for consideration during this meeting. Asm. Cooley seconded the Motion. The Health Committee then voted without objection by way of a voice vote to adopt Asm. Barclay's Air Ambulance Model Act.

ADJOURNMENT

There being no further business, Asm. Cooley made a Motion to adjourn the Committee. Asm. Barclay seconded the Motion. The Committee adjourned at 12:00 P.M.