# Can AB 651 Survive Possible Legal Difficulties as California Strives to Protect Both Air Ambulances and Patients?

*Updated 10/14/2019: Governor Newsom has signed AB 651, which will take effect January 1, 2020.*

There are few bills in the 2019 California Legislative cycle more supported by the Legislature than AB 651, which would reauthorize the Emergency Medical Air Transportation Act ("Act") and prohibit balance billing by air ambulances.

To fully understand the impact and significance of AB 651, we will first examine the history and evolution of the Emergency Medical Air Transportation Act, starting in 2010, to better appreciate the original intent of the Act. Second, we will discuss AB 651's additional, unique provision: a prohibition of balance billing to patients. Third, we will discuss why AB 651, in its current form, may be preempted by the federal Airline Deregulation Act of 1978.

**The Emergency Medical Air Transportation Act of 2010 (AB 2173)**

The Emergency Medical Air Transportation Act, passed in 2010 (AB 2173), imposes on all vehicle traffic violations an additional $4 penalty, except for those related to parking, to supplement and increase Medi-Cal reimbursement for air ambulances. As of now, the additional penalty is slated to sunset on January 1, 2020.

When passing this bill, the Legislature enacted a number of findings. First, the Legislature found that air ambulances were essential in transporting the "most critical patients from automobile accident scenes" in rural areas, and in urban areas

where “traffic congestion inhibits rapid transportation.”[1] Given the Legislature’s findings that air ambulances transport any emergency patients whether they can pay or not and that most air ambulance patients cannot pay or do not have insurance,[2] the Legislature was concerned that Medi-Cal reimbursement is “far below what it costs . . . to provide emergency air transportation” and that Medi-Cal reimbursement is unavailable “if the patient is indigent and not eligible for Medi-Cal.”[3]

As such, the additional penalty from traffic violations was enacted to raise funds for air ambulances. This method of raising money was not new. As noted in a 2009 Assembly Committee on Public Safety analysis for AB 1153, a substantively similar bill from 2009 that failed in committee, the Legislature had been “increasingly” using penalty assessments on both traffic and criminal violations to raise program funds.[4] According to the Assembly Appropriation Committee, an additional $3 penalty as proposed in a previous version of the bill would result in about $40 million in revenue.

Under this Act, counties would transfer the raised money to the State Department of Health Care Services (DHCS)’s Emergency Medical Air Transportation Act Fund (“Fund”).[5] The Legislature directed DHCS to use the Fund for the following three purposes:[6]

(1) Fund administrative costs to implement and maintain the Act;

(2) Supplement the state portion of the Medi-Cal reimbursement rate for emergency medical air transportation services (20% of remaining fund after (1) is funded);

(3) Provide additional Medi-Cal reimbursement for emergency medical air transportation services (80% of remaining fund after (1) is funded).

Relative to (3), the Act prohibited the additional reimbursement “to exceed normal and customary charges” and prohibited the use of the General Fund (i.e. taxes) to fund the increase.[7] Lastly, AB 2173 terminated the penalty on January 1, 2016 and mandated that the provisions be repealed on January 1, 2018.

In 2017, AB 1410 added to the Act by requiring DHCS to “notify the Legislature of the fiscal impact . . . and the planned reimbursement methodology for emergency

medical air transportation services after" the penalty is terminated. AB 1410 additionally extended the penalty's end date to January 1, 2020, with a repeal set for January 1, 2022. On top of this, the bill expanded the coverage of the Act to include funding of children's health care coverage.

## Recent Attempts to Extend the Act and Prohibit Balance Billing by Air Ambulances (AB 2593 and AB 651)

As the Act's sunset date began to draw close, legislators worked to either extend the Act or permanently increase the Medi-Cal rate. Expiration of the penalty would reset Medi-Cal air ambulance rates to 1993 levels. In addition to reauthorizing the Act, recent efforts, including the vetoed AB 2593 in 2018 and recently enrolled[8] AB 651 in 2019, would also prohibit noncontracting air ambulances from charging more than the in-network cost sharing for patients. This prohibition would be limited to patients insured under plans regulated by the Department of Managed Health Care (DMHC) or Department of Insurance (CDI).

However, AB 651 differs significantly from AB 2593 in two respects. First, AB 651 does not, unlike AB 2593, permanently increase the Medi-Cal fee rate for air ambulance services to at least the current reimbursement level under the Act.[9] In doing so, the bill would assure air ambulances an increase in Medi-Cal rates that is not dependent on the number of vehicle violations, and thereby eliminate the need of a penalty to augment the 1993 Medi-Cal rate. Second, while AB 2593 did not change the sunset date, AB 651 would extend the sunset date for the penalty to July 1, 2020 and have the Act itself expire on July 1, 2022.

Essentially, the Legislature embraced AB 651's two biggest changes to the Act, which is extending the Act without setting a permanent increase and eliminating balance billing. After passing both houses, AB 651 is still awaiting the Governor's signature as of September 30.

## AB 651's Balance Billing Prohibition Seeks to Protect Patients from High Air

## Ambulance Costs

It should be noted that AB 651, with its balance billing provision against air ambulances, received unanimous support. As discussed in a previous post regarding AB 1611, another balance billing bill which was shelved this session, balance billing is of great concern for California legislators. Because air ambulances are expensive and may be out of network, patients may end up with bills they cannot afford. The United States Government Accountability Office expressed concern that balance billing by out of network air ambulance providers "may pose financial risks to patients covered by health insurance." Because the average private insurance payment for air ambulances in California was estimated to be around $21,975 in 2010,[10] about four times as much as the Medicare payment, those with private insurance may be on the hook for a significant amount for out of network air ambulance services.[11]

While California has a great amount of balance billing protection, much of that protection covers only 65% of the state's insured population, namely services performed at in-network hospitals or for emergency services.[12] 28 CCR § 1300.71.39 specifically prohibits "billing an enrollee . . . for amounts owed . . . by the health care service plan." AB 651 would go further and set a maximum amount a patient could owe to a noncontracting provider of covered medical transportation services, which would include any ambulance transport services needed for an emergency medical condition.[13] As a result, California Health Benefits Review Program (CHBRP) predicts that AB 651's balance billing prohibition would save patients $2,174,6700.

## Legal Obstacles May Prevent the Implementation of AB 651

While AB 651's balancing billing prohibition is laudable, AB 651 possibly conflicts with current statutes and may be preempted by the federal Airline Deregulation Act. As such, implementation of the balance billing prohibition may be difficult.

*Conflict with Current Statutes*

CHBRP's report raised concerns that AB 651 would conflict with Health & Safety Code § 1367.11 and Cal. Ins. Code § 10352. In both statutes, the insurer or health care service plan must directly reimburse "any provider of covered medical transportation services," which would have (1) the patient file the claim with their insurer or plan and (2) after receiving payment from the insurer or plan, "the provider could demand payment . . . for any unpaid portion." If the Governor signs AB 651 into law, the noncontracting provider would only be entitled to "the in-network cost-sharing amount for [covered] services."

Both DMHC and CDI could possibly resolve this by interpreting that AB 651 limits the "unpaid portion" to the in-network cost-sharing amount.

*Preemption by Federal Airline Deregulation Act*

Additionally, legislative staffers and CHBRP expressed concerns that AB 651's balance billing prohibitions may be prohibited by the federal Airline Deregulation Act of 1978 ("ADA"). The ADA preempts any state laws relating to the "rates, routes, or services"[14] of an air carrier, which includes an air ambulance. To underscore how broadly the ADA preemption applies, the U.S. Supreme Court interpreted the preemption standard of the ADA to be on par with the extremely broad preemption standard of the Employment Retirement Income Security Act (ERISA).[15]

As such, most courts have held that the ADA preempts rate setting for air ambulances. In *Air Evac EMS, Inc. v. Cheatham*[16] and *EagleMed LLC v. Cox*,[17] the Fourth Circuit and the Tenth Circuit held, respectively, that West Virginia's and Wyoming's rate setting for air ambulances for worker compensation claims were preempted by the ADA. Additionally, federal district courts held that the ADA preempted similar rate setting laws in Texas and Tennessee. In California, the Division of Worker's Compensation determined that setting maximum fees for ambulance services would be preempted by the ADA and would not apply such maximums on air ambulances. While AB 651 is not exactly rate setting as seen in those cases, an argument could be made that setting the maximum amount out of

network air ambulance providers can charge patients is a form of rate setting.

Some courts have accepted this argument. In *Guardian Flight, LLC v. Godfread*,[18] the federal district court found North Dakota's balance billing law to be preempted. The court noted that the "impact . . . [on air ambulance] prices is clear and significant as it caps air ambulance prices."[19] The court further observed that even if air ambulance rates are "out of control," "[g]ood intentions do not save state legislation intended to protect patients from exorbitant air ambulance bills from ADA preemption."[20] Additionally, in *Bailey v. Rocky Mountain Holdings, LLC*,[21] the Eleventh Circuit held that the ADA preempted a cause of action arising from a Florida law prohibiting balance billing. In this case, Florida's law had capped the amount that a medical provider, like an air ambulance provider, could charge an insured who is injured in an automobile accident. The court held that because the "balance billing provision . . . has a significant effect on air carrier price," the ADA would preempt the cause of action.[22]

As such, AB 651's balance billing prohibitions may be preempted by the ADA in court. However, given that the air ambulance industry supports AB 651, it remains uncertain who would challenge AB 651 on the basis of federal preemption.

## Conclusion

AB 651, as a bill aimed at protecting both the air ambulance industry and patients who use air ambulances, would extend the assessment of the penalty to fund an increased Medi-Cal reimbursement rate for air ambulances and also prohibit air ambulances from balance billing patients on Department of Managed Health Care and Department of Insurance-regulated plans. However, AB 651 may have a challenging road ahead, as it possibly conflicts with existing DMHC and CDI statutes. Additionally, as a form of rate setting, it could face preemption by the federal Airline Deregulation Act as seen in other federal cases involving similar state laws.

That said, air ambulances are a critical part of the emergency transportation system in California. With a coalition of consumer advocates, labor unions, air ambulances,

and hospitals supporting AB 651, this bill would be one way to ensure not only that air ambulances are well funded, but also that patients are protected from high air ambulance prices. It's now up to Governor Newsom to decide if this is the best way.

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[1] In an Assembly Committee on Public Safety analysis prepared for an April 28, 2009 hearing, the analysis quoted Assemblymember Beal as stating that "[e]mergency helicopter air ambulance providers maintain a critical link

between rural areas and urban tertiary care hospitals (trauma centers, heart/stroke centers, burn units, etc.)."

[2] California Association for Air Medical Service claims that 40% of medical air transports involve Medi-Cal patients.

[3] Specifically, Assemblymember Jim Beall, author of the bill, noted that Medi-Cal paid air ambulances 40% of the average Medicare rate or even below 35% in rural areas. Additionally, according to the United States Government Accountability Office (GAO), "air ambulance providers do not turn away patients based on their ability to pay and receive payments . . . often at rates lower than the price charged."

[4] A 2009 Assembly Committee on Public Safety analysis for AB 1153 cautioned that imposing more penalty assessments would lead to "indigent defendants . . . simply choos[ing] to spend time in jail in lieu of the fines, causing taxpayers to be required to pay the costs of jail space and courts." As such, increased fines would lead to less fines being paid and therefore, less revenue for the program. Taking that warning to heart, the Legislature passed SB 326 in 2015 to require DHCS to develop a "funding plan that ensures adequate reimbursement" after penalties are terminated. In enacting the bill, the Legislature declared that while "[i]t is in the state's interest to ensure [sufficient] funding for emergency medical air transportation," the Legislature found that the "ever-increasing reliance on penalty assessments" was a "regressive financing mechanism" that "perpetuate[d] a cycle of poverty and inequality, given that individuals with lower incomes are more likely to miss

payments and suffer the consequences." What's puzzling is that the Legislature, in enacting this bill, extended the Act to terminate penalties on January 1, 2018 and mandated the repeal to be on January 1, 2020. In doing so, SB 326 actually extended the Act and its associated penalty by two more years.

[5] 2011's AB 215 later centralized the Act, such that the counties no longer have their own emergency medical air transportation act fund but instead transfer the money directly to DHCS.

[6] Additionally, Assemblymember Jim Beall, author of the bill, noted that the raised money would be matched with federal funds.

[7] Interestingly, with the passage of this bill, the Legislature reduced Medi-Cal air ambulance rates by 10% in its 2011 budget (AB 97).

[8] Enrolled means both the Assembly and the Senate passed the bill, but the bill is awaiting the Governor's signature to become law.

[9] In other words, the Medi-Cal fee rate, as proposed in AB 2593, would meet or exceed the sum of the air ambulance service rate and the increased payment under the Act.

[10] Prices may be higher now. According to the United States Government Accountability Office (GAO), the median prices for air ambulances have doubled between 2010 and 2014.

[11] The California Health Benefits Review Program (CHBRP) estimated that 15% of air ambulance services used by commercial and CalPERS enrollees in California were out of network. While this is lower than the national average, this still means that someone will be balance billed a significant amount.

[12] The Knox-Keene Act, the statute regulating DMHC-regulated plans, defines "emergency health care services" as "including ambulance and ambulance transport services." Cal. Health & Safety Code § 1345(b)(6).

[13] Covered medical transportation services would include "any ambulance or ambulance transport services . . . provided . . . [because] an enrollee reasonably

believed that the medical condition was an emergency medical condition and reasonably believed that the condition required ambulance transport services." Cal. Health & Safety Code § 1371.5(a). Additionally, Welfare and Institutions Code 14019.4 already prohibits balance billing of Medi-Cal patients.

[14] 49 U.S.C.A. § 41713(b)(4)(A).

[15] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C.App. § 1305(a)(1)").

[16] 910 F.3d 751 (4th Cir. 2018).

[17] 868 F.3d 893 (10th Cir. 2017).

[18] 359 F. Supp. 3d 744 (D.N.D. 2019).

[19] *Godfread*, 359 F. Supp. 3d at 755.

[20] *Id.*

[21] 889 F.3d 1259 (11th Cir. 2018).

[22] *Id.* at 1270.