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Association of American Physicians and Surgeons, Inc.
A Voice for Private Physicians Since 1943
Omnia pro aegroto

September 5, 2016

Re: California Assembly Bill 72, Request for Veto

Dear Governor Brown,

On behalf of many physicians in California, the Association of American Physicians & Surgeons (AAPS) and the individual undersigned physicians ***urge you to veto Assembly Bill 72***. This legislation is unprecedented in allowing insurance companies to engage in price-fixing of reimbursement rates for all physicians, even those who are have no contractual relationship with the insurance companies. This would have a dreadful effect on the availability of care to patients in California. ***Simply put, AB 72 is anti-physician, anti-patient, and anti-charity care.***

Strong legal and policy arguments weigh heavily against this bill. AAPS, founded in 1943, wants to share with you our objections to AB 72. By way of background, AAPS has members in virtually every specialty, and AAPS speaks out frequently about issues concerning patients and medical practice. The United States Department of HHS favorably cited a comment by AAPS in connection with the landmark Privacy Rule. 65 FR 82462, 82468 (Dec. 28, 2000). Our legal filings have also been cited favorably by the U.S. Supreme Court and appellate federal and state courts.

Independent physicians have been against this bill, which would allow insurance companies to fix prices for the reimbursement of doctors who are not under contract with insurance companies, and not in their network. This is a potential violation of **quantum meruit:** i.e., a reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract.

<u>Legal Flaws in AB 72</u>

Assembly Bill 72, as recently enacted by the legislature, is invalid under the due process clauses of the California and U.S. Constitutions. It would have a devastating effect on the availability of life-saving medical care to the people of California.

The California Supreme Court has established clear rules with respect to price controls, and AB 72 violates these rules. The Court struck down a provision in Proposition 103, an initiative measure which was enacted on November 8, 1988, for reasons that require vetoing AB 72 also. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 812, 258 Cal. Rptr. 161, 163, 771 P.2d 1247, 1249 (1989).

AB 72 authorizes private insurance companies to set price controls on physicians who are not part of their network, and who have never signed any contracts with the insurance companies. This legislation prevents a physician from obtaining adjustments in the rates that may be necessary for the physician to stay in practice, or to obtain a reasonable fee for the services he provides.

The *Calfarm Ins. Co. v. Deukmejian* expressly prohibits such a law. The California Supreme Court held unanimously in that case as follows:

> Having determined that [the challenged provision] precludes adjustments necessary to achieve the constitutional standard of fair and reasonable rates, and that the subdivision cannot be sustained as a temporary or emergency measure, ***we hold it invalid under the due process clauses of the state and federal Constitutions***.

Id. at 821 (emphasis added).

AB 72, like the constitutionally defective provision in Proposition 103, "precludes adjustments necessary to achieve the constitutional standard of fair and reasonable rates." *Id.* Instead, AB 72 grants insurance companies *carte blanche* to set the rates however they see fit, to maximize their own profits. This is unconstitutional for multiple reasons, as explained further below.

Price controls are allowed as a "temporary or emergency measure," but there is nothing temporary or emergency about **AB 72. It is a permanent delegation of authority to insurance companies to fix prices (rates) for services not under contract with the insurance companies.** The victims of these price controls have no procedure for challenging the rates, other than a one-by-one piecemeal arbitration process that has proven to be unfair in Florida and Illinois. That costly, one-sided arbitration system fails to comport with the standard required ***unanimously*** by the California Supreme Court in striking down an analogous provision passed by the voters.

The price controls of AB 72 are not salvaged by its backstop of keeping rates slightly above Medicare. It is well-known that Medicare reimbursements for many services are too low to compensate a physician fairly for the service. Often Medicare reimbursements are even below cost for certain services. AB 72 cannot be sustained by merely guaranteeing that reimbursements will not fall below a rate that is pegged to something that is often below the cost of the service.

Recently the U.S. Court of Appeals for the D.C. Circuit considered a similar issue in a law of Congress, which conferred on Amtrak the ability to set regulations that would affect other

private entities. The Court ***unanimously*** held that the law was unconstitutional under multiple clauses of the U.S. Constitution. *Ass'n of Am. R.R. v. U.S. DOT*, 821 F.d 19 (D.C. Cir. 2016).

In addition, the price-fixing authorized by AB 72 does not quality for the "state immunity" exception from the Sherman Act and its prohibition against setting prices, which in this context relates to reimbursement rates for medical services. AB 72 authorizes private insurance companies to impose price controls of only 125 percent of Medicare across-the-board, thereby fixing the fees of physicians who are not even in network. Under *Parker v. Brown*, 317 U.S. 341 (1943), and *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105-06 (1980), non state-actors are immune from the Sherman Act with respect to fixing prices only if there is active supervision by the State of the conduct. Yet that requirement of active supervision by the state is absent from AB 72, which leaves physicians and patients stuck without any politically accountable entity to appeal to when insurance companies drive reimbursement rates too low on out-of-network physicians and other medical caregivers.

Private entities are not properly authorized to regulate other private entities. AB 72 is an unprecedented, unconstitutional step towards allowing price-fixing by insurance companies. ***AB 72 should be vetoed.***

Policy Flaws in AB 72

Already many physicians cannot afford to see MediCal or Medicare patients, unless they opt out. Consequently MediCal and Medicare patients are finding increasing difficulty in obtaining needed care and turn increasingly to costly Emergency Rooms as safety nets for their treatment. With one third of Californians now enrolled in MediCal, AB 72 will greatly worsen provider shortages, for all patients, by allowing insurance companies to reduce rates for all insured services to something comparable to Medicare. Reduced overall reimbursement will make it impossible to offset the charity payment physicians currently receive for treating underinsured MediCal patients.

Insurance companies do not compensate for care provided to uninsured and underinsured patients. If insurance reimbursement rates are allowed to decline to Medicare-type levels, then there will be inadequate financial margins that currently enable physicians to provide charity care. ***Instead, physicians will be compelled to avoid providing charity care entirely, or will need to reduce their availability for charity care***. AB 72, unfortunately, only enriches insurance companies by allowing them to drive down already low physician reimbursement rates further, and that will hurt uninsured, underinsured and insured patients alike. AB72 does not require insurance companies to reduce profit margins in order to control patients' rising out of pocket expenses or premiums. Rather, AB 72 will have the effect that all price controls have: to reduce the supply of the service.

An approach in Florida that is similar, but not as extreme, as AB 72 has been a failure. As explained by a physicians' group there:

> "The alleged [Florida Medical Association] FMA "Compromise" is a charade that forces doctors into an unfair dispute resolution process. The process actually costs physicians time and fees for participation—with additional fees if they lose their disputed claim. The process is run under the auspices of the Agency for Health Care Administration (AHCA) by private contractor 'Maximus' and is ineffective . For instance in 2015, only 9 claims were submitted and only one of those was settled after a $1,205 review fee. In addition, the false 'FMA Compromise' still ensures that a physician will never get more than 110% of the amount they were originally granted by the insurance company."

http://www.flaaps.org/wp-content/uploads/2016/05/AAPS-FL-Newsletter-Spring-2016_As_Mailed.pdf

A similar bill, though not as extreme as AB 72, was introduced last year in New Jersey (S20/A4444) and was defeated due to well-justified opposition by both physician groups and individual hospitals. Health insurance companies, which have been racking up record profits and paying mammoth compensation to their executives, do not need protection from state legislatures.

AB 72 is even contrary to the public policy in California, which uses the Gould Criteria to establish usual and customary rates (UCR). *See* 28 Cal. Code of Reg. § 1300.71(a)(3)(B) ("the payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider's training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider's practice that are relevant; and (vi) any unusual circumstances in the case …."). In violation of this public policy, AB 72 would essentially allow private insurance companies to fix the reimbursement rates for all physicians, even including physicians who are not in-network or under contract with the insurance companies.

Increasingly, insurers and managed care plans offer inadequate out-of-network coverage for their enrollees. AB 72 does nothing to address this problem long-term and instead offers the wrong solution: regulating doctors. This bill will only create additional problems, notably a dangerous drop in access to medical care. Properly addressing this situation begins with rolling back failed policies that push patients into unaffordable plans that offer little actual coverage, not in passing an unconstitutional bill that attempts to shift the burden to independent physicians and their patients. ***AB 72 violates both State and Federal law, and public policy, and we respectfully ask you to veto it.***

Respectfully submitted,

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