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INSIDE
SEPTEMBER 2019
FOCUS ON
LEADERSHIP
DEVELOPMENT

Sunrise at the Suffolk County Bar Association Annual Outing

By Jane LaCova

The day was perfect for fishing on the Osprey, on Aug. 12, which sailed out of Port Jefferson Harbor in the early morning. Our appreciation goes to past president Barry M. Smolowitz and SCBA newest staff member Joseph Benedetto who helped with organizing this annual event. We'd also like to thank Amanda Cash and her crew, who made sure that the trip was a pleasant and happy experience for all 60 of our members and their guests. Barry doubled as our fishing photographer and captured the spirit of the good time the fishing devotees had on what we knew would be a spectacular day when we crossed the Sound traveling almost to Connecticut.

Staff member Mary Shannon was the first prize winner with the biggest fish, a sea bass. We would like to recognize and thank the Aquarium in Riverhead who donated Mary's prize basket. Tom Marino caught the second largest fish, also a sea bass. He won Yankee tickets donated by the LaCova family. The anglers on the charter boat also caught sand sharks, sea robins and had a great deal of fun in the sun.

Thank you to the Road Kings who played and sang beautiful music and to Foo Luck who supplied the Chinese Food.

(Continued on page 20)

PHOTO BY BARRY SMOLOWITZ

After fishing the day away members of the Suffolk County Bar Association and their friends and family took a moment to gather one last time.

PRESIDENT'S MESSAGE

The Many Planned Initiatives and Events for This Year

By Lynn Poster-Zimmerman

LYNN POSTER-ZIMMERMAN

It is with a combination of wistfulness at summer's end and anticipation for the fall and the upcoming year that I address you this month. I hope you all enjoyed your summer, whether away on some adventure or simply to have partaken in all that this wonderful locale of Long Island provides for us.

Now that it is September, I would like to take this moment to set the stage for the many initiatives and events for this year in the Suf-

(Continued on page 28)

BAR EVENTS

Council of Committee Chairs & Leadership Summit Meeting
Tuesday, Sept. 17, at 4 p.m.
Great Hall
All Committee chairs, co-chairs, Academy officers and members of the Board of Directors should attend this meeting. The event will include a wine and cheese reception immediately following meeting. If you are interested in co-chairing a committee, wish to attend and are interested in becoming a leader, call Jane LaCova.

Attorneys, Appraisers, Condemnation & Tax Certiorari: Avoiding Potential Pitfalls in the Litigation Process
Wednesday, Sept. 25, registration at 2:30 p.m.; reception from 3–4 p.m.; CLE program from 4–7 p.m.
Great Hall
The program, presented by the SCBA Condemnation & Tax Certiorari Committee, in partnership with the Appraisal Institute, will cover important information for attorneys with clients with property interests and doing business in New York state. A distinguished panel will discuss the roles of attorneys and appraisers when preparing reports. The CLE segment will be webcast and recorded.

Red Mass
Wednesday, September 25 at 6 p.m.
St. John of God (new location this year), 84 Carleton Ave., Central Islip, N.Y.
The Red Mass is for attorneys and judge celebrating the new court term. The mass will be led by Bishop Richard G. Henning. Cocktails and dinner immediately following at the Irish Coffee Pub, East Islip, N.Y. The guest speaker will be Laurette D. Mulry, Attorney in Charge of the Legal Aid Society of Suffolk County. Lawyers and the judiciary of all faiths and their families are invited to attend. $75/person, cash bar. Contact: John Powers (631) 667-7100, johnpowerslaw@yahoo.com.

Breast Cancer Awareness Month Breakfast
Tuesday, October 15, at 7:30 a.m.
Great Hall
The SCBA and the Suffolk County Women's Bar Association are marking Breast Cancer Awareness Month with a breakfast. Guest speaker Dr. Joyce T. Au, breast surgeon at Northwell Health Cancer Institute at Huntington Breast Surgery Associates. $20/person. Register on the SCBA website.

Pro Bono Attorney Volunteers Luncheon
Wednesday, October 30, at noon
Great Hall
Join us to honor our pro bono attorney volunteers. Our guest of honor and keynote speaker will be the Hon. Edwina G. Mendelsohn, Deputy Judge for Justice Initiatives, New York State Supreme Court.

Fireside Chat
Monday, November 4
Great Hall
The second in our series of Fireside Chats, our speaker will be the Honorable Leonard B. Austin, Associate Justice, Appellate Division, Second Judicial Department. The moderator will be Immediate Past President Justin M. Block. This is a complimentary membership event hosted by the SCBA's Appellate Law Committee, the Academy of Law and sponsored by PrintingHouse Press.

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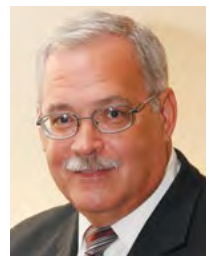
HEALTH AND HOSPITAL

Updates on Surprise Billing Laws and Association Health Plans

By James G. Fouassier

There have been several significant developments on both the federal and state levels advancing patient protections against balance billings for "surprise" hospital bills.

Readers of this column are familiar with the issues surrounding the "balance billing" of patients for emergency and "surprise" medical bills. Current New York law prohibits physicians and ancillary providers like laboratories from billing patients for unpaid balances for claims submitted to health plans for *bona fide* emergency services and requires payers and providers to submit these disputes to an external review process. Providers may bill patients for non-emergency services that are unpaid or uncovered by their health plans but the patients may seek review by an independent third party if the billing meets the criteria of a "surprise" bill. In addition, the New York law requires health plans and providers to make public in a variety of formats the names of providers that are "in network" with those plans so patients may ascertain their financial exposure for employing "out of network" providers in advance of services. (Article Six of the Financial Services Law (sections 601 to 608), and amendments to Insurance Law sections 3217-a; 3224-a; 4306-c; 4324; 4900; 4904; 4910; 4914; a new section 3241; and parallel provisions in the Public Health Law.) Readers may find a summary at: https://www.dfs.ny.gov/consumers/health_insurance/surprise_medical_bills


James G. Fouassier

Glaringly absent from the New York laws is the application of these protections to hospital bills. Insurance Law 3241-c generally is presumed to provide protections for patients against both physician and hospital balance billing for out-of-network "emergency" services **1** but the legislature now has specifically addressed the issue in S.3171A / A264B, which gives health insurers the ability to pay hospitals outside their networks what they consider reasonable for emergency care. It would also require that patients pay no more out of pocket than they would at an in-network facility. If the plan is billed by the hospital for more than what the plan believes that amount to be the plan may initiate an independent dispute resolution process, allowing the dispute resolution agent to decide whether the hospital's charge or insurer's payment is appropriate. The bill has passed both houses of the legislature and, as of this writing, remains pending signature on the governor's desk.

Health plans and payers subject to New York regulation obviously are pleased by this development as it effectively takes the member-patient out of the fight. Patients often are the providers' strongest advocates in getting the plans to pay more on out-of-network emergency bills since the consequence of a plan and a provider failing to agree on the amount of the bill is that the patient is personally responsible (which, by the way, is an express violation of the provisions of Insurance Law 3241-c and effectively compels the plans to pay more than they believed was reasonable).

Hospitals, on the other hand, argue that the legislation has nothing to do with protecting consumers from costly hospital out-of-network emergency bills because New Yorkers with private insurance are already protected under the 3241-c provision that members of a plan cannot personally be charged more for out-of-network emergency treatment than what they would pay at an in-network hospital. Instead, the argument goes, the bill would harm hospitals in their negotiations with insurers. By allowing insurers in out-of-network emergency situations to simply pay hospitals what they deem "reasonable," the bill would eliminate the current incentive for insurers to include hospitals in their networks. Insurers would, over time, design tighter and tighter networks (reducing choice for their members in selecting the hospitals the patient and his or her physicians think most medically appropriate) and force hospitals already suffering from inadequate Medicare and Medicaid rates to accept unreasonably low payments.

Turning to similar activity in the federal sphere, initiatives first suggested by the President **2** seem to have resulted in Congressional activity in establishing consumer protections from surprise medical bills at the national level, thus implicating ERISA self-funded plans now preempted from state regulation along with traditional insured plans. Formally introduced on July 9, is surprise bill legislation known as the No Surprises Act. **3** (A similar but more broadly drafted bill is called the *Lower Health Care Costs Act*.) Other lawmakers also have released surprise bill proposals. Being more limited in scope and apparently without many provisions that would incur public ire it is likely that in the near future some iteration of a No Surprises Act bill will pass; the President has promised to sign such legislation.

The legislation requires out-of-network providers to accept the amount the plan or payer would remit representing the payers' median rates for in-network providers, *i.e.,* the amount at which half of payment rates are higher and half are lower. In almost every case that amount will be significantly lower than the "actual" or full retail charges that providers usually bill for out-of-network services. Alternate dispute processes are incorporated in

(Continued on page 37)

FAMILY

Issuing an Initial Custody Order Where the Children Reside Outside New York State

By Jeffrey L. Catterson

If a parent moves out of New York state and is now residing in another state with the children, can a New York court still issue an initial custody and parenting time order? The simple answer is yes. So long as a parent still resides in New York state and the children have not resided in another state for six consecutive months, New York state should take jurisdiction to issue an initial custody order. Additionally, the New York courts may look at the conduct of the relocating party, the appropriate forum for witnesses and the availability of evidence in New York to assert jurisdiction over custody and parenting time.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, adopted by 49 out of the 50 states, and Domestic Relations Law article 5-A (hereinafter referred to as the "UCCJEA"), New York courts have jurisdiction to make an initial custody determination if New York is the child's "home state." *See Slade v. White*, 133 A.D.3d 767, 21 N.Y.S.3d 266 (2d Dept. 2015); DRL §76(1)(a).

The UCCJEA defines "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding." DRL §75-a. Further, the definition of "home state" permits a period of temporary absence during that six-month time period. *See Felty v. Felty,* 66 AD.3d 64, 882 N.YS.2d 504 (2d Dept. 2009); DRL §75-a. Indeed, if a parent wrongfully removes a child from a state, the time following the removal is considered a "temporary absence." *See Felty*, 66 A.D.3d at 71; *Michael McC. v. Manuela A*., 48 A.D.3d 91; 848 N.Y.S.2d 147 (1st Dept. 2007); *Padmo v. Kayef*, 134 A.D.3d 942, 21 N.Y.S.3d 336 (2d Dept. 2015).


Jeffrey L. Catterson

So, for example, if a parent relocates with the children to Florida and has remained there for five months with the intent to make it their permanent residence, while Florida may have jurisdiction over the divorce based upon the intent of the relocating party to make Florida his/her permanent residence, it would not divest New York of jurisdiction over the issues of custody and parenting time.

Furthermore, pursuant to the UCCJEA (Florida's UCCJEA §61.521 and New York's UCCJEA §76-g), a court may decline to exercise jurisdiction if "it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." Thus, assuming *arguendo* in the above example that the Florida court has jurisdiction over the issue of custody and parenting time, New York could still assert jurisdiction if the more appropriate forum. *See, e.g*., *Miller v. Shaw*, 123 A.D.3d 1131, 999 N.Y.S.2d 192 (2d Dept. 2014) (where the Second Department held that New York, not Virginia, was the more appropriate forum for child custody proceedings based upon the child's "significant connection with New York, and that substantial evidence is available in New York concerning [the child's] care protection, training, and personal relationships"); *Gottlieb, supra*, 103 A.D.3d 593, 960 N.Y.S.2d 101 (1st Dept. 2013) (where the Appellate Division held that New York, not North Carolina was the more appropriate forum for child custody proceedings because not only was New York the "home state" of the children but the majority of witnesses and evidence as located in New York).

In addition, pursuant to the UCCJEA (Florida's UCCJEA §61.521 and New York's UCCJEA §76-g), a court may decline to exercise jurisdiction if "the person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." Accordingly, in the above example, assuming *arguendo* that the Florida court has jurisdiction over the issue of custody and parenting time, the relocating parent's conduct may rise to the level of unjustifiable conduct. For example, *Gottlieb v. Gottlieb*, 103 A.D.3d 593, 960 N.Y.S.2d 101 (1st Dept. 2013), the Appellate Division, in determining that New York was the appropriate state to determine custody stated that:

The court also gave proper weight to plaintiff's claims that defendant moved the children to North Carolina without her consent, and thus engaged in "unjustifiable conduct," which, if true, would obligate the North Carolina court to decline jurisdiction. Without making any determination whether defendant engaged in such conduct, the court observed, correctly, that if a determination were made that he did so, North Carolina would have no basis for continuing jurisdiction, whereas there are no such potential hindrances to jurisdiction in New York.

Clearly, the simplest analysis in obtaining New York jurisdiction for custody and parenting time issues is determining the prior six consecutive months for the Children's "home state" pursuant to the UCCJEA. Therefore, time is of the essence for the parent remaining in New York to make an application for a custody and parenting time order. Otherwise, the parent remaining in New York must then perform the much more difficult task of establishing either that the alternate state is an inconvenient forum or the unjustifiable conduct of the relocating parent. We must also anticipate the court's practical reaction of deferring to the state where the children presently reside as a matter of convenience to the children; especially if that state court has jurisdiction over the other issues of the marriage. This is why it is imperative that the non-residential parent quickly files a request with the New York courts to have the children returned and a custody order issued from New York State. Otherwise, despite the clear and unambiguous parameters of jurisdiction under the UCCJEA, the New York court may defer to the state court where the Children are then residing.

Note: *Jeffrey L. Catterson is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP, with offices in Garden City, Melville and Manhattan and practices primarily in matrimonial and family law. He can be reached at JLC@BCLBLawGroup.com and (516) 222-6500.*