

**ISSUE OF THE YEAR:  
REFERENCE-BASED PRICING  
AND BALANCE BILLING**



## THE PHIA GROUP

EMPOWERING PLANS  
December 15, 2015  
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**Specialties:**

- Plan drafting, review, analysis, custom amendments
- ACA compliance questions
- Network, provider, stop-loss, client dispute resolution
- ...and so much more

**Features:**





- Simple submission process
- Same-day quotes in most cases
- Average turnaround of 8 business days
- Flat, transparent fees
- No surprises

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# OVERVIEW





Welcome to a special edition 90 minute Phia Group webinar!

- **SUBROGATION UPDATE**
  - CATHERINE DOWIE ON THE FRONT PAGE
- **INTRODUCTION TO REFERENCE-BASED PRICING (“RBP”)**
  - GROWING INDUSTRY TRENDS
- **IS REFERENCE-BASED PRICING ILLEGAL? (WHO IS SAYING WHAT?)**
- **BALANCE BILLING: A CLOSER LOOK**
  - MINDSET OF THE PLAN, EMPLOYER, PATIENT, PROVIDER

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# OVERVIEW

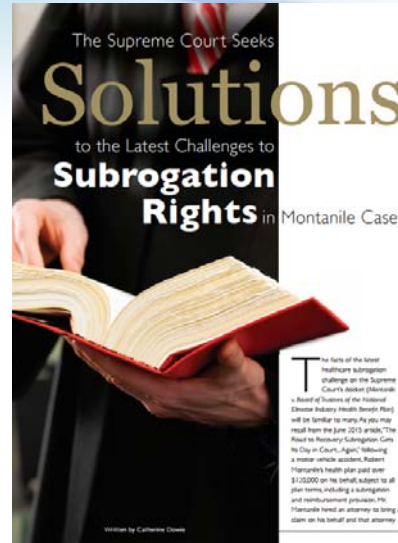
- **THE MANY ARGUMENTS OF RBP AND BALANCE BILLING**
  - PRE-SERVICE, PRE-PAYMENT
  - POST-SERVICE, POST-PAYMENT
    - POST-PAYMENT PLAN APPEALS
    - POST-PAYMENT BALANCE-BILLING
- **THE ONLY WAY FOR RBP TO SUCCEED...**
  - PATIENT ADVOCACY AND EDUCATION
  - TPA AND EMPLOYER ADVOCACY AND EDUCATION
  - PROVIDER EDUCATION
- **THE CRUCIAL DISTINCTIONS: PLAN BALANCE BILLING DEFENSE VS. PATIENT ADVOCACY VS. PATIENT LEGAL DEFENSE**
- **RBP BLOOPERS & BLUNDERS**

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## SUBROGATION UPDATE (MONTANILE)

- Facts: Member recovered from third party but spent recovery; Plan then asserted recovery rights
- Member's attorney: Can't recover from a fund that is empty!
- Issue: Whether or not a "defined fund" is needed for a plan to recover
- The "defined fund" is made up specifically of the recovered money; if spent, fund is emptied, and no more funds for Plan to recover...

December 2015 Issue of The Self-Insurer



**Can we really make it *that* easy to shirk responsibilities?**

\*NASP and SIIA filed amicus brief with help from The Phia Group, Bryan Davenport, and others

Available via SIIA ([SIIA.org](http://SIIA.org)) or Passion for Subro ([passionforsubro.com/montanile](http://passionforsubro.com/montanile))



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## INTRODUCTION TO RBP

- PPO Trends and Alternatives
  - RBP as OON Replacement
- A PPO State of Mind
  - "We Didn't Agree to this Discount!"
  - "You're Breaching the Contract!"
  - "We Provided Services in Good Faith; Detrimental Reliance!"
- Brokers Asking, and TPAs Need Options
  - Employers Talking the Talk but not Walking the Walk
- Four Main Elements:
  - Data
  - Plan Language, ID Cards, EOBs, Correspondence
  - Patient Advocacy
  - Plan Defense



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## IS RBP ILLEGAL? (WHO IS SAYING WHAT?)

- Providers: Yes, it's illegal – we didn't agree to it
- Networks: We don't care if it's illegal – but it violates our contract
- Vendors: Of course it's legal – and plans have a responsibility to cut costs
- DOL: No, it's not illegal – RBP has a network underlying it anyway, right?
  - FAQ XXI
- Plans: No, it's not illegal – what should be illegal is this billing
- TPAs: I sure hope it's not illegal, because all our plans want it...
- Bottom line: RBP is not illegal...but balances may apply to max OOP limits



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## BALANCE BILLING: A CLOSER LOOK MINDSET OF THE PATIENT

- Patients become “pawns” without realizing
- “But I have insurance. This must be a mistake.”
- Upset patient talks to HR department
- Patient doesn't care how it's settled as long as the \$50,000 balance bill gets corrected



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## BALANCE BILLING: A CLOSER LOOK MINDSET OF THE EMPLOYER

- Employer cares about patient's well-being...
- ...but also about the Plan's well-being
- Higher plan payments mean more employer funding...
- ...but balance bills are bad for HR and possibly even PR



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## BALANCE BILLING: A CLOSER LOOK MINDSET OF THE PLAN

- Plan has set its payment point for a reason, and has already exhausted benefits
- Plan doesn't want to be price-gouged by facilities...
  - ...But also doesn't want patient to be balance-billed
- Questions of fair market value
  - “Among health systems with credit ratings from Moody's Investors Service, the median share of revenue in 2014 from contracts based on chargemaster prices was nearly one-fifth.”

(source: "Hospitals rethink prices as patients grow more cost-conscious," by Melanie Evans. Accessed at modernhealthcare.com)



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## BALANCE BILLING: A CLOSER LOOK MINDSET OF THE PROVIDER

- The unfortunate state of our industry: **unregulated charges**
- Providers typically don't care where money comes from
  - Although some differentiate between the "patient" paying a balance and a "Plan" paying the balance
- "Unjust enrichment" argument
  - Counterpart to "quantum meruit" (tr: "as much as he deserved")



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## ARGUMENTS: PRE-SERVICE; PRE-PAYMENT

- Providers encouraged to contract on the front-end, or at least to review and accept the Plan's payment
- Incentives: Prompt payment, no audits, steerage
- Provider education: what's going to happen?
- Once billed charges are known, plan has its "end game"
  - Defend the Plan; protect the Patient







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## ARGUMENTS: POST-SERVICE, POST-PAYMENT

- Assignment of benefits: prohibition, revocation
- Negotiating to settle current (and future) balances
- Accord and Satisfaction?
- Egregious charges / fair market value / valid contracts

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## ARGUMENTS: POST-PAYMENT PLAN APPEALS

- Conflict of interest in defending both Plan and patient
- Fiduciary duties & the SPD: Plan benefits are limited to the amount paid ... but by defending itself, the Plan may harm the patient

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## ARGUMENTS: POST-PAYMENT BALANCE BILLING

- Providers don't actually expect patients to pay...
- Threshold question is whether a valid contract exists
  - Has patient signed provider's AOB form?
    - What does it mean? Is it enforceable?
  - Can Plan's AOB be revoked?
- Can provider justify its charges?
  - Does it have to?
  - Will it?
- Unjust enrichment, restitution, quantum meruit



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## THE ONLY WAY FOR RBP TO SUCCEED... PATIENT EDUCATION

- Physician-only networks, narrow networks, direct provider contracts
- Who pays the balance?
- Worst-case scenario?
- New approaches: HRAs, incentives, AOB limitations
- Difference between defending patient and giving patient tools to defend itself



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## THE ONLY WAY FOR RBP TO SUCCEED... EMPLOYER EDUCATION

- As sponsor and administrator of the Plan, employer must be well-educated
- Must be able to inform employees of options and consequences
- Should go into RBP with a gameplan for how to handle balance billing
  - Cost analyses of savings
  - Safe harbor providers
  - Strong patient advocacy



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## THE ONLY WAY FOR RBP TO SUCCEED... PROVIDER EDUCATION

- ACA's anti-provider discrimination law
  - “Discrimination” permitted if due to quality metrics
    - Quality of service vs. quality of billing practices
- Assignment of Benefits
- Incentives – AKA contracts
  - Steerage vs. prohibition – size of employee base?
  - TPA-wide or plan-wide?



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## THE CRUCIAL DISTINCTIONS: PLAN BALANCE BILLING DEFENSE VS. PATIENT ADVOCACY VS. PATIENT LEGAL DEFENSE

	Clear Set of Rights	Fiduciary Duties involved	Neutral Party May be Involved	Client Protected by Law	Needs Attorney	Client Protected by Contract	May Require Additional Payment
Plan Balance Billing Defense	X	X	X	X		X	
Patient Advocacy							X
Patient Legal Defense	*	X	X	*	X		X

\* Only if signed AOB can be invalidated; standard is *fair market value*





Conflict of interest when defending Plan and patient

- Plan: balance falls to patient
- Patient: Plan should pay

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## RBP BLOOPERS & BLUNDERS

- Lack of preparation: Poor or no supporting SPD language
- Applying RBP payments to in-network claims
- Fees taken for “theoretical” savings whether or not realized
  - Pushback not taken into account; fees not refunded
- Promise of “patient defense”
  - Remember the conflict of interest...
- Muddying the fiduciary waters

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## THANK YOU

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