

June 18, 2020

The Honorable Nancy Pelosi
Speaker of the House
1236 Longworth House Office Building
Washington, DC 20515

The Honorable Kevin McCarthy
House Minority Leader
2468 Rayburn House Office Building
Washington, DC 20515

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, DC 20510

RE: **Out-of-Network Proposals in COVID-19 Relief Efforts**

Dear Speaker Pelosi, Leader McConnell, Leader McCarthy, and Leader Schumer:

On behalf of the American Society of Plastic Surgeons (ASPS), we are writing with our opposition to the inclusion of non-COVID-19 balance billing provisions in emergency relief packages. As the largest association of plastic surgeons in the world, representing more than 7,000 members and 93 percent of all board-certified plastic surgeons in the United States, it is our responsibility to advance quality care and promote public policy that protects patients. Our top priority is to ensure that patients receive necessary services wherever and whenever they need our care.

As you continue to deliberate a final compromise solution, we encourage you to consider the following principles, so it is truly equitable for all stakeholders:

- **Do not add insult to injury for the physicians struggling during this financial crisis and please carefully deliberate this policy through the traditional legislative process.** Physicians have made tremendous sacrifices to answer the nation's call for help during the public health emergency. Despite these efforts, physicians are struggling to remain in practice due to the challenges of the public health emergency and federal actions such as the proposed physician reimbursement cuts to the 2021 E/M finalized policies. That's why our members are deeply concerned about attempts to jam various House and Senate balance billing proposals into COVID-19 relief packages. These proposals will cut physician reimbursement by tens of billions of dollars and will be yet another financial burden that physicians will have to shoulder while trying to maintain financial solvency. ASPS and other physician organizations have actively engaged with members of Congress about the complex issue of balance billing throughout the 115th and 116th Congresses, and unfortunately a fair and comprehensive solution has yet to be achieved. That's why we implore you to not turn your back on us now on this issue because doing so will only further jeopardize the livelihoods of physicians who are already under financial distress due to this pandemic. Given that patients are protected from balance billing for COVID-19 treating and testing, we believe that broader policy decisions should be considered through the traditional legislative process. When they are, we believe they should be *re*-considered with respect to what's received votes in committees or been floated as a potential bicameral compromise.

- **Hold patients harmless and do not ban elective out-of-network care chosen by patients with informed consent.** Patients should be removed from balanced billing disputes for emergent care by automatically assigning their benefits to the physician. That said, physicians should be able to bill patients directly for *elective* care in which the patient can fully research their healthcare options and make an informed decision to see an out-of-network provider.
- **Oppose benchmarking to the median in-network rate and ensure fair physician reimbursement.** An in-network rate is determined only by the insurance company, with no outside input from the federal government, physicians, or patients as to whether the methodology is representative of the cost of care. The median in-network contracted rate is never an appropriate amount for out-of-network services, as it automatically forces the provider to accept in-network rates without any of the benefits that come with a negotiated carrier contract. This is coercive contracting because it removes any incentive for insurers to negotiate in good faith and incentivizes even narrower networks. The government-set rate becomes the maximum amount that an insurer will ever pay, which in turn will limit patients access to life-saving specialty services in the future as witnessed in the wake of California’s balance billing law (AB 72).¹
- **Include an independent dispute resolution (IDR) system to prevent the further erosion of physician negotiation power.** ASPS supports a baseball-style arbitration process such as the New York model,² where the arbitrator can consider a number of factors to determine a commercially reasonable rate of physician reimbursement. As noted, the median in-network rate should not be one of those factors. As evidenced in New York, the establishment of an independent dispute resolution process protects patients while incentivizing insurers to expand their insurance networks, which increases patients’ access to health services. The New York law has had tremendous success, as seeing a 34 percent drop in out-of-network billing since its enactment. Congress should pursue model national legislation such as the New York law, that has already proven to work in the real world by protecting patients and creating a level playing field for insurance carriers and physicians.
- **Institute strong network adequacy and transparency provisions.** We encourage Congress to reverse 82 FR 18346, which was a promulgated rule that abdicated the federal government’s network adequacy enforcement responsibility to the states and private organizations. The federal government needs to incorporate specific, quantitative standards to address the patchwork of state requirements and ultimately stop insurers from creating even-narrower networks that prevent patients from receiving the necessary specialty care they need when they need it. It’s imperative that any federal solution ensures that insurers are held accountable for their directories. Insurers should also be required to pay the entire amount billed for each instance that the insurer violates the network adequacy rules and is unable to provide an in-network physician within the specified time and distance. Finally, when a patient or physician relies on an inaccurate network directory, the insurer should be obligated to pay the full amount. Without these enforcement mechanisms in place, insurers will continue to offer “in name only” health coverage plans further limiting patients access to care.

We appreciate the tremendous efforts made by Congress to support physicians during the current public health emergency, but we urge you to recognize the likelihood that a one-sided out-of-network proposal will

¹ <https://www.ajmc.com/journals/issue/2019/2019-vol25-n8/influence-of-outofnetwork-payment-standards-on-insurer-provider-bargaining-californias-experience?p=1>

² <https://georgetown.app.box.com/s/6onkj1jaiy3f1618iy7j0gpzdoew2zu9>

undermine that work. Hastily crafted out-of-network proposals that are pegged to in-network rates hurt not only out-of-network physicians, but also all physicians who are in-network, as insurers unilaterally ratchet down their rates without any recourse for physicians. This type of out-of-network legislation artificially creates a lopsided take-it-or-leave-it scenario that puts all power in the hands of insurers, ironically, the very ones who benefited during the COVID crisis from the decreased number of patients seeking care or having surgery during this COVID crisis and penalizes physicians, the ones on the front lines, risking and sacrificing their lives, their families, and their practices. The current financial strain on the physician community is real, and further stress brought on by additional cuts and reduced leverage with payers will hasten the end of private practice in America. That presents a possible future of expensive consolidation and an ever-growing private equity presence in our health system. Please stand with physicians in not allowing that to happen. Please do not hesitate to contact Patrick Hermes, Director of Advocacy and Government Relations, at phermes@plasticsurgery.org or (847) 228-3331 to request any additional information or with any questions. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, reading "Lynn Jeffers". The signature is written in a cursive, flowing style.

Lynn Jeffers, MD, MBA, FACS
President, American Society of Plastic Surgeons

Cc: Members of Congress

Cc: Brooke Rollins, Acting Director of the United States Domestic Policy Council