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BY EMAIL AND U.S. MAIL

Rebecca Polizzotto
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Re: Alaska Division of Insurance Order of June 20, 2023.

Dear Ms. Polizzotto:

Please consider this a pre-litigation demand letter on behalf of the Coalition for Reliable Medical Access, Inc., the Alaska State Medical Association, the Alaska Medical Group Management Association, the Alaska Podiatric Medical Association, the Alaska Physical Therapy Association, Inc., and the Alaska Chiropractic Society (hereafter "organizations" or "Plaintiffs"). These organizations believe that the June 20, 2023, Order Adopting Changes to Regulations of the Division of Insurance ("Order"), executed by the Alaska Division of Insurance (ADOI) director Lori Wing-Heier, is illegal and should be withdrawn.

The Order, which would repeal the so-called 80th Percentile Rule, was arbitrary, unreasonable, and an abuse of discretion. This is because the repeal, which would take effect at the end of this year, would reduce consumer protection for Alaskans, which is directly contrary to ADOI's stated reason for the action in the first place. The Order would not bring about the cost savings the ADOI has forecast. Moreover, if this regulatory change is allowed to proceed without an adequate replacement for the 80th Percentile Rule (the ADOI has proposed no replacement), the result will be enhanced power in the Alaska marketplace for out-of-state insurance companies, which will end up with an

unhealthy amount of control over Alaska's healthcare system, and leave Alaskans with limited access to critical healthcare services.

ADOI failed to perform proper due diligence in evaluating the ramifications of this sweeping change to Alaska's healthcare system. In fact, the Division relied on incorrect data as the foundation for its decision. After various attempts by Alaska's medical community to bring these issues to light, including presenting real-time data on actual medical costs in Alaska, Director Wing-Heier refused to reverse course or to meaningfully consider the widespread harm the Order would cause. Under her direction, the ADOI continues to apply the same flawed methodology and data used to repeal the 80th Percentile Rule, which already has resulted in dramatic reductions in reimbursement rates.

The Plaintiffs are prepared to file suit if need be in order to protect access to healthcare for Alaskans.

Although the Order repeals the regulation containing the 80th Percentile Rule, effective Jan. 1, 2024, as a matter of basic public policy the rule should not be repealed because doing is against the public interest.

By way of background, by regulation in 2004 the "ADOI" adopted the 80th Percentile Rule in order to protect Alaska patients from the predatory practices of insurance companies. Once it was adopted, the rule required payment to an out-of-network provider to be based on an amount equal to or greater than the 80th percentile of charges for a particular medical service in a geographical area. Under the rule, consumers would avoid catastrophic "balance billing" from a provider not in an insurance company's network. Balance billing under the 80th Percentile Rule is avoided because the insurance company would be required to pay an amount equal to or greater than charges at the 80th percentile in a particular geographic area.

Ms. Wing-Heier told the Senate Health and Social Services Standing Committee in February 2016 that the mission of the Division of Insurance is to regulate the insurance industry in a manner that protects Alaska consumers. The ADOI is responsible for reviewing rules, forms and rates based on an analysis of whether they are excessive, inadequate or unfairly discriminatory.

Nonetheless in May 2018 the ADOI issued a Notice of Public Scoping for possible changes to the regulation containing the 80th Percentile Rule. The notice stated it was seeking alternatives that would provide equal or greater consumer protection.

Then in 2021, Congress adopted the Consolidated Appropriations Act, which includes protections for consumers against so-called "surprise billing." The "No Surprises Act" took effect in January 2022. The No Surprises Act bans balance billing for out-of-network **emergency** services, and does not allow balance billing for out-of-network providers during patient visits to in-network health care facilities absent notice and consent. These facilities include hospitals, hospital outpatient departments, critical access hospitals and ambulatory surgery centers. However, **these protections do not apply** to other types of health care facilities, such as urgent care centers or physicians' offices. Moreover, as of this writing further policymaking at the federal level under the No Surprises Act will be necessary in order to bring about the protections of that law even for the minority of patient encounters those protections are intended to cover.

In January 2023, the ADOI gave notice that it intended to abolish the 80th Percentile Rule. The notice cited the No Surprises Act as the principal reason for the change. On February 20, 2023, Ms. Wing-Heier told the Senate Labor and Commerce Standing Committee that with the 80th Percentile Rule in place Alaskans rarely received large surprise bills. However, she said the No Surprises Act would protect consumers from most surprise medical bills. In this assertion, Ms. Wing-Heier was wrong.

In response to a question from Senator Dunbar, she admitted the No Surprises Act deals primarily with emergency room visits and some other procedures, and she acknowledged the No Surprises Act left gaps. She also admitted the ADOI Order established **no alternative payment methodology or rule**. In other words, she admitted the protection for Alaskans contained in the No Surprises Act will not be in place after the 80th Percentile Rule is abolished. Thus, the rationale for abolition, protection of Alaska consumers, is being undermined by ADOI's own action.

In reviewing state regulations, the Alaska Supreme Court first will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provision conferring rule-making authority on the agency. Sagoonick v. State, 503 P.3d 777, 804 (Alaska 2022). Then, the Court will decide whether the regulation is arbitrary and unreasonable. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). A decision is arbitrary if "an agency fails to consider an important factor in making its decision." Sagoonick v. State, 503 P.3d 777, 803 (Alaska 2022). Agencies must take "a 'hard look' at the salient problems" and "genuinely engage[] in reasoned decision making." Id. at 803 (quoting Southeast Alaska Conservation Council, Inc. v. State, 665 P.2d 544, 538-49 (Alaska 1983)).

To avoid "the taint of arbitrariness, [the agency] must have a reasonable basis for promulgating the revised regulations." Hooch v. Alaska State-Operated Sch. Sys., 536 P.2d 793, 806 (Alaska 1975). The agency must consider **all relevant matter**

presented to it before amending or repealing a regulation. State v. Hebert, 743 P.2d 392, 397 (Alaska 1987) (citing AS 44.672.210).

The ADOI failed to meet these standards. As Ms. Wing-Heier has acknowledged, the No Surprises Act leaves significant gaps in coverage. When actually examined, the reality is the majority of health care provided by out-of-network providers is not emergent, but rather at urgent care centers, physicians' offices, chiropractic clinics and the like and therefore is not covered by the No Surprises Act – but is covered by the 80th Percentile Rule. Thus with the Order, consumers once again will be facing surprise balance billing.

It is important to keep in mind that even before the repeal of the 80th Percentile Rule takes place on Jan. 1, the fact that the repeal is pending has allowed insurers to force at least one busy provider out of network, creating even more patients who will face balance billing if they choose to keep seeing their long-time physician. This practice, widespread in the lower 48, can be expected to proliferate if the repeal goes forward. As more and more providers are forced out of network, their patients will be faced with balance billing. Repealing the 80th Percentile Rule just worsens the problem it was created to solve, access to care without balance bills, and turns back the clock 20 years on the healthcare system in Alaska.

In deciding to repeal the 80th Percentile Rule, the ADOI failed to consider the financial interests of Alaska consumers who receive out-of-network care at physicians' offices or urgent care centers. Nor did the agency take a "hard look" at the problem it stated it was trying to solve -- protecting consumers from surprise balance billing. In fact, its action in repealing the rule serves to exacerbate the problem the agency has been trying to address.

While the ADOI has stated it wants to reduce healthcare costs, in fact provider reimbursement by insurance **has gone down over the past five years while health insurance premiums have skyrocketed**. How can 'inflated' provider costs be the driver of higher premiums when providers have been paid less?

Perhaps there are other reasons for the high costs of health insurance in Alaska. One may be the Division of Insurance itself. For 2023 Moda, one of two insurers in the individual market in Alaska, submitted a proposed rate increase of 3.97%. After completing a review, the ADOI issued a final rate increase for Moda of 12.10%, closer to its competitor Premera's increase of 19.78% -- making Moda much less competitive and, in the bargain, increasing health insurance costs for Alaskans in the individual market.

Importantly, despite the claims that repeal of the 80th Percentile Rule will lower healthcare costs in Alaska, Premera proposes to raise its prices in the individual market in 2024 by 17.8%, claiming premiums would have increased by 4.5% more if repeal

were not to occur. At a recent State of Reform Health Policy Conference, Premera's CEO suggested he would reduce employers' premiums by 2.5% due to the repeal. But which is it? In spite of Premera's promises, its premiums continue to go nowhere but up.

The ADOI's stated reason for the repeal is simply not borne out by the facts. The decision was unreasonable and arbitrary. Please let me know within ten (10) business days if the ADOI will reconsider its decision.

BIRCH HORTON BITTNER & CHEROT

By: _____

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