

California Court Endorses Percentage Billing Fees for Medi-Cal Providers

By [Anne M. Brendel](#)

California's First District Court of Appeal ("Court of Appeal") has recognized that percentage-based billing arrangements do not violate California's Medi-Cal laws and that the California Department of Health Care Services ("DHCS") should have known this in the absence of any authority otherwise. In *Al-Shaikh v. State Department of Health Care Services*, decided on March 27, 2018, the Court of Appeal confirmed that Dr. Al-Shaikh's percentage-based billing arrangement with a third-party billing company for Medi-Cal claims was permitted. In addition, he was entitled to attorneys' fees where DHCS unreasonably withheld Medi-Cal provider approval.

Dr. Al-Shaikh, an orthopedic surgeon, submitted a provider application to Medi-Cal for approval of a new office location. DHCS denied his application and appeal, over the course of three years, partly because of his percentage-based fee arrangement with a third-party billing company, which DHCS argued violated state and federal law. DHCS incorrectly asserted that *any* percentage-based fee arrangement with a billing company violated statutory and regulatory law, based on the following laws and regulations:

- [22 CCR § 51502.1\(e\)](#): Provides the following requirements to submit electronic claims to Medi-Cal: "The agreement between a provider and a biller shall be in writing and shall be readily retrievable and available on request to [DHCS] or any duly authorized agency for [DHCS] review to ensure compliance with state and federal standards. Said agreement must in no case contain an agreement for compensation of the biller based on a formula which has as a factor the percentage of the amount billed or collected from the Medi-Cal, Medicaid or Medicare programs in violation of state or federal law."
- [Cal. Welf. & Inst. Code § 14040.5\(b\)](#): Provides that if such agreement (as mentioned above) is entered into, the agreement "shall meet the requirements of Section 447.10 of Title 42 of the Code of Federal Regulations."
- [42 C.F.R. § 447.10](#): "[P]rohibits State payments for Medicaid services to anyone other than a provider or beneficiary, except in specified circumstances."

One of the specified circumstances is that payment may be made to a billing service if the billing service furnishes statements and receives payments in the name of the provider, and the compensation for the service is "(1) related to the cost of processing the billing; (2) not related on a percentage or other basis to the amount that is billed or collected; and (3) not dependent upon the collection of the payment."

DHCS did not approve Dr. Al-Shaikh's application until he submitted the Office of Inspector General's ("OIG") *OIG Compliance Program for Individual and Small Group Physician Practices*, published in the Federal Register. This guidance states, "Although percentage based billing arrangements are not illegal *per se*, the [OIG] has a longstanding concern that such arrangements may increase the risk of intentional upcoding and similar abusive billing practices. A physician may contract with a billing service on a percentage basis. However, the billing service cannot *directly* receive the payment of Medicare funds into a bank account that it solely controls."¹ Based on this guidance and the laws and regulations listed above, percentage-based billing arrangements for third-party billers billing Medi-Cal claims are permitted, so long as the billing company does not receive payment directly from Medi-Cal.

Following Dr. Al-Shaikh's application approval, the case was dismissed as moot and without prejudice to Dr. Al-Shaikh. Dr. Al-Shaikh moved for attorneys' fees under California Code of Civil Procedure Section 1028.5, which permits small businesses or licensees that prevail in an action against a state regulatory agency to recover a maximum of \$7,500 in attorneys' fees, if the agency acted (or refused to act) without substantial justification. The trial court denied Dr. Al-Shaikh's request, and the Court of Appeal reversed and remanded with directions to award the full amount of attorneys' fees recoverable under Section 1028.5 to Dr. Al-Shaikh.

¹ 65 Fed. Reg. 59434, 59447 (Oct. 5, 2000).

The Court of Appeal further stated, “As the state agency responsible for implementing Medicaid and Medi-Cal, the DHCS has an obligation to be knowledgeable about the law it is charged with implementing. Moreover, this is not a case where the applicable regulatory law was unclear or in dispute. On the contrary, the OIG’s publication has been on the books for more than a decade, and it has never been questioned by any regulatory body or court. Nor was this publication hidden within the Federal Register. Accordingly, it is no surprise that throughout these proceedings the DHCS has been unable to cite a single case or regulatory decision supporting its position that Dr. Al-Shaikh’s fee arrangement with the billing service is unlawful.”

Although certain percentage fee arrangements are permitted under Medi-Cal (and Medicare),² both Medi-Cal and Medicare providers are cautioned that there is a risk that such arrangements may still run afoul of state and federal fraud and abuse laws, resulting in civil and/or criminal penalties. Arrangements with third-party billing companies should be properly structured to conform to such laws. Providers applying for enrollment and currently enrolled providers should contact a Buchalter attorney to review their billing company arrangements to help ensure compliance with federal and state laws.



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² Medical Claims Processing Manual, Chapter 1 – General Billing Requirements § 30.2.4 (Rev. 12/07/2017).