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August 15, 2016

Nick Mazanec
Office of the Montana State Auditor
Commissioner of Securities and Insurance
840 Helena Ave
Helena, MT 59601

Re: Draft Air Ambulance Legislation

Dear Mr. Mazanec:

Thank you for the opportunity to comment on the draft legislation presented by the Office of the Commissioner of Securities and Insurance to the Economic Affairs Interim Committee Air Ambulance Working Group (“Working Group”). Blue Cross and Blue Shield of Montana (“BCBSMT”) has completed a review of the draft legislation, and would like to offer the comments below for the Working Group’s consideration.

As has been previously noted by BCBSMT and other contributors at committee and work group meetings, all discussions surrounding air ambulance service must focus on the out-of-network billed charges and exorbitant balance bills causing financial hardship for Montanans.

Although air ambulances can provide a critical lifeline for some Montana residents, we as a state cannot allow companies that refuse to negotiate with insurers on behalf of Montanans to financially harm our residents during their time of need. Nor can we allow any future action to reward the behavior and billing practices of these out-of-network air ambulance companies by providing avenues to pursue payment of full-billed charges from insurers.

For instance, one out-of-network air ambulance company charged a Montana resident and BCBSMT member \$307,825 for a 1,063 mile trip from Missoula to Rochester, MN. These charges were 2,148 percent above Medicare – leaving the patient with an astronomical \$271,164 balance bill. In comparison, an in-network provider transporting a BCBSMT member from Kalispell to Rochester, MN., a flight of 1,093 miles, charged \$48,499, at 264 percent of Medicare. The balance bill to the patient was \$0.

We will continue to collaborate with all providers, to be good stewards of care for Montanans, and to ensure that air ambulance services are available to our members at affordable amounts. For many years, many hospitals and providers have been able to operate air ambulance business models that do not leave consumers with high bills, and still provide essential services. Increasing the insurer and employer payments to the out-of-network air ambulance companies is not only bad policy, but will increase rates to all other customers. It will do nothing to solve the problem of out-of-network companies from charging high prices. In fact, it could easily encourage in-network providers to leave the network in order to receive higher payments, and escalate the cost of health care for all. Again, we at BCBSMT are working hard to balance costs and access with our in-network providers in a way that protects the consumer from balance billing.

We have been working diligently to support state efforts to reduce the financial harm that out-of-network air ambulance services are causing to Montanans. We also have been working to educate our groups, members, and health care providers on the appropriate utilization of air ambulance services to further minimize those services provided by out-of-network providers.

For these reasons, and those below, BCBSMT respectfully opposes this draft legislation.

Enclosed are our specific comments on the proposed legislation.

1. Federal preemption: While BCBSMT acknowledges and applauds the Working Group's ongoing efforts to address excessive air ambulance charges, the State of Montana simply does not have regulatory authority over issues that are regulated by federal agencies. Such is the case with the issues that are proposed for regulation in the draft legislation. The Airline Deregulation Act (ADA) does not allow states to regulate prices, routes, or services of air ambulance companies, and any law that proposes to do will be preempted under the ADA. The preemption clause in the ADA has been very broadly interpreted by the U.S. Supreme Court and other courts.¹

Montana is not the first state to attempt to regulate the air ambulance industry. Texas, Hawaii, Florida, Tennessee, and North Carolina have all tried to regulate air ambulances, only to find that their laws or proposed laws were preempted under the ADA. For example, in *Bailey v. Rocky Mountain Holdings, LLC*,² the plaintiff contended that an air ambulance invoice for air ambulance services violated a Florida statute. The Florida statute prohibited air ambulances from seeking to collect amounts in excess of those permitted by statute (200% of Medicare rates) from individuals transported by air ambulance. In 2015, the U.S. District Court for the Southern District of Florida dismissed the plaintiff's claim, stating that the Plaintiff's claims were completely preempted by the ADA. The Court reasoned that "each of Plaintiff's state ... claims can only be fairly characterized as directly challenging Defendants' rates for its air ambulance services," an area clearly preempted by the ADA.

Such could be the fate of this draft legislation if passed by the Montana Legislature. The legislation seeks to regulate air ambulance pricing/rates, an area completely preempted by the ADA, by mandating that if an air ambulance provider disagrees with the insurer's payment on a claim, the only recourse the air ambulance provider has is to pursue a binding dispute resolution process to determine the usual, customary, and reasonable (UCR) reimbursement for the claim, or pursue judicial remedies. In either case, the air ambulance company could not collect any additional amounts (its billed charges) from either the member or insurer above and beyond the amount that is determined by the arbitrator or the court.

2. Hold Harmless: Given the concerns identified in sections (1) and (6) of this letter, the recently added severability section is of great concern. If the regulation of air ambulance companies is either preempted by federal law or found invalid under the scope of the Montana Insurance Code, the remainder of the legislation would fall solely on insurers, essentially requiring insurers to pay full billed charges to the out-of-network air ambulance companies. This would result in higher premiums for members throughout the state of Montana. For example, some out-of-network air ambulance company charges are in excess of \$300,000 for a single flight. If BCBSMT had to pay the full billed charges for every air ambulance claim, it would create incentives for in-network air ambulance providers to leave our networks in pursuit of higher reimbursement, and the billed charges of all air ambulance providers would continue to increase.

¹ *Hiawatha Aviation of Rochester, Inc. v. Minnesota Department of Health*, 389 N.W.2nd, 507 (Minn. 1986).

² 136 F.Supp.3d 1376 (S.D. Fla. Sept. 23, 2015).

3. Network disruption: The legislation will cause disruption to BCBSMT's current air ambulance network by potentially incentivizing current in-network air ambulance carriers to leave the network through the lure of potentially higher reimbursement and direct out-of-network payment from the insurer through arbitration or judicial action. Similarly, the legislation would remove any incentive for out-of-network air ambulance companies to contract with an insurer to become an in-network provider due to the hold-harmless clause and possible higher out-of-network payment. This would in turn result in higher medical costs, and increased premium amounts for our members.

4. No application to non-governmental self-funded groups: The legislation would not apply to non-governmental self-funded group members, creating an imbalance in consumer financial liability based on nothing more than the funding status of the consumer's health plan. About 30% of BCBSMT's out-of-network air ambulance claims in 2015 were for non-governmental self-funded members.

5. Cost and time of dispute resolution or judicial process: The time and expense of an arbitration or judicial process for every single challenged out-of-network air ambulance claim would be considerable. Problems would also arise with respect to prompt-pay laws, causing large interest accumulations, as the draft legislation contemplates a more than 90-day process to resolve an out-of-network claim payment, while insurers are currently required to pay claims in 30 days or less. The potentially higher and uncertain compensation amounts for out-of-network air ambulance claims could also have an impact on insurers' rates.

6. Application of insurance code to air ambulance companies: There is considerable doubt as to whether air ambulance companies can be regulated under the Montana Insurance Code. The draft legislation imposes penalties under the Insurance Code for failure to comply with its arbitration provisions; however, it's doubtful if these penalties would be binding on or applicable to air ambulance companies. The draft legislation further attempts to regulate air ambulance companies by prohibiting them from (i) balance billing a patient, (ii) reporting the patient to a consumer reporting agency, or (iii) placing a lien on the patient's property, in any case where the insurer has advised the air ambulance company it will assume responsibility for the charges. The Insurance Code is intended to regulate the business of insurance only, not the operations of health care providers.

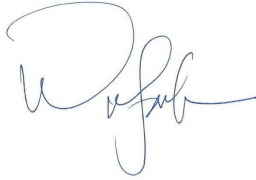
In addition to those efforts it has taken as described here, BCBSMT believes that the solution to this issue must be executed at the federal level. We continue to support ongoing Congressional efforts to remove or limit the preemption that prevents states from regulating air ambulance services.

BCBSMT continues to work with our in-network air ambulance companies to ensure access and affordability for our members. We continue to increase our education and outreach efforts to our members and health care providers on the importance of using in-network air ambulance providers to avoid out-of-network balance bills. We will continue our efforts to bring out-of-network air ambulance companies into our networks.

BCBSMT appreciates the opportunity to comment on the Commissioner's draft legislation. We also greatly appreciate your office's efforts to highlight the importance of this issue and to find a solution to the high balance bills that some Montanans face after they have been airlifted on an out-of-network aircraft. We will continue to work together with your office and other stakeholders to find solutions to hold down costs while providing needed emergency medical treatment to Montanans.

BCBSMT continues to review the draft legislation and may have additional comments as the Working Group continues its review of the legislation. Please do not hesitate to contact us should you have any questions regarding our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bill Lombardi". The signature is fluid and cursive, with the first name "Bill" being larger and more prominent than the last name "Lombardi".

Bill Lombardi
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cc: The Honorable Ryan Lynch, Chairman of EAIC and State Representative
The Honorable Tom Facey, State Senator
The Honorable Vince Ricci, State Representative
The Honorable Mike Lang, State Representative