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To the Air Ambulance and Patient Billing Advisory Committee, United States Department of Transportation

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I.
INTRODUCTION

The issue of air ambulance charges is of increasing importance to state workers' compensation systems and their major participants — including employers, workers, and workers' compensation insurers — across the country. Air ambulance companies seek to exploit a technicality in federal law — one specifically designed to promote price competition in the open market of airline travel[1] — in order to disrupt the states' carefully regulated workers' compensation systems to enlarge their own profit margins. This committee should recommend regulatory and legislative corrections that protect these state systems.

Texas Mutual Insurance Company is the largest workers' compensation insurer in Texas. It was created by the Texas Legislature as a not-for-profit mutual insurance company to serve as a competitive force in the marketplace; to guarantee the availability of workers' compensation insurance in Texas; and to serve as the workers' compensation insurer of last resort. The Texas Department of Insurance requires that all workers' compensation insurers, including Texas Mutual, use the NCCI's standard workers' compensation insurance policy that is approved for use in Texas, as well as most other states.

The fees that Texas Mutual pays on air ambulance claims are set by the Texas Department of Insurance, Division of Workers' Compensation under statutory standards that must be "fair and reasonable" to all medical providers.[2] Most medical fees are set at a percentage above the applicable Medicare rate.

Texas Mutual has been embroiled in litigation with for-profit air ambulance companies for nearly six years. The issues in those administrative and civil lawsuits are: (1) whether Texas Mutual and other insurers must pay whatever charge the air ambulances unilaterally set — and those unregulated charges are "sky high"[3] due to the lack of market competition; and (2) whether the air ambulances may "balance bill" or send "surprise bills" to injured workers.

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[1] *See* July 2017 Report of the United States Government Accountability Office ("GAO"), entitled "Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight" (GAO-17-637) at page 27 ("The ADA … was intended to promote reliance on competitive market forces in order to best further quality of services at low prices, among other things.").

[2] Tex. Labor Code § 413.011.

[3] The recent rapid increase in out-of-network air ambulance charges, combined with the balance billing tactic, has drawn national attention. *See, e.g.*, CNN.com article "Sky high prices for air ambulances hurt those they are helping," at: https://www.cnn.com/2018/11/26/health/air-ambulance-high-price/index.html; New York Times' feature article at: https://www.nytimes.com/2015/05/06/business/rescued-by-an-air-ambulance-but-stunned-at-the-sky-high-bill.html; ABC News "Nightline" feature "Sky Rage" at:

Balance billing of injured workers within workers' compensation systems poses a serious threat to those systems. In their Texas lawsuits, the air ambulances make clear that they intend to go after our injured workers unless the courts mandate payment of their full billed charges. Air ambulance lawsuits in other states have already attacked state laws prohibiting balance billing.

Permitting such a practice within workers' compensation systems would violate the very core promise of those systems. Workers' compensation is known as "the grand bargain" between employers and employees to cover the costs of workplace accidents on a no-fault basis. Employers gain immunity from personal injury lawsuits and all of their attendant costs and uncertainties — this is known as the "exclusive remedy." And employees, in exchange for forgoing the right to file such suits, are guaranteed certain statutorily defined benefits that compensate for lost income as well as unlimited lifetime medical care for their injuries. If air ambulances were to be granted the unique ability to threaten to, and actually seek to, balance bill injured workers, the workers would obviously lose the benefit of this grand bargain. This is not immaterial. As the whole country knows from national media reports, air ambulance bills now frequently exceed $50,000 for a single, short flight — more than the annual income of many injured workers.

Such an outcome would bring chaos to an insurance market that is currently healthy and functioning in the public interest. If injured workers are allowed to be hounded for payment by air ambulances, they will likely sue their employers for this fundamental breach of their bargain. The employers will in turn lose the exclusive remedy that workers' compensation insurance promised them. And the workers' compensation insurer loses the benefit of the system's regulation of prices, which is the only check on its unlimited liability for lifetime medical care it owes to the injured worker. The grand bargain that workers' compensation depends on cannot sustain such an assault and still remain a healthy and viable insurance system.

This committee should recommend regulatory and legislative corrections that protect the states' carefully-crafted workers' compensation systems from untethered air ambulance charges and balance billing of injured workers.

II.
WORKERS' COMPENSATION BASICS AND THE CONFLICT WITH AIR AMBULANCES

Most states administer their workers' compensation systems through a tightly-regulated insurance market,[4] though some states have opted for a monopolistic system in which a state agency collects taxes from employers and administers claims through a state fund.

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https://abcnews.go.com/US/sky-rage-bills-debt-lawsuits-follow-helicopter%20medevac/story?id=37669153 (all websites last viewed January 7, 2020).

[4] These include Texas. The Texas Department of Insurance licenses insurers to sell workers' compensation insurance to Texas employers. *See* Tex. Labor Code § 401.011(28); Tex. Ins. Code § 2052.002(a).

Most states that rely on an insurance market, including Texas, have adopted the National Council on Compensation Insurance (NCCI)'s standard workers' compensation insurance policy form. The policy obligates the issuing insurer to pay the benefits required by the applicable state's workers' compensation law. While the types of benefits (*i.e.*, medical and lost-income) workers receive for work-related injuries are fairly consistent from one state to another, the amount of benefits varies from state to state. Thus, each state's own workers compensation law is incorporated into the standard policy. Every provision of that state's compensation law thus becomes part of the insurance contract.[5]

On workers' compensation claims, air ambulances are generally paid the medical benefits set by the state workers compensation regulation that is incorporated into the policy. This core element of state workers' compensation regimes — that state law sets the insurance benefits paid to all medical providers (including air ambulances) — has led to expensive and contentious litigation for the following reason: a preemption provision in the Airline Deregulation Act (ADA). Claiming to be the "air carriers" contemplated by the ADA's preemption provision, air ambulances file lawsuits against workers' compensation insurers and regulators, and argue that the state laws setting medical payments are preempted, at least as applied to air ambulance claims. These lawsuits generally seek payment of the full billed charges without regard to any law or objective standard. But neither the ADA nor any DOT regulation mandates that state workers' compensation systems must pay whatever amount, however exorbitant, that air ambulances charge.

Air ambulances do not have this (or any other) avenue into court to seek orders of payment of their billed charges against health insurers, HMOs or ERISA plans, because the benefits required of such plans are generally not set by state law. Thus, ironically (and certainly unintentionally under the ADA) workers' compensation — which is generally understood to be exempt from federal interference — has become a hotbed of air ambulance payment litigation, imposing extra costs of litigation and uncertainty on those state systems.

These air ambulance lawsuits create havoc in otherwise well-functioning state workers' compensation systems. Texas Mutual and workers' compensation insurers not only must pay medical benefits required by their respective states' laws, and must also rely on these state laws to price and underwrite their policies — *i.e.*, to do the business of workers' compensation insurance. State mandated medical benefits are thus an integral part of the business of workers' compensation insurance.

Because workers' compensation systems are fundamentally creatures of state law, state legislatures and regulators must carefully balance competing interests to ensure the viability of

[5] *See generally*, https://www.thebalancesmb.com/workers-compensation-policy-what-s-covered-462779 (explaining that in states that have adopted the NCCI policy, "the applicable workers compensation law (of the state in which your workplaces are located) is incorporated into the policy. This means that the provisions of your state's compensation law become part of your insurance contract.").

each respective system. Recognizing that workers' compensation systems are quintessentially state matters, federal lawmakers rarely (if ever) infringe on those systems. In fact, Congress has expressly exempted workers' compensation from federal interference where it could reasonably foresee that its laws would touch on state workers' compensation laws.[6]

Here, a misuse of the ADA by air ambulance companies threatens the careful balance that each state has struck within its workers' compensation system. It is clear that Congress did not intend, or even reasonably foresee, that its seminal act deregulating the commercial airline and freight industries would interfere with state workers' compensation regimes with respect to air ambulance claims. Yet that untoward result is occurring in an increasing number of states.

In litigation across the country, air ambulance companies seek to, and are succeeding in, exploiting a technicality in the ADA — an act specifically designed to promote price competition in the open market of airline travel[7] — in order to disrupt the states' carefully regulated workers' compensation systems to enlarge their own profit margins. Disrupting state workers' compensation laws does not promote any federal policy with respect to amounts insurance companies pay to air ambulances. Federal law directly sets payments to air ambulances through Medicare and prohibits balance billing. State workers' compensation laws do precisely the same two things. It cannot possibly, therefore, advance any federal aviation policy to disallow states from acting exactly as federal agencies do with respect to air ambulance claims.

III.
AIR AMBULANCE LITIGATION AGAINST STATE WORKERS' COMPENSATION SYSTEMS

Because Texas Mutual receives a high volume of air ambulance claims, it has been sued, or has intervened in suits against the state, concerning air ambulance claims against Texas workers' compensation insurance. This litigation has been occurring for more than six years in state and federal courts.

The air ambulances' argument seeks to capitalize on broad preemption language in the ADA that was not intended to apply in this context. The 1978 ADA transformed the federally-

[6] For example, Congress removed all federal court jurisdiction over civil actions arising under state workers' compensation laws, even where the parties were otherwise diverse and could establish federal subject matter jurisdiction. *See* 28 U.S.C. § 1445(c). Congress has also exempted state workers' compensation laws from arguably its most broadly preemptive statute, ERISA. *See* ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). State workers' compensation regulations on healthcare benefits are also exempted from the Affordable Care Act. *See* 42 U.S.C. § 300gg-91(c)(1)(D).

[7] *See* July 2017 Report of the United States Government Accountability Office ("GAO"), entitled "Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight" (GAO-17-637) at page 27 ("The ADA … was intended to promote reliance on competitive market forces in order to best further quality of services at low prices, among other things.").

regulated airline market into a free market in which prices for airline tickets are driven by consumer choice. The market for air ambulance services is not that market. No patient makes a voluntary decision to purchase an air ambulance "ticket" after shopping around. Air ambulances provide medical services, and have always been so regulated, primarily by Medicare and Medicaid.

Some air ambulance companies (many of which have been consolidated under the ownership of a few private equity firms) now use this business model: (i) increase charges unilaterally, and by great amounts that far exceed costs, (ii) remain out-of-network with insurance companies and employer-sponsored plans, and (iii) balance bill or threaten to balance bill patients. This approach creates very effective pressure on the insurer to pay a high percentage of the arbitrary billed charge. No market force constrains air ambulance charges. Neither the insurers nor the patients have any negotiating power after the service is provided. Indeed, Texas Mutual's billing data from April 2018 to October 2019 shows that billed charges by the large privately-owned providers regularly exceed $30,000 per flight — and sometimes $50,000 for a single, short helicopter transport. These charges are often 500% or more of the Medicare rate for air ambulance services. This is not the competitive market the ADA created for passenger and freight airlines, which relies on a voluntary consumer choice that is made with full knowledge of the price. The air ambulances are misusing a statute intended to achieve lower prices through greater consumer choice in order to collect their ever-increasing billed charges that result from the *lack* of consumer choice for their services.

Yet, because of the technical language in the ADA's preemption provision, some courts have felt constrained to apply the ADA's ban on price regulation of airlines to bar state workers' compensation payment rules for air ambulance services (even while lamenting the unintended and disruptive consequences of this outcome).[8] This is so even though the federal health insurance programs — Medicare and Medicaid — treat air ambulance services as the regulated medical service that they so clearly are, and not as a commercial air transportation service that the ADA freed from regulation.

In contrast to payment of unilaterally-set billed charges, Texas law requires that insurance payments to medical providers be high enough to ensure that providers participate in the workers' compensation system — typically a healthy margin above the standard Medicare payment. For example, on a fully-developed record of a major for-profit air ambulance company's financial data, a Texas administrative law judge found that payment for that provider's claims at 149% of

[8] In wiping away Wyoming's workers' compensation payment regulations for air ambulance services, the United States Court of Appeals for the Tenth Circuit explained that the result was "unfortunate," created an "ill-conceived intersection of the [ADA's] broad preemption provision with states' attempts to administer financially sound workers' compensation programs in the face of skyrocketing air-ambulance bills," and actually undermined Congress's intent to promote free-market bargaining because of the "warped market of air-ambulance services." *EagleMed, LLC v. Cox, et al.*, 868 F.3d 893, 903, 906 (10th Cir. 2017).

Medicare was "fair and reasonable" — and guaranteed a profit margin of greater than 9% on all workers' compensation claims.[9]

The ADA was never intended to be, and should not be, used to prey upon and ultimately do possibly grave damage to the workers' compensation systems that protect employers and workers in every state — and which, if left untouched by preemption, would still guarantee a fair and reasonable payment to air ambulances. The ADA clearly evinces no federal policy that state workers' compensation regimes be disrupted for *any* reason.

Despite the apparent lack of any such federal interest or actual Congressional intent to disrupt state workers' compensation laws, air ambulances have had some success with their preemption argument simply because courts have found that they are, technically, "air carriers" – – the term used in the ADA's preemption provision. *See* 49 U.S.C. § 41713(b)(1) ("Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.").

But the air ambulances are not really asking that state regulations be set aside in favor of market outcomes. They avail themselves of the benefits of the regulated system even while insisting that no payment regulation may touch them. They file claims with state regulators against workers' compensation funds or insurance policies, and then pursue those claims with lawsuits demanding that the state regulator or judge order payment at whatever noncompetitive price they name. This underscores the fallacy of ADA preemption: in an actual competitive market, neither regulators nor judges decree prices.

Further, the air ambulances, using the pretext of ADA competition, seek recovery not of a bargained-for contract price, but of costs and a significant return on equity. Does anyone who opens a bakery or a hardware store believe their consumer can be *ordered* to cover costs and ensure a profit? These are regulatory indicia. The air ambulances also insist that the regulated insurers must be ordered to cross-subsidize patients who don't pay everything they demand. Such a practice could hardly be more contrary to a competitive market.

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[9] That decision and order is attached here as Exhibit A. It contains a stamp stating that it is "confidential pursuant to Texas Labor Code § 402.083." However, the order is not a confidential document. It contains none of the information required to be kept confidential by section 402.083, and the document has been in the public domain for several years. The copy attached here was filed in open court in 2016, contains the filing stamp of the United States District Court for the Western District of Texas (Case No. 1:16-cv-00060-SS), and is publicly available through the court's e-filing system.

On appeal, a state district judge reduced the payment to 125% of Medicare. That case is set for oral argument in the Supreme Court of Texas on February 25, 2020.

Some states, not knowing what alternative to employ once their payment regulations are preempted, capitulate to the air ambulance demands of payment of their full, unregulated, noncompetitive billed charges. The air ambulances thus achieve the full benefit of state price regulation on terms that they alone dictate.

These outcomes endanger the carefully balanced workers' compensation payment regulations that states have enacted since the early 20th Century. At bottom, the air ambulances' litigation tactics are aimed at diverting resources intended to benefit injured workers and their employers into windfall profits that no other medical providers obtain from workers' compensation.

IV.
STATES SHOULD RETAIN THE RIGHT TO REGULATE THEIR OWN WORKERS' COMPENSATION SYSTEMS WHEN AIR AMBULANCES SEEK THE BENEFITS OF THOSE SYSTEMS.

This Committee is charged in part with examining the authority of the states with respect to air ambulance billing and patient billing.

In litigation in many states across the country, an important argument in favor of state regulation has not been fully developed: namely, the McCarran-Ferguson Act. DOT has not yet expressed a position as to the application of the McCarran-Ferguson Act to state workers' compensation insurance laws that dictate the insurers' policy obligations. The McCarran-Ferguson Act exempts state insurance regulation from inadvertent federal preemption. It provides that "Acts of Congress" which do not expressly regulate the "business of insurance" will not preempt state laws or regulations that do regulate the "business of insurance." 15 U.S.C. § 1012(b). The GAO in its 2019 report, *Air Ambulance: Available Data Show Privately-Insured Patients Are at Financial Risk*, recognizes that McCarran-Ferguson provides the states with "authority to regulate the business of insurance," including the authority to "review insurers' health insurance plans and premium rates."[10]

Applied in this context, McCarran-Ferguson should defeat the air ambulances' attempts to preempt state workers' compensation regulation of the medical benefits required by state-approved insurance policies. The business of insurance undoubtedly includes the setting and making of payments due on claims made under insurance policies. *See, e.g., United States Dep't of the Treasury v. Fabe*, 508 U.S. 499, 502-03 (1993) ("[t]here can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance'" under the McCarran-Ferguson Act).

Texas Mutual respectfully asks this committee to issue recommendations consistent with the traditional state authority to regulate their own workers' compensation insurance markets and the business of insurance.

[10] GAO-19-292 at 9.

V.
CONCLUSION AND RECOMMENDATIONS

Workers' compensation system participants have historically been protected by state regulations that set fair and reasonable payment amounts and prohibit balance billing. The components of this highly-regulated industry are carefully balanced and must therefore be protected with vigilance. In the mid-80's, for example, the Texas system had become so weakened by high medical costs and lengthy lawsuits that it collapsed. The solution devised by the Texas Legislature in 1989 has become the gold standard for the regulatory and industry balance needed for the system to work. We do not wish to see this crucial element of the state's economic stability needlessly eroded by uncontrolled air ambulance charges and scare tactics aimed at vulnerable injured workers.

The committee should recommend steps to clarify the states' authority to regulate payments to air ambulances within their workers' compensation systems, and to put an end to the air ambulances' litigation-driven attacks on those state systems. Such steps should include:

- Recommend that DOT issue regulations making clear that state-regulated workers' compensation payments for air ambulance medical transports do not interfere with the ADA or DOT's economic regulations under the ADA, thereby allowing states to regulate such payments just as CMS does. If necessary, the DOT should study the matter and issue an opinion stating that the McCarran-Ferguson Act allows states to regulate amounts that workers' compensation insurers must pay on air ambulance claims, and to prohibit balance billing of insured patients and injured workers.

- If this committee concludes that a legislative correction is necessary, then it should recommend that Congress amend the ADA to clarify that its preemption provision does not apply to air ambulances, and does not prevent workers' compensation and other state-regulated insurance systems from regulating payments to air ambulances for medical transports of covered individuals.