



Butte County Decision Clarifies the Power of the State EMS Authority Over “Grandfathered” EOA Designations

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In a significant decision issued on August 27, 2010, the California Court of Appeal held that the state EMS Authority (the “Authority”) is empowered by the state EMS Act (the “Act”) to approve or reject determinations by local EMS agencies (“LEMSAs”) that providers qualify for “grandfathered” exclusive operating areas (“EOA”) under Section 1797.224 of the Act. The Court also held, however, that the criteria used by the Authority in determining whether a provider qualifies for grandfathering (i.e., whether it has operated in the same “manner and scope” since 1981) must be set forth in regulations formally adopted by the Authority under the California Administrative Procedures Act, rather than established informally by the Authority on a case by case basis. The Court further held that a county which designates a LEMSA may not reserve any of the LEMSA’s statutory powers, such as the ability to award EOAs, to the county itself, or divide LEMSA powers among multiple EOAs.

Although the facts of the case were complicated and involved a number of parties, the case primarily involved a dispute between the County of Butte (the “County”) and ambulance provider First Responder EMS (“First Responder”) on the one hand, and the Authority on the other hand, over whether the County or its designated LEMSA, Northern California Emergency Medical Services, Inc. (“Nor-Cal”), could grant First Responder and certain other providers grandfathered EOAs in the local EMS plan submitted for the County. The Court of Appeal, affirming the trial court’s decision, held that the Authority could properly reject the County’s grandfathering determinations by refusing to approve the local EMS plan. The Authority’s grounds for doing so were that the County and Nor-Cal had failed to provide the Authority with sufficient information supporting their determination that the providers in question qualified for grandfathering. However, the Court further held that in determining whether candidates for grandfathering meet the “manner and scope” test found in the Act, the Authority must establish regulatory criteria rather than relying on case by case guidelines.

The following sets forth the complex facts of the case and the legal grounds for the Court’s decision in more detail.

BACKGROUND

In 1991, the County entered into an agreement with Nor-Cal to administer, as its LEMSA, certain specified LEMSA functions, such as submitting an annual local EMS plan. The agreement provided that the County reserved to itself certain other LEMSA functions not expressly granted to Nor-Cal, including the establishment and designation of EOAs.

In June 1992, the Butte County public health officer issued an order directing that the County’s local EMS plan be amended to establish EOAs pursuant to Section 1797.224 of the Act. In his order, the health officer found that the providers serving five operating areas in the County qualified for grandfathering within their respective service areas because they had been operating within those areas “in the same manner and scope since at least January 1, 1981,” as required by Section 1797.224. In accordance with these findings, the health officer ordered that “the current and present operators providing service within [their respective EOAs] be deemed the exclusive operators within each area.” Three of the five EOAs established by the County health officer were at issue in

the case ultimately decided by the Court of Appeal.

In July 1992, the health officer submitted to the Authority an amendment to the County’s EMS plan establishing the EOAs, along with copies of correspondence he had received from each of the providers in question, purporting to attest to their qualifications for grandfathered status. The health officer requested that the Authority approve the plan and confirm the County’s ability to grandfather the current providers into the EOAs.

The Authority responded by asking the health officer to provide more information about “the continuity of providers within the zones for which grandfathering is proposed” as well as additional information pertinent to grandfathering. The record in the case does not indicate whether the County responded to the Authority’s request for this additional information.

Although the health officer initially had requested the Authority’s approval of the EOA designations, the County subsequently took the position that the Authority’s approval was not required. In January 1994, the County Board of Supervisors passed a resolution which (1) formally adopted the findings and conclusions of the health officer set forth in his prior EOA order, and (2) purported to formally amend the County’s local EMS plan to create the EOAs set forth in the health officer’s order and to establish the current operators in those areas as exclusive operators. In addition, the Board’s resolution indicated that the installation of these operators within the EOAs was intended as an “interim measure,” pending a competitive process, and established a schedule for holding a competitive process for each of the County’s zones.

In March 1996, a new interim health officer for the County issued an order which changed direction by finding that the continued maintenance of the EOAs and the

¹ All references to the Act refer to the Emergency Medical Services System and the Prehospital Medical Care Personnel Act, Health and Safety Code Section 1797 et. seq.

² That section states: “A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. No competitive process is required if the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981. A local EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals.”

continued utilization of the current providers within those EOAs was proper and appropriate, and that a competitive bid process was neither required nor in the best interest of the County citizens at that time. The Board of Supervisors subsequently passed a second resolution which rescinded the schedule providing for a competitive process and affirmed the designation of the existing providers in their existing zones.

In March 2000, Nor-Cal submitted the County's EMS plan to the Authority, including the EOAs established by the first health officer and affirmed by his successor. In July 2001, the Authority approved the plan, except for the section grandfathering the existing providers into their respective EOAs. In the Authority's view, the previous expressions of intent by Nor-Cal and the Board of Supervisors to establish a competitive process "changed the scope and manner of operation," and therefore grandfathering the three zones at issue was no longer possible. The Authority also indicated that to establish EOAs and install the existing providers would require a clear determination of eligibility for exclusivity but that, to date, sufficient information had not been provided to the Authority to determine whether grandfathering was appropriate.

The Authority was particularly concerned that three of the ambulance services in question had changed ownership, and, in one case, three different owners had operated the ambulance service since 1981. As discussed further below, the Authority's position was that although some changes of ownership permit grandfathering, others constitute a change in manner and scope which disqualify a provider from being grandfathered. In addition, the Authority was aware that a significant boundary change had been made in one of the areas, as a result of the incorporation of a college campus which added a day time population of over 10,000 students. The Authority indicated that if Nor-Cal wished to establish EOAs through grandfathering, the current providers would have to supply Nor-Cal with appropriate documentation regarding their eligibility, and Nor-Cal would have to amend the local EMS plan accordingly. The Authority also asserted, for the first time, that Nor-Cal, and not the County Health Department, was the LEMSA with statutory authority to establish EOAs.

In June 2006, Nor-Cal approved a new provider, Priority One Medical Transport, Inc. ("Priority One") to provide EMS services in one of the three EOAs established by the County, subject to securing a base hospital and determining the dispatch logistics of 911 calls. However, because Priority One was unable to secure a base hospital, it was unable to begin operations within the County.

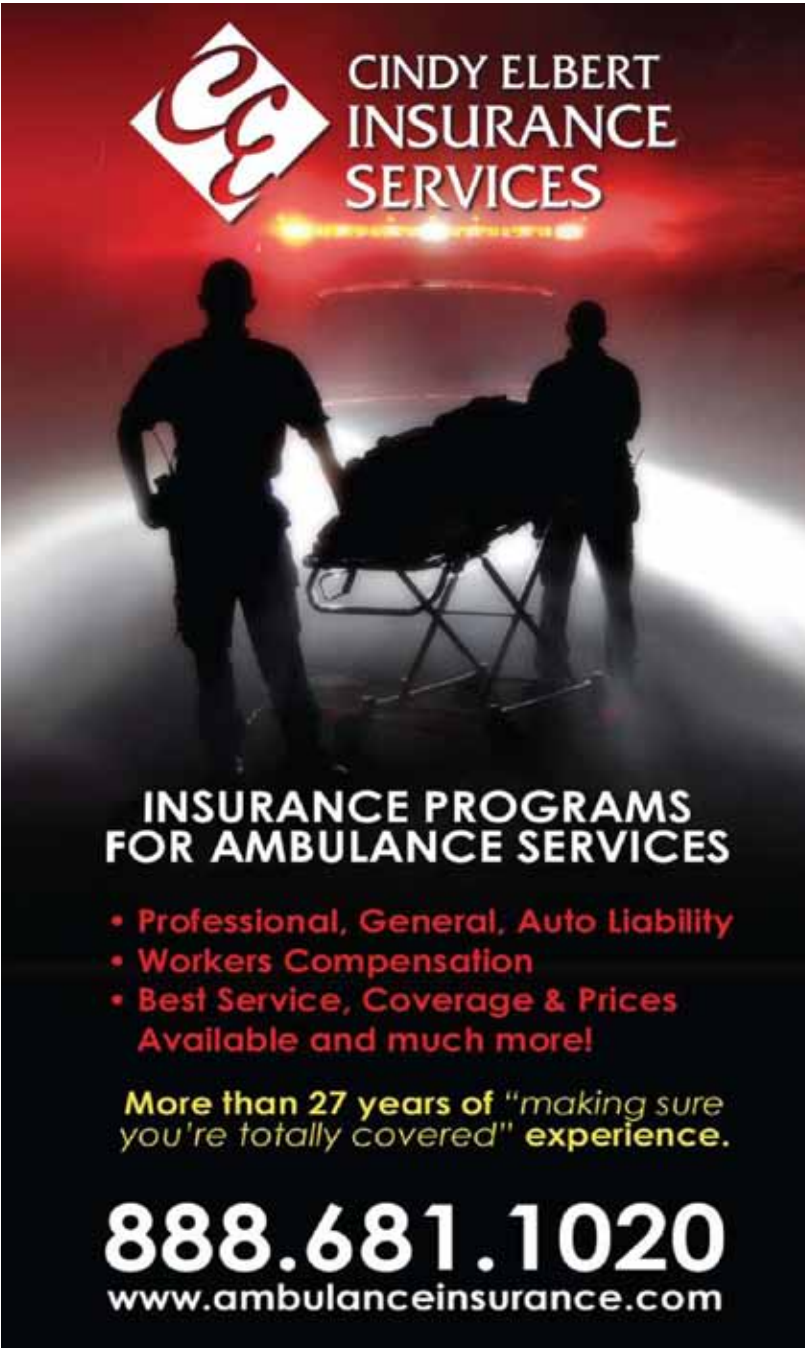
The three grandfathered providers, led by (and collectively referred to by the Court as) First Responder, subsequently brought an action against Nor-Cal and the County seeking

declaratory and injunctive relief. First Responder asked the court to rule that (1) the agreement between Nor-Cal and the County did not grant Nor-Cal any authority with respect to the creation of EOAs; (2) the County retained the right as a LEMSA with respect to the creation and designation of EOAs; and (3) Nor-Cal had no authority to integrate an additional EMS provider into the EOAs set up

by the County.

The County filed a cross-complaint against the Authority, seeking a judicial declaration regarding whether (1) the County had the authority to exercise powers under Section 1797.224 (i.e., the creation of EOAs), and (2) whether the current providers were eligible for EOAs. The County also sought an order prohibiting the

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Butte County Decision

Authority from rejecting the County’s grant of grandfathered EOAs.

The trial court held that Nor-Cal, not the County, had exclusive authority to establish and award EOAs, and that the purported reservation of this right by the County was void. The court further found that it could not order the Authority to refrain from enforcing its determination that the current providers were not properly grandfathered. It reached this conclusion because the Authority had a “discretionary duty” to determine whether the local EMS plan for the county was acceptable, and the Authority’s discretionary findings could not be overruled by the court, absent an abuse of discretion. Here, the trial court found no abuse of discretion.

THE COURT OF APPEAL DECISION

On appeal, the Court of Appeal affirmed the trial court’s findings. It addressed the three primary issues in the case as follows:

1. Ability of the County to Reserve EOA Designations

The first issue addressed by the Court was “whether a County may contractually designate a local EMS agency to administer some of the requirements of the EMS Act, while reserving for another local EMS agency [or itself] all of the remaining statutory powers and duties not covered by the agreement.” The Court said that “the short answer is No.” The Court based its conclusion on the plain language of Section 1797.200, which states that each county which has chosen to develop an EMS program “shall designate a local EMS agency”. The Court observed that by using the words “a local EMS agency”, Section 1797.200 “unambiguously requires a county to designate one local EMS agency, not two such agencies sharing the statutory powers and duties of [a LEMSA] under the EMS Act.”

2. Powers of the Authority to Approve or Reject Grandfathering Determinations

The second issue addressed by the Court was “whether the Authority has the statutory power to disapprove a local EMS agency’s designation of an exclusive operating area through the grandfathering provision of Section 1797.224 of the EMS.” The Court said “the short answer is Yes.”

The Court rejected the argument, put forth by the County and First Responder, that Section 1797.224 only requires approval by the Authority of a competitive process. Although the plain language of the statute can be read in that fashion, the Court indicated that it is necessary to read that statute in the overall context of the EMS Act. The Act provides that a LEMSA “shall annually submit an emergency medical services plan for the EMS area to the Authority” (Section 1797.254), and, “among the mandatory subjects of the local EMS plan is transportation of emergency medical patients.” (See Sections 1797.76, 1797.103, and 1797.70.)” The Act further provides that a LEMSA may implement a local plan, “unless the Authority determines that the plan does not effectively meet the needs of the persons served and is not consistent with coordinated activities in the geographical areas served, or that the plan is not concordant and consistent with applicable guidelines or regulations... established by the Authority.” (Section 1797.105(a)(b)) Based on these factors, the Court concluded as follows:

The Authority has the statutory authority to review a local EMS agency’s creation of an EOA as part of the transportation portion of the local EMS plan, regardless of whether the EOA was created through a competitive process or grandfathered, and then to reject the local EMS plan if it is not “concordant

and consistent with applicable guidelines or regulations... established by the Authority.”

3. Requirement that the Authority Promulgate “Manner and Scope” Guidelines as Formal Regulations

The third issue addressed by the Court was the validity of the criteria used by the Authority to determine whether grandfathering is appropriate. The County argued that, even if the Authority had the power to reject EOAs created via grandfathering, the Authority’s disapproval of the County’s EOAs was invalid because it was based on “invalid, underground regulations.”

The California Administrative Procedures Act (“APA”) provides that, if a policy or procedure falls within the definition of a “regulation” within the meaning of the Act, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law. A regulation that substantially fails to comply with these requirements may be judicially declared invalid. Such invalid regulations are often called “underground regulations.”

A regulation subject to the APA has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than only in a specific case. Second, the rule must implement, interpret or govern the agency’s procedures.

In determining whether the Authority’s criteria used in evaluating grandfathered EOAs constituted an underground regulation, the Court focused on a declaration submitted in the case by Dan Smiley, Chief Deputy Director of the Authority. Mr. Smiley’s declaration stated, in pertinent part, as follows:

A change in manner and scope, defeating a County’s ability to grandfather existing providers into EOAs, may occur in the following instances: (1) where there is a change in the number of providers in the area; (2) where there are interruptions in the services provided by one or more providers in the area; (3) where there is a change in the economic distribution of calls between providers in the area; (4) where there is a change in ownership in one of the providers in the area; (5) where there is a change in the geographical boundaries of the area; (6) where areas or sub-areas are combined or splintered; and (7) where there is an approval by the local EMS agency of a new provider in the area. A change in manner and scope will not occur in the following situations: (1) an upgrade in ambulance service from basic life support to advanced life support; (2) the subcontracting of a grandfathered provider with another provider for minor activities within an area that does not alter the manner and scope of operations, is approved



by the local EMS agency and is part of the County’s local EMS plan; and (3) the response of providers into an area for mutual aid or instant aid in the event of significant events or disaster situations.

Smiley’s declaration also stated that “changes in ownership in EMS providers can result in a change in manner and scope.” He elaborated that, “where one company purchases another, as evidenced by a stock transfer, purchase of goodwill, transfer of liabilities and transfer of accounts receivables, no change in manner and scope occurs. However, there is a change in manner and scope if one company purchases only the assets of another company.”

The Court agreed with the County’s assertion that these statements constitute a generally applicable interpretation of the “manner and scope” language of Section 1797.224. Consequently, the Court held that the establishment of “manner and scope” criteria requires formal rule-making through the APA. The Court stated:

We thus conclude that the Authority’s interpretation of the “manner and scope” language of Section 1797.224 is a generally applicable policy subject to the rule-making procedures of the APA. Because the Authority did not comply with those procedures, this interpretative regulation is void and not entitled to any deference.

The Court nevertheless held, however, that the Authority had the power to reject the local EMS plan submitted for the County, and the grandfathering designation found in it, “based on a lack of information provided by Nor-Cal,” rather than on the merits of whether the “manner and scope” test was in fact met. The Court did not determine “whether the changes in ownership and boundary change in this case amounted to a change in manner and scope.” Rather, the Court simply concluded that the Authority had not abused its discretion in requiring additional information to make that determination.

CONCLUSION

The Butte County case has not been appealed and is significant for three primary reasons. First, it affirms that the Authority has the power to approve or disapprove grandfathered EOAs. While it has been widely assumed that this was the case, counties, their LEMSAs and providers have argued that the Authority should in most cases defer to the LEMSAs’ findings on this issue. The case indicates that the Authority is under no obligation to do so.

Second, the case will require that the Authority promulgate regulations defining what constitutes a change in manner and scope, rather than relying on its own case by case guidelines. Perhaps in response to early developments in the case, the Authority had recently circulated draft guidelines on this and other EOA-related issues for public comment. Those draft guidelines may be the Authority’s starting point for drafting regulations. The EMS Act and the APA require that the draft regulations be circulated for public comment, reviewed at a public hearing and ultimately approved by both the EMS Commission and the Office of Administrative Law. This process will take several months, at a minimum.

Finally, the Court’s finding that a county may not reserve any of a LEMSA’s statutory powers to itself is significant for counties that have designated outside agencies as their LEMSAs.

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Chairman’s Message

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were responsible for saving you thousands of dollars in fees by helping defeat AB 511 last year? Well that’s the approximate annual cost of dues for the CAA’s largest member companies. If you keep it in perspective, the CAA is an outstanding value for your company and the CAA cannot represent the interests of the entire industry without the support of its members.

The threats remain. If we do not join together to represent the interests of our industry, others will make decisions that impact our businesses for us. The potential impacts on your business, makes these challenges your business. Now is the time to get involved.

I am looking forward to seeing you at our Legislative Summit in January.

Executive Director’s Update

Continued from page 4

Medi-Cal reimbursement rates, this increase in Medi-Cal coverage and transports has the potential to have a major impact on California’s EMS systems.

Clearly, there are now many more questions than answers, yet there are many opportunities to collaborate with other areas of healthcare to contain cost and improve quality. While health insurance reform will increase coverage and reduce the number of uninsured by creating “near universal” coverage, cost containment and quality improvement will surely impact providers.

Resources

The CAA has created a members-only section of the CAA website to provide resources to CAA members regarding the various issues which will impact ambulance providers as both healthcare providers and as employers. After entering their password, members can access the Healthcare Reform page by clicking on the link.

For information about healthcare reform implementation in California, go to: <http://www.healthcare.ca.gov/>. For information about federal healthcare reform implementation, go to: <http://www.healthcare.gov/>.

The CAA is a statewide leader in promoting quality, efficient and medically appropriate patient care within California’s local EMS systems. With healthcare reform implementation accelerating in California, it is essential to assure the state’s EMS systems continue to serve the medical transportation needs of our patients and communities.