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◆ INTRODUCTION

Air ambulances are often the only available method of quickly transporting patients to hospitals in life-threatening situations. They are a critical part of the health care landscape, particularly in rural areas where hospitals and specialized care have become less available. Air ambulances are generally helicopters equipped with medical equipment and staffed by medical professionals just like traditional ambulances. A patient might need air ambulance transport after an accident when a ground ambulance is too slow or an accident site is inaccessible.

More than 550,000 patients in the U.S. are transported by air ambulance services every year, according to the Association of Air Medical Services.¹ Air ambulance services have grown significantly in recent years; in 2002, there were approximately 400 dedicated air ambulances. By 2008, the number had more than doubled to over 800. Possible reasons for the explosive growth include an aging population, a significant decline in the number of emergency departments in existing hospitals,² and changing health care delivery models. Additionally, some stakeholders have argued such high growth in this industry may be an indicator of medically unnecessary use,³ although more research is needed in this area before definitive conclusions may be drawn.

Consumer complaints about exorbitant air ambulance bills have risen noticeably over the past several years. For example, a 2017 New Mexico Office of Superintendent of Insurance (OSI) study⁴ found the average charge per air ambulance claim increased 229% from 2006 to 2015. Additionally, in 2015, the average amount of an air ambulance claim unpaid by insurers was \$26,829. Many states are reporting instances of air ambulance providers not affiliated with a hospital and refusing to contract with an insurer. As such, air ambulances are being called to airlift individuals in emergency situations and billing them for out-of-network charges to the tune of tens of thousands of dollars.

The federal Airline Deregulation Act of 1978 (ADA),⁵ originally passed with the intent of encouraging competition in the airline industry, prohibits the states from regulating the amount air carriers charge, including air ambulance providers. As such, any state laws passed to regulate the costs of air ambulance services are preempted by the ADA. Because state insurance departments do not currently have jurisdiction to regulate air ambulance company rates, routes, or

services, and the federal government has not yet addressed the issue, there are no regulations or laws, at present, protecting the economic interests of consumers from high air ambulance costs.

◆ AIR AMBULANCE HISTORY

The ADA explicitly prohibits the states from regulating the “rates, routes, or services of any air carrier.” When the ADA was passed in 1978, air ambulances were new and there is no indication the air ambulance industry was given any consideration by the U.S. Congress when crafting the law.⁶ However, subsequent court rulings and the U.S. Department of Transportation has consistently found, as early as 1986, air ambulances fall within the definition of “air carriers” promulgated by the ADA, holding the states are, therefore, generally preempted from regulating their services.⁷

Air ambulances generally fall under one of three business models: 1) hospital-based; 2) independent; or 3) government. Early air medical programs were hospital-based, with staff and equipment provided and maintained by the hospital, with pilot and aircraft contracted out. However, in 2002, Medicare released a national fee schedule⁸ for air ambulances based on a thorough investigation of the “reasonable cost” for emergency medical services (EMS). The schedule increased the reimbursement rate across the board for air ambulance transport, especially for rural air ambulance services.

This increase enabled the proliferation of for-profit and independent air ambulance providers. As a result of the increase, for-profit operators were able to expand their presence in the air ambulance industry; prior to 2002, for-profit providers were nonexistent, while the market today is dominated by for-profit providers.⁹

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¹“Air Med 101”. The Association of Air Medical Services. January 9, 2014. Retrieved from: <http://aams.org/publications/air-med/101>.
²“Why Are Many Emergency Departments in the United States Closing?” Rand Health. 2011. Retrieved from: www.rand.org/content/dam/rand/pubs/research_briefs/2011/RAND_RB9607.pdf.
³“Air Ambulance: Effects of Industry Changes on Services Are Unclear.” U.S. Government Accountability Office. September 20, 2010. Retrieved from: www.gao.gov/products/GAO-10-907.
⁴“Air Ambulance Memorial Study Report”. New Mexico Office of the Superintendent of Insurance. January 2017. Retrieved from: www.osi.state.nm.us/MiscPages/docs/newsroom/Air%20Ambulance%20Memorial%20-%20201.19.17.pdf.
⁵Airline Deregulation Act of 1978. Retrieved from: www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1705.pdf.
⁶Legislative history of the Airline Deregulation Act of 1978. Retrieved from: <https://babel.hathitrust.org/cgi/pt?id=uc1.b4176000;view=1up;seq=454>.
⁷U.S. Department of Transportation Letter to the State of Arizona’s Office of Attorney General. June 16, 1986.
⁸Ambulance Fee Schedule. Centers for Medicare & Medicaid Services. Retrieved from: www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AmbulanceFeeSchedule/afspuf.html.
⁹“Up in the Air: Inadequate Regulation for Emergency Air Ambulance Transportation.” ConsumersUnion. March, 2017.

◆ WHY IS THIS AN ISSUE NOW?

Although the ADA became law nearly 40 years ago, a confluence of several factors has led to where we are today. As mentioned earlier, the air ambulance market has expanded significantly in the past 15 years, with the number of air ambulances doubling in that time, due in part to Medicare reimbursement increases. Another contributing factor to the growing market is the closure of rural hospitals and clinics, which increases the need for air ambulances to transport patients in emergency situations.

Because the market is now dominated by for-profit providers, reliable and independent data about actual air ambulance transport costs are hard to come by. The Association of Air Medical Services (AAMS) funded a study of its members, which found, on average, Medicare covers only 59% of actual costs. The president of AAMS has said because Medicare and Medicaid reimbursements are so low, air ambulance companies need to collect more from patients with private insurance to recoup these losses.¹⁰

As with other segments of the health care market, the air ambulance industry has seen a large number of mergers in recent years, with half of the market controlled by three companies. Air Methods, the largest air medical provider in the country, controls nearly 25% of the market as of 2016. The New Mexico OSI study found the providers with the largest market share also “had amongst the highest billed charges.” Air Methods reported a net revenue of more than \$12,000 per patient transport in 2016¹¹ and regularly uses aggressive legal tactics like debt collection agencies and lawsuits to collect unpaid bills from consumers.¹²

There is some evidence to indicate the huge increase in supply of air ambulances has led to instances of medically unnecessary use. A 2015 study from researchers affiliated with the University of Arizona found in a six-year period at one trauma center, nearly one-third of patients transported by air ambulance were “minimally injured” and would have had similar health outcomes with traditional ground ambulance transport.¹³

The National Transportation Safety Board (NTSB) found evidence in 2009 of highly competitive practices such as building relationships with emergency dispatchers in the hopes of gaining extra referrals. The NTSB requested further study on these issues and, in 2014, published recommendations for “the selection of appropriate transportation modes for urgent care.”¹⁴

Furthermore, while the health care industry generally seems to be moving toward a model encouraging consumer involvement and smart shopping, that is not always a possibility in emergency situations. A determination is often left up to emergency responders or health care providers who have no knowledge of the patient’s insurance network and for whom the threat of malpractice suits are a significant consideration.

To provide a stable revenue base, some air ambulance companies offer memberships charging a monthly or annual fee to help cover costs above and beyond what insurance plans will pay. However, these memberships are only an effective consumer protection tool if the company issuing the membership is the one responding to the emergency situation, something on which a consumer has no say. These memberships often target rural consumers without close access to major emergency medical services. The Montana Legislature passed a bill in 2017 to regulate these memberships as insurance.¹⁵

◆ WORKERS’ COMPENSATION CONSIDERATIONS

The 2017 New Mexico OSI study found, from 2006 to 2015, the average claim paid by health and workers’ compensation for air ambulance charges increased 50%. Data from the National Council on Compensation Insurance (NCCI) also shows an increase of nearly 40% for some air ambulance services from 2011 to 2015.¹⁶ Many states do not include air ambulance services in their workers’ compensation fee schedule due, in part, to concerns about preemption by the ADA.

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¹⁰ “Air Ambulances: Taking Patients for a Ride.” Consumer Reports. April 6, 2017. Retrieved from: www.consumerreports.org/medical-transportation/air-ambulances-taking-patients-for-a-ride.

¹¹ Air Methods Corporate Presentation. March 2017. Retrieved from: www.airmethods.com/docs/default-source/investor-documents/corporate-presentations/roadshow-march-2017.pdf?sfvrsn=2.

¹² “Sky-Rage: Bills, Debt, Lawsuits Follow Helicopter Medevac Trips.” ABC News. March 16, 2016. Retrieved from: <http://abcnews.go.com/US/sky-rage-bills-debt-lawsuits-follow-helicopter-medevac/story?id=37669153>

¹³ “Overuse of helicopter transport in the minimally injured: A health care system problem that should be corrected.” Journal of Trauma and Acute Care Surgery. March 2015. www.ncbi.nlm.nih.gov/pubmed/25710420.

¹⁴ Safety Recommendation A-09-103. National Transportation Safety Board. 2014. Retrieved from: www.ntsb.gov/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=A-09-103.

¹⁵ House Bill No. 73. Montana Legislature. 2017. Retrieved from: <http://leg.mt.gov/bills/2017/billhtml/HB0073.htm>.

¹⁶ NCCI presentation to the NAIC Workers’ Compensation (C) Task Force. April 10, 2017. http://naic.org/meetings1704/cmtc_c_wctf_2017_spring_nm_materials.pdf?1498746526260.

NEW HEIGHTS IN AIR AMBULANCE COSTS (CONTINUED)

Furthermore, air ambulance companies are challenging state workers' compensation administrators' authority for resolving fee disputes or preventing the practice of balance-billing injured workers. The New Mexico OSI reports an increase in litigation between workers' compensation insurers and air ambulance providers. Additionally, in December 2016, a judge in Texas district court ruled the federal McCarran-Ferguson Act of 1945 preempts the ADA in the narrow case of workers' compensation payments;¹⁷ however, an appeal is likely.

◆ STATUS

For ground ambulance services, the federal Patient Protection and Affordable Care Act protects consumers from higher cost-sharing requirements for out-of-network providers and the states can protect consumers from balance-billing. However, in the case of air ambulances, the federal cost-sharing protections are only applied when the service is affiliated with the hospital and, thus, considered an extension of the emergency room service. Various states have attempted to pass laws to protect consumers from out-of-network air ambulance bills, but these laws are preempted by the ADA and air ambulance operations have successfully challenged the majority of these efforts.

After receiving an uptick in consumer complaints, several states have held hearings or launched investigations into air ambulance company practices, including Maryland, New Mexico and North Dakota. A law in North Dakota requiring 911 operators to contact in-network air ambulance providers before out-of-network providers was struck down in 2016 on the grounds the ADA preempts such legislation. A second bill, signed into law in April 2017, mandates hospitals notify patients in non-emergency situations which air ambulance providers are in-network, as well as addresses balance-billing.¹⁸

The Montana Legislature also took action, commissioning a study of air ambulance membership services in 2016.¹⁹ In 2017, the legislature considered bills intended to impose taxes on air ambulance charges above allowable Medicare costs for providers that do not contract with any insurance networks, to protect patients' credit reports from certain unpaid bills, and to regulate air ambulance "memberships" as insurance products. The Utah Legislature passed a resolution in March 2017 urging Congress to amend the ADA to allow the states to regulate air ambulance companies.²⁰

The National Conference of Insurance Legislators (NCOIL) formed a task force in March 2017 to examine ways to legislate this issue successfully at the state level.²¹ The National

Association of State EMS Officials has a standing committee on air medical services, which, in September 2016, issued model rules for the regulation of air medical services intended to "assist states with regulatory language intended to avoid conflict with the ADA."²² These models only address issues relating to the medical care provided on air ambulances, such as licensure of medical personnel and medical equipment requirements and best practices, and avoid touching matters of aviation safety and economic regulation so as not to impinge on federal law.

There is some recent movement at the federal level, as well, where this issue has received bipartisan attention. At the request of the U.S. House of Representatives' Transportation and Infrastructure Committee leadership U.S. Rep. Bill Shuster (R-PA) and U.S. Rep. Peter DeFazio (D-OR), the U.S. Government Accountability Office is studying pricing and competition in the air medical transport industry. U.S. Sen. Jon Tester (D-MT) introduced S. 471²³ in February 2017, which carves out an exemption in the ADA for state regulation of air ambulances. This bill does not insert the states in federal oversight of any other type of aviation. The bill was referred to the U.S. Senate Committee on Commerce, Science and Transportation where it awaits further action.

In addition, the U.S. Government Accountability Office (GAO) studied pricing and competition in the air medical transport industry in a report issued in July, 2017.²⁴ This report found trends identified in the GAO's 2010 report have intensified: a greater concentration of independent providers, balance-billing of privately insured patients to recoup losses by Medicaid and Medicare patients, a lack of reliable data on provider costs and information, and rates charged by air ambulance providers continue to swell.

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¹⁷ "Texas Mutual: Judge Upholds State Regulation of Air Ambulances." Insurance Journal. December 30, 2016. Retrieved from: www.insurancejournal.com/news/southcentral/2016/12/30/436942.htm.

¹⁸ Senate Bill No. 2231. North Dakota Senate. 2017. Retrieved from: www.legis.nd.gov/assembly/65-2017/bill-index/bi2231.html.

¹⁹ "Study of Air Ambulances." The Montana Legislature. 2016. <http://leg.mt.gov/css/committees/interim/2015-2016/Economic-Affairs/Committee-Topics/Ambulance/ambulance-memberships.asp>.

²⁰ "Concurrent Resolution on Air Ambulance Providers." Utah State Legislature. 2017. Retrieved from: <https://le.utah.gov/~2017/bills/static/SCR002.html>.

²¹ "NCOIL Announces Air Ambulance Task Force." National Conference of Insurance Legislators. Mary 7, 2017. Retrieved from: <http://ncoil.org/wp-content/uploads/2017/03/air-ambulance-task-force-FINAL.pdf>.

²² Air Medical Committee. National Association of State EMS Officials. www.nasemso.org/Projects/AirMedical.

²³ Isla Rose Life Flight Act, S. 741, 115th Congress. Retrieved from: www.congress.gov/bill/115th-congress/senate-bill/471.

²⁴ Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight." U.S. Government Accountability Office. July 27, 2017. Retrieved from: <https://www.gao.gov/assets/690/686167.pdf>

NEW HEIGHTS IN AIR AMBULANCE COSTS (CONTINUED)

Finally, U.S. Rep. Rob Woodall (R-GA) offered an amendment to a Federal Aviation Administration (FAA) reauthorization bill to create an advisory committee for the development of air ambulance industry regulation. While this does not give any regulatory authority to the states, it does propose to include state insurance regulators on the committee. The amendment passed unanimously, but at the time of this writing, the bill remains in the House Transportation and Infrastructure Committee. The NAIC issued its support for this amendment in a letter to Congress in July, 2017.²⁵

◆ CONCLUSION

While state laws protecting consumers in such cases are preempted by the ADA, members of both the Senate and the House are drafting bipartisan legislation to amend the ADA and allow the states to regulate air ambulances in a limited way to protect consumers from excessive out-of-network charges. The NAIC membership is closely monitoring this issue. The Workers' Compensation (C) Task Force is in dialogue with the NCCI to monitor the impact of air ambulance costs and their impact on workers' compensation insurance. A number of NAIC groups are interested more broadly in the practice of balance-billing, which features prominently in many consumer complaints regarding air

ambulance transport. However, federal action is ultimately needed to provide a workaround to the ADA to allow the states the authority to regulate the air ambulance industry. The NAIC supports S. 471 and is closely following its status in Congress.

ABOUT THE AUTHOR



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²⁵ NAIC Letter to Congress on 21st Century AIRR Act Air Ambulance Provision. July 12, 2017. www.naic.org/documents/government_relations_171217_letter_to_congress_21st_century_airr_act_air_ambulance_provision.pdf



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