Filed 8/19/13 ATG Designing Mobility v. Douglas CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ATG DESIGNING MOBILITY, INC., Plaintiff and Appellant, v. TOBY DOUGLAS, as Director of Department of Health Services, etc. et al., Defendants and Respondents.	D062076 (Super. Ct. No. 37-2010-00102239-CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

Hooper, Lundy & Bookman, Mark A. Johnson, Mark E. Reagan, Felicia Y. Sze and Katrina A. Pagonis for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Karin S. Schwartz and Charles J. Antonen, Deputy Attorneys General, for Defendants and Respondents.

ATG Designing Mobility, Inc. (ATG) appeals a judgment denying its petition for writs of administrative and traditional mandamus against the California Department of

Health Care Services and Toby Douglas, its director (together Department). The petition challenged a decision of the Department under the Department's Medi-Cal upper billing limit regulation (Cal. Code Regs., tit. 22, § 51008.1)[1] (UBL) regarding ATG's billing practices in providing custom wheelchairs to Medi-Cal beneficiaries. In general, the UBL limits the amount that providers of durable medical equipment (DME) can bill Medi-Cal to the lesser of: (1) their usual charge (i.e., price) in sales to the general public; or (2) their net purchase price for the item, plus no more than a 100 percent mark-up. (§ 51008.1(a).) The UBL defines "net purchase price" as "the *actual cost* to the provider to purchase the item from the seller, *including any* rebates, refunds, *discounts* or any other price reducing allowances, *known by the provider at the time of billing* the Medi-Cal program for the item, *that reduces the item's invoice amount*." (§ 51008.1(a)(2)(A), italics added.) The trial court denied the petition, concluding the Department correctly found that timely payment and volume purchase discounts shown on vendors' invoices to ATG were "known" discounts within the UBL's definition of the "net purchase price," even if they were subject to contingencies at the time of billing the Medi-Cal program. On appeal, ATG contends: (1) "known" discounts under the UBL should be interpreted as excluding unrealized, contingent discounts even though they are reflected on invoices or, if not, the UBL is void for vagueness; and (2) it should be allowed to bill the Department for all labor costs incurred in assembling custom wheelchairs or, if not, the UBL is void for vagueness. We conclude the Department

---

1 All statutory references are to title 22 of the California Code of Regulations unless otherwise specified.

correctly interpreted and applied the UBL in the circumstances of this case and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

ATG is a wholly-owned subsidiary of ATG Holdings, Inc., and does business with other subsidiaries across the nation under the name "ATG Rehab." ATG is an enrolled Medi-Cal supplier of DME and provides custom wheelchairs to Medi-Cal beneficiaries. ATG Rehab purchases all of the inventory ATG provides to Medi-Cal beneficiaries pursuant to contracts ATG Rehab negotiates with manufacturers and suppliers. Those contracts set forth the terms of ATG's purchases, including pricing, discounts, and timing of payments.

In 2006 and 2007, the Department audited ATG for compliance with the UBL regarding certain types of wheelchairs and parts it provided to Medi-Cal beneficiaries from September 1, 2005, through September 1, 2006. The Department concluded ATG billed the Medi-Cal program for more than the net purchase price plus the 100 percent mark-up allowed for those wheelchairs and parts under the UBL and therefore ATG had been overpaid by $27,962.09.

ATG appealed the Department's audit findings. During the evidentiary hearing before administrative law judge (ALJ) Frank Perez Tays, evidence was presented regarding the types of discounts ATG received from vendors. A primary discount was a standard, noncontingent discount ATG received when it entered into a purchase contract with a vendor and was shown on the vendor's invoice. Secondary discounts were

contingent discounts ATG received for satisfying certain timely payment terms and/or volume purchase thresholds and were also shown on the vendor's invoice. If ATG did not ultimately satisfy a particular volume threshold, the vendor had the right to reclaim that secondary discount. ATG may also have received certain tertiary discounts, apparently not shown on vendor invoices, for accelerated payment or satisfaction of other qualifying conditions. The Department apparently did not include those tertiary discounts in determining the amount ATG overbilled the Medi-Cal program under the UBL. ATG also presented evidence regarding its estimated labor cost ($286.50) for assembling a custom wheelchair.

ALJ Tays issued a proposed decision granting in part and denying in part ATG's claims. He concluded that because secondary discounts were contingent, they were not "known" at the time ATG billed the Department within the meaning of "net purchase price" under the UBL. He also concluded actual labor costs must exceed the allowable 100 percent mark-up to be billed under the UBL.

Chief ALJ Dan L. Colson then reviewed the administrative record, received supplemental briefing from the parties, and issued a final decision denying ATG's appeal in its entirety. He concluded:

> "When discounts are listed on an invoice and reduce the amount the Provider actually pays for the product, such discounts are known to the Provider and are to be used in determining the net purchase price for computation of the maximum Medi-Cal reimbursement. . . .
>
> "Pursuant to the [UBL], only that labor that is directly related to the assembly of the custom wheelchair can be included in determining the cost of labor. Labor cost for each individual custom wheelchair

> must have its own itemized documentation showing the 'actual' time spent, not an estimation. Additionally, labor costs are to be absorbed within the allowed 100 [percent] mark[-]up on the net purchase price of the wheelchair, unless those costs exceed the 100 [percent] mark[-]up, in which case the amount of the excess may also be billed. Here, the labor costs did not reach that threshold and the labor costs, even had they been properly documented, are unallowable. The overpayment that occurred may be collected by the Department."

He rejected ATG's assertion that the term "known" under the UBL should be interpreted as "certain," concluding such interpretation was not the usual and ordinary meaning of the term "known" in this context. He reasoned:

> "The regulatory language is clearly an attempt to capture all types of rebates and discounts, however denominated; anything that reduces the invoice amount. There is no indication whatsoever that discounts, especially those appearing on the invoice itself and accepted by a provider in paying only the reduced amount, should in some circumstances be considered 'unknown.' If the discount is on an invoice and reduces the amount the Provider actually pays for the product when it pays the invoice, the Provider has 'direct cognition of' the discount and it is 'known' to the Provider. Obviously, since the Provider had possession of the invoice before billing Medi-Cal, it was aware of those discounts at the time it billed the Medi-Cal program."

He found ATG "did meet the timely payment and volume conditions for the audit period and realized all its secondary discounts for that period. . . . [T]he Department was correct in determining the cost of the wheelchairs net of the discounts at issue here." Colson executed the final decision on behalf of the Department's director.

ATG filed the instant petition for writs of administrative and traditional mandamus. It sought a writ of administrative mandamus directing the Department to set aside its final decision, to issue a new decision finding ATG complied with the UBL by

including only primary discounts in calculating its net purchase price and by including its labor costs based on estimates, and to release any funds wrongfully retained from ATG. It also sought a writ of traditional mandamus invalidating the Department's interpretation and application of the UBL or, in the alternative, invalidating the UBL as unconstitutional.

The trial court issued an order denying the petition. The court stated:

> "Secondary discounts rely on timely payment of an invoice and overall sales volume. Secondary discounts can be rescinded or reduced if ATG does not ultimately pay on time or meet the required sales volume. However, during the audit period (9/1/05-9/1/06) ATG received all of the available secondary discounts. [¶] Secondary discounts are reflected on the invoices received by ATG from the suppliers. In other words, the amounts paid by ATG to its suppliers reflected these discounts, even though the discounts could ultimately be rescinded or reduced at year's end."

The court concluded: "The interpretation of 'net purchase price,' as stated within [the UBL] and adopted by [the Department] is more reasonable and controls. The combination of the terms 'actual cost' and 'known by the provider at the time of billing' demonstrates that all discounts realized by ATG at the time the Medi-Cal bill is submitted must be deducted such that Medi-Cal pays no more than the amount actually paid by ATG for the equipment. All of the discounts [were] 'known' by ATG even though there was a possibility ATG would have to repay all or a portion of the secondary discounts at year's end. The fact that a secondary discount was not one hundred percent certain does not make it an unknown discount. The intent behind the [UBL] was to 'capture' all of these discounts to prevent providers from charging more than what was actually paid by

them." The court entered a judgment for the Department. ATG timely filed a notice of appeal.

DISCUSSION

I

Standard of Review

"A trial court may issue a writ of administrative mandate if an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b).) 'Abuse of discretion is established if the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.' (*Ibid*.) The Department's decision is evaluated by the trial court under the substantial evidence test. [Citation.] Our task [on appeal] is to determine whether the Department's findings, not the trial court's findings, are supported by substantial evidence. [Citation.] [¶] [The petitioner] bears the burden of pleading and proving facts upon which its petition is based [citation] and of affirmatively demonstrating trial court error [citation]." (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1669.) In reviewing an agency's decision, we must determine whether it "applied the proper legal standard in evaluating the evidence before it. [Citation.] The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations],

the ultimate resolution of such legal questions rests with the courts." (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310.)

" 'Section 1085 of the Code of Civil Procedure authorizes a trial court to issue a writ of [traditional] mandate to compel an act which the law specifically requires.' " (*Yoo v. Shewry* (2010) 186 Cal.App.4th 131, 144.) Pursuant to that statutory authority, a court may invalidate a governmental agency's regulation or other quasi-legislative act that is arbitrary, capricious, or without reasonable or rational basis. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 560-562; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168-169.) In a traditional mandamus proceeding, the trial court determines "whether the agency's action was arbitrary, capricious, or without evidentiary support, and/or whether it failed to conform to the law. The trial court may not substitute its judgment for that of the agency or force the agency to exercise its discretion in a certain way. [Citation.] [¶] The reviewing court exercises independent judgment in determining whether the agency action was 'consistent with applicable law.' [Citation.] Where the issue is one of statutory [or regulatory] interpretation, the question is one of law for the courts, which are the ' "ultimate arbiters" ' of statutory [or regulatory] construction. [Citations.] Since we apply the same standard as the trial court, its determination is not binding on us." (*Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist.* (2008) 168 Cal.App.4th 535, 542-543.)

II

UBL Generally

In 2003, the Department proposed adoption of the UBL to prevent and curtail provider fraud and abuse in the provision of medical supplies to Medi-Cal beneficiaries. The Department stated one type of such abuse is "when providers . . . bill in amounts that represent more than a 100 percent mark-up over their net purchase [price] for the products." The initial draft of the UBL proposed by the Department generally would have limited providers to billing the Medi-Cal program for a maximum of their net purchase price plus up to a 100 percent mark-up. The Department explained "[t]he phrase 'net purchase price' is understood by the regulated community to be the amount actually paid for an item after all discounts or rebates have been applied." Public comments on the proposed UBL expressed concern regarding the treatment of discounts in calculating the net purchase price and the exclusion of labor costs incurred in customizing wheelchairs. In response, the Department proposed a revised draft of the UBL, which would provide in pertinent part:

> "(a) Bills submitted pursuant to Section 51008 for durable medical equipment . . . shall not exceed an amount that is the lesser of:
>
> "(1) The usual charges made to the general public, or
>
> "(2) The *net purchase price* of the item, which shall be documented in the provider's books and records, *plus no more than a 100 percent mark-up*. Documentation shall include, but not be limited to, evidence of purchase such as invoices or receipts.
>
> "(A) *Net purchase price is defined as the actual cost to the provider to purchase the item from the seller, including any rebates, refunds,*

> *discounts or any other price reducing allowances, known by the provider at the time of billing the Medi-Cal program for the item, that reduce the item's invoice amount*.
>
> "(B) The net purchase price shall reflect price reductions guaranteed by any contract to be applied to the item(s) billed to the Medi-Cal program.
>
> "(C) The net purchase price shall not include provider costs associated with late payment penalties, interest, inventory costs, taxes, or labor.
>
> "(D) Where a custom wheelchair as defined in (d) is subject to the provisions of this regulation, *the provider may bill the provider's cost of labor to assemble the custom wheelchair which is above the 100 percent mark-up, only when the inclusion of the actual labor cost would result in a bill that exceeds the net purchase price of the entire custom wheelchair plus a 100 percent mark-up*. Regardless of any codes used to bill the wheelchair base or frame of a custom wheelchair, where inclusion of the provider's actual cost for assembly of the custom wheelchair exceeds the amount of the allowed 100 percent mark-up, *the provider shall be allowed to add to the bill* submitted under [section] 51008 *that actual cost of labor that exceeds the 100 percent mark-up* to the claim line that would otherwise have been used to bill only the custom wheelchair's base or frame.
>
> "(E) If the provider's actual cost of labor is included in the bill, the actual time spent assembling the entire custom wheelchair shall be itemized by hours or fractions thereof and the per hour cost of labor, and each shall be documented in the provider's books and records." (Italics added.)

During a second comment period, providers expressed concern regarding how rebates and other customary discounts would be treated in determining an item's "net purchase price." ATG's representative commented:

> "It is my understanding that the revised regulations are designed to exclude discounts unknown to the provider at the time of billing in the definition of net acquisition cost. Where a discount is dependant

> [sic] on timely payment or volume of purchase, the state does not influence the discount. Due to the time it takes for payment by Medi[-]Cal, a supplier taking advantage of a timely payment discount from a manufacturer or wholesaler is, in effect, giving the state an interest free loan. Similarly, performance based discounts are also driven by aggregate provider behavior assessed over time -- not as a function of individual sales."

He proposed the revised UBL be modified to add the following provision: "After the fact discounts [dependent] on time of payment to the seller and/or aggregate volume of purchase from the seller are excluded from net purchase price."

Also, a representative for a medical equipment trade organization commented:

> "During extensive negotiations with the Department, we've been informed that two forms of rebates, discounts, or allowances would be considered by the Department <u>not</u> to be included in the definition of 'net purchase price.' This would be the case as long as the provider did not know that rebate, discount, or allowance would be granted at the time of billing the Medi-Cal Program. . . .
>
> "The first practice involves growth or volume discounts extended to a provider by a seller based upon a provider's sales performance, subsequent to billing the Medi-Cal Program, usually determined on a quarterly, semi-annual, or annual basis."

He proposed the revised UBL be modified to add the following provision: "The net purchase price . . . shall not include (1) growth or volume discounts extended to a provider by a seller based upon a provider's sales performance subsequent to the provider's billings to the Medi-Cal Program that are determined on a quarterly, semi-annual, or annual basis . . . ."

The Department submitted its revised UBL for review by the Office of Administrative Law (OAL) without making the modifications suggested by provider

representatives. In its final statement of reasons, the Department confirmed the UBL's 100 percent maximum billing mark-up was expected to reflect volume or other customary discounts. The Department also summarized the modifications to the revised UBL proposed by providers' representatives and its responses thereto, as follows:

> "**COMMENT #2:** Section 51008.1 [(a)](2)(A) should be amended to exclude 'after the fact discounts' dependent on time of payment to the seller and/or aggregate volume of purchase from the seller from the net purchase price.
>
> "**RESPONSE:** Section 51008.1(a)(2)(A) already excluded discounts not known to the provider at the time of billing. [¶] . . . [¶]
>
> "**COMMENT #6:** Amend Section 51008.1(a)(2)(C) to exclude from the net purchase price (1) growth or volume discounts extended to a provider by a seller based upon a provider's sales performance subsequent to the provider's billings to the Medi-Cal Program that are determined on a quarterly, semi-annual, or annual basis . . . .
>
> "**RESPONSE:** Section 51008.1(a)(2)(A) already excludes after the fact discounts."

On April 26, 2004, the OAL filed a certificate of compliance approving the UBL.

III

Interpretation of "Net Purchase Price" under the UBL

ATG contends the Department erred by concluding "known" discounts in the UBL's definition of "net purchase price" includes unrealized, contingent discounts reflected on invoices. It alternatively contends that even if the Department correctly interpreted that regulatory language, the UBL is void for vagueness.[2]

---

[2] On December 12, 2012, ATG filed a motion for judicial notice of a letter dated May 21, 2012, from Mark Hawkins, owner of Western Rehab, to the Department's chief

A

We interpret the UBL de novo, or independently, as a question of law. "The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with the courts." (*Carmona v. Division of Industrial Safety*, *supra*, 13 Cal.3d at p. 310.)

ATG asserts, however, that we should not give any weight to the Department's interpretation of the UBL. In support of its position, it cites *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), in which the appellant challenged an agency's interpretation of a statute. (*Id*. at p. 5.) *Yamaha* concluded:

> "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha*, *supra*, 19 Cal.4th at p. 7.)

The court explained: "Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional

---

of the medical review branch of audits and investigations. Because that letter is irrelevant to the issues decided in this opinion, we deny ATG's request for judicial notice.

domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation (whether in a regulation or less formally, as in the case of the [agency's] tax annotations), that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Id*. at p. 11.) Accordingly, *Yamaha* set forth the following principles for determining the extent of judicial deference, if any, to an agency's interpretation of a statute:

> "Whether judicial deference to any agency's interpretation is appropriate and, if so, its extent--the 'weight' it should be given--is thus fundamentally *situational*. A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command. Professor Michael Asimow, an administrative law advisor to the California Law Revision Commission, has identified two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: Those 'indicating that the agency has a comparative interpretive advantage over the courts,' and those 'indicating that the interpretation in question is probably correct.' [Citations.]
>
> "In the first category are factors that 'assume the agency has expertise and technical knowledge, especially where the text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. *A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately*

> *familiar with regulations it authored and sensitive to the practical implications of one interpretation over another*.' [Citation.] The second group of factors in the Asimow classification--those suggesting the agency's interpretation is likely to be correct--includes indications of careful consideration by senior agency officials . . . , evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing' [citation] ('[a] vacillating position . . . is entitled to no deference' [citation]), and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted." (*Yamaha, supra*, 19 Cal.4th at pp. 12-13, second italics added.)

ATG argues, applying the above *Yamaha* principles, the Department's interpretation of the UBL is entitled to no judicial deference whatsoever. In contrast, the Department argues its interpretation of the UBL was a quasi-legislative act that deserves substantial deference by the courts. We disagree with both parties' positions and conclude the Department's interpretation of the UBL, as a regulation it adopted and enforces, is entitled to *some deference* in our process of independently determining the legal question of the meaning of a "known" discount in the circumstances of this case. We disagree with the Department's assertion that its interpretation of the UBL was a quasi-legislative act entitled to substantial deference. Although we presume the Department's adoption of the UBL was, in itself, a quasi-legislative act (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 302), ATG is not challenging the Department's adoption of the UBL, but rather its subsequent *interpretation* of that regulation. Therefore, the Department's interpretation of the UBL in this case was not a quasi-legislative act to which we give substantial deference.

On the other hand, we also disagree with ATG's assertion that the Department's interpretation of the UBL is entitled to no deference whatsoever. Applying the *Yamaha* factors to this case, we conclude the Department's interpretation of the UBL is entitled to *some*, albeit limited, judicial deference. Although the Department's interpretation of the term "known" under the UBL may not, as ATG asserts, have been consistent since its adoption, other *Yamaha* factors weigh in favor of giving some deference to its interpretation in this case.[3] Furthermore, although the Department's interpretation of the UBL in this case occurred about three years after its adoption, the lack of an interpretation contemporaneous with its adoption of the UBL does not preclude giving

---

[3] ATG argues the Department's responses, quoted above, to the two comments from provider representatives to the Department's revised draft of the UBL show it took the opposite position regarding the term "known" from its current position. Our reading of the Department's responses to those comments in adopting the UBL does not show it took a position contrary to its current position. Rather, the Department's responses could reasonably be construed as stating that unknown, "after-the-fact" discounts for volume purchases are already excluded from the definition of "net purchase price" because they are not "known" at the time of the purchase. Alternatively stated, the Department's response could be construed as interpreting "after-the-fact" discounts as those not reflected on a vendor's invoice and therefore not "known." Although the Department's responses could have been more clearly stated, we do not conclude, as ATG asserts, the Department's responses clearly stated that all contingent volume purchase discounts are not "known" and therefore are excluded from the calculation of "net purchase price" under the UBL. At most, the Department's responses were ambiguous and do not preclude us from giving some deference to its interpretation of the term "known" in this case. Likewise, to the extent we can consider the transcript of the deposition testimony of Stanley Rosenstein, the Department's former chief deputy director of health programs (first submitted by ATG in support of the instant petition), any statements he made regarding his recollection of discussions with DME providers at the time the UBL was adopted and the reasons for revising the UBL to include the term "known" do not persuade us the Department's current interpretation of the UBL should not be given any deference.

some deference to its interpretation in this case. A three-year period after adoption of a regulation is not unduly long for an interpretation of the regulation to have some relevance in its determining its regulatory intent.

Most importantly, we conclude the Department has a comparative interpretive advantage over the courts in interpreting the UBL. (*Yamaha*, *supra*, 19 Cal.4th at p. 12.) The Department has expertise and technical knowledge in adopting, interpreting, and enforcing regulations pertaining to the Medi-Cal program and in taking measures to prevent Medi-Cal fraud and abuse. (See, e.g., Welf. & Inst. Code, § 14043.75, subd. (a) ["The director [of the Department] may . . . by regulation, adopt . . . additional measures to prevent or curtail [Medi-Cal] fraud and abuse."].) In the course of auditing Medi-Cal providers for proper billing practices, the Department presumably has gained special expertise in examining invoices and other accounting or billing paperwork for provider compliance with Medi-Cal rules and regulations. Therefore, it has special expertise in interpreting and applying regulations such as the UBL. Furthermore, as *Yamaha* noted: " '*A court is more likely to defer to an agency's interpretation of its own regulation* than to its interpretation of a statute, *since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another*.' " (*Yamaha*, *supra*, 19 Cal.4th at p. 12, italics added.) Because the Department adopted the UBL, we presume it is intimately familiar with it and is sensitive to the practical interpretations of one interpretation over another. (*Ibid*.) Therefore, weighing all of the *Yamaha* factors, we conclude the Department's interpretation of the

UBL in this case is entitled to *some* judicial deference in our independent determination of the meaning of the term "known" under the UBL.

B

Like interpretation of statutes, we independently interpret the meaning of an agency rule or regulation (e.g., the UBL) and, in so doing, apply the same rules as in interpreting a statute. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 148; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *In re Clarissa H.* (2003) 105 Cal.App.4th 120, 125; *Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1214 [rules for statutory interpretation also apply to interpretation of regulations].) "When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.) "Words used in a statute . . . should be given the meaning they bear in ordinary use." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "If the language is clear and unambiguous, the plain meaning of the statute governs, and that meaning must be applied according to its terms." (*Sneed v. Saenz* (2004) 120 Cal.App.4th 1220, 1235.) "When a statute is ambiguous, . . . we typically consider evidence of the Legislature's intent beyond the words of the statute [citation] and look both to the legislative history of the statute and to the wider historical circumstances of its enactment [citation]." (*Freedom Newspapers, Inc.*, at p. 828.) "In construing a statute to comport with the Legislature's

apparent intent, we strive to promote rather than defeat the general purpose of the statute and avoid an interpretation that would lead to absurd consequences." (*Sneed*, at p. 1235.) "[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren*, at p. 735.)

C

We conclude the term "known," as used in the UBL's definition of "net purchase price," includes timely payment and volume discounts shown on vendors' invoices to Medi-Cal providers, whether or not any contingencies or conditions for those secondary discounts have been satisfied at the time the providers bill the Medi-Cal program. The UBL defines "net purchase price" as "the *actual cost* to the provider to purchase the item from the seller, *including any* rebates, refunds, *discounts* or any other price reducing allowances, *known by the provider at the time of billing* the Medi-Cal program for the item, *that reduces the item's invoice amount*." (§ 51008.1(a)(2)(A), italics added.) Based on the plain, ordinary meaning of the word "known," a discount under the UBL is "known" if it is shown or otherwise reflected on a vendor's invoice, thereby apprising the Medi-Cal provider of its existence. Any contingency or condition for that discount presumably will also be shown on the invoice or otherwise known by the provider so that a contingent or conditional secondary discount also will be "known" under the UBL. The fact a contingency or condition may subsequently not be satisfied does not show that discount is "unknown." At the time the provider bills the Medi-Cal program, it knows, or is aware (whether actually or constructively), of the contingent or conditional discount

and presumably has paid or will pay the vendor that discounted purchase price. At the time the provider bills the Medi-Cal program, the secondary discount acts to reduce the amount the provider paid or pays to the vendor (i.e., the discount "reduces the item's invoice amount"). (§ 51008.1(a)(2)(A).) Any possibility that a contingency or condition may subsequently not be satisfied and a vendor may seek to recoup that discount is speculation and does not show the contingent or conditional discount was unknown at the time the provider billed the Medi-Cal program.

We are not persuaded by ATG's assertion that the term "known" under the UBL must be interpreted as meaning "certain" (i.e., a noncontingent or unconditional discount certain to apply). There is nothing in the language of the UBL or the UBL's underlying statutory intent supporting that interpretation. Furthermore, we are not persuaded by ATG's citation to one dictionary definition of the verb "know" as meaning to grasp in the mind with clarity or certainty *or* to regard as true beyond doubt. First, that definition is of the verb "know" and not its past participle "known." Second, the plain and ordinary meaning of the word "known" is something of which a person is cognizant or aware.[4] A person can be aware, or "know," of a fact even though that fact may be subject to some contingency or condition subsequent. Under the UBL, a Medi-Cal provider can be aware, or "know," of a contingent, secondary discount shown on an invoice even though that contingency may not ultimately be satisfied. In fact, the likelihood that

---

4 For example, one dictionary's definition of "know" is "to be cognizant or aware of," supporting our interpretation of the word "known" under the UBL. (The Random House Dictionary of the English Language (1987 2d ed., unabridged), p. 1064.)

contingencies for a timely payment or volume purchase discount will not be satisfied for a Medi-Cal provider apparently is quite low. During the audit period in this case, ATG apparently received all of the secondary discounts shown on vendor invoices and none of them were subsequently recouped by vendors. Therefore, a secondary discount is "known" to a Medi-Cal provider (e.g., ATG) if it is shown on a vendor's invoice and reduces the invoice amount the provider pays for an item. (§ 51008.1(a)(2)(A).)

Assuming arguendo the term "known" is ambiguous and reasonably susceptible to the alternative meanings suggested by the Department and ATG, we nevertheless conclude that ambiguity must be resolved in favor of the Department's interpretation. The UBL provides the "net purchase price" is the "actual cost to the provider," which includes any discounts known by the provider at the time of billing the Medi-Cal program that reduce the item's invoice amount. (§ 51008.1(a)(2)(A).) In adopting the UBL, the Department presumably intended to reduce Medi-Cal fraud or abuse. To accomplish that goal, it adopted the UBL, which generally limits the amounts Medi-Cal providers can charge the program to their *actual cost* plus a 100 percent mark-up based on that actual cost. (§ 51008(a)(2)(A).) In so doing, the Department could reasonably conclude, based on its extensive experience in auditing providers and special expertise in enforcing Medi-Cal regulations, almost all providers that receive secondary discounts (e.g., timely payment and volume purchase discounts) retain them by satisfaction of any contingencies and therefore do not have to repay them to vendors. Therefore, the Department could reasonably conclude a provider's "actual cost" is the price shown on the invoice after

subtracting all discounts (whether contingent or not) shown on the invoice that reduce the item's price. The end result is that the Medi-Cal program generally will pay a DME provider no more than the provider actually paid for an item (i.e., its actual cost) plus a 100 percent mark-up.

If the UBL were interpreted as ATG suggests, medical providers could bill the Medi-Cal program without accounting for secondary discounts they receive and retain. In that event, the Medi-Cal program would not only pay an amount greater than the provider actually paid for an item, but it would, in effect, pay the provider that secondary discount twice because the provider's additional 100 percent mark-up is based on the provider's cost for an item. To prevent Medi-Cal fraud and abuse, the Department reasonably adopted the UBL and interpreted it as including "known" secondary discounts (e.g., timely payment and volume purchase discounts) shown on the invoice but possibly subject to contingencies that may not be satisfied in the future.

Furthermore, to the extent the term "known" is ambiguous, we conclude that had the Department intended to exclude secondary or contingent discounts from the UBL's definition of "net purchase price," it would have expressly so stated in its definition of that term. For example, had the Department so intended, it could have defined "net purchase price" as the actual cost to the provider, including any *noncontingent* discounts or other price-reducing allowances, known by the provider at the time of billing the

Medi-Cal program for the item, that reduce the item's invoice amount.[5] Because the Department did not include any limitation in defining "net purchase price" under the UBL, we conclude it intended to include all discounts shown on an invoice, whether contingent or not.[6]

Independently applying the rules for interpretation of regulations, we conclude the term "known," as used in the UBL's definition of "net purchase price," includes timely payment and volume purchase discounts shown on vendors' invoices to Medi-Cal providers, whether or not any contingencies or conditions for those secondary discounts have been satisfied at the time the providers bill the Medi-Cal program. Additional support for our conclusion is provided by the Department's interpretation of the UBL, to which we give some deference. As the adopting agency with special expertise in the administration and enforcement of the Medi-Cal program, the Department's interpretation, as discussed above, is entitled to some deference by the courts. (*Yamaha*, *supra*, 19 Cal.4th at p. 12 [courts are more likely to defer to an agency's interpretation of its own regulation because the agency is likely more familiar with those regulations and the practical implications of one interpretation over another].) Therefore, based on our

---

5 The Department apparently concedes that "after-the-fact" discounts, rebates, or other price-reducing allowances *not* shown on an invoice or other provider paperwork are tertiary discounts excluded from the UBL's definition of "net purchase price."

6 To the extent we have misinterpreted the Department's intent in adopting the UBL, the Department can correct any error we have made in interpreting the UBL by adopting an amendment expressly providing for exclusion of contingent discounts shown on an invoice.

independent interpretation of the UBL and some deference we give to the Department's interpretation, we conclude the Department correctly interpreted the term "known," as used in the UBL, to include discounts shown on invoices ATG received from vendors that reduced an item's invoice amount. The trial court correctly reached the same conclusion.

D

Because we conclude the term "known" is not ambiguous and includes discounts shown on vendor invoices that reduce an item's invoice amount, the UBL is not unconstitutionally vague. Therefore, we reject ATG's assertion that the UBL violates its constitutional right to due process of law based on its failure to give fair warning of prohibited or required conduct.

IV

Labor Costs

ATG contends it should be able to bill the Department for all labor costs incurred in assembling custom wheelchairs or, if it is not, the UBL is void for vagueness. The UBL expressly provides that providers of custom wheelchairs may bill the Medi-Cal program for labor costs for assembling wheelchairs only to the extent their actual labor costs exceed the 100 percent mark-up otherwise allowed under the UBL. (§ 51008.1(A)(2)(D).) The UBL states:

> "(D) Where a custom wheelchair as defined in (d) is subject to the provisions of this regulation, *the provider may bill the provider's cost of labor to assemble the custom wheelchair which is above the 100 percent mark-up, only when the inclusion of the actual labor*

> *cost would result in a bill that exceeds the net purchase price of the entire custom wheelchair plus a 100 percent mark-up*. Regardless of any codes used to bill the wheelchair base or frame of a custom wheelchair, where inclusion of the provider's actual cost for assembly of the custom wheelchair exceeds the amount of the allowed 100 percent mark-up, *the provider shall be allowed to add to the bill* submitted under [section] 51008 *that actual cost of labor that exceeds the 100 percent mark-up* to the claim line that would otherwise have been used to bill only the custom wheelchair's base or frame.
>
> "(E) If the provider's actual cost of labor is included in the bill, the actual time spent assembling the entire custom wheelchair shall be itemized by hours or fractions thereof and the per hour cost of labor, and each shall be documented in the provider's books and records." (§ 51008.1(a)(2)(D), (E), italics added.)

ATG argues the Department's interpretation of that labor cost provision is incorrect because the labor costs involved in assembling a wheelchair will never exceed the 100 percent mark-up amount. However, in so arguing, ATG does not cite any evidence in the administrative record that persuades us to adopt its position. It merely makes a conclusory argument that labor costs will never exceed that amount. In so doing, ATG has not carried its burden on appeal.

In any event, we conclude the Department has correctly interpreted the UBL's labor cost provisions for custom wheelchairs (i.e., § 51008.1(a)(2)(D)). There is no other reasonable interpretation based on the plain and ordinary meaning of the language of that regulation. The UBL clearly provides that providers of custom wheelchairs may bill the Medi-Cal program only for those labor costs actually incurred in assembling wheelchairs to the extent those costs exceed the 100 percent mark-up otherwise allowed. (§ 51008.1(a)(2)(D), (E).) We conclude the Department and trial court properly rejected

ATG's argument that the UBL must be interpreted as allowing providers to bill the Medi-Cal program for all costs of assembling custom wheelchairs in addition to billing it for the wheelchair's net purchase price plus a 100 percent mark-up.

Finally, we likewise are not persuaded by ATG's assertion that the labor cost provision of the UBL violated its right to due process of law because it is unconstitutionally vague. Providers of custom wheelchairs are not required to guess as to the meaning of the UBL's labor cost provisions. Those provisions are clearly stated and therefore give providers fair warning regarding compliance with those provisions.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.