Contracts speak when PPOs are silent

Thomas L. Hudson considers the implications for international travel insurers operating within the US following the news of a court case that will soon be heard in Florida.

In the news report on this month’s front page, Facing the music in Florida, the Tenet Healthcare case is centre stage. The case pits four Florida hospitals against a large Canadian insurance company. The case involves snowbirds, a travel insurer, an assistance company, claims management, a Preferred Provider Organisation (PPO), and discounted medical bills.

Delray Medical Center, Inc., Palm Beach Gardens Community Hospital, Inc., St. Mary’s, Inc. and West Boca Medical Center, Inc. v Co-Operators Life Insurance Company, TIC Travel Insurance Coordinators, Ltd and Selectcare Worldwide Corp.

that the hospitals claim should have been paid in full.

What are the liability implications for travel insurers, assistance companies, and third-party administrators? Could you find your company in the dock? The answer is an emphatic yes!

Held to account

I will not dwell on the decision of the court to use a long arm statute to subject the Canadian companies to jurisdiction in Florida. This topic is beyond the scope of this analysis. In general, long arm cases depend on the contacts or ties that the defendants have with the foreign jurisdiction. Suffice to say that the court found a sufficient level of activity in the business being conducted in Florida by the Canadian companies.

While they do not maintain offices in Florida, the court found that Florida was a covered territory in the defendants’ travel policy. Whether the level of activity is sufficient may turn on the facts of each case; however, US courts are increasingly willing to hold in foreign defendants in this era of globalisation.

My first impression after reading the initial flurry of pleadings was that the Tenet Healthcare case was about a silent PPO transaction. But the story is more complicated because it involves the contractual relationships of the parties as much as the body of law created to deal with silent PPO abuses. Regardless, there are lessons to be learned.

Providers of healthcare services sometimes enter into discount arrangements with payers. PPOs negotiate discount arrangements with hospitals in consideration of steering patients to the hospital and perhaps quick access to a discount, everybody in the boat may be liable.
payment of medical bills. A "silent PPO" is a network of providers, but the discount it provides may be without the knowledge of the hospital. If a patient suffers from an adverse event and later develops complications, the hospital may not be aware that the patient really benefited from the premium Mrs Fleming paid. The hospital did not have any control over the sale of travel insurance and that each defendant appeared that all of the defendants were involved in the claim. Mrs Fleming had fallen in Greece and fractured her hip. The other defendants, TIC and SelectCare, are affiliates of Co-Operators. TIC holds the insurance company (Co-Operators), the claims TPA (SelectCare), and the claims TPA (SelectCare), and the contracted PPO/re-pricer granting PPO access (Olympus). If the hospitals had accepted the discount if the Co-Operators' patients had presented ID cards, the case is not about a silent PPO: it concerns the terms of a contract and whether those terms were followed. In his article (referenced above), James Marks cited an American Medical Association estimate that silent PPOs cost providers between US$750 million and $3 billion annually in lost revenues. Any reasonable fraction of this huge amount would attract the attention of US legislators, and that is what began happening in 2002 with a New York law aimed at silent PPOs. Twenty-seven states have followed with legislation targeting silent PPOs. California prevents the improper selling, leasing, or transferring of a healthcare provider's contract to discount the cost of its services. Florida prohibits the use of "silent PPOs" unless the contract with the hospital expressly authorizes such arrangements. Minnesota refers to silent PPOs as "network shadow contracting" and requires a provider's affirmative consent. North Carolina's law characterizes silent PPOs as an unfair trade practice. Texas prohibits silent PPOs as a misrepresentation of discounts by insurers to hospitals and physicians. These laws are all designed to prevent the effect of unwarranted provider discounts. It will be interesting to follow Tenet Healthcare and report on the result. In the meantime, remember how important your contracts are. By law, they are permitted only to speak for themselves, so draft them with clarity. In a dispute, listen to what they say. Of course, if it's not a question of contractual rights and duties, a stealth discounting may have occurred, and there will be silence until a provider finds out.

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party administrators (TPA) to piggyback the PPO with the contract. Contracted PPOs sometimes 'rent' their PPO relationships to payers, and payers can go 'PPO shopping' and select a PPO without the knowledge of the hospitals. A contract for improperly claiming the discount? Did PPO B review the contract between the hospital and PPO A to determine if it could take the discount? These are the kinds of questions that need to be asked, answered, and reflected in the contracts between the parties. In Tenet Healthcare, the ultimate decision of the court will be based on the contracts. Did what the contract said about the hospitals and Olympus provide? If the hospitals would have accepted the discount if the Co-Operators' patients had presented ID cards, the case is not about a silent PPO: it concerns the terms of a contract and whether those terms were followed. In his article (referenced above), James Marks cited an American Medical Association estimate that silent PPOs cost providers between US$750 million and $3 billion annually in lost revenues. Any reasonable fraction of this huge amount would attract the attention of US legislators, and that is what began happening in 2002 with a New York law aimed at silent PPOs. Twenty-seven states have followed with legislation targeting silent PPOs. California prevents the improper selling, leasing, or transferring of a healthcare provider’s contract to discount the cost of its services. Florida prohibits the use of ‘silent PPOs’ unless the contract with the hospital expressly authorizes such arrangements. Minnesota refers to silent PPOs as ‘network shadow contracting’ and requires a provider’s affirmative consent. North Carolina’s law characterizes silent PPOs as an unfair trade practice. Texas prohibits silent PPOs as a misrepresented misrepresentation of discounts by insurers to hospitals and physicians. These laws are all designed to prevent the effect of unwarranted provider discounts. It will be interesting to follow Tenet Healthcare and report on the result. In the meantime, remember how important your contracts are. By law, they are permitted only to speak for themselves, so draft them with clarity. In a dispute, listen to what they say. Of course, if it’s not a question of contractual rights and duties, a stealth discounting may have occurred, and there will be silence until a provider finds out.

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A case in point

Let’s assume that a patient is treated in a hospital that has contracted with PPO A. The patient is covered by travel insurance, and as of the case is managed by the insurer’s assistance company (and there may be a managing general agent that sells the policy on behalf of an insurer). Through the assistance company and its PPO B, the insurer claims the hospital’s discount when PPO B rents access from PPO A. In this example, PPO B is a silent PPO. When it learns that PPO B was not entitled to the discount, the hospital sues. Who is liable? Let’s start with the travel insurer. Does it have a contract with the assistance company that indemnifies it if the assistance company uses a PPO that is not authorised to claim a discount from the provider? The contract may be with a claims management company or a TPA. And is PPO B liable for improperly claiming the discount? Did PPO B review the contract between the hospital and PPO A to determine if it could take the discount? These are the kinds of questions that need to be asked, answered, and reflected in the contracts between the parties. In Tenet Healthcare, the ultimate decision of the court will be based on the contracts. Did what the contract said about the hospitals and Olympus provide? If the hospitals would have accepted the discount if the Co-Operators’ patients had presented ID cards, the case is not about a silent PPO: it concerns the terms of a contract and whether those terms were followed. In his article (referenced above), James Marks cited an American Medical Association estimate that silent PPOs cost providers between US$750 million and $3 billion annually in lost revenues. Any reasonable fraction of this huge amount would attract the attention of US legislators, and that is what began happening in 2002 with a New York law aimed at silent PPOs. Twenty-seven states have followed with legislation targeting silent PPOs. California prevents the improper selling, leasing, or transferring of a healthcare provider’s contract to discount the cost of its services. Florida prohibits the use of ‘silent PPOs’ unless the contract with the hospital expressly authorizes such arrangements. Minnesota refers to silent PPOs as ‘network shadow contracting’ and requires a provider’s affirmative consent. North Carolina’s law characterizes silent PPOs as an unfair trade practice. Texas prohibits silent PPOs as a misrepresented misrepresentation of discounts by insurers to hospitals and physicians. These laws are all designed to prevent the effect of unwarranted provider discounts. It will be interesting to follow Tenet Healthcare and report on the result. In the meantime, remember how important your contracts are. By law, they are permitted only to speak for themselves, so draft them with clarity. In a dispute, listen to what they say. Of course, if it’s not a question of contractual rights and duties, a stealth discounting may have occurred, and there will be silence until a provider finds out.

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