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[1] 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 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 for steering patients to the hospital and perhaps quick

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1 Delray Medical Center, Inc., Palm Beach Gardens Community Hospital, Inc., Tenet 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.

payment of medical bills. A 'silent PPO' is a network of providers, but the discount it provides may be without the knowledge or contractual consent of a provider. Whether the discount is taken illegally may depend on the relationship between the payer and the provider. In some cases, the contract between the PPO and the hospital is poorly drafted, and ambiguity arguably permits other PPOs, assistance companies, or third

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party administrators (TPAs) 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 treating hospital.

In a series of articles[2] about cost containment published over the years in the *International Travel Insurance Journal* (*ITIJ*), Milan Korcok has explained the dynamics of silent PPOs – or what Chicago attorney James W. Marks has termed 'the stealth discounting of provider reimbursement'.[3] As Milan has explained, foreign insurance companies feel that US hospitals over-treat and/or over-charge: "This has exacerbated an antagonistic environment in which travel insurers and their cost containment representatives sometimes feel justified in using whatever means possible (short of larceny) to get the biggest discount..."[4] This complaint has been the constant refrain of International Travel Insurance Conference cost containment panels and audience participation. Regardless of the motives, stealth discounting exposes insurers and all related parties to a hospital suit to pay medical bills in full.

The Tenet Healthcare case is the most recent example of hospitals defending themselves against PPO discounts they deem to be illegal. In the Tenet Healthcare case, the hospitals allege that Co-Operators Life, a large Canadian insurance company, used a PPO discount that it was not entitled to use. While the hospitals have discount agreements with PPOs, they allege that Co-Operators had no right to a discount because it failed to claim the discount when its insureds did not present an identification card at the time of admission. The other defendants, TIC Travel Insurance Coordinators, Ltd. and SelectCare Worldwide Corp., are affiliates of Co-Operators. TIC sells travel insurance, and SelectCare is an assistance company that manages claims and provides cost containment. Together, the three Co-Operators' defendants answered that they did have the right to the discount, but they brought in Olympus Managed Health Care, Inc. as a third-party defendant. In a 2007 agreement between Olympus and TIC, Olympus agreed to re-price claims for Co-Operators for a fee of ten per cent of the savings. It is not clear whether the Tenet hospitals were in the Olympus PPO network. In their third-party claim, the Co-Operators defendants are saying that if they are liable for not using the Olympus PPO correctly, Olympus may be liable to them.

The liability boat in Tenet Healthcare is full up. It holds the insurance company (Co-Operators), the travel insurance seller (TIC), the assistance company (SelectCare), the claims TPA (SelectCare), and the contracted PPO/re-pricer granting PPO access (Olympus). If the contract between the hospitals and Olympus did not permit the PPO to rent access to a discount, everybody in the boat may be liable. If the contracted PPO knew or should have known that it could not grant Co-Operators access to the discount arrangement, the ultimate liability may reside with Olympus. However, analysing the relative liability of the parties' defendant is a guessing game from this distance, especially with the litigation still in the pleading and discovery stage. For example, Olympus has answered in its defense that Co-Operators either did not submit the claims to Olympus or simply took the discount without paying Olympus. There is also a dispute over which party had the responsibility for notifying the hospital that a discount would be claimed. A trial date has been set for August.

Language barriers

Based on the pleadings in Tenet Healthcare, I think that all parties need to review their contractual relationships because therein lies the danger. Clearly, based on what we know, this pending case is about contractual terms as much as stealth discounting. As protection against silent PPOs, the provider needs to negotiate specific language in its PPO contract to prevent renting and PPO shopping. Clearly define who the payer is. If ID cards are used, require that they be presented at the time treatment is requested. The consideration – either steerage or quick pay – should be clearly described. A complete payer list should be attached to the contract and require notice of changes. As stated in *ITIJ*'s news article, the Co-Operators' attorneys will be focusing on what the hospitals agreed to accept in their contract with Olympus.

Insurers, assistance companies, and TPAs are in a similar position: they need to be aware of their contractual relationships. In Fleming v. American Automobile Association[5], the court had multiple defendants before it. Mrs Fleming had fallen in Greece and fractured her hip. She had hip replacement surgery in Athens, but during her return flight to the US, her hip popped out. Mrs Fleming sued her travel insurer, the policy administrator, the assistance company, and the tour provider to recover for injury from alleged faulty medical evacuation. The court held all defendants jointly liable because it could not discern who was responsible for what from its reading of the contracts between the parties. To the court, it appeared that all of the defendants were involved in the sale of travel insurance and that each defendant profited from the premium Mrs Fleming paid.

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 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. What did the contract between 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 cites 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[6] 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 authorises such arrangements. Minnesota refers to silent PPOs as 'network shadow contracting' and requires a provider's affirmative consent. North Carolina's law characterises 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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If you would like to make a comment about the use of PPOs in the US health-care system, please get in touch with the *ITIJ* editorial team: editorial@itij.co.uk

2 Silent PPOs – threat or illusion?, Milan Korcok (ITIJ Cost Containment Supp; Sept. 2006); Cost Containment – achievable, but at what cost?, Milan Korcok (2nd ITIJ Cost Containment Supp., Nov. 2007); and Not so silent PPOs turn too profitable, Milan Korcok (2nd ITIJ Cost Containment Supp., Nov. 2007).

3 Silent PPOs: The Stealth Discounting of Provider Reimbursement, James W. Marks (Greenbranch Publishing; 2005).

4 Cost Containment – achievable, but at what cost?, supra.

5 Fleming v. American Automobile Association, 764 S.2d 274 (2000).

6 California, Connecticut, Colorado, Florida, Georgia (case law), Idaho, Indiana, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia and Wisconsin.