

Who's afraid of silent PPO's?



Who is afraid of getting caught taking an improper discount? In this follow-up article for *ITIJ*, contributor **Tom Hudson** tries to answer this question and several others

In my recent article for *ITIJ*, *Contracts Speak when PPOs are Silent* (July 2012; Issue 138), I revisited a topic that I first explored for the ITIC held in Prague in 2006. I participated in a cost containment panel at that conference – paying as little on claims as possible always being a topic dear to the hearts of most ITIC attendees. I remember a number of questions after the presentation; many people in the audience were not familiar with silent or blind PPOs, not to mention aggregator PPOs and rental networks. Today, these terms are generally familiar to the cost containment industry. Some businesses active in paying travel insurance claims may encounter improper discounting from time to time, but for some, improper discounting does not appear to be a problem. One leading cost containment company told me that silent PPOs are much ado about nothing. But another felt that it is still a major problem.

A case in point

In 2006, Shai Gold (today the CEO of International-Triage, LLC) was in the audience in Prague, and he listened intently to my stories about silent PPO abuses. At that time, Shai was the VP of international services at Jackson Memorial Hospital (Miami, FL). Upon returning to his office, he shared the information with the CEO, the hospital attorney, and the director of managed care contracting. The hospital investigated and learned that it had been victimised by improper discounting/silent PPOs. Rather than start an open-ended legal battle to recover unjust discounts, the hospital decided to preserve its relationships in the managed care industry and close the loophole. All cost containment companies, networks and TPAs known to Jackson Memorial were put on notice that any sub-rental of their contract

with the hospital would result in termination of their agreement and litigation to recover illegal discounts. Appropriate clauses were immediately added to all contracts and the practice ended quickly without jeopardising the hospital's industry relationships. "We felt that the best way to address the issue was to send a strong message and at the same time tighten the loose ends. This practice was (and remains) a byproduct of sloppy contracting," said Shai as he related this success story to me when we met in 2009.

Shai Gold's story about Jackson Memorial gives us some insight into the answer to the question posed above: who fears getting caught? The answer may be: not as many as you might think. Certainly, the payers that could have been sued by Jackson Memorial were never in jeopardy. There was a cashless settlement. Payers using silent PPOs frequently can probably breathe easily because they hardly ever get caught. Payers in an untainted payer chain – no discount shenanigans – have no fear, and if they are implicated in an improper discount, they are indemnified. And from the provider viewpoint, there is a trend for large US hospital systems to open doors to international patients and figure out ways to get their bills paid – maybe using an international collection agent as the intermediary and no silent PPO risk. For large

healthcare systems it may be less a concern about silent PPOs and more about lack of co-operation with large, nationwide payer-agents. In other words, is silent PPO litigation a fight between two large interests that do not like each other? That would be large healthcare systems and large payer networks – certainly no love lost there!

Also, it is curious that improper discounting of provider bills is not always characterised as silent PPO abuse. When I contacted one of the attorneys in the Tenet Healthcare case, which was the focus of my July article, he felt that the case was not about improper discounts or silent PPOs. When I mentioned the 27 states that have enacted laws to combat silent PPOs, the lawyer was aware of the Florida statute but did not think it applied to the case. Of course, as I pointed out in the article, the case could be framed as a dispute involving the interpretation of contract language, and if that is how the parties and their counsel proceed – litigating the meaning of contractual provisions rather than improper discounting – then the case could be tried along those lines.

When the *ITIJ* editorial staff thought about the issues I addressed in my July article, they asked some interesting questions and scoped out another article, as follows:

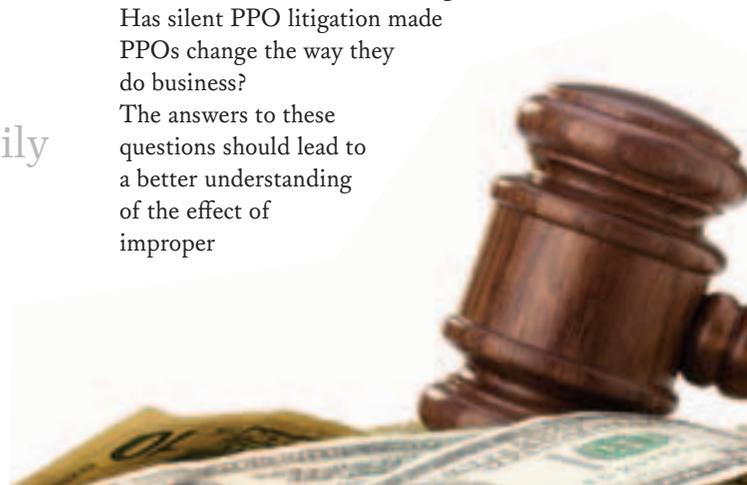
Assess the different silent PPO cases.

Settlements – how much, etc. – what damages have been awarded in silent PPO litigation?

Has silent PPO litigation made PPOs change the way they do business?

The answers to these questions should lead to a better understanding of the effect of improper

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discounting of hospital bills by payers as well as the implications for the cost containment industry. I will also keep returning to the question of who cares about the consequences of taking an improper discount.

Industry evaluation

Assessing the different cases is not too difficult. There have been a lot of cases, and the volume is not decreasing. Google ‘silentppolitigation’ and spend days looking at the results. The plaintiffs are usually large healthcare systems. Very few silent PPO cases are brought by a single hospital. This litigation is big provider versus big payer. That is why many people reading this article may not care about silent PPOs. Unless they are affiliated with one side or the other, why would they care? It is self-evident that just about any hospital bill can be scrutinised and something wrong can be found. It may be a coding problem or it may be an improper discount. Moreover, the volume of litigation and the claims represented by the cases is a very small percentage of total claims filed. So small, in fact, that it leads some cost containment specialists to debunk silent PPO abuse. “Move on,” they say, “it’s not a big problem.”

Information on settlements is available from law firms and audit services that provide medical bill reviews. While insurance companies have targeted medical providers to reduce costs and increase profits, an audit of hospital accounts receivable payment history can be performed at no cost. Operating out of offices in multiple states, companies like SL Chapman LLC hunt for improper discounting through the use of silent or rental PPOs. Two other audit companies are MedAssets and Triage Consulting Group. These companies specialise in revenue recovery. They attract silent PPO cases by identifying improper discounting and taking the hospital’s case on a contingent fee basis. Audit companies delve into records, find an irregularity, and earn a percentage of what the hospital recovers. Predictably, in the cost containment industry, they are viewed as vultures by some and as useful watchdogs by others. Moving on to address the question of how silent PPO litigation has affected the payer chain, lawyers representing companies in the payer chain know how silent PPO litigation changed business practices. Terms in contracts to pay claims, either directly or indirectly, now protect payers in the chain from anyone in the chain – assistance companies, TPAs, brokers, smaller PPOs – that arranges an improper discount. So contracts have changed, but more than contractual terms, many cost containment experts are savvy enough to avoid doing business with companies that do not stand behind their business practices – that is, the network discounts they pass on. Good companies maintain their good reputation. On the other hand, one frequent ITIC attendee described a less virtuous course of conduct. When a foreign patient is provided a discount to which he is not entitled, there is obviously a saving. The saving, however, is subjected to a

percentage-of-savings fee that generates substantial revenue for the payer chain. Yes, the foreign travel insurer overall pays less (but may be subject to a claim later on) while the payer chain enjoys the savings fee. Of course, the hospital is throwing the party by paying for the abuse.

Any assessment includes class action cases. For example, a class action lawsuit is filed against an insurance company and its adjuster. Medical providers form the class of plaintiffs. They received partial payments on their bills under an alleged PPO agreement. These suits are similar, always pleaded as variations on the silent PPO theme. First, the hospitals do offer discounted rates in exchange for patient volume, and they do have various PPO agreements in place. However, the defendant companies do not steer patients and have no payer agreement with the hospital. They simply take the discount improperly.

Audit companies delve into records, find an irregularity, and earn a percentage of what the hospital recovers

Class action defendant insurers and related co-defendants are too numerous to name, but over the last 10 years, they include Aetna, Cincinnati Insurance, Connecticut Indemnity, CNA, Farmers Group, Mid-Century Insurance, StrataCare, UnitedHealthcare, Universal Underwriters, and Zurich. The Class Action Fairness Act (CAFA) was enacted in 2005 to discourage filing class actions in friendly venues (i.e., forum shopping), and there was a decline in class action suits for a time. Today, the certification of classes by courts (a first step) appears to be increasing.

The damage awards in silent PPO cases (or settlements) depend obviously on the facts of each case, and with class actions, it depends on how many providers opt out of the class. It is not mandatory to remain in the lawsuit. Prudence may dictate a different course, such as the one pursued by Jackson Memorial. In any event, if the case is pursued individually by a single hospital or a larger healthcare system, the damages can be substantial. In one case, the insurer paid \$500,000 in cash and agreed to contractual rates going forward that were favourable to the hospital and would allow the hospital over time to recover what it had lost in past years (and I’ll bet the insurer simply raised its premiums!). A case such as Tenet Healthcare involves four hospitals and a number of patient bills that were allegedly improperly discounted. Based upon my investigation, a typical claim could range from \$10,000 to \$50,000, easily. And one audit specialist advises that millions of dollars have been recovered from various payers during the last decade.

Underhand tactics

There is a darker side to the improper discounting of medical provider bills. Hospitals have alleged that they have been deceived by US insurers and their assistance companies and TPAs when foreign patients receive the benefit of a discount that is only available to domestic patients. The allegations have included violation of state consumer fraud statutes, civil conspiracy, fraudulent concealment and unjust enrichment. Noting the problem, the American Medical Association (AMA) has branded silent PPO activity as fraudulent. The AMA points out that both the seller and the purchaser of the discount rely heavily on the fact that a busy physician practice or the back office of a hospital will have difficulty spotting an improper discount. Of course, the failings of the provider are not an excuse, but it indicts the insurer that takes unfair advantage. Simply put, fraud is conduct undertaken with the intent to deceive, and while the burden of proof is great, it is not insurmountable. Insurance companies that sense any chance of losing a fraud count will settle, and they will not admit any liability. They will simply pay money and probably extract a non-disclosure agreement from the hospital.

In conclusion, there are silent PPO cases filed across the US. Many are class actions, and they pit large providers against large payers. Settlements can be substantial, but like the number of cases compared to total claims, the dollars involved are small when compared to total travel insurance claims paid in any period. The cost containment industry recognises honest payers in the payer chain, and reputable companies work with other reputable companies to pay providers. Finally, who’s afraid of silent PPOs? There are many answers to this question. Each reader will have one. It may be an indifferent answer because your company does not work with a company that does not stand behind its business practices. Or the answer may reflect your concern about improper discounting because your business encounters frequently what the AMA calls fraud. ■

Author



Tom Hudson has practiced law for over 35 years, and during a long career with MEDEX, he developed an understanding of legal matters relating to travel insurance and the assistance business. In addition to practicing law, Tom is a co-founder of American Clinics International, Inc. (FirstMed Centers), MediTRAVEL Insurance LLC, and recently Nurse Call Centers LLC.