Insurance Company Appeals Silent PPO Ruling

By Thomas L. Hawker

In *HCH Health Serv. of Ga., Inc. v. Employers Health Ins. Co.*, 22 F. Supp. 2d 1390 (N.D. Ga. 1998), a federal district judge in Atlanta recently ruled in favor of a provider in its claim against a payor alleging unauthorized PPO discounts. The hospital sought payment from a health insurer under the civil enforcement provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”). ERISA allows hospital-assignees to recover benefits from a patient-assignor’s insurance company following an improper denial of benefits. Prior to treatment, the patient had assigned insurance benefits to the hospital. When the payor received the hospital’s invoice, it attempted to access a “leased” PPO network and to reduce the hospital’s invoice by applying a 25 percent discount.

The insurer had no contract with the hospital giving it discount rights, and the patient was not enrolled in the PPO through which the discount was taken. The patient was enrolled in another network, which the insurer had marketed to the patient’s employer. Therefore, the patient had not been directed or given any incentive to seek treatment at the hospital.

The insurer claimed the discount through its contract with a discount “broker” or “vendor.” The insurer had entered into a “shared savings” agreement with a vendor that purported to provide access to “leased” PPO networks and the accompanying discounts. One of the “leased” PPOs had a contract with the hospital, and the insurer relied upon that leasing agreement in invoking the 25 percent discount.

The hospital challenged the discount by arguing that the patient’s insurance plan could not be interpreted to encompass shared savings discounts accessed through discount vendors. The insurer argued that the term “Expense Incurred” in the insurance contract between the payor and the employer could be interpreted to mean a charge reduced or discounted through a shared savings program. The judge disagreed.

Specifically, the judge upheld the hospital’s interpretation of the insurance policy — that fees may be discounted only through the policy’s PPO provisions. The judge found that the payor’s attempt to access the “shared savings” agreement through the term “Expense Incurred” was arbitrary and capricious and violated ERISA. The insurer asked the judge to reconsider its order, but the judge refused.

On May 5, 1999, the insurer appealed the district judge’s decision. The case is currently before the Eleventh Circuit Court of Appeals, the Oral argument has been set for March 2, 2000.

On appeal, the insurer argues that the ERISA plan documents can be read to encompass the brokered discount and that its decision was not arbitrary and capricious. The insurer also makes a number of procedural arguments in favor of reversal. For example, the insurer argues that the hospital could not file suit in the first place because the patient benefited from the silent discount. The insurer also contends that the hospital did not properly contest the discount through administrative channels with the insurance company prior to filing a lawsuit. The district judge resolved all of these issues in favor of the hospital.

Attorneys with Morris, Manning & Martin have represented the hospital throughout these proceedings because of the potential implications of the ruling for providers, PPOs, and insurance companies, however, a number of organizations have filed Amicus or “friend of the court” briefs, taking sides with either the hospital or the insurer. The American Association of Preferred Provider Organizations and The Health Insurance Association of America have filed briefs in support of the silent discounting arrangement. The American Medical Association and the Medical Association of Georgia have filed a brief in support of the hospital. The opposing sides have drastically conflicting views concerning the propriety of taking brokered discounts. Moreover, the litigants disagree on the effect that the brokered discounts would have on the cost of health care.

Regardless of the outcome of the case, providers should be aware that many insurance companies are accessing silent discounts and offering nothing in return. This is costing the health care industry untold millions of dollars. Generally, if services are provided to a patient whose PPO has no contract with the provider, then no discount
should be taken. Of course, the patient’s insurance plan will govern, but the practice of accessing “brokered” discounts should be reviewed carefully. Providers should review their PPO contracts to ensure that the PPO cannot indiscriminately pass along discounts. In addition, providers should review their managed care contracts to ensure that payors are required to provide direction and steerage to patients so that the providers realize the benefit of increased patient volume.