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In drawing up contracts, HMOs aren't shy about asking for terms favorable to themselves. Here, five health care attorneys discuss the most outrageous HMO demands they've encountered. Watch out for clauses like these.

Five Lawyers Recall: 'The Craziest HMO Contract Clause I've Seen'

By Deborah Epstein
 Contributing Editor

It's still true: Many physicians who wouldn't dream of substituting a penny for a burned-out fuse or poking a knife into a plugged-in toaster nevertheless continue to sign contracts proffered by HMOs without reading them—and having a competent health care attorney read them, too. They risk getting burned, because HMO legalese tends to ask for the moon, and sometimes gets it.

To drive that point home, Managed Care asked five prominent health care attorneys to share with us the most outrageous HMO contract clauses they've ever seen. The examples they cite should serve as a warning to proceed with caution when striking managed care deals.

QUALITY-OF-CARE AND COST-CONTROL CLAUSES

"You wouldn't expect a sane physician to sign a contract agreeing to provide plan members with the highest quality of medical care available," says James B. Wieland, a partner with the Health Care Group in the Palo Alto, Calif.-based law firm of Cooley, Godward. Lately, however, he has seen a number of these contracts. The provision may be located in the "whereas" clauses in the opening of a contract or in the text of the agreement. And although it may sound reasonable, Wieland says, signing it could be dangerous.

The risk is that the physician in effect agrees to provide a higher standard of care than would normally be available or required. Under such a clause, for example, a physician practicing in a small town would be held to the same standard of care as a physician in a tertiary care center that is associated with a major academic institution. In the event of a malpractice suit, the standard of care is generally held to be what a reasonably qualified physician in the same area would provide. If a physician agrees to this clause, however, a malpractice plaintiff's attorney could argue that the agreement was made for the beneficiary's interest and in fact raises the standard of care required. "That doesn't benefit anyone except a plaintiff's lawyer in a malpractice suit," Wieland says. "But this argument has succeeded in some cases."

To make matters worse, agreeing to the clause could be grounds for a decision by your malpractice insurance company to decline coverage. "The insurance company can claim that you agreed not to impede its ability to defend a claim, and that by signing the contract, you did impede that ability," says Wieland. The result: no coverage in the event of a malpractice suit.

This quality-of-care clause is often followed by another provision, Wieland reports. "Here, the physician agrees to participate with the plan in innovative cost-control methodologies. But this can be a problem in cases where patients sue doctors and plans for denying care that the plan thought too expensive. This clause makes it sound as though the physician has agreed to deny care to save costs, and that's how the plaintiff's attorneys will represent it."

The remedy? Ask that the following amendment be included in writing and signed by both parties: "Whereas clause X is amended by deleting the present language and inserting the following: The physician agrees to provide medical care of a reasonable quality." This should replace the clauses on both quality of care and cost-control methodologies.

INDEMNIFICATION CLAUSES

"One contract feature that concerns me is the indemnification clause, which says the physician agrees to indemnify and hold the plan harmless for anything that happens as a result of his or her relationship with the plan," says Alice Gosfield, a principal with Gosfield & Associates in Philadelphia. "I've seen horrendous indemnification clauses."

Such clauses threaten trouble, says Gosfield, because the doctor isn't covered under malpractice insurance for that liability. "Signing some indemnification clauses is like opening your wallet and giving away your summer home and your child's college fund if something goes wrong."

Any number of absurd cases could arise from such a clause, Gosfield adds. "Someone in your office could say something defamatory about another plan physician in the context of discussing the plan. If the plan is sued as a result, the liability would lie with you," she says.

"That is not what a doctor needs to indemnify a plan for. A physician should indemnify a plan for his or her negligence in the performance of professional services, which is what is covered under malpractice insurance." No matter what your sense of the clause, have your malpractice carrier review it.

The best advice, says Gosfield, is to have an attorney look over the contract, and to read it yourself. "Most physicians don't read contracts before signing them, but they should know the scope of the bargain that they're entering into."

INCENTIVE MANAGEMENT FEE REQUIREMENTS

"We've seen contracts with something called an incentive management fee, payable to the HMO by the physician," says G. Nicholas Casey Jr., partner at Lewis, Friedberg, Glasser, Casey & Rollins in Charleston, W.Va. "When we first saw it, we thought it couldn't be true."

The clause requires physicians to pay a percentage of their billing to the HMO. "But what are you paying for?" Such fees probably run afoul of the law, he notes, since they could be seen as payment in a fee-splitting arrangement, even though they may not be labeled as such. "The physician and HMO thus become business partners, and that violates practice prohibitions stating that HMOs are not legally able to provide medical services," Casey says.

"We also have a huge concern about kickback prohibitions, which state that physicians cannot participate in any type of scheme in which they are buying referrals," he adds. "If you become a participating member of an HMO, that HMO drives business in your direction."

Paying it a fee based on a share of the business has the feel of a kickback. None of our physicians come near signing this clause."

Talk to other physicians about their experiences with an HMO, especially preapprovals, claims problems and whether the HMO crosses that line where management ends and the practice of medicine begins. "You want a good contract, of course," says Casey. "But what worries me even more than the contract is your comfort level with a particular HMO. You want to be confident that it will let you practice medicine within appropriate professional bounds."

CONTINUATION-OF-COVERAGE PROVISIONS

All HMO contracts require physicians to provide services for a period of time after the contract is terminated, to allow time to transfer patients to another provider. Some of these provisions, however, are written in a way that locks physicians in till the proverbial cows come home.

"There are some contracts that can actually continue coverage after termination indefinitely," says Joseph T. Butz, principal at Clousson & Butz in Chicago. "It's hilarious. Typically, the physician is required to provide coverage until the member's policy expires. A reasonable person would construe this to mean that if the member's contract is renewable in February, and the physician's contract expired in December, then care would continue until February. But the HMO has an evergreen contract, so the member's policy is automatically renewed. Managed care companies claim that it means the physician cannot terminate care, and thus, ten years from now, you're still providing services!" Also, some clauses require physicians to provide care for the entire course of a patient's illness. In cases of long illness, the physician may be bound indefinitely.

"Whether or not an HMO will enforce these provisions depends on the market," Butz says. "Generally, though, they want to keep their doctors on board." Physicians can guard against such clauses by agreeing to provide services for a limited time—no longer than one year after termination, for example.

AMENDMENT CLAUSES

This common clause states that the HMO may amend a contract in any way and at any time. "With these clauses, the HMO is basically giving with the right hand and taking away with the left," says Neil B. Caesar, president of the Health Law Center (Neil B. Caesar Law Associates PA) in Greenville, S.C. "I've seen contract amendments that switch the rules unilaterally, without any recourse for the physicians. And that means all your hard work is subject to the HMO's pulling the rug out from under you without notice."

The clauses let HMOs make changes in fees, payments or any other contract features. "The problem is, physicians don't have the ability to say 'no' to these sudden changes," Caesar says. Some contracts do state that physicians who wish to object to the change have X number of days to do so; if no objection is raised by that time, the physician is assumed to agree.

"At a minimum, the contract in this case should state that the amendment will not go into effect for a physician if he or she objects, and the HMO may terminate the contract within a certain period of time as a result," Caesar says.

He cautions, however, that if you refuse to accept the amendment, you will submit claims under the old rules, and the HMO clerical staff probably will process them under the new rules. "You should therefore expect to have an ongoing hassle with billing clerks."

Deborah Epstein is a writer in West Milford, N.J.

Watch out for these contract clauses, too

Besides the five contract clauses highlighted in this article, says Neil B. Caesar, Managed Care editorial advisory board member and "Legal Forum" columnist, physicians should also be on the lookout for the following deal-sourers.

UNDEFINED TERMS Most contracts mention various rules or regulations, such as utilization review, appeal and hearing processes, or credentialing plans. To protect themselves, physicians should review these clauses and reference them specifically in the contract. If the plan later wants to amend these rules, the contract should state that, if the physician doesn't agree with the new rules, he or she may terminate the agreement.

SCOPE OF SERVICES Many contracts state that the physician agrees to provide a certain scope of services, such as all primary care. But beware: HMOs can define this scope very broadly. For example, primary care may be considered to include pediatric and obstetric care. It's critical to define the scope of care you will provide.

PROJECTED FEES Capitated fees may be based on the plan's projected volume of patients, but physicians should include minimum guarantees or assurances of patient volume in the contract, or a right to renegotiate if volume promises are unfulfilled.

DESELECTION RECOURSE Contracts should include adequate due process for the physician in the event of deselection, ideally promising prior warning of the decision.

FEE WITHHOLDS There are often huge contractual holes in the way fee withholds are allocated. Be certain that the formula is clear. First choice is for your entitlement to be based on your own performance. In addition, the contract should be very clear on the timing of payment for fee withholds, as well as the way in which the fee is calculated. Does the contract mention any way for the physician to be certain the amount is accurate?