

Prompt Pay Statutes for Physicians' Billing Claims: An Imperfect Remedy for a Systemic Problem

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Physicians are losing millions of dollars each year from delayed and wrongfully denied claims. Glass ceilings prohibit the use of many forms of procedural relief, but do not cover physicians' losses from delays in claim payment. This article explains the impact of state prompt pay statutes and recommendations to HMOs, health plans, and attorneys who represent advisers. The article discusses the strengths and weaknesses of the statutes, as well as strategies for effectively using the statutes for the benefit of physicians.

Key Words: Provider reimbursement; clean claim; prompt pay

Systematic delay and underpayment of claims is creating a financial crisis in the health-care industry. In a survey published by the American Medical Association, more than 82 percent of state medical societies cited delayed payments as the most significant issue facing their members. The California Healthcare Association alone reported that its hospital members were owed nearly \$1 billion in claims that were 60 days past due. Many physicians and other providers face significant cash-flow problems while being forced to expend substantial administrative resources pursuing the payment of unpaid and underpaid claims. In the past five years, payers have been assessed more than \$50 million in prompt payment fines and restitution, a clear indication of the depth and brazenness of payers' payment delay practices.

In 2000, a number of state medical associations and individual physicians filed class action suits against 10 managed care companies. In these cases, consolidated before Judge Federico Moreno in the United States District Court for the South District of Florida, a significant claim was that the managed care companies had vexatiously delayed or refused to process physician claims honestly. In 2003,

the court approved settlements between the class and two of the managed companies, Aetna and Cigna.

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Much of the settlements concern prospective relief: an agreement by Cigna and Aetna to curb certain practices, to establish physician advisory boards, disclose payment rules, etc. The economic result of these settlements, however, is a minimal reimbursement to individual providers for hundreds of millions of dollars in delayed and wrongfully denied claims. The Aetna class action settlement will result in an average reimbursement of less than \$150 per physician class member. The Cigna settlement is substantially the same.

Other solutions to the problem of delayed payments are direct common-law actions for breach of contract and unjust enrichment and fraud brought by the provider against the payer. Your provider contract may have specific provisions requiring the payer to pay your claim within 30 to 60 days from claim submission. Most contracts, however, do not require the payer to pay interest or attorneys' fees for payments delayed beyond the contrac-

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tual claims determination period. As a result, even though you may receive or win a greater amount of your claims in a lawsuit, you and your practice are still not going to be made completely whole.

THE STATES STRIKE BACK

States have responded to the provider payment crisis by enacting laws requiring payers to pay claims within strict time frames or face penalties, fees, and other administrative and legal remedies. Since 1990, 47 states and the District of Columbia have enacted prompt payment laws to curb systematic payment delays and underpayments. Statutes generally require the payer to make payment or a claim determination within 30 to 60 days after a physician submits a claim for payment.

Most contracts . . . do not require the payer to pay interest or attorneys' fees for payments delayed beyond the contractual claims determination period.

These statutes, in combination with individual direct actions, can provide you with a more direct, faster, and more efficient solution to getting paid in a timely manner and reimbursed for delays.

Coverage

The terms and coverage of the prompt pay statutes vary by state. The Illinois Prompt Pay Statute requires payment within 30 days and imposes a penalty of 9 percent interest if the payer violates the statute (215 ILCS 5/36(a)). In Texas, the statute provides for interest penalties, administrative fines, and attorneys' fees (TX Ins. § 843.338). Pennsylvania requires payment of a clean claim within 45 days or interest at 10 percent (40 P.S. 991.2101-991.2193).

It is imperative that you become knowledgeable about the existence and scope of the prompt pay statute . . .

Many of the statutes have been criticized for offering little protection to providers. Some statutes do not apply to out-of-state payers, or apply to only certain types of payers. For example, the Illinois Prompt Pay Statute applies to a broad class of payers, such as insurers, HMOs, IPAs (individual or independent practice association), and physician hospital organizations, whereas Louisiana's law applies only to issues of health insurance. It is imperative that you become knowledgeable about the existence and scope of the prompt pay statute applicable to your claims

to take full advantage of the protections these statutes afford you and your practice.

Clean Claims and Reimbursement

State prompt pay statutes apply only to properly filed claims. Most statutes condition the right to prompt payment upon the submission of a "clean claim," which is often a poorly defined term in the statute and can be circumvented by a payer determined to delay payment.

Payer delay tactics include disputing medical necessity or levels of care, downcoding, disputing documentation receipt or completeness, and a host of imaginative excuses. (Some of the more colorful excuses for claim delays are posted on the Clean Claims Hall of Shame of the Texas Medical Association Web site, <http://www.texmed.org/pmt/lel/cln/CleanShameWhyDirty.asp>.)

You must review and strictly comply with the payer's submission protocols to take full advantage of your rights under the prompt pay statutes applicable to your claims. These protocols will determine what claim information needs to be submitted, when it must be submitted, and what the format is for submitting your claims. Do not give the payer an easy excuse for delaying payment.

Enforcement: Administrative and Civil Remedies

Let us assume that you have submitted a clean claim in a timely manner, but the payer delays payment in violation of the prompt payment statute applicable to your claim. Virtually all prompt pay statutes empower the state department of insurance to investigate and levy fines and penalties against offending payers, and issue cease and desist orders against repeat offenders.

Do not give the payer an easy excuse for delaying payment.

Many insurance commissioners and their departments have created Web sites explaining your rights under the statute with online forms that enable you to file a complaint electronically against a payer that violates the state's prompt pay statute.

Prompt pay statutes in at least five states . . . expressly permit you to file suit against the payer . . . [or] the court may find an implied right of action . . .

You always have the right to bring a claim in court for breach of contract, unjust enrichment, fraud, and various other legal theories; you can also file a complaint with the commissioner of insurance. In addition to these traditional common-law claims, the prompt pay statutes in at

least five states (Alabama, Mississippi, Texas, Nevada, and Virginia) expressly permit you to file suit against the payer for violation of the prompt pay statute.

In states where the prompt pay statute does not expressly give you a direct right to sue the payer, the court may find that you have an implied right of action to bring a lawsuit for violation of the prompt pay statute. Few courts have addressed this issue. At least two courts in Illinois have found that physicians can bring a lawsuit for violation of the prompt pay statute (*Chicago IPA v. Unicare Health Care Plan of the Midwest*, 02 CH 13425, and *Rush SurgiCenter v. Unicare*, 02 L 007141). A court in Florida found an implied right of action, whereas in Pennsylvania the court declined to find a private basis to bring suit under that state's prompt pay statute. Your right to bring a claim against the payer for violation of the prompt pay statute depends on the language of the statute and how the courts in your state interpret the legislature's intent.

THE FEDERAL SOLUTION—PROMPT PAY PROVISIONS IN ERISA

What happens if you are seeking payment of a claim provided by an employer-sponsored health plan covered by the Employee Retirement Income Security Act of 1974 (ERISA)? You have received an assignment of benefits from the employee that gives you the right to sue to recover benefits, including payment for benefits that you have provided to the employee or the employee's beneficiary.

ERISA has its own mandatory prompt pay provisions . . .

ERISA preempts all state law claims, including state prompt pay statutes. That does not mean, however, that the ERISA plan can ignore or delay payment of your claim. ERISA has its own mandatory prompt pay provisions that offer similar, if not better, protection than many state statutes.

ERISA sets specific time limits for claim determinations. For pre-authorization claims, (i.e., the claimant must get pre-approval for care), the ERISA plan must notify the claimant within 15 days of the claim determination. For post-authorization claims, the benefit determination has to be made no later than 30 days after receipt. If the

claim is being denied in whole or in part, the ERISA plan must provide the claimant with a written adverse claim determination within these mandatory time periods.

The adverse claim determination must contain very specific information, including, but not limited to, the following:

- Reason for the adverse determination
- The specific plan provisions on which the determination is based
- Identification of any additional material information necessary to perfect the claim
- The claimant's appeal rights

If the ERISA plan fails to follow these requirements, you are deemed to have exhausted all administrative remedies available under the ERISA plan and would be entitled immediately to pursue all available remedies under Section 502a of ERISA. This includes the right to payment for benefits rendered to your patient. Since ERISA is a federal statute, you would bring suit in federal court. The court has the discretion to award attorneys' fees to the prevailing party. Therefore, unlike the state prompt pay statutes that may limit your rights to filing a complaint only with an administrative agency, ERISA accelerates your right to be in court if the payer fails to follow the deadlines set forth in the statute.

CONCLUSION

Payers continue to delay and wrongfully deny clean claims on a routine basis. Prompt pay statutes provide you with a way to level the playing field and demand timely reimbursement. Although neither the state prompt pay statutes nor ERISA provide a total solution to the problem of delayed payment, these statutes point to a new legislative and regulatory awareness of the problem and willingness to assist providers. Used in tandem with traditional common-law claims such as breach of contract and unjust enrichment, providers are one step closer to receiving timely reimbursement at the contracted rate or what is usual and customary. ■

Editor's Note: *In a future article, the author will outline appeals procedures that providers can realistically pursue in the event of delayed payment.*