

# Silent PPOs: The Stealth Discounting of Provider Reimbursement

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hysicians are losing millions of dollars per year from payers engaging in abusive discounting practices. One of the worst of these practices is the silent PPO.

This article explains what a silent PPO is and how it unlawfully reduces a provider's reimbursement. The article discusses how providers can recognize silent PPOs and how to protect their practices from this discounting. The article also reviews statutes that prohibit or regulate silent PPOs and recent court decisions finding in favor of providers and against silent PPOs.

**Key words:** Provider reimbursement; silent PPO; ERISA; unfair trade practices.

Preferred provider organizations (PPOs) have been a fundamental component of health insurance plans since the early 1990s. These popular plans give participants the freedom to choose their physicians while also encouraging cost containment. Many of the contracts by which providers participate in PPOs, however, are drafted broadly, enabling managed care organizations (MCOs) to engage in abusive discounting practices. These abuses slash provider reimbursement in ways that providers do not foresee when they sign MCO agreements

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Silent PPOs are one such form of discount abuse—an abuse that in 2002 was estimated to cost providers between \$750 million and \$3 billion annually in lost revenues.<sup>1</sup> This article discusses how silent PPOs occur and how they affect your reimbursement. It examines how the courts and legislation can protect you and your practice and sets forth some basic steps you can immediately take to detect and avoid silent PPOs.

A PPO is a “group of selected healthcare providers that agrees to charge lower rates for medical services in exchange for attracting a greater number of patients.”<sup>2</sup> Third-party payers “steer” or direct plan participants to providers in the PPO network through marketing materials and financial incentives. Providers in the network that offer the discounts are called *in-network providers* and those that do not offer the discounts are referred to as *out-of-network providers*. PPO participants are given financial incentives to use in-network providers but retain the freedom to choose out-of-network providers at a higher cost.

## WHAT IS A SILENT PPO?

A silent PPO defeats the purpose for which a provider joins a PPO: steerage of patients in exchange for discounting fees for services provided to plan participants. A silent PPO occurs when the MCO “sells” or “rents” PPO discounts to parties not included in the PPO agreement between the provider and the MCO. In other words, the MCO negotiates discounts with providers for patients in the MCO’s network but sells access to the PPO discounts to other, nonrelated parties for ultimate use by third parties who are not payers participating in the PPO.

The third party (typically a third-party administrator, insurance broker, indemnity insurer, or smaller PPO) gets the advantage of the negotiated discount, the MCO is paid an access fee for selling/renting the PPO discounts, and the provider is paid the discount rate. This is at the

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PPO rates should apply only to payers that agree to comply with the PPO agreement prior to the date of service. You should insist that the discount rates and rate-related information be kept confidential, including a guarantee that the PPO-payer agreement prohibits the payer from disclosing rate information to brokers.

You should institutionalize certain basic steps your practice can take to prevent or minimize the unauthorized discounting of your claims through a silent PPO. Be sure you know the discount rates and fee schedules of the PPOs in which your practice participates. Make a copy of the patient's health insurance ID card at the time of service. If the patient is a member of a PPO, make sure at the time of service that the PPO logo is on the patient's ID card. Require the PPO to disclose all discounts applicable to the plan participant at the time coverage is verified by your office.

***You do not have a contract with the silent PPO, and . . . you should refuse to accept the silent PPO rate.***

Periodically review EOBs and compare them with the patient's ID card to make sure that the payer has the right to apply a discount and is applying the correct percentage. If you begin to see a pattern of discounting, conduct an audit of the payer's EOBs to determine the extent of the abusive discounting. You do not have a contract with the silent PPO, and you should refuse to accept the silent PPO rate. Insist on being paid the rates you agreed to or, in the case of an indemnity insurer, your usual and customary rate. In all instances, your office should appeal the silent PPO discounts.

## THE LEGAL CHALLENGE

Providers have been increasingly successful in finding legal remedies to resist silent PPOs. The American Medical Association (AMA) and many state medical societies have been very successful in promoting legislation and supporting physician lawsuits to stop silent PPOs.

First, legislation at the federal and state levels has been passed to restrain or prohibit silent PPOs. In 1998, the AMA successfully encouraged the passage of federal legislation banning silent PPOs from all Federal Health Benefits Plan (FEHBP) contracts.<sup>4</sup>

***Legislation at the federal and state levels has been passed to restrain or prohibit silent PPOs.***

Similar provider successes have occurred at the state level:

- In Florida, section 627.736(10) provides the exclusive means by which an insurance company can pay PPO

rates for personal injury protection (PIP) benefits.

- A North Carolina statute provides that it is an "unfair trade practice" for insurers to make a "material misrepresentation to a healthcare physician to the effect that the insurer or service corporation is entitled to certain preferred physician or other discount off the fees charged for medical services, procedures, or supplies provided by the healthcare physician, when the insurer or service corporation is not entitled to any discount or is entitled to a lesser discount from the physician on those fees."<sup>5</sup>
- In Massachusetts, it is an unfair or deceptive practice to "set the price to be paid any healthcare facility by reference to the lowest price paid that provider under contract with any other nonprofit hospital service corporation... or preferred provider organization."<sup>6</sup>
- California requires payers and contracting agents to disclose whether their lists of providers can be sold to other payers, and allows a provider to opt out of any list sold to payers that does not actively engage in steerage.<sup>7</sup>

***. . . silent PPOs breach the contract between the provider and MCO and violate federal and state insurance and unfair trade practices laws.***

Courts have declared that silent PPOs breach the contract between the provider and MCO and violate federal and state insurance and unfair trade practices laws. In *HCA Health Services of Georgia, Inc. v. Employers Health Insurance Co.*,<sup>8</sup> the 11th Circuit Court of Appeals affirmed a district court ruling that a silent PPO violated the Employee Retirement Income Security Act of 1974 (ERISA).<sup>9</sup> In that case, the hospital plaintiff was an out-of-network provider. Instead of paying the hospital 80 percent of its usual and customary rate, the insurer, EHI, applied a PPO 25 percent discount that it had purchased through a series of contracts with other brokers/payers. Applying the 25 percent discount to determine the amount allowed, EHI paid the provider 80 percent of the 25 percent discounted allowed amount.

EHI claimed it was entitled to take the MedView discount even though it was not a party to the contract between the hospital and MedView. The court held that EHI was "not entitled to the benefits of a contract to which it is not a party" and that the ERISA plan did not allow EHI to base the percentage it owed on a discounted fee.<sup>10</sup> The silent PPO "in effect turns a discounted fee negotiated between a specific provider and a specific insurance company into the usual and customary fee for the entire medical services industry."<sup>11</sup>

Providers are enjoying similar results applying state law. In *Nationwide Mutual Fire Insurance Co. v. Central*

provider's loss. If the patient is covered by indemnity insurance, the provider is paid the silent discount rate instead of the provider's usual and customary rate.

***A silent PPO occurs when the MCO "sells" or "rents" PPO discounts to parties not included in the PPO agreement between the provider and the MCO.***

If the provider is out-of-network, the silent PPO will apply the PPO discount before reimbursing the provider at the out-of-network rate (e.g., 25 percent of 80 percent). Providers lose significant sums of money in either instance.<sup>3</sup>

Here is an example of how one type of silent PPO can routinely reduce your reimbursement:

- You sign a contract with the MCO and agree to a 30 percent discount for PPO patients.
- The MCO contract has an all-payer clause. The MCO rents or sells your negotiated discount to insurance broker B, whom you have never heard of and do not have a contract with.
- You treat patient A, who has an indemnity insurance plan that pays 80 percent of the usual and customary rate. You bill the indemnity insurer your usual and customary charge of \$10,000.
- The indemnity insurer contacts insurance broker B, who sells the 30 percent PPO discount to the indemnity insurer for an access fee.
- The indemnity insurer reprices your claim and references the 30 percent discount on the explanation of benefits (EOB). Instead of \$10,000, you receive \$7,000, of which \$5,600 is paid by the indemnity insurer and the rest by the patient.
- You lose \$3,000.

The payer does not disclose at the time of service that it is going to discount the provider's claim by the silent PPO rate.

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The entire process is offline and is not apparent to either the patient or the provider. Since many providers do not periodically compare EOB statements with the patient's insurance coverage, providers unknowingly lose millions of dollars a year because of routine silent PPO repricing of their clean claims.

## THE WARNING SIGNS

Silent PPOs are often the hardest reimbursement schemes to detect. There are signs, however, to detect if a payer is using a silent PPO to reduce your reimburse-

ment. Look for the following clues that a silent PPO discount may have been applied to your claim:

- Your patient is not aware of the PPO and on intake lacks a patient ID card.
- The patient's ID card lacks a PPO logo.
- The patient never received a provider directory listing you as a preferred provider, or was not steered to your office.
- The EOB does not specifically identify the PPO whose discount is supposedly being accessed.
- Your practice does not have a PPO agreement with the PPO named on the EOB.
- On its letterhead the EOB has the name of a bill-review repricing company or repricing software product (e.g., Concentra Managed Care, PriceWell) or other firm that you do not recognize as a regular payer.
- The insurer cannot produce a plan summary or written confirmation that it has incentives in its plan design to direct patients to your office/facility.

## PROTECT YOUR PRACTICE

Silent PPOs often rely on broad or vague contract language to justify the sale of PPO discounts. The first step in protecting your practice is to review your current contracts to determine if they permit or prohibit such discounting. For example, all-payer clauses may require the physician to accept the silent PPO rate as payment in full from any payer. In addition, look for language in the contract that allows the MCO to assign the contract in whole or in part to third parties; this again may be an invitation for silent PPO discount abuse.

***All-payer clauses may require the provider to accept the silent PPO rate as payment in full from any payer.***

Even if your MCO contract does not contain these clauses, there are additional contract terms that you should demand to protect your practice from silent PPOs. For example, your contract should provide that plan participants be issued ID cards clearly bearing the PPO logo. The PPO should be required to provide you with a list of payers participating in the PPO and give you timely notice of all changes to the list.

***The negotiated PPO rates should apply only to payers that agree to comply with the PPO agreement prior to the date of service.***

You should seek the right to opt out of the PPO by terminating the agreement on a plan-by-plan basis, without terminating the entire agreement. The negotiated

*Florida Physiatrists*,<sup>12</sup> the insured did not have a PPO plan. The insurer, however, sought to pay the provider at the Beech Street PPO rate because the provider was a participant and the insurer was a member of the PPO. The Fifth District Court of Appeals in Florida, in applying the state's PIP statute,<sup>13</sup> held that the insurer could not pay at the discount rate because it had not complied with the statute and sold the insured a PPO plan. In *Mitzan v. MedView Services*,<sup>14</sup> a group of chiropractors filed a class action claiming that the repricing of claims and sale of the PPO's databases were breaches of their contracts with the insurer and breached the Massachusetts unfair competition statute.<sup>15</sup> In finding that the chiropractors had stated a claim for breach of contract, the court reasoned that the dominant purpose of the PPO arrangement was to increase patient volume by marketing to plan subscribers in exchange for the negotiated discount—a purpose defeated by the silent PPO. The court also declined to dismiss the unfair competition claims against the brokers.

## CONCLUSION

Silent PPOs present a direct threat to provider reimbursements. Broad and vague MCO contract terms, as well as the sheer number of claims that physicians submit, often permit MCOs to sell or rent PPO discounts to brokers and other third parties that then reprice provider claims. It is a practice that courts and state legislatures are

increasingly willing to challenge. As shown here, providers can and should take proactive steps to stop silent PPOs from reducing their reimbursements. You are entitled to the rates you negotiated and should accept nothing less. ■

## REFERENCES

1. AMA Model Managed Care Contract. Supplement 2.
2. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 603 F.Supp. 1077, S.D. Ind. (1985).
3. Some commentators also define a silent PPO as an entity that does not use financial or educational mechanisms to steer patient volume to preferred providers. See, e.g., *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001). This article does not discuss "nondirected" PPOs.
4. Federal Employees Health Care Protection Act of 1998.
5. N.C. Gen. Stat. 58-63-700.
6. Section 3A(iii) of G.L. Chapter 93A
7. SB 559, effective July 1, 2000.
8. 240 F.3d 982 (11th Cir. 2001)
9. 29 U.S.C. § 1001, et. seq.
10. *Supra*, 240 F. 3d at. 1005.
11. *Id.* The court, however, cautioned that its ruling should not be read to mean that payers could never contract with out-of-network providers for reduced fees.
12. 2003 Fla. App. LEXIS 9475.
13. Section 627.736(10), Fla. Stat. (1999).
14. 10 Mass. L. Rep 242 (1999).
15. G.L.c. 90, 34A-M; (1994); 176D, 3A (iii)(1996).