

STIFFED - DON'T LET IT HAPPEN TO YOU

Protecting Yourself from HMOs and IPAs That Don't Pay

By: Jeremy N. Miller

THE BAD NEWS seems to be companies with increasing frequency. HMOs, practice management companies, and "super" IPAs, once thought to be financial giants are falling apart, leaving behind a trail of bad debts and broken promises to physicians. FPA Medical Management, Inc., owes California physicians an estimated \$40 million. The California Department of Corporations has seized control of MedPartners because of grave concerns about its financial condition. Similar problems have occurred in Texas, New Jersey, and Connecticut. And many smaller, physician-owned IPAs are failing to pay their members on time, one of the first signs of financial trouble.

With the difficulties even the largest health plans are having managing risk contracts, more physicians are likely to find themselves with a substantial number of delayed or unpaid claims. In spite of these ominous trends, physicians can reduce their risk of working for free.

The first line of defense is to carefully investigate an HMO or IPA before signing a contract. It's a good idea to find out:

- , number of years in business
- , market share and competition
- , employer groups under contract
- , whether it has reinsurance or "stop loss" coverage (many IPAs won't, but this is ideal)
- , record of paying physicians fully, accurately, and on time
- , whether the IPA has adequate funds on hand for claims not yet reported (incurred but not reported claims)
- , speed of the organization's growth (FPA and MedPartners, for example, both grew at an extremely rapid pace through an aggressive acquisition strategy)
- , backgrounds, experience, and track records of HMO and IPA key officers or IPA management company

A good way to begin gathering these facts is by checking the organization's financial statements. The state Department of Corporations (DOC) regulates California licensed HMOs and can be a good source of information about these plans. If the organization is publicly traded and registered with the federal Securities and Exchange Commission (SEC), annual (Form 10-K) and quarterly (Form 10-Q) reports are public records. (See box on page 36 for phone numbers and websites.)

If you are already working with an HMO or IPA, you can still request financial information. If the organization will not provide it, you may be able to obtain the information from DOC or SEC. Under California law, physicians who are IPA shareholders or directors also have broad rights to information about their IPAs. (See box for special considerations for IPAs.)

All Looks Well? Protect Yourself Anyway

Even when a background check fails to uncover serious financial problems, physicians still need to carefully negotiate provider agreements with HMOs or IPAs. Consider whether it is preferable to contract with multiple IPAs and HMOs rather than have a single third-party payer account for a substantial portion of your managed care business.

Ideally, a contract should:

- , Require the organization to provide you with quarterly financial information and copies of documents filed with DOC.
- , State exactly what services you will perform, and how much and when you will be paid for those services.
- , Pay uncontested claims within 30 working days of their submission. This is required by law for IPAs and health insurers. HMOs have 45 working days to pay. The timing for capitation payments varies considerably, but the faster the better.
- , Specify that capitation payments be reconciled monthly and begin accruing on the date a patient selects you as his or her physician, rather than when he or she first schedules an appointment.
- , Provide that late claims accrue interest. California law requires the payment of 10 percent interest on claims paid after the 30- and 45-work-day periods described above. Another approach is to ask to be paid one month in advance, as a form of security deposit. This protection, however; will probably be difficult to get.
- , Clearly specify that you can terminate your contract for nonpayment. Regardless of what the contract states, once an HMO or IPA files for bankruptcy, a court's approval is required before the contract can be terminated. Further, try to keep the time period the organization has to attempt to remedy a breach of contract for nonpayment as short as possible; 10 days, for example, rather than the 30 to 60 days typically allowed to correct other kinds of breaches.
- , Provide for payment of attorney fees in the event you have to sue or arbitrate to get paid. Arbitration might allow you to collect unpaid claims more quickly and at less cost than filing a lawsuit. Avoid contract requirements for extended, nonbinding mediation periods.
- , Provide that if you are terminated for breach of contract, your post-termination obligation is limited to a reasonable time period for your patients to find another physician. A capitated payment contract should provide that any post-termination services will be will _____ nt to a previously negotiated fee schedule.

Warning Signs

It is unusual for an HMO or IPA bankruptcy to occur without warning. Repeated late payment of claims is a big tip-off to financial troubles. Another sign is when primary care physicians receive capitation checks on time, but specialists and ancillary service providers receive no payment at all. Physicians and IPAS should make sure their monthly capitation payments correspond with the number of enrollees assigned by the HMO or IPA. Many physicians don't know which IPAs and HMOs are paying and which are not. Excessive claim denials or repeated assertions that they never received your claims, poor record keeping, and repeated requests for unnecessary or previously provided documentation are also red flags. Falling stock prices and an organization's financial statements may also reveal decreased equity and reserves.

You've Been Stiffed-Now What?

Your options for trying to get paid differ vastly depending on whether the HMO or IPA has declared bankruptcy, and whether you are an employee of the organization.

If the organization hasn't declared bankruptcy, not being paid gives you the right to sue for payment and terminate the contract. Before taking this leap, however; you may want to contact the IPA's or HMO's representatives. Don't be afraid to be pushy about getting paid. You and a group of colleagues might also explore whether a friendly hospital that the IPA or HMO is affiliated with would make a loan to it. Of course, any loan would have to be carefully structured to meet fraud-and-abuse and other legal concerns. If there are three doctors with liquidated, undisputed claims totaling at least \$10,000, you may be able to threaten to force the HMO or IPA into involuntary bankruptcy. CMA might also be able to help, as it is doing for member physicians in the FPA bankruptcy case.

Also, be sure to notify DOC if a health plan hasn't paid its debts. Sometimes HMOs reserve the right to pay physicians directly if the IPA is not doing so. If the IPA is not forwarding capitation payments, notify the HMO immediately and request payment. If the HMO fails to pay, the IPA and physician should have the right to approach patients and employers directly to switch health plans. The legal argument for such a provision is that if the HMO or IPA is not meeting its contractual obligations, you should not be required to do so either. Arguably, this right is guaranteed by Business and Professions Code S2056.1, which may supersede the typical restrictions in HMO and IPA provider agreements on the solicitation of enrollees.

You also might be able to negotiate partial payment, which could be preferable to a lawsuit. Be aware that if a payment is made within 90 days of a bankruptcy filing, you may have to return the payment because "preferences" among creditors are not permitted.

If you have no choice but to terminate your contract, you usually can sue the HMO or IPA for nonpayment. California law generally prohibits physicians from attempting to collect from patients. Because many plans are concerned about their relationships with employers, it might be helpful to inform the employer that the plan is not meeting its obligations. You must be careful to provide only accurate information to avoid a defamation claim by the plan.

If you are not being paid for your services, take action quickly. It may be better to cut your losses than treat patients for free.

When they've gone under

If the HMO or IPA has filed for bankruptcy, your rights and options for getting paid are much more limited, and often you will not be able to terminate your contract. If the term of your contract expires during the bankruptcy, however, the court will not extend it. This is a reason to negotiate a one-or two-year contract that does not automatically renew. One downside to nonrenewing contracts is that they may leave you open to increasingly worse contract terms. Even if your contract expires during the bankruptcy proceeding, you will have to continue treating patients already under your care until they can be transferred to another physician. Physicians who contract with HMOs may be required to provide care until the enrollee obtains coverage with another, solvent HMO. If the HMO or IPA goes bankrupt, you will likely be an unsecured, general creditor and will probably recover only a small portion of unpaid claims. If the HMO or IPA elects to continue your provider contract, however, and expects you to treat patients during the bankruptcy proceedings, it will generally have to pay all overdue claims as well as future ones. If the bankrupt organization elects to discontinue your contract, you will usually have no obligation to render future services but will become a general, unsecured creditor with respect to payment for prior services.

Physician employees of HMOs or IPAs have special rights in a bankruptcy. Claims for unpaid wages up to \$4,300 earned no more than 90 days before a company files for bankruptcy may be treated as priority unsecured claims. Similarly, unpaid retirement benefits of up to \$4,300 for services rendered no more than 180 days before bankruptcy is filed may be considered priority claims.

It is important for physicians to know how to protect themselves from IPAs and HMOs in financial trouble. Although time consuming, advance legwork can save you from later grief. Physicians pressed for time might find it useful to contact a health care law attorney or consultant to help navigate through the maze of HMO and IPA background research and contract negotiation. Contact CMA's paralegals for a list of such attorneys at 4151882-5144.

Special Considerations for IPAs

While many IPAs may not have it, stop-loss insurance from a third-party reinsurer rather than from the HMO is preferable in a contract. If the HMO is self-insuring, stop-loss coverage, that coverage could be worthless if the HMO goes bankrupt. Moreover, it is usually less expensive to purchase stop-loss insurance from an outside source.

When contracting, make sure your contract states that you have the right to seek payment directly from the HMO if the IPA fails to make timely payment. Under California Health & Safety Code S1371, health plans are ultimately responsible for timely payment of physician claims whether or not they delegate claims payment to medical groups or IPAs. In the FPA bankruptcy case, however, various health plans have contested this position.

IPAs should ask health plans to maintain risk-pool and other withhold money in a bank

account separate from other HMO funds. The IPA should also take a security interest in the separate account. If possible, negotiate to have risk-pool bonuses calculated and paid quarterly rather than annually. That way, less of your bonus money is at risk in an insolvency.

One way to get early notice that your IPA is having financial problems is to become a shareholder or member of the board of directors. As directors, physicians have the right to see their IPA's records. If the IPA is a partnership (which is unusual), all of the general partners will have the same rights. As a director, you could also attend board meeting to learn about payment problems. Bear in mind that directors and partners have fiduciary duties to the IPA and cannot use their position for personal financial gain. Directors and partners might also be sued by disgruntled physicians if the IPA fails to make all payments due its members. IPA shareholders also have certain rights to see the IPA's books and records, although these rights are not as extensive as those accorded to directors.

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