



policy points

Putting the Brakes on Delistment In a long-awaited decision, the California Supreme Court adds more armor to physicians dropped “without cause” from provider lists.

BY JEFF ATKINSON



Louis Potvin, MD, an obstetrician and gynecologist in Orange County,

California, was well regarded in his field. He had practiced medicine for 35 years, served nine years as chair of the Department of Obstetrics and Gynecology at Mission Regional Hospital, and was a past president of the Orange County Medical Association.

In the 1990s, he entered into a preferred provider agreement with Metropolitan Life Insurance Company (MetLife), making him one of 16,000

participants on two of its preferred provider lists. Under the contract, Dr. Potvin provided medical services to MetLife’s policy holders in exchange for agreed-upon fees. The agreement did not create an employment or agency relationship, and it allowed Dr. Potvin to contract with

other preferred provider organizations.

Termination without cause

The agreement allowed either MetLife or Dr. Potvin to terminate their relationship “at any time, with or without cause, by giving thirty (30) days prior written notice to the other party.”

Approximately two years into the agreement, MetLife notified Dr. Potvin that it was terminating his preferred provider status. Initially, MetLife declined to provide a reason to Dr. Potvin, citing the “without cause” provision in the contract. When Dr. Potvin pushed for further explanation, MetLife said that “delistment from the provider network was related to the fact that [Dr. Potvin] did not meet [MetLife’s] current selection and retention criteria for malpractice history.”

At the time MetLife gave its notice to Dr. Potvin, MetLife would not include or retain on its preferred provider lists any physician who had more than two malpractice suits or

The court said the underlying subject matter of the doctor-patient relationship affects substantial public interest and, thus the contracts between doctors and insurance companies are subject to more careful scrutiny than ordinary commercial contracts.

POLICY POINTS

Continued from previous page

who had paid an aggregate sum of \$50,000 in judgments or settlements. Dr. Potvin had been sued for malpractice on four separate occasions, all predating his agreement with MetLife. Plaintiffs in three of these actions abandoned their claims and the fourth case settled for \$713,000.

"Right to fair procedure"

Dr. Potvin requested a hearing from MetLife regarding his removal from the preferred provider lists. When MetLife did not respond, Dr. Potvin filed suit. The case reached the Supreme Court of California, which issued its ruling in May of this year. (*Potvin v. Metropolitan Life Insurance Company*).

The court held that there is a "common law right to fair procedure" regarding a physician's termination from a preferred provider insurance program. The court also held that a clause for termination "without cause" is unenforceable to the extent that it limits a right to a fair hearing. The court said the underlying subject matter of the doctor-patient relationship affects substantial public interest and, thus the contracts between doctors and insurance companies are subject to more careful scrutiny than ordinary commercial contracts.

The California Supreme Court limited its ruling, saying that the right to common law fair procedure "arises only when the insurer possesses power so substantial that the removal significantly impairs the ability of an ordinary, competent physician to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest."

Under the court's ruling, if a physician were delisted from a relatively small health plan that did not have dominant economic power in the geographic market

in question, a "without cause" provision might be permissible and the physician would not necessarily have a right to a hearing before delistment.

In Dr. Potvin's case, he alleged that MetLife did have strong market power and that the delistment devastated his practice, reducing it to "a small fraction" of his former patients. Thus, Dr. Potvin was entitled to a hearing with "fair procedure."

The California Supreme Court drew analogy to an earlier case before the court (*Pinsker v. Pacific Coast Society of Orthodontists*, 1969) which held that an orthodontist who sought membership in a specialty society was entitled to a hearing to determine if his exclusion from the society was arbitrary or capricious. Attaining status as a "Diplomate" in the society was described by the court as "if not absolutely essential, at least extremely helpful."

Questions left open

The decision in Potvin's case leaves many issues open. It is not certain, for example, the degree of market power a health plan must have before it is considered to be "so substantial" that it will impair the ability of a competent physician to practice medicine. Perhaps the market power could be a little as 10 percent, or it may need to be 30 percent or more.

Also relevant, although not conclusive according to the California Supreme Court, is the percentage of the physician's income that comes from the plan that seeks to terminate the physician. The greater the percentage, the greater the interest of the physician in having a hearing before loss of the contract.

The court's opinion applied only to physicians working for preferred provider plans. It did not apply to physicians who were full-time employees of health plans or to physicians who were seeking to join a preferred provider list for the first time.

The court's rationale, including the focus on public interest, could extend to these other situations as well, but the court left resolution of those issues for another day.

Another issue that remains open is the procedure that must be followed. If the decision to terminate is one for which "fair procedure" must be followed (and for which a "without cause" provision is not valid), there could be a range of options for deciding the validity of the termination.

Perhaps it would be sufficient for the health plan to provide the physician with a list of reasons for the termination and then give the physician an opportunity to meet with a health-plan administrator to discuss the charges. Alternatively, "fair" might be construed to require a multi-week hearing before a neutral arbitrator with a right to call a parade of witnesses, including experts.

Not a job guarantee

The right to a hearing does not mean the physician has a guarantee of lifetime job security or inclusion on a preferred provider list. The court said the insurer's decision need only be "substantively rational and procedurally fair" and may include the exercise of "sound business judgment when establishing standards for removal of physicians from its preferred provider lists."

A physician's malpractice history certainly is relevant to that determination, but the California Supreme Court implied that health plans should not place too much weight on malpractice claims that are filed, but then abandoned. Decisions regarding what does and does not constitute "sound business judgment" will take many court decisions to sort out.

The decision in Potvin's case is binding only in California. Other states may choose to follow California's approach, but they are not obliged to.

POLICY POINTS

Continued from previous page

A few years before that case, New Hampshire followed a similar approach. In *Harper v. Healthsource New Hampshire, Inc.* (1996), an HMO sought to terminate a physician by use of a “without cause” provision in the provider contract. (See “Policy Points” in *UO's* July/August 1998 issue.)

The New Hampshire Supreme Court, like the California Supreme Court, noted the public interest in the relationship between health plans and preferred provider physicians and held that a decision to terminate a physician “must comport with the covenant of good faith and fair dealing and may not be made for a reason that is contrary to public policy.”

In the Healthsource case, Dr. Paul Harper complained to the HMO about its handling of patient records and billing. Soon thereafter he was terminated by use of the “without cause” provision. The New Hampshire Supreme Court held that Dr. Harper was entitled to challenge the decision and seek a determination of whether the HMO had acted in good faith.

In many other states, the dominant rule is employment-at-will, which means that either the employer or the employee can terminate an employment relationship at any time and for any reason (or no reason) unless a contract between the parties provides otherwise. If a contract provides that employment or a preferred provider arrangement can be terminated “without cause,” that provision is valid and a physician can be fired or dropped from a plan without being given a reason.

As patients and lawmakers become more suspicious of managed care, legislatures and the courts can be expected to give more scrutiny to decisions of managed-care companies and to provide appeal processes when the decisions are not what the doctor or patient wants.

There will be a price, however. When

decisions regarding the termination of a preferred provider or employee are subject to increased review, there will be added costs of time and money for the hearings and for the piles of paperwork that health plans and physicians will gather to defend their positions. Many of these costs will be added to the health-care bills paid by patients, employers, and the government.

For Dr. Potvin and MetLife, time moved on.

Dr. Potvin died while his case was still pending, and MetLife sold its health-care business to United HealthCare which, in turn, discontinued the plan of which Dr. Potvin was a part. They left behind a legal case which will provide more protections to physicians who are in preferred provider plans.

The protections will be of increasing importance to physicians as there is more consolidation by the organizations with which they affiliate. ■

Jeff Atkinson teaches courses in health-care reform and health-care contracts at DePaul University College of Law in Chicago, from which he graduated summa cum laude. He also writes on legal, medical, and ethical issues.