

CAVEATS IN CONTRACT LIABILITY

By Cliff Rapp, LHRM
Vice President, Risk Management, FPIC

With the advent of Managed Care (MC), physicians have become increasingly involved in the business arrangements and contracts required to participate in the business of healthcare delivery. Before signing a "Provider Agreement" MC contract remember that it is legally binding between the parties. Carefully read every proposed contract to determine how it defines the relationship created between the healthcare delivery system and you, the physician. Be mindful of "Hold Harmless and Indemnification Agreements" in such contracts which because of their wording may be excluded from coverage by your FPIC policy and could expose you to significant personal financial exposure.

Key Clauses

Hold harmless clauses are commonly used in business contracts primarily to shift liability from one party to another. Similarly, hold harmless and indemnification clauses in MC contracts are designed primarily to transfer the liability and expense of claims brought against the business entity away from the entity, and to the physician in the event a claim against the entity arises out of the physician's professional services. Many hold harmless and indemnity agreements may require the physician to indemnify the entity for losses caused by parties over which the physician has no direct control.

Accordingly FPIC believes that hold harmless indemnification clauses in such contracts are unnecessary and should be removed. Florida courts recognize a passive tortfeasor's common law right of indemnification from an active tortfeasor. If a patient you treat through a MC plan recovers damages from the plan attributed solely to your negligence you, the physician, is the active tortfeasor. The MC plan, absent an independent act of negligence of its own, is the passive tortfeasor. If the plan pays such damages it is thus entitled under common law to the right of indemnity of these damages from you. In our opinion, seeking to create a *contractual* right to indemnity, when such a right already exists under common law, is unnecessary. Therefore, you should seek to have such clauses removed from contracts whenever possible. A MC plan will usually seek to keep such clauses in the Provider Agreement because contractual indemnity is far easier to prove than common law indemnity.

While hold harmless and indemnification agreements do not reduce the insurance protection provided by FPIC, signing a contract with such language could mean that you assume additional liability by contract, which the FPIC policy does not cover. FPIC's policy, as virtually all professional liability policies, excludes ***"any liability you have assumed under any contract or agreement."***

Entering into any contract where the duty to indemnify or hold harmless is *unilateral*, whereby you, the physician, have the sole duty to the MC plan is disadvantageous to the physician. In the event the plan is found liable for something you did or did not do you are effectively financially responsible to the plan. Indemnification and hold harmless clauses commonly seen in provider agreements and MC contracts generally read:

Physician agrees to defend, indemnify, and hold Plan, its parent, subsidiaries, affiliated and related companies, directors, officers, employees, and agents harmless from and against all costs (including reasonable attorney's fees), liabilities, claims, losses, lawsuits, settlements, demands, causes, judgments, and expenses related to this agreement to the extent that such costs and liabilities are caused by the Provider.

When contracts are unilateral, FPIC recommends that such contracts be made reciprocal by adding the language below. This entitles the physician to the same benefits of risk transfer as the plan, and creates a duty on the part of the MC plan to defend, indemnify and hold harmless, the physician, from liability the entity created by its own negligence.

Plan agrees to defend, indemnify, and hold the Physician...harmless from and against all costs, attorney's fees, liabilities, claims, losses, lawsuits, settlements, demands, causes, judgments, and expenses related to this agreement caused by the Plan.

You should determine if these clauses go beyond the scope of your professional liability coverage provided by FPIC before signing the contract. Ideally, such clauses should clearly limit indemnification to the extent that the physician assumes financial responsibility for the liabilities incurred by the plan *only* to the extent that such liabilities are attributed to the negligence of the physician. The language would then parallel the plan's common law right of indemnity and FPIC's exclusion would *not* apply. Coverage for contractual indemnification is excluded by FPIC's indemnity agreement. However, FPIC does recognize and protect its insureds from claims based on a passively

negligent entity's common law right of indemnity due to its vicarious liability for the acts of an actively negligent physician, provided that the claim arises out of medical treatment you rendered which is covered by your FPIC policy.

When a hold harmless and indemnity agreement is unilateral the entity may recover legal fees and damages paid to the patient attributed to negligence other than yours, but for which, by contract, you have agreed to indemnify the entity. Under such contracts FPIC's exclusion would apply and you would be personally responsible to the MC plan for such expenses.

Clauses to Avoid

You should also be mindful of clauses pertaining to your rights and duties in the event a claim or suit arises which create a contractual duty on your part to the plan. You may not be able to fulfill these rights or duties given the terms and conditions of your professional liability coverage with FPIC. For example, language such as the following may create a duty or limit your rights to defend or settle claims and could force you to choose between breach of contract to the MC plan or loss of professional liability coverage.

The indemnifying party shall within three days after the notice of claim has been received from the indemnified party notify the indemnified party in writing of its election to assume the defense of any such claim or cause of action, which defense shall be conducted at indemnifying party's expense through counsel acceptable to the indemnified party. The indemnifying party shall not, in the defense of such claim, consent to the entry of any judgment or enter into any settlement except with the indemnified party's written consent. Failure by the indemnifying party to timely notify the indemnified party of its election to defend shall be deemed a waiver by the indemnifying party of its right to so defend such claim at which point the indemnified party shall have the right to assume such defense at the indemnifying party's expense.

Your worst nightmare in the event you are confronted with a claim or suit: having to choose between breach of contract to the entity or loss of professional liability coverage by FPIC as a result of having entered into a contract with a clause such as the above.

Commitment to cost containment may set restrictions to the extent medical care is provided under a managed care plan. Avoid entering into a provider agreement that forfeits your ability to seek compensation for services that you feel are necessary. Be cautious of the language following. Such clauses should be modified to retain your right to seek compensation from the patient or a third party payor for those services which in your judgment are medically necessary and in the best interest of the patient.

"...physician shall not seek compensation whatsoever for covered services which are deemed not medically necessary pursuant to Plan..."

Also be cautious of forfeiting your right to compensation. Case law* has established that a physician who complies without protest with the limitations imposed by a third party payor, when the physician's medical judgment dictates otherwise, cannot avoid the ultimate responsibility for the patient's care. Therefore, the physician could be held liable if a court determines that treatment not rendered was medically necessary notwithstanding any limitations imposed by a MC plan, utilization review, or its definition of what constitutes "medically necessary." If a MC plan is unwilling to permit the physician the right to seek compensation, you must be prepared, in view of current case law, to provide treatment in certain circumstances with the knowledge that you may not be compensated and forego the rights to do so.

Perseverance pays off, however. If the aforementioned clauses are objected to, the MC organization may agree to remove or modify contractual language to the extent any conflicts are resolved. Coverage with FPIC is intended to respond to medical malpractice claims brought by the patient that you treat whether privately or as a member of an entity. The coverage FPIC provides will not respond as a result of a contract you enter whereby you assume liability for another party however, FPIC will indemnify and defend you for professional services you render.

Contact your personal attorney or FPIC's Risk Management Department should you encounter problematic language in MC contracts under consideration to determine what, if any, impact such language may have upon your professional liability coverage.

*Wickline v. State of California - 228 CaLRptr.661, CaLApp.2 Dist.1986