



Protecting Your Assets

ANATOMY OF A NEGLIGENCE LAWSUIT AGAINST A THIRD-PARTY BILLING COMPANY

By Michael Bamberger, Esq.

You've worked hard to build your medical billing business. You've reached a comfortable level of success—your accounts receivables are on the rise, you've invested a considerable sum in equipment and employee training. Your assets are growing. What could go wrong?

Plenty. Today, more than ever, it is important that third party medical billers understand the risks and processes involved in potential lawsuits arising from clients' claims of negligence for services performed. A single lawsuit can drain enormous amounts of time and cash, and may even drive a billing company into bankruptcy.

E & O insurance offers a critical piece of asset-protection planning for any third-party billing company that intends to build or maintain enterprise value and protect its owners.

The following scenario, involving a hypothetical lawsuit between a group of physicians (let's call it Doctors Group) and its third-party medical biller (let's call it ABC Billing), illustrates the process and costs of defending such a claim.

ABC Billing did not maintain errors and omissions insurance. The company had a substantial client base, a substantial number of employees, meaningful accounts receivable, several bank accounts, and significant equipment and assets that would be at risk should it lose the case.

Had ABC Billing maintained an errors and omissions policy that provided a defense against a negligence claim, ABC may have been able to save hundreds of thousands of dollars.

Genesis of the Claim

In 1999, Doctors Group contracted with ABC Billing to process its claims. ABC agreed to provide coding, reimburse-

ment consultation, billing, and collection as part of its basket of services. However, the relationship between Doctors Group and ABC Billing deteriorated over the next few years as collections failed to meet the expectations of the physicians. ABC and Doctors Group met on numerous occasions to resolve problems in the documentation, coding, collection, and processing of claims. No agreement was reached. Ultimately, the physicians hired an independent audi-

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tor to assess the coding, billing, and collection activities performed by ABC.

The consultant indicated that the error rate in coding was outside the "standard of care" in the industry. This consultant also suggested that the batching of claims, processing and collection of co-pays, and insurance payments resulted in a shortfall of reimbursements to the physicians. Doctors Group demanded that ABC compensate the physicians for the "lost collections."

Although ABC may have recognized some deficiencies in its operational processes, it argued that the doctors were equally at fault for poor documentation. Consequently, ABC terminated its relationship with Doctors Group. Shortly thereafter, a multiple-count lawsuit was filed by the physicians against ABC Billing claiming the biller experienced operational deficien-

cies and performed poorly. The lawsuit alleged lost collections.

The Case for the Prosecution

After the lawsuit was filed, Doctors Group hired an independent expert to testify as to the coding errors, submission and claim process, and other concerns. The expert reviewed records for several patient-visit days over a multi-year period, calculated an average per-chart reimbursement, and tracked the actual collection and processing of the charges from the patient intake through the last payment, if any, by the patient.

The expert also dissected each stage of the billing process and collection cycles. Through this process, random-sample days suggested an error rate on coding that was higher than what the expert had proposed as the standard of care in the industry. Fully extrapolated over a period of four years, the error estimate resulted in a significant damage claim. Moreover, the physicians' expert suggested that the coding distribution/breakdown for the group was below the norm (blaming the billing company). He also alleged that the reimbursement to Doctors Group should have been higher than the norm because of the percentage of commercial payors in the local market.

The expert re-analyzed and re-calculated the alleged "undercollections" based on the coding levels revealed by the Medicare bell curve and other available surveys. To attempt to support this contention, the expert provided additional data obtained through MGMA-affiliated studies on coding profiles for practices in the physicians' specialty in their geographic section of the country.

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The Process

ABC hired its own third-party expert to challenge the physicians' expert analyses, extrapolation methodologies, and conclusions. ABC's expert re-analyzed and re-extrapolated the information to establish billing and coding "standards of care" in the marketplace that would be useful for testimony purposes in a jury trial. The standard would arguably serve as the benchmark for proving the innocence of the billing company. The approximate cost for all this—the reimbursement and coding expert, forensics, accountant, and expert economist hired by the billing company—was a six-figure amount.

The physicians' attorneys sought discovery of every e-mail between Doctors Group and ABC Billing and every e-mail between ABC's supervisors and its employees dealing directly and indirectly with billing for Doctors Group. Moreover, the physicians' attorney subpoenaed the new billing company, which subsequently had been hired to handle all billing and collection matters for the physicians, to obtain its actual data on performance, write-off percentage, turnaround time for collection, and such other relevant statistics that would be appropriate to prove that ABC Billing did not meet the standard of care.

By the time discovery was completed, each of the parties had expended hundreds of thousands of dollars in the lawsuit. The process included the experts' opinions; the review of e-mails and other documents, including internal annual employment reviews of employees servicing the client; and various depositions, including employees of the billing company, the leadership of the physician group, the experts who would testify in the case, and medical group personnel.

It was clear that should this case proceed, the cost of a full trial, given the relative complexities, could have ex-

ceeded several hundred thousand dollars. Moreover, given that the standards of care in the industry are not precise and are subject to interpretation and dueling expert opinions, there was substantial risk of an adverse jury determination. Any adverse verdict would bankrupt ABC Billing. Thus, a mutually negotiated outcome was the only means of resolution short of a jury trial. The parties necessarily reached a settlement.

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The lessons in this case are clear:

1. The existence of errors and omissions insurance for a third-party billing company may be the only means by which a billing company can afford to defend itself from negligence claims made by its physicians. Recognize, however, that coverage is not a given in every case and is dependent upon the actual facts and claims made, as certain matters (e.g. fraud) are outside the scope of insurance coverage.
2. All communications between the physicians and the billing company, as well as internal communications between the billing company and its staff, may be accessible in discovery by the physicians.
3. The standards of care that apply in the coding industry are not a "bright line" or as precise as everyone might think.
4. The failure to train and supervise staff can result in substantial damage

claims against a billing company.

5. A third-party billing company should take reasonable steps to ensure that the responsibilities assumed by the company are carefully delineated. The company should insist upon physician co-ownership in activities that require physicians' involvement, such as the coding of client services and documentation.
6. The service agreement between a third-party billing company and client physicians should contain various protective provisions to insulate the third-party billing company from liability for negligence in the discharge of its services. Provisions should also be made for attorney fees and expert expense reimbursement to the billing company if the billing company prevails in the lawsuit (although state law and public policy may render such protective language unenforceable if challenged).

Billing companies face great vulnerability in the face of claims of negligence (and breach of contract) by clients. One hedge against costly and disastrous outcomes is a clear understanding between the client and the billing company as to each party's responsibilities. Should the dispute come to a lawsuit, errors and omission insurance coverage owned by the billing company may mean the difference between survival and bankruptcy of the biller. Had ABC Billing maintained E & O insurance, coverage might have been available to assist in facilitating a resolution or pay the costs of defense along with funding an adverse judgment. ■

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