Most State Prompt-Pay Laws Impose Penalties of Up to 18 Percent Annually

Most states with prompt-pay laws have included in their statutes interest penalties as high as 18 percent annually on unpaid or untimely paid claims, Paul Giancola, an attorney with Snell & Wilmer LLP, Phoenix, said April 26.

Of the 49 states and the District of Columbia with prompt-pay laws, 45 states and Washington, D.C. have adopted interest penalties, Giancola said during a teleconference sponsored by the American Health Lawyers Association. Administrative fines are assessed by 15 states in addition to interest penalties and seven states require restitution, he said.

Giancola discussed the efforts by states to enforce prompt-pay laws, which were established to relieve the problems of delayed payments by health care plans to providers. Sanctions for failure to pay promptly include penalties, fines, and, in some cases, restitution, Giancola said.

Rights of Action

Private rights of action to enforce prompt-pay laws are not usually addressed by the states, Giancola said. He referred to two Pennsylvania cases in which a private right of action was the issue.


The state court determined the first prong of a three part test for a private right of action was met—the physicians appeared to be members of the class for whose benefit the statute was enacted. However, the other two parts, whether there was an indication of legislative intent to create a private remedy, and whether the regulations under the state act indicated that a private cause of action existed, were not met and the superior court upheld the trial court's dismissal.

However, in another case, Grider v. Keystone Health Plan Central (E.D. Pa., No. 01-CV-05641, 9/18/03), the U.S. District Court for the Eastern District of Pennsylvania disagreed with the Pennsylvania superior court in Solomon on the effect a lack of legislative intent has in this case, Giancola said. The district concluded that it was consistent with the underlying purpose of the legislative scheme to imply a private cause of action.

RICO Violations

In Klay v. Humana, 382 F.3d 1241 (11th Cir. 2004) (No. 171 9/3/04), a class action filed by physicians against all major MCOs, claimed the MCOs violated the federal Racketeer Influenced and Corrupt Organizations (RICO) Act in denying, delaying, and diminishing payments due the physicians. The Eleventh Circuit upheld the certification of federal RICO claims, but rejected the lower court's certification of state law claims.
The basis for the court's rejection of the state law claims in *Klay* was that the claims were so individualized by the variations in state law, including different standards and definitions for each state and individualized proofs of harm, Giancola said. In addition, not all states had prompt-pay laws or had a cause of action, he added.

In a more recent case, *Baylor University Medical Center v. Arkansas Blue Cross Blue Shield*, 331 F. Supp.2d 502 (N.D. Tex. 2004), Baylor sued the Arkansas Blue Cross Blue Shield (ABCBS) health plan, asserting breach of contract and violation of the Texas prompt pay law. ABCBS removed the case to federal court, arguing that Baylor's claims were preempted by ERISA.

The district court found that Baylor's breach of contract claim was not preempted by ERISA. The court also found that ERISA did not preempt Baylor's claim under the Texas prompt-payment law, Giancola said.

**Contract Provisions**

In her recommendations for prompt-pay provisions to be included in contracts, Katherine M. Keefe, an attorney with Reed Smith LLP, Philadelphia, said that the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) significantly expanded preemption of state laws applicable to Medicare managed care plans. Before MMA, preemption of state laws was applicable to Medicare managed care plans if they were inconsistent with Medicare+Choice rules, Keefe said.

Under MMA, Medicare managed care plan (Medicare Advantage) requirements supersede all state laws and regulations, except those relating to licensure and plan solvency, Keefe said. CMS commentary in the final Medicare Advantage regulations published in the *Federal Register* in January (70 Fed. Reg. 4664), reinforced preemption of the state prompt-payment laws, she said.

Under the new terms, contracts or other written agreements between Medicare Advantage organizations and providers must contain a prompt-payment provision, Keefe said. The terms of the provision are to be developed and agreed to by both the Medicare Advantage organization and the provider.

The regulation (42 CFR §422.520(a)(3)) states that all other claims by noncontracted providers must be paid or denied within 60 calendar days from the date of request. Keefe noted that the provision raises the issue of interest payments.

**Consistency Important**

The provider should be sure to include in the contract that the prompt-payment provision applies to all plan enrollees, Keefe said. From the plan perspective, it is important that the contract clarifies consistency of operations under Medicare Advantage compliance, she said.

Keefe pointed out that state prompt-payment laws that are otherwise applicable to an MCO as a health plan do not apply to the MCO as administrator or to self-insured plans. Other state laws or regulations that are not applicable include the "hold harmless" laws, contract termination, member appeals, and continuity of care.

Keefe also recommended that the contract should specify that the prompt-payment provision applies to all plan enrollees. From the plan perspective, it is important to put in the contract a statement saying that if the group health plan does not pay, the administrator cannot pay, she said.
The Health Insurance Portability and Accountability Act's transactions and code sets rule established electronic standards for specified transactions, including claims payment, Keefe said. A HIPAA provision that is contrary to a state law provision preempts the state law, she said.

Many states' prompt-payment laws define clean or completed claims that trigger managed care organization claims payment timeframes, Keefe said. Some state laws are potentially contrary to HIPAA, but others define clean claims in a more open-ended way that are not contrary to HIPAA, she said.