From *Health Plan Week*

Nev. Hepatitis Case Puts Plans on Notice; UnitedHealth Unit May Owe $500 Million

- April 15, 2013 - Volume 23 Issue 13

The health insurance industry and legal community are not sure what to make of the massive $500 million award a jury ordered on April 9 for punitive damages in a Nevada malpractice case against UnitedHealth Group subsidiary Health Plan of Nevada, Inc. The size of the award is an eye-opener, legal watchers say, but whether the case has a far-ranging impact on how carriers monitor the quality of their provider networks is the most important lesson that may come out of the legal battle — that is, if an appeals court doesn't overturn the controversial decision.

"I don't know if it's a huge deal or not," Barak Richman, Ph.D., a law professor at Duke University School of Law who researches and teaches on the economics of contracting and health care policy, tells *HPW*. "Hopefully, insurers are already considering quality when they form their networks and are not just driven by cost."

An attorney says the message, even if the jury award is reduced, is clear to health plans. "I do think it sends a signal to health plans to have some responsibility about who they accept into their network. This case, though, is somewhat rare, but could be part of a new wave of litigation against health plans to make sure they are living up to their responsibilities. After all, they do market health plans as providing quality medical care, making a promise to subscribers and members," William Shernoff, attorney with the California law firm Shernoff Bidart & Darras who has filed several legal actions against health insurers, tells *HPW*.

The Nevada case concerns two women who were infected with hepatitis C in 2005 while undergoing outpatient endoscopy procedures at a clinic in Las Vegas. The facility was owned by Dipak Desai, M.D., who was a member of the provider network of Health Plan of Nevada, a unit of Sierra Health Services, now a subsidiary of UnitedHealth. Desai's clinic was the source of a wider hepatitis outbreak in 2007 and 2008, which required state health officials to notify more than 50,000 patients of possible infection.

UnitedHealth Preps Nevada Appeal

On April 4, the two hepatitis C victims and a spouse of one of the women were awarded $24 million in compensatory damages from the UnitedHealth-owned Nevada plan. Lawyers for the three plaintiffs successfully argued that the insurer should have known of the physician's unsafe practices, but instead was concerned with keeping its contract with an inexpensive provider in order to make money. The $500 million award for punitive damages is in addition to the compensatory damages and is actually well below the $2.5 billion sought by the plaintiffs' lawyers, but ranks as the largest such jury award in the U.S. this year.

How Far Do Insurers Have to Go?

Tom Baker, a professor at University of Pennsylvania Law School who teaches insurance and medical malpractice law, tells *HPW* that if the jury's decision stands on appeal, it will really shake up the way health insurers do business with their provider networks. "The basic allegation is that the health plan should have had a monitoring system set up for quality control….That is not what health plans do these days, as far as I know. The significance is that if this sort of thing is adopted in other states, it will be a pretty major event. What it would do is make health insurers malpractice liability companies," Baker says. But he adds that "it is not something that will bankrupt the health insurance industry." What it would do in the short term is disrupt how health plans organize and manage their networks, in addition to dealing with any large payout. "It is a not a huge financial problem long term, but it would cause a lot of short-term disruption and nobody likes disruption," he says.

Ronen Avraham, a law professor at the University of Texas at Austin specializing in medical malpractice, tells *HPW* that the Nevada case may be peculiar to that state, but could lead to tighter checks by health plans on provider credentialing around the country. He adds that health plans do have the advantage in being able to assess the quality of their provider networks. "Patients are in a worse position to check doctor credentials," Avraham adds.

Baker stresses that the responsibility being placed on the health plan in the Nevada case seems to reach into areas that appear, without knowing all the details of the case, a stretch. "I don't think this is going to stick," he says, referring to the total of $524 million in damages for the plaintiffs.

In a statement reported in the Associated Press, one of the plaintiffs' lawyers, Robert Eglet, said "pressure from Wall Street and investors causes these companies to put their profits and their shareholder profits above patient safety." But, for Shernoff, the question during the appeals process will be how much the Nevada health plan knew about the now-disreputable practices of the gastroenterologist Desai. "That is going to be the major point. How far does the health plan have to go," he says. Increasing the responsibility for monitoring provider networks may cause the panel size, which is already narrowing, to slim down even further. Shernoff adds that these types of cases seem to come in cycles, recalling that he represented an insurance policyholder in a California case arguing that doctors were being incentivized by an insurer not to pay for care. "The payment schedule was structured so that the doctor was disincentivized to give treatment. This is another example, like a health plan knowing about a doctor, of how they would be responsible," he says.

Shernoff says at least there should be some form of background check performed by a health plan on the physicians in their provider networks. "You can't let anybody in the network who has a problem," he adds.

Plan Says Facts Will Aid Its Case

Health Plan of Nevada released a statement shortly after the jury's punitive award decision, declaring the case winnable on appeal because jurors were not allowed to hear "extensive evidence" about the covert nature of how Desai operated.

"For example, the jury did not hear that Dr. Desai has been criminally charged for the outbreak, that the same plaintiffs already sued and collected millions from a pharmaceutical company, that we used extensive provider credentialing and contracting policies and procedures, that Dr. Desai and others were credentialed or accredited by other HMOs, hospitals and the Accreditation Association for Ambulatory Health Care, and that during the relevant time period a number of government agencies had inspected the clinic where these providers practiced and found no issues," the statement said.

The insurer said the $500 million award was a "fantasy" number and that the "only numbers that matter here are the higher insurance premiums that Nevadans may pay if health plans are held liable for the criminal conduct of independent doctors."

Desai wasn't named in the civil lawsuit and has denied any wrongdoing. He has also declared bankruptcy and given up his medical license. However, he will face trial in a Nevada state court later in April and federal court in May on separate criminal charges stemming from the 2008 outbreak.

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