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Court Reinstates \$1.13 Million Judgment Against Insurer for Excluding Providers From its PPN Without Giving Notice and a Right to be Heard

By Robert R. Pohls

In *Potvin v. Metropolitan Life Insurance Co.* (2000) 22 Cal.4th 1060, the California Supreme Court held that the common law doctrine of fair procedure can limit an insurer's right to remove a physician from its list of preferred providers. When doing so, though, the Court explained that the common law doctrine of fair procedure does not apply to an insurer's removal of a physician from its preferred provider list unless 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." The Court also added that, even when the common law doctrine of fair procedure does apply, an insurer may remove a physician from its preferred provider list without regard to the financial effect on the physician, so long as the insurer's decision is "substantively rational and procedurally fair."

The plaintiff in *Palm Medical Group, Inc. v. State Compensation Ins. Fund* (Cal.App., Mar. 25, 2008) had twice applied for admission to the preferred provider network (or "PPN") operated by a leading worker's compensation insurer. The insurer declined the first application, explaining that there was no need for another network provider in the plaintiff's geographic area. In response to the second application, however, the insurer stated only that it would not consider the plaintiff for admission into the PPN because it had "significant concerns" with the plaintiff's prior and current performance.

After a month-long trial, the jury found that the insurer owed the provider a duty of fair procedure because it possessed power so substantial over the market for the treatment of occupational injuries in the geographic area that its failure to admit an ordinary, competent medical provider to its PPN would significantly impair the provider's ability to practice occupational medicine. After separately finding that the insurer's reasons for rejecting the plaintiff's application were arbitrary and unreasonable, the jury awarded the plaintiff \$1,131,000 in damages.

The trial court later granted the insurer's motion for judgment notwithstanding the verdict, explaining that there was "no substantial evidence that [the insurer] possessed power so substantial over the market ... that the failure to admit [the plaintiff] to its [PPN] significantly impaired [the plaintiff's] ability to practice occupational medicine." For a variety of reasons, though, the Court of Appeal disagreed.

The court first explained that there is no "bright line" for determining whether an insurer possesses power so substantial over the market as to trigger the common doctrine of fair procedure. See, *Appelbaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 658; *Ambrosino v. Metropolitan Life Ins. Co.* (N.D.Cal. 1995) 899 F.Supp. 438, 445. It therefore reasoned that evidence showing the insurer controlled 31 percent and that its PPN accounted for 16 percent of the market was sufficient to support the jury's finding that the PPN had a significant impact on



the plaintiff's profitability. Likewise, it found that data suggesting only 20 percent of local employers participated in the PPN program did not compel a different conclusion.

The court next reasoned that the plaintiff's ability to compete for – and significantly profit from -- business outside the PPN was irrelevant. Indeed, while the insurer had presented evidence which showed the plaintiff's gross revenues had increased between its first and second applications for admission to the PPN, the plaintiff presented other evidence which showed its gross revenues never had met its projections and had dropped sharply after the insurer rejected its second application.

Finally, the court reviewed all seven of the reasons the insurer offered at trial for excluding the plaintiff from its PPN. After finding conflicts in the evidence with respect to each of those reasons, the Court held that the jury could reasonably have concluded those reasons were arbitrary and unreasonable. It therefore reversed the order granting the insurer's judgment notwithstanding the verdict and reinstated the jury's \$1,131,000 award in favor of the plaintiff.

About the Author

Rob Pohls has been shaping California insurance law for more than 20 years. He is the principal of *Pohls & Associates*, a firm in the San Francisco Bay Area that he established in 1999 to represent life, health, disability and long term care insurance companies in bad faith, ERISA and other forms of complex litigation. As a member of the Association of Life Insurance Counsel and a former Chair of the American Bar Association's Health & Disability Insurance Law Committee, he is a prolific author and frequent speaker on issues of interest to the insurance and financial services industries. More information about Rob, his firm and his practice is available online at: www.califehealth.com. Contact him by e-mail at: rpohls@califehealth.com.