

Price transparency issue has all sides seeking clarity

Pending court ruling has major implications for hospitals and GPOs

BY ROBERT NEIL

QUICK TAKE>>>

A lawsuit brought in 2004 by medical device manufacturer Guidant against the consulting firm Aspen Healthcare Metrics, which is owned by a large group purchasing organization, could have major ramifications on pricing data that is shared with hospitals. At stake is whether consultants, acting in a third-party capacity, can have access to and divulge pricing data on expensive physician preference items such as cardiac rhythm management devices. As the case winds its way through the court system, hospitals, consultants and vendors need to keep a close eye on the proceedings and outcome.

The binding that holds together one of the health care field's most essential, yet sometimes combative affiliations is being given a new bit of stress. A court case involving medical device manufacturer Guidant, Indianapolis, and a consulting firm owned by one of the industry's largest group purchasing organizations is putting a spotlight on price transparency and the relationship between buyers and sellers in the supply chain.

"There's a natural friction that's always existed between buyers and sellers, and I don't think it will ever go away," says Al LoBiondo, chairman of the Health Industry Group Purchasing Association (HIGPA), Chicago.

"Some companies are adopting a more strategic approach, but there's always going to be a certain element of friction between the two."

Although HIGPA isn't a party in the court battle, the association has stepped into the debate that's emerged as a result of a summary judgment ruling handed down in the case.

The suit was originally brought by Guidant in 2004 against Aspen Healthcare Metrics, Englewood, Colo., a subsidiary of MedAssets, Alpharetta, Ga.

Guidant claims that while Aspen was working on a consulting project for a mutual hospital customer, the consulting firm "tortuously" interfered with Guidant's contracts by wrongfully induc-

ing the hospital to reveal Guidant pricing information. The contracts included a confidentiality clause that stipulated third parties were not allowed access to any contract information without prior written permission from the manufacturer.

Aspen argued it was acting as an agent of the hospital, and therefore was not a third party bound by the restrictions of the contract.

However, the U.S. District Court judge hearing the case in Minneapolis didn't agree and ruled that Aspen had indeed violated the confidentiality agreement Guidant had with the hospital.

The ruling took some people on the provider side of the supply chain by surprise, including John Bardis, chairman, president and CEO of MedAssets.

"The contract (that Aspen had with the hospital) clearly states that Aspen is an agent, and what the judge cited, to my knowledge, as the reason for him saying Aspen was a third party and not an agent, was that Aspen didn't have contract signing rights on behalf of the hospital," says Bardis.

Heart of the matter

Aspen has been performing hospital consulting work in the industry for a number of years, and in previous dealings—as well as the one in dispute—has signed agreements stating the company was an agent of the hospital, according to Bardis.

Such agreements are not unusual in the industry, and one of the reasons consultants are hired by hospitals is to examine pricing information and compile benchmarking data that can be used to help facilities get better prices on contracts with manufacturers, if possible.

The case involving Guidant centers on contracts for cardiac rhythm-management devices, which fall into the high-tech physician preference item category, in large demand by some physicians.

However, the products also can come

with a high price tag, and hospitals have been working on ways to find the best deals possible.

Guidant, which has a corporate policy of not commenting on pending court cases, didn't return a phone call or respond to an e-mail seeking comment on this matter.

However, court papers show the company has not only accused Aspen of looking at private contract information without permission, but also of sharing that information with other hospitals with the

purpose of advising them on what to pay for the Guidant products.

A mid-May trial date was set for Guidant to begin presenting its case for damages, but Bardis says his concern goes beyond the specifics of the case to wider implications for the industry that may follow.

He says the pretrial ruling has brought confusion over who can legally look at a hospital's data. It's not clear if hospitals that sign confidentiality agreements would be restricted from sharing pricing infor-

Gingrich encourages price transparency

The timing of the trial in the Guidant-Aspen case comes as the Bush administration is working to encourage transparency from hospitals. The Centers for Medicare & Medicaid Services (CMS), Ballmer, recently said it would begin publishing the government's disclosed rates for several common hospital procedures. The agency says that if you would like to know how much you're paying for hospital services,

the U.S. House of Representatives' House Energy and Commerce Committee Subcommittee on Health recently held a hearing on subject, and former House Speaker Newt Gingrich, who founded the Brookings Center for Health Transformation, Washington, D.C., in 2003, testified that medical device manufacturers should be held to the same price transparency standard as hospitals.

The following is the latter portion of Gingrich's testimony:

"I want to encourage this committee to look at something we've run across at the Center for Health Transformation that I am absolutely outraged at. There are some medical device companies that now require hospitals to sign contracts that they cannot tell the patient or the doctor what the device costs. This is turning the price of the medical device into a trade secret in a way that is insane. I use that word deliberately. How can you talk about a free market, how can you talk about any kind of transactions and say that the price is secret? And I would urge this committee, first of all, to hold hearings on this... and I would suggest to you that you ultimately want to move toward legislation that says any medical device that is going to be sold to any aspect of the federal government—the price ought to be public. These are commodities. They may be scientifically based commodities, they may be sophisticated commodities, but they're commodities. If you walked into a store and said I'd like to buy a TV set, and they say, 'Well, we can show you four options, but, by the way, we're not allowed to tell you the price,' you'd think they were crazy. And for medical device companies to be so arrogant as to think they can keep their prices secret by contract, I think is a violation of everything we're trying to accomplish in transparency, and I would urge you to look into that area as a particularly egregious example of an unjustifiable secrecy in the health system." —RN



FEATURE 2 [data mining]

mation not only with consultants, but also with physicians or other hospitals within the same health system.

Bardis is not the only one with this apprehension.

"What I have is a healthy concern about whether this is something that's going to be a domino effect," says Alison Flynn, associate vice president and director for Nexera Consulting, New York, a company that works with hospitals on various projects, including some that involve evaluating contracts with manufacturers.

"Is this something that's going to become the norm, where hospitals are going to lose the ability to be competitive, and even more so than be competitive, to be collaborative with other institutions, quite possibly in their own integrated delivery network? That concerns me," she says.

Many hospitals work with third parties to make sure they're paying the right price on a contract, and millions of dollars have been saved for the greater good of the health care industry as a result.

However, if hospitals are going to lose title to their own data, that's not going to be in the best interest of the industry at large, Flynn says.

She notes vendors are for-profit companies that seek to keep their margins high, and that there's nothing wrong with that; however, most manufacturers also are willing to partner with hospital customers to help them save money while still being able to provide the quality products the hospital wants.

The reason the ruling in the Guidant v. Aspen case is odd is because it goes against the spirit of the collaborative relationship most vendors try to foster with their

customers, she says.

The legal battle is giving renewed energy to an industry debate concerning overall price transparency, which many experts say would greatly help reduce hospital costs, and thus have a positive effect on overall health care pricing, including health insurance rates and out-of-pocket expenses for consumers, says LoBiondo.

"There's always been a little tug-of-war between manufacturers and providers in terms of allowing total transparency through data. It first manifested itself several years ago when we tried to get a standard nomenclature in the industry and standard device descriptions, and there was tremendous resistance (from manufacturers) against that."

Certain sectors in the supplier community haven't been willing to surrender their opposition to total transparency for prod-



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uct pricing and product descriptions that would allow hospitals to easily compare one manufacturer's products with another, he says.

These companies want to avoid making products generic or having generic descriptions because they want to be able to distinguish their products in the marketplace in terms of the features and benefits of the products—whether those features and benefits are necessarily something that's of a true value to the provider, LoBiondo says.

"There are progressive companies that are moving away from that, but you're still seeing remnants of it, and I think it's more prevalent among the device manufacturers," LoBiondo says.

As far as any deliberate involvement Guidant might have in price shielding, Bardis says there's no question that it's

not just a matter of it appearing that Guidant wants to guard its pricing.

"I think it's a matter of clear fact," he says.

This should be a huge concern to the entire industry because cardiac rhythm management devices are generally the single largest cost in cases that require the equipment. The prices are high and run more than labor, more than anesthesia and more than operating room time, says Bardis.

Long-term effects

If the ruling in the Guidant case means hospitals will be constrained from bringing outside help to deal with pricing issues, then what you have is "a highly restricted seller's market for a company like Guidant, who would then have no price competition," Bardis says.

"The impact of this is potentially devastating for U.S. hospitals, which have an obligation to patients, payers and their communities to drive efficient pricing. The hospital industry, under this type of ruling, could find itself in a position of not being able to create any competitive atmosphere whatsoever, which would create a seller's market at prices the seller controls entirely."

The manufacturing community's side of this issue is still unclear. Guidant isn't talking about the situation right now, and the industry's trade organization, the Advanced Medical Technology Association (AdvaMed), Washington, D.C., declined an offer to present its side of the argument.

The GPO's trade association, HIGPA, on the other hand, is embracing the issue. It has issued a Public Policy Committee



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“We’re not taking sides at all, other than to say (to our members), ‘Here is the situation, here are the ramifications and here’s what you can do to make sure you have some flexibility when you begin working on process and price issues.’”

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Alert, designed to educate the group purchasing organizations that make up the association, and to advise hospitals about the issues and implications of the case.

LoBiondo says HIGPA needs to be involved in this because one of the business practices GPOs use is collecting data—in a legally acceptable manner—to benefit hospitals.

This ruling takes a tool away from

GPOs that the organizations use to help hospitals, he says.

“It’s not really just an issue between Guidant and MedAssets or Aspen. It restricts what is now a common practice among GPOs in terms of collecting data and helping hospitals manage costs by proving benchmarking reports.”

It’s important for hospitals to understand the danger of signing a contract that has a confidentiality clause that is so privileged that it forces facilities to give up their rights to use the data that can help them operate more efficiently, LoBiondo says.

Flynn agrees and says materials managers need to be very diligent about their contracts, and make sure they understand what the unintended consequence could be if they sign something that forbids a hospital from sharing data.

She emphasizes the data is something the hospital rightfully owns in the first place, and if the court’s ruling is interpreted in a way that would restrict third parties from viewing pricing data, there could be unintended problems.

Hospitals could be hindered in completing projects such as cleansing their item masters, for example, because that task would allow someone access to pricing information.

“Who would be able to look at the item master? Is a hospital going to have to call 500 vendors to get permission to have ABC company—or even their own internal people if they fall into one of these third-party categories—just to look at the data to clean it? That seems pretty much

a waste of time,” Flynn says.

At press time, individual GPOs were still assessing what specific action, if any, to take regarding the ruling in the Minneapolis case.

Premier, San Diego, sent an e-mail updating its members on the situation, and VHA, Irving, Texas, co-owner of Novation, Irving, Texas, issued a statement saying, in part, the company was watching the legal case with interest, “because we favor clarity and transparency in the pricing arena. We do not believe any hospital should be precluded from using its own information for its own benefit.”

Consorta, Schaumburg, Ill., and Amerinet, St. Louis, say they support HIGPA’s decision in this matter and also will work to educate their hospital members.

But the groups are being cautious in what is a delicate issue in the dichotomy that defines the buyer-seller relationship in health care.

“We’re not taking sides at all,” says Amerinet President Todd Ebert, “other than to say (to our members), ‘Here is the situation, here are the ramifications and here’s what you can do to make sure you have some flexibility when you begin working on process and price issues.’”

He added that hospitals need to check contract language with their own legal staff.

Also, he cautions that if the court ruling were to be interpreted narrowly, facilities would need to know up front the ramifications, if any, of signing contracts. **MMHC**

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