PLUNKETT COONEY

Flight and Fight: Medical Tourism

Mark S. Kopson
(248) 901-4061
mkopson@plunkettcooney.com

What it is and how it will affect you – Part II

"Medical tourism" is the practice of traveling from one country to another for the purpose of obtaining medical care or treatment. In February, we addressed some of the factors driving the "flight" – the development and projected growth of "outbound" medical tourism, in which patients travel away from the United States for care.

In summary, by the end of 2010, rapidly rising US healthcare costs, substantially lower healthcare costs abroad, and other factors, together, are projected to cause 1.6 million US patients per year to seek medical care abroad.

In this Part II, we examine the "fight" – some of the critical issues that outbound medical tourism poses for US healthcare providers. While, overwhelming uncertainty permeates virtually every aspect of medical tourism, experience to date suggests that it will significantly impact a wide range of US providers in a number of ways, many of which are negative.

The one-two punch of revenue loss and price competition will undoubtedly have the greatest impact on US-based providers. The Deloitte Center for Health Solutions estimated that, in the single year of 2008, the 750,000 US outbound medical tourists who obtained medical care abroad translated into $15.9 to $17.9 *billion* of lost revenue for US healthcare providers.

Some US health plans already carve out and pay for certain services, such as organ transplants or bariatric surgery, only if they are furnished at designated "centers of excellence," with demonstrated quality and cost superiority. If foreign providers, trained in the US and accredited by the Joint Commission International, can produce empirical evidence that they provide care quality equivalent to that obtained in the US at a mere eight percent to 40 percent of the cost of that care in the US, might not those same payors also restrict payment for select medical services to those provided exclusively at foreign centers of excellence? If so, US providers' revenue losses could grow exponentially.

Moreover, experience with outbound medical tourism to date suggests that foreign providers likely will not be the only competition or even exert the greatest downward pressure on US pricing. In 2008, Aetna partnered with a self-funded employer to offer its 27,000 employees the option to obtain hip or knee replacements in Singapore. It sweetened the deal by agreeing to waive all copays and deductibles and to pay the travel costs of both the employee and a companion. In the first year, no employees elected to receive treatment in Singapore.

Within less than one year after the program launched, however, three *US-based* providers unilaterally contacted the employer and offered to provide the same orthopedic services within the US. at a price competitive with that of the Singapore provider. By August 2009, at least three of its employees availed themselves of the resulting, reduced-cost intra-US options.

Unless those results are a mere anomaly, the projected revenue losses resulting from medical tourism are likely to also generate more heated price competition by and among all types of US providers. If healthcare becomes a commodity, the revenue impact of that intra-US pricing competition on US-based healthcare providers could be unpleasantly similar to that realized by the former "Big Three" after the widespread introduction of inexpensive autos produced by foreign manufacturers.

Outbound medical tourism also may pose continuity-of-care concerns. For example, if your patient undergoes surgery abroad, will you be assured of receiving complete and accurate records of that surgery and related care when she appears in your office after her return home? Factors as mundane as different time-zones and language barriers may also hinder communications with the foreign care providers and your ability to rapidly resolve treatment questions or concerns.

While continuity-of-care issues primarily impact patients, potential legal liability for patients' post-surgical complications, injuries, and death presents a virtual hornets' nest of legal and financial issues for US-based after-care providers. It is here more than perhaps anywhere else, that the magnitude of the uncertainty surrounding medical tourism becomes most clear.

The complexity of establishing or disproving liability on the part of a single provider in any multi-party case presents an abundance of challenges. Add to that mix the widely varying substantive laws and procedural rules of multiple foreign countries and the challenges can rapidly become overwhelming. As a threshold issue, the US court must first determine whether it even has jurisdiction over the foreign party on whom the liability, if any, may properly rest.

Assuming the personal jurisdiction hurdle is overcome, there still remains the issue of which country's laws are to be applied in the case. The substantive laws concerning professional liability in many common medical tourism destinations vary dramatically from those of the US and from one country to another. In fact, many countries' laws pose virtually insurmountable barriers for medical malpractice plaintiffs.

While that degree of liability insulation may sound appealing to US physicians, the ultimate result of it may be that the US-based physician is the only party from whom the aggrieved patient has any realistic chance of recovery. Suddenly, that physician wears not only a bulls-eye liability target but also a flashing neon arrow.

Finally, in any suit, foreign procedural rules and limitations on subpoena power can pose significant obstacles to meaningful discovery and the ability to mount a successful defense. Even if those issues can be overcome in a post-tourism medical malpractice case, they are likely to significantly increase the US-based provider's total litigation costs and attorney fees.

While uncertainty is the rule, not the exception, when it comes to medical tourism, the likelihood of its continued growth seems assured for, at least, the near term. It also appears unlikely that US healthcare reform legislation will entirely eliminate the void now partially filled by medical tourism and that the outward flight will thus continue. The resulting impact on US-based physicians and other providers likely will be substantial and, in many respects, negative.

To survive and thrive in this new international marketplace, US providers must ultimately slay the two-headed serpent of enhanced quality and reduced cost. Can there be a more difficult fight?