

Hold Harmless Clauses May Be Harmful to Your (Fiscal) Health

A PROJECT FAIR Report

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Hold harmless clauses, otherwise known as indemnification clauses, have broad implications for your practice and yet are not widely understood. Every psychologist who signs a hold harmless clause needs to understand that it could cause them devastating financial losses if they don't take steps to protect themselves.

Hold harmless clauses appear in many documents and are invariably found in managed care contracts. I discussed in an earlier Project Fair Report that Ohio law requires hold harmless clauses in all contracts that providers sign with managed care/insurance companies. This required clause states that in the event of the bankruptcy/insolvency of the insurance/managed care company, the psychologist agrees not to bill the patient/client if no payment is received from the insurance/managed care company. The beneficiary of the hold harmless clause is the consumer in that instance. Unfortunately there is no way to protect yourself against loss in this situation. Just keep submitting bills in as timely a manner as possible to keep any potential losses at a minimum.

A hold harmless clause is contractual, meaning that it is language agreed upon between the parties and it is invariably put into written form spelling out all of the terms and conditions of the indemnification. The actual language of the clause states who is holding whom harmless and for what events. In the typical managed care/insurance contract, in addition to the required clause holding the patient harmless in the event of a bankruptcy/insolvency of the managed care/insurance company, there is usually another clause that requires the psychologist to hold harmless the managed care/insurance company in the event it is sued based on what the psychologist does. This sounds fair, it's merely requiring the psychologist to take responsibility for his or her own actions. In practice, however, it can have a devastating effect on the psychologist.

For years managed care/insurance companies have escaped liability for any type of malpractice on the part of their panel providers. Although this is a complex, ever-changing area of the law, the protection from liability came about because of the Employee Retirement Income Security Act, known as ERISA. Under ERISA malpractice actions were said to be preempted where an employer sponsored health care plan was involved. Recently, however, many courts around the country have been narrowing the exemption and allowing patients to sue managed care/insurance companies where potential malpractice of their panel providers is alleged to have occurred.

If a patient sues you, the psychologist, involving treatment they received you would have malpractice insurance that would cover your potential liability (which you are also required by the managed care/insurance contract to have) and, often more importantly, to cover the attorneys fees required to provide a defense. Winning a lawsuit does not mean that you are entitled to get from the party who sued you attorneys fees you've expended to defend yourself, but these costs are covered by the malpractice carrier. So although the suit might cost you in terms of time spent on the defending against the charges, it wouldn't cost you any money for the attorneys hired to defend you or for any settlement or judgment costs, because your malpractice insurer would cover those costs. The typical managed care contract hold harmless clause involving malpractice liability reads something like the following: "The psychologist agrees to hold Managed Care/Insurance Company harmless from any and all liability, including costs and attorneys fees, arising from psychologist's seeing any of Managed Care Company's patients." If you've signed a clause like this and the managed care/insurance company is also sued and it is based on your actions as the psychologist, then the managed care company would be looking to you to pay for its attorneys fees, even if they or you weren't at fault, and any judgment costs if you were at fault and they were found to have liability based on your actions also.

The simplest way to protect yourself from having to pay for the managed care company's attorneys fees, costs, and any judgment, is to make sure that your malpractice insurance carrier covers "contractual" liability, i.e. the malpractice carrier is insuring not only you but also others that you have agreed to hold harmless where your potential malpractice is involved. This would mean that your malpractice insurer has agreed to provide protection to the managed care/insurance company where your malpractice is alleged, in addition to the malpractice coverage provided to you. Some malpractice insurance companies automatically provide that as part of their policies (and there are advertisements in OPA publications which highlight this benefit), while others do not. Those which do not typically offer it as an extra benefit that can be purchased. If you have the type of malpractice coverage which doesn't provide the additional coverage, then if you signed the managed care/insurance contract as a psychologist individual, it means that your personal assets will go to pay the managed care/insurance companies attorneys to defend it, and you also would be personally liable for any judgment against the managed care/insurance company based on your malpractice liability. If you operate as a

business and signed the contract in that capacity, then the business would be liable for these costs. As I said, in the past most of these cases involving the managed care/insurance company were dismissed, but the law is changing. Given our evermore litigious society, it is more important than ever to make sure that you have adequate insurance to protect your personal and/or business assets in the event of a malpractice lawsuit. So make sure you check to see if you have "contractual" liability coverage as part of your malpractice policy if you are part of any managed care/insurance company panels. In addition, check to see if you are agreeing to hold the managed care/insurance company harmless for other types of liability and then make sure you have insurance coverage to protect you and the company against that liability also.