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PREFERRED HOME HEALTHCARE AND NURSE SERVICES, INC., Plaintiff, v. ALLSTATE NEW JERSEY INSURANCE COMPANY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO. MON-L-4408-18 Civil Action **OPINION** **(CBLP)**

Argued: May 19, 2021

Decided: September 28, 2021

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Marc E. Wolin, Esq., and Alexander C. Banzhaf, Esq., of Saiber, LLC, attorneys for defendant Allstate New Jersey Insurance Company.

HONORABLE MARA ZAZZALI-HOGAN, J.S.C.

This matter comes before the court on a motion to seal documents related to a motion and cross-motion for summary judgment, which were filed contemporaneously and concern challenges of reimbursement rates for medical services related to personal injury protection (PIP) benefits. Here, the parties seek to seal three categories of documents: (1) documents with personal identifiers or personal health information; (2) entire contracts or portions thereof among parties and non-parties to this litigation; and

(3) documents such as invoices or spreadsheets involving services to the particular insureds.[1] The issue is somewhat novel because only one published case in New Jersey has addressed the mechanics of a motion to seal since electronic filing on e-Courts was formally implemented approximately five years ago, and it was in the narrow context of a disqualification motion under R.P.C. 1.18(a). See Greebel v. Lensak, 467 N.J. 251 (App. Div. 2021) (reversing trial courts sealing of records).

I. Background

The agreements at issue relate to health care services provided by hospitals, providers and other health care entities and the proper reimbursement rates for those services. The parties dispute how the rates should have been determined, relying on the parties' underlying contracts, billing companies, third-party claims administrators or the PIP benefits statute. By way of background, Defendant Allstate New Jersey Insurance Company (Allstate) provided automobile insurance to H.K., J.M. and H.W. (the Insureds), who were injured decades ago in automobile accidents. Plaintiff Preferred Home Healthcare and Nurse Services, Inc. (Preferred) is a company that provides home nursing and home health aide services. The Insureds executed assignments of their PIP medical expense benefits in favor of Preferred to allow Preferred to bill Allstate directly for those services for reimbursement.

[1] Concededly, no party is objecting to the request to seal, and both parties rely on the confidentiality agreement. However, the court cannot rubber stamp unopposed motions. Fireman's Fund Ins. Co. v. Imbesi, 361 N.J. Super. 539 (App. Div. 2003) (citing In re Matzo Food Prods. Litig., 156 F.R.D. 600, 604 (D.N.J.1994)). It must look to the merits of each case.

On April 1, 2015, Preferred entered into a Provider Participation Agreement (Preferred's PPO Contract) with MagnaCare, which is a healthcare management company that operates a network of participating hospitals, providers and other healthcare entities. MagnaCare's contracts with those providers require them to accept a certain amount of reimbursement for their services that is reduced from their standard rate. In exchange, MagnaCare advertises the providers' services to payor clients and ensures guaranteed reimbursement rates for those services. MagnaCare plays the role of a broker, whose function is to bring providers (such as Preferred) and payors (for example, insurers like Allstate) together in a network.

By entering into its PPO Contract with MagnaCare, Preferred joined MagnaCare's PPO Network and became subject to the reimbursement rate schedule, which Allstate claims was limited to a maximum of two hours of home nursing or home health aide services per day at the applicable hourly rates. On October 12, 2016, Preferred sued MagnaCare in the Chancery Court for Middlesex County, Docket No. MID-C-160-16, seeking to have the Preferred PPO Contract rescinded. Ultimately, the parties mutually agreed to terminate the Preferred PPO Contract effective October 14, 2016. The parties then proceeded to litigate the enforceability of the Preferred PPO Contract from the date of inception (April 1, 2015) to the date of its termination (October 14, 2016). On a motion for summary judgment, the court determined that the Preferred PPO remained enforceable during that operative period. Preferred appealed, and the Appellate Division affirmed the grant of summary judgment in MagnaCare's favor. Preferred Home Healthcare & Nurse Servs. v. Magnacare Admin. Servs., LLC, No. A-3353-17T2 (App. Div. July 5, 2019). Based upon the court's findings, any and all billings Preferred

submitted to payors in MagnaCare's PPO Network from April 1, 2015 to October 14, 2016 were subject to the Rate Schedule. [2]

Within this system, many payors contract with medical bill review companies or third-party claims administrators such as Procura Management, Inc. (Procura) to evaluate the necessity of medical treatment for those services. Here, Procura contracted with MagnaCare in 2003 to be the exclusive distributor of MagnaCare's PPO Network in New Jersey. The contract between Procura and MagnaCare allows Procura to distribute the MagnaCare PPO Network to its customers or members like Allstate, which is why Allstate does not contract directly with MagnaCare.

In 2010, Allstate also contracted with Procura to provide bill review services for care rendered to Allstate insureds for PIP claims, allowing Procura to distribute MagnaCare's PPO Network to Allstate. In 2016, Procura and Allstate entered into another contract that allowed Allstate the same access to Procura's PPO network partners but altered the compensation arrangement between Procura and Allstate. Because of the reduced rate, Preferred contends that Allstate improperly denied Preferred's PIP claims for the insureds.

In response, Allstate asserts that it did not adjust Preferred's PIP claims for services rendered to the Insureds; rather, Procura did. According to Allstate, Procura

[2] Parenthetically, the parties' argument regarding confidentiality is weakened by the events that transpired in the above-referenced Middlesex County case, which involved similar, if not the same, subject matter and issues. In that opinion, the court discussed on the record specific rates and who was obligated to do what. Most importantly, the parties could not identify any motions to seal that were provided in that case.

received Preferred's bills related to this matter either from Allstate or from Preferred directly.

For Preferred's PIP claims both prior to and after the Period at Issue (April 1, 2015 to October 14, 2016), Allstate claims that it reimbursed Preferred in accordance with the New Jersey PIP fee schedule as set forth in the Explanations of Review (EORs). During the period that Preferred's PPO Contract was in effect, the EORs related to Preferred's PIP claims to Allstate, were instead reduced based upon the Rate Schedule. Those EORs set forth the amount charged by Preferred, the amount of the re-priced bill and the reason for the reduction, if any. Thereafter, Allstate purportedly reimbursed Preferred based on the amount of the re-priced bill as set forth in the EORs generated by Procura.

In this lawsuit, Preferred now seeks approximately $1.1 million in what it considers to be unpaid medical services for the three underlying claimants, H.K., J.M. and H.W., who assigned their PIP benefits to Preferred for accidents that occurred as far back as forty years ago. Allstate contends that Preferred was reimbursed for what it was entitled to under the contract, i.e., two hours of home nursing care for the time period at issue even though those services were rendered at a rate below New Jersey's PIP fee schedule.

II. Motions to Seal and the Presumption of Public Access

The Judiciary's commitment to transparency supports public trust in the administration of justice. As set forth in Lederman v. Prudential Life Ins. Co. of America, Inc., "[t]he presumption of openness to court proceedings requires more than a passing nod." 385 N.J. Super. 307 (App. Div. 2005) (holding "that the parties' contractual agreements do not outweigh the presumption of openness that applies to court

proceedings and filed documents."). Open access is the lens through which the public views our government institutions and is essential to foster public confidence in the judiciary. Access to the courts advances "the first amendment's 'core purpose of assuring freedom of communication on matters relating to the functioning of government.'" Id. at 323 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980)).

If a proceeding is required to be conducted in open court, no record of any portion thereof shall be sealed by order of the court except for good cause shown, as defined by R. 1:38-11(b), and which shall be set forth on the record. Hammock by Hammock v. Hoffman-Laroche, 142 N.J. 356, 367 (1995). In other words, the court in Hammock made clear that all trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by caselaw, rule or statute such as to protect the identity of a confidential informant in order to enable a criminal investigation, protect a victim of child abuse or domestic violence from further trauma, or minimize risks of identity theft by prohibiting the publication of Social Security numbers or other confidential personal identifiers. See Rules 1:36-4 and 1:38-1A.

Notwithstanding those fundamental tenets, the presumption of access may be rebutted by showing that "society's interest in secrecy outweighs the need for access." Spinks v. Twp. of Clinton, 402 N.J. Super. 454, 460 (App. Div. 2008). And our courts have made clear that the person or persons seeking to deprive the public of access to certain information must "establish by a preponderance of the evidence that the interest in

secrecy outweighs the presumption" for each and every document at issue. Hammock, 142 N.J. at 381-82.

However, "[a] personal interest in privacy and freedom from annoyance and harassment, while important to the litigant, will not outweigh the presumption of open judicial proceedings even in relatively uncomplicated and non-notorious civil litigation." Verni v. Lanzaro, 404 N.J. Super. 16, 24 (App. Div. 2008). Applying this reasonableness standard, our courts have also emphasized that in weighing the interests, the public interest is independent from the interests of parties and their attorneys, particularly when matters of health, safety and consumer fraud are at issue. Hammock, 142 N.J. at 379.

"A determination of what standard should guide our courts when deciding whether to unseal judicial records filed with the court should begin with our court rules." Id. at 367 and 376. More specifically, Rule 1:38-11 provides that:

> (a) Information in a court record may be sealed by court order for good cause as defined in this section. The moving party shall bear the burden of proving by a preponderance of the evidence that good cause exists.
> (b) Good cause to seal a record shall exist when:
> (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
> (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38.

Rule 1:38-11, however, did not eliminate the requirement that a party seeking to seal a record must demonstrate with specificity the need for secrecy for each document sought to be sealed. Hammock,142 N.J. at 381-82. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Ibid.

III. Documents at Issue and the Application of R. 1:38-11(b)

Category I: Documents With Personal Identifiers

Both parties seek to seal documents such as Assignments of Benefits (AOBs), EORs and claims documents including general documents filed with the Healthcare Finance Administration (HCFA). Indeed, because they contain personal identifiers or personal health information (PHI) that could have significant, negative ramifications if available to the public, those documents should be properly redacted. Specifically, information about one's health could affect employment, health care access or personal relationships if it were not protected. In other words, the person's privacy interest and the corresponding harm that disclosure could create substantially outweigh the presumption of access.

Some of that information is already protected by statutes such as the Health Insurance Portability and Accountability Act (HIPAA), 110 Stat. 1936, which contains a section dictating privacy rules and how PHI can be shared or stored**.** Similarly, our Court Rules define a "confidential personal identifier" as a Social Security number, driver's license number, vehicle plate number, insurance policy number, active account number, or active credit card number." R. 1:38-7(a). When filing documents that contain personal identifiers, they must be redacted. See R. 1:38-7(b). No motion to seal, however, is required.

To the extent the parties redacted PHI and personal identifiers, those actions were proper. Even though the parties are permitted to identify individuals by their initials, the right to redaction is not so broad to include the specific assignment language for the claimants at issue because the meaning and scope of the assignments of benefits are

material issues in this case. Therefore, the presumption of public access has not been rebutted regarding the AOBs.

Category II: Contracts

For many of these contracts, the parties wish to seal them because the entities that are parties to the contract may not be parties to the lawsuit. For example, Allstate requests that portions of the Preferred PPO Contract with MagnaCare be sealed. According to Allstate, the one-page rate schedule "clearly and unambiguously sets forth rates involving a maximum of two hours of skilled nursing services per day." It also provides the type of home health service at issue, HCPC code revenue code, MagnaCare allowance, classification (per diem or hourly) and how many units of that service are at issue (one or two hours). No one, however, states why that allowance or any of the other terms are confidential let alone a trade secret. The rate schedule at issue is not based on any secret formula but rather, is a fixed dollar amount. More importantly, the allowance is at the heart of the dispute — whether the applicable rate is derived from the PPO Agreement, Procura or from the PIP statute. As a practical matter, how would damages be calculated for a judgment if the rates were withheld?

Similarly, Allstate attempts to redact various definitions from that document set including "covered person," "covered services," "health benefit plan", "rates" and "payors." The court needs to rely on that information in adjudicating the motions for summary judgment as the parties dispute what constitutes a "health benefit plan;" whether the PPO contract with MagnaCare specifically applies to these PIP claims; whether the PPO rate or the statutory rate applies to those claims; who or what constitutes a "covered person;" and whether Allstate waived its right to the MagnaCare PPO rate. For example, Allstate

argues that based upon the PPO it is "unquestionably a payor in MagnaCare's PPO Network and … it acted properly and pursuant to the contract" and that it was entitled to reimburse Preferred as the rates it agreed to in a PPO Contract with MagnaCare. In other words, that information is relevant as defined by N.J.R.E. 401, meaning it has a "tendency in reason to prove or disprove any fact of consequence to the determination of the action." Consequently, the presumption of access attaches to all documents filed in support of, or opposition to, a dispositive motion such as the underlying motion for summary judgment as distinguished from general discovery disputes. Id. at 380-81 (stating that motions on the ultimate issue of a case "crosses the threshold" requiring a presumption of public access). Here, because the parties here fail to articulate any specific harm that would ensue if those definitions were disclosed to the public coupled with the fact that those definitions are central to the dispute, the parties cannot overcome the presumption of public access.

There are four other contracts or portions thereof that the parties request the court to seal: the Professional Services Agreement between Healthcare Solutions, Inc. (the parent company of Procura) and Allstate; the 2016 PPO Network Access and Services Agreement between Healthcare Solutions and Allstate; an agreement between MagnaCare entities and Procura; and an agreement between Preferred and Consumer Health Network Plus, LLC (CHN). Even though some of the signatories to these contracts may be non-parties to this litigation, our Supreme Court has made clear that the "applicability and importance of the interests [favoring public access] are not lessened because they are asserted by a public party that was not a party to the litigation." Hammock, 142 N.J. at 379 (citation omitted).

While the court appreciates why information not known to competitors or deemed proprietary could give a company an advantage, that information is not automatically entitled to protection. For example, the motion to seal seeks redaction of a rate schedule in the agreement between Healthcare Solutions, Inc. and Allstate. This information is relevant because Procura agreed to provide bill review services for care rendered to Allstate insureds who have been injured in automobile accidents (regarding PIP claims). Likewise, the agreement between Healthcare Solutions and Allstate explains the compensation arrangement between those parties. To the extent any party relies on this document to explain the relationship between Allstate and Procura and who had what obligations particularly as they relate to rates, those portions must be disclosed because the parties fail to explain how the purported right to secrecy of those documents outweigh the public's right to access.

As for the MagnaCare Services Agreement, the motion to seal seeks to redact various terms such as "savings," "provider contracting services," "exclusivity," "network fees", "Payment of participating providers" and "solicitation of payors," all of which were redacted. According to Allstate, when Procura repriced the bills, it was obligated to first determine whether the medical provider was a member of the MagnaCare PPO Network and, if it was, to apply the MagnaCare PPO rate to the bills regardless of whether the provider has joined other PPO Networks. In other words, this issue again goes to what reimbursement rates were applicable, making the information essential to the court's analysis regarding the motions for summary judgment because no potential harm is articulated. Neither party articulates why information is "confidential" – only that it is confidential as defined by the agreement.

Lastly, the Agreement between Preferred and CHN is relevant to the underlying dispute because it too relates to a relevant rate schedule. According to Preferred, the material terms of the MagnaCare Agreement are similar to the CHN agreement referred to above, except that the MagnaCare agreement contains a rate schedule with "significantly lower hourly rates than the CHN Agreement for nearly identical nursing services;" contains caps; and provides reimbursement at a specific hourly rate which again is redacted. Moreover, the parties dispute whether the MagnaCare PPO was the only PPO in effect or whether there was a CHN PPO was applicable. Again, this rate dispute goes to the core of the litigation, and the potential injuries to the signatories are not explained. Therefore, it was improper to redact those deficiencies and rate information.

Category III: Other Documents

Preferred also seeks the redaction of invoices and "spreadsheets [or financial statements] tracking financial information relating to Preferred's patients, which contain information designed by Preferred as "Confidential" under the Confidentiality Order. For example, one document is described as a "spreadsheet" adding only that it was designated by Preferred as confidential pursuant to the Confidentiality Agreement. It consists of six pages related to claimant "H.W." and lists the invoice number, date, services, quantity of services, amount charged, amount paid and the balance due. It is referenced in support of Preferred's argument that "Allstate failed to pay any amount on three invoices for services Preferred rendered to H.W. in January and February 2017." It is a business record that both parties are relying on for explanatory and/or evidentiary

purposes. Considering the foregoing, it is impossible to determine how the court would mechanically or substantively exclude that document from a trial record.

To the extent such documents contain the same type of personal information described in Category I, they can be redacted. That Preferred refers to them as "Preferred's confidential busines information" or that they are "Preferred Business Records" does not mean they are confidential as defined by the Court Rules. In other words, the presumption has not been rebutted.

IV. Parameters for Future Motions to Seal

For the reasons set forth above, the evolution of technology has provided an ideal opportunity for the Court Rules Committee to provide additional guidance regarding what is required procedurally and substantively when a party seeks permission to file a document under seal. For example, while the redacted filing can be easily processed through e-courts, there should be a clearly-identified depository through which the unredacted documents are filed to ensure there is a record of that filing and that confidentiality is maintained. It would be helpful if a courtesy copy were provided to the judge. If the information is instead automatically forwarded to the judge, the court as an institution may not be able to ensure that the information is preserved for the record.

In the alternative, the committee might consider recommending that parties have the ability to electronically file confidential information similar to Rule 2:6-1. That option is likely more efficient and less cumbersome. Although the Appellate Division issued a Notice to the Bar earlier this month regarding motions to seal, many of the directives apply only to the Appellate Division as opposed to trial courts.

When those unredacted documents are filed under seal, the motion to seal can be filed on short notice as set forth in Rule 1:38-11(d). The Committee may also wish to consider whether additional designations should be required such as "UNREDACTED" and "FILED UNDER SEAL" to distinguish them from document designations required under the Court Rules. See Current N.J. Court Rules, Appendix XXX to R. 4:104-6 (providing designation options such as "CONFIDENTIAL," "CONFIDENTIAL – SUBJECT TO DISCOVERY CONFIDENTIALITY ORDER," "ATTORNEYS' EYES ONLY" or "ATTORNEYS' EYES ONLY – SUBJECT TO DISCOVERY CONFIDENTIALITY ORDER"). Otherwise, the risk is that even when the unredacted documents are submitted separately to the court, there is no clear demarcation of their sensitive nature and that they are not accessible by the public.

One additional consideration is whether the form Discovery Confidentiality Order (DCO) for the Complex and Business Litigation Program (CBLP) be revised so that is clear that a motion to seal is necessary even if there is a DCO in place. See id. As currently written, paragraph 8 of the form order does not explicitly require a motion to seal and states as follows: "If the need arises during trial or in any application to/at any hearing before the Court for any party to disclose Confidential [or Attorneys' Eyes Only] information, it may do so only after giving notice to the producing party, and as directed by the Court." Ibid. For example, the rule could be revised to include language that, "After being notified by the parties that a motion to seal is being contemplated, the court should hold a conference to discuss the timing and logistics of filing the motion to seal." Ultimately, it would be helpful for both the Rules Committee and the CBLP Judges to provide input regarding whether any revisions to the form order are appropriate.

As for the substance, the applicant must demonstrate by a preponderance of the evidence that disclosure will likely cause a clearly defined and serious injury to any person or entity and that the person's or entity's interest in maintaining privacy substantially outweighs the presumption that court records are open to public review. Because the parties' intent to keep information confidential does not supersede the important public interest in disclosure, confidentiality orders should contain language that a confidentiality designation made by the parties, does not entitle them to filing that information under seal as set forth below. Moreover, the filing party should indicate whose information it is and whether any effort was made to obtain the written consent of the non-filing party or entity. Here, there were such provisions allowing disclosure after securing consent, but it does not appear the parties made any effort to address that issue.

When filing an application to seal, it does not suffice to simply state in a conclusory fashion that good cause exists because disclosure will result in harm to one's personal life or to business interests or that disclosure will put the individual or business entity at a competitive disadvantage. The filing party should also provide a legal basis and corresponding analysis to justify sealing the documents rather than simply providing a certification. Likewise, a party seeking protection must do more than parrot the buzz words like "privacy," "trade secret" or "proprietary information." See Hammock, 142 N.J. at 384 (explaining distinction between a "trade secret" and something being "proprietary" as the former is entitled to heightened protection). The applicant must identify with specificity the substance of the material to be sealed and why it is unique or how the person or entity would be harmed if a competitor or member of the public had access to the information.

In a civil matter, it may be an individual's medical records, customer lists, a patent, a formula, design specifications or a unique manufacturing or assembly process. When requesting such protection, the applicant should not, however, over designate the materials at issue by asking to seal an entire certification or the entirety of employment agreements, stock purchase agreements, contracts or other similar documents.

Ultimately, just as the applicant must provide details regarding how it overcomes the presumption of public access, a court must state with particularity the facts that "currently persuade the court to seal the document[s]." Id. at 382. To that end, the court must "examine each document individually and make factual findings" with regard to why the interest in public access is outweighed by the interest in nondisclosure. Keddie v. Rutgers, 148 N.J. 36, 54 (1997); see also Greebel, 467 N.J. Super. at 260 (reversing trial courts sealing of records because no findings were made).

Undeniably, e-filing has dramatically changed the issue of access to our courts, which overall is beneficial to everyone. Prior to e-filing, a person would generally come to the courthouse to review a pleading or file. Now, one can access all documents that have been filed in a case with a click of a button. If more specific guidance is provided regarding the mechanics of this type of application, it will ensure uniformity, access, efficiency and fairness while protecting confidentiality.

/s/ MARA ZAZZALI-HOGAN, J.S.C.