RISK NOTE

HIROC

Non-Residents of Canada and Governing Law and Jurisdiction Agreements ("GLJA")

OVERVIEW OF ISSUE

This Risk Note deals with the risks associated with foreign judgments, the limitation of HIROC's coverage in relation to such judgments and provides advice that is applicable for these situations regardless of whether HIROC's coverage applies.

Effective January 1, 2005, the *Territory* and *Territorial Limitation* clause was added to HIROC's Master Policy (the "Policy") to mitigate potential exposure from U.S. and other foreign liability claims. While HIROC continues to provide coverage for covered losses and accidents occurring anywhere in the world (subject to the terms and conditions of the Policy), this clause limits HIROC coverage to judgments issued by Canadian courts of competent jurisdiction. The two exceptions to this rule are when the care at issue is provided in Canada on (1) an emergency basis, or (2) for humanitarian purposes as defined in the Policy.

KEY POINTS

- The *Territory* and *Territorial Limitation* clause in HIROC's Master Policy limits coverage to Canadian court proceedings and resulting decisions.
- A GLJA is a tool for limiting a subscriber's exposure to foreign judgments.
- GLJA does not prevent lawsuits, but instead provide legal counsel with a basis for arguing the legal suit should be heard in the subscriber's home jurisdiction.

Subscribers may face exposure not covered by HIROC's Master Policy if a foreign court (e.g. a US court) were to issue a judgment against a subscriber. Canadian law permits enforcement of foreign judgments in Canada in some circumstances. To help mitigate this risk, in situations where subscribers reach a decision to treat non-resident patients, subscribers should require that such persons/patients (or their substitute decision makers (SDMs)), sign a Governing Law and Jurisdiction Agreement ("GLJA"). The GJLA signifies that the non-resident patient or SDM agrees to pursue any legal claims that arise within the subscriber's home jurisdiction, in other words in the place where the care was provided. Having such an agreement in place, before the events giving rise to the claim occur, can be a useful tool. It may encourage a foreign patient/SDM who wishes to sue to do so in the jurisdiction where the care was provided. If the patient/SDM is not deterred and opts to pursue a claim in a foreign jurisdiction and is successful in securing an award against the subscriber, then a signed GLJA may be useful evidence to prevent that award from being enforced in Canada.

THINGS TO CONSIDER

Two exceptions to HIROC's *Territorial Limitation* clause

- HIROC's Master Policy provides coverage for covered losses and accidents that occur anywhere in the world.
- The *Territorial Limitation* clause, however, limits that coverage to judgments issued by Canadian courts with jurisdiction over the claims. This means that if a non-resident patient sues the subscriber in a foreign jurisdiction and wants the judgment enforced in Canada, that judgment will not be covered by HIROC's Master Policy.
- There are, however, two situations where foreign judgments will be covered. These are:
  1. Coverage is extended for the provision of healthcare services to a patient in Canada on an **emergency basis** by an insured. "Emergency basis" is defined by the Policy as:
     - A life-threatening medical condition requiring immediate medical attention; or
     - A non-life threatening illness or injury of a

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nature where failure to provide immediate medical attention could result in serious threat to quality of life, to an organ or a body part.

2. Coverage is extended for the provision of healthcare services in Canada for **humanitarian purposes** by an insured. Humanitarian purposes references care the subscriber had reached a decision to provide to a patient who comes from a country where the needed treatment is not available. Evidence of this unavailability should be confirmed in writing by the referring physician. Certain conditions must be met in order for coverage under the Policy to apply to foreign judgments arising out of humanitarian treatment (see "Reminder" sidebar).

Greater risks and costs associated with foreign lawsuits

- There are many reasons why U.S. and other foreign judgments represent significant sources of liability for subscribers. These reasons include, but are not limited to:
    - Foreign court systems can perceive and adjudicate the assessment of liability and damages differently from Canadian court systems;
    - There are no monetary caps on pain and suffering damage (i.e. legal term for the compensable physical and emotional stress caused by the harm) in most jurisdictions such as the U.S.;
    - Some foreign jurisdictions, including the U.S., are more likely to award significant punitive damages (i.e. legal awards designed to punish and reform/deter the defendants).
- For the reasons noted above, the monetary compensation (damages awards) in foreign jurisdictions are often significantly higher than the measurable value of the injury.

REMINDER
Written preapproval from HIROC's Insurance Operations department is required to enact coverage under the humanitarian purposes exception. The Policy requires that the practitioner provide written confirmation that he or she has professional liability protection (e.g. from the CMPA) if they are sued for the treatment provided in Canada. Physicians with questions regarding eligibility for assistance should be encouraged to contact the CMPA. When seeking HIROC's pre-approval, be sure to provide HIROC with evidence that i) the professional has liability protection for the proposed treatment and ii) the GLJA is signed by the patient or SDM.

Canadian courts will enforce foreign judgments

- The law requires Canadian courts to enforce foreign judgments in many situations.
- There is a complex legal test used to determine whether to enforce a foreign judgment in Canada which depends in large measure on the foreign jurisdiction's connection to the claim.
- A large damage award is not a basis for opposing enforcement of foreign judgments.
- The risk of a Canadian court enforcing a foreign judgment increases the more:
    - It appears that a non-resident was encouraged or invited to attend in Canada for medical care or attention;
    - It appears that arrangements for the care were initiated while the non-resident patient was in the foreign jurisdiction;
    - The care or treatment provided was elective; or
    - It appears foreign funding was involved in paying for the treatment.

A preventive measure – Governing Law and Jurisdiction Agreements

It is impossible to prevent foreign judgments in all circumstances. Steps can be taken, however, to maximize the chance that a foreign court will refuse jurisdiction over the claim or that a Canadian court will refuse to enforce a foreign judgment. ***One of the***

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most important steps is to have non-resident patients or non-resident SDMs sign a Governing Law and Jurisdiction Agreement (GLJA).

- GLJAs are ***legal documents*** drafted by the CMPA and HIROC. They are an agreement between the subscriber and the non-resident patient or non-resident SDM.
- GLJAs state that the subscriber and non-resident patient or non-resident SDM agree to litigate any claims in the subscriber's home jurisdiction.
- GLJAs permit legal counsel to argue that a foreign jurisdiction should refuse to adjudicate a claim arising from the care provided or that a Canadian court should refuse to enforce a foreign judgment.
- GLJAs do not prevent or prohibit the non-resident patient or SDM from suing. The intent of the GLJA is to ensure that any law suits that are commenced are decided in the subscriber's home jurisdiction.
- There are three GLJAs:
    1. One for healthcare organizations (and their employees and contracted service providers – such as physicians and midwives – who practice in them);
    2. One for physicians in private practice;
    3. One for midwives working in private practice/practice groups.
- Physicians providing care and treatment in a healthcare organization are not required to have a "Physicians in Private Practice" agreement completed. The organization's agreement is sufficient in these circumstances. The CMPA has advised its members of this best practice (March, 2014).
- As the wording on the GLJAs was carefully crafted by expert legal counsel and reflects lessons learned from evolving case law, **HIROC therefore advises against modifying the wording**. HIROC recommends adopting the wording 'as is' (with the exception of inserting your organization's logo and name).
- The GLJAs may be subject to change based on evolving Canadian law. For that reason, ensure the most current version of the form is being used. All previous versions (i.e. prior to March 2014) are superseded by the current version located on HIROC and CMPA's websites:
    - HIROC - https://www.hiroc.com/insurance/glja-insurance-midwives-and-physicians
    - CMPA - https://www.cmpa-acpm.ca/en/advice-publications/risk-management-toolbox/governing-law-and-jurisdiction-agreement

Who can sign the "Governing Law and Jurisdiction Agreement for healthcare organizations" form on behalf of the healthcare organization?

- Practices vary based on organization policy. For example, some organizations may require the proposing/most responsible practitioner to sign on behalf of the healthcare organization while others may elect to have the form signed by registration/clerical personnel. Whatever is decided, it is essential that all subscribers have a clear policy stating who is authorized.
- The person obtaining the non-resident's signature and signing the form on behalf of the healthcare organization **should understand and be able to explain the purpose of the agreement.** Further, they must not give 'legal advice'. If a non-resident patient or SDM has legal questions about the GLJA they must be permitted to consult independent legal counsel.

Who can sign the GLJA on behalf of the patient?

- Only the patient themselves or, if applicable, their SDM may sign the GLJA.
- If there is any doubt as to a patient's capacity or who the proper SDM is then the organization should follow all law, best practices and organization policies relating to those issues.

Patient/substitute decision-maker's refusal to the sign the GLJA

- HIROC expects insured healthcare organizations and practitioners will make all reasonable efforts to ensure the form is signed.

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- Due to the potential for lack of insurance coverage, this is of particular concern for healthcare organizations and practitioners offering elective procedures or accepting into care non-resident patients outside of emergent and humanitarian clinical scenarios.
- If the non-resident patient or SDM declines to sign a GLJA the subscriber should:
    - Attempt to provide clarification, additional information or the opportunity to consult legal counsel;
    - Consider whether the elective or humanitarian care can and should still be offered within the context of the clinical care scenario;
    - Document all attempts to obtain the patient or SMD's consent, including the content of any discussions;
    - Contact HIROC for advice and guidance. Physicians are encouraged to contact CMPA.

IMPORTANT
Do not delay the provision of urgent or emergent care because a non-resident patient refused to sign the GLJA.

Retaining the Governing Law and Jurisdiction Agreement

- GLJAs are legal documents. Access to these forms will be important should legal action be commenced in the future. If the GLJA is not retained then it will be of no assistance should a claim be brought in a foreign jurisdiction. GLJAs should be retained as a permanent part of the health record.
- Adopt a reliable retention and storage practice for signed GLJAs to ensure access to the records years/decades later. Limitation periods vary based on jurisdiction and GLJAs should be retained as a permanent part of the health record.

REFERENCES

- Beals v. Saldanha Supreme Court decision.
- CMPA. (2016). Consent: A guide for Canadian physicians.
- CMPA. (2014). Governing Law and Jurisdiction Agreement – protecting physicians and healthcare organizations when treating non-residents of Canada.
- CMPA. (2013). Treating non-residents of Canada.
- CMPA (2011). They can't sue me outside of Canada, or can they? Considerations when treating non-residents.
- HIROC. (2012). Offering obstetrical & midwifery services to non-residents of Canada.
- HIROC. (2011). Professional liability insurance – 'going bare'.

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