Uniting to Defeat "Brown Bagging"

by James B. Albertson III

I work with oncology practices that are struggling with brown bagging issues, and am concerned about the burdens and costs that brown bagging transfers from insurance companies to medical practices. I think it's time that state oncology societies take advantage of the antitrust safety zones to jointly influence insurance companies to reconsider the brown bagging process.

Some practices have successfully convinced payers that brown bagging will jeopardize patient safety and the quality of care their office can provide. Having third parties with no accountability prepare and deliver chemotherapy drugs can put both the patient and oncologist at risk. An example is the pharmacist in Kansas City, Kans., who diluted the chemotherapy drugs he delivered to physicians.

In addition to safety problems, practices that have been forced to try brown bagging are having financial difficulties. Although insurance companies believe that brown bagging saves their plan money, the additional revenue insurance companies receive comes not from savings but from transferring some of the costs of chemotherapy from the payer to the oncology practice.

Oncologists are expected to maintain drug inventories large enough to allow them to provide chemotherapy in a timely manner. Insurance companies that practice brown bagging say they will replace drugs that doctors take from their stock, but the replacement process usually takes several weeks and payers insist that the drugs they send practices must be used by their patient alone. In other words, the insurance company pays for their patient's next dose, but does not reimburse the doctor for the first dose.

So who pays for the original drug that was administered? Who pays for the carrying costs of the physician's drug inventory? The answer is the oncologist. If the oncologist uses the replacement drug to replenish the practice's drug inventory instead of saving the drug for the insurance company's patient, legal liability issues are brought into play.

The best way to fight brown bagging is collectively. Unfortunately, when individual oncology practices talk about joining together to approach insurance companies as a group, some practices (especially competing ones) refuse to participate, citing antitrust liability issues. I think these antitrust concerns are not valid.

In 1996 the Department of Justice and the Federal Trade Commission issued "Statements of Antitrust Enforcement Policy in Health Care." These statements established antitrust safety zones and describe conduct that the agencies will not challenge under the antitrust laws. I think brown bagging falls into one of these safety zones. (The full text of the statements can be found at *www.ftc.gov/reports/hlth3s.htm*.)

Statement 4 provides guidance on what happens when health care providers give purchasers of health care services (which, in these circumstances, means insurance companies not patients) non-fee-related information. I would argue that brown bagging issues are non-fee-related. I quote from the statement as follows:

"Providers' collective provision of underlying medical data that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment is unlikely to raise any significant antitrust concern and will not be challenged by the Agencies, absent extraordinary circumstances. (emphasis added) *. . . The Agencies…will not challenge, absent extraordinary circumstances, providers' development of suggested practice parameters—standards for patient management developed to assist providers in clinical decision-making—that also may provide useful information to patients, providers and purchasers.*

"…[T]he antitrust safety zone excludes any attempt by providers to coerce a purchaser's decisionmaking by implying or threatening a boycott of any plan that does not follow the providers' joint recommendation… [For example] providers' collective attempt to force purchasers to adopt recommended practice parameters by threatening to or actually boycotting purchasers that refuse to accept their joint recommendation also would risk antitrust challenge."

A state oncology society's effort to discuss the quality concerns raised by brown bagging with an insurance company may fall within this safe harbor, as long as financial issues are not discussed and the society or group of oncologists does not threaten to boycott or refuse to deal with the payer. The time has arrived for oncologists to collectively approach payers about the additional liability, costs, and danger to quality of care brown bagging creates.

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