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PSOs and PSNs: A New Regulatory Niche

by John S. Hoff

Medicare reform legislation is designed to make more kinds of alternative types of health plans (MedicarePlus) available to Medicare beneficiaries. In large part these will be HMOs and other managed care plans. However, fee-for-service plans could qualify if they assume the risk of providing the Medicare benefit package for the amount of the premium. At the urging of provider groups, the legislation includes (at this writing) a special type of MedicarePlus plan. The intent is to give providers an extra boost in creating their own health care plan: a provider-sponsored organization (PSO). The Medicare reform legislation would treat PSOs differently. It remains uncertain, however, what meaningful benefits physicians within a PSO would receive from this different treatment.

A PSO is a provider or a group of affiliated providers that delivers a "substantial" proportion of the MedicarePlus package directly through the provider or an affiliated group of providers. PSOs are intended to help providers by enabling and encouraging them to set up their own plans. Since providers can already come together to form plans, what is so special about this new legislation? It treats PSOs differently in three respects.

1. Today PSOs have to be organized and licensed under state regulations governing health insurance or health benefits coverage. Under Medicare reform legislation PSOs would no longer have to be organized and licensed under these state regulations. Instead, the Department of Health and Human Services would set the standards that entities would have to meet in order to be PSOs. A state could determine compliance with the federally imposed standards, if it obtained federal approval to certify the PSO.

Since HHS would also approve the standards to be administered by the states for Medicare plans other than PSOs, HHS will in effect be setting the standards both for PSOs and for other plans. Both could be subject to state administration of the standards. The special treatment for PSOs therefore may not in fact be so different. However, different types of health plans would be subject to different regulatory requirements and by different regulators. This is likely to lead to confusion and to unfair and disparate competition among health plans.

2. The legislation preempts for PSOs state laws relating to capitalization or solvency. The purpose of this provision is to have the solvency requirements that apply to PSOs differ from those that other MedicarePlus plans would have to meet. This will create interesting competitive situations. The legislation may make it easier for providers to form a PSO, but that does not protect them from the vagaries of the market or the effects of insolvency.

3. Antitrust relief is provided for provider services networks (PSN), which are PSOs. PSNs provide services under contract to PSOs. The conduct of a PSN in negotiating, making, or performing a contract under a MedicarePlus PSO plan and the conduct of any member of the PSN in providing health care under that contract will not be subject to the "per se rule" that applies to certain conduct (price fixing in particular). Instead, their activities will be examined under the "rule of reason," in which a case-specific examination is made to determine whether the conduct at issue restricts competition.

There are additional requirements that must be met to qualify as a PSN. A PSN must have programs for reviewing appropriateness of treatment, controlling utilization, coordinating delivery of health care, and considering grievances. The members of the PSN must agree that all services they provide under the terms of a MedicarePlus PSO plan will be provided through the PSN, and the PSN will receive and distribute the compensation for the services to the provider members.

In the real world, the change from a per se rule to a rule of reason analysis is unlikely to have much practical effect. Conduct is subject to per se rules because it is inherently anticompetitive. It is unlikely that activities that would otherwise be per se violations would be dealt with any differently under a rule of reason analysis, and the cost of litigation to defend the conduct will be high.

Physicians should not assume that the special treatment provided for PSOs and PSNs is a magic bullet that will resolve their concerns about managed care. A PSO/PSN will have to assume the risk of providing the Medicare benefit package for the amount of the premium charged, like other MedicarePlus plans. If anything, PSOs and PSNs may suffer from more financial and administrative instability than other plans. ■

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