

BRIEF ANALYSIS

No. 243

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Who's Afraid of Patient Choice?

Should patients, in consultation with their physicians, be allowed to make their own health care decisions? Or must bureaucrats protect patients from themselves and their doctors? These questions are prompted by the issue of Medicare private contracting.

What Is Private Contracting in Medicare?

Medicare, the federal health insurance program that covers about 35 million seniors — as well as about 4 million disabled Americans under age 65 — pays doctor and hospital expenses. However, for some years Medicare has been systematically reducing the amount of its reimbursement. As a result, many physicians limit the number of Medicare patients in their practices, and some refuse to accept new Medicare patients at all. The recent budget agreement will reduce Medicare payments even further relative to actual costs.

Another problem is that Medicare rules sometimes prevent patients from obtaining the highest quality care or care they personally believe they need. To get around these problems, some Medicare patients bypass the system by paying for care with their own money. This is known as private contracting.

Is Medicare Private Contracting Legal? That is unclear. The Health Care Financing Administration (HCFA), which administers the Medicare program for the Department of Health and Human Services (HHS), has contended that private contracting is illegal. The agency has frequently threatened to sanction, fine or prosecute doctors who saw Medicare patients privately.

To settle the question, a group of patients — including some nursing home patients who wanted to see a

physician more frequently than the once a month permitted by Medicare and were willing to pay out of pocket for those visits — filed suit against the agency. In a 1992 decision, *Stewart v. Sullivan*, Federal Judge Nicholas Politan found no law or regulation that prevented Medicare patients from privately contracting with physicians.

Nonetheless, HCFA has never conceded the point and frequently resorts to intimidating physicians who try to privately contract. For example, an HHS letter from the director of the Bureau of Policy Development warns that “the very existence of an agreement

between the beneficiary and a physician of the kind described will be viewed as *prima facie evidence* that any violations of Medicare requirements by the physician with respect to the beneficiary were *intentional*.” (Emphases added.)

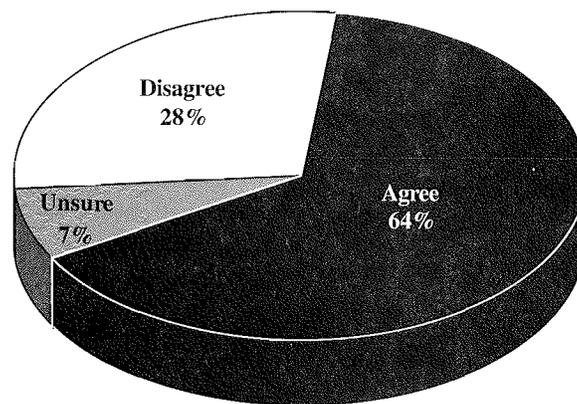
A later technical amendment to the Social Security Amendments of 1994 “has been viewed by many as strengthening HCFA’s position against private contracting,” according to the Congressional Research Service.

Doctor “mistakes” that are judged intentional can result in civil sanctions, such as the doctor’s being removed from the Medicare program, or

even in criminal prosecution. Many physicians are understandably reluctant to challenge a bureaucracy that provides a large portion of their income and has a very deep pocket when disputes turn to litigation.

The Attempt to Legalize Private Contracting. Seeking to clear up this murky issue, Senator Jon Kyl (R-AZ) successfully attached to the recent budget legislation a provision allowing physicians to contract privately with Medicare beneficiaries. At the last minute, however, opponents inserted a provision requiring physicians who contract privately with even one Medi-

Should Seniors Have the Right to Contract Privately with Physicians?*



* October 7-9, 1997, N=1000 Registered Voters, Margin for Error \pm 3.1 percent.

Source: Public Opinion Strategies, The Tarrance Group, Voter Consumer Research.

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care patient to remain outside of Medicare for at least two years. This restriction effectively undermined the Kyl provision, since relatively few physicians — especially those who treat diseases of the elderly — can afford to drop out of Medicare for a substantial time.

To rectify this situation, Senator Kyl and House Ways and Means Chairman Bill Archer (R-TX) have introduced legislation reaffirming patient choice by making private contracting legal. The fate of their bill is uncertain, however.

Why Does Anyone Oppose Patient Choice? Those who oppose patient choice usually cite three reasons why. First, they say doctors will take advantage of vulnerable patients by charging them more under a private contract than Medicare's government-set price. This criticism ignores the fact that seniors, especially when spending their own money, are quite frugal. And it assumes that seniors are unable to make good decisions regarding their own money. It further assumes that seniors need bureaucrats to protect them from exploitation — a dubious notion given the government's own notorious lack of frugality.

The second reason opponents cite is that private contracting would create a two-tiered system. Wealthy seniors would get the health care they want by paying out of pocket, while poorer seniors would have to settle for the problem-plagued Medicare system. Apparently opponents believe that if we can't give every senior immediate access to high-quality health care, we should prevent everyone from having it.

The final objection has to do with power: Who will control the health care system? If seniors are permitted to contract privately, they will bypass the government's price fixing, rationing and oversight. More importantly, they will bypass government intrusion into their medical history and needs. If a senior sees a doctor under private contract, the government will have no record of the visit. Having these records is so important to some bureaucrats that they would permit private contracting only if doctors submitted to Medicare a record of every patient visit even if Medicare doesn't pay the bill.

Why Would Seniors Want to Contract Privately?

Relatively few seniors would choose to pay out of pocket for health care normally covered by Medicare. However, there are four reasons why a senior might want to obtain services outside the system.

Privacy. A senior might want to visit a physician without having the results of a visit, test or procedure end up in a widely accessible government data base. While it may be reasonable to assert that if Medicare pays for a procedure a record should be filed with HCFA, it is unreasonable to require similar reporting when people spend their own money instead of the government's.

Peace of mind. Consider a senior who is experiencing headaches and wants an MRI to relieve the fear that they might be caused by a brain tumor. In this situation, Medicare rules may prohibit the doctor from prescribing an MRI.

But shouldn't this patient be allowed to pay out of pocket for the procedure? Private contracting would allow him to do so.

Choice of physician. To the majority of seniors, having a choice of physicians is important. [See the figure.] Private contracting would give them the opportunity to see any physician, including one who currently rejects Medicare patients because the fees are so low.

Rationing avoidance. Medicare's low reimbursement rates mean that seniors often do not get the best available care. For example, Medicare's reimbursement rate for a hip replacement may cover only the lowest-cost prosthesis. Since seniors cannot pay extra to upgrade, they must settle for lower quality. Private contracting would enable them to avoid rationing and opt for quality.

Conclusion. Should seniors be permitted to use their own money to purchase health care services from any provider they choose? Or should the federal government be permitted to keep them from doing so?

In a country whose founding principle is individual liberty, the answers to these questions should be clear.

This Brief Analysis was prepared by NCPA Vice President of Domestic Policy Merrill Matthews Jr.