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A Better Patients' Bill of Rights

By John Hoff

Congress is poised to pass a law specifically designed to encourage litigation against health plans. Advocates of the so-called Patients' Bill of Rights are selling this legislation as necessary to permit members of health maintenance organizations to sue their plans. However, this is not an accurate description of the bill:

- Members of HMOs already can sue their plans.
- The legislation affects all health plans, not just HMOs.
- Although descriptions of the bill typically omit mention of the fact, the legislation would impose intricate and intrusive federal regulation on the day-to-day operations of all health plans.

The supporters of the bill are correct about one thing: it will greatly expand the possible litigation liability of health plans that determine a treatment or test is not medically necessary and is not covered by the plan.

The Current Law. At present, if an employer provides health coverage, employees who believe that the plan has improperly or wrongfully denied coverage of a treatment have only one remedy: they can sue under federal law to obtain the benefit to which they claim to be entitled. They cannot recover ancillary damages (such as lost wages). They cannot sue for noneconomic damages (such as pain and suffering or loss of consortium). And they cannot sue for punitive damages to punish the plan for wrongful denial. Under different laws, Medicare and Medicaid beneficiaries and federal government employees are subject to the same limitations.

The Proposed Law. The Patients' Bill of Rights would expand employer-sponsored plans' liability to their members. (It would not expand the remedies available to Medicare and Medicaid beneficiaries and federal employees, no doubt because of the additional costs this would entail.) Plans could be sued not merely for the denied benefit, as under current law, but also for economic losses and noneconomic damages, and they would be subject to punitive damages intended to punish the plan.

Key Elements of an Early Offer

Health plan offers to:

- Provide denied treatment
- Pay economic damages caused by delay
- Provide fee for lawyer to assess offer

Plan member can:

- Accept offer
- Reject offer and sue for damages permitted by law, but with higher standard of proof required.

Increasing Litigation — and Costs. In effect, the legislation would turn what are essentially contract issues (whether a treatment desired by a patient is included in the member's coverage) into tort cases. Tort law is designed to provide compensation where one person has inflicted harm on another with whom he does *not* have a contractual relationship.

This Patients' Bill of Rights will increase the cost of health insurance (the only question is by how much) and decrease the number of people with health insurance (again, the only question is by how many). Perhaps even more troubling is the degree to which it expands opportunities for litigation. It is premised on the unexamined assumption that litigation is the way to resolve disputes. But, as Americans increasingly understand, litigation should be a last resort, not a favored goal.

Litigation is complicated and expensive, and requires skilled lawyers on both sides. More money is spent in the

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friction of the process than in compensating injured victims. It also is time-consuming and delays recovery for injured plaintiffs. And it is an emotionally wrenching experience for individuals who are not accustomed to the adversarial process — a process that is particularly difficult for a sick patient concerned about getting treatment. The patient does not want to go through litigation to establish what is covered.

The possibility that a few claimants may last out the process and win the lottery of large noneconomic damages is no consolation to most patients, who simply want to get the treatment they believe is covered by their plan. Patients are much better off if their coverage disputes are resolved quickly, efficiently and without resort to the full panoply of adversarial litigation.

An Alternative Way to Resolve Coverage Disputes. Instead of a Patients' Bill of Rights that encourages litigation, what is needed is an alternative way of resolving coverage disputes — one that facilitates settlement by plans and their members and in appropriate cases enables members to get the care they need without the expense, delay and angst of litigation.

One such mechanism — called Early Offers — has been developed by Jeffrey O'Connell, a professor of law at the University of Virginia. Pairing any expansion of liability with Early Offers would serve the purposes of the Patients' Bill of Rights far better than merely expanding litigation possibilities for plan members.

Here is how Early Offers would work in a Patients' Bill of Rights. If a patient claimed that a plan had refused to provide a covered treatment, the plan could make an Early Offer to settle the claim. The terms of the Early Offer would be specified by the legislation:

- An offer would qualify only if the plan offered to provide the denied treatment (or pay its cost) and to pay the economic damages suffered by the patient because of delay in getting the treatment.
- The offer would provide reasonable attorney's fees, for the patient to hire a lawyer to assess the offer.

The plan member could accept or reject the offer. If he accepted it, the matter would be resolved and litigation avoided. If he rejected it, he could still go to court to obtain the damages the legislation would permit. However, to provide an incentive for the plan to make an offer and for the member to accept it, the member who rejected an Early Offer would have to present clear and convincing evidence that the plan had violated the terms of the coverage, and could recover only if the plan's denial of coverage was wanton or outrageous.

Incentives for Both Sides. This mechanism increases the possibility that health plans will settle claims by members and provide coverage previously denied. The law already permits defendants to make settlement offers without the Early Offers approach. But they are inhibited by the fact that if they make an offer, the claimant may take that as a sign of weakness and be encouraged to hold out for more. Knowing this, plans may be reluctant to make settlement offers and count on outspending and outlasting the claimant in litigation.

Early Offers gives health plans an incentive to make a qualifying offer and the member an incentive to accept it. If the member rejects the offer and insists on going through litigation, he faces a higher hurdle. This will encourage settlements in more cases, and at the same time leave it open to the member to pursue litigation if he wants — particularly in the more egregious cases where he can meet the heightened standard. The end result is that the patient is more likely to get what he wants — treatment that he believes is covered under the plan — not just a slim chance for a larger payoff through litigation.

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