Year in Review 2016: Recent Trends and Updates in Managed Care

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Tweeting about this conference?  
#ACIManagedCare  
AmericanConference.com
Hospital Consolidation – Litigation Update

• **FTC Cases** (mergers)
  - Advocate / NorthShore
  - Cabell Huntington / St. Mary’s
  - Penn State Hershey / PinnacleHealth

• **DOJ Cases** (non-mergers / adjacent issues)
  - Carolinas HealthCare System
  - Allegiance Health

• **Private Cases** (non-mergers / adjacent issues)
  - Methodist Health / OSF (St. Francis)
Year in Review 2016: Hospital Consolidation

Hospital Consolidation – MCO Front-End Measures

- Is there any realistic way - from the strategic business and contracting perspectives - to deter hospitals and other providers from seeking increased market power, and/or minimize the impact if obtained?

- **Specific contract terms**
  - Favorable escalators
  - Longer term agreements
  - Restructure benefits / provider networks to move away from facility-based services

- **Shift from FFS models to value / risk models**
  - Some correlation between market power and resistance to change
  - Importance of CMS pressure and Original Medicare shift

- **Blur the lines between “payers” and “providers”**
  - Acquisitions, joint ventures, etc.
  - More aggressively invest in care delivery and coordination
Hospital Consolidation – MCO Back-End Responses

- Involve Regulatory Authorities
- Revisit Contract Terms
- Litigation or ADR
- Do Nothing

Provider with Market Power
Year in Review 2016: Pharmacy Clawback Litigation

Clawbacks Work Like This:

1. Customer is prescribed 40 milligrams of the stomach medicine pantoprazole.

2. The pharmacy benefit manager has helped negotiate a $15 co-payment for generic pantoprazole. The medicine costs the pharmacist $2.05.

3. The pharmacist is reimbursed $7.22, giving him a profit of $5.17.

4. The benefit manager “claws back” $7.78 from the pharmacy.

Update, Feb. 27: Corrects dosage
Source: Bloomberg research
## Year in Review 2016: Pharmacy Clawback Litigation

### Examples

<table>
<thead>
<tr>
<th>Drug</th>
<th>Copayment</th>
<th>Pharmacist Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melacoxam</td>
<td>$6.99</td>
<td>$2.03</td>
</tr>
<tr>
<td>Azithromycin</td>
<td>$10.00</td>
<td>$4.29</td>
</tr>
<tr>
<td>Amlodipine Besylate</td>
<td>$20.00</td>
<td>$1.75</td>
</tr>
</tbody>
</table>
Year in Review 2016:
Pharmacy Clawback Litigation

Class Actions

• In re Humana Inc., PBM Litigation – W.D. Ky.

• In re UnitedHealth Group PBM Litigation – D. Minn.

• In re Cigna Corporation PBM Litigation – D. Conn.

• In re Express Scripts/Anthem ERISA Litigation – S.D.N.Y.
Year in Review 2016: Pharmacy Clawback Litigation

Claims

- Civil RICO (including conspiracy)
- ERISA violations
- Fraud/negligent misrepresentation
- Breach of contract
- Quasi-contract
- ACA anti-discrimination violations
- Consumer protection statute violations
Year in Review 2016:
Pharmacy Clawback Litigation

Procedural Status

• Transfer and consolidation activity

• Motion to dismiss briefing underway

• No discovery yet
Year in Review 2016:
Provider Fraud Schemes
“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under

• title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.),
• title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.),
• the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or
• section 794 of title 29,
• be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”
Section 1557 In Plain English

• Section 1557 is a nondiscrimination provision under the ACA and provides that an individual cannot, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, denied benefits, of or be subject to discrimination under any health program or activity that is receiving federal financial assistance. Includes meaningful access to individuals with limited English proficiency.

• Your company is subject to the new regulations if it is a “covered entity.” A covered entity is an entity that is a “health program or activity” and that receives federal financial assistance from HHS. Examples of health programs or activities include group health plans, hospitals, health clinics, health insurance issuers, and physicians’ practices. Examples of federal financial assistance from HHS include funds, services of federal personnel, and real and personal property (e.g., research grants, Medicare payments, Medicare Part D subsidies).
Relief

- Private right of action
- Compensatory damages
- Office of Civil Rights has authority to refer cases to DOJ
- Corrective action
The Road Ahead

- Appellate courts beginning to hear cases
- Repeal and replace?
- HHS’s OCR now headed by Roger Severino
- Executive Orders limiting it
- Injunctions limiting it
- Decisions addressing scope including gender identity, HIV/AIDS, sexual orientation, religious exemptions

- Private right of action, elements/standard of proof, intent requirement, administrative exhaustion, direct liability, “health program or activity”
From one big bite to bite-sized?
The failure of the American Health Care Act suggests that the Trump Administration and 115th Congress are most likely to pursue health policy priorities through incremental legislative and administrative actions.
Phase 2 is the new Phase 1

The AHCA was billed as the first of a three-phase integrated approach to the GOP health care agenda—but its apparent collapse moves regulatory action to the fore.