Lead Report

Provider Networks

Insurer's Effort to Trim Physician Network For MA Plan Blocked by Federal Trial Court

A recent decision enjoining United Healthcare from removing certain physicians from its Medicare Advantage (MA) network is a manifestation of the tension between health insurers and physicians struggling to adapt to a changing health-care environment, according to attorneys who spoke to Bloomberg BNA (*Fairfield Cnty. Med. Ass'n v. United Healthcare of New England,* 2013 BL 339122, D. Conn., No. 3:13-cv-1621, 12/5/13).

The attorneys said similar litigation is likely to be more common and widespread as physicians with network contracts resist efforts by health insurers to reduce the size of their provider networks in an effort to control their costs. While ultimately concerning interpretation of contractual rights and remedies, rather than regulatory provisions under federal law, these disputes involve not only physicians who serve MA plan participants but also those serving other commercial health plans, they added.

The Dec. 5 ruling by the U.S. District Court for the District of Connecticut, which granted a preliminary injunction requested by a pair of Connecticut physician groups, found the groups met their burden of proving their members would suffer irreparable harm if removed from the United MA network before they have an opportunity to avail themselves of the ''full appeal, arbitration, and review process'' available to them under their network contracts.

In addition to barring the removal of the physicians from the network, the preliminary injunction prevents the company from notifying beneficiaries that certain providers will be terminated and bars the company from removing or failing to advertise affected physicians in United's 2014 provider directories. The court found the threatened injury to the physicians outweighed any potential injury to the health insurer.

The insurance company immediately asked the district court for a stay pending appeal. That request was denied Dec. 8 and a notice of appeal was filed the next day.

Physician Terminations. Michael F. Schaff, with Wilentz, Goldman & Spitzer PA, Woodbridge, N.J., said the lawsuit exposes an ongoing dynamic in which health insurers, not just those administering Medicare Advantage plans, are seeking to trim their networks in order to save money. ''This is going on all over the place, not just in Connecticut and not just with MA plans,'' Schaff said.

''This is an important development for all health plan participants, who face a loss of choice and access to in-network providers as well as increased deductibles and out of pocket expenses should they decide to remain a patient of a physician who treated them on an in-network basis in the past but who now has been excluded from the health insurer's network,'' Schaff said.

''From a physician perspective,'' Schaff continued, ''these actions by health insurers are equally problematic because physicians rely on participation in these networks to maintain their practices.''

''These physicians are entitled under their network agreements to an opportunity to contest their exclusions and, as the court found in this case, should be able to pursue their contractual rights before their patients are alerted that a physician they may have come to rely on is no longer in their insurer's network,'' he said.

''The ruling foreshadows likely further litigation by providers.''

—Kathryn A. Roe, The Health Law Consultancy, Chicago

''In the end, insurers have a right to modify their networks to ensure that the highest quality and most efficient physicians are given preferred status,'' Schaff said. ''However, health insurers should not be allowed to engage in wholesale and arbitrary alterations to network makeup that harm physicians and plan participant choice without rational reasons to support their actions.''

Kathryn A. Roe, with The Health Law Consultancy, Chicago, agreed that the case reflects the continued pressure on health insurers to keep costs and insurance premiums low but that the physician associations ''appear to be raising potentially legitimate claims of contractual and regulatory noncompliance by the health insurer.''

The court, in granting injunctive relief, focused on contractual requirements and didn't embrace the associations' assertions that reputational harm or interference with the provider-patient relationships—associated with physician exclusion or termination—provided a valid reason for challenging '' 'narrow' and other similarly named networks for Medicare Advantage plans and other insurance products,'' Roe noted.

''The ruling foreshadows likely further litigation by providers (or associations on behalf of their member providers) seeking a remedy for their exclusion or termination from a payer's provider network,'' Roe continued. ''More court challenges can be expected on the narrow network front as pressure to contain premiums—especially for exchange products—drives payers to explore options for containing provider price increases, such as through the competition of narrow networks, and as providers resist these cost-management strategies.''

Larger Ramifications? Steven V. Schnier, with Arent Fox LLP, San Francisco, said the decision ''clearly has nationwide implications'' because of the national prominence of United Healthcare, the nature of the contract and fair procedure issues addressed by the court and the economic factors, ''which become more important by the day.'' He also cited the role of CMS, the importance of the Medicare Advantage program and the fact that the dispute does not involve an ''idiosyncratic clash between a small insurer and a maverick physician group'' as buttressing his view.

''The opinion, and its thinking, which will be replicated throughout the land like kudzu, concern fairness and physician-patient relationship values that are at odds with what many would view as the essence of the ACA and, for that matter, the evolution of health care delivery systems over the past 30 years,'' Schnier said.

Thomas E. Jeffry Jr., with Arent Fox, Los Angeles, said the court's holding in the case, that a unilateral action by a health plan to terminate a physician contract disrupts the physician-patient relationship sufficient to grant injunctive, equitable relief, is both novel and significant. ''Although the case deals with Medicare Advantage contracts and the court infers that elderly Medicare patients may be more vulnerable, it is not clear that the holding or the reasoning would only apply in the Medicare managed care context,'' he said.

''The court focused on the irreparable harm that may occur to the Medicare patients of these physicians even though these patients were not a party or separately represented in the petition brought by the associations, Jeffry said. ''The case is therefore significant in that the court assumes the role of protecting the patients as the 'consumer' of the health services arranged by the health plan,'' he added.

The court seemed to reason that termination of any physician contract, even those for good cause, will be disruptive to the patients of that physician,'' Jeffry continued. ''If extended, this could be a dangerous precedent if hospitals, employers, IPAs or other health organizations were precluded from terminating a physician contract without cause based on an allegation that such termination may harm the patients,'' he concluded.

Associations File Suit. The suit, filed by the Fairfield County Medical Association and the Hartford County Medical Association in November, sought to prevent United Healthcare of New England from terminating 2,200 physicians from United's Medicare Advantage network.

United is the largest private Medicare insurer in Connecticut. It had issued letters in October to more than 2,000 physicians in Connecticut notifying them that they would be removed from the network effective Feb. 1, 2014.

The company argued before the court that it has the right to amend its contracts with the physicians to discontinue their participation in the Medicare Advantage network while allowing them to remain part of other United networks. However, the medical associations argued that United had denied the terminated physicians' substantive and procedural due process rights under the Medicare Act, and that United had breached the individual contracts with each terminated physician.

In arguing for the preliminary injunction, the associations identified three categories of harm they believe would be irreparable and impossible to fully compensate with damages. They cited reputational harm, harm that is broadly related to consumer protection and continuity of patient care, and harm to the long-standing trust relationships between physicians and their patients.

The court found that the associations met their burden of demonstrating that the physicians will suffer imminent harm and can't be adequately compensated through damages. It also noted that the harm is magnified because United is the largest Medicare insurance provider in the state and loss of United's Medicare insureds ''translates to both a larger loss of market share and a broader reputational harm to affected doctors than would termination from a smaller plan.''

The judge also said the associations demonstrated a likelihood of success on the merits of their contract-based claims. ''United's argument that it has a unilateral right to terminate participating physicians from participation in the Medicare Advantage plan by 'amendment' of that plan is not supported by the language of the contract or the parties' experience under it,'' the judge wrote.

United's Response. A company representative said in an e-mail to Bloomberg BNA Dec. 6 that it disagreed with the court's preliminary ruling.

''We believe the court's ruling will create unnecessary and harmful confusion and disruption to Medicare beneficiaries in Connecticut. We continue to have a broad network of doctors that is designed to encourage higher quality, affordable health care coverage. We know that these changes can be concerning for some doctors and customers, and supporting our customers is our highest priority. UnitedHealthcare will continue to stay focused on the people we serve.''

A company spokeswoman noted the motion granted is specific to members of the two associations named.

A spokeswoman for America's Health Insurance Plans Dec. 6 said that the trade association doesn't comment on rulings pertaining to specific companies but referred to its Nov. 19 letter to the Centers for Medicare & Medicaid Services, urging the agency not to interfere with plans' ability to put together focused provider networks.

Medical Groups' Reaction. The decision ''speaks clearly to the importance of not allowing health insurance companies to place profits ahead of patient care,'' Roy W. Breitenbach of Garfunkel Wild PC, an attorney for the Fairfield and Hartford County medical associations, said in a statement.

Robin Oshman, president of the Fairfield County Medical Association, said that the court's ruling is ''one huge step in the right direction'' but that ''the journey is far from over.''

Mark S. Thompson, executive director, Fairfield County Medical Association-Greater Bridgeport Medical Association, told Bloomberg BNA that he expects the next steps to be a hearing on United's appeal and then a full hearing on the merits of the case.

This ''definitely has national implications,'' he said.

State Response. Connecticut Attorney General George Jepsen (D) Dec. 6 called the decision ''welcome news for the thousands of United Healthcare Medicare Advantage Plan beneficiaries in Connecticut who would be affected by these terminations.''

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''This decision confirms my view that these terminations—unprecedented in scope—offend public policy and threaten irreparable harm to patients whose relationships with their doctors are at risk of disruption,'' Jepsen said in a statement.

''United's lack of transparency for both physicians and patients has been of great concern. I urge United to abide by the court's decision and its clear contractual obligations to all affected physicians, not just those who are members of the Fairfield and Hartford County Medical Associations,'' he said. ''Its failure to do so will only compound the confusion United has already caused to thousands of vulnerable Connecticut patients and prospective Medicare Advantage enrollees, who deserve much greater care and respect.''

Timing of Ruling. The decision came two days before the end of the 2014 Medicare Advantage annual enrollment period in which beneficiaries may sign up for a MA or Part D (drug) plan.

''Yesterday's court decision is a victory, giving patients some assurance, if only temporary, that they will continue to receive vital care from the doctors they know and trust,'' Sen. Richard Blumenthal (D-Conn.) said in a Dec. 6 statement.

Blumenthal had written to CMS Administrator Marilyn Tavenner Nov. 27, asking that the CMS allow additional time for enrollment decisions by opening an additional period or extending the current one.

''While we understand that insurance companies need the ability to adjust their network of providers in response to market realities, the significant disruptions that we are experiencing in Connecticut show an urgent need for CMS to immediately review how the network adjustment was made and address the needs of the consumers in Connecticut moving forward,'' Blumenthal said.

However, Margaret Murphy, an attorney with the national Center for Medicare Advocacy, cautioned that whether doctors stay in United's networks will eventually depend on the results of their individual arbitrations (the court's decision noted that terminated physicians sought relief in order to have the time to undergo an individual arbitration before they are removed). If they lose, it could result in more confusion for United's enrollees if their doctors' contracts are terminated midyear, Murphy said. These enrollees won't have an opportunity to change Medicare plans because there is no special election period for them and ''will have no choice but to change doctors or face more expensive out-of-network healthcare,'' she said.

United Under Review. A CMS spokesman Dec. 6 said that the agency doesn't comment on ongoing litigation.

However, in a Nov. 27 letter to the American Medical Association, Danielle Moon, director of CMS's Medicare Drug & Health Plan Contract Administration, said that the agency is reviewing United's networks against CMS standards in each county in the various states affected by the terminations and is investigating allegations about inadequate specialists.

''We are also meeting with UHC on a regular basis to discuss complaints and inquiries they are receiving,'' Moon told Margaret Garikes, AMA's director of federal affairs.

However, managed care organizations ''have the flexibility to establish and manage contracted provider networks as they choose, as long as they continue to furnish all Medicare Part A and B services, fully meet Medicare access and availability standards, and have a process in place to ensure that in the case of a provider termination, continuity of care is maintained for patients affected by those terminations,'' Moon said.

At this point, no MA special election period is warranted, she said.

In addition, Moon said, the CMS lacks the authority to ''hold in abeyance all terminations initiated just prior to the annual enrollment period,'' as the AMA had requested.

The AMA has been urging medical associations to document problems in their state or specialty and to provide examples of the impact that terminated practices will have on patients.

As an example, the Ohio State Medical Association told the CMS that it has collected 18 examples that it said raise questions about network adequacy and need investigations by the federal agency.

The doctors are represented by Roy W. Breitenbach, of Garfunkel Wild PC, in Great Neck, N.Y.

United's attorneys include William H. Jordan, of Alston & Bird in Atlanta, and Theodore J. Tucci, of Robinson & Cole LLP, in Hartford, Conn.

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The court's ruling is at http://www.bloomberglaw.com/public/document/Fairfield_County_Medical_Association_et_al_v_United_Healthcare_of. United's motion for a stay pending appeal is at http://www.bloomberglaw.com/public/document/Fairfield_County_Medical_Association_et_al_v_United_Healthcare_of/1. The court order denying the stay is at http://www.bloomberglaw.com/public/document/Fairfield_County_Medical_Association_et_al_v_United_Healthcare_of/2.