Impact of Recent Federal Court Decisions

NAIC Consumer Liaison Committee Meeting
August 12, 2022

Marietta Memorial Hospital v. DaVita by Jackson Williams, Dialysis Patient Citizens

- PLACEHOLDER – ADDITIONAL SETS OF SLIDES PENDING 8/5/22

Marietta Memorial Hospital v. DaVita

- End Stage Renal Disease provisions of Medicare Secondary Payer Act permit enrollees to keep a group health plan for 30 months before Medicare becomes primary payer.
- Non-differentiation protection prohibits plans from treating ESRD patients less favorably to circumvent mandate.
- Plan language in question carved out dialysis treatments from PPO.
- Court ruled that the need for maintenance dialysis was not the same has having ESRD, so carve-out was permissible.

The Policy Rationale for Private Coverage of First 18-30 months of Dialysis

- Illness-triggered coverage changes create perverse incentives.
- Best known is “nursing home bounce back” for Medicare/Medicaid dual eligible – no incentive to prevent urinary tract infections when provider gets higher reimbursement and state gets financial relief
- Same dynamic in employer coverage of treatment for Chronic Kidney Disease
- If kidneys fail, sick patient moves to Medicare
- Only 5% of diabetic patients receive SGLT2 inhibitors that preserve kidney function

Two Pathways for Plans

- Continue to Pursue Population Health Strategies
  - Many plans have prioritized detection and treatment of Chronic kidney disease
  - Major insurers have value-based agreements with kidney care providers
  - NCQA moving to adopt kidney care measures for HEDIS
- Shirking Strategy
  - Several benefit consultants are aggressively selling dialysis carve-out to employers
  - In 2015-16, several insurers in Northwest introduced similar language

45 CFR 156.125 - Prohibition on discrimination

"We will notify an issuer when we see an indication of a reduction in the generosity of a benefit in some manner for subsets of individuals that is not based on clinically indicated, reasonable medical management practices. We conduct this examination whenever a plan subject to the EHB requirement reduces benefits for a particular group. Issuers are expected to impose limitations and exclusions based on clinical guidelines and medical evidence…"

"Examples of benefit design that potentially discriminatory under the Affordable Care Act":

- **Visit Limits**
  Outpatient Rehabilitation Services
- **Potentially Discriminatory Benefit Design Example**
  The number of covered outpatient rehabilitation visits is limited without regard to best medical practices for a given condition
- **Reason Example Benefit Design is Potentially Discriminatory**
  Limiting the number of covered outpatient rehabilitation visits without regard to medical necessity may discriminate against individuals conditions that require more rehabilitation services than are covered in order to fully regain function after certain conditions, such as stroke