LEGISLATIVE UPDATES

Emergency Doctors Sue Anthem in Federal Court for Restrictive Emergency Room Policy

On July 17, 2018, American College of Emergency Physicians and the Medical Association of Georgia filed a lawsuit against Anthem Blue Cross and Blue Shield of Georgia ("Anthem") on behalf of emergency physicians to force the health insurer to rescind its current policies that allow it to deny coverage of emergency room care when certain diagnoses are resolutely indicated.[15]

The lawsuit, filed in the United States ("U.S.") District Court in Atlanta, suit alleges that Anthem's current policies cause both providers and patients to operate in fear of denial of payment of essential and needed emergency patient care in violation of the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA"), [16] the Patient Protection and Affordable Care Act ("ACA"),[17] the Employee Retirement Income Security Act of 1974 ("ERISA"),[18] and the Civil Rights Act of 1964.[19]

Anthem, based in Indianapolis, is the second-largest health insurer in the U.S., operating in 14 states with approximately 40 million health insurance members and $3.8 billion in net income. The company first introduced its "avoidable ER program" policy in 2015 in Kentucky, and expanded the policy to insurance markets within Georgia, Missouri, Indiana, Ohio, and New Hampshire. The policy's goal is to reduce the patient trend and subsequent behavior of going to a hospital emergency department for what results in non-emergency care that may cost up to 10 times more than the amount of urgent care.

Under the policy, Anthem may retroactively deny payment for emergency care and treatment in more than 120 distinct situations where patients were determined post-treatment not to have suffered from an "emergency" condition. Conditions that may seem emergent to a patient but may warrant claims rejections under the policy include bronchitis, contusions, sprains, and low back pain, among others. In this case, the plaintiffs allege that patients and emergency room physicians, who are often independent contractors, risk receiving large emergency room bills because they will be denied payment for care rendered or received pursuant to Anthem's policy.

Under EMTALA, also known as the "anti-dumping law," hospitals are required to medically screen and stabilize any patient that presents at an emergency department regardless of the patient's ability to pay. Given the additional cost of such emergency care, insurers began requiring that patients obtain pre-authorization prior to receiving payment for care to help reduce costs. This practice, in turn, prompted a revision under EMTALA, enacted under Balanced Budget Act of 1997, called the "prudent layperson" standard which extended to all Medicare and Medicaid plans. Similarly, 47 states enacted statutes enforcing the prudent layperson standard.

The standard revised what constitutes an emergency medical condition. Generally, the prudent layperson standard states that an emergency medical condition is any condition that would require a person of typical or average knowledge of health and medicine to believe the condition constitutes an emergency, i.e., could result in serious patient jeopardy, serious impairment to bodily function, or serious dysfunction to a bodily part. In 2010, the standard was extended to all

health plans under the ACA. Subsequently, under this standard, payment for emergency care by an insurer is based on the prudent layperson standard.

After pressure from patients and physicians, in February 2018, Anthem outlined criteria that would allow for exceptions to the policy for when certain care would be provided, including when patients travel out of state or if specifically directed to go to the emergency room by a provider. However, the basic tenets of the policy remained in place.

A month later, in March 2018, Senators Clair McCaskill (D-MO) and Ben Cardin (D-MD) sent a letter to the U.S. Department of Health and Human Services and the U.S. Department of Labor to ask that the agencies investigate the payment denials by Anthem and the likely violations of federal law. The Senators' letter stated that Anthem forces patients to act as medical professionals while experiencing an "urgent medical event."

Healthcare providers, insurers, regulators and patients should closely monitor this case as the decision will significantly impact similar insurance company policies throughout the country that restrict payment for emergency room care and consequential treatment.

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[15] *See Complaint & Demand for Jury Trial, Am. College of Emerg. Physicians & Med. Assoc. of Ga. v. Blue Cross & Blue Shield of Ga. & Anthem Ins., Inc.*, No. 1:18-cv-03414-MLB, 2018 WL 3453477 (N.D. Ga, July 17, 2018).
[16] 42 U.S.C. § 1395dd.
[17] *Id.* § 18166, et seq.
[18] 29 U.S.C. § 1132(a)(1)(B), et seq.
[19] 42 U.S.C. § 2000D, et seq.