
INSIDE CONSUMER-DIRECTED CARE

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Poor Communication, Design Could Boost CDH Liability Risk, Says Legal Group

By allowing patients to choose their own doctors and care path — rather than being directed by gatekeeper physicians — consumer-directed health (CDH) care could do away with several legal issues that sometimes swirl around HMOs.

However, as CDH closes the door on some liability risks, such as denied benefits, it could cause other doors to swing open. Employees who recklessly spend their health reimbursement arrangements (HRAs), or are financially motivated to forego necessary care, could blame the plan if their bad decisions lead to negative outcomes, says Brian Heller, a Toledo, Ohio-based partner at Managed Liability Associates (MLA), a consulting group that specializes in managed care litigation. The company's partners plan to produce a "white paper" on the topic this spring.

Similar liability questions emerged shortly after managed care — particularly HMOs — burst onto the scene, notes Jay Savan, health and welfare practice leader with the St. Louis office of Towers Perrin.

"Liability associated with financial incentives to network providers has been around for a long time, but certainly there's a resurgence of interest given the HRA concept," he says.

Case in point: MLA was involved in a court case in which an HMO was accused of providing a physician with a financial incentive not to perform a Caesarian section. The plaintiff argued that the incentive delayed a necessary procedure, which led to a negative outcome.

Similar suits could pop up under CDH, warns Heller. A patient who selects a less-expensive procedure to avoid draining HRA funds might blame the employer, the carrier, or the provider for a negative outcome.

"There will be bad outcomes in any care model. The real issue is whether those outcomes can be tied back to the plan," says Heller. "If there are areas of possible differentiation that result in negative outcomes, you can be sure attorneys will uncover them."

CDH Removes Risk, Says Vendor

The idea of liability runs contrary to the intent of CDH, counters Michael Showalter, vice president of development at Definity Health, a CDH vendor based in Minneapolis. Most CDH plans, he says, remove liability issues by giving patients more choice.

"It's becoming more common for employers to try to save money by raising deductibles. I'd argue that that approach makes people avoid care more than a [personal care account] with 100% preventive coverage," Showalter says.

Traditional managed care plans, he adds, are designed for the most common user.

Case in point: An HMO might set financial limits on mental health benefits or chiropractic care, for example. A CDH plan, by contrast, allows the patient to determine where health dollars are spent. If a patient needs an above average amount of mental health care, HRA funds are allocated to mental health. The ability to spend health dollars where they are most needed reduces liability, Showalter explains.

Provider, Employer and Plan Risks

Under the CDH model, employers, providers and insurers/vendors face new obligations and liabilities. Consider the following:

Provider liability: The CDH model could redefine the patient/physician relationship, says Heller. Rather than convincing an HMO that a procedure is necessary, providers might have to convince penny-pinching patients.

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If a patient decides against an expensive medical procedure — despite the insistence of the physician — the physician still could be liable if something goes wrong, says Robert Chabon, M.D., medical director for managed care operations at Heartland Health System, St. Joseph, Mo., and a partner at MLA. To protect themselves, physicians need to clearly document the advice given to the patient and note that the patient declined for financial reasons. If possible, the patient should be asked to sign off on the document, he says.

“I don’t know if providers are as skilled in negotiating with patients as they are with payers,” adds Heller.

Employer liability: By increasing the employee’s decision-making responsibility through a CDH plan, the employer could be seen as less responsible for negative outcomes, Chabon says. While employers generally don’t get caught up in managed care lawsuits, they could if benefits are denied by an HMO that the employer selected, for example.

Employers could face similar risk with a CDH plan if employees don’t receive the information needed to make appropriate health care decisions. Ensuring that employees understand risks, such as high deductibles, is critical during the formative years of CDH, Chabon says.

“The communication responsibility for the employer could be enormous,” adds attorney Erling Hansen, former general counsel at the Group Health Association of America, now known as the American Association of Health Plans. Hansen, based in Washington, D.C., is a partner at MLA. “Are there features in the plan that constrain decision making to the employee’s detriment? If bad outcomes occur, the first place attorneys will look is at the quality of communication the employee received about the plan.”

Plan liability: Variations between CDH models will undoubtedly lead to the development of an industry standard, says Heller. Such a standard might be a plan design that includes 100% preventive care coverage. Plans that don’t include that feature could be at risk for any adverse outcomes that could be traced back to the standard.

“When you see something like this really light up the landscape, you need to think about some of the possible risks,” says Hansen. “Employers are talking about cost savings, and not being jerked around by the insurance companies. But no one is talking about who will be left holding the bag in litigation.”

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