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Commentary

Increasing Risk, Hurting Patients

Shirley Svorny, 11.02.09, 4:00 PM ET

A new Congressional Budget Office report estimates that a set of tort reform measures--including caps on awards for non-economic and punitive damages--would have lowered total national health care spending in 2009 by $11 billion, largely by reducing so-called defensive medicine. Damage caps, though, would result in patients losing the benefit of the market oversight and penalties associated with malpractice underwriting. Capping liability could have the unintended consequence of reducing private market efforts to investigate the risk characteristics of the individuals they insure and of hurting patients.

A careful reading of the report shows that a significant portion of the problem can be attributed to fee-for-service physician reimbursement, a system that fails to discourage spending on services that have "marginal or no benefit to patients." The findings suggest an alternative to caps on damages: moving Medicare recipients into managed-care arrangements where defensive medicine is controlled. The advantage of using managed-care arrangements over caps is that this would allow medical professional liability insurance underwriters to continue to provide both oversight and penalties for negligence and substandard care.

The medical malpractice industry provides valuable private market oversight of physicians. Underwriters review each physician annually, examining a clinician's claims history in detail and investigating myriad possible practice-related issues. Premium surcharges penalize physicians with a history of negligence or substandard care; claims-free physicians are rewarded with premium credits. In some cases, as in anesthesiology, some insurance policies dictate very specific evidence-based standards of care that must be used for coverage to apply. These financial arrangements create incentives among all physicians for risk management.

Physicians rejected by state-regulated "admitted" companies for substandard care are forced into the surplus lines market. There, they bear additional costs, including carrying a deductible and a much higher annual premium--generally between one-and-a-half to five times higher.

Once in the surplus lines market, the high cost provides a strong incentive to physicians to take steps to reduce their perceived risk so that they can return to the admitted market. Often specific remedial actions are required, particularly of those physicians with substance abuse problems. Some surplus lines companies offer risk management services on a case-by-case basis.

Some physicians are in the surplus lines market because they perform fairly unique or risky procedures that companies in the admitted market do not have the expertise to underwrite. The surplus lines industry plays a role when doctors are just getting experience with a new procedure, as with the introduction of laparoscopic gallbladder surgery (cholecystectomy) and bariatric procedures (including gastric bypass and lap band). Underwriters keep an eye on claims and verify a physician's training to be sure it is adequate, managing the risk associated with the introduction of new medical procedures.

Decisions about the tasks physicians take on are best made with information about the magnitude of the underlying risk to patients. In the surplus lines market, malpractice insurance underwriters convey this information to physicians through their brokers in the form of pricing options for insurance. One option may include surgical coverage while another option, with a lower premium, would not cover surgery. This creates the appropriate incentive for physicians to consider the risk associated with their practice patterns.

All of this protects consumers. The potential for surcharges or cancellation of policies offered by admitted carriers and the higher cost of obtaining insurance in the surplus lines market create an incentive for physicians to practice care that meets medical community standards.

Rarely, in the very worst cases, physicians will be denied coverage in the surplus lines market. It may be because the physician is such a danger to the public that there is no viable restriction that would permit the physician to continue in practice. Even when a state medical board fails to sanction a physician who should not be practicing medicine, denial of malpractice insurance precludes affiliations with most hospitals and other provider organizations, protecting consumers served by those providers. In the seven states where medical malpractice is mandated for practice, all consumers benefit from these protections.

Medical professional liability insurance companies use experts to assess the validity of claims against a physician. This not only works to preserve the reputation of a falsely accused physician, but pushes the entire tort system toward more accurate penalties. More accurate penalties for negligence and substandard care create incentives better aligned with society's objective of quality care.

The oversight, risk management, serious financial penalties for negligent and substandard care, efforts to assess the validity of claims, and policy exclusions on practice associated with medical malpractice underwriting and insurance improve safety in the provision of medical care. By setting up appropriate incentives, medical professional liability insurance can be viewed as contributing to consumer protection in the market for physician services. Putting caps on damages would inhibit these efforts and hurt consumers.

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