Maine’s Plan to Lower Drug Costs for the Uninsured Passes a Major Legal Test

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The efforts of managed care organizations to control health care costs may have spread eastward from California, but innovation in controlling prescription drug spending today is flowing in the opposite direction. In 2000, the state of Maine enacted an aggressive plan, called “Maine Rx,” to force pharmaceutical companies to lower the prices of drugs for uninsured residents. The industry challenged it all the way to the Supreme Court, and on May 19, 2003, Maine won, at least in the first round. As a result, Maine’s plan may become a model for many other states; 28 states have already expressed interest.

The Maine Experiment

Maine’s approach is to piggyback discounts for those who have no insurance coverage for prescriptions onto discounts that drug companies must already provide for Medicaid recipients. In 1990, Congress voted to require drug manufacturers to provide steep discounts to state Medicaid programs. These take the form of rebates that must be paid to the states on the basis of their Medicaid drug purchases.

The new Maine law requires that companies offer rebates that are at least as large as those under Medicaid for drug purchases made by the state’s 300,000 uninsured residents. The rebates are put into a fund that the state’s Secretary of Health and Human Services administers to reimburse pharmacists who sell drugs to these residents at discounted prices.

If a drug company refuses to provide the state with large enough rebates under the plan, then its drugs may be subject to prior authorization when they are prescribed for Medicaid patients. This would not apply to drugs that have no therapeutic alternative, but it might limit access to drugs for which there are alternatives within a therapeutic class. Presumably, the threatened reduction in Medicaid sales would constitute an effective incentive for drug companies to participate in the program.

The Industry Fights Back

Obviously, the pharmaceutical industry does not like this approach. In filing suit to block it, the Pharmaceutical Research and Manufacturers of America (PhRMA) argued on two fronts:

• that the plan is using Medicaid patients as pawns. If a manufacturer declines to provide discounts for uninsured residents, Medicaid beneficiaries would feel the effect through limits on access to that company’s products. This, PhRMA argued, violates the federal Medicaid Act, which mandates that beneficiaries receive full access to all needed care.

• that the plan violates the commerce clause of the Constitution, which prohibits states from interfering with the interstate flow of goods and services. By limiting the sales of nationally marketed drugs beyond the Medicaid program, PhRMA argued that Maine is creating such interference.

The Supreme Court Weighs In

By a vote of 6 to 3, the Supreme Court disagreed with the industry’s objections. Justice John Paul Stevens, writing for the majority, noted that states have “considerable latitude” in deciding which services they will provide to Medicaid recipients, even when they base their decisions on criteria that are not directly related to the program itself. Moreover, the impact of the law on Medicaid recipients might turn out to be minimal. Access to drugs that are manufactured by companies participating in the rebate program would not be affected, and access to needed medications, when alternatives to the drugs of non-participating companies are available, would be affected to a minimal extent.

With regard to the commerce clause, the Court found a presumption against overturning state laws that regulate public health. None of PhRMA’s arguments was considered strong enough to overcome this presumption. The “modest” impediment to access to prescription drugs that the law might impose on Medicaid patients did not constitute a sufficient burden on interstate commerce for the Court to overturn it.

Next Steps

Maine’s victory is still tentative. Its use of Medicaid as a bargaining chip could be overturned if the Secretary of the federal Department of Health and Human Services, as overseer of the program, considers it inconsistent with the Medicaid Act. The Court specifically declined to decide whether or not he should do so. Further, the case reached the Court as a challenge to a lower court’s injunction that suspended the law’s implementation when PhRMA filed suit. The Court lifted the injunction upon finding that PhRMA was not likely to ultimately succeed at trial. However, this is not a final decision on the underlying issues; it means only that the law can go into effect pending a trial. PhRMA will continue to pursue the case and might still succeed if a trial is eventually held.

The Immediate Repercussions

States are increasingly desperate to control drug costs, both for Medicaid recipients and for residents who lack prescription insurance. Maine’s approach has far-reaching implications in its use of Medicaid as a bargaining tool. With a green light from the Supreme Court, even a tentative one, the experiment is certain to spread westward. The world of pharmacy benefits may never be the same.

Reference