Compliance Today - July 2018

Insurance compliance risks facing telemedicine providers

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Telemedicine providers can sell their services in a number of ways. Consumers, self-funded health plans, and health insurance companies are all important and growing customers for many telemedicine providers. Telemedicine providers have taken a wide range of approaches to contracting with these customers. Many of these approaches have included pricing that is not fee-for-service, and can create risks under state insurance law. Although the number of pricing models is nearly infinite, it is useful to think about three models for pricing telemedicine services:

1. Unlimited — users pay a fixed amount and receive unlimited access to telemedicine services.
2. Hybrid — users pay a fixed amount and receive a fixed, limited amount of telemedicine services. These models may also include access to services beyond the fixed amount at additional cost.
3. Fee-For-Service — users pay a fixed amount for each consultation, potentially with discounts for greater volume.

Offering telemedicine services through these three approaches involves varying amounts of risk, which varies both by approach and by customer (i.e., selling to consumers comes with greater risk than selling to health insurers). This article identifies the insurance law risks faced by telemedicine providers and also identifies how those providers can reduce or eliminate their risk by tailoring their product design based on the state and type of customer.

Insurance law risks

The most significant insurance law risk facing telemedicine providers is that those providers will be deemed a health insurance company under state insurance law, because they offer consumers telemedicine services on the unlimited model or possibly the hybrid model if it contains significant discounts below the market price for similar services. If a telemedicine provider is deemed to be an insurer, it could be subject to monetary penalties, cease-and-desist orders, and other regulatory action from state insurance commissioners where the provider delivers its services. Generally, state law only permits licensed insurers to engage in the "business of insurance." A number of insurance risks are relevant to the question of whether an entity has engaged in the business of insurance under state law, but for telemedicine providers, the most important type of risk is "utilization risk" — the risk that consumers will use more telemedicine services than they pay for. This risk is the primary risk covered through health insurance.

Case law

This risk is illustrated by two cases, one in Illinois and another in Florida. In Illinois, insurance was first defined more than 120 years ago as "an agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss [or] damage."[1] Much more recently, an Illinois appeals court applied this definition to a pre-paid home healthcare services contract. That court found that a pre-paid home health contract with no incremental cost for increasing utilization constituted insurance.[2] Pre-paid home health is very similar to pre-paid telemedicine services, and any provider adopting the unlimited model for use with consumers in Illinois is at significant risk of such a product being deemed insurance by the Illinois regulator as well.

In Florida, a similar home health care product was also deemed insurance by a state appeals court.[3] There, Liberty Care Plan sold a membership that entitled members to purchase home healthcare services at a discount of approximately 50% from the market price for such services in Florida at the time. The court found that this membership was insurance; it wrote, “The Plan is a contract whereby [Liberty] undertakes to allow a determinable benefit (i.e., home health care services at discount rates) upon a determinable contingency (i.e., the member’s exercise of the option to purchase these home health care services at discount rates).” Like the law in Illinois, this case suggests that providing unlimited access to care, or even just below-market discounts for a fixed cost, would place a telemedicine provider at risk of being deemed an insurer.

Not all risk transfer is sufficient to render an agreement “insurance” under state laws, however; nearly all contracts contain some element of risk transfer, whether through indemnification or otherwise. One illustrative case, where contracts were found not to be insurance even though they contained some risk transfer, is the case of collision damage waivers in car rental agreements. A California court held that the availability of collision damage waivers in car rental agreements did not constitute insurance, because the collision damage waiver was incidental to a contract whose main purpose was car rental, not insurance.[4] Following this logic, a contract for telemedicine services might contain a risk transfer element (e.g., through the provision of discounts or the offering of a specified number of consultations for a fixed fee) without becoming “insurance” under state law, as long as the risk transfer is incidental to a contract for healthcare services rather than the primary objective of the contract. There is relatively little case law guidance on this point, however, so telemedicine providers must determine whether they are comfortable with any particular method of pricing telemedicine services in the context of insurance law compliance risk.