Suing HMOs Won't Improve Care

Commentary

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With Republican presidential hopefuls John McCain and George W. Bush the latest to join the bandwagon to expand patients' ability to sue health plans, momentum is building for change. But going too far could undermine the large savings already achieved by the national shift to managed care and, worse, make it harder to upgrade health care and deliver it more safely.

So what does "too far" mean? Not that better oversight isn't needed. Higher standards, more demanding consumers and stronger sanctions would help keep some managed care health plans from curbing care arbitrarily.

Nor should legal remedies stay as they are. Today, the workplace health plans that cover most Americans can be sued only in federal court and only to enforce delivery of promised benefits. The federal Employee Retirement Income Security Act, which governs employee benefits, specifies that such plans face no penalty beyond paying disputed benefits, even in cases of outrageous denial or repeated misconduct.

What going too far means is allowing trial lawyers to launch any and all lawsuits they can think of against health plans, whether related to patient rights or appeals processes or not. It means giving the nod to any amount of damages, including punitive awards unrelated to harm caused.

There is a better way to prevent wrongful denials of benefits: setting reasonable standards for medical practice and allowing immediate appeal of denials to independent medical experts. Lawsuits would be used strictly to penalize noncompliance. Experience with non-ERISA plans suggests that this combination eliminates most misuses without triggering excessive lawsuits or awards. In contrast, an unstructured, unconditional "right" to sue could set off a tidal wave of litigation against deep-pocket health plans that would scare off both the employers who pay for care and the practitioners who provide it.

The ostensible reason for suing health plans for mismanagement is to promote better care. The presidential candidates are buying into the comforting rationale that merely getting health plans off physicians' backs will do that. But research documents huge gaps between the care people should get and what they actually do get. Overservice, underservice and wrong service persist no matter the type of provider or health plan.

A better way to promote quality and safety is to demand widespread changes in clinical care and place a premium on across-the-board safety measures. This has little to do with simply legislating patient rights and much to do with the hard work of developing new clinical and administrative processes to monitor and improve quality. Measures range from setting clinical guidelines with teeth to creating new support systems for medical decision-making and careful performance. Even such simple steps as timing tests better or increasing coordination among specialists can greatly improve detection of breast cancer, for instance. Hospitals and physician groups can do a lot that they aren't routinely doing now to make sure that the right people deliver the right care at the right time and place. Buyers and regulators can do more than lawsuits can to motivate them.

Last month, the National Academy of Sciences pegged the annual toll of avoidable deaths at up to 98,000. Clearly, 50 years of lawsuits against doctors and hospitals haven't made medicine as safe, effective or efficient as it should be.

One key to minimizing medical mistakes is willingness to monitor and learn from individual errors and system failures, as other high-risk industries have done. But front-line caregivers have to cooperate, and threats of legal action work against this. Courage is needed to try new techniques and technologies and also to limit the liability of those who do. But the payoffs can be dramatic. Take the case of the Las Vegas casino operators. They demanded and got legislation protecting them from liability so they could install automated defibrillators for nonprofessionals to use to help resuscitate heart attack victims while waiting for the ambulance. As a result, many Americans in those casinos have won life itself.
The presidential candidates wisely see patients' rights as a key issue. But it's unwise to see litigation as a cure-all. It would be far better to target litigation at the worst cases, while going full-tilt to upgrade clinical practices and encourage innovation in risk reduction and information flow.

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