

Estimates of the Cost Impact of Managed Care Accountability Legislation

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Malpractice Liability Assessment Model

William M. Mercer, Inc. and the American Medical Association

Model

Managed Care Accountability Law

- MCOs are liable for damages to enrollees caused by a failure to exercise ordinary care in making treatment decisions
 - any decision made by the plan that affects the quality of the diagnosis, care, or treatment provided
- Both vicarious liability and direct negligence claims are allowed
- Plaintiffs must demonstrate breach of duty and proximate cause of injury
- MCOs are prohibited from including provisions in provider contracts that would require contracting providers to hold the MCO harmless for its actions
- The law applies to all MCOs; it does not extend to employers

Variables

- Legislative Impact
- ERISA Preemption
- Type of MCO
- Mix of Commercial, Medicare, and Medicaid Enrollment
- Caps on Malpractice Awards

Legislative Impact

■ Significant Impact

- Active enforcement of a complete bar against the corporate practice of medicine

■ Moderate

- Active enforcement of a bar against the corporate practice of medicine with exceptions for hospitals, HMOs, and professional corporations

■ Low Impact

- No bar against the corporate practice of medicine or such a bar is not enforced

ERISA Preemption

■ Broadly Construed

- Claims against MCOs by ERISA enrollees other than claims based on vicarious liability are preempted

■ Narrowly Construed

- The courts allow both vicarious liability and direct negligence claims against MCOs by ERISA enrollees
- MCO liability from commercial enrollees is expanded.

Managed Care Environment

■ Type of MCO

- The Model assumes that Staff Model MCOs will face only 30% of the additional liability that will be incurred by IPA/Network Model MCOs

■ MCO Enrollment Mix

- The Model allows for shares of commercial, Medicaid, and Medicare business in a state

Caps on Awards

■ Variations Considered

- No cap on awards
- A cap of \$500,000 on non-economic damages with no cap on economic or punitive damages
- A cap of \$250,000 on non-economic damages but no cap on economic or punitive damages

MCO Claim Incidence

- An initial set of MCO-related claims are predicted from existing physician malpractice claims; claims vary according to the nature and intensity of services provided
- The annual incidence of MCO claims (per 1000 members) is estimated for 43 different specialties using annual incidence of claims and the MCO share of total RVUs
- Physician+Hospital liability claims are 1.14 times physician malpractice claims alone

Assumptions Regarding Claims

- New vicarious liability claims against MCOs are proportionate to the number of existing physician and hospital malpractice claims and vary by legislative impact:
 - .05, .10, and .20 of claims for low, moderate, and significant legislative impact, respectively
- New direct negligence claims against MCOs are 10% of the number of existing physician and hospital malpractice claims, for all legislative scenarios
- The number of new claims allowed by the courts varies by ERISA construction
 - Narrowly construed 100%
 - Broadly construed 5%

Awards

- 25% of plaintiffs are successful
- Bureau of Justice Statistics (plaintiff awards)
 - median \$ 201,000
 - average 1,484,00
 - % over \$250,000 47.1
 - % over \$1,000,000 24.8
- Adjusted MCO Distribution (plaintiff awards)
 - median \$ 875,000
 - average 1,718,600
 - % over \$250,000 82.0
 - % over \$1,000,000 52.0
- Average cost per MCO case: \$429,651 + legal
- Legal expenses average \$125,000 over all suits

PMPM Cost Calculations

■ Baseline Total PMPM premium (Mercer Cost Model)

- Commercial: \$139.17
- Medicare Managed Care 309.35
- Medicaid Managed Care 111.84

■ Additional Cost PMPM

Additional Cost PMPM =

(MCO malpractice claim incidence/1000 members) x

x (Average award + Legal expenses)/1000 members/12 months

Increase as a Percent of MCO Premiums No Cap on Awards

Legislative <u>Impact</u>	ERISA Preemption	
	<u>Broadly Construed</u>	<u>Narrowly Construed</u>
Low	0.2%	0.9%
Moderate	0.3%	1.2%
Significant	0.5%	1.8%

Impacts are 40% lower, 48% lower with caps at \$500K and \$250K, respectively

Final Thoughts

■ Seven studies drive the debate

- “Expensive”
 - Barents for AAAP (2)
- “Not Expensive”
 - Price Waterhouse for Kaiser
 - Muse & Associates for Patient Access to Responsible Care Alliance
 - Coopers & Lybrand for Kaiser
 - CBO for Congress
 - Mercer/AMA for the American Medical Association

■ Barents analysis depends critically on defensive medicine estimates

- Overstated
- Irrelevant if cost effective treatment through MCO liability coverage exists

Final Thoughts, Continued

- Majority of studies indicates it's affordable
 - Methodologies differ
 - Estimates are consistent relative to one another
- Some MCOs are already liable under a broad set of actions
 - They continue to profit
 - People continue to purchase coverage
- Concern among a part of managed care industry is loss of competitive advantage relative to both ffs and staff model plans