Texas: A Cautionary Tale for Medicaid Management and Managed Care Companies

Sunday, July 8, 2018

State Medicaid Agencies have historically engaged in an epic balancing act. Federal law requires State Medicaid Agencies to ensure beneficiaries have access to medically necessary services. Federal law also requires State Medicaid Agencies to safeguard their Medicaid Programs against fraud, waste or abuse in billing for Medicaid services. Balancing those competing requirements has long proven challenging.

Indeed, that very challenge is why federal law also requires State Medicaid Fraud Control Units (MFCUs) be housed outside of the State Medicaid Agencies, and that the State Medicaid Agencies have no authority over which cases the individual MFCUs investigate or prosecute under applicable civil or criminal statutes. Concerns over access to care should not factor into prosecution judgments in the face of allegations of Medicaid fraud.

No state is more emblematic of the challenges presented by that balancing act than Texas. But Texas may also be a case study in why use of private Medicaid Management and Medicaid Managed Care companies is no panacea for those challenges. Moreover, Texas may be a case study in the importance of private Medicaid Management and Medicaid Managed Care companies understanding the depth of those challenges and the need to fully assess what the company may be taking on, before contracting to provide Medicaid services in a particular state.

Access to Care and the Legacy of Frew v. Hawkins

In 2010, Texas entered into a landmark settlement of a 14-year old lawsuit, Frew v. Hawkins. The Frew litigation, originally filed as a class action in 1993, alleged that Texas had failed to ensure that children enrolled in Medicaid were receiving necessary preventative and specialty health care services. The essence of the plaintiff's case was that inadequate Medicaid reimbursement had led to a drastic shortage of providers willing to provide children with essential health services, including dental services.

Texas first tried to settle the case through a 1995 consent decree, but were hauled back into court on allegations the state was refusing to implement and pay for Medicaid services called for by the consent decree. Texas’ attempts to fend off the plaintiff’s enforcement efforts, including 11th Amendment arguments before the Supreme Court, were all thwarted. Facing a trial deadline, the state essentially caved.

The 2010 settlement required Texas to substantially increase Medicaid spending by hundreds of millions of dollars to incentivize health care providers to enroll in Medicaid. A specific provision of the settlement required the state to allocate $258.7 million to fund a 50% increase in Medicaid dental reimbursement rates.

One of the ways Texas chose to implement the Frew settlement was by substantially increasing its use of private companies; contracting out Medicaid provider enrollment, screening, and claims processing to private entities instead of state employees. Through those contracts, the state delegated many of its responsibilities to the
contracting private companies, including the responsibility for oversight and prevention of fraud waste and abuse; the state also insisted on contract provisions requiring the private companies to swiftly process and pay Medicaid claims to ensure an unimpeded flow of services.

One of the private companies chosen by Texas in 2004 to administer Texas State Medicaid was known as the Texas Medicaid and Health Care Partnership, a subsidiary of Affiliated Computer Services, Inc. The company was later acquired by Xerox.

Fall Out from WFAA Investigation

In 2011, TV station WFAA-TV in Dallas reported on its investigation of Texas Medicaid spending on pediatric orthodontic services. Dubbing its investigation “Crooked Teeth,” the reports alleged that Texas spending on pediatric orthodontic services in 2009 was more than almost all the other 49 states combined.

Ensuing federal and state audits found that Texas dental providers were being paid for pediatric orthodontic services that were beyond what was medically required or justified. A 2015 HHS-OIG Report found that the Texas Medicaid and Health Care Partnership paid out at least $191.4 million for what OIG determined was unallowable Medicaid pediatric orthodontic services.

The state attempted to institute administrative overpayment cases against individual dentists, but in the first three cases hearing officers found the state failed to establish that there was reliable evidence of fraud to even support suspending the individual dentists from Medicaid. While the state continued separate attempts to pursue individual dental providers, it added a new tactic.

In 2014, Texas cancelled its contract with the Xerox and sued Xerox. Using the civil false claims remedies under the Texas Medicaid Fraud Prevention Act as the basis for its lawsuit, the state alleged that Xerox misrepresented, concealed or failed to disclose that it was not substantively reviewing documentation before approving prior authorizations for pediatric orthodontic services, as required by contract terms. Thus, the state alleged, Xerox indirectly caused the state to pay millions of dollars in unnecessary or what should have been unauthorized Medicaid pediatric orthodontic services. Under the Texas statute, which largely mirrors the Federal False Claims Act, the state sought treble actual damages, civil penalties of not less than $5,500 per individual claim, and costs of pursuing the lawsuit. The state alleged its potential recovery against Xerox under the lawsuit exceeded $1 billion.

Texas Supreme Court Decision

After the civil lawsuit was filed, Xerox sought to join the separate proceedings against individual dentists to the lawsuit; Xerox also asserted counterclaims and third party claims alleging that individual dentists bore at least some responsibility for the state’s losses. Despite the fact that the state itself was still actively pursuing claims against the individual dentists, Texas went all out to oppose Xerox’s attempts to add individual dentists as parties to its case against Xerox. The pretrial dispute between the state and Xerox eventually landed in the lap of the Texas Supreme Court.

The Texas Supreme Court decision issued on June 22, 2018 relied heavily on language of the state false claims act, the Texas Medicaid Fraud Prevention Act. The Court held that statute was not akin to a tort claim and did not allow for apportionment of responsibility: Xerox could not attempt to pass or share blame with the individual dentists. The ruling left Xerox as the sole defendant, and deepest pocket, facing the state’s billion-dollar false claims case.

Meanwhile, Access Concerns Return to Center Stage

At the same time the Texas Supreme Court was entering its ruling on the Xerox case, the Texas House General Investigating and Ethics Committee was hearing hours of testimony from state Medicaid officials, Medicaid Managed Care Companies (MCOs), and other witnesses regarding alleged deficiencies in providing Medicaid Managed Care services to needy children. The hearing was spurred by a heartbreaking series of stories in the Dallas Morning News that ran in early June 2018, alleging that Medicaid MCOs were unreasonably denying needy children necessary medical services. The media stories and subsequent hearing highlighted individual examples: a child rendered brain dead after the Medicaid MCO denied him individual in-home nursing services; another child hospitalized when the Medicaid MCO denied coverage of a prescription antibiotic that he had previously taken.

Adding to the angst of the situations discussed in the articles and the hearing, the medically needy children had been adopted from Texas foster care with the promise of continued Medicaid coverage of necessary medical service.

Moreover, former Texas Health Commissioner Nancy Toll testified that oversight of the Medicaid MCOs was
complicated by access concerns: the state needed to keep the MCOs in the Medicaid Program. So while the state legally had authority to oversee the Medicaid MCOs and impose fines if an MCO unduly limited necessary health services: “I was told that if we implemented all of those fines, I would put the managed care organizations out of business. If we can’t punish them…then how are any changes going to take place?”

Lawmakers attending the hearing pressed state officials about lack of care coordination, including reported indifference to helping sick children and their families even locate providers who would treat Medicaid patients. One state official acknowledged that perhaps Texas had “focused too much on partnership [with the MCOs] and not enough on accountability.”

**Moral of the Story**

Medicaid oversight often resembles the fabled Push-Me-Pull-You. If you closely monitor fraud, waste and abuse, providers will balk at even enrolling as Medicaid providers. If you don’t closely oversee the providers, you run the risk of that fraud, waste and abuse going unchecked.

Hiring private companies or MCOs to manage Medicaid services does not change the difficult balancing dynamic. It only changes the responsibility for maintaining that balance. And it is important that private companies and MCOs fully understand how that dynamic has played out in an individual state before assuming Medicaid responsibilities in that state.

©1994-2019 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.