Health Insurers Must Count Co-Pays as Patient Costs, Court Rules

Patient groups had sued over a Trump administration Medicare rule that allowed insurers not to count co-pays as out-of-pocket costs.

October 3, 2023 By Trent Straube

A district judge struck down a federal rule implemented under the Trump administration that allowed health insurers to ignore co-pay assistance when tabulating a patient's out-of-pocket costs.

The ruling is a win for people who need expensive prescription drugs, notably those with HIV, hepatitis, cancer, arthritis, diabetes and multiple sclerosis. It's also a victory for the three patient advocacy groups that brought the case against the Department of Health and Human Services: the HIV+Hepatitis Policy Institute, the Diabetes Leadership Council (DLC), and the Diabetes Patient Advocacy Coalition (DPAC). Combined, the patient advocacy groups represent over 42 million people. The lawsuit also included three patients who depend on co-pay assistance and whose insurers implemented "co-pay accumulator" policies, according to the HIV+Hepatitis Policy Institute.

> Court Strikes Down @HHSGov Rule that Allowed #Insurers to Not Count #CopayAssistance: Copay Assistance for #Rx's Must Now Count in Most Instances: https://t.co/UKpYPyEEsS #AllCopaysCount pic.twitter.com/amdWxUmrc0
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> — HIV+Hepatitis Policy Institute (@HIVHep) October 3, 2023

Under the Trump administration's 2020 rule from the Centers for Medicare & Medicaid Services, when health insurers add up the costs that patients have paid, they don't have to include co-pay assistance as part of patients' deductible and out-of-pocket expenses. This co-pay accumulator policy allowed "the insurer to divert the benefit of the assistance away from the patient to the plan then make the patient pay that amount again before meeting their deductible and other out-of-pocket cost obligations," explained the three advocacy groups when they filed the lawsuit in 2022.

Judge John D. Bates of the U.S. District Court for the District of Columbia wrote that the rule conflicted with the definition of cost-sharing under the federal Affordable Care Act (ACA, or Obamacare). What's more, the rule was arbitrary, Bates noted, in that it allowed insurers themselves to define what counted as cost-sharing. You can read Bates's full opinion here.

"We are thrilled that the Court has taken the side of patients who have been struggling to afford their prescription drugs due to the greedy actions of insurers and their PBMs [pharmacy benefit managers, which manage prescription drug benefits on behalf o insurers]," said Carl Schmid, executive director of the HIV+Hepatitis Policy Institute in a press statement. "We call on the Biden administration and states to immediately enforce this decision and not take any further steps to undermine the co-pay assistance that allows patients to access their essential medications."

"While this victory will certainly help millions of patients, it is a shame that so many have been forced to pay thousands of dollars in extra costs each year for their prescription drugs forcing us to take this legal action," added George Huntley, CEO of the Diabetes Leadership Council and the Diabetes Patient Advocacy Coalition. "It is imperative that the Biden administration now support the American people by precluding big insurers and their PBMs from denying patients the benefit of all forms of support they receive in paying for their critical medicines."

Health insurers and the government had argued that the co-pay assistance ultimately reduced the patient's cost of a drug. The plaintiffs argued that high deductibles and cost-sharing often resulted in prices as high as 50% of the list price of the drug, forcing patients to depend on the assistance.

In related health insurance news, another legal case is working its way through the courts and could affect patient costs. Earlier this year, in Braidwood v. Becerra, a Texas judge ruled that insurers do not have to cover certain perventive services, including cancer and diabetes screenings, HIV tests and pre-exposure prophylaxis (PrEP) to prevent HIV.

In May, a U.S. Court of Appeals temporarily paused the judge's ruling. For details, see "UPDATE: Court Pauses Judge's Ruling to End Health Coverage of Some Preventive Services." And for more insight, see "Judge's Decision Would Make Some No-Cost Cancer Screenings a Thing of the Past" by Kaiser Health News.

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