Update on “never events”

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RECENT LEGAL PROCEEDINGS RELIEVE FEARS OF “STRICT LIABILITY” WITH NEVER EVENTS

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When the Centers for Medicare & Medicaid Services (CMS) initiated its project on “never events,” few imagined that it would lead to increased risk exposure for physicians. This project was meant both to raise awareness of preventable errors that should never happen, such as wrong-site surgery or re-tention of surgical instruments within a patient, and to save the government money by declaring that expenses associated with treating the never event will not be paid for by Medicare or Medicaid.

The intent was not to expand medical liability, which already costs the nation between $76 billion and $102 billion per year in defensive medicine. However, intended or not, the concern that the strict liability standard for reimbursement of never events will translate to a strict liability standard for medical liability with never events is real.

Because these new CMS guidelines use a strict liability posture to deny payments, the same posture may be used by plaintiff’s attorneys to argue, without any proof of negligence, that the treating physician was at fault per se. This significantly expand physicians’ liability risk. This article reviews the history of never events, discusses how the CMS decision could potentially expand physician risk exposure, and examines recent legal decisions that appear to limit the scope of that risk.

History of “never events”

The history of never events began with a study performed by the National Quality Forum (NQF), a national patient advocacy group. The NQF reported that 87 percent of hospitals did not follow recommendations to prevent hospital-acquired infections, and that Medicare covered (and reimbursed) 57 percent of these infections. This caught the attention of both Congress and President Obama. Congress directed CMS to reduce payments to hospitals to discourage infections, and the president’s Fiscal Year 2009 Budget included the following proposals:

1. Hospitals would be prohibited from billing Medicare for “serious, preventable adverse events.”
2. The Medicare program would be prohibited from paying for never events.
3. Hospitals would be required to report any occurrence of a never event or risk reduced payment updates.

CMS was ordered to identify at least two never events for which Medicare would not pay by October 1, 2008. CMS initially identified eight non-reimbursable hospital acquired conditions, and later expanded the list to include seventeen conditions (Table 1).

Soon after, private companies, including HealthPartners, Cigna, Blue Cross, Aetna, and WellPoint, adopted similar policies. CMS has also issued letters to states, urging that state programs also not pay for never events.

Impact on medical liability

The problem is that never event reimbursement guidelines may be twisted to create a new standard of care and proof of medical liability. In a court of law, different standards of proof exist depending on the tort type. Traditional medical liability falls under a negligence standard, which requires proof of duty, breach of duty, causation and damages.

A much less demanding standard is applied under strict liability. To meet standards under strict liability, the plaintiff simply has to prove that damages occurred. For example, if a tiger escapes from a zoo and injures someone, the zoo faces strict liability for the tiger’s actions. No matter how reasonable the zoo’s prevention measures were, if the tiger hurts someone, the zoo is liable.

The strong language of never events could result in the application of a strict liability standard to what has traditionally been a tort judged under a negligence standard. For example, consider the case of a patient who falls on postoperative day three after a total hip replacement. Under CMS guidelines, falls in a hospital are never events, because CMS believes that they should be preventable with due diligence. The hospital could have performed a fall assessment, had a nurse call button within reach, treated the patient with physical therapy, and made a walker available for the patient. A nurse expert may testify that there was no negligence in this case, and that all falls are preventable. None of this may matter, however, when a plaintiff’s attorney points out that, according to the federal government, falls should never occur in a hospital.

Recent proceedings

Fortunately, recent legal proceedings have aimed to help prevent this. The best way to avoid an expansion of liability is to apply CMS rulings just where they were intended: on reimbursement issues only. The goal of the CMS never event statements was to save the government money, not to change the standard of care. Plaintiff attorneys should thus be prevented from turning a reimbursement guideline into a standard of care issue.

For example, it is not true that all errors are preventable. According to the Institute of Medicine’s study “To Err is Human: Building a Safer Health System,” medical errors are inherent risks that are not avoidable through censure or punishment. Therefore, plaintiff attorneys should not be able to rebut a defense witness’s statement by introducing evidence from the CMS never events policy. Payment responsibility does not alter the standard of care.

Several case rulings support this interpretation. For example, a North Carolina court recently opined that a “violation of a hospital’s policy is not necessarily a violation of the applicable standard of care, because the hospital’s rules and policies may reflect a standard that is above or below what is generally considered by experts to be the relevant standard.” In a similar way, plaintiff attorneys should be...