

Legal, Compliance & Regulatory

APC Procedures and Policy Language Best Practices

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Introduction



- APC History and Challenges
- How Use of APC has Evolved
- Three Different Viewpoints:
 - Third Party Administrator
 - Carrier
 - Outside Counsel
- Best Practices and Tips

Problems with APC/ACB



- Inconsistency
- Lack of Documentation
- Provider Type Changes at the State Level



- Has been abused by policyholders *and* agents
 - Vague Wording & Inconsistent Administration
 - Discrepancies between the Contract & Marketing Materials
 - Agents Misrepresenting what APC Covers



- Carrier communications may not have been consistent among different policyholders or even with the same policyholder
- As a TPA, we administer blocks of LTCL for which documentation around APC processes is not always as robust as we would like



- Carriers who ignore what was sold to policyholders, covering benefits/riders offered, but not purchased under APC.
- Private, or Family caregivers: informal care present opportunities for fraud.



- Policyholders may try to have APC cover services that are not LTC services
 - E.g., broken bones, intellectual disabilities
- The rapid change in provider types may create layers of complexity for carriers (not consistent across states, i.e. broader definitions of certain types of providers in certain states, provider types that are unique to a given state, etc.)



- **Set expectations early and reinforce those expectations at each step in the process**



- Review existing practice to ensure that the approach addresses the following concerns:
 - Ensure approach does not seem arbitrary
 - Be consistent
 - During the diligence process, We review carrier's existing policies and procedures re: APC
 - If there are ways that we can help make more consistent, best to do that at the outset.
 - If no written approach has been drafted, we create one, and review with the company

Potential APC Solutions



- Review existing practice to ensure that the approach addresses the following concerns:
 - Negotiation between the parties is allowed (not unilateral)
 - If rate of reimbursement has an element of discretion for carrier (language other than “actual charges”)
 - Ensure it is based on a well-thought out approach – ideally something developed by an independent third-party
 - E.g. BLS wages for type of care, carrier-specific surveys, etc.



- Review existing practice to ensure that the approach addresses the following concerns:
 - Review what was sold to the policyholder who is requesting APC
 - E.g., if a HHC benefit was offered as a rider when sold, unwise to cover that same benefit under APC if that rider/benefit not purchased by policyholder.
 - Process is well documented



- Consistent Communication
 - Scripting for Customer Service/Claims is always important, but...
 - With APC, it is paramount
 - Going off script can lead to legal issues
- Review provider types on a regular basis to ensure that there have not been any changes to the law



- Reaching Agreement
 - The benefit/or APC may be open-ended or very narrow
 - Carefully worded APC arrangements help both parties understand that which has been agreed upon, and how it will be administered.
 - May help limit litigation exposure
 - Regular review of the agreement upon recertification



- We heard about APC administration from the perspective of a TPA, but what are the challenges and considerations in play at a carrier that administers its own business?
 - Policy language
 - Process
 - Documentation
 - Communication



- Observations:
 - Abuse by policyholders *and* agents is also one of the biggest problems we see
 - Combatting inconsistent administration by using an APC approval letter, which the insured signs before the APC is implemented

APC Administration at the Carrier Level



- Standard set of scenarios consistently used for APC, then consider unusual requests or requests from insured outside policy benefits on *ad hoc* basis.
- Once an APC is requested and approved, use document to outline what the alternate plan of care is covering and require the insured to sign off and return the form.

APC Administration at the Carrier Level



- **Informal Care** - Indemnity benefit product, use APC for severely cognitive impaired insureds where it would be detrimental for them to change care givers from their informal care giver to a Home Care agency; use APC to extend care.
- **ALFs for Cognitively Impaired Insureds** - older policies, sold back in the 90s, did not have Assisted Living coverage – may use the APC benefit for insured's with our older policies to cover cognitive claims if the ALF meets the policy requirements of a nursing home.
- **Home Care Covered Through Licensed Home Care Agencies** -- May use the APC benefit, at times and upon request, to allow licensed individuals/care providers (CNA's, RNs etc) to process the care from the private licensed care giver under the home care benefit.

Service Providers/Vendors for Informal or Private Care



- Many APCs involve informal or private caregivers
- Potential for fraud
- Third party vendors and service providers help to prevent/mitigate fraud
 - Monitoring services
 - Investigative services
 - E.g. Assuricare



- Agents setting incorrect expectations as to how APC can be used
- New CA Regulation: Possible new issue that even if the policy does not have an APC benefit, insureds can request APC
 - Risky because policies were not priced for APC
 - All APCs would need to be cost beneficial



- Legal Background
- Compliance Issues
- Current Legal Risks
 - Increased scrutiny of APC arrangement
- Risk Mitigation



- APC Provisions, Historically, Have Not Received Significant Scrutiny by Courts
 - *Mansur* (Carrier won, 10th Cir. affirmed, 2009)
 - *Roland* (Carrier won, 5th Cir. affirmed, 2009)
 - Carrier has contractual right to approve APC plan, and that approval required for there to be liability for benefits
 - *Berry* (SD Federal Court, Carrier settled after motion to dismiss denied, 2011)
 - Carrier must be reasonable in making APC approval decision



- Duty to Inform of APC Provision
- Documentation
- Provider Eligibility Issues
- Individual APC Determination v. Administrative Exception



- What lengths must a carrier go to in order to inform insureds of APC benefit?
- State Requirements Differ
 - “No duty” states
 - “Reasonable” states
 - “Settlement” states



- How should carriers memorialize APC agreements?
- Iowa Insurance Department Bulletin 14-01 (March 25, 2014)
- Claim procedures
- Claim forms
- Policyholder communications
- Physician certifications
- Non-agency family caregivers

Provider Eligibility Issues



- Policy language sets forth parameters for providers
- Policy language does not conform to current care environment
- Should carriers use APC provisions to address these scenarios?
 - What if scenarios are widespread across a block?
 - Cognitively impaired insureds

APC v. Administrative Exception



- What is the most effective way to address recurring difficult benefit eligibility determinations?
 - Individual APC evaluations. Does APC end up swallowing the baseline policy coverage?
 - Administrative exception. How does a carrier tailor such an exception appropriately? Is there risk in deviating from strict policy language?

Increased Scrutiny/New Theories of Liability



- *DeLancey*
- Plaintiff, as executor of decedent insured's estate filed complaint against insurer
- Insured elected to receive care at home from privately hired caregivers pursuant to her policy's alternative care benefit provision
- After insurer instituted new requirement that care received by privately-hired caregivers under alternative plan of care be "verified"; insured did not agree to "verify" receipt of such care
- Insurer thus stopped reimbursing insured for her receipt of care from privately hired caregivers, noting she was free to receive care by an approved provider

Increased Scrutiny/New Theories of Liability



- Complaint sought (i) declaration of insurer's responsibility under the policy and asserted causes of action for (ii) breach of contract; (iii) tortious breach of contract; (iv) breach of the duty of good faith and fair dealing; (v) bad faith; (vi) negligence; (vii-viii) intentional and negligent infliction of emotional distress; and reserved right to seek class action status
- Executor argued insurer should have continued to pay for privately hired caregiver care
- Insurer filed motion to dismiss; arguing it had no obligation under the policy to approve claims or reimburse insured for care provided by privately-hired caregivers; rather, the alternative care benefit provision enabled the insurer and insured to agree to terms under which the insured *may* receive coverage for care not otherwise available under the policy
- Where there was no agreement by both insurer and insured in writing as to the terms of the alternative care benefit; the insurer was not required to provide alternative care benefits
- MTD remains pending



- Policies and procedures
- Clear policyholder communications
- Documentation
- Third party vendors/service providers
- Effective anti-fraud infrastructure
- Well defined protocols for recurring facts
- Sales practices



Questions?