In response to public discontent over surging drug prices, federal and state lawmakers are scrambling to introduce drug price reform legislation. While many of these reforms have targeted drug manufacturers, a few state legislatures have considered bills that would impact insurers’ ability to shift excessive drug costs to their insured enrollees. Most notably, California recently adopted legislation that will cap copayments for outpatient prescription drugs offered by commercial insurers in the general market and under the state’s health insurance exchange. Industry stakeholders will be closely monitoring this novel legislation in the Golden State for its potential impact on future drug pricing reforms.

On October 8, 2015, California Governor Jerry Brown signed Assembly Bill 339, which will require insurers to limit copayment amounts to $250 for a single 30-day outpatient prescription and $500 for enrollees with high-deductible plans. The new law, which becomes effective on January 1, 2017, also contains anti-discrimination provisions that prohibit an insurer from grouping all or most of the drugs used to treat a particular condition on the highest cost tier in its drug formulary.

These measures expand upon the policy initiative announced earlier this year by Covered California, the state’s health insurance exchange marketplace, which requires health plans to comply with similar cost-sharing caps for expensive drugs. While the new rules govern plans offered in the private sector, they only apply to outpatient prescription drugs and do not affect reimbursement policies for specialty drugs administered in the inpatient setting.

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Consumer advocates have praised the new California legislation, which is intended to facilitate patient access to expensive specialty drugs. To manage rising drug prices, insurers have increasingly utilized mechanisms that shift much of the cost burden to their enrollees. For instance, many beneficiaries have seen their real dollar costs rise dramatically in recent years as more insurers have substituted coinsurance (calculated as a percentage of the total drug cost) in place of co-payments (calculated as a fixed dollar amount) as the preferred cost-sharing mechanism. Proponents of the legislation contend that the cost-sharing limits will promote patients’ adherence to drug regimens, which, in turn, will help reduce avoidable medical costs. Finally, the new law has received ample support from drug manufacturers, who look to benefit as reduced beneficiary out-of-pocket costs will promote drug utilization.

Insurers, however, view the new California legislation as misguided insofar as it treats the symptoms of high drug prices in a manner that overlooks, if not encourages, their underlying causes. While the new law is designed to provide instant relief for patients with high drug expenditures, insurers claim that it will hamstring their ability to check and spread drug costs through the use of tiers and differential cost-sharing, which are used to incentivize beneficiaries and providers to make more cost-effective decisions regarding drug selection. Likewise, insurers fear that the new drug formulary restrictions will reduce their bargaining power in negotiating discounts with drug manufacturers, who provide such discounts in return for preferred drug tier status. Some observers believe that insurers may respond to these restrictions by raising premiums—leading to higher costs for all beneficiaries, and not just those associated with high drug expenditures. Also, because a large portion of prescription drug coverage is employer-sponsored, many businesses may soon face higher insurance costs.

As expensive specialty drugs and biologics flood the market, the debate over drug price reforms will continue to escalate. Against this backdrop, insurers and drug manufacturers are pitched in a lobbying battle over the shape of drug price reforms, which could dramatically impact the way drugs are created, priced, and paid for in the United States. Insurers note that laws that directly control drug prices or require transparency of underlying drug development costs would get to the heart of the problem. Drug manufacturers, on the other hand, have argued that such legislation would hamper their incentive and ability to create innovative drugs, especially for rare diseases.

The nature of this debate will largely hinge on how pioneering reforms play out in the market. If the new California law succeeds in promoting access to specialty drugs without destabilizing insurers’ ability to manage prescription drug costs, then other states may follow suit with legislation addressing cost-sharing. But if the law and similar reforms prove ineffective in stemming the negative impacts of drug prices, lawmakers may resort to more radical measures and industry mandates.
This Client Alert was authored by John S. Linehan. For additional information about the issues discussed in this Client Alert, please contact the author or the Epstein Becker Green attorney who regularly handles your legal matters.

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