Medicare Electronic Prescription Drug Programs

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The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA)\(^1\) requires the Department of Health and Human Services (HHS) to develop national standards for electronic prescriptions. The standards will allow physicians and pharmacists to share a wealth of information electronically. For example, physicians and pharmacists will be aware of all the drugs a patient is taking to help avoid dangerous adverse drug interactions. Physicians will also be able immediately to determine whether a less-expensive therapeutically appropriate drug could save the patient (and Medicare) some money.\(^2\)

Although final standards will not be in place for several years, Texas is already well positioned to enjoy the benefits that may be achieved through electronic prescribing. Texas and at least thirty-two other states already permit the electronic transmission of prescriptions between a practitioner and a pharmacy.\(^3\) A U.S. Department of Justice study found that a majority of all electronic prescriptions occurs in Texas and two other states.\(^4\) However, even within these three states, “only a small number of doctors are using these systems” and they are being used “primarily to automate refill requests,” i.e., pharmacies requesting refill authorizations from physicians.\(^5\) The study estimated that 88% of all electronic prescriptions currently transmitted are for refills.\(^6\)

Broader electronic prescribing may soon become more commonplace in Texas. A company called SureScripts launched a Texas electronic prescribing network in August 2004 and already has 55 percent of Texas pharmacies on the network.\(^7\) SureScripts connects physicians and pharmacists existing software to the network, and pharmacies pay a fee each time the network delivers a new prescription or refill to the pharmacy.\(^8\) The fee is not passed on to patients.\(^9\) In addition to reducing medication errors, electronic prescribing saves physicians and pharmacies considerable time. Physicians can authorize

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4. Id. The three states are Arizona, Texas and Florida.
5. Id.
6. Id.
7. See Alice Adams, Electronic prescribing becomes a reality in Texas, Houston Chronicle, Health Care Professional Update (Sunday, Sept. 8, 2004).
8. Id.
9. Id.
refills from anywhere electronically, and pharmacies do not have to “spend time tracking down physicians to handle these refill requests.”

A report by the National Academy of Sciences found a variety of medication errors are not uncommon, including those involving drug interactions, nomenclature such as incorrect drug name, dosage form, or abbreviations. The report found that medication errors are often preventable, and that “computerized drug order entry systems have much potential to reduce errors.” In a Texas case, the jury found a physician negligent for writing an illegible prescription. The jury attributed the death of Ramon Vasquez to the illegibility of a prescription. The physician’s attorney, Max E. Wright, said, “This jury clearly questioned why in the electronic age…we’re still using this antiquated system based on a 3 ½ -by-5 [inch] piece of paper.”

“Electronic prescribing is introducing significant changes in how drugs are used and monitored.” Electronic prescribing can help reduce prescribing errors, dispensing errors, and administration errors. It is already possible for a physician to directly transfer a prescription to a pharmacy using a Palm handheld device together with a wireless Internet connection. Commercial services allow physicians to send prescriptions to pharmacies using a secure wireless connection to the Internet.

So-called “quill pen” laws can present a barrier to implementation of electronic prescribing. For example, federal Medicaid law provides that “[t]he upper limit for payments [for] multiple source drugs for which a specific limit has been established under … does not apply if a physician certifies in his or her own handwriting that a specific brand is medically necessary for a particular recipient.” These types of statutes can limit electronic prescribing, because the statutory phrase “in his or her own handwriting” presents the question of whether an electronic prescription would comport with the statute. Presumably, the intent of the statute is to promote less expensive generic drugs over their brand name counterparts by requiring the physician to make the extra effort when writing the prescription. Texas State Board of Pharmacy (TSBP) regulations interpret the above federal statute literally. To prohibit substitution on an electronic prescription drug order reimbursed through Medicaid as set forth in the above statute, the physician must fax a copy of the original prescription drug order with her or her manual

10 Id.
11 See To Err is Human, available at http://www.nap.edu/books/0309068371/html/.
12 A pharmacist dispensed 20mg Plendil, a drug used to control high blood pressure, rather than Isordil, used to control angina. The maximum daily dosage of Plendil is 10mg, so the patient not only received the wrong medication, but also took an overdose. One day after taking the medication, the patient suffered a heart attack, and he died a few days later. Jurors held both the pharmacy and physician liable for the medication error. The error could have been prevented if the prescription had been typed, or transmitted electronically from the physician to the pharmacy. See Ronald L. Scott, Move Prescriptions Online Now (12-10-99) available at http://www.law.uh.edu/healthlawperspectives/Internet/991210Move.html.
14 See id.
16 42 C.F.R. §447.331 (emphasis added).
signature within 30 days of the electronic prescription.\textsuperscript{17}

Texas law required that TSBP “adopt rules regulating a prescription drug order or medication order transmitted by electronic means.”\textsuperscript{18} The implementing regulations solve the “quill pen” issue discussed above by allowing a physician to note “brand necessary” or “brand medically necessary” in the electronic prescription drug order.\textsuperscript{19} However, if the physician does not clearly indicate in the electronic order that a brand is medically necessary, the pharmacist may substitute a generically equivalent drug product. “Electronic prescription drug order” is defined as “[a] prescription drug order which is transmitted by an electronic device to the receiver (pharmacy). Electronic prescription drug order includes computer to computer transmission, but does not include facsimile prescription drug orders.”\textsuperscript{20}

The Centers for Medicare & Medicaid Services believes that “[m]edication errors due to bad handwriting or other errors will be sharply reduced by the electronic prescribing provisions of the Medicare Modernization Act (MMA).”\textsuperscript{21}

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\item \textsuperscript{17} 22 Tex. Admin. Code § 309.3.
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\item \textsuperscript{19} 22 Tex. Admin. Code § 309.3.
\item \textsuperscript{20} 22 Tex. Admin. Code § 309.2.
\item \textsuperscript{21} See CMS Issue Paper 14, \textit{Electronic Prescribing} (July 29, 2004) available at \url{http://www.cms.hhs.gov/medicarereform/issuepapers/title1and2/}.
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