HOUSE DOCKET, NO. 3049 FILED ON: 1/14/2009

HOUSE . . . . No. 1093

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act authorizing health care professionals to negotiate with health care insurers and providing for the powers and duties of the attorney general..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 93H the
2 following chapter:

3 CHAPTER 93I

4 PROVIDER JOINT NEGOTIATIONS

5 Section 1. As used in this chapter, the following words shall have the following
6 meanings:

7 "Attorney General," the attorney general of the commonwealth and individuals
8 designated by him to act on his behalf in carrying out the purposes of this chapter.

9 "Carrier," an insurer licensed or otherwise authorized to transact accident or health
10 insurance under chapter 175; a nonprofit hospital service corporation organized under chapter
11 176A; a nonprofit medical service corporation organized under chapter 176B; a health
12 maintenance organization organized under chapter 176G; and an organization entering into a

13 preferred provider arrangement under chapter 176I. A third party administrator shall be
14 considered a carrier when interacting with health care professionals.

15 “Carrier affiliate,” a carrier that is affiliated with another entity by either the insurer or
16 entity having a five percent or greater, direct or indirect, ownership or investment interest in the
17 other through equity, debt or other means.

18 “Covered lives,” the total number of individuals who are entitled to benefits under a
19 health care insurance plan, including, but not limited to, beneficiaries, subscribers and members
20 of the plan.

21 “Health care professional,” a physician or other health care practitioner licensed,
22 accredited or certified to perform specific health services consistent with law, person, acting
23 alone or acting with other persons through a partnership, professional corporation, organization
24 or association.

25 “Health care provider” or “provider,” a health care professional or a facility.

26 “Health care services,” services for the diagnosis, prevention, treatment, cure or relief of
27 a health condition, illness, injury or disease provided by a health care professional and performed
28 within the lawful scope of practice.

29 “HMO,” a health maintenance organization organized under chapter 176G. The term
30 includes any carrier product that requires enrollees to use health care professionals in a
31 designated provider network to obtain covered services except in limited circumstances such as
32 emergencies.

33 “Incentive plan,” any compensation arrangement between a carrier and a health care
34 professional or health care provider group or organization that employs or utilizes services of one
35 or more health care professionals that may directly or indirectly have the effect of reducing or
36 limiting services furnished to insureds, including but not limited to withholds and risk sharing
37 arrangements.

38 “Joint negotiation,” negotiation with a carrier by two or more health care professionals
39 acting together as part of a formal entity or group or otherwise.

40 “Joint negotiation representative,” a representative selected by a group of health care
41 professionals to be the group’s representative in joint negotiations with a carrier under this act.

42 “Office of Attorney General,” the office of attorney general of the commonwealth.

43 “POS,” a point-of-service plan, a variation of an HMO that provides insureds with the
44 choice of obtaining diagnostic and treatment services from a provider of health care services who
45 is not under contract with or is otherwise a participating provider in a carrier’s network.

46 “PPO,” a preferred provider organization organized under chapter 176I. The term
47 includes any carrier product, other than an HMO or POS product, that provides financial
48 incentives for enrollees to use health care professionals in a designated provider network for
49 covered services.

50 “Provider contract,” an agreement between a health care professional and a carrier which
51 sets forth the terms and conditions under which the provider is to deliver health care services to
52 enrollees of the carrier. The term does not include employment contracts between a carrier and a
53 health care professional.

54 "Provider network," a grouping of health care providers who contract with a carrier to
55 provide services to insureds covered by any or all of the carrier's plans, policies, contracts or
56 other arrangements.

57 "Self-funded health benefit plan," a plan that provides for the assumption of the cost of or
58 spreading the risk of loss resulting from health care services of covered lives by an employer,
59 union or other sponsor, substantially out of the current revenues, assets or any other funds of the
60 employer, union or other sponsor.

61 "Third party administrator," an entity that provides utilization review, provider network
62 credentialing or other administrative services for a carrier or a self-funded health benefit plan.

63 Section 2. Purpose.

64 (1) Active, robust and fully competitive markets for health care services provide the best
65 opportunity for residents of this commonwealth to receive high-quality health care services at an
66 appropriate cost.

67 (2) A substantial amount of health care services in this commonwealth is purchased for
68 the benefit of patients by carriers engaged in the provision of health care financing services or is
69 otherwise delivered subject to the terms of agreements between carriers and health care
70 professionals.

71 (3) Carriers are able to control the flow of patients to health care professionals through
72 compelling financial incentives for patients plans to utilize only the services of health care
73 professionals with whom the carriers have contracted.

74 (4) Carriers also control the health care services rendered to patients through utilization
75 review programs and other managed care tools and associated coverage and payment policies.

76 (5) The power of carriers in markets of this commonwealth for health care services has
77 become great enough to create a competitive imbalance, reducing levels of competition and
78 threatening the availability of high-quality, cost-effective health care.

79 (6) Carriers often are able to virtually dictate the terms of the contracts that they offer
80 health care professionals and commonly offer provider contracts on a take-it-or-leave-it basis.

81 (7) The power of carriers to unilaterally impose contract terms jeopardizes the ability of
82 physicians and other health care professionals to deliver the superior quality health care services
83 that have been traditionally available in this commonwealth.

84 (8) Physicians and other health care professionals do not have sufficient market power to
85 reject unfair provider contract terms that impede their ability to deliver medically appropriate
86 care without undue delay or hassle.

87 (9) Inequitable reimbursement and other unfair payment terms adversely affect quality
88 patient care and access by reducing the resources that health care professionals can devote to
89 patient care and decreasing the time that physicians are able to spend with their patients.

90 (10) Empowering health care professionals to jointly negotiate with carriers as provided
91 in this act will help restore the competitive balance and improve competition in the markets for
92 health care services in this commonwealth, thereby providing benefits for consumers, health care
93 professionals and less dominant carriers.

94 (11) Allowing health care professionals to jointly negotiate with carriers through a
95 common joint negotiation representative will improve the efficiency and effectiveness of
96 communications between the parties and result in provider contracts that better reflect the mutual
97 areas of agreement.

98 (12) This chapter is necessary, proper and constitutes an appropriate exercise of the
99 authority of this commonwealth to regulate the business of insurance and the delivery of health
100 care services.

101 (13) It is the intention of the General Court to authorize health care professionals to
102 jointly negotiate with carriers and to qualify such joint negotiations and related joint activities for
103 the State-action exemption to the Federal antitrust laws through the articulated State policy and
104 active supervision provided in this act, under section 7 of chapter 93 of the General Laws.

105 Section 3. Health care professionals may jointly negotiate with a carrier and engage in
106 related joint activity, as provided in sections 6 and 7, regarding nonfee-related matters which can
107 affect patient care, including, but not limited to any of the following:

108 (1) The definition of medical necessity and other conditions of coverage.

109 (2) Utilization review criteria and procedures.

110 (3) Clinical practice guidelines.

111 (4) Preventive care and other medical management policies.

112 (5) Patient referral standards and procedures, including, but not limited to, those
113 applicable to out-of-network referrals.

114 (6) Drug formularies and standards and procedures for prescribing off-formulary drugs.

115 (7) Quality assurance programs.

116 (8) Respective health care professional and carrier liability for the treatment or lack of
117 treatment of plan enrollees.

118 (9) The methods and timing of payments, including, but not limited to, interest and
119 penalties for late payments.

120 (10) The terms and conditions for amending any agreement between health care
121 professionals and a health insurer, including the amendment of payment methodologies, fee
122 schedules, and payment and claims policies and procedures.

123 (11) The terms and conditions for the reconciliation process under incentive plans,
124 including but not limited to risk sharing and withhold arrangements.

125 (12) The terms and conditions for retroactive termination of covered lives, including but
126 not limited to beneficiaries, subscribers and members of the plan.

127 (13) Other administrative procedures, including, but not limited to, enrollee eligibility
128 verification systems and claim documentation requirements.

129 (14) Credentialing standards and procedures for the selection, retention and termination
130 of participating health care professionals.

131 (15) Mechanisms for resolving disputes between the carrier and health care professionals,
132 including, but not limited to, claims payment, and the appeals process for utilization review and
133 credentialing determination.

134 (16) The carrier plans sold or administered by the insurer in which the health care
135 professionals are required to participate.

136 Section 4. When a carrier has substantial market power over health care professionals,
137 the professionals may jointly negotiate with carrier and engage in related joint activity, as
138 provided in sections 6 and 7 regarding fees and fee-related matters, including, but not limited to,
139 any of the following:

140 (1) The amount of payment or the methodology for determining the payment for a health
141 care service.

142 (2) The conversion factor for a resource-based relative value scale or similar
143 reimbursement methodology for health care services.

144 (3) The amount of any discount on the price of a health care service.

145 (4) The procedure code or other description of the health care service or services covered
146 by a payment.

147 (5) The amount of a bonus related to the provision of health care services or a withhold
148 from the payment due for a health care service.

149 (6) The amount of any other component of the reimbursement methodology for a health
150 care service.

151 Section 5. (a) A carrier has substantial market power over health care professionals when
152 either (1) the carrier's market share in the comprehensive health care financing market or a
153 relevant segment of that market, alone or in combination with the market shares of its carrier
154 affiliates, exceeds either twenty-five percent of the covered lives in the geographic service area

155 of the professionals seeking to jointly negotiate; or (2) the Attorney General determines that the
156 market power of the insurer in the relevant service and geographic markets for the services of the
157 professionals seeking to jointly negotiate significantly exceeds the countervailing market power
158 of the professionals acting individually.

159 (b) The comprehensive health care financing market includes (1) all carrier products
160 which provide comprehensive coverage, alone or in combination with other products sold
161 together as a package, including, but not limited to, indemnity, HMO, PPO and POS products
162 and packages; and (2) self-funded health benefit plans which provide comprehensive coverage.

163 (c) Relevant market segments in the comprehensive health care financing market shall
164 include the following: (1) carrier products and self-funded health benefit plans; (2) within the
165 carrier product category, private health insurance, Medicare HMO, PPO and POS and Medicaid
166 HMO; (3) within the private health insurance category, indemnity, HMO, PPO and POS
167 products; and (4) such other segments as the Attorney General determines are appropriate for
168 purposes of determining whether a carrier has substantial market power.

169 Section 6. The following requirements shall apply to the exercise of joint negotiation
170 rights and related activity under this act:

171 (1) Health care professionals shall select the members of their joint negotiation group by
172 mutual agreement.

173 (2) Health care professionals shall designate a joint negotiation representative as the sole
174 party authorized to negotiate with the carrier on behalf of the health care professionals as a
175 group.

176 (3) Health care professionals may communicate with each other and their joint
177 negotiation representative with respect to the matters to be negotiated with the carrier.

178 (4) Health care professionals may agree upon a proposal to be presented by their joint
179 negotiation representative to the carrier.

180 (5) Health care professionals may agree to be bound by the terms and conditions
181 negotiated by their joint negotiation representative.

182 (6) The health care professionals' joint negotiation representative may provide the health
183 care professionals with the results of negotiations with the carrier and an evaluation of any offer
184 made by the carrier.

185 (7) The health care professionals' joint negotiation representative may reject a contract
186 proposal by a carrier on behalf of the health care professionals as long as the health care
187 professionals remain free to individually contract with the carrier.

188 (8) The health care professionals' joint negotiation representative shall advise the health
189 care professionals of the provisions of this act and shall inform the health care professionals of
190 the potential for legal action against health care professionals who violate the federal antitrust
191 laws.

192 Section 7. (a) Before engaging in any joint negotiation with a carrier, health care
193 professionals shall obtain the Attorney General's approval to proceed with the negotiations. The
194 petition seeking approval shall include the following: (1) the name and business address of the
195 health care professionals' joint negotiation representative; (2) the names and business addresses
196 of the health care professionals petitioning to jointly negotiate; (3) the name and business address

197 of the carrier or insurers with which the petitioning providers seek to jointly negotiate; (4) the
198 proposed subject matter of the negotiations or discussions with the carrier or insurers; (5) the
199 proportionate relationship of the health care professionals to the total population of health care
200 professionals in the relevant geographic service area of the providers by providers by provider
201 type and specialty; (6) in the case of a petition seeking approval of joint negotiations regarding
202 one or more fee or fee-related terms, a statement of the reasons why the carrier has substantial
203 market power over the health care professionals; and (7) such other data, information and
204 documents that the petitioners desire to submit in support of their petition.

205 (b) The petition seeking approval shall include the following: (1) the Attorney General's
206 file reference for the original petition for approval of joint negotiations; (2) the proposed new
207 subject matter; (3) the information required by subsection (a)(6) with respect to the proposed
208 new subject matter; and (4) such other data, information and documents that the health care
209 professionals or carrier desire to submit in support of their petition.

210 (c) No provider contract terms negotiated under this act shall be effective until the terms
211 are approved by the Attorney General. The petition seeking approval shall be jointly submitted
212 by the health care professionals and the carrier who are parties to the contract. The petition shall
213 include: (1) the Attorney General's file reference for the original petition for approval of joint
214 negotiations; (2) the negotiated provider contract terms; and (3) such other data, information and
215 documents that the health care professionals or carrier desire to submit in support of their
216 petition.

217 Section 8. (a) The Office of Attorney General shall either approve or disapprove a
218 petition under section(s) 7(a), (b) or (c) within 30 days after such petition is filed. If any petition

219 is disapproved, the Attorney General shall furnish a written explanation of any deficiencies with
220 such petition along with a statement of specific remedial measures as to how such deficiencies
221 may be corrected.

222 (b) (1) The Office of Attorney General shall approve a petition under section 7(a) and
223 (b) if (i) the pro-competitive and other benefits of the joint negotiations outweigh its anti-
224 competitive effects, and (ii) in the case of a petition seeking approval to jointly negotiate one or
225 more fee or fee-related terms, the carrier has substantial market power over the health care
226 professionals.

227 (2) The pro-competitive and other benefits of joint negotiations or negotiated
228 provider contract terms may include, but shall not be limited to (i) restoration of the competitive
229 balance in the market for health care services, (ii) protections for access to quality patient care,
230 and (iii) improved communications between health care professionals and carriers.

231 (c) For the purpose of enabling the Attorney General to make the findings and
232 determinations required by this section, the Attorney General may require the submission of such
233 supplemental information as it may deem necessary or proper to enable him to reach a
234 determination.

235 Section 9. In the case of a petition under section 7(a) or (b), the Attorney General shall
236 notify the health insurer of the petition and provide the insurer with the opportunity to submit
237 written comments within a specified time frame that does not extend beyond the date on which
238 the Attorney General is required to act on the petition.

239 Section 10. Within 180 days from the mailing of a notice of disapproval of a petition
240 under section 8, the petitioners may commence a claim in superior court seeking approval of

241 such petition. The matter shall be tried by the court without a jury. The court shall enter its
242 findings as a judgment of the court and the judgment shall have the same effect and be
243 enforceable as any other judgment of the court in civil cases, subject to the provisions of this
244 chapter. Appeals may be taken to the supreme judicial court under the same conditions and
245 under the same practice as appeals are taken from judgments in civil cases rendered by the
246 superior court.

247 Section 11. Any petition submitted under section 7 herein and any supplemental
248 submission made under section 8 herein shall be considered confidential, not a public record
249 under the section 7 of chapter 4, and not subject to public disclosure under section 10 of chapter
250 66.

251 Section 12. The Attorney General may, in effectuating the purposes of this chapter,
252 engage experts or consultants to assist with the review of the petition. All copies of reports
253 prepared by experts and consultants shall be made available to the petitioners. All costs incurred
254 under this chapter shall be the responsibility of the petitioners in an amount to be determined by
255 the Attorney General. No petition for approval of joint negotiations, petition for approval of
256 modification of joint negotiations, or petition for approval of provider contracts shall be
257 considered complete, unless an agreement has been executed with the Attorney General for the
258 payment of costs incurred pursuant to this chapter.

259 Section 13. Nothing contained in this act shall be construed (1) to prohibit or restrict
260 activity by health care professionals that is sanctioned under the federal or state laws; (2) to
261 prohibit or require governmental approval of or otherwise restrict activity by health care
262 professionals that is not prohibited under the federal antitrust laws; (3) to require approval of

263 provider contracts terms to the extent that the terms are exempt from state regulation under
264 section 514 of the Employee Retirement Income Security Act of 1974 (Public Law 93-406, 88
265 Stat. 829); or, (4) to expand a health care professional's scope of practice or to require a carrier
266 to contract with any type or specialty of health care professionals.

267 Section 14. If any provision of this chapter or the application thereof to any person or
268 circumstances is held invalid, such invalidity shall not affect other provisions or applications of
269 the chapter, which can be given effect without the invalid provision or application, and to this
270 end the provisions of this chapter are declared to be severable.

271 SECTION 2. This act shall take effect on October 1, 2010.