

# Health Care Contracting & Market Forces

Special Commission on Provider Price Variation

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# Agenda

- Introduction
- Challenges in the Massachusetts Health Care Market
- History of Health Care Contracting
- Health Care Contract Provisions
- Recent Cases & Initiatives
- Market & Regulatory Solutions: Reducing Price Variation
- Component Contracting
- Key Take-Aways

# Challenges in the Massachusetts Health Care Market

- Fragmented care
- High volume in a primarily fee-for-service payment system
- Increasing consolidation in the market
- Increasing health care costs

# History of Health Care Contracting

- Managed Care Revolution (mid-1990s)
  - Selective contracting – i.e. plans are looking for specific providers to adhere to cost containment principles and accept their payment methodology
  - Growth of hospital systems
- Consolidation & Integration (mid-1990s - 2004, post Affordable Care Act)
  - Cost-containment initiatives – i.e. risk-based contracting
  - Large health care systems & large health insurance companies

# Health Care Contract Provisions

- All-or-Nothing\*
  - Clause requiring the purchase/use of unwanted goods/services as a condition to obtain the desired good/service.
  - In MA, all-or-nothing language in limited- and tiered-network plans is prohibited under Ch. 176O Section 9A(a)(3) (2010).
- Anti-Incentive/Anti-Steering
  - Clause prohibiting a payer from steering consumers to high-value, low-cost providers.

\*This is different from tying in the anti-trust context, which is linking goods or services across different markets.

# Health Care Contract Provisions

- Price Secrecy
  - Clause prohibiting a payer from sharing the price/cost of a good or service.
  - In MA, Ch. 176O Section 9A(d),(e) (2010) and Ch. 224 prohibit price secrecy and require providers and payers to share price and cost-sharing information with consumers.
- Quality/Performance Secrecy
  - Clause prohibiting a payer from sharing quality, efficiency, or performance data.
  - In MA,
    - Ch. 224 requires providers to report quality measures to the Center for Health Information and Analysis (CHIA). CHIA must make quality information available to consumers on its website.
    - Ch. 176O Section 7 (2010) requires payers to make available provider quality information (CHIA – Standard Quality Measure Set) upon member enrollment or request.

# Health Care Contract Provisions

- Most Favored Nation
  - Clause under which a dominant plan/provider demands the best price and precludes the other party from offering similar terms to its competitors.
  - In MA, these clauses are banned under Ch. 176D Sections 3 & 3A (2010).
- Out of Network Billing
  - An out-of-network bill arises when an insured individual inadvertently receives care from an out-of-network provider.
  - Examples:
    - Individual taken to an out-of-network emergency room
    - Service provided by an out-of-network provider within an in-network facility. This occurs most often with emergency, radiology, anesthesiology, and pathology services (ERAP).
  - Under Ch. 224, a consumer is not responsible for out-of-network charges if he/she did not have a “reasonable opportunity” to choose to have the service performed by an in-network provider.

# Recent Cases & Initiatives

- CA Senate Bill 932 (Apr 2016)
  - Prohibits all-or-nothing language (tying), anti-tiering/steering, and price secrecy.
  - Limits rates for emergency room out-of-network providers.
- Federal Trade Commission (FTC) ACO Policy (Oct 2011)
  - Identifies four types of conduct that raise competitive concerns when exercised by ACOs with market power.
    - Anti-tiering/steering, guaranteed inclusion, and most favored nation clauses
    - All or nothing language (tying)
    - Mandating exclusive contracting with providers
    - Price, quality, performance secrecy
- UFCW & Employers Benefit Trust v. Sutter Health (2014)
  - Union and self-insured employer vs. Northern California provider
  - Alleges that certain contract provisions are anti-competitive: all or nothing language (tying), anti-incentive, exclusive dealing, price secrecy.
- US/NC v. Carolinas Healthcare System (2016)
  - US Dept of Justice and North Carolina vs. major North Carolina hospital system
  - Alleges that several contract provisions (no tiering/narrow networks and price/quality confidentiality) violate the Sherman Anti-Trust Act by unreasonably interfering with competition.



# Market & Regulatory Solutions: Reducing Price Variation

- Market Solutions
  - Prohibit anti-competitive\* contract provisions
  - Encourage transparency – price and quality information
  - Incentivize use of high-value providers
    - Ex: Tiered- and Limited-Network Products
- Regulation
  - All-payer rate setting (Maryland)
  - Rate caps

\*Anti-competitive practices are “unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation.” Federal Trade Commission, *Anticompetitive Practices*, <https://www.ftc.gov/enforcement/anticompetitive-practices> (last visited Nov. 10, 2016).

# Component Contracting

- Evanston FTC Order (2007)
  - Two Illinois hospitals merged in 2000.
  - The FTC retroactively reviewed the impact of the merger and found that prices had increased.
  - The FTC imposed a conduct remedy requiring separate contracting for 10 years. Payers, however, did not take advantage of this option.
    - Each hospital was required to create separate negotiating teams and establish firewalls.

# Component Contracting (cont.)

- Benefits of Component Contracting
  - May reduce rates paid to certain providers.
- Disadvantages of Component Contracting
  - Increased administrative costs
  - Difficult to monitor/regulate
  - Duration
  - Changing dynamic in the health care market
- The FTC has not ordered a component contracting remedy since Evanston.
- The reviewing court heavily criticized the component contracting requirement that was part of the proposed anti-trust settlement between Partners HealthCare and the Commonwealth of Massachusetts, when Partners' proposed mergers with South Shore and Hallmark Hospitals.

# Key Take-Aways

- Provider price variation exists across the country.
- Health care contracts are a product of dynamics in the health care market and have a role in price variation.
- Solution is likely a combination of both market and regulatory actions.
- Any solution will need to be phased in over time.

# QUESTIONS