Health Care Contracting & Market Forces

Special Commission on Provider Price Variation
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Professor Gwendolyn Roberts Majette
The Center for Health Law and Policy
Cleveland-Marshall College of Law
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)
  - 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