Recent Trends in Legislation and Regulation

As the "laboratories of democracy," the states play a major role in creating new laws and shaping public policy on important issues, including those related to healthcare costs and competition. Our Legislation/Regulation page provides various ways to research and track recent happenings in the legislative and regulatory arena. Our state-by-state map displays new regulatory and legislative developments, and these developments can be further explored by viewing the documents below the map, which are organized by topic, including by specific type of statute. Also, The Source Blog will take you through both specific provisions and multi-state trends. In this, our first Source Blog post about what's happening in the states, we point out a few trends that have developed over the past several years and continue to expand among state legislatures and regulatory bodies. Stay tuned to the Blog for more information about these laws and regulations.

- **Price Transparency**

A major trend of healthcare reform in the states centers on the value of price transparency. Viewed as a means of reining in the high costs of healthcare, price transparency efforts have become standard in a majority of the states. Nevertheless, a vast majority of states have a long way to go in terms of price transparency efforts, including the Source's own California, which recently received an "F" in price transparency on the Report Card issued by healthcare cost watchdogs Catalyst for Payment Reform and the Healthcare Incentives Improvement Institute. In total, forty-five states received a failing grade in price transparency. The National Council of State Legislatures provides an overview of state actions related to price transparency.

All-Payer Claims Databases

Over the past decade, New Hampshire spearheaded the use of healthcare price transparency tools as a means to give more information to consumers and to reduce the costs of healthcare. Early on, in 2003, New Hampshire created one of the nation's first all-payer claims databases ("APCD") to collect and disseminate healthcare price information, and many other states were soon to follow. Now, almost half of the states require disclosure of healthcare price information to their respective state departments of insurance, many of which maintain such databases. Currently, eleven states have implemented APCDs. The recent push for improved price transparency in healthcare has been characterized by the development of state-run websites that use information stored in APCDs to provide consumers tools to calculate the costs of healthcare services and to make better healthcare decisions. The All-Payer Claims Database Council issues a state report map that shows those states which do and do not have an APCD. In 2007, price transparency leader New Hampshire took their APCD one step further and launched NHHealthCost.org, a website that provides the median bundled prices for the thirty most common healthcare services. Unfortunately, New Hampshire's effort has been undermined by poor implementation challenges and technical difficulties. Currently, the HealthCost website is down for maintenance and will not be available until later this year. The Catalyst for Payment Reform's 2014 price transparency report downgraded New Hampshire's price transparency grade from an "A" to an "F" because its website is inoperative and may remain so for an extended period of time.

Now, approximately thirty states have passed statutory provisions that mandate the posting healthcare pricing information on a public website. However, for some states, it is practically impossible to build such a website without first requiring by statute that health plans submit data

relating to the actual prices paid for healthcare services. And, because most states currently only require hospitals and healthcare facilities, but not health plans, to disclose pricing information, there is an information gap relating to the actual prices that are ultimately paid for health services by those plans. When only healthcare providers are only required to disclose standardized charges, the more relevant prices negotiated by health plans and the out of pocket costs paid by the consumer remain unknown . Without requirements for health plans to submit data concerning the actual prices paid, as seen in states like Maine and Massachusetts, consumers and policymakers will not have access to important information regarding the actual costs of healthcare services.

In California, Gov. Jerry Brown recently vetoed proposed price transparency legislation that would have required health plans and insurers to disclose broad pricing and premium data. California Senate Bill 746 would have required insurers selling to large employers to provide detailed reports to the state explaining pricing and premium increases. Gov. Brown explained his veto by reporting that his administration is working toward its own price transparency program. Notwithstanding this bill's failure, the California Department of Insurance, with a grant from the federal government, is working on a database of pricing information for the state.

Beginning with New Hampshire and a small minority of states, efforts to promote healthcare price transparency have become a major trend in healthcare reform. However, a vast majority of the states have come woefully short of effectively promoting price transparency in healthcare. By requiring more extensive disclosure by providers and health plans, as well as giving consumers greater access to that information through easy-to-use websites, states can foster more efficient healthcare markets. In this way, state price transparency efforts can help bring down the rising costs of healthcare in the United States. Find a collection of state price transparency

legislation by clicking on the "price transparency" filter on the Legislation/Regulation page!

- **Antitrust Exemptions**

Another major trend in state healthcare reform relates to exemptions to protect healthcare organizations from state antitrust laws. That is, while state and federal authorities alike are scrutinizing and in many instances challenging mergers between healthcare entities, as we detail on our Litigation/Enforcement page, some types of mergers are being encouraged and protected by statute. In this vein, a number of states have begun to expressly exempt certain kinds of coordination and consolidation among competitors to encourage more efficient healthcare delivery and bring down costs. Similarly, some states have begun to grant immunity from federal antitrust laws to healthcare entities through the doctrine of state action immunity, under which an entity may be exempt from federal antitrust scrutiny if it is acting pursuant to clearly expressed state policy. In other words, a state may immunize certain entities or conduct from federal antitrust scrutiny, so long as there is a clearly articulated policy to displace competition and there is active supervision of the policy/activity by the state. The United States Supreme Court recently addressed the "clearly articulated" prong of the state action doctrine in *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013), in which the Court held that the state action doctrine did not immunize a Georgia hospital board from antitrust scrutiny in a merger context because that board was not acting pursuant to a "clearly articulated" policy. We note here that the Supreme Court will take up the "active supervision" prong of the state action doctrine when it hears the appeal from the Fourth Circuit Court of Appeals decision in *FTC v. North Carolina Dental Board* this fall.

States including Oregon, New York and New Jersey have exempted certain types of agreements and coordination among healthcare

providers (that may be competitors) from state antitrust scrutiny to encourage more efficient markets and healthcare delivery. And, likely in response to the recent decision in *Phoebe/Putney*, these states are explicitly declaring their policy to displace competition. In Oregon, for example, the state legislative assembly declared that collaboration among public payers, private health carriers, third party purchasers and providers is in the best interests of the public. Despite the possible anticompetitive effects that could result, Oregon has articulated a clear policy to immunize such collaboration from antitrust scrutiny. Of course, this exemption does not extend to criminal or *"per se"* violations such as price-fixing.

This trend of granting antitrust exemptions derives from provisions of the Affordable Care Act ("ACA") that encourage the formation of accountable care organizations ("ACOs"). ACOs are essentially integrated healthcare delivery systems consisting of groups of doctors, hospitals, other healthcare providers, and sometimes third party payers. As such, these statutory structures could diminish competition depending on the markets in which they operate. But, with the ACA's provisions and the recent grants of immunity in states like Oregon and Washington, it is unclear how federal or state antitrust enforcement will affect integrating healthcare systems. How far does a clear articulation of policy go in exempting integration in healthcare? Antitrust exemptions could immunize joint ventures between insurance companies and healthcare systems, which could in turn allow for anticompetitive effects in certain geographic markets. To see the states which have exempted healthcare entities from certain kinds of antitrust scrutiny, click on the "Antitrust Exemptions" filter at the bottom of the Legislation/Regulation page.

- **Regulating Costs Through Modification of Health Plan Contracts**

Another recent trend in the states are attempts to control healthcare costs by regulating health plan contracts and health plan contracting. This trend is most evident in the rise of legislation aimed at prohibiting certain types of provisions in contracts between insurers and healthcare providers. A particular contract provision that has received attention over the past few years is the most-favored-nations clause ("MFN"). MFNs are contract provisions in which a seller agrees to give the buyer the best terms it makes available to any other buyer. In the context of healthcare, health plans often insist on the inclusion of a MFN when provider organizations demand high reimbursement rates. They do so to ensure that no other competitor will receive the same services at a cheaper rate. In order to stay competitive, health plans do not need to negotiate for low reimbursement rates, only the lowest reimbursement rates, which ultimately drives up healthcare costs. MFNs allow plans with a significant share of the market to acquire or maintain monopoly power and drive out competitors.

At least fifteen states have express statutory bans on MFNs in health plan contracts, including Connecticut and Maine. Other states define MFNs as unfair or deceptive trade practices that are injurious to competition under their consumer protection laws, such as North Dakota and New Hampshire. In Michigan, a court case involving the use of MFNs in health plan contracts with providers spurred recent legislation and reform aimed at preventing MFNs in that state. As of May 2014, at least fifteen states have outright bans on MFNs in the healthcare context. And as the courts continue to grapple with the possible anticompetitive effects resulting from MFNs, it is likely that more state legislatures and regulatory agencies will take up the issue. To follow this trend, click on the "MFN Bans" filter on the Legislation/Regulation page!

As the states continue to experiment with healthcare reform, we here at the Source will keep you up-to-date on the recent

legislative and regulatory trends relating to healthcare costs and competition!