

Price Transparency in Minnesota: Why Not?

On June 29, the FTC responded by [comment letter](#) to a request from two Minnesota state legislators to analyze the competitive impact of recent amendments to the Minnesota Government Data Practices Act (MGDPA). The MGDPA is an “open records” law that aims to provide greater accountability for government by granting public access to government data through Freedom of Information Act requests. The amendments at issue would expand the MGDPA to cover all data collected by health maintenance organizations, health plans, and other health services vendors contracting with the state to provide health care services for Minnesota residents. The purpose of the MGDPA amendments, as described in the FTC’s letter, is to improve government accountability through increased transparency with respect to the use of public funds in government contracting. The comment letter focuses on the amendments’ application to contracts for health care services to more than 1.1 million low-income, disabled, and senior Minnesotans through programs jointly funded by the state and the federal government, including Medical Assistance (Medicaid) and MinnesotaCare.

To determine whether the MGDPA amendments might have other negative unintended consequences, the Minnesota Department of Human Services conducted an economic impact analysis, and, according to the FTC, concluded that the amendments’ risks to competition, and therefore to consumers, outweighed its (minimal) benefits. The FTC concurred.

The Worst-Case Scenario: Government-Induced Collusion

The FTC’s concerns boil down to the risk that the transparency provided by the legislation will result in the following scenario:

In a selective contracting environment where health care providers do not know each other’s prices, providers are more likely to bid aggressively – offering lower prices – to ensure they are not excluded from selective networks, because exclusion could substantially decrease their service volumes and revenues. In contrast, if

providers have better knowledge regarding each other's prices, they will not need to bid as aggressively to ensure network inclusion. The lower-priced providers, in particular, are likely to bid higher than they would have otherwise, and overall prices are likely to go up as a result of this reduced price competition. Therefore, unmitigated data disclosures could ultimately raise the prices that Minnesota consumers pay for health care services.

We are certainly aware of this theory, which has been raised in response to many price transparency efforts in health care, and appreciate that it likely would play out as the above-quoted paragraph states in *some* markets. But! – the FTC's letter admits that “[t]hus far, empirical evidence regarding the competitive effects of these types of price disclosures in selective contracting in health care markets is limited.” Notwithstanding the lack of data, the FTC concludes *based on studies of analogous circumstances* (those cited include: the concrete industry in Denmark in 1993, railroad grain contracting in the 1980s, and the motor vehicle industry in the 1990s), the risk of collusion is too high.

Why Not Try It?

Without diminishing the importance of those studies in their own rights, and putting aside the debate over their relevance, we pose the question: why not try it?

For one, it would actually be valuable as an empirical experiment. Many state-level price transparency efforts—aimed at encouraging competition and helping consumers—are gaining ground. As states consider transparency efforts including open records laws and APCDs, it would be quite helpful to test out this collusion theory instead of using it to shut down those efforts without empirical study. And, the Medicaid/MinnesotaCare market at issue in this comment letter might actually make for an ideal experiment. In this highly regulated space, it would probably be easy to step in and take action if the worst-case scenario panned out.

And two, we aren't convinced that the risks of huge price increases are as great in the Medicaid and MinnesotaCare markets to begin with. Price variations between providers are unlikely to be as large as in the private market because the margins on services paid for by Medicaid and other state subsidized health care programs are generally lower than on those paid for by private payers. In other words, you might

not see Medicaid paying \$1,500 for one hip replacement and \$20,000 for another. Price variations do occur, but the negotiated rates tend to cluster together toward the bottom end of the payscale. Therefore, the risk of massive price increases resulting from any collusion that might occur appears lower than in the private market. But, the question is an empirical one. So, we say, why not consider letting a piece of transparency legislation like the MGDPA amendments play out and just see what happens? What's the worst that could happen?

The FTC's Role

At a time when so many states are working to form workable price transparency solutions, such a comment letter could have broadly negative impact on price transparency efforts in general. We are left wondering why the FTC would come out so strongly against the MGDPA amendments when the empirical evidence supporting the collusion risk is admittedly so scant. If Minnesota is not the test case, we hope that another transparency measure will be allowed to play out to allow for an empirical look its effects. In the meantime, we will be interested to see how other states and stakeholders react to this comment letter.