Provider Contracts

Overview

In consolidated markets, dominant firms may be able to negotiate anticompetitive contract terms to obtain prices above the competitive level and reduce competition from existing firms and potential entrants. Combining the legal expertise of The Source on Healthcare Price and Competition at UC Hastings and the economic analysis and data modeling expertise at the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare in the School of Public Health, UC Berkeley, this project aims to provide policymakers with unbiased, evidence-based, policy-relevant information on the most effective strategies for states to address anticompetitive conduct in healthcare markets.

The four contract clauses that have raised the most concern among antitrust enforcers and lawmakers are:

- **Most Favored Nation (MFN) Clause**: a guarantee that a buyer of goods or services (i.e. an insurer) receives terms from a seller (i.e. a hospital or provider) that are at least as favorable as those provided to any other buyer. Also known as price parity clause or prudent buyer clause.

- **Non-compete Clause**: an agreement, typically in an employment contract, that an employee (i.e. a physician) will not compete with his or her current employer (i.e. current practice group or hospital) within a geographic area for a limited amount of time. These agreements may also include prohibitions on soliciting or continuing to offer medical care to patients of the current medical group (i.e. a non-solicitation clause).

- **All-or-nothing Clause**: a requirement that an insurer contract with all facilities in a health system if they want to include any facilities in the plan. Provider organizations typically use all-or-nothing provisions to leverage the status of their must-have facilities.
- **Anti-tiering/Anti-steering Clause**: a contractual requirement that an insurer place all physicians, hospitals, and other facilities associated with a hospital system in the most favorable tier of providers (i.e. anti-tiering) or at the lowest cost-sharing rate to avoid steering patients away from that network (i.e. anti-steering). Also known as anti-incentive clause.

- **Gag Clause (Price Secrecy Provision)**: a contractual agreement in which providers and insurers prevent patients or employers from knowing the negotiated rates and other costs of health care services.

## State Regulation of Provider Contracts

See [major litigation](#) and [resource table](#) sections below for more detailed information.

## Major Litigation

**UFCW & Employers Benefit Trust v. Sutter Health** (CGC 14-538451 Consolidated with Case No. CGC-18-565398)

- **Contract Clauses Used**: Anti-tiering/Anti-steering and All-or-nothing Clauses
- **Complaint**: *Filed April 7, 2014*. The UFCW & Employers Benefit Trust, a trust providing employee benefits to unions, and a group of self-funded employers filed a class-action lawsuit, later joined by the California AG, alleging that the unusually high cost of health care in
Northern California resulted from anticompetitive conduct by Sutter Health. The alleged anticompetitive conduct included contracting that required all-or-nothing and anti-incentive clauses, setting extremely high out-of-network rates, and restricting disclosure of provider costs to patients and payers.

- **Status:** Settlement Filed Dec. 19, 2019. Hearing scheduled June 22, 2020 *(postponed from April 6).* The settlement terms require Sutter Health to cease anticompetitive bundling of services, all-or-nothing contracting with must have facilities, and increase transparency in pricing. The settlement also requires Sutter Health to pay $575 million in compensation and legal fees. A court-approved monitor will ensure compliance with the settlement for at least ten years.

**United States and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System (Atrium Health)** (Case No. 3:16-cv-00311)

- **Contract Clauses Used:** Anti-tiering/Anti-steering Clauses
- **Complaint:** Filed June 9, 2016. The DOJ and North Carolina AG filed a civil suit alleging that the provider uses anticompetitive, illegal anti-steering clauses in its contracts with insurers, which prohibit commercial health insurers in the Charlotte area from offering patients financial benefits to use less-expensive healthcare services offered by CHS’s competitors.
- **Status:** Final Judgement April 24, 2019. The court approved a settlement which prohibits Atrium from using anticompetitive steering restrictions in contracts with insurers or require that Atrium facilities by included in the most-preferred tier of benefit plans.

**United States and the State of Michigan v. Blue Cross Blue Shield of Michigan** (Case No. 2:10-cv-15155-DPH-MKM)

- **Contract Clauses Used:** Most Favored Nation Clauses
- **Complaint:** Filed Oct 18, 2010. The DOJ and the Michigan AG filed a civil suit alleging BCBS of Michigan used MFN clauses to unreasonably restrain trade in violation of Section 1 of the Sherman
Act and Section 2 of the Michigan Antitrust Reform Act. The DOJ alleges the use of MFNs by BCBS reduced the ability of other health insurers to compete with Blue Cross and raised prices paid by Blue Cross’ competitors and by self-insured employers.

- **Status**: *Settlement Filed March 25, 2013*. After Michigan passed laws prohibiting the use of MFNs in insurance contracts with providers, the parties agreed that the injunctive relief sought was unnecessary and dropped the lawsuit.

## Resource Tables

- Most Favored Nation
- Non-Compete
- All-or-Nothing
- Anti-Tiering/Anti-Steering
- Gag Clause
- Most Favored Nation
About the Project

With support from Arnold Ventures, this collaboration between The Source on Healthcare Price and Competition and the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare leverages the latest and most comprehensive data on state laws, healthcare markets, and healthcare prices and quality to determine the most efficient and successful policy levers. This collaborative series will analyze the variation in state laws and subsequent economic impacts in the last ten years (2008-2018), as well as more recent legislative trends to develop recommendations and strategies for states with varied resources and political environments.
Blog Post

After much delay due to the pandemic induced hiatus, the preliminary approval hearing for the proposed settlement agreement in the Sutter Health antitrust case resumed on August 12 at the Superior Court of San Francisco. At the hearing, plaintiff attorneys on behalf of both class members UEBT and the Attorney General addressed in turn questions with respect to specific proposed terms raised in a tentative ruling by Judge Anne-Christine Massullo.

One key issue the court rested
was the selection of the independent compliance monitor, who will be responsible for evaluating and enforcing the compliance of the settlement terms for up to thirteen years.

At the last preliminary approval hearing in February, the parties requested to appoint Jesse Caplan of Affiliated Monitors in Boston, Massachusetts as the compliance monitor. However, while the court did not question the qualification of the choice, the court expressed significant reservations and lack of confidence in the selection process. Judge Massullo appeared troubled by the fact that a nationwide search and outreach resulted in a choice who is neither
a woman nor a person of color, but an individual from a firm with a lack of diversity in its management structure and not even based in California. The court repeatedly emphasized that the application and selection process for this role must be based on considerations of diversity, equity and inclusion. Yet, through the lens of the court and given the backdrop of the case (the parties' previous choice of experts also showed lack of diversity), there was insufficient evidence presented to the court that this was adequately considered. Judge Massullo noted that class members are sophisticated companies that value diversity and
inclusion. For a role that is a multi-million dollar appointment to act as an officer of the court for the next decade or more, the selection process must be transparent and preserve public integrity and confidence.

Emilio Varanini from the AG's office assured the court that the application and interview process, a long collaborative process involving both the AG's office (headed by Deputy AG Cheryl Johnson) and Sutter's counsel that began in October 2019, considered all necessary factors to promote diversity, equity, and inclusion. However, the qualified candidate must be an expert with appropriate experience in antitrust and healthcare and...
must be free of conflict of interest, which significantly narrowed down the broad pool of applicants to only five candidates. Additionally, the parties provided that Dionne Lomax, a managing director of Affiliated Monitors who is a woman of color, will work closely with Jesse Caplan on the case, and offers a great total package. In response to the court’s request to provide insight and transparency to the selection process, Varanini stated that the selection process of experts has always been confidential and for good reasons, citing adverse impact on the business of denied applicants, among others. At the same time, the fiduciary duty to the
people and the integrity of both the AG's office and Sutter as a large healthcare system ensures that the selection process is fair and reasonable. Nonetheless, Judge Massullo indicated that because the appointment of the monitor is a material term of the contract, the court will not grant preliminary approval of the settlement agreement until it is satisfied that there is sufficient public record to show a fair and reasonable selection process. To that end, the supplemental filing should provide generic, non-confidential information that would provide additional insight to the outreach process, including the race and gender identity of all
applicants and the total pool of applicants. Additionally, the court requested a supplemental declaration from Deputy AG Cheryl Johnson regarding Dionne Lomax's involvement with the monitor, as well as a report on the outreach process for hiring additional experts to assist the monitor.

The parties agreed to provide Sutter with a draft of the filing by August 17, and submit to court by August 24, jointly or otherwise. The court tentatively set a continued approval hearing for September 4 at 9:15AM. It may be taken off calendar if the court has no additional questions based on the submissions, including other outstanding
issues such as notice to class members and allocation of settlement funds, in which case the settlement approval could finally move forward to bring closure to this long dragged out case.


[2] See Amy Y. Gu, A Huge Deal: Settlement Terms of Sutter Health Antitrust Case Will Promote Transparency and
News & Articles

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