

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 six 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.
- **Exclusive Contracting Clause:** a contractual agreement in which a provider prevents the insurer from contracting with other competitive providers. Under the umbrella of exclusive contracting are exclusive dealing provisions and tying arrangements.

Additional resources and reports:

- ["Preventing Anticompetitive Contracting Practices in Healthcare Markets"](#) – research report on antitrust enforcement, economic justification or procompetitive use, and states that have restricted the use of each of these clauses in healthcare contracts.
- ["A Tool for States to Address Health Care Consolidation: Prohibiting Anticompetitive Health Plan Contracts"](#) – model legislation for states to rein in the use of anticompetitive contract terms to create a more level playing field and rein in healthcare costs.

State Regulation of Provider Contracts

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

Major Litigation

See “Anticompetitive Conduct” under [Major Cases](#) of the Litigation Portal for complete list of the latest and pending cases.

[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*](#). Preliminary approval of the settlement was granted March 2021; final approval hearing of the judgment is scheduled for July 19, 2021. 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 be 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

- MFN
- Non-Compete

- **All-or-Nothing**

- **Anti-steering**

- **MFN**

- **Non-Compete**

- **All-or-Nothing**

- **Anti-steering**

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

News & Articles

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****Disclaimer:** No information presented here is intended to be legal advice. The court cases presented here are illustrative examples in which the court applied a standard for public harm or another standard unique to health care practitioners. Anyone seeking legal advice about the enforceability of specific noncompete provisions should consult with an attorney licensed in their state.*