The Source Roundup: October 2020 Edition

With the passing of Justice Ruth Bader Ginsburg and nomination of Amy Coney Barret to the Supreme Court just weeks before the presidential election, many are turning their attention to health care and the fate of the Affordable Care Act (ACA). With this backdrop, this month's Source Roundup looks at 1) what is at stake as the ACA faces the Supreme Court again in *California v. Texas*, 2) new information about rising healthcare prices, 3) anticompetitive contract practices between providers and insurers, and 4) the potential of a public option or single-payer system to alleviate the malfunctioning of healthcare markets.

Affordable Care Act

This November, the Supreme Court will review the constitutionality of the ACA in *California v. Texas*, a suit brought by several Republican states. They argue that the Act's standing parts are not severable from the individual mandate, which was struck down by a federal appeals court last year. In light of the impending review, the Kaiser Family Foundation published an issue brief titled the Potential Impact of California v. Texas Decision on Key Aspects of the Affordable Care Act. The issue brief surveys the ACA's major provisions and how the Act's repeal would impact the U.S. healthcare system. Significant areas of impact include Medicaid expansion, dependent coverage, protections for pre-existing conditions, preventative services, essential health benefits, and many others. The report also includes extensive state-level data on enrollment in ACA coverage, federal minimum standards for private coverage, and Medicaid and Medicare provisions.

Further, in an article for Health Affairs, A Hot Summer Brings More ACA Litigation, Katie Keith examines not only *California v. Texas* but also other significant developments revolving around the ACA. The article summarizes other recent appellate and district court decisions regarding various ACA provisions. Some of the recent decisions held that insurers are entitled to unpaid cost-sharing reduction payments and that states are not entitled to recoup the ACA's health insurance tax as applied to Medicaid managed care entities. Additionally, several decisions considered the ACA's ban on discrimination. The article also outlines the new rules and reports from the Centers for Medicare & Medicaid Services (CMS) and additional COVID-19 responses from CMS, including the delay of several ACA requirements and developments in state waivers and essential health benefits.

Healthcare Costs

In the realm of healthcare costs, Christopher Whaley and his colleagues found that employers and private health insurers pay upwards of twice as much as Medicare for hospital services in a new RAND study published this month titled Nationwide Evaluation of Health Care Prices Paid by Private Health Plans. Using data from 2016 to 2018 from almost every state, the authors documented the variation in negotiated prices for the commercially- and self-insured and compared them to Medicare prices. The study illustrates providers' aggressive pricing, particularly large health systems that have gained immense market power (and consequently bargaining power) through consolidation. As a result, employers and insurers' are increasingly unable to purchase healthcare services competitively compared to the government. The study is also critically important because many employers lack information about the prices negotiated on their behalf, which inhibits their ability to be prudent purchasers of health insurance, despite being among the most important purchasers of health

care in the U.S. However, Christopher Whaley et al. argue that increased transparency, although a step in the right direction, is not enough to address the wide variations in prices. The authors ultimately reason that there needs to be a rethinking of traditional pricing approaches and suggest various benefit design changes that employers should consider.

The Commonwealth Fund's 2020 Scorecard on Health System Performance also found higher costs for consumers in commercial health plans and pointed to increasing healthcare costs as a significant driver of overall spending growth. In addition to healthcare spending, the report tracked dozens of measures relating to healthcare quality and costs, health outcomes, and health disparities. The authors found that gains in insurance coverage under the ACA have stalled, health care is becoming less affordable with out-of-pocket costs rising, and vast racial inequities continue in the U.S. healthcare system.

Antitrust and Market Competition

To address these high prices, many are looking towards healthcare consolidation as the root and how state and federal enforcers can prevent further consolidation or address the effects of immense provider market power in already consolidated markets. In Preventing Anticompetitive Contracting Practices in Healthcare Markets, a recent research report jointly published by The Source and UC Berkeley's Petris Center, Katie Gudiksen et al. examine five different contracting practices, including most-favored-nation, all-or-nothing, exclusive contracting, anti-tiering or anti-steering, and gag clauses, and how they are used anticompetitively in contracts between providers and insurers. The report also examines how antitrust enforcers have challenged these practices and what states have attempted to curb their use. Additionally, the report provides recommendations for state

policymakers to prohibit or limit the use of these provisions in healthcare contracts.

One recent example of the anticompetitive use of contract clauses is the Sutter Health case, which The Source has tracked extensively. This enforcement case has drawn a lot of attention to the anticompetitive use of contract terms by health systems in their contracts. The parties are now in the final stages of having their settlement approved by the court. In the Milbank Memorial Fund report, California's Sutter Health Settlement: What States Can Learn About Protecting Residents from the Effects of Health Care Provider Consolidation, Rob Waters examines how Sutter Health gained the bargaining power to demand high prices. Citing The Source extensively, Waters also analyzes how conditions of the landmark settlement will hopefully rein in the health system's market power. Notably, the Sutter Health case and the subsequent settlement can potentially provide a roadmap for other antitrust enforcers to address anticompetitive behavior in healthcare markets.

Health System Reform

Lastly, as the focus on health care magnifies as we draw nearer to the presidential election, the potential of a health care public option is also garnering public attention. In The Public-Private Option in Germany and Australia: Lessons for the United States, UC Berkeley researchers Richard Scheffler and Taylor Wang of the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare look to Germany and Australia to provide some guidance on how the United States could implement the public option framework suggested by the Biden-Sanders Unity Task Force. The article in Milbank Quarterly Opinion examines the two-tier public-private system employed in Germany and Australia as a potential model for the United States. The article also acknowledges that there are

significant barriers to achieving such a model under our current system. The authors find that considerable barriers include the turbulent history of the individual mandate, obstacles around biased risk-selection, and the potential hesitancy towards an option that many might consider an overreach of the federal government.

That concludes this month's Roundup. If you find articles or reports that you think should be included in the monthly Roundup, please send them our way. Stay safe and healthy!