

MEDICAL SOCIETY of the STATE OF NEW YORK

Elizabeth Dears Kent, Esq.
Senior Vice President/
Chief Legislative Counsel

Division of Governmental Affairs
MEMORANDUM IN SUPPORT

**IN ASSEMBLY WAYS & MEANS
COMMITTEE**

A.336-A (GOTTFRIED)

**ON SENATE FINANCE COMMITTEE
AGENDA**

S.1157-A (HANNON)

**AN ACT to amend the public health law, in
relation to requirements for collective
negotiations by health care providers with
certain health benefit plans**

This bill would amend the public health law to permit some collective negotiations between health care providers and health insurance plans under close state supervision. **The Medical Society of the State of New York strongly supports this measure.**

Currently, federal antitrust laws generally prohibit individual health care providers from collectively negotiating any provisions of contracts presented to them by managed care entities. This bill would allow physicians -- especially in solo or small group practices -- to communicate with each other and jointly negotiate with health insurance companies in certain circumstances. Without this basic right, independent physicians and those in small group practices are powerless to challenge the practices of huge health insurance companies that offer "take it or leave it" contracts which almost always contain provisions which are not only unfair to care providers but unfair to patients as well. With health insurance company domination likely to grow as a result of the hundreds of thousands of New Yorkers newly receiving coverage through the State's Health Insurance Exchange, as well as the implementation of the mandate to purchase health insurance, we must protect the ability of the patient's physician to be an advocate for the patient so that this new coverage actually means the ability to receive the care patients need.

Moreover, physicians face intense new pressures from both public and commercial payors to transition to "value-based" payments. While VBP methodologies hold the promise to reward physicians for all they do to improve patient care, there is also great concern that successfully achieving such "value" is difficult to define, and can be subject to manipulation by health insurers looking to simply cut costs. Moreover, inherent in achieving such "value" is investment in expensive electronic medical record technologies to facilitate care coordination with other health care providers involved in providing patient care. We must make sure physicians have the ability to negotiate with payors so as to better assure that such VBP mechanisms are developed fairly and in a way that truly rewards quality care, rather than simply rewarding reducing costs.

While the Federal Trade Commission (FTC) does not favor "state action immunity" exceptions to federal jurisdiction, the exception is well recognized. This bill would take advantage of the "State Action" doctrine created nearly 70 years ago by the US Supreme Court in a landmark decision permitting collective action under close state supervision to vindicate legitimate public interests. This bill would allow in limited instances health care providers in New York State to conduct some collective negotiations by creating a system under which the

state would closely monitor those negotiations, and approve or disapprove such negotiations from going forward. Negotiations involving fee-related matters would be prohibited unless an individual health plan controls a substantial share of the managed care market in a particular region.

The new dynamic created by this legislation will not increase the cost of health care but will re-distribute existing dollars which will be re-directed away from insurance company profits and to the provision of necessary clinical care for patients. Moreover, reductions in cost would result from greater standardization of administrative procedures which often now vary from plan to plan. As an absolute failsafe mechanism to assure that costs will not rise inappropriately, the bill grants broad powers to the Commissioner of Health that would in effect permit him to prevent joint health care provider negotiations from going forward if it is believed that such negotiations would have an adverse interest on patient access to care, for any reason including any concerns regarding increases in the cost of health care.

New York’s Concentrated Health Insurance Market

With insurer consolidation, regional markets continue to be further dominated by a dwindling number of health insurance behemoths. According to a 2015 report from the American Medical Association, 87% of the enrollees in the commercial managed care market in New York State were enrolled in just 6 health insurance companies. This lack of competition will only grow worse if the parent (Anthem) of the 3d largest company, Empire, is permitted to acquire the 6th largest company Cigna, and the 4th largest company Aetna is permitted to acquire Humana.

As noted below, the AMA report also demonstrated that most regions of New York State had two insurers dominating that market.

Health Insurer Penetration – Selected NY MSAs

MSA	Insurer 1	Insurer 2	Share % of Top 2 Insurers
Albany-Schenectady-Troy	CDPHP (36%)	United (18%)	54%
Binghamton	Excellus (40%)	United (26%)	66%
Buffalo-Cheektowaga-Tonawanda	Independent Health (36%)	Excellus (24%)	50%
New York-White Plans-Wayne, NJ	United (31%)	Emblem (21%)	52%
Rochester	Excellus (31%)	MVP (30%)	61%
Suffolk-Nassau	United (44%)	Empire (21%)	64%
Syracuse	Excellus (39%)	United (20%)	59%

Source: AMA, Competition in Health Insurance, 2015 Update

The Broader Impact of Market Concentration

This overwhelming power of the companies to force providers to accept unfavorable terms is manifested by a number of different health plan actions, such as:

- The disrespectful way that Emblem Health Plan recently dropped 750 of its network physicians, potentially disrupting continuity of care for thousands of patients, based upon specious allegations of failing to adopt value-based payments.
- Imposing burdensome processes and permitting inappropriately long wait times for physicians and their staffs when they request pre-authorization for patient care and needed prescription medications;
- Constraining reimbursement to the same level year after year, or in some instances imposing cuts, despite the fact that the cost of running a practice keeps going up significantly each year;
- Employing a host of other tactics to cut reimbursement, including:
 - Downcoding physician claims despite appropriate medical justification;
 - Bundling multiple services provided by a physician into just one service, in contrast to rules set forth under the AMA’s CPT coding guidelines;

- Making exorbitant refund demands long after the time that payment was initially made, sometimes by making specious allegations of “abusive billing” and using the grossly unfair practice of extrapolation to grossly inflate refund demands; and
- Having the unprecedented ability to change the terms of a contract with a physician unilaterally, with little notice to the physician and only an illusory ability to “opt out” of the contract if the physician disagrees with the amendment;
- Limiting the ability of physicians to refer their patients to ancillary service providers necessary for making correct diagnoses, including imaging facilities and laboratories; and
- Having physician networks that are inadequate to meet patient needs.

This bill would enact important reforms which would allow doctors to negotiate fairly with the HMO industry under strict conditions. Activities which would negatively affect patients access to necessary health care -such as collective slow downs, strikes or boycotts - are expressly prohibited by the legislation. Negotiations over professional fees have been carefully limited to those circumstances where the plan has substantial market power and could otherwise radically reduce physician reimbursement to levels that jeopardize access to care.

This law will empower physicians to advocate for their patients, encourage competition among health care plans, and restore some semblance of fairness and balance in a marketplace that is increasingly and overwhelmingly dominated by one sector of the health care industry. Most importantly, it will enhance the quality of health care for all New Yorkers which is being jeopardized by the vast power wielded by huge health insurers with tremendous market domination.

Our national framework of trade regulatory statutes, including our antitrust laws, was enacted to prevent the huge concentration of market power in a few massive sellers and/or buyers. The application of these laws in such a way as to enhance the power of huge health insurers by effectively crippling providers, patients and health insurance purchasers is a gross perversion of these statutes.

For all of the foregoing reasons, the Medical Society strongly supports this measure and urges its enactment into law.

Respectfully submitted,

ELIZABETH DEARS KENT, ESQ.

9/29/16 - Support
MMA