

Payment for Non-contracted Emergency Services

HFMA Northern California MANAGED CARE ROAD SHOW

Speakers:

Frank Fedor

Murphy Austin Adams Schoenfeld

***Jeff Rogers, Tim Bryan, Ryan Perry
Smith***

Perry Smith LLP

Daniel Dugan, Ph.D.

Trial Science, Inc.



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03/29/13

Legislature Lets Hospitals Control Access To Discounts 1985 Amendment to B&PC § 657

- ▲ Authorizes providers to grant:
 - Prompt pay discounts
 - Discounts to uninsured

- ▲ Subsection (c): "Any discounted fee granted pursuant to this section shall not be deemed to be the health care provider's usual, customary, or reasonable fee for any other purposes, including, but not limited to, any health care service plan contract or insurance contract."

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Legislature Lets Hospitals Control Access To Discounts

1999 Additions to the H&S Code, Ins. Code,
B&P Code and Labor Code

- ▲ Purpose is "to prevent the improper selling, leasing, or transferring of a health care provider's contract" without the consideration of steerage for which the provider had agreed to trade the discount with the original contracting party. (e.g. H&SC §1395.6(a))

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DMHC Provider Price Setting

Gould Factors

28 CCR § 1309.71(a)(3)

For . . . non-contracted providers . . . the payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration:

- The provider's training, qualifications, and length of time in practice
- The nature of the services provided
- The fees usually charged by the provider
- Prevailing provider rates charged in the general geographic area in which the services were rendered
- Other aspects of the economics of the medical provider's practice that are relevant; and
- Any unusual circumstances in the case

These can take you a long way

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DMHC Provider Price Setting

From:

September 1, 2004 DMHC memo to All Licensed Plans:

- "Contract rates . . . are not an enumerated criteria upon which to establish a reimbursement methodology to calculate the reasonable and customary value of non-contracted provider services."
- "If the plan's internal database is based, in part, on contracted rates or does not distinguish between emergent and non-emergent services, the plan's methodology does not satisfy the regulatory requirements."

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DMHC Provider Price Setting

To:

September 2, 2005 DMHC memo to All Licensed Plans:

- DMHC "unable to conclude that a payor's reimbursement methodology for commercial claims constituted an unfair or unjust payment pattern where it included:
 - ✓ "A payment methodology based on the 50th percentile or higher of a statistically credible aggregated billed charge database . . . ; and"
 - ✓ "A payment methodology based on an amount at least 10% - 20% above the payor's average contracts rates for similar services; and"
 - ✓ "A payment methodology based on an amount above the current Medicare fee schedule for similar services . . . ; and"
 - ✓ "Adequate procedures to timely and fully consider the remaining "Gould" criteria [upon provider submission with claim or on appeal]."

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How Plans Think About Reasonable Value: Cost-Based

- ▲ Cost plus reasonable profit
- ▲ Medicare plus "X" percent
- ▲ A cost-to-charge ratio over the state median is "excessive"

Labor Theory of Value

Value = the labor needed to produce the commodity or service

"The real price of every thing, what every thing really costs to the man who wants to acquire it, is the toil and trouble of acquiring it." -Adam Smith



Marginal Revolution

▲ Adam Smith (nor Will nor Granny) could not solve the paradox of "value in use" and "value in exchange"

- In use, the value of water is higher
- In exchange, the value of a diamonds is higher

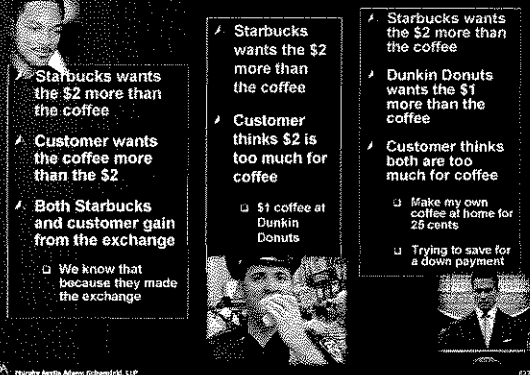
▲ Paradox is solved by distinguishing "total utility" and "marginal utility"

- Total utility: We would rather do without diamonds than water
- Marginal utility: To choose the diamond over the bucket of water we do not ask what we could live without, but whether one more unit of the diamond gives more satisfaction than one more unit of water

Free Market

- Summary term for exchanges that occur in society
- Exchange of commodities or services
- Exchange occurs between two people
- Both parties make the exchange because they intend to gain from it

\$2 Starbucks Coffee



- Starbucks wants the \$2 more than the coffee
- Customer wants the coffee more than the \$2
- Both Starbucks and customer gain from the exchange
 - We know that because they made the exchange
- Starbucks wants the \$2 more than the coffee
- Customer thinks \$2 is too much for coffee
 - \$1 coffee at Dunkin Donuts
- Starbucks wants the \$2 more than the coffee
- Dunkin Donuts wants the \$1 more than the coffee
- Customer thinks both are too much for coffee
 - Make my own coffee at home for 25 cents
 - Trying to save for a down payment

Marginalist Revolution: Value is in the eye of the beholder

- Value is subjective
- Value depends on circumstances or preferences of the person making the value judgment
- Each decision is made with intent to maximize one's gain

Market Value is . . .

- ^ the result of a free exchange . . .
- ^ . . . between two parties
- ^ . . . each with his own subjective valuation of the thing exchanged
- ^ . . . each intending to gain from the exchange
 - Some will not make the trade because they see a higher value in a different trade or no trade

The Leaders of the Marginal Revolution



Carl Menger



William Stanley Jevons



Leon Walras

Health Plan Hero

Karl Marx
Since 1850s the
Labor Theory of Value
is most often associated with
Marxian economics



The Hospital Market Functions on Trades of Volume For Discounts

“These participating providers in effect pay for the competitive advantage of securing patient referrals from the plans by agreeing to accept lower reimbursement and controls on their clinical autonomy”

51 *Law & Contemporary Problems* 195 (1988)

The Dumbest Hospital Would Not Give Free Discounts

“Given what is usual and customary in the managed care industry, we cannot imagine that even a poorly represented entity would promise to discount its fees in return for nothing”

HCA v Employers Health, 240 F. 3d 982, 999 (11th Cir. 2001)

Scenario 1 ED Services Available at Full Charges from Hospital A Hospital A Negotiates with Plan X

- ✓ A wants to sell ED & non-ED services
- ✓ X wants to buy ED & non-ED services from hospital
- ✓ A and X negotiate a managed care contract
 - Both parties make the deal because they intend to gain from it

Scenario 2
ED Services Available at Full Charges from Hospital A
A Negotiates with Plan Y

- A wants to sell ED & non-ED services
- Y wants to buy ED & non-ED services from hospital
- No Deal because the parties cannot agree on price
 - ❑ A thinks it gains from no deal b/c it prefers ED only @ full charges over all services at too deep a discount
 - ❑ Y thinks it gains from no deal b/c it prefers ED only @ full charges over all services at too steep of a price

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Choice Freely Made In
Each Party's Perceived
Self-Interest

- Both hospital and plan model from recent claims data
- Both hospital and plan have recent market data
- Both hospital and plan consider their respective business goals
- Decision not to contract was rationally chosen as the better result

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Scenario 3
ED Services Available at Full Charges From Hospital A
A Negotiates with Plan Z

- A wants to sell ED & non-ED services
- Z wants a discount on only ED services
 - ❑ (or) Z offers low-volume or low-value non-ED services.
- No Deal
 - ❑ A thinks it gains from no deal b/c it prefers ED only @ full charges over value offered by Z
 - ❑ Z does not care that discount could not be "negotiated" because it will obtain the same discount by applying its custom interpretation of the DMHC "reasonable and customary" regulations.

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Benefits to Plan of Underpayment

- ✓ Forces provider to make cost-benefit analysis of whether to seek underpayment
 - Small amounts likely not to be pursued
- ✓ Many providers are not used to using the legal process and will not pursue even larger amounts
- ✓ Provider's that pursue underpayment will have a high likelihood of compromising their claims
 - Results in an after-the-fact "contract" for discounts on the claims in dispute
- ✓ No practical risk from regulator

Implied-in-Fact Contract

- ✓ **Legal precedent:**
 - "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it" Civil Code § 1589
 - "If a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of mind." *Cowan v. Mewes* (1996) 546 N.W.2d 104, 108

Implied-in-Fact Contract

- ✓ Applied to unique facts of industry
- ✓ Plan must:
 - Make services available locally.
 - Create a network of local providers through "fair and reasonable" contracts.
 - Direct its enrollees to go to the closest emergency room
- ✓ Hospital must provide stabilizing treatment to all who present at the emergency room

Quantum Meruit Reasonable Value

- An equitable remedy to avoid the unjust enrichment of the recipient of the goods or services
- Applies to non-contracted providers of emergency healthcare services.
 - *Bell v. Blue Cross*, 131 Cal. App. 4th 211 (2005)

What is "Reasonable Value"

- The measure of reasonable value is "what it would have cost Defendant to obtain the services Plaintiff provided from another person." *Maglica v. Maglica*, 66 Cal. App. 4th 442, 460-462 (1998).
 - Reasonable value also referred to as "what it would cost on the open market." *Maglica*, at 450.

Proving Reasonable Value What Elements Hospital Prices Must Cover

- Accounting costs
- Losses from Indigents & Government Payors
- Reasonable return on investment

Proving Reasonable Value
What is the Hospital's Payor Mix

- ▲ Medicare
- ▲ Medi-Cal
- ▲ Contract
- ▲ Uninsured
- ▲ Non-Contract Commercial

Proving Reasonable Value
Return on Investment Method

- ▲ Is profit reasonable?
- ▲ Are costs reasonable?
- ▲ Is investment reasonable?

Showing Reasonable Charges
Charge Comparison Method
(Gould Factors)

- ▲ What is the peer group
- ▲ Apply the *Gould* factors
 - Qualifications & mission
 - Scope and nature of services
 - Rates usually charged by provider
 - Prevailing rates in geographic area
 - Other aspects of the economics of the hospital
 - Unusual circumstances

Charges That Support the Hospital's Budgetary Needs Are Reasonable

- "A hospital's internal factors are relevant to determining the reasonable value of hospital services." *HCA Health Serv. Of Tenn., 46 S.W.2d 191, 188 (2001)*
- "The fact that hospital's charges are based on the costs associated with providing health care, including the hospital's budgetary needs, does not make the charges unreasonable." *Guliverty v. Methodist Hosp. Inc., 650 N.E.2d 811, 814 (1995)*
- In determining the reasonable value of medical services the court may consider "other aspects of the economics of the medical provider's practice that are relevant." *Gold's Workers Compensation Appeals Board, 4 Cal. App. 4th 1059, 1071 (1992)*
- "Any assessment of the reasonableness of a private hospital's charges must include consideration and recognition of the particular hospital's costs, functions and services." *Victory Memorial Hospital v. Robt., 493 N.E.2d 117, 120 (1986)*

Court Is Not Equipped To Set Prices

"The Court is ill-equipped to examine 'the hospital's costs, functions, and services, what the services are ordinarily worth in the community – i.e. what people ordinarily pay for the services, the hospital's internal factors and similar charges of other hospitals in the community, as well as the hospital's budgetary needs,' in order to make a policy determination that the political branches have been unwilling or unable to make for themselves."

DiCarlo v. St. Mary Hospital, 2008 Wit. 2498105 (Ird Cir 2008)

Strategy Balance Billing

- Is it effective?
- Does it coerce payors to pay billed charges?
- Does it prejudice jurors?
- Do its remaining benefits outweigh the risks

Strategy Separate Contract Rates for Emergency Services

- Outpatient Services: 65% of billed charges
- Outpatient Services:
 - ❑ Emergency Services: 85% of billed charges
 - ❑ Other Services: 55% of billed charges
- Hypothetical Plan pays UCR rate of 75% of billed charges
 - ❑ 75% is higher than 65%; more likely to be reasonable value
 - ❑ 75% is less than 85%; more likely that reasonable value is more than 85%

Strategy Volume Discounts

- Difficult not to attribute some value to a high volume of emergency services paid at a significant margin over cost
- Is there a value for giving a discount to non-contracted plans whose enrollees receive predominately emergency services?

Strategy Managed Care Contract Rates

- Impact of DMHC *Gould* factors
- Impact of ERISA plans with UCR database rates e.g. Ingenix

Strategy Remedies

↗ Negotiation

↗ Mediation

↗ Litigation

□ *Quantum Meruit* Statute of Limitations
