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## **TALKING POINTS: COLLECTIVE NEGOTIATION**

The **PROBLEM** sought to be addressed by S.3690 /A.5692

- New York State's Health Insurance Market is highly concentrated with domination by just one or two large health insurers in every region of the State.
- With this market domination, health insurer profits have grown substantially and rapidly because neither health care providers nor consumers/patients have adequate market leverage to meaningfully negotiate either the financial or the clinical terms and conditions of most health insurance contracts. Consequently, fees, covered benefits and access are rigorously limited.
- Health insurance company profits effectively extract huge dollars from our health care system which is already becoming prohibitively expensive.
- As disproportionately large amounts of the financial resources committed to health care are extracted in the form of corporate profits from the sums available to purchase health care services, quality and access must inevitably suffer.
- Currently, federal antitrust laws prohibit individual health care providers from acting in concert to collectively negotiate any of the financial provisions of the contracts they sign with managed care entities.

The **SOLUTION** embodied in S.3690 /A.5692.

- There is an exception to the federal anti-trust laws known as the "State Action" exception.
- Two main conditions must be met to trigger the "State Action" exception:
  - (i) The subject of the collective action must be one in which the public has a substantial and compelling interest; and (ii) the collective action process must be closely monitored by the State.
- The first condition is met by the bill's express legislative finding that collective negotiation can "produce beneficial results for healthcare consumers." In other words, there is a strong public interest in patient access to high quality, affordable care.
- This bill meets the second pre-requisite to triggering the "State Action" exception by creating a system under which the state, through the Commissioner of Health, the Superintendent of Insurance and the New York State Attorney General, will closely monitor the collective negotiations, facilitate resolution of negotiation impasses, and

actively monitor implementation of agreements. Indeed, the negotiated agreement to become effective must be approved by the Attorney General. Moreover, the Attorney General must monitor the agreement as it is implemented by the parties.

- Negotiations between providers and a health plan are to be conducted through a health care provider's representative.
- The bill divides the matters subject to being collectively negotiated into two major areas.
- The first issue area involves non-fee related matters such as utilization review, coverage provisions, benefits and exclusions definition of medical necessity, risk transfer, referral provisions, burdensome pre-authorization procedures, limited drug formularies and access where necessary to out-of-network specialists.
- The second issue area which can be negotiated involves fee-related matters. These can be negotiated, however, only if the health care plan has substantial market share in the service area in which the physicians are practicing. (“Substantial market share” is defined in the bill.)
- Strikes are prohibited.

### **Arguments in Support:**

- Allowing otherwise independent physicians to come together for negotiation purposes would remediate the inequities which result from the grossly disparate bargaining power between very large plans (often proprietary) and comparatively very small physician and other provider practices.
- To those who are concerned that a group of providers engaged in negotiations would have too much power, it should be pointed out that in order to qualify under the state action exception the State must closely monitor and control the negotiation process.
- To those who claim that allowing healthcare providers to negotiate fees will increase costs, the point should be made that the new dynamic created by this legislation will not increase monies committed to health care but will re-distribute existing dollars which will be re-directed away from insurance company profits and to the provision of enhanced clinical care. For example, the patient who needs a currently uncovered service but must forego it because he or she cannot afford it, will now have his or her premium dollars used to buy such service rather than to disappear into shareholder profit.
- Moreover, costs will quite possibly be reduced through improved efficiencies negotiated by providers which will eliminate costs of administrative burdens unrelated to quality.
- This operational dynamic is assured by the extensive state oversight of all aspects of the contract between the insurance company and the healthcare provider group including both the clinical aspects of that contract and, if certain conditions are met, the fee-related aspects of that contract.
- Fees can be negotiated only if the health plan has “substantial market share in a business line in any service area.”

- The collective conduct authorized by this bill is quite different than that which is contemplated in the new Federal Health Care Reform law. The Accountable Care Organizations (ACO's) provided for in the Affordable Care Act (ACA) and in the demonstration ACO's provided for in the recently concluded New York State Budget are not the collective action entities authorized by this legislation.
- The New York State Budget first of all is only a demonstration and only 7 are authorized throughout the entire state. ACO provisions in the federal law, furthermore, apply only to Medicare not commercial health insurance contracts.
- ACO's involve comprehensive clinical integration delivery models between and among healthcare providers of different types (e.g. physicians and hospitals) which will involve sophisticated information exchange capabilities often not possessed by or affordable to individual physician practitioners. The ACO involves major risk transfer to the provider entity not necessarily present in the collective action model contemplated by this legislation

More detailed information can be found in the bill itself, the sponsor's memo, the MSSNY Memorandum in Support, MSSNY's 2014 *Legislative Program*, or by calling MSSNY's Division of Governmental Affairs at (518) 465-8085.