

An Act providing for joint contract negotiations by physicians and dentists with carriers.

Be It Enacted by the Senate and General Assembly of [STATE]:

Findings, declarations relative to joint negotiations by health care providers with carriers.

1. The Legislature finds and declares that:

a. Healthcare is inclusive of many specific disciplines working together to promote well-being of patients, including the oral health care provided by general and specializing dentists.

b. Active, robust and fully competitive markets for health care and dental services provide the best opportunity for the residents of this State to receive high-quality health care and dental services at an appropriate cost;

b. A substantial amount of health care and dental services in this State is purchased for the benefit of patients by health and dental insurance carriers engaged in the financing of health care and dental services or is otherwise delivered subject to the terms of agreements between carriers and health care providers;

c. Carriers are able to control the flow of patients to health care providers through compelling financial incentives for patients in their health and dental benefits plans to utilize only the services of health care providers with whom the carriers have contracted;

d. Carriers also control the health care and dental services rendered to patients through utilization management and other managed care tools and associated coverage and payment policies;

e. Carriers are often able to virtually dictate the terms of the contracts that they offer health care providers and commonly offer these contracts on a take-it-or-leave-it basis;

- f. The power of carriers to unilaterally impose provider contract terms jeopardizes the ability of health care providers to deliver the superior quality health care and dental services traditionally available in this State;
- g. Health care providers do not have sufficient market power to reject carriers' contract terms that impede their ability to deliver medically appropriate care without undue delay or difficulties;
- h. Inadequate reimbursement and other payment terms that are advantageous to carriers adversely affect the quality of patient care and access to care by reducing the resources that health care providers can devote to patient care and decreasing the time that health care providers are able to spend with their patients;
- i. Inequitable reimbursement and other unfair payment terms also endanger the health care infrastructure and progress by diverting capital needed for reinvestment in the health care delivery system, curtailing the purchase of state-of-the-art technology, the pursuit of medical research, and expansion of health care services, all to the detriment of the residents of this State;
- j. The inevitable collateral reduction and migration of the health care work force will also have negative consequences for the economy of this State;
- k. Empowering independent health care providers to jointly negotiate with carriers as provided in this act will help restore the competitive balance and improve competition in the markets for health care and dental services in this State, thereby providing benefits for consumers, health care providers and less dominant carriers;
- l. This act is necessary and proper, and constitutes an appropriate exercise of the authority of this State to regulate the business of insurance and the delivery of health care and dental services;
- m. The pro-competitive and other benefits of the joint negotiations and related joint activity authorized by this act, including, but not limited to, restoring the competitive balance in the market for health care services, protecting access to quality patient care, promoting the health care infrastructure and progress, and

improving communications, outweigh any potential anti-competitive effects of this act; and

n. It is the intention of the Legislature to authorize independent health care providers to jointly negotiate with carriers and to qualify such joint negotiations and related joint activities for the State-action exemption to the federal antitrust laws through the articulated State policy and active supervision provided under this act.

Definitions relative to joint negotiations by health care providers with carriers.

2. As used in this act:

"Carrier" means an insurance company, health service corporation, hospital service corporation, medical service corporation or health maintenance organization which is authorized to issue health benefits plans in this State and a dental service corporation or dental plan organization authorized to issue dental plans in this State.

"Covered person" means a person on whose behalf a carrier which offers a health benefits or dental plan is obligated to pay benefits or provide services pursuant to the plan.

"Covered service" means a health care or dental service provided to a covered person under a health benefits or dental plan for which the carrier is obligated to pay benefits or provide services.

"Dental plan" means a benefits plan which pays or provides dental expense benefits for covered services and is delivered or issued for delivery in this State by or through a dental carrier.

"Health care provider" means a person who is licensed to provide health care services by the State.

"Health benefits plan" means a plan which pays or provides hospital and medical expense benefits for covered services and is delivered or issued for delivery in this State by or through a carrier. For the purposes of this act, health benefits plan shall not include the following plans, policies or contracts: Medicare

supplement coverage and risk contracts, accident only, specified disease or other limited benefit, credit, disability, long-term care, CHAMPUS supplement coverage, coverage arising out of a workers' compensation or similar law, automobile medical payment insurance, personal injury protection insurance issued pursuant to P.L.1972, c.70 (C.39:6A-1 et seq.), or hospital expense or confinement indemnity coverage only.

"Joint negotiation representative" means a representative selected by two or more independent health care providers to engage in joint negotiations with a carrier on their behalf.

"Utilization management" means a system for reviewing the appropriate and efficient allocation of health care or dental services under a health benefits or dental plan in accordance with specific guidelines, for the purpose of determining whether, or to what extent, a health care or dental service that has been provided or is proposed to be provided to a covered person is to be covered under the health benefits or dental plan.

Joint negotiations regarding non-fee related matters.

3. Two or more independent health care providers who are practicing in the service area of a carrier may jointly negotiate with a carrier and engage in related joint activity, as provided in this act, regarding non-fee-related matters which may affect patient care, including, but not limited to, any of the following:

- a. the definition of medical necessity and other conditions of coverage;
- b. utilization management criteria and procedures;
- c. clinical practice guidelines;
- d. preventive care and other medical management policies;
- e. patient referral standards and procedures, including, but not limited to, those applicable to out-of-network referrals;
- f. drug formularies and standards and procedures for prescribing off-formulary drugs;

- g. quality assurance programs;
- h. respective health care providers and carrier liability for the treatment or lack of treatment of covered persons;
- i. the methods and timing of payments;
- j. other administrative procedures, including, but not limited to, eligibility verification systems and claim documentation requirements for covered persons;
- k. credentialing standards and procedures for the selection, retention and termination of participating health care providers;
- l. mechanisms for resolving disputes between the carrier and health care providers, including, but not limited to, the appeals process for utilization management and credentialing determinations;
- m. the health benefits or dental plans sold or administered by the carrier in which the health care providers are required to participate;
- n. the formulation and application of reimbursement methodology;
- o. any provider rating program and the ability to appeal a carrier's rating of a provider;
- p. the terms and conditions of health care provider contracts, including, but not limited to, all products clauses, and the duration and renewal provisions of the contract; and
- q. the inclusion or alteration of a contractual term or condition, except when the inclusion or alteration is required by a federal or State regulation concerning that term or condition; however, the restriction shall not limit a health care provider's right to jointly petition the federal or State government, as applicable, to change the regulation.

Joint negotiations regarding fees, fee related matters.

- 4. a. Upon a finding by the Attorney General, in consultation with the Department of Insurance, that a carrier has substantial market power in its

service area and that any of the terms or conditions of the contract with the carrier pose an actual or potential threat to the quality and availability of patient care among covered persons, two or more independent health care providers who are practicing in the service area of a carrier may jointly negotiate with the carrier and engage in related joint activity, as provided in this act regarding fees and fee-related matters, including, but not limited to, any of the following:

(1) the amount of payment or the methodology for determining the payment for a health care or dental service, including, but not limited to, cost of living increases;

(2) the conversion factor for a resource-based relative value scale or similar reimbursement methodology for health care or dental services;

(3) the amount of any discount on the price of a health care or dental service;

(4) the procedure code or other description of a health care or dental service covered by a payment and the appropriate grouping of the procedure codes;

(5) the amount of a bonus related to the provision of health care or dental services or a withholding from the payment due for a health care or dental service; and

(6) the amount of any other component of the reimbursement methodology for a health care or dental service.

b. The Department of Insurance, in consultation with the Attorney General, shall have the authority to collect and investigate such information as it reasonably believes is necessary to determine, on an annual basis:

(1) the average number of covered lives and geographical distribution of covered lives per quarter per county for every carrier in the State; and

(2) the impact of the provisions of this section on average physician or dentist fees in the State.

(3) the Medical Loss Ratio of each carrier for every line of insurance in which a plan is issued.

The Department of Insurance shall provide this information to the Attorney General on an annual basis.

Criteria for exercise of joint negotiation rights.

5. The exercise of joint negotiation rights by two or more independent health care providers who are practicing in the service area of a carrier pursuant to this act shall conform to the following criteria:

a. the health care providers may communicate with each other concerning any contractual term or condition to be negotiated with the carrier;

b. the health care providers may communicate with the joint negotiation representative authorized to negotiate on their behalf with the carrier concerning any contractual term or condition;

c. the joint negotiation representative shall be the sole party authorized to negotiate with the carrier on behalf of the health care providers as a group;

d. the health care providers may, at the option of each health care provider, agree to be bound by the terms and conditions negotiated by the joint negotiation representative; and

e. when communicating or negotiating with a joint negotiation representative, a carrier may offer different contractual terms or conditions to, or may contract with, individual independent health care providers.

Inapplicability of act.

6. The provisions of this act shall not apply to a health benefits, dental plan, or vision plan which is certified by the Commissioner of Human Services to the Attorney General as providing covered services exclusively or primarily to persons who are eligible for medical assistance under P.L.1968, c.413 (C.30:4D-1 et seq.), or the FamilyCare Health Coverage Program under P.L.2000, c.71 (C.30:4J-1 et seq.).

Requirements to act as joint negotiation representative.

7. A person or entity which proposes to act as a joint negotiation representative shall satisfy the following requirements:

a. Before entering into negotiations with a carrier on behalf of two or more independent health care providers, the joint negotiation representative shall submit to the Attorney General, for his approval pursuant to section 8 of this act, on a form and in a manner prescribed by the Attorney General, a petition which identifies:

(1) the representative's name and business address;

(2) the names and business addresses of each health care provider who will be represented by the identified representative;

(3) the ratio of the health care providers requesting joint representation to the total number of health care providers who are practicing within the geographic service area of the carrier;

(4) the carrier with which the representative proposes to enter into negotiations on behalf of the identified health care providers;

(5) the intended subject matter of the proposed negotiations with the identified carrier;

(6) the representative's plan of operation and procedures to ensure compliance with the provisions of this act;

(7) the anticipated effect of the proposed joint negotiations on the quality and availability of health and dental care among covered persons;

(8) the anticipated benefits of a contract between the identified health care providers and a carrier;

(9) such other data, information and documents as the petitioner desires to submit in support of their petition; and

(10) such other data, information and documents as the Attorney General deems necessary.

The joint negotiation representative, upon submitting the petition, shall pay a fee to the Attorney General in an amount, as determined by the Attorney General, which shall be reasonable and necessary to cover the costs associated with carrying out the provisions of this act.

b. After the joint negotiation representative and the carrier identified pursuant to subsection a. of this section have reached an agreement on the contractual terms or conditions that were the subject matter of their negotiations, the joint negotiation representative shall submit to the Attorney General, for his approval in accordance with the provisions of section 8 of this act, a copy of the proposed contract between the health care providers identified pursuant to subsection a. of this section and the carrier, as well as any plan of action which the joint negotiation representative and the carrier shall formally agree to for the purpose of implementing the terms and conditions of the contract.

c. Within 14 days after either party notifies the other party of its decision to decline or terminate negotiations entered into pursuant to this act, or after the date that a joint negotiation representative requests that a carrier enter into such negotiations to which request the plan fails to respond, the joint negotiation representative shall report to the Attorney General that the negotiations have ended, on a form and in a manner to be prescribed by the Attorney General. The Attorney General may, within 30 days of a requested termination, make a binding determination as to the merits of the joint negotiation request. Should the Attorney General determine sufficient cause for the negotiation to occur, then the carrier shall be compelled to jointly negotiate with the negotiation representative as set forth in this Act.

Should Attorney General not find compelling need for a joint negotiation to occur, the joint negotiation representative may resume negotiations with the carrier no later than 90 days after reporting to the Attorney General that the negotiations have ended, on the basis of the petition submitted to the Attorney General pursuant to subsection a. of this section and approved by the Attorney General in accordance with the provisions of section 8 of this act. After that date, the joint negotiation representative shall be required to submit a new petition and pay an additional fee to the Attorney General pursuant to subsection a. of this section, to engage in negotiations with the carrier under this act.

Powers, duties of Attorney General.

8. a. The Attorney General shall provide written approval or disapproval of a petition or a proposed contract furnished by a joint negotiation representative pursuant to section 7 of this act no later than 30 days after receipt of the petition or proposed contract, as applicable. If the Attorney General fails to provide written approval or disapproval within this time period, the joint negotiation representative may petition a court of competent jurisdiction for an order to require the Attorney General to take such action. If the Attorney General disapproves the petition or the proposed contract, he shall forward a written explanation of any deficiencies therein to the joint negotiation representative along with a statement of the specific remedial measures by which those deficiencies may be corrected.

A joint negotiation representative shall not engage in negotiations with a carrier over any contractual term or condition unless the petition furnished by the joint negotiation representative has been approved in writing by the Attorney General, nor shall a proposed contract between two or more independent health care providers and a carrier be implemented unless the Attorney General has approved the contract.

b. The Attorney General shall approve a petition or a proposed contract furnished by a joint negotiation representative pursuant to section 7 of this act if the Attorney General determines that the petition or proposed contract demonstrates that the benefits which are likely to result from the proposed joint negotiations over a contractual term or condition or the proposed contract, as applicable, outweigh the disadvantages attributable to a reduction in competition that may result from the proposed joint negotiations. In making his determination, the Attorney General shall consider health care provider distribution by specialty and its effect on competition in the geographic service area of the carrier.

c. The Attorney General's written approval of a petition which is furnished by a joint negotiation representative under section 7 of this act shall be effective for all subsequent negotiations between the joint negotiation representative and the identified carrier, subject to the provisions of subsection c. of section 7 of this act.

d. In the case of a petition submitted pursuant to subsection a. of section 7 of this act, the Attorney General shall notify the carrier of the petition and provide the carrier with the opportunity to submit written comments within a specified time frame that does not extend beyond the date by which the Attorney General is required to act on the petition.

Application for hearing.

9. a. Within 45 days from the mailing by the Attorney General of a notice of disapproval of a petition submitted under section 7 of this act, the petitioners may make a written application to the Attorney General for a hearing.

b. Upon receipt of a timely written application for a hearing, the Attorney General shall schedule and conduct a hearing in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.). The hearing shall be held within 45 days of the application unless the petitioner seeks an extension.

c. The sole parties with respect to any petition under section 7 of this act shall be the petitioners, and notwithstanding any other provision of law to the contrary, the Attorney General shall not be required to treat any other person as a party and no other person shall be entitled to appeal the Attorney General's determination.

Confidentiality of information.

10. All information, including documents and copies thereof, obtained by or disclosed to the Attorney General or any other person in a petition under section 7 of this act, shall be treated confidentially and shall be deemed proprietary and shall not be made public or otherwise disclosed by the Attorney General or any other person without the written consent of the petitioners to whom the information pertains.

Good faith negotiation required.

11. A carrier and a joint negotiation representative shall negotiate in good faith regarding the terms and conditions of health care provider contracts pursuant to this act.

Construction of act.

12. a. The provisions of this act shall not be construed to:

(1) permit two or more health care providers to jointly engage in a coordinated cessation, reduction or limitation of the health care or dental services which they provide;

(2) permit two or more health care providers to meet or communicate in order to jointly negotiate a requirement that at least one of the health care providers, as a condition of participation with a carrier, be allowed to participate in all of the products offered by the carrier;

(3) permit two or more health care providers to jointly negotiate with a carrier to exclude, limit or otherwise restrict a non-health care provider from participating in the carrier's health benefits or dental plan based substantially on the fact that the health care provider is not a physician or dentist, unless that exclusion, limitation or restriction is otherwise permitted by law;

(4) prohibit or restrict activity by health care providers that is sanctioned under federal or State law or subject such activity to the requirements of this act;

(5) affect governmental approval of, or otherwise restrict activity by, health care providers that is not prohibited under federal antitrust law; or

(6) require approval of health care provider contract terms to the extent that the terms are exempt from State regulation under section 514(a) of the "Employee Retirement Income Security Act of 1974," Pub.L.93-406 (29 U.S.C. s.1144(a)).

b. Prior to entering into negotiations with a carrier on behalf of two or more independent health care providers over a contractual term or condition, a joint negotiation representative shall notify the health care providers in writing of the provisions of this act and advise them as to their potential for legal action against health care providers who violate federal antitrust law.

Report to Governor, Legislature by Attorney General.

13. The Attorney General, in consultation with the Department of Insurance, shall report annually to the Governor and the Legislature on its implementation.

The report shall include the number of petitions submitted for approval to engage in joint negotiations and the outcome of the petitions and the negotiations, an assessment of the effect the joint negotiations provided for in this act has had in restoring the competitive balance in the market for health care or dental services and in protecting access to quality patient care, an assessment of the impact this act has had on health insurance premiums in the State, and such other information that the Attorney General deems appropriate. The report shall also include the Attorney General's recommendations as to whether the provisions of this act shall be expanded to include other types of health care professionals and facilities.

Rules, regulations.

14. The Attorney General, in consultation with the Department of Insurance, shall adopt rules and regulations to effectuate the purposes of this act.

15. This act shall take effect 90 days after enactment. The Attorney General, in consultation with the Department of Insurance, may take such anticipatory administrative action in advance of the effective date as shall be necessary to implement the act.