Health Care Pricing

Health Law Webinar

February 8, 2023

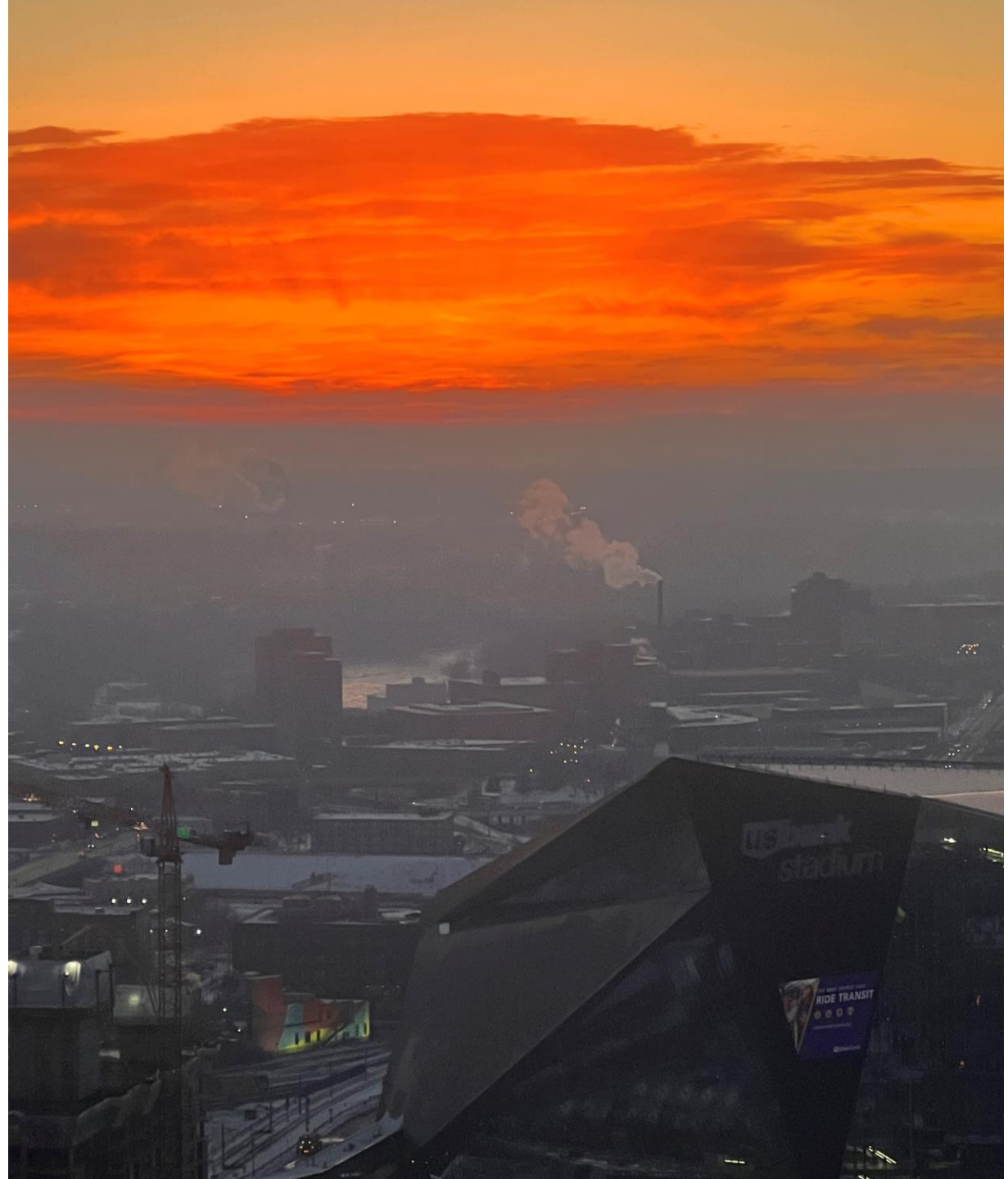
Fredrikson

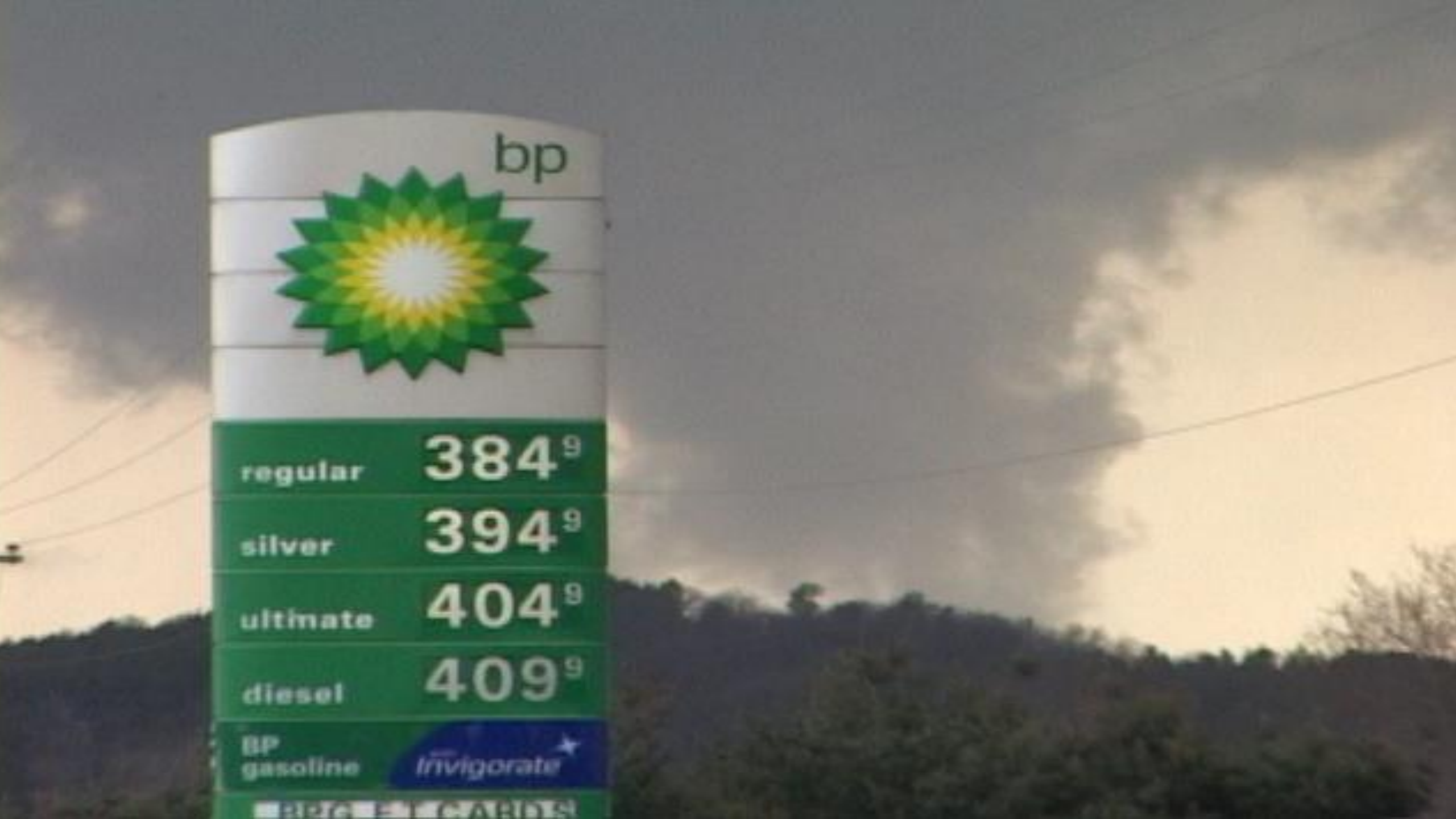
Where Law and Business Meet®

Agenda

- General principles on pricing that apply in all settings.
- Exploration of Medicare specific rules.
- Overview of some antitrust issues, and what you can and can’t do.
- How inconsistent pricing/discounts can create trouble.
- A brief overview of price transparency for hospitals and NSA.

© 2023 Fredrikson & Byron, P.A.


RIDE TRANSIT


bp
regular 384.9
silver 394.9
ultimate 404.9
diesel 409.9
BP gasoline
invigorate

Let’s Make A Deal

- There are two ways to buy a good or service:
  - *Explicit agreement on terms.*
  - *Implied contract.*
- Implied contracts are rare in any other industry.
- If parties disagree about a term in an implied contract, a court will impose a “reasonable” result.

© 2023 Fredrikson & Byron, P.A.

I'll Have What She's Having…

- How much can a patient/payor using an implied contract rely on the terms of your actual contracts?
- How much can a patient/payor using an implied contract rely on discounts to others with implied contracts?
- How much can a patient/payor using an express contract rely on your discounts to others?

© 2023 Fredrikson & Byron, P.A.

Peril of the Percentage

- Your “standard charge” for a service is $5,000. A patient without insurance is eligible to pay 70% as payment in full. What is your charge for the service?

  A. $5,000.

  B. $3,500.

  C. What the “average patient” pays?

  D. We need more information.

© 2023 Fredrikson & Byron, P.A.

Can I Have Different Prices For Different Patients?

- Absolutely. Every organization has multiple charges for identical services.
- Beware of catchy phrases like “you can’t discriminate.”
- Inconsistent pricing for services isn’t inherently “illegal,” but there are collateral consequences, including claims of fraud.

© 2023 Fredrikson & Byron, P.A.

Can I Have Different Prices For Different Patients?

- Note that Robinson-Patman prohibits price discrimination for **goods**. We often speak of “items and services” but they are different!!
- If you provide a discount to a cash paying walk-in, why is an auto insurer not entitled to the same rate?
- Many seemingly logical justifications run afoul of the law or your contracts.

© 2023 Fredrikson & Byron, P.A.

The Discount Is Because…

- Timing. They paid the day of service. (So if they paid 1 day late, there is a large financial penalty??)
- Administration. We didn’t have to bill them. (Do your contracts forbid billing fees?)
- Fairness. Self-pay shouldn’t have to pay more than insurers pay. (Reasonable, but is ANYONE paying the billed charge?)

© 2023 Fredrikson & Byron, P.A.

I Have To Give Medicare My Lowest Price, Right?

- Wrong. Medicare pays the lower of:
  - *Actual charge.*
  - *Fee schedule amount.*
  - *Usual and customary charge.*
- Usual and customary charge is defined as your median (50th percentile) charge. Medicare Claims Processing Manual, Ch. 23, §80.3.1.

© 2023 Fredrikson & Byron, P.A.

42 CFR § 405.503(b)

- This regulation defines “customary charges” as “the uniform amount which the individual physician or other person charges in the majority of cases for a specific medical procedure or service.”

© 2023 Fredrikson & Byron, P.A.

Actual Charges May Vary

If the individual physician or other person varies his charges for a specific medical procedure or service, so that no one amount is charged in the majority of cases, it will be necessary for the carrier to exercise judgment in the establishment of a “customary charge” for such physician or other person. In making this judgment, an important guide, to be utilized when a sufficient volume of data on the physician's or other person's charges is available, would be the median or midpoint of his charges, excluding token and substandard charges as well as exceptional charges on the high side. A significant clustering of charges in the vicinity of the median amount might indicate that a point of such clustering should be taken as the physician's or other person's “customary” charge. Use of relative value scales will help in arriving at a decision in such instances.

42 CFR § 405.503(b)

© 2023 Fredrikson & Byron, P.A.

I Have To Give Medicaid My Lowest Price, Right?

- Maybe. Depends on state law.
- In some states the “usual and customary” charge is defined as the charge that you charge most often. (Mode).
- Some states follow Medicare. (Median).
- Some states require Medicaid to be the lowest. (Minimum).

© 2023 Fredrikson & Byron, P.A.

Can Our Group Have Different Rates For Different Physicians?

- You CAN, the question is what it will mean.
- Unclear if U&C is by code or practitioner.
- If you bill as a group, probably best to assume it is by code.

© 2023 Fredrikson & Byron, P.A.

Do I Have To Post My Price?

- Generally, no, but…
  - *COVID-19 testing.*
  - *Price transparency for hospitals.*
  - *State law.*
- No Surprises Act Good Faith Estimates.
- If not required, helps to avoid the (potentially dangerous) element of surprise.

© 2023 Fredrikson & Byron, P.A.

Can I Require Patients To Pay More Than Their Insurer Reimburses?

- Do you have a contract with the insurer?
- If yes, then you will need to review the contract.
- If no, then you can charge the patient what you want.
- Remember concepts of implied contract.

© 2023 Fredrikson & Byron, P.A.

Can I Require Patients To Pay More Than Their Insurer Reimburses?

- What if the payer is Medicare?
  - *If participating, then you must accept Medicare.*
  - *If nonparticipating, then limited by Medicare Limiting Charge (15% over Medicare's approved amount). (Beware of state limits!)*
  - *If opted out, then do what you want.*
- Medicaid – state by state.

© 2023 Fredrikson & Byron, P.A.

Opting Out

- Done by professional, not entity.
- Out for 2 years. Other than 90-day recanting window, must stay out the WHOLE time. Even if the professional changes jobs.

© 2023 Fredrikson & Byron, P.A.

Can I Charge A Patient For “Extras” Like Phone Calls? Faster Service? More In-person Time?

- Each payer has different rules.
- Medicare prohibits charging patients for covered services. What is covered?
- Most insurers include similar prohibitions in their contracts.
- Absent a contract, almost anything goes.

© 2023 Fredrikson & Byron, P.A.

Can I Adjust My Fees To Out-of-Network Patients To Mirror The Network?

- Extremely controversial issue.
- Insurers want the network to mean something.
- There may be no contract between you and the insurer, but there is a contract between the patient and the insurer.

© 2023 Fredrikson & Byron, P.A.

Can I Adjust My Fees To Out-of-Network Patients To Mirror The Network?

- How the insurer reimburses out of network services may affect the analysis.
  - *Fee schedule.*
  - *Percentage of charges.*
  - *Percentage of fee schedule.*

© 2023 Fredrikson & Byron, P.A.

Can I Adjust My Fees To Out-of-Network Patients To Mirror The Network?

- New Jersey court ruled against Health Net and for the physicians in an ASC dispute where ASC waived co-insurance. State law forbid dentists from waving co-insurance. Garcia v. Health Net of New Jersey, Inc., No. A-2430-07T3, 2009 BL 295398, 2009 WL 3849685 (N.J. Super. Ct. App. Div. Nov. 17, 2009.)

© 2023 Fredrikson & Byron, P.A.

Can I Adjust My Fees To Out-of-Network Patients To Mirror The Network?

- Compare this with North Cypress Medical Center Operating Co., Ltd. v. Cigna Healthcare, 781 F.3d 182 (2015)781 F.3d 182, 197, (5th. Cir. 2015), holding that limiting the patient's liability, limited the plan's liability in the same fashion.

© 2023 Fredrikson & Byron, P.A.

Do I Have To Provide Patients With Information About Pricing?

- This is partially driven by state law. Hospitals must worry about price transparency.
- Some states require providers to give patients a “good faith estimate” of what the provider expects to receive.
- The NSA now requires that for patients not using insurance. That will likely expand to all patients.

© 2023 Fredrikson & Byron, P.A.

© 2023 Fredrikson & Byron, P.A.


© 2023 Fredrick

Are There Limits On How Much I Can Raise My Prices?

- Federally, no.
- State law or contract may apply.
- Antitrust analysis considers a 5% price increase as suggestive of monopoly.

© 2023 Fredrikson & Byron, P.A.

Antitrust

- Policy: Competition is good.
- Note: Health policy is a bundle of contradictions. How do you reconcile CONs and a desire for competition?
- Biased heavily in favor of buyers.
- Policy is almost as important as law.
- Antitrust is a broad term covering many behaviors.

© 2023 Fredrikson & Byron, P.A.

Can You Know A Competitor's Charge?

© 2023 Fredrikson & Byron, P.A.

Can You Know A Competitor's Charge?

- Of course. Target knows what Walmart charges.
- The problem is AGREEMENT about prices, not knowledge.
- But that agreement can be implied.

© 2023 Fredrikson & Byron, P.A.

Antitrust

- For many antitrust issues, a violation is possible only if you have “market power.” The definition of the market is key.
  - *Product Market: what other good/service can a buyer get instead?*
  - *Geographic Market: where could the buyer reasonably go for an alternative?*

© 2023 Fredrikson & Byron, P.A.

Antitrust

- Price Fixing: competitors agree to sell at a price or establish a minimum price. (You don’t need market power!!)
- Boycott: competitors agree not to deal with a particular party.

© 2023 Fredrikson & Byron, P.A.

"Psst…Quit taking insurance. Pass it on."

Antitrust

- Monopolization: One party controls enough of the market to be able to fix price. Market share and barriers to entry are both relevant.
- Tying arrangements: One party requires buyers to purchase an unrelated item to receive the item sought by the purchaser. (Seller must have “market power.”)

© 2023 Fredrikson & Byron, P.A.

Antitrust

- Most of the antitrust laws (with the exception of monopolization) require agreement between competitors.
- Airline pricing/conscious parallelism.

© 2023 Fredrikson & Byron, P.A.


C7
C8
C10
C11
C9

When Antitrust Matters

- Negotiations with insurers.
- Relations with hospitals.
- Peer review.
- Joint ventures.
- Pricing.
- Mergers.

© 2023 Fredrikson & Byron, P.A.

How Can You Get Negotiating Clout?

- Apparent options:
  - *Just say no.*
  - *Unionize.*
  - *Agree not to sign a contract.*
  - *Get big.*
- Which of these are legal?

© 2023 Fredrikson & Byron, P.A.

Can We Jointly Negotiate?

- You can form a network, but if it increases your reimbursement, watch out.
- The safest approach for clinics may be a divisional merger.
- If the payor objects, joint negotiation is perilous.

© 2023 Fredrikson & Byron, P.A.

Can I Collect My Fees Upfront?

- Nothing prohibits it (if your “fee” means only the patient liability. Collecting the whole fee from an insured patient is likely to be trouble.)
- It creates some practical issues.

© 2023 Fredrikson & Byron, P.A.

Do I Have To Refund All Credit Balances?

- In many states the purely legal answer is yes.
- The practical answer is consistency; WWYW?

© 2023 Fredrikson & Byron, P.A.

Can I Charge Patients Who No-Show?

- Depends who the payer is.
  - *Private payer: Check your contract.*
  - *Medicare: Yes, as long as you don't discriminate.*
    - Charge is for the missed business opportunity.
  - *Medicaid: Depends on the state.*

© 2023 Fredrikson & Byron, P.A.

Can I Waive Co-Payments?

- Laws to consider:
  - *Federal Antikickback Statute.*
  - *Civil Monetary Penalties Provision.*
  - *State laws.*
    - Case to read: Kennedy v. Connecticut General Life Insurance, 924 F.2d 698 (7th Cir. 1991).

© 2023 Fredrikson & Byron, P.A.

Can I Waive Co-Payments?

- Antikickback Statute: illegal to offer, give, solicit, or receive any remuneration if the purpose of the remuneration is to induce or reward referrals for services reimbursed under Medicare/Medicaid.
- Intent based.
- One-purpose test.

© 2023 Fredrikson & Byron, P.A.

Can I Waive Co-Payments?

- Civil Monetary Penalties Provision: it is illegal to provide anything of value that the provider “knows or should know” is likely to influence the beneficiary’s selection of a particular provider.
- Intent could be irrelevant, given the “knows or should know” language.

© 2023 Fredrikson & Byron, P.A.

Can I Waive Co-Payments?

- Beware of state antikickback statutes, which extend the federal statute to private payers.
- State statutes may not necessarily mirror federal statute.
- Most contracts prevent it.
- What about for the poor? The angry?

© 2023 Fredrikson & Byron, P.A.

Can I Give Free Care To Employees?

- Sort of…
- Beware of benefit plan issues.
- Who does it benefit, the employee or the insurance company?
- When treating your employees, remember the risks.

© 2023 Fredrikson & Byron, P.A.

Can I Give Free Care To Doctors?

- Antikickback analysis: What is the intent?
- If only your best referral sources get free care, that's a problem.
- Stark law might apply, too.

© 2023 Fredrikson & Byron, P.A.

Can I Give Free Care To Doctors?

- Stark: a physician may not make a referral to an entity for the furnishing of designated health services if the physician (or an immediate family member) has a financial relationship with the entity.
- Entity may not bill for DHS furnished under a prohibited referral.
- Intent is irrelevant.

© 2023 Fredrikson & Byron, P.A.

Can I Give Free Care To Doctors?

- Designated Health Services.
  - *Clinical laboratory.*
  - *Physical therapy.*
  - *Occupational therapy.*
  - *Radiology services.*
  - *Radiation therapy services and supplies.*
  - *Durable medical equipment and supplies.*
  - *Parenteral and enteral nutrition.*
  - *Prosthetics and orthotics.*
  - *Home health services.*
  - *Outpatient prescription drugs.*
  - *Inpatient and outpatient hospital services.*

© 2023 Fredrikson & Byron, P.A.

Can I Give Free Care To Doctors?

- Stark Professional Courtesy Exception:
  - *Must have medical staff;*
  - *Offered to all physicians on medical staff or in local community without regard to volume/value of referrals or other business generated by physician;*
  - *Items/services are routinely provided by the entity;*
  - *In writing and approved by governing body;*
  - *Recipient is not a Federal health care program beneficiary, unless there is financial need; and*
  - *Does not violate antikickback statute/other law.*

© 2023 Fredrikson & Byron, P.A.

Can We Give Discounts To The Poor?

- Absolutely.
- At times, people take unusual positions.

© 2023 Fredrikson & Byron, P.A.

Do I Have To Provide Charity Care? If So, How Much?

- Distinction: may v. must/hospital v. clinic.
- Federal tax-exemption requirement – must be organized for an exempt purpose.
  - *"Charitable" can include relief to poor and underprivileged, but also advancement of education and science.*
  - *Form 990 Schedule H.*
  - *No specific percentage of revenue is required.*

© 2023 Fredrikson & Byron, P.A.

Do I Have To Provide Charity Care? If So, How Much?

- State tax-exemption rules vary.
- Medicare.
  - *Hospital may determine its own indigence criteria.*
  - *Provider Reimbursement Manual (PRM) sets forth guidance for charity care policies.*

© 2023 Fredrikson & Byron, P.A.

Do I Have To Provide Charity Care? If So, How Much?

- PRM Guidance:
  - *May deem dual eligible as qualified to receive charity care.*
  - *Patient's indigence must be determined by hospital, not patient.*
  - *Consider patient's "total resources," including an analysis of assets, liabilities, income and expenses.*

© 2023 Fredrikson & Byron, P.A.

Do I Have To Provide Charity Care? If So, How Much?

- PRM Guidance:
  - *Determine that no other source is legally responsible for medical bill (e.g., Medicaid, local welfare agencies).*
  - *Retain documentation of method by which indigence was determined, as well as back-up documentation to substantiate determination.*

© 2023 Fredrikson & Byron, P.A.

Must I Put A Patient Into Collections?

- Different answer for clinics and hospitals.
- To claim bad debt on cost report, you must make "reasonable" collection efforts.
- The only issue for clinics is whether your fee is "real." Generally, collection isn't a factor in that analysis.

© 2023 Fredrikson & Byron, P.A.

When Can I Claim Bad Debt?

- The debt must be related to covered services and derived from deductible and coinsurance amounts.
- The provider must be able to establish that reasonable collection efforts were made.
- The debt was actually uncollectible when claimed as worthless.
- Sound business judgment established that there was no likelihood of recovery at any time in the future.

42 CFR 413.89(e)

© 2023 Fredrikson & Byron, P.A.

Can I Charge Interest On Debts?

- Consider both federal and state law.
- Federal Truth in Lending Act.
  - *Applies if you extend credit to patients.*
  - *Must make periodic disclosures.*
- State usury laws.
- Medicare Policy.
- Medicaid.

© 2023 Fredrikson & Byron, P.A.

Can I Charge Interest On Balances?

- WPS, CIGNA, MACs (and even CMS) assert that physicians cannot charge Medicare patients interest. They cite 42 CFR 424.55 (b)(2)(ii) which says a supplier agrees:

© 2023 Fredrikson & Byron, P.A.

42 CFR 424.55 (b)(2)(ii)

"To collect only the difference between the Medicare approved amount and the Medicare Part B payment (for example, the amount of any reduction in incurred expenses under Sec. 410.155(c), any applicable deductible amount, and any applicable coinsurance amount) for services for which Medicare pays less than 100% of the approved amount."

© 2023 Fredrikson & Byron, P.A.

The Flaw

“The charge for a missed appointment is not a charge for a service itself (to which the assignment and limiting charge provisions apply), but rather is a charge for a missed business opportunity. Therefore, if a physician's or supplier's missed appointment policy applies equally to all patients (Medicare and non-Medicare), then the Medicare law and regulations do not preclude the physician or supplier from charging the Medicare patient directly.”

MLN MM5613

© 2023 Fredrikson & Byron, P.A.

The Flaw

- A charge for interest is not a service.
- The MACs have created a policy that is inconsistent with other Medicare guidance.

© 2023 Fredrikson & Byron, P.A.

Can I Charge Interest On Debts?

- Minnesota:
  - *No written agreement: ≤ 6%.*
  - *Written agreement: ≤ 8%.*
  - *In most cases, need special license for > 8%.*
- Georgia:
  - *No written agreement: ≤ 7%.*
  - *Might need special license for > 8%.*
  - *Also depends on principal balance.*

© 2023 Fredrikson & Byron, P.A.

What Collection Issues Must I Be Worried About?

- Fair Debt Collection Practices Act.
  - *Cannot call during "inconvenient" time.*
    - 8 a.m. – 9 p.m. is presumed convenient.
  - *If patient is being represented by an attorney, then must contact attorney.*
  - *Cannot call at work if patient/employer says not to.*
  - *Must cease communications if receive written notice from patient of refusal to pay.*

© 2023 Fredrikson & Byron, P.A.

Pricing Transparency

- 45 CFR Part 180, 84 Fed. Reg. 65524, Nov. 27, 2019 requires hospitals to disclose pricing.
- Shoppable services must be publicly disclosed.
- Provide machine readable data.
- Initial CMP of $300 a day increased to up to $5,500 for hospitals with more than 550 beds.

© 2023 Fredrikson & Byron, P.A.

Key Terms

- **De-identified maximum** (minimum) negotiated charge means the highest (lowest) charge that a hospital has negotiated with all third-party payers for an item or service.
- **Discounted cash price** means the charge that applies to an individual who pays cash (or cash equivalent) for a hospital item or service.

© 2023 Fredrikson & Byron, P.A.

Key Terms

- **Gross charge** means the charge for an individual item or service that is reflected on a hospital's chargemaster, absent any discounts.
- **Machine-readable format** means a digital representation of data or information in a file that can be imported or read into a computer system for further processing. Examples of machine-readable formats include, but are not limited to, .XML, .JSON and .CSV formats.

© 2023 Fredrikson & Byron, P.A.

Key Terms

- **Shoppable service** means a service that can be scheduled by a healthcare consumer in advance.

© 2023 Fredrikson & Byron, P.A.

Key Terms

- **Standard charge** means the regular rate established by the hospital for an item or service provided to a specific group of paying patients. This includes all of the following as defined under this section:
  1. *Gross charge.*
  2. *Payer-specific negotiated charge.*
  3. *De-identified minimum negotiated charge.*
  4. *De-identified maximum negotiated charge.*
  5. *Discounted cash price.*

© 2023 Fredrikson & Byron, P.A.

Subpart B – Public Disclosure Requirements

- § 180.40 General requirements.
- A hospital must make public the following:
  a) *A machine-readable file containing a list of all standard charges for all items and services as provided in § 180.50.*
  b) *A consumer-friendly list of standard charges for a limited set of shoppable services as provided in§180.60.*

© 2023 Fredrikson & Byron, P.A.

Operationalize This?

- Two separate requirements: publishing “standard charges” and displaying “shoppable services.” In lieu of a list of shoppable services, hospital may use an internet based price estimating tool for 70 specified shoppable services and at least 230 additional shoppable services.
- Must be prominently displayed on the website, accessible to the public without charge or registration.

© 2023 Fredrikson & Byron, P.A.

Operationalize This?

- The list for all service must include: Gross charge for inpatient and outpatient care, payer specific negotiated charge for each payer, de-identified maximum and minimum negotiated charges and the discounted case price.

© 2023 Fredrikson & Byron, P.A.

Authority: 42 U.S.C §300gg-18(e)

(e) Standard hospital charges — Each hospital operating within the United States shall for each year establish (and update) and make public (in accordance with guidelines developed by the Secretary) a list of the hospital's standard charges for items and services provided by the hospital, including for diagnosis-related groups established under section 1395ww(d)(4) of this title.

© 2023 Fredrikson & Byron, P.A.

No Surprises Act: Updates!

CMS.gov Centers for Medicare & Medicaid Services

About CMS Newsroom Search CMS.gov

Medicare | Medicaid/CHIP | Medicare-Medicaid Coordination | Private Insurance | Innovation Center | Regulations & Guidance | Research, Statistics, Data & Systems | Outreach & Education

> No Surprises Act

Home | Policies & Resources | Consumers | Resolving out-of-network payment disputes

CMS published Guidance on Good Faith Estimates (GFEs) for Uninsured (or Self-Pay) Individuals - Parts 3 and 4. Part 3 clarifies that HHS is extending enforcement discretion, pending future rulemaking, for situations where GFEs for uninsured (or self-pay) individuals do not include expected charges from co-providers or co-facilities. Part 4 provides additional guidance for providers that offer sliding fee discounts as well as additional guidance for providers who do not expect to charge. Additional FAQs related to GFEs for uninsured (or self-pay) individuals are available here.

Ending Surprise Medical Bills

See how new rules help protect people from surprise medical bills and remove

© 2023 Fredrikson & Byron, P.A.

Presenters

David Glaser
Attorney
612.492.7143
dglaser@fredlaw.com

Mary Heath
Attorney
612.492.7272
mheath@fredlaw.com

© 2023 Fredrikson & Byron, P.A.

Thank you!

Fredrikson

Where Law and Business Meet®

© 2023 Fredrikson & Byron, P.A.