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Rising Health Care Costs

*Introduction by Mary M. Pozarycki**

I. INTRODUCTION

Troyen Brennan, M.D., J.D., M.P.H., gave the keynote speech at the Loyola University Chicago Institute for Health Law's Fifth Annual Health Law and Policy Colloquium held in Chicago on November 10, 2005. A professor of medicine at Harvard Medical School and President of the Brigham and Women's Physicians Organization, Dr. Brennan is also a professor of law and public health at the Harvard School of Public Health. Dr. Brennan received his law, medicine, and public health degrees from Yale University and he trained in internal medicine at the Massachusetts General Hospital in Boston. Dr. Brennan researches legal and ethical issues in medicine and public health and has written over 200 peer reviewed articles and four books since joining the staff of the Brigham and Women's Hospital in 1988.

In his keynote speech, Dr. Brennan canvassed the key issues in health care policy, addressed ways to control costs, and provided insight as to whether health care law was the appropriate vehicle for rational reform. This introduction briefly addresses the primary factors responsible for the increasing cost of health care and analyzes the corresponding legal provisions designed to contain such costs.

II. KEY DRIVERS OF HEALTH CARE COSTS

Americans spend more on health care than any other country.¹ Last year, 15.3% of the GDP was spent on health care, totaling \$1.7 trillion.² Yet, despite these exorbitant expenditures, more than thirty-seven million

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1. J. Edward Hill, President, American Medical Association, Health Care: Cost, Quality and Access, (Oct. 27, 2005), available at <http://www.ama-assn.org/ama/pub/category/print/15695.html>.

2. *Id.*; John C. Nelson, Immediate Past President, American Medical Association, The Roadmap for Improving Health Care in America (Nov. 14, 2005), available at <http://www.ama-assn.org/ama/pub/category/print/15747.html>.

Americans are without health insurance.³ The rising cost of health insurance prevents the uninsured from accessing affordable and quality health care.⁴ Key factors that contribute to these costs include medical advances and consumer demand, government mandates and regulations, and litigation and risk management,⁵ each of which will be discussed in turn.

A. Medical Advances and Consumer Demand

Spending associated with medical advances such as prescription drugs, technological devices, treatments, and new diagnostic procedures are major drivers of health care costs.⁶ The availability of more expensive medical advances fuels health care spending because the cost of these advances must be recouped by the industry.⁷ Without doubt, these rising costs associated with the diffusion of new medical technology will only continue to contribute to the increasing cost of health care as research suggests market forces are not sufficient to motivate health plans to oppose the external forces driving technological advances.⁸ Physicians, especially, are inclined to encourage new medical technology because of its potential to improve patient outcomes through more advanced diagnostic testing and treatment procedures.⁹ However, because these advances will enable medical conditions to be diagnosed and treated at earlier stages, they will likely decrease the long-term cost of health care.¹⁰ For that reason, these current expenditures must be viewed contemporaneously with future cost mitigation.

Consumer demand for these new medical advances has also contributed to the overall increase in health care spending because many of these new advances are covered not by insurance, but obtained at high out-of-pocket costs.¹¹ Specifically, as consumer awareness of prescription drug choices has increased due to the rise in direct-to-consumer advertising, there has

3. COUNCIL ON GRADUATE MEDICAL EDUCATION, SUMMARY OF THIRD REPORT, IMPROVING ACCESS TO HEALTH CARE THROUGH PHYSICIAN WORKPLACE REFORM: DIRECTIONS FOR THE 21ST CENTURY (1992), available at <http://www.cogme.gov/rpt3.htm>.

4. *See id.*

5. PRICEWATERHOUSECOOPERS, THE FACTORS FUELING RISING HEALTHCARE COSTS, (2002), available at <http://www.heartland.org/pdf/14621.pdf>

6. *Id.* at 5.

7. Carolina Gutierrez & Usha Ranji, *U.S. Health Care Costs: Background Brief*, available at http://www.kaiseredu.org/topics_im.asp?imID=1&parented=61&id=358 (last visited Dec. 23, 2005).

8. Agency for Healthcare Research and Quality, *Health Care Costs and Financing*, RES. ACTIVITIES, Feb. 2005, available at <http://www.ahrq.gov/research/feb05/0205RA20.htm>.

9. *Id.*

10. PRICEWATERHOUSECOOPERS, *supra* note 5, at 5.

11. *Id.* at 7-8.

been a corresponding increase in prescription drug spending.¹² Consumer demand for medical advances will also increase as the baby boomer generation ages.¹³ As aging baby boomers increase the per capita expenditure for health care, a corresponding higher demand for new medical advances will further burden the health care system.¹⁴ This will have a significant effect on the public sector, as many will begin qualifying for Medicare in 2011.¹⁵

B. Government Mandates and Regulations

Another chief contributor to the rising cost of health care is government mandates and regulations.¹⁶ In fact, state and federal mandates have increased at an average annual growth rate of more than 15% since 1970.¹⁷ According to the Council of Affordable Health Insurance (CAHI), compliance costs are estimated to increase the cost of basic health coverage from about 20% to more than 50%, depending on the state.¹⁸ The Health Insurance Portability and Accounting Act (HIPAA) alone has added billions of dollars in compliance costs to the health care system.¹⁹ So, even though mandates may assure that some consumers receive benefits that they would not otherwise receive from insurers or employers, these same mandates may have the unintended effect of raising the cost of health care, reducing competition, and increasing the number of uninsured Americans.²⁰

C. Litigation and Risk Management

The medical malpractice insurance crisis threatens affordable access to health care for Americans.²¹ The number of multi-million dollar jury awards is skyrocketing and is reflected through “higher health care costs, higher health insurance premiums, higher taxes, reduced access to quality care, and threats to quality care.”²² Even if a lawsuit never reaches trial, the

12. *Id.*

13. *Id.*

14. Hill, *supra* note 1.

15. Gutierrez & Ranji, *supra* note 7.

16. Washington Alliance for a Competitive Economy, *Health Care Mandates Boost Costs*, Feb. 8, 2005, available at <http://www.awb.org/otherissues/competitiveness/2005/WashACEHealthCareBrief.pdf>.

17. PRICEWATERHOUSECOOPERS, *supra* note 5, at 6.

18. Washington Alliance for a Competitive Economy, *supra* note 16.

19. PRICEWATERHOUSECOOPERS, *supra* note 5, at 7.

20. Washington Alliance for a Competitive Economy, *supra* note 16.

21. Michael Millenson, *The Malpractice Insurance Crisis: The Impact on Healthcare Cost and Access* (2003), available at http://www.bcbs.com/coststudies/reports/Malpractice_Ins_Crisis0127.pdf.

22. U.S. DEP'T OF HEALTH AND HUM. SERVICES, ADDRESSING THE NEW HEALTH CARE

costs to defend such lawsuits can be millions of dollars.²³

The litigation system has had a particularly poignant effect on physicians' malpractice insurance premiums. The litigation system and the malpractice insurance system are inexorably linked: the former imposes rising costs on the latter, which directly increases the price of insurance premiums paid by physicians and hospitals.²⁴ The American Medical Association has reported that an alarming number of physicians are unable to afford or even obtain medical liability insurance.²⁵ This leads physicians to move to other states to practice or even stop their practices entirely and retire early.²⁶ For example, the Washington State Medical Association reported that some physicians have faced a tripling of their premiums, which might account for the 31% increase in the number of physicians moving out of Washington since 1998.²⁷

III. HEALTH LAW: A VEHICLE TO CONTAIN COSTS?

Health law is the legal field that addresses all aspects of the health care industry including providers, insurers, patients, drug companies, and researchers.²⁸ As the American delivery of health care has become increasingly complex and fragmented with private insurers, non-profit and for-profit hospitals, managed-care companies, and a dominant pharmaceutical industry, lawyers have found themselves representing various constituencies of the health care system.²⁹ Health lawyers' practices can include such varied domains as protecting injured patients, negotiating agreements with insurance companies, or advocating health policy issues.³⁰ The following analysis provides a general overview of some particularly dominant areas of health law: antitrust law, fraud and abuse law, and medical malpractice law.

CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE, [hereinafter ADDRESSING THE NEW HEALTH CARE CRISIS] (2003), available at <http://www.aspe.hhs.gov/daltcp/reports/medliab.pdf>.

23. PRICEWATERHOUSECOOPERS, *supra* note 5, at 16.

24. ADDRESSING THE NEW HEALTH CARE CRISIS, *supra* note 22, at 12.

25. *Id.* at 6.

26. *Id.*

27. *Id.* at 3.

28. Barry R. Furrow, *From the Doctor to the System: The New Demands of Health Law*, 14 Health Matrix 67, 67 (2004), available at http://law.case.edu/student_life/journals/health_matrix/141/furrow.pdf.

29. *Id.*

30. *Id.*

A. Antitrust Law

The Federal Trade Commission (FTC) is an independent federal law enforcement agency that works to maintain a strong and competitive free enterprise system by protecting consumers against anticompetitive behavior and deceptive and unfair business practices.³¹ The FTC's antitrust arm, the Bureau of Competition, is responsible for investigating and prosecuting antitrust violations involving health care, such as illegal conduct related to monopolization, agreements not to compete, agreements on price or price-related terms, agreements to obstruct innovative forms of health care delivery or financing, restraints on advertising and other forms of solicitation, illegal tying, restrictions on access to hospitals, and pharmaceutical mergers.³² In 2000 alone, the federal government collected \$717 million from judgments, settlements and administrative imposition in health care fraud cases.³³

B. Fraud and Abuse Law

The federal government has the authority to combat health care fraud by imposing civil penalties and criminal sanctions against individuals or entities that inappropriately file claims for payment.³⁴ Civil penalties can be imposed if an individual knowingly submits a claim that falls into a prohibited category.³⁵ These fines can be as much as \$10,000 per claim or \$50,000 for an anti-kickback violation plus a trebling of the improperly claimed amount.³⁶ Criminal penalties can be imposed where an individual knowingly and willfully defrauds the Medicare, Medicaid, or other federal health care benefits program.³⁷ Sanctions for defrauding these programs may include imprisonment for up to five years, a fine of up to \$250,000 per claim, or a five-year exclusion from participation in the Medicare and Medicaid programs.³⁸ A recent report by the Office of Inspector General (OIG), which is dedicated to the mission of detecting fraud, waste, and

31. FED. TRADE COMM'N, HEALTH CARE SERV. AND PROD. DIV., OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS 1 (2005), available at <http://www.ftc.gov/bc/0510hupdate.pdf>.

32. *Id.*

33. THE DEP'T OF HEALTH AND HUMAN SERVICES & THE DEP'T OF JUSTICE HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM, ANNUAL REPORT FOR FY 2000, (2001), available at <http://www.usdoj.gov/dag/pubdoc/hipaa00ar21.htm>.

34. American Medical Association, *Federal Fraud Enforcement: Physician Compliance*, Mar. 7, 2005, available at <http://www.ama-assn.org/ama/pub/category/print/4598.html>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

abuse, and promoting economy and efficiency in the programs of the Department of Health and Human Services (HHS), indicated there was a nearly \$35.4 billion reported savings and expected recoveries for the fiscal year 2005.³⁹ For the fiscal year, OIG also reported exclusions of 3806 individuals and entities for fraud or abuse of federal health care programs and their beneficiaries, 537 criminal actions against individuals or entities that engaged in crimes against departmental programs, and 262 civil actions, which include False Claims Act and unjust enrichment suits filed in district court, Civil Monetary Penalties Law settlements, and administrative recoveries related to provider self-disclosure matters.⁴⁰

The health care community is facing a situation where the federal government is categorizing billions of dollars worth of claims for services as inappropriate and possibly fraudulent.⁴¹ In fact, the amount of spending attributable to waste, fraud, and abuse ranges from 3% to over 10% of national health care expenditures.⁴² In light of these figures, the federal government's need to reduce spending attributable to fraudulent behavior is apparent.⁴³

C. Medical Malpractice Law

While medical malpractice law is justified on the theory of deterrence, studies actually suggest that it impedes efforts to improve the quality of care.⁴⁴ Instead of providing incentives for physicians to provide better quality care by sanctioning the negligent, the fear of liability discourages open discussion of medical errors and strategies to reduce them.⁴⁵ Hospitals, doctors, and nurses are reluctant to report problems and participate in quality improvement programs because they fear that such information would be used against them in subsequent lawsuits.⁴⁶ The litigation system encourages the practice of defensive medicine by doctors as a preventative measure to avoid malpractice lawsuits.⁴⁷ Defensive medicine, where physicians perform certain tests and treatments based not on professional clinical judgment but solely to protect themselves from

39. U.S. DEP'T OF HEALTH AND HUM.SERV., OFFICE OF INSPECTOR GENERAL, FALL 2005 SEMI-ANNUAL REPORT TO CONGRESS xxxi (2005), <http://oig.hhs.gov/publications/docs/semiannual/2005/SemiannualFall05.pdf>.

40. *Id.*

41. American Medical Association, *supra* note 34.

42. *Id.*

43. *Id.*

44. ADDRESSING THE NEW HEALTH CARE CRISIS, *supra* note 22, at 9.

45. *Id.*

46. *Id.* at 10.

47. PRICEWATERHOUSECOOPERS, *supra* note 5, at 9.

lawsuits, has spiraled out of control and has not only increased the cost of health care, but has hindered physicians' ability to provide low-cost quality care to patients.⁴⁸ Such practices dilute the quality of patient care because each test and treatment imposes unnecessary medical risks to the individual patient.⁴⁹

IV. CONCLUSION

This country's health care system is in the midst of a crisis. The increasing cost of health care coupled with an overall economic slow down and rising federal deficit places great strains on the systems used to finance health care.⁵⁰ Major drivers of these costs include medical advances and consumer demand, government mandates and regulations, and litigation and risk management. In the following transcript, Dr. Brennan examines various efforts to contain health care costs, and then discusses the role of health law in bringing about rational health care reform.

48. ADDRESSING THE NEW HEALTH CARE CRISIS, *supra* note 22, at 9.

49. *Id.* at 9-10.

50. Gutierrez & Ranji, *supra* note 7.