

BILL ANALYSIS

C.S.H.B. 711
By: Frank
Health Care Reform, Select
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The National Academy for State Health Policy (NASHP) reports that since 2009, health insurance premiums have risen more than 50 percent while deductibles have gone up by 162 percent. Over this same period, wages have risen only 20 percent according to NASHP. A report on anticompetitive contracting practices from the Petris Center claims that consolidation in the health care and insurer markets is increasing and suggests that this consolidation has played a role in the skyrocketing costs of health care in America. The report suggests that regulating certain anticompetitive contract provisions such as gag clauses and most favored nations clauses could help restore competition and drive down costs. C.S.H.B. 711 seeks to prohibit the use of certain anticompetitive contract clauses.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 711 amends the Insurance Code to prohibit an applicable health care provider from doing any of the following with respect to a provider network contract:

- offering to a general contracting entity a written contract that includes an anti-steering, anti-tiering, gag, or most favored nation clause;
- entering into a contract that includes any such clause; or
- amending or renewing an existing contract previously entered into with a general contracting entity so that the contract as amended or renewed adds or retains such a clause.

The bill makes any provision in a provider network contract that is an anti-steering, anti-tiering, gag, or most favored nation clause void and unenforceable but specifies that the remaining provisions in the contract remain in effect and are enforceable. The bill establishes that a health benefit plan issuer has a fiduciary duty to the enrollee or policyholder to engage in conduct that encourages an enrollee to obtain a health care service from a particular provider or that introduces or modifies a tiered network plan or assigns providers into tiers only for the primary benefit of the enrollee or policyholder.

C.S.H.B. 711 sets out the following terms and definitions with respect to a provider network contract:

- "anti-steering clause" means a provision in a contract that restricts the ability of a general contracting entity to encourage an enrollee to obtain a health care service from a

competitor of the provider, including offering incentives to encourage enrollees to use specific providers;

- "anti-tiering clause" means a provision in a contract that restricts the ability of a general contracting entity to introduce or modify a tiered network plan or assign providers into tiers or that requires a general contracting entity to place all members of a provider in the same tier of a tiered network plan;
- "gag clause" means a provision in a contract that restricts the ability of a general contracting entity or provider to disclose out-of-pocket costs to an enrollee or price or quality information to a governmental entity as authorized by applicable law or its contractors or agents, an enrollee, a treating provider of an enrollee, a plan sponsor, or potential eligible enrollees and plan sponsors; and
- "most favored nation clause" means a provision in a contract that does any of the following:
 - prohibits or grants an option to prohibit a provider from contracting with another general contracting entity to provide health care services at a lower rate or a general contracting entity from contracting with another provider to provide health care services at a higher rate;
 - requires or grants an option to require a provider to accept a lower rate for health care services if the provider agrees with another general contracting entity to accept a lower rate for the services or a general contracting entity to pay a higher rate for health care services if the entity agrees with another provider to pay a higher rate for the services;
 - requires or grants an option to require termination or renegotiation of an existing provider network contract if a provider agrees with another general contracting entity to accept a lower rate for providing health care services or a general contracting entity agrees with a provider to pay a higher rate for health care services; or
 - requires a provider to disclose its contractual reimbursement rates with other general contracting entities or a general contracting entity to disclose its contractual reimbursement rates with other providers.

The bill defines "general contracting entity" as a person who enters into a direct contract with a provider for the delivery of health care services to covered individuals regardless of whether the person, in the ordinary course of business, establishes a provider network for access by another party. The term does not include a health care provider or facility unless the provider or facility is entering into the contract in the provider's or facility's role as a health benefit plan.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 711 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

Whereas the introduced included an all-or-nothing clause among the prohibited contract clauses, the substitute does not. The substitute also includes a clarification absent from the introduced that the prohibition against offering a general contracting entity a provider network contract with any of the prohibited clauses applies with respect to a written contract.

The substitute includes a provision absent from the introduced excluding from the definition of "general contracting entity" a health care provider or facility unless the provider or facility is entering into the contract in the provider's or facility's role as a health benefit plan.

The introduced included a provision establishing that a general contracting entity that encourages

an enrollee to obtain a health care service from a particular provider or that introduces or modifies a tiered network plan or assigns providers into tiers has a fiduciary duty to engage in conduct only for the primary benefit of the enrollee. The substitute makes this provision applicable instead to a health benefit plan issuer and makes the established fiduciary duty to both enrollees and policyholders.