Anticompetitive Managed Care Contracting Practices

Daniel G. Bird, Esq.

KELLOGG HANSEN

KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC

Employers' Forum of Indiana

August 19, 2020

Competitive Market for Health Care Services

Employers

Coverage

Employees

Care

Providers

Contracts/
Networks

Health Insurance Companies

Access

Access

KELLOGG HANSEN

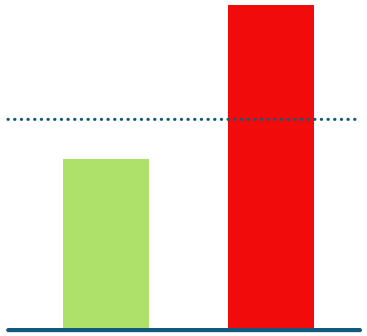
Competitive Market: “Tool Box” Full of Steering Tools

Information

1 **Price Transparency**

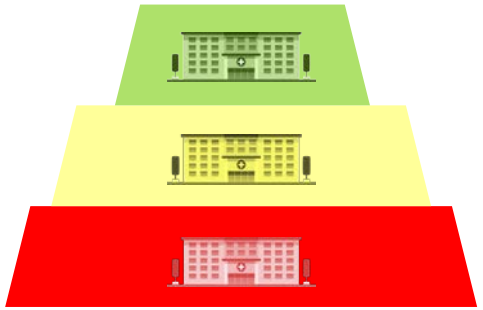
Information + Incentives

2 **Reference-Based Pricing**

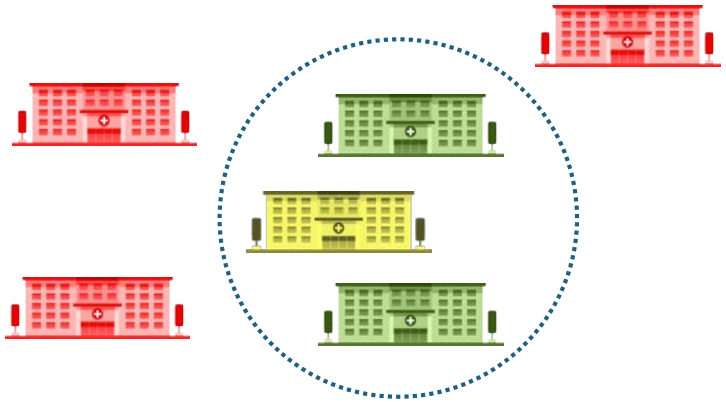


3 **Centers of Excellence**

4 **Tiered Networks**

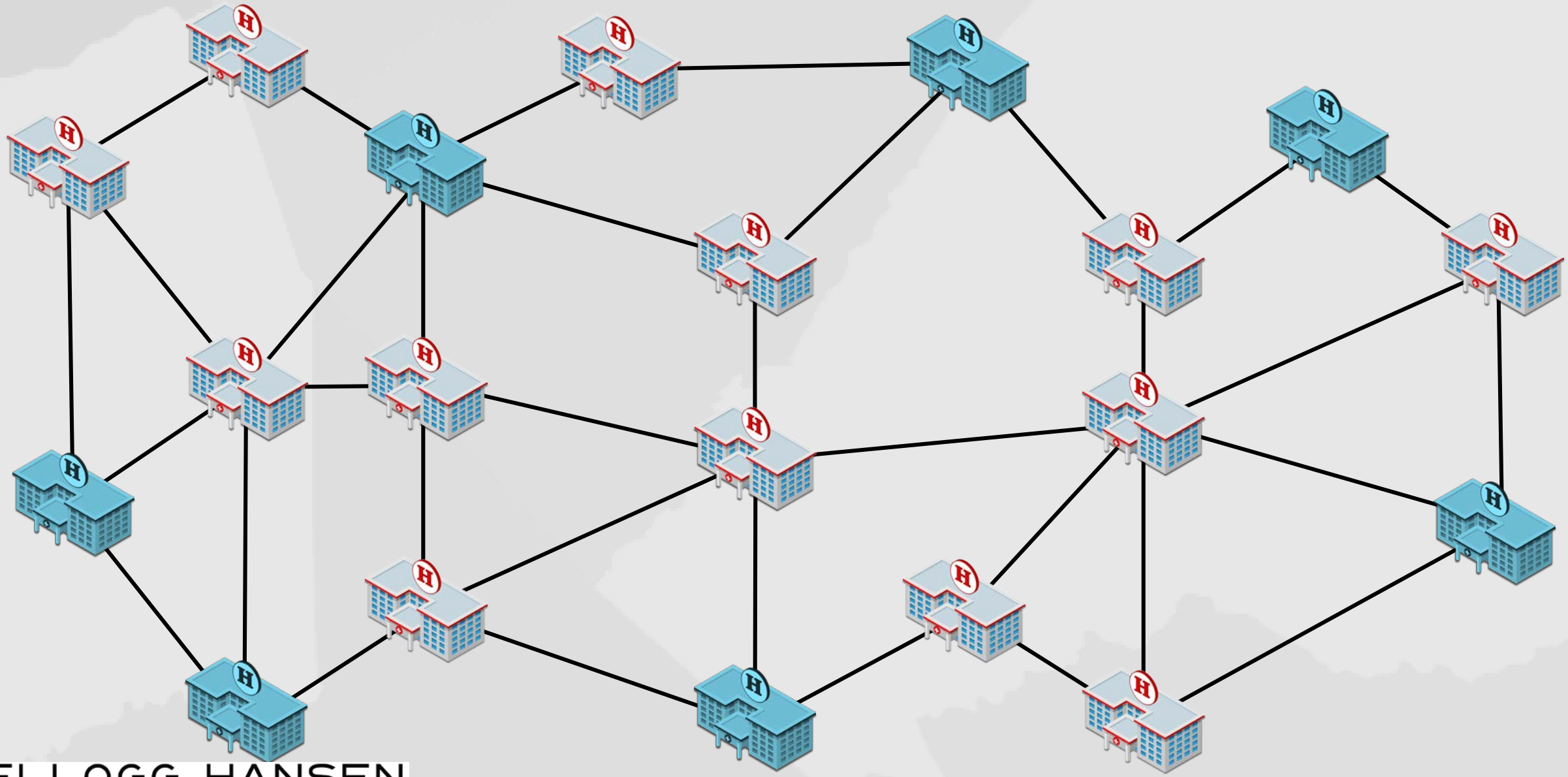


5 **Narrow Networks**



KELLOGG HANSEN

Hospital Networks



KELLOGG HANSEN

Hospital with Market Power

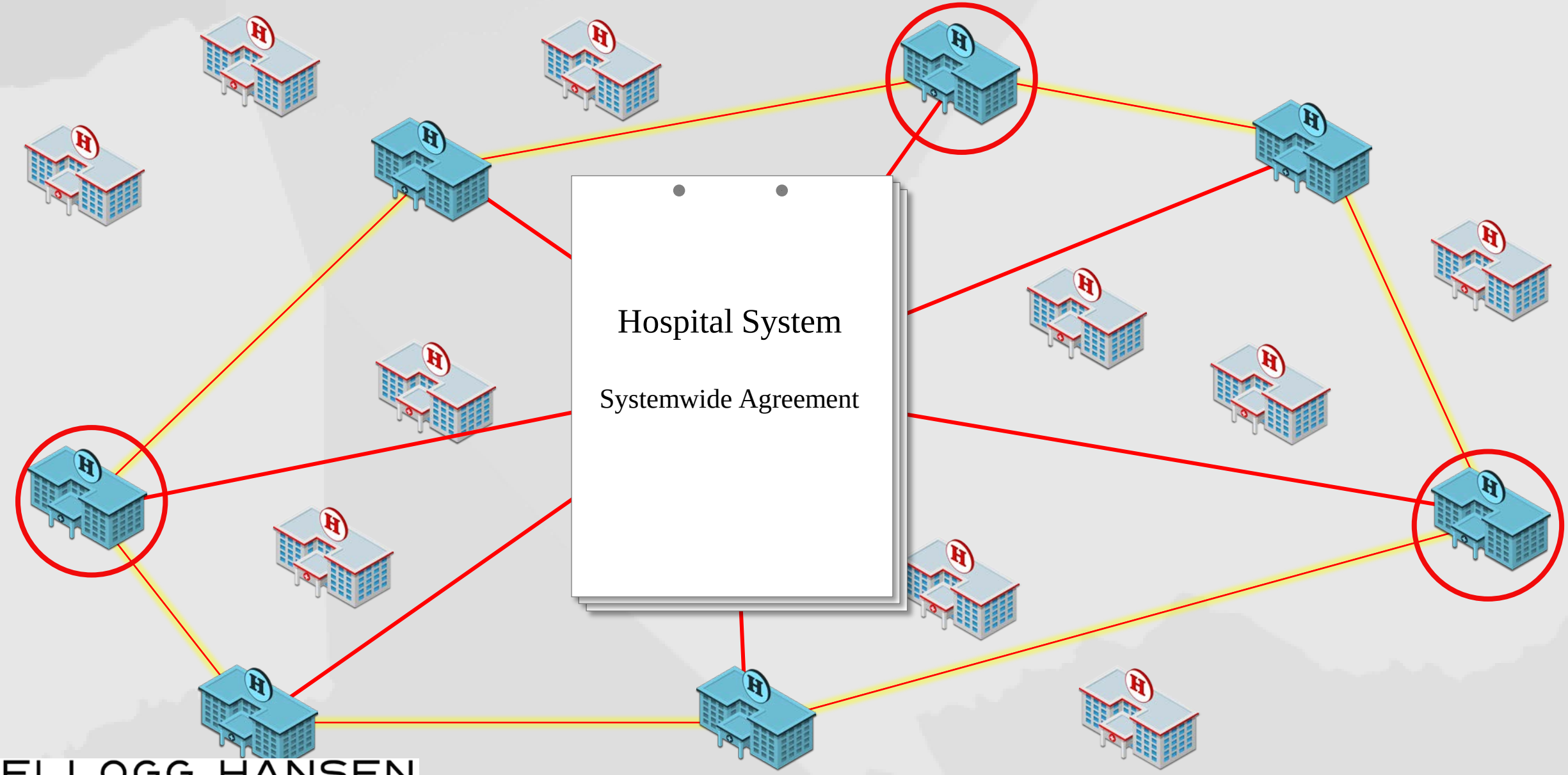
Geography

Prominence

"Must Have" Hospital = **Market Power**

KELLOGG HANSEN

Anticompetitive Hospital System



KELLOGG HANSEN

Signs of an Uncompetitive Market

Information	Information + Incentives

Empty “Tool Box”

Large Provider Systems

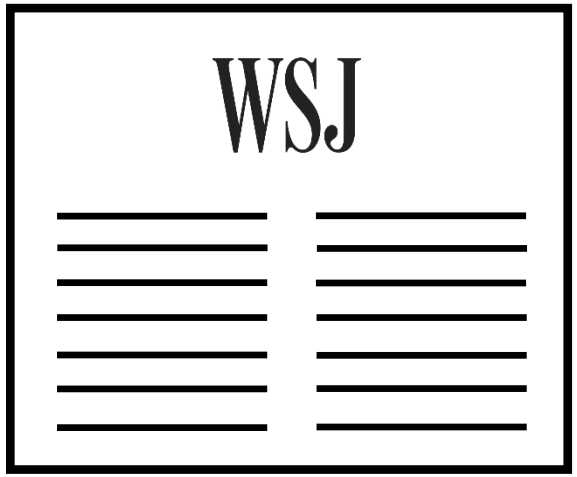
Unreasonably High Prices

Does Indiana Have an Uncompetitive Healthcare Market?

- [x] Studies show Indiana has high prices
- [x] Indiana has large provider systems
- [ ] Is Indiana's "tool box" empty?

<u>Key Question</u>: Are anticompetitive contracting practices impeding the ability of Indiana employers to use the tools that have been proven to boost competition, drive down prices, and improve provider quality?

Anticompetitive Contracting Practices



"Dominant hospital systems use an array of secret contract terms to protect their turf and block efforts to curb health-care costs." WSJ: *Behind Your Rising Health-Care Bills*.

"The effect of contracts between hospital systems and insurers can be difficult to see directly because negotiations are secret. The contract details, including pricing, typically aren't disclosed even to insurers' clients – the employers and consumers who ultimately bear the cost." WSJ: *Behind Your Rising Health-Care Bills*.

Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

Anticompetitive Contracting Practices

1. All-or-Nothing
2. Gag Clauses
3. Anti-Tiering/Anti-Steering
4. Facility Fees
5. New Acquisition Pricing

1. All-or-Nothing: What is it?

When a hospital system "require[s] all hospitals to be in the system if a single hospital is in the system. These clauses limit the ability of employers to design lower-priced networks." RAND 2.0, p. 6.

https://www.rand.org/pubs/research_reports/RR3033.html

"Health systems realized that as they grew, they could demand that insurers include all of their hospitals, physician networks and related businesses in their contracts or else they would lose their business." ModernHealthcare.com (Sept. 4, 2018)

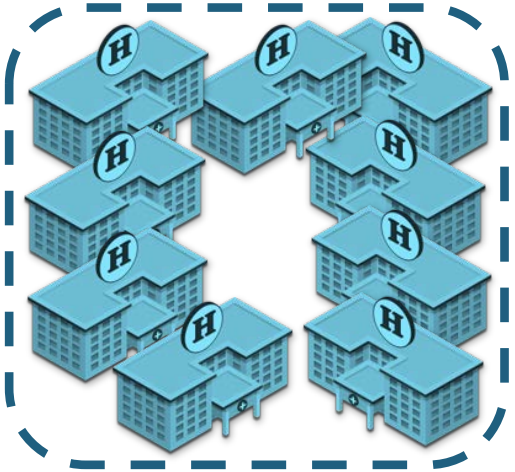
https://www.modernhealthcare.com/article/20180904/NEWS/180909986/health-systems-drivingprices-higher-with-physician-group-purchases

1. All-or-Nothing: What does it look like?

Competitive Hospitals

Health Insurance Network

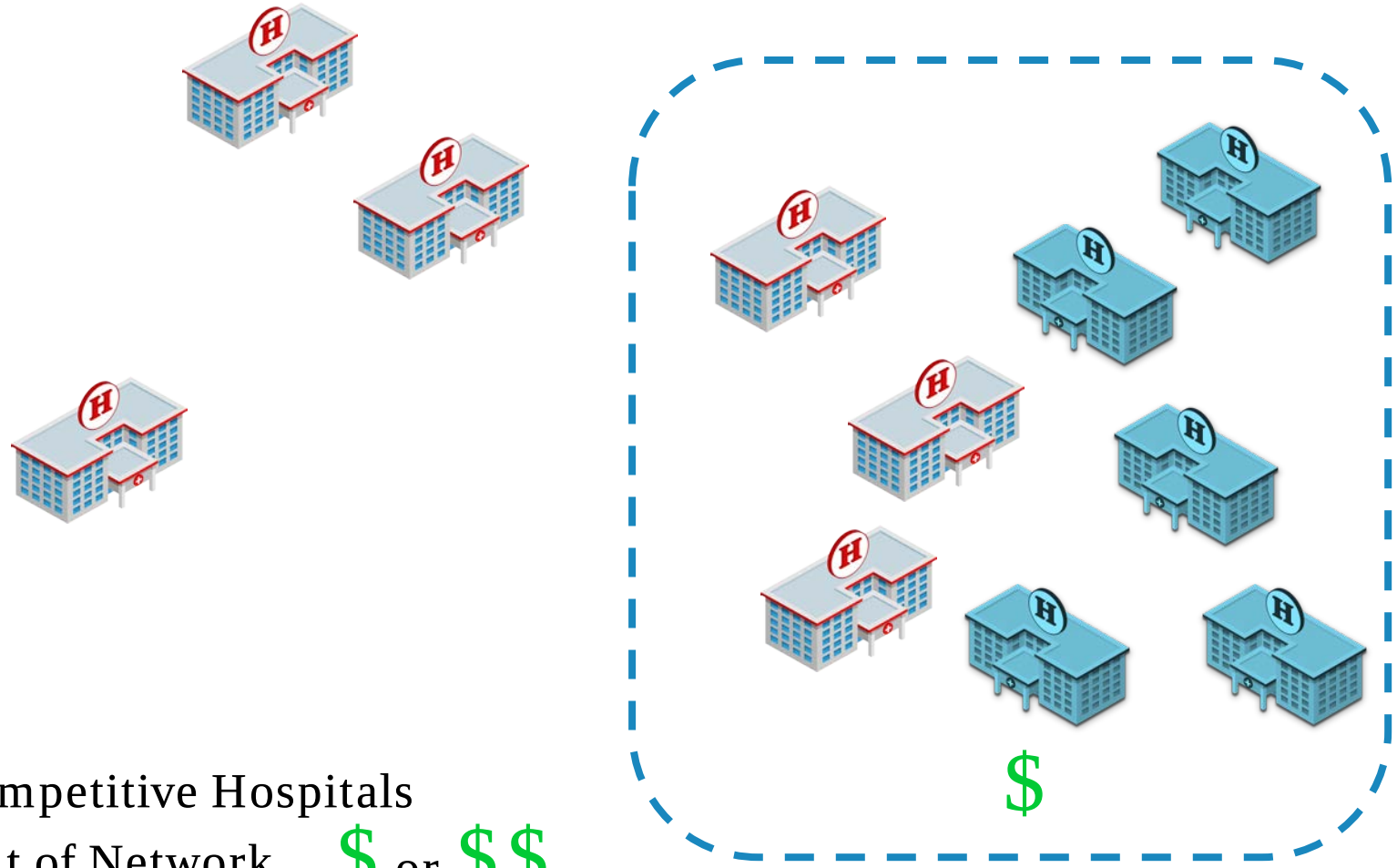
Anticompetitive Hospitals



Health Insurance Network

KELLOGG HANSEN

Excessive Out-of-Network Pricing Provisions



Out-of-Network Hospital

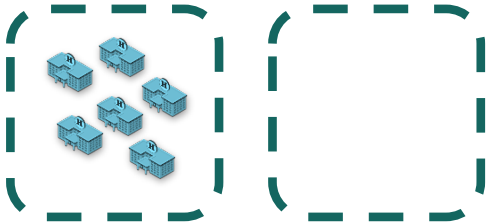
Competitive Hospitals
Out of Network $ or $$

Network

Anticompetitive Hospitals
Out of Network $$$$

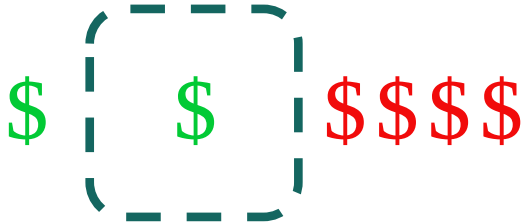
KELLOGG HANSEN

All-or-Nothing ≈ Excessive OON Rate



All-or-Nothing

- Limits narrow networks
- Inflates prices
- Hurts competition



Excessive OON Rate

- Limits narrow networks
- Inflates prices
- Hurts competition

1. All-or-Nothing: Is it happening in Indiana?

In Indiana, "three of the four health systems have developed a statewide footprint that extends beyond the Indianapolis region. These statewide networks are often used as a point of leverage in negotiations with the insurers to secure 'all-or-nothing' contractual provisions that require inclusion of all the system's facilities in a network." Indianapolis Case Study p. 3.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

In Indiana, "many current contracts are with health care systems, so if an employer or insurer wants access to one facility in a health system it has to accept all hospitals in the same system." Managed Care Mag (November 15, 2019)

https://www.managedcaremag.com/archives/2019/10/employer-groups-hospitals-your-prices-are-too-darn-high

1. All-or-Nothing: Why is it harmful?

- Raises the cost of health care

WSJ

"A health plan that excludes a costly system can be more than 10% less expensive for consumers and employers, according to insurance-industry officials."

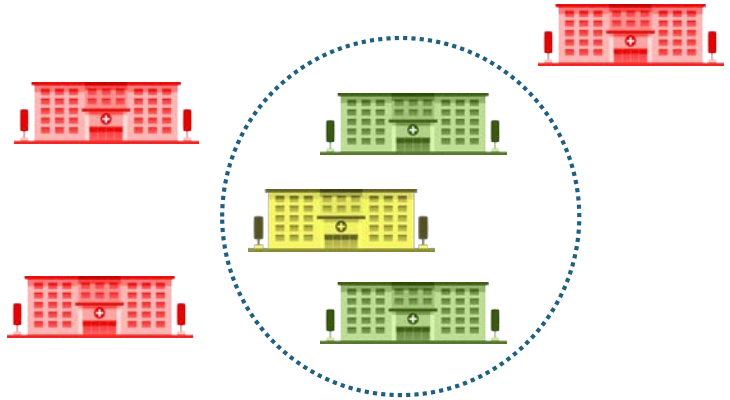
"If their costs are 50% higher for the same service, you have to include them. That cost is directly built into premiums . . . in the end the buyer of the service pays that."

https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963

1. All-or-Nothing: Why is it harmful?

- Raises the cost of health care

- Difficult /expensive to exclude high-cost providers and form narrow networks



2. Gag Clause: What is it?

A. Tight confidentiality provision that makes it difficult for employers to learn prices they are paying

"[M]any contracts between large provider systems and insurers actually prohibit sharing detailed pricing information with employers or patients." RAND 2.0, p. 1.

https://www.rand.org/pubs/research_reports/RR3033.html

2. Gag Clause: What is it?

A. Tight confidentiality provision that makes it difficult for employers to learn prices they are paying

B. Limits participation in price transparency tools that would enable patients to comparison shop

WSJ

"In some cases, contract clauses prevent patients from seeing a hospital's prices by allowing a hospital operator to block the information from online shopping tools that insurers offer. Because of such restrictions, some health-insurance enrollees can't find prices for hospital systems." WSJ: *Behind Your Rising Health-Care Bills.*

https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963

2. Gag Clause: Is it happening in Indiana?

"Despite spending more than half a billion dollars on hospital care over a three-year period, the [Indiana] employers participating in this study have limited or no information about the prices they are paying for that care." RAND 1.0, p. 1.

Chapin White, "Hospital Prices in Indiana," *RAND 1.0* (2017), *https://www.rand.org/pubs/research_reports/RR2106.html*

"Most contracts [in Indiana] between health plans and hospitals are loaded with nondisclosure agreements, so hospitals and insurers tell employers that they can't – or won't – disclose the prices they pay." Managed Care Mag (November 15, 2019)

https://www.managedcaremag.com/archives/2019/10/employer-groups-hospitals-your-prices-are-too-darn-high

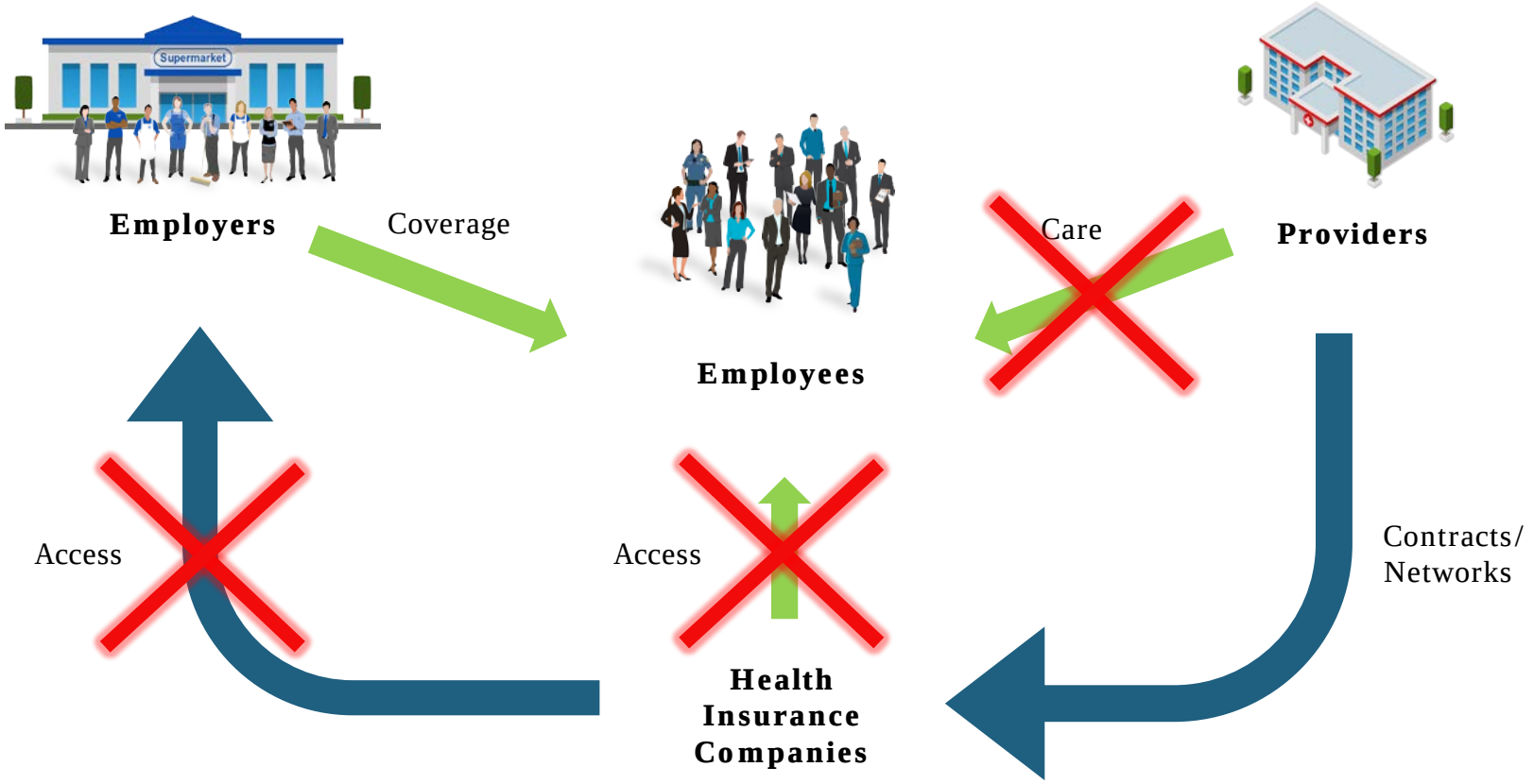
2. Gag Clause: Is it happening in Indiana?

"A health provider contract, including a contract with a pharmacy benefit manager or a health facility, may not contain a provision that prohibits the disclosure of health care service claims data to employers providing the coverage. . . ." Ind. St. § 27-1-37-7(b).

- This is a good start, especially in conjunction with APCD
- Prohibits a prohibition on the disclosure of claims data
  - Doesn't require disclosure
  - Doesn't prevent limitations or burdensome procedures on disclosure
- Limited to claims data
  - Doesn't address disclosure of contract rates
  - Doesn't address price transparency tools

2. Gag Clause: Why is it harmful?

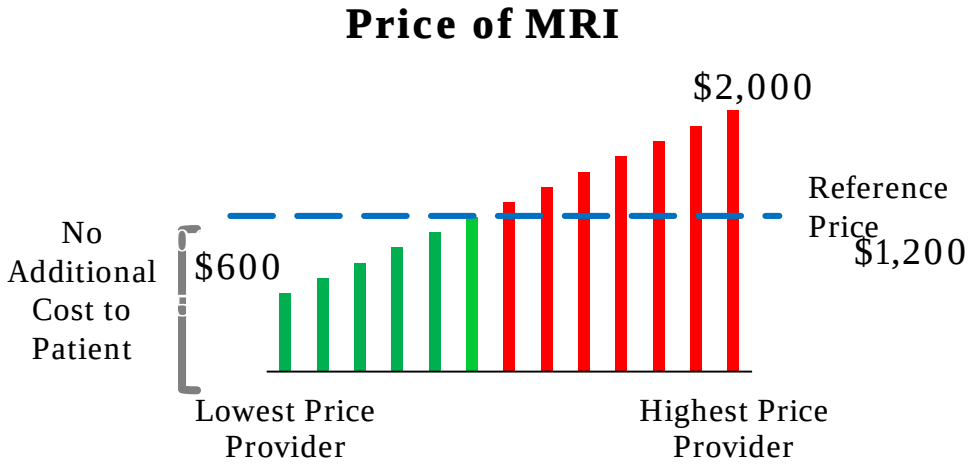
- Difficult for **employers and employees** to comparison shop among health plans and providers



2. Gag Clause: Why is it harmful?

- Difficult for **employers and employees** to comparison shop among health plans and providers

- Difficult for **health plans** to offer tools that enable price competition (e.g., <u>price transparency</u>, <u>reference pricing</u>)



KELLOGG HANSEN

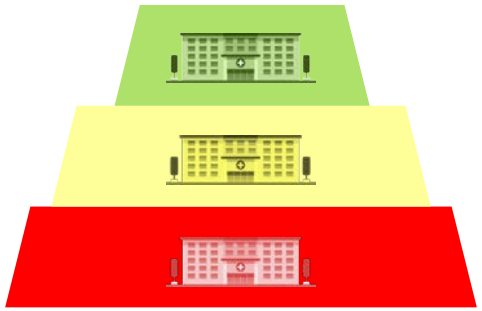
3. Anti-Tiering/Anti-Steering: What is it?

WSJ

"Among the secret restrictions are so-called anti-steering clauses that prevent insurers from steering patients to less-expensive or high-quality health-care providers." WSJ: *Behind Your Rising Health-Care Bills*.

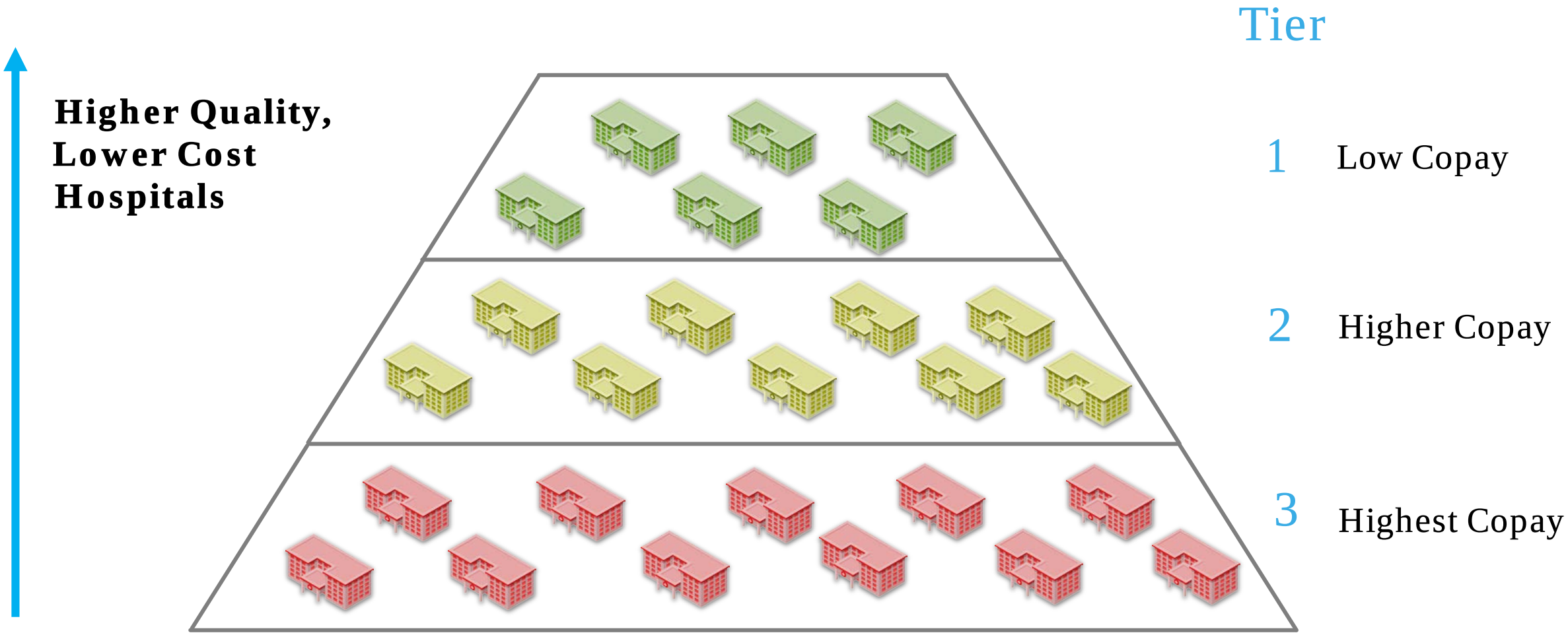
A. Anti-tiering

"They also hinder plans that offer incentives such as lower copays of patients to use less-expensive or higher-quality health-care providers." WSJ: *Behind Your Rising Health-Care Bills*.



Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

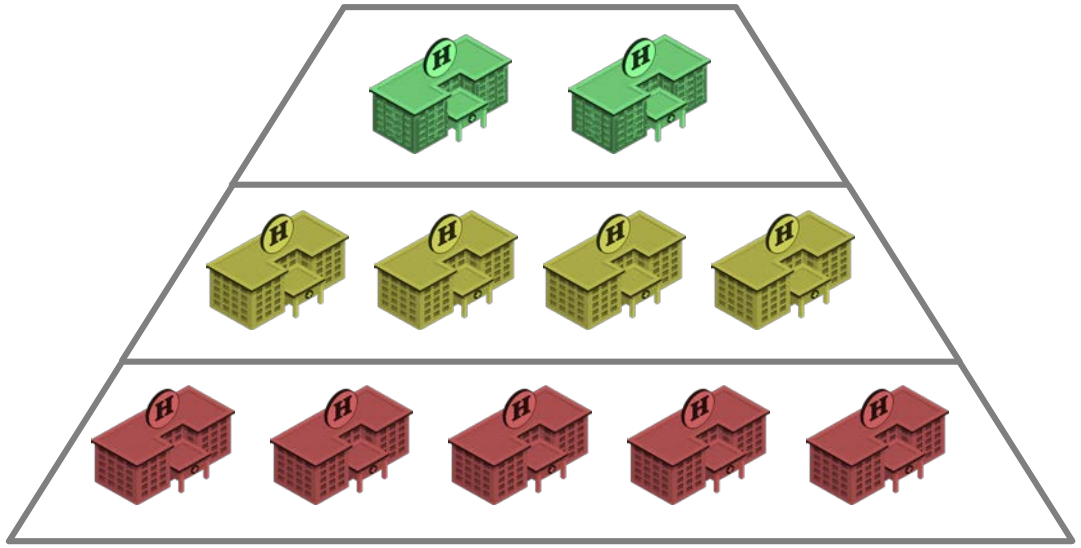
3. Anti-Tiering: What does it look like?



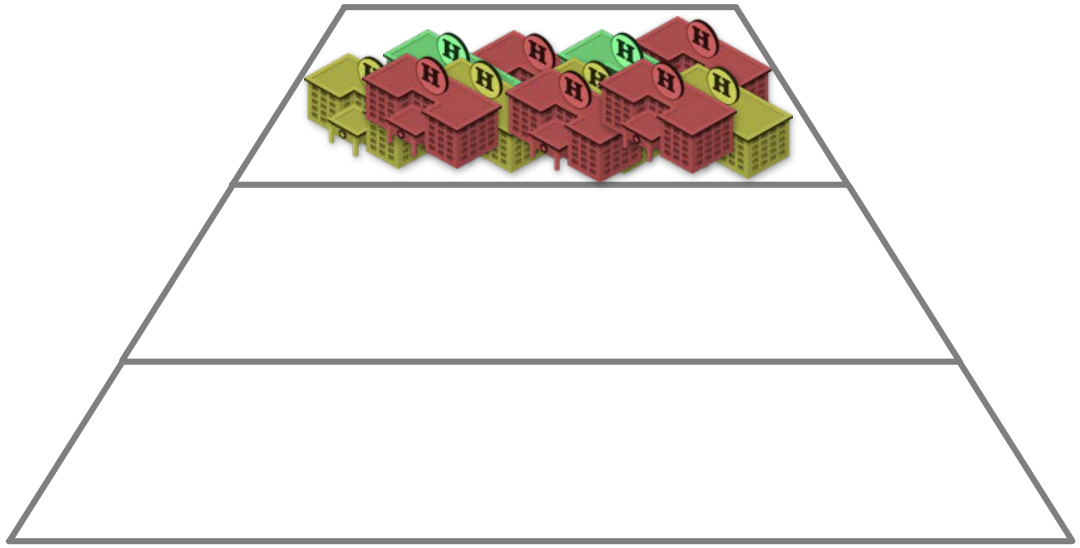
KELLOGG HANSEN

3. Anti-Tiering: What does it look like?

Competitive Hospitals



Anticompetitive Hospitals



KELLOGG HANSEN

3. Anti-Tiering/Anti-Steering: What is it?

WSJ

"Among the secret restrictions are so-called anti-steering clauses that prevent insurers from steering patients to less-expensive or high-quality health-care providers." WSJ: *Behind Your Rising Health-Care Bills*.

B. "Centers of Excellence"

"The restrictive contracts sometimes require that every facility and doctor in the contracting hospital system be placed in the most favorable category, with the lower out-of-pocket charges for patients – regardless of whether they meet the qualifications." WSJ: *Behind Your Rising Health-Care Bills*.

Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

3. Anti-Steering: What does it look like?

KELLOGG HANSEN

3. Anti-Tiering: Is it happening in Indiana?

MANAGED Care

"'We have a huge problem in Indiana because we have wide-open networks,' Sachdev says. 'The employers don't have any narrow or tiered networks or centers of excellence.' . . . [T]here is minimal tiering." Managed Care Mag (November 15, 2019)

https://www.managedcaremag.com/archives/2019/10/employer-groups-hospitals-your-prices-are-too-darn-high

3. Anti-Tiering/Anti-Steering: Why is it harmful?

- Raises costs and eliminates competition on price and quality

WSJ

"A plan that includes all providers but steers patients away from the costlier ones can save 3% to 7% or more," according to insurance-industry officials. WSJ: *Behind Your Rising Health-Care Bills*.

Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

3. Anti-Tiering/Anti-Steering: Why is it harmful?

- Raises costs and eliminates competition on price and quality

- Removes consumer signaling
  - If providers don't participate – employees don't know price and quality status
  - If providers insist on top tier/COE status – employees won't realize what they're paying for

4. Facility Fee: What is it?

WSJ

"[H]ospitals often receive extra charges, known as 'facility fees,' that are supposed to cover the extra costs associated with care given in a hospital setting, including regulatory and safety standards that apply to hospitals. Hospitals can often impose these fees after they acquire an off-site clinic or office." WSJ: *Behind Your Rising Health-Care Bills*.

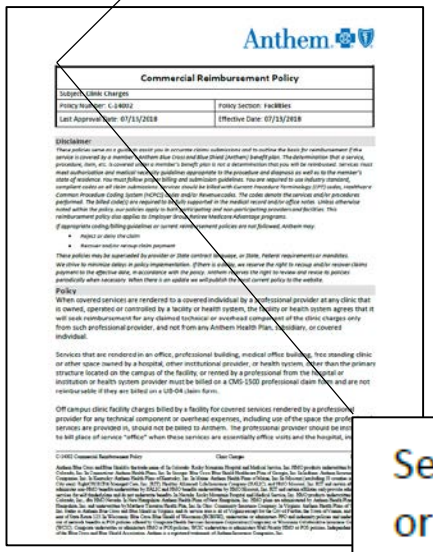
https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963

Modern Healthcare
The leader in healthcare business news, research & data

"Some of the price increases stem from facility fees, which are higher reimbursement rates meant to account for a hospital's overhead. They are also influenced by market clout and brand power, [Richard Scheffler] said." ModernHealthcare.com (Feb. 12, 2019)

https://www.modernhealthcare.com/article/20190212/NEWS/190219994/employer-sponsored-healthcare-spending-reaches-record-high

4. Facility Fee: What does it look like?



Anthem

Commercial Reimbursement Policy

Subject: **Clinic Charges**	
Policy Number: **C-14002**	Policy Section: **Facilities**
Last Approval Date: **07/13/2018**	Effective Date: **07/13/2018**

Services that are rendered in an office, professional building, medical office building, free standing clinic or other space owned by a hospital, other institutional provider, or health system, other than the primary structure located on the campus of the facility, or rented by a professional from the hospital or institution or health system provider must be billed on a CMS-1500 professional claim form and are not reimbursable if they are billed on a UB-04 claim form.

https://www11.anthem.com/provider/noapplication/f0/s0/t0/pw_b157046.pdf?refer=ahpmedprovider&state=mo

4. Facility Fee: Is it happening in Indiana?

In Indiana, "[t]he hospital systems have also used 'facility fees,' where payers are charged an extra fee for services delivered in a hospital-owned clinic, to generate more revenue. As one observer put it, hospitals saw 'there was a lot of money to be made [having] physicians under the hospital's roof.' Others noted that insurers initially fought these facility fees, but 'didn't have anything to push back with,' and eventually capitulated." Indianapolis Case Study p. 4.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

4. Facility Fee: Why is it harmful?

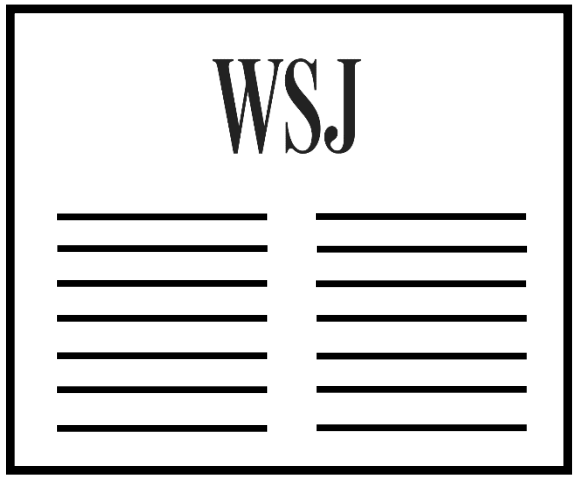
- Pay more for the same service at facilities that don't qualify for facility fees
- Creates an incentive for vertical integration by powerful hospital systems

WSJ

"Hospitals can often impose these fees after they acquire an off-site clinic or office." WSJ: *Behind Your Rising Health-Care Bills*.

Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

5. New Acquisition Pricing: What is it?



"Hospital systems have also been snapping up other types of providers, including doctor practices, clinics and outpatient surgery centers, and raising these providers' prices." WSJ: *Behind Your Rising Health-Care Bills.*

"In many cases, insurer-hospital contracts allow hospitals to move these new acquisitions immediately to the hospitals' reimbursement rates – which are typically far more generous for the same services. That leads to a fast markup in prices." WSJ: *Behind Your Rising Health-Care Bills.*

Anna Wilde Mathews, "Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition," *Wall Street Journal* (Sept. 18, 2018), *https://www.wsj.com/articles/behind-your-rising-health-care-bills-secret-hospital-deals-that-squelch-competition-1537281963*

5. New Acquisition Pricing: Is it happening in Indiana?

"As in the rest of the country, hospitals in Indianapolis have established and tightened their relationships with physician practices and used those relationships to drive referrals within their systems." RAND 1.0, p. 3.

https://www.rand.org/pubs/research_reports/RR2106.html

In Indiana, "costs have increased because acquired physicians now refer patients within their health system rather than to the lowest-cost provider. Thus, instead of referring a patient to a lower-cost free-standing MRI facility, hospital-employed physicians refer the patient within the hospital system, even if the MRI costs 40 percent more." Indianapolis Case Study p. 4.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

5. New Acquisition Pricing: Why is it harmful?

- Acquisitions→ increased leverage → "all-or-nothing" contracting → higher prices

MANAGED Care

"'What happens is once health systems get all-or-nothing contracts, then they add in the physician groups and other businesses like home health,' said Glenn Melnick, a professor at the University of Southern California . . . . 'For these big systems that can be an $8 billion to $10 billion contract. Vertical integration gives them the power to exact higher prices.'"

https://www.modernhealthcare.com/article/20180904/NEWS/180909986/health-systems-driving-prices-higher-with-physician-group-purchases

5. New Acquisition Pricing: Why is it harmful?

- That's exactly what some have observed in Indiana.

"The systems' acquisitions of other Indiana hospitals outside the metropolitan region were strategic, with on observer noting that 'communities where there was a [hospital] monopoly' were targeted and then used to negotiate 'tying contracts' with payers, meaning that payers wishing to contract with the 'must have' hospital in one community were required to include all the hospitals in the system in their networks." Indianapolis Case Study p. 4.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

Effects of Anticompetitive Contracting Practices

Effects of Anticompetitive Contracting Practices

Georgetown University Health Policy Institute
CENTER ON HEALTH INSURANCE REFORMS

"[T]he lower-priced systems have used the [RAND] data to seek reimbursement levels closer to their higher priced peers." Indianapolis Case Study p. 5.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

Potential Provider Responses

- Lack of market power
- Necessary to shift costs to commercial payers to offset Medicare/Medicaid losses
- Employers/employees don't want narrow/tiered networks
- Clinical integration and coordination of care
- Total cost of care
- Quality of care
- High-cost, low-health population (e.g., obesity, smoking)
- Powerful insurance companies are to blame

Recommendations for Indiana

2017: In the next 2-5 years, try to "move patient volume away from high-priced hospitals and hospital systems" by "narrowing hospital networks," by tiering, and by using "reference-pricing." RAND 1.0, p. 16.

Employers' "leverage" to do so "may be lacking in negotiations with geographically dominant 'must-have' systems . . . ." RAND 1.0, p. 17.

https://www.rand.org/pubs/research_reports/RR2106.html

2019: "The Indianapolis commercial health care market is at a crossroads." Indianapolis Case Study p. 6.

http://chirblog.org/wp-content/uploads/2020/02/GtownCHIR_ProviderConsolidation_Indianapolis_Jun2019.pdf

Recommendations for Indiana

- *Fill Indiana's "tool box" with steering tools*
- *Protect/incentivize those steering tools with legislation*
  1. "All or nothing" contracting
  2. Gag clauses
  3. Anti-tiering/anti-steering
  4. Facility fees
  5. New acquisition pricing
- *Antitrust enforcement and merger oversight*
  - Public
  - Private