

New Jersey Lawmakers Propose Bill Complicating Out-of-State Medical Care



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A group of New Jersey lawmakers recently introduced the Patient Protection Act (A5369, S3816), which would make it more difficult for doctors to transfer or refer patients to out-of-state providers or facilities.

The bill would declare that surprise out-of-network charges pose problems for patients who are transferred or referred to facilities or providers outside of New Jersey, and, thus, it is in the public interest to enhance consumer protections surrounding out-of-state care. The bill would require New Jersey health care professionals to provide patients, insurance companies and state agencies with certain information before transferring or referring a patient to an out-of-state provider or facility.

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For example, health care professionals would need to inform patients, in writing, of:

- the patient's right to receive medical care from a professional or at a facility of the patient's choosing
- the clinical basis for the proposed transfer or referral
- the availability of clinically appropriate services by professionals or at facilities anywhere in New Jersey or, in the case of transfer, a determination that no such services are available in the state
- the location of the out-of-state professional's office or the out-of-state facility
- the nature of the relationship, if any, between the referring or transferring facility or professional and the out-of-state facility or professional.

Additionally, New Jersey health care professionals would need to inform the patient's health insurance carrier of the pending transfer or referral and facilitate communication between the patient and the carrier regarding the network participation status of the out-of-state professional or facility, whether the services are covered by the patient's plan, and any estimated out-of-pocket costs the patient may incur.

Finally, the bill would require New Jersey professionals and facilities to regularly report their out-of-state transfers and referrals to the Department of Health, which would forward this information to the Division of Consumer Affairs in the Department of Law and Public Safety. Both agencies would be required to post this information online.

The bill would apply broadly, with the only exception being for pediatric care — an exception driven by the fact that New Jersey does not have any standalone children's hospitals.

The bill supplements the Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act, N.J.S. § 26:2SS-1, et seq., which similarly notes the legislature's concern about surprise out-of-network charges and imposes disclosure requirements on New Jersey facilities and providers. For instance, among other disclosures, before scheduling or providing nonemergency services, health care facilities and professionals must disclose their network participation status to patients.¹ If facilities or providers are out-of-network, they must inform patients of their financial responsibility

for services and advise patients to consult their insurance carriers for further information.² Facilities must also make publicly available lists of their standard charges and post on their websites the insurance plans in which they participate and statements that physicians may or may not participate in the same plans.³

If the Patient Protection Act is signed into law, it could raise important and serious constitutional questions. It may implicate the dormant Commerce Clause, which “limits the power of the States to discriminate against interstate commerce” and “prohibits economic protectionism.”⁴ Under the dormant Commerce Clause, a law that regulates evenhandedly “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁵ In contrast, a law that facially discriminates against interstate commerce will be struck down unless it is “justified by a valid factor unrelated to economic protectionism.”⁶ Such a law must be narrowly tailored to “advance[e] a legitimate local purpose.”⁷ For example, the U.S. Supreme Court recently struck down a state’s two-year residency requirement for obtaining a liquor license as unconstitutional, finding the requirement “blatantly favors the State’s residents and has little relationship to public health and safety.”⁸

Notably, arguments for and against the bill parallel the dormant Commerce Clause test.

Proponents of the bill argue it protects patients by keeping them better informed about health care decisions, and the bill itself states that it serves the public interest. CEOs of three major New Jersey hospitals have advocated in favor of the bill, stating it provides patients with “significant rights they currently lack” and “will help many patients make an informed choice to stay close to home for excellent, affordable health care.”

Meanwhile, opponents of the bill argue it was designed to benefit in-state hospitals and clinicians by making it more difficult to receive care in New York or Philadelphia. Opponents also argue the bill will harm patients by delaying or preventing New Jersey residents from receiving life-saving medical care across state lines, even when an out-of-state hospital is closer than a New Jersey facility providing the same services. Maura Collingsgru, health program director for the consumer advocacy group New Jersey Citizen Action, described the bill as “protectionist” and stated her group is “actively working to stop [it].”

Acknowledging potential dormant Commerce Clause concerns, the New Jersey Legislative Counsel issued a June 19, 2019 opinion concluding that the Patient Protection Act does not violate the dormant Commerce Clause because it would not

impose requirements on out-of-state actors, would not prevent out-of-state transfers, and would supplement existing law that requires in-state facilities and providers to disclose similar information to patients. The opinion also states that, to the extent compliance with the bill would burden out-of-state transfers, “the burden imposed is far outweighed by the State’s interest in protecting consumer patients against unforeseen and avoidable financial hardship.”

Whether the bill will be signed into law and withstand constitutional challenges remains to be seen.

Endnotes

- 1 N.J.S. §§ 26:2SS-4(a), 26:2SS-5(a).
- 2 N.J.S. §§ 26:2SS-4(a)(4), 26:2SS-5(a)(3)-(4).
- 3 N.J.S. § 26:2SS-4(b), (c).
- 4 *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).
- 5 *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- 6 *Limbach*, 486 U.S. at 274.
- 7 *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008) (citation omitted).
- 8 *Tennessee Wine & Spirits Retailers Assoc. v. Thomas*, No. 18-96, slip op. at 2 (June 26, 2019).

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