

A Fresh Take on Health Care Price Transparency

Author : Amy Monahan

Date : June 25, 2018

Wendy Netter Epstein, [*Price Transparency and Incomplete Contracts in Health Care*](#), 67 **Emory L.J.** 1 (2017).

The lack of price transparency in health care is well established. Patients are almost never informed of the cost of their care prior to receiving services. Even if a patient makes a concerted effort to determine price prior to receiving care, most are told that price information is simply unavailable. This lack of transparency results in a long list of negative consequences for both patients and the health care system as a whole.

[Wendy Netter Epstein](#)'s article, *Price Transparency and Incomplete Contracts in Health Care*, revisits this well established problem from a novel perspective. The article examines the lack of price transparency between providers and patients through contract theory. After all, when a patient seeks medical care, she signs a contract with an unspecified price term. Most contracts simply require the patient to pay whatever the provider ends up charging. While such incomplete contracts are deemed unenforceable in many other contexts, Professor Epstein explains that courts uniformly allow open-price contracts for medical care, often based on incorrect assumptions about the inability to ever know the cost of care in advance. The article then relies on contract theory to propose a solution: courts should, in appropriate cases, adopt a penalty default rule that provides a price of zero where the price term is unspecified. A default price of zero would essentially force providers to include price in the contract, so that consumers are aware prior to receiving care the financial consequences thereof.

The article is a great read for anyone who wants to know more about what health care pricing looks like from a patient's perspective, and to understand why price opacity harms both patients and the health care market. But I found two aspects of the article particularly valuable. The first is that Professor Epstein repeatedly challenges the assumption that we simply cannot know the price of medical care in advance. This assumption is everywhere in health care. We can't know the price because we don't know what insurance you have, and therefore we don't know which negotiated rate you are eligible to receive. And, more fundamentally, we can't know the price because we don't know what services the doctor is going to provide. Professor Epstein pushes against these assumptions in a thoughtful, nuanced way. First, she explains that while some care is unknown in scope (e.g., a patient presenting at the emergency room following a car accident with unknown injuries, or a patient undergoing exploratory surgery), most medical care is not. For example, there is no reason why a patient coming in for a screening mammogram could not be given at least a cost estimate prior to receiving care. Second, she argues that the claimed inability to know negotiated prices is overblown. Providers, after all, have the relevant insurance information. They just need to query the relevant data. The article does not suggest we can always know price in advance, but it makes a compelling case that, for much of health care, we can disclose price (or at least an estimate thereof) with relatively little burden.

The other particularly valuable contribution of this article is its central thesis—that in examining price from a contractual perspective, we can come up with a solution that strongly encourages the types of contracts we have reason to believe are most efficient. Specifically, Professor Epstein argues that, in certain cases, courts should adopt a penalty default that "fills in" a price of zero in contracts that fail to specify price. While this may sound like an extreme position (if you don't specify price, you don't get

paid!), the actual proposal is careful and refined. Professor Epstein offers a framework for determining when the penalty default should be applied, and acknowledges that it would not be appropriate in all circumstances. The three factors she would use to determine whether imposing a penalty default is appropriate are (1) the transaction costs associated with providing a price *ex ante*, (2) the extent of information asymmetry between the parties, and (3) the potential that leaving out a price term will serve to build positive relational capital between the parties. Each of these factors is explored in depth in the article.

It may be an uphill battle to have courts adopt this approach, but this article provides good food for thought for anyone interested in the issue of price transparency in health care. As Professor Epstein points out in a footnote, some states require written price estimates for auto repair services prior to work being performed. Why not for health care?

Cite as: Amy Monahan, *A Fresh Take on Health Care Price Transparency*, JOTWELL (June 25, 2018) (reviewing Wendy Netter Epstein, *Price Transparency and Incomplete Contracts in Health Care*, 67 **Emory L.J.** 1 (2017)), <https://health.jotwell.com/a-fresh-take-on-health-care-price-transparency/>.