How the Law Contributes to Our Ever-Rising Health Care Costs

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William M. Sage, *Explaining America's Spendthrift Health Care System: The Enduring Effects of Public Regulation on Private Competition*, **Healthcare Finance** (forthcoming 2019), available at SSRN.

Do you ever wonder why our healthcare system costs double that of many other industrialized nations, yet the health of Americans is faltering? Why has our healthcare not progressed in terms of safety, efficiency, affordability, or equity in the last 20 years? In his forthcoming chapter in *Healthcare Finance*, Bill Sage argues that rather than the failings of partisan politics or corporate greed, our nation's healthcare system struggles to provide quality care for a reasonable price in large part due to an inefficient legal infrastructure that hinders competition and distorts the collective investment in population health. Specifically, Sage critiques "the accumulation of laws, regulations, self-regulatory practices, and financial subsidies which locks US health care into inefficient, unfair patterns and practices."

What follows in this impressively short, yet comprehensive, chapter is a description of how shifts in our understanding of the cost drivers in healthcare and the resultant healthcare reform efforts have created an inextricable web of laws and regulations that make healthcare so complicated and expensive. Beginning with the Affordable Care Act (ACA), Sage details the key provisions that sought to address the challenges facing health and healthcare in the US in 2010. He then points out that the ACA's approach to national reform reflected a major shift in expert understanding of the US healthcare system in the past 20 years, and that the "dramatic implications of this new knowledge are not explicitly acknowledged in public policy debates." The ACA's policies transitioned the dominant health reform paradigm from one of a "three-legged stool" of tradeoffs between cost quality and access to the Triple Aim which sought policies that improved population health, improved the patient experience, and reduced costs simultaneously. This new paradigm captured the attention and focus of policymakers, telling them that eliminating "waste, fraud, and abuse" could improve healthcare quality and reduce costs. Under this paradigm, the fix could come from curbing overutilization, promoting efficiency, and expanding preventive care.

The crux of Sage's argument is that we must go further—to really fix the ills of the US healthcare system, we must also look closely at and challenge the laws and regulations that constrain it. Sage discusses how a litany of laws, regulations and legal standards contribute to the dysfunction of our healthcare system, including scope of practice laws, physician privileges, corporate practice of medicine laws, certificate of need, tax-exempt and non-profit status for hospitals, tax benefits of employer sponsored insurance, physician-hospital employment arrangements, defining the standard of care as "customary practice," unfettered consolidation, and physician, clinic and hospital licensing requirements. (All the things we health law professors teach about every day.) Sage discusses how many of these laws and other common occurrences in medical practice greatly hinder competition and market efficiency. While it will take great political will and fortitude to overturn these laws and practices, we must give each of them a hard look to see how they contribute to the problem, and whether they are hurting more than helping.

Finally, Sage identifies three key lessons for future policy and practice reform efforts: 1) National health reform models should align around the task of "facilitating decentralized, incremental improvement rather than asserting a national political consensus on setting limits"; 2) DOJ and FTC should pursue long term strategies to reverse the market distortions that currently burden competition; and 3) America needs to stop over-medicalizing social and economic problems like poverty, lack of education, and substandard or lack of housing, and instead invest dollars spent on healthcare to alleviate these conditions more appropriately in non-medical social services.

Perhaps these are the places to start. While there is plenty of blame to go around when we look at the problems facing

the US healthcare system, I, for one, agree with Bill Sage that we should start looking at “the deep legal architecture of US health care” to help us find some of our answers.

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