SUBJECT: Extending the law authorizing joint negotiation by physicians

COMMITTEE: Insurance — favorable, without amendment

VOTE: 8 ayes — Smithee, Seaman, Bonnen, Gallego, Keffer, Taylor, Thompson, Van Arsdale

0 nays

1 absent — Eiland

SENATE VOTE: On final passage, March 27 — 31-0, on Local and Uncontested Calendar

WITNESSES: None

BACKGROUND: Federal antitrust laws prohibit physicians from jointly negotiating contractual arrangements with insurers unless state law specifically authorizes them to do so. The Sherman Act of 1890, which prohibits contracts or combinations that restrain interstate trade or commerce, limits the ability of physicians to negotiate jointly with health-benefit plans. Individual physicians can negotiate on their own, and groups of physicians, such as independent provider associations or individual practice associations (IPAs), can negotiate contract terms for their members. IPAs, however, are subject to strict federal guidelines on the sharing of proprietary information and to prohibitions against price-fixing. Groups of physicians that are not organized into an IPA may not negotiate jointly with health-benefit plans and may violate antitrust laws if they discuss among themselves the terms or conditions of their contracts with health-benefit plans.

Physicians may seek advisory opinions from the Federal Trade Commission on whether their actions would violate antitrust laws. The penalty for violating antitrust law can be up to three years in federal prison or a $350,000 fine. An IPA or other group of physicians can be fined up to $10 million for an antitrust violation.

Federal law allows states to carve out exceptions to antitrust laws to enable physicians to negotiate jointly under certain conditions, as long as the state

retains oversight of the process. In 1999, the 76th Legislature enacted SB 1468 by Harris (Insurance Code, chapter 29), which authorizes groups of physicians to negotiate contract terms and conditions with insurers, except for actual fee or discount amounts.

The attorney general may authorize joint negotiation of actual fee and discount amounts in limited circumstances where the attorney general finds that the benefits of joint negotiation would outweigh disadvantages from reduced competition. The rules the Attorney General's Office adopted to implement SB 1468 were designed to protect physicians' and insurers' proprietary business information while providing enough information to make expedient decisions about market share and the need for joint negotiation. SB 1468's provisions are scheduled to expire September 1, 2003.

DIGEST:

SB 752 would extend the expiration date of the statute authorizing joint negotiation by physicians from September 1, 2003, to September 1, 2007.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

SUPPORTERS SAY:

Joint negotiation can be an important part of Texas' commercial health-care landscape, even though it has not fulfilled its promise yet. Only one group of physicians has received approval to use joint negotiation. In August 2001, Attorney General John Cornyn authorized 11 physicians in Rusk County to negotiate fees and contract terms with Blue Cross/Blue Shield. That negotiation never came to fruition, as Blue Cross/Blue Shield refused to negotiate with a physician coalition. The state should extend the expiration of the statute to see what the results will be when more parties have gone through the process.

The current statute strikes the right balance between the needs of physicians and insurers in a manner that complies with federal law. The key benefits of the current law include the authority for insurers to opt out of joint negotiations and the protection of proprietary information about market share and insurers' businesses. The statute was written carefully to prevent conflict with federal antitrust laws, and the difficulty inherent in the approval process

is necessary to guarantee the attorney general adequate oversight to comply with the narrow exception to federal law.

Before enactment of SB 1468, the growth of managed care had given health-benefit plans a significant advantage over individual physicians in contract negotiations. Such contracts typically contain terms and conditions that are onerous, such as reducing payment if a health-plan enrollee visits the doctor too often or transferring to the physician all liability for the cost of patient care. These provisions were detrimental to patient care, but individual physicians had little power to avoid them because their only options were to turn down health plans that dominate the market or join an IPA, even if they would rather work on their own. SB 1468 has equalized the playing field for individual physicians, who now are in a better position to negotiate.

OPPONENTS SAY:

Since the state enacted SB 1468, the attorney general has approved only one group for joint negotiation. Clearly, physicians are not clamoring to engage in joint negotiations; otherwise, more groups would have come forward. The legislation contained an expiration date so that the Legislature could evaluate whether the process worked and if a need existed for it. The process works but there is no need for it, so the state should let the provision expire.

Before SB 1468, physicians were free to contract with other health plans or to find other patients if the contract terms were not to their liking. The contract conditions generally were not too onerous for physicians, or more physicians would have balked at signing them. Given the high and rising cost of health insurance, it is in the state's best interest to avoid situations where health plans have to change their contracts to suit physicians rather than ensure that a plan's beneficiaries receive an array of services at a reasonable cost.

OTHER OPPONENTS SAY:

The state should amend the joint negotiation statute to make it easier to use. The manner of implementing SB 1468 has prevented fulfillment of the law's goals. The law, although intended to restore a balance of power in the relationship between physicians and health plans, makes it too difficult for physicians to enter into joint negotiation. Very few physicians have been able to use joint negotiation because they are reluctant to disclose information that could be shared with other physicians and insurers and because it is difficult to obtain information from insurers to demonstrate to the attorney general that joint negotiation is justified.

The Legislature should make confidential certain commercial information that physicians give the attorney general or the Texas Department of Insurance (TDI) and should authorize TDI to collect information from insurers that the agency needs to make certain determinations about the market.

NOTES:

SB 752 is identical to HB 1399 by Smithee, which the House Insurance Committee considered in a public hearing on March 17 and left pending.