Bending the Health Care Cost Curve

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We are inundated with news reports and talking heads discussing "health care reform" or "ObamaCare." Always a favorite target, insurers are scrutinized for proposed premium rate increases and we hear calls for Congressional hearings on the topic.

What is absent from the noise is an intelligent discussion of what the government can and can't legally do.

For example, on March 3, 2010, the Ninth Circuit Court of Appeals issued an opinion in *California Pharmacists Association, et al. v. David Maxwell-Jolly, Director of The California Department of Health Services* enjoining California's legislative attempt at reducing payments to medical service providers by five percent under the State's Medicaid program.

The Court held that the State must establish reimbursement rates that are (1) consistent with high-quality medical care and (2) sufficient to enlist enough providers to ensure that medical services are generally available to Medicaid recipients.

In other words, under the Federal Medicaid Act, a State cannot pick a rate that may lead to rationing or shortages in the market place. Apparently, California's legislature failed to conduct the necessary analysis before attempting to mandate lower reimbursement rates.

The government's ability to fix prices is ultimately constrained by the very instrument that gives the government its legitamacy, the United States Constitution. California has a long history of insurance premium rate regulation and the Courts have recognized that the Constitution places very real limits on what the government can do.

California's Proposition 103 was passed in 1988 and attempted to require insurer's to "rollback" by 20% the premium on policies of property and casualty insurance issued or renewed after November 8, 1988. Proposition 103 allowed relief from the 20% rate rollback requirement only if an insurer could establish that it was "substantially threatened with insolvency."

In *Calfarm v. Deukmejian*, 48 Cal.3d 805 (1989), the California Supreme Court struck down the "insolvency" standard for relief from the rollback requirement. To replace that standard the Court held that an insurer must be granted relief from the rollback if it would deny the insurer the "possibility of a just and reasonable return" on its Proposition 103 lines of business. *Calfarm*, supra at 816, 820-825. Specifically, the Court stated at page 817:

[t]he concept that rates may be set at less than a fair rate of return in order to compel the return of the past surpluses is not one supported by precedent. 'The just compensation safeguarded . . . by the Fourteenth Amendment [of the Constitution] is a reasonable return on the value of the property used at the time that it is being used for the public service . . . . [T]he law does not require the company to give up for the benefit of future subscribers any part of is accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future.'

So, as we hear calls for hearings on health insurance premium rates and politicians making promises regarding what health insurers will be required to provide and do under proposed health care reforms, remember that every service promised comes with a cost. A cost for which the health insurer has the Constitutional right to charge a premium sufficient to reimburse its cost and provide it with a fair rate of return [profit].