# Consumer Financial Protection in Health Care

Erin C. Fuse Brown, JD, MPH
Georgia State University College of Law

For Seton Hall University School of Law

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# Overview

- The Problem: Harmful medical billing practices
  - Example: Surprise Medical Bills
- State & Federal Policies to Address the Problem
- Model Policy
- But, ERISA

# Claim

- Harmful medical billing practices are widespread.
- Good news: there is a growing body of financial protections at the state & federal levels.
- Bad news: ERISA creates a structural gap in protections that states cannot overcome alone.
- A federal solution to consumer financial protection in health care is needed.

# Medical Billing Practices that Harm Health Care Consumers

- Surprise medical bills
  - Inadvertent, unavoidable, out-of-network
  - Balance bills & higher cost-sharing
- Opaque, a la carte bills
  - Facility fees
- Medical debt collection and credit reporting

# Surprise Medical Bills - Stories

- John Elfrank-Dana: $106,000 from OON physicians at in-network hospital for emergency craniotomy
- Peter Drier: $117,000 from OON surgeon who assisted his in-network surgeon, in-network hospital
- Linda & Danny Postell: $4,279 for son Luke's care in OON NICU at in-network hospital.
- Greg & Madeleine Adami: $4,878 for 8 stitches in son's chin by OON surgeon at in-network ER.

* *From* Haley Sweetland Edwards, *How You Could Get Hit with a Surprise Medical Bill*, TIME (Mar. 7, 2016); Elisabeth Rosenthal, *After Surgery, Surprise $117,000 Medical Bill from Doctor He Didn't Know,* NY Times (Sept. 20, 2014); *Cost Can Go Up Fast When E.R. Is In-Network But Doctor is Not*, NY Times (Sept. 28, 2014).

# What is driving the problem:

- Cost-shifting to patients
- Rising deductibles, consumerism
- Narrow networks
- Complexity

# Policies to Address Surprise Bills

- ACA Limits on Cost-Sharing
  - OON Emergency Care
  - Annual out-of-pocket limits
- Network Adequacy / Provider Directory Laws
- State Surprise Billing Laws
  - NY, CT, CA, FL, TX, AZ

# State Surprise Billing Laws

- Disclosure/consent
- Prohibits *OON providers* from balance-billing or imposing higher cost-sharing
- Requires *health plans* to hold member harmless and pay for OON care
- Determines OON rates through statutory cap or dispute resolution

# Policy Gaps

- ACA Limits on Cost-Sharing
  - Limited reach for OON, balance bills
- Network Adequacy / Provider Directory Laws
  - Difficult to enforce
- State Surprise Billing Laws
  - Substantively robust, but few states so far

# Model Policy: Surprise Bills

- Prohibit surprise billing for all emergencies and services by OON providers at in-network facilities
  - Unless patient chooses OON provider over meaningful in-network options
  - With presumptively binding cost estimate
- Patient owes only in-network cost-sharing amounts, which count toward in-network deductible and OOP limits

# Model Policy: Surprise Bills cont'd

- Plan must hold patient harmless and pay OON provider amount based on:
  - Statutory cap (CA)
  - Binding dispute resolution (NY)
- Individuals have private remedy (unfair practice claim) for violations
- No debt collection or credit reporting of amounts greater than in-network cost-sharing.

# But . . . ERISA

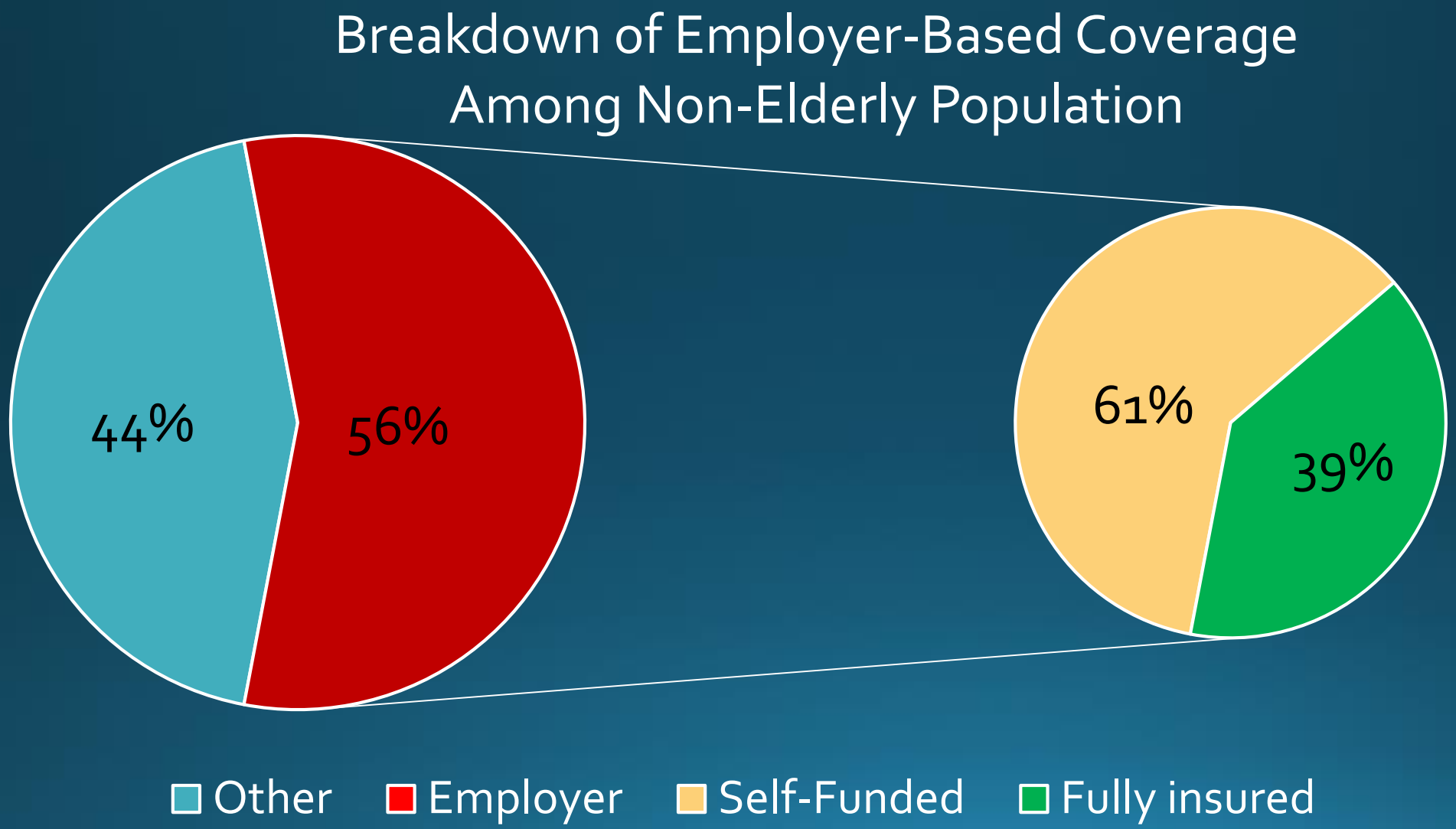
- ERISA preempts state laws that "relate to employee benefit plans"
- So state surprise billing law requirements of *plans* are preempted
  - hold-harmless, plan terms, in-network deductibles and cost sharing caps, network adequacy, provider directory laws

# ERISA § 514 Preemption

§514 preempts state laws that relate to employee benefit plans if they either:

- (1) do not qualify as insurance regulation (Savings Clause); or
- (2) relate to self-funded employee health plans (Deemer Clause). ~1/3 of nonelderly U.S. population

# ERISA Coverage



# Federal Solution

- Option 1: Seek federal rules from DOL
  - DOL could interpret network adequacy standards to prohibit ERISA plans from counting surprise bills toward OOP limits.
  - Require plans to disclose when they receive care from an OON provider and provide cost-estimate
  - Hold harmless? Dispute resolution or rate caps?
  - DOL requires statutory authority to act
  - Political will for more regulation?

# Federal Solution

- Option 2: Amend ERISA
  - Carve out state health care consumer protection laws from ERISA preemption, apply ordinary conflict preemption instead.
  - Consistent with current emphasis on state responsibility, consumerism
  - Political will?

# Federal Solution

- Option 3: FTC deems surprise billing an unfair trade practice
  - Could apply to self-funded plans, which are not in the business of insurance
  - Also could apply to for-profit providers, including physicians (but not nonprofits)
  - Could be persuasive for enforcement under State UDAP laws

# Takeaways

- This pattern of state innovation and ERISA preemption holds across the other types of policies to protect health care consumers
- ERISA vacuum is becoming a black hole
- Federal solution is needed, but it should preserve state flexibility and innovation
- It is time to amend ERISA

# Thank you!


## Erin C. Fuse Brown, JD, MPH

 efusebrown@gsu.edu

 @efusebrown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