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Health Insurer Sued over Most Favored Nation Clauses

Jeffrey May (Wolters Kluwer) · Tuesday, October 19th, 2010

It has been more than a decade since the U.S. Justice Department has brought an antitrust challenge to enjoin the use of “most favored nation” clauses in the health care industry. Many of the more recent, civil non-merger actions against industry participants have targeted alleged boycotts and fee-setting arrangements by providers.

Today, the U.S. Justice Department and the Michigan Attorney General filed a civil action in the federal district court in Detroit against Blue Cross Blue Shield of Michigan, the largest provider of commercial health insurance in Michigan, over its use of MFN clauses. The suit alleges that Blue Cross’s contracting practices violated Sec. 1 of the Sherman Act and Sec. 2 of the Michigan Antitrust Reform Act.

Through the use of MFN clauses in its agreements with hospitals, Blue Cross has raised hospital prices to competing health care plans and inflated the costs of health care services and insurance, according to the Department of Justice Antitrust Division.

Some of the MFN clauses require hospitals to provide services to Blue Cross’s competitors at no less than Blue Cross pays. Other MFN clauses give Blue Cross an even better rate than the rate available to other plans.

These “MFN-plus clauses” require some hospitals to charge Blue Cross’s competitors as much as 40 percent more than they charge Blue Cross. The government contends that these MFN-plus clauses “guarantee that Blue Cross’s competitors cannot obtain hospital services at prices comparable to the prices Blue Cross pays, which limits other health insurers’ ability to compete with Blue Cross.” Blue Cross has allegedly agreed to pay some hospitals higher fees for services in order to reach MFN agreements.

The 37-page complaint details the impact on eight geographic markets where Blue Cross had an MFN agreement with at least one significant hospital. Blue Cross currently has agreements containing MFNs or similar clauses with at least 70 of Michigan’s 131 general acute care hospitals, according to the complaint. The government argues that no procompetitive or efficiency-enhancing effects of the MFN clauses would outweigh the alleged anticompetitive effects of the agreements.

Past MFN Challenges

In the 1990s, the Antitrust Division successfully challenged a number of MFN clauses in the health care industry. The Antitrust Division went after dental care and vision care insurers that used MFN

clauses in agreements with providers that purportedly had the effect of inhibiting the ability of the providers to lower their fees to competing insurance plans and individual patients.

The first case was brought in 1994 against Delta Dental Plan of Arizona Inc.—the dominant dental plan in the state. Under the terms of a consent decree resolving allegations brought by both the U.S. Department of Justice and the Arizona Attorney General, Delta agreed to refrain enforcing any MFN provision in its agreements with dentists **((CCH) 1995-1 Trade Cases ¶71,048).**

Until now, the most recent case was an action brought by the Justice Department and the State of Ohio against Medical Mutual of Ohio, formerly known as Blue Cross and Blue Shield of Ohio, in 1999 for using a Most Favorable Rate (MFR) provision to raise hospital costs for competing health plans. Medical Mutual, the largest health care insurer in Ohio, agreed under the terms of a consent decree to refrain from enforcingthe MFR **((CCH) 1999-1 Trade Cases ¶72,465).**

Blue Cross Blue Shield of Michigan Response

Blue Cross responded in an October 18 statement, saying that the lawsuit was without merit.

“We will vigorously defend our ability to negotiate the deepest possible discounts for our members and customers with Michigan hospitals,” said Andrew Hetzel, Blue Cross Blue Shield of Michigan vice president for corporate communications. “At a time when insurance premiums are increasing because of medical costs, it hurts consumers to remove tools that insurers use to negotiate the lowest possible cost for medical care in the hospital.”

The case is *U.S. and State of Michigan v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14155-DPH-MKM.

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