

United States and State of Michigan v. Blue Cross Blue Shield of Michigan: A Forecast of Renewed Scrutiny of Most Favored Nation Clauses in the Health Care Industry?

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Introduction

On October 18, 2010, the United States Department of Justice (“DOJ”) and the Michigan Attorney General filed suit against Blue Cross Blue Shield (“BCBS”) of Michigan alleging the insurer violated antitrust laws by forcing hospitals to charge higher prices to rival insurers.¹ The DOJ alleges that BCBS of Michigan’s use of most favored nation (“MFN”) clauses in its contracts with hospitals in Michigan is anticompetitive.² The lawsuit comes at a time when the national debate over rising health care costs is center stage. Since the 1990s, there has been little scrutiny of MFN clauses, so this recent lawsuit could signal a new focus on the practice of MFN clauses by health insurers.

Attempted challenges to MFN clauses frequently occur in the context of the health care industry, despite their wide use in many other industries.³ MFN clauses typically require a provider to give the payor the lowest rate that it gives to any other comparable payor.⁴ However, in the current DOJ suit against BCBS of Michigan, DOJ alleges that the insurer also employs the use of “MFN-plus” clauses, which require hospitals to charge its competitors higher prices for health care procedures.⁵ This practice clearly goes beyond

¹ Dep’t of Justice Press Release, Oct. 18, 2010; *see generally*, *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, case 2:10-cv-14155-DPH –MKM (E.D. Mich. 2010).

² Dep’t of Justice Press Release, Oct. 18, 2010. Specifically, the lawsuit alleges violations of section 1 of the Sherman Act and Michigan’s antitrust laws. *See generally*, Wright, Beth Ann, *How MFN Clauses Used in the Health Care Industry Unreasonably Restrain Trade Under the Sherman Act*, 18 J. L. HEALTH 29, 31-34 (2003-04) (citing Sherman Act, 15 U.S.C. §§ 1 and 2) (detailing the antitrust violations brought under the Sherman Act. Most challenges against MFN clauses are brought under Sections 1 and 2 of the Sherman Act. Section 1 claims are examined under the per se rule or the rule of reason. Section 1 states, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Section 2 requires a showing of (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”). Challenges are sometimes brought under Section 5 of the Federal Trade Commission Act. Dennis, Anthony J., *Most Favored Nation Contract Clauses Under the Antitrust Laws*, 20 U. DAYTON L. REV. 821, 823 (1995).

³ Arnold Celnicker, *A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers*, 69 N.C. L. REV. 863, 868 (1991).

⁴ James F. Doherty and Monique Ras, *Most Favored Nation Clauses in Payor/Provider Agreements (2006)*, *1, at http://www.msba.org/sec_comm/sections/health/docs/AHLA%20MFN%20Article.pdf last visited Mar.10, 2011).

⁵ *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, case 2:10-cv-14155-DPH –MKM, at 3 (E.D. Mich. 2010) (alleging that MFN-plus clauses “require the hospital to charge some or all other commercial insurers more than the hospital charges Blue Cross, typically by a specified percentage differentia”); *see also*, Thomas Catan and Avery Johnson, *Michigan’s Blue Cross Sued Over Pacts with Hospitals*, WALL ST. J., Oct. 19, 2010, at 1 (stating that, [t]he DOJ stipulates that in some cases, BCBS’ MFN clauses required hospitals to charge the insurer’s competitors up to 40% more”).

what standard MFN clauses (or “equal-to MFN”) require, and therefore will likely receive increased scrutiny by federal and state regulators.⁶

Competing Arguments

The DOJ alleges BCBS of Michigan, the dominant insurer in Michigan, has MFN clauses in its contracts with at least 70 of Michigan’s 131 general acute care hospitals, including many of the major hospitals in the state.⁷ The complaint further alleges that these clauses raise hospital prices to competitors and prevent other smaller insurers from entering the marketplace, thereby reducing overall competition in the health insurance market.⁸ DOJ argues that this practice harms consumers because they end up paying more for health care services.⁹ In one example, a hospital was required to charge competing plans 30 to 40 percent more than the hospital was charging BCBS of Michigan.¹⁰

BCBS counters that the federal government is “usurping the state’s ability to provide affordable health care coverage to its residents.”¹¹ The insurer further argues that its practice allows it to secure the best prices available for their customers and help control costs.¹²

History of Challenges to MFN Clauses in the Health Care Industry

It has been several years since DOJ has brought an action against a health insurer challenging the use of MFN clauses. Several cases were brought by DOJ prior to and during the 1990s, although none of these cases found the use of MFN clauses by health insurers to be illegal under antitrust laws.¹³ Many cases were instead settled by consent judgments,¹⁴ which allowed the continued use of MFN clauses in the health care industry.¹⁵ However, the recent lawsuit against BCBS of Michigan signals a potential renewed focus by federal and state regulators.

Challenges to MFN clauses are primarily challenged under Section 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act.¹⁶ Under Section 1,

⁶ See James F. Doherty and Monique Ras, *supra* note 4 (defining typical MFN clauses as those which “[r]equire the provider to charge the payer the provider’s ‘usual’ fee with the ‘usual fee’ defined to be ‘the lowest fee charged or offered and received as payment in full.’”).

⁷ Dep’t of Justice Press Release, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Typical MFN clauses require the seller to charge the purchaser no more than it charges competitors. James F. Doherty and Monique Ras, *supra* note 4.

¹¹ Reed Abelson, *Antitrust Suit in Michigan Tests Health Law*, N.Y. TIMES, Dec. 20 2010, at 2.

¹² *Id.* at 3.

¹³ Anthony J. Dennis, *Most Favored Nation Contract Clauses Under the Antitrust Laws*, 20 U. DAYTON L. REV. 821, 823 (1995).

¹⁴ James F. Doherty and Monique Ras, *supra* note 4 at *8-11.

¹⁵ Anthony J. Dennis, *supra* note 13 at 822-23 (finding that although MFN clauses are used in a variety of industries, they are most used in the health care industry, between health insurers, as the purchaser, and health care providers, as the seller).

¹⁶ See generally, Beth Ann Wright, *How MFN Clauses Used in the Health Care Industry Unreasonably*

claims are analyzed under the per se rule or the rule of reason.¹⁷ The U.S. Supreme Court has interpreted Section 1 as “rendering unlawful only those restraints that unreasonably restrict competition.”¹⁸ MFN clauses are less frequently challenged under Section 2.¹⁹ Section 2 violations require the “possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power”²⁰ In addition to challenges under the Sherman Act, the FTC has tried to challenge MFN clauses as an “unfair method of competition” under Section 5 of the FTC Act.²¹

Prior to the 1990s, three key federal cases demonstrated the courts’ general response to challenges against MFN clauses in the health care industry under these Acts. In *Kitsap v. Washington Dental*²² and *Ocean State Physicians Health Plan, Inc., et al. v. Blue Cross Blue Shield of Rhode Island*,²³ the courts held that MFN clauses were not anti-competitive under the Sherman Act.²⁴ The *Kitsap* court went as far as stating that the MFN clause being challenged “makes good business sense” and is “pro-competitive.”²⁵ In upholding MFN clauses, courts have typically relied on the Colgate doctrine, which states that a buyer has a right under the antitrust laws to “exercise its own independent discretion as to parties with whom he will deal.”²⁶

However, in *Reazin v. Blue Cross Blue Shield, Inc.*,²⁷ the court recognized the potential for MFN clauses to be anticompetitive, especially when the insurer had significant market power, but did not hold that the challenged MFN clauses were illegal.²⁸ Since 1990, several DOJ and FTC consent settlements resulted from challenges to MFN clauses. In most of the settlements, insurers agreed to discontinue their use of MFN clause with hospitals.²⁹ DOJ’s recent scrutiny of MFN clauses signals that the debate

Restrain Trade Under the Sherman Act, 18 J. L. HEALTH 29, 31-34 (2003-04); Anthony J. Dennis, *supra* note 13 at 823.

¹⁷ Beth Ann Wright, *How MFN Clauses Used in the Health Care Industry Unreasonably Restrain Trade Under the Sherman Act*, 18 J. L. HEALTH 29, 31-32 (2003-04).

¹⁸ *Id.* (citing *United States v. Delta Dental of R.I.*, 943 F.Supp. 172 (D.R.I 1996)).

¹⁹ *Id.*

²⁰ *Id.* at 33-34.

²¹ Anthony J. Dennis, *supra* note 13 at 825-26.

²² 671 F.Supp. 1267 (W.D. Wash. 1987).

²³ 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990).

²⁴ *Kitsap v. Washington Dental*, 671 F.Supp. 1267, 1269-70 (W.D. Wash. 1987); *Ocean State Physicians Health Plan, Inc., et al. v. Blue Cross Blue Shield of R.I.*, 883 F.2d 1101 (1989), *cert. denied*, 110 S.Ct. 1473 (1990).

²⁵ Arnold Celnicker, *supra* note 3 at 873 (citing *Kitsap Physicians Serv. v. Washington Dental Serv.*, 671 F.Supp. 1267, 1269-70 (W.D. Wash. 1987)).

²⁶ Anthony J. Dennis, *Potential Anticompetitive Effects of the Most Favored Nation Contract Clauses in Managed Care and Health Insurance Contracts*, 4 ANNALS HEALTH L. 71, 73 (1995) (citing *United States v. Colgate*, 250 U.S. 300, 207 (1919)).

²⁷ 899 F.2d 951 (10th Cir), *cert. denied*, 497 U.S. 1005 (1990).

²⁸ *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 971 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990). In this case, the MFN clause was not being challenged under antitrust laws; rather, the court analyzed the competitive impact of the clauses by evaluating BCBS of Kansas’ market power. Arnold Celnicker, *supra* note 3 at 876.

²⁹ See Anthony J. Dennis, *Potential Anticompetitive Effects of the Most Favored Nation Contract Clauses in Managed Care and Health Insurance Contracts*, 4 ANNALS HEALTH L. 71, 73 (1995) (highlighting the settlement decrees against Delta Dental Plan of Arizona, Inc. which was using MFN clauses in contracts

over the legality of MFN clauses is still unsettled.

What's Next?

Health care providers and health insurers will likely be closely following new challenges to MFN clauses, such as the one against BCBS of Michigan, to see how the court responds in this new era of health care reform. Some United States Senators have called for a repeal of the McCarran-Ferguson Act, which shields many insurance practices from antitrust laws.³⁰ The Health Insurance Industry Antitrust Enforcement Act of 2009 sought to alter the McCarran-Ferguson Act so that the antitrust exemption no longer applies to health insurance, but the bill did not pass.³¹ Furthermore, despite the refusal of courts to find MFN clauses illegal, some states have enacted laws that limit their use, and more states might follow suit.³²

Conclusion

Insurance companies and health care providers alike should carefully evaluate their contracting practices that may receive new scrutiny. The use of MFN-plus clauses should face increased scrutiny because of their obvious potential anticompetitive effects that go beyond standard MFN clauses. With federal health reform focused on reducing rising health care costs, it is likely that DOJ and state regulators will begin to challenge more practices in the health care industry that it views as anticompetitive. Therefore, hospitals and health insurers need to carefully consider the potential anticompetitive impact of MFN provisions and employ practices that are beneficial for consumers, health care providers and payors alike.

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with dentists, and against Vision Service Plan's use of MFN clauses in contracts with optometrists).

³⁰ Michael Cowie, *Health Insurance and Federal Antitrust Law: An Analysis of Recent Congressional Action*, *1 (2009), at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec09_Cowie12_17f.authcheckdam.pdf (last visited Mar. 10, 2011).

³¹ *Id.* (detailing the recent congressional proposals surrounding health insurance and antitrust law and the debate surrounding the issue).

³² James F. Doherty and Monique Ras, *supra* note 3 at *14.