'Most Favored Nation' Clauses And Health Insurers

Law360, New York (April 23, 2010) -- On March 25, a legislative commission appointed by the Ohio General Assembly to examine the competitive effects of “most favored nation” ("MFN") clauses in health insurance contracts issued its report and recommendation ("the Report") on this highly controversial subject.

The committee's report recommends that the Ohio General Assembly enact legislation prohibiting the use of MFN clauses in all contracts between health insurers and health care providers in the state. (A copy of the Report is available on the Ohio Department of Insurance website.)

What is a Most Favored Nation Clause?

The term “most favored nation” traces its origin to international trade agreements. When two nations agreed that the tariffs between them would be no higher than the lowest tariffs granted to any other nation, they were said to have conferred “most favored nation” status on their trading partner.

In the health care context, MFN clauses have been used by health insurers to ensure that providers (i.e., physicians or hospitals) charge the insurer a rate no higher than the lowest reimbursement rate the provider accepts from any other commercial insurer. Advocates of the use of MFN clauses in health care contracts contend they reduce insurer expenses, promote efficiency and lower insurance rates, ultimately benefiting consumers.

Opponents of the clauses, however, contend that they cause competitive harm, particularly when utilized by a “dominant” health insurer. The purpose of the clause, opponents claim, is to dissuade providers from contracting with other health care insurers (who may offer lower reimbursement rates than the insurer with the MFN clause), ultimately limiting consumer choice and harming competition.

How Have MFN Clauses Been Interpreted By the Courts?

Over the last 10 to 15 years, the courts have considered whether MFN clauses in health care contracts are anti-competitive in several cases, but have failed to come to any clear consensus on the issue.

One of the earliest cases to consider the issue, and still a leading case on the subject, is United States v. Delta Dental of Rhode Island, 943 F. Supp. 172 (D.R.I. 1996). In Delta Dental, Rhode Island’s largest dental insurer required that each dentist with whom it contracted agree to, “[L]imit reimbursements . . . to such levels as [it] has agreed to accept from other non governmental dental benefit reimbursement programs.”

The U.S. Department of Justice’s Antitrust Division brought an action challenging Delta Dental’s use of the clause, contending that, in practice, it impeded the ability of competing insurers to contract with Rhode Island dentists, and was thus anti-competitive.
Delta Dental moved to have the DOJ action dismissed, arguing that its use of the clause was pro-competitive because it was intended to reduce its costs, resulting in lower insurance rates for its members. The District Court, however, concluded that the DOJ’s allegations, taken as true for purposes of the defendant’s motion, were sufficient to support the DOJ’s claim that the MFN clause might dissuade participating dentists from contracting with other insurers.

Accordingly, the Court refused to dismiss the DOJ action. The parties subsequently settled the matter, but only on the condition that Delta Dental agreed to discontinue its use of the MFN clause in its contracts.

Other cases challenging the use of MFN clauses have reached quite different results. In Ocean State Physicians Health Plan v. Blue Cross and Blue Shield of Rhode Island, 883 F.2d 1101 (1st Cir. 1989) cert. denied, 494 U.S. 1027 (1990), for example, the Court rejected an MFN challenge, stating, “As a naked proposition, it would seem silly to argue that a policy to pay the same amount for the same service is anti-competitive, even on the part of one who has market power. This, it would seem, is what competition should be all about.”

Similarly, Judge Richard Posner concluded in Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995), that “Most favored nations’ clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. . . . Perhaps, as the Department of Justice believes, these clauses are misused to anti-competitive ends in some cases; but there is no evidence of that in this case.”

The Ohio Legislature Weighs in on the Issue

Notwithstanding the lack of consensus in the courts regarding the market effects of MFN clauses, 15 states have enacted legislation restricting their use in health care contracts, including Ohio. Ohio’s “Healthcare Simplification Act,” enacted in 2008, banned the use of such clauses in contracts between insurers and physicians, imposed a two-year moratorium on the use of MFN clauses in hospital contracts, and created a Commission to study the effect of MFN clauses in Ohio.

The legislation also directed the Commission to prepare and present a report and recommendation to the General Assembly on this issue by March of this year. The Commission’s recently released Report is the culmination of this effort.

The Commission’s Work

Concluding that they had insufficient time and resources to undertake a detailed economic analysis of the effects of MFN clauses in the state, the Commission instead solicited comments from hospitals and insurers regarding their experience with MFN clauses. From these comments, the Commission distilled the following information:

(1) Nine of the 13 large hospital respondents indicated that they would have granted a competing insurer a lower rate but for the existence of an MFN clause;

(2) None of the six “midsize” hospital respondents indicated that the existence of an MFN clause had dissuaded them from granting a competing insurer a lower rate; and

(3) Both large and mid-size hospitals were evenly split regarding whether an MFN clause had discouraged them from entering into a contract with innovative payment methodologies.

The Commission also heard from an economic expert who had performed an empirical analysis of the impact of MFN clauses in other markets, specifically Rhode Island and Philadelphia. The expert cautioned that each market is
unique, and that the conclusions he reached with respect to those markets were not necessarily applicable to the Ohio market.

Nevertheless, at the Commission’s urging, he offered an opinion indicating that the effect of MFN clauses in Ohio was likely quite modest, if not de minimis, and was in all likelihood pro-competitive, not anti-competitive.

The Commission’s Recommendation

Given the rather limited, and conflicting, information presented to the Commission, the conclusion reached by one Commissioner about whether MFN clauses are anti-competitive — “It depends” — is certainly not surprising (and quite possibly correct). Nevertheless, seeking to provide a more definitive recommendation to the General Assembly, the Commission ultimately voted, by an 8-3 margin, to recommend that MFN clauses be barred in all hospital contracts.

In support of that recommendation, the majority relied principally on the fact that the hospital survey reflected that some hospitals claimed MFN clauses had negatively impacted competition, and that some insurer responses seemed to echo that sentiment. The minority, however, maintained that this evidence “does not make the case that [MFN clauses] are always bad,” and was, therefore, insufficient to support the majority’s sweeping recommendation.

The Future

With the Commission’s Report now in hand, the Ohio General Assembly is expected to revisit this issue within the next two months, before the current two-year moratorium on their use in hospital contracts lapses. Whether the General Assembly will follow the Commission’s recommendation and enact legislation permanently prohibiting the use of MFN clauses in hospital contracts remains, at least for now, uncertain.

What is certain, however, is that the debate over this issue is likely to continue, both in Ohio and elsewhere, and that the Committee’s Report has provided those on each side of the debate with some new support for their respective positions. Will the result ultimately be a widespread ban on the use of MFN clauses in insurer/provider contracts? If so, will that be a positive development, justified by sound antitrust doctrine? The answer to these questions remains to be seen, and likely only time will tell.

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