DOJ Contends Health Insurer's Use of Most Favored Nation Clauses is Anticompetitive

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On October 18, Assistant Attorney General Christine Varney, who heads the Department of Justice Antitrust Division, announced the filing of an antitrust action against Blue Cross Blue Shield of Michigan ("BCBSM"). The suit, which was filed in the Eastern District of Michigan and was joined by the Michigan Attorney General's office, accuses BCBSM of forcing Michigan hospitals to agree to contractual provisions that restrain competition and increase health care costs for Michigan consumers. Specifically, the action challenges BCBSM's use of "most favored nation" ("MFN") clauses that required the hospitals to provide BCBSM with its best prices and, according to the DOJ complaint, in some cases also required the hospitals to charge BCBSM's competitors significantly higher prices. The action seeks to enjoin BCBSM from enforcing the provisions in its existing agreements and from using any such provisions in the future.

"MFN" clauses generally guarantee a buyer of goods or services that it is getting terms that are at least as favorable as those provided to any other buyer. Typically, such provisions result in reduced costs for the buyer, which can be passed on to its customers in the form of lower rates or prices. As such, in most cases "MFN" clauses do not raise antitrust concerns. The DOJ complaint, however, alleges that BCBSM has not utilized its MFN clauses simply to reduce its own costs, but to "raise hospital prices to any competing health care plans." As AAG Varney explained in announcing the filing of the action: "Our extensive review of the evidence shows that in Michigan, Blue Cross used MFNs to actually raise costs to its rivals. In some circumstances, Blue Cross agreed to pay higher prices to hospitals in exchange for a promise from the hospitals to charge even higher prices to their competitors." AAG Varney continued: "When a large health care plan with a substantial market share, like Blue Cross, imposes an anticompetitive MFN in the marketplace, it harms competition and consumers. It prevents others from entering the marketplace and discourages discounting. The end result – fewer options and higher prices." Michigan Attorney General Michael Cox echoed AAG Varney's views, and added that "These greedy deals are hardly what the Legislature had in mind when it created Blue Cross."

BCBSM's response to the suit was swift and unequivocal. A Blue Cross spokesman stated that "This lawsuit is without merit, and we will vigorously defend our ability to negotiate the deepest possible discounts for our members and customers of Michigan hospitals."

While it has been many years since the DOJ has brought an action against a health insurer challenging the use of MFN clauses in provider contracts, the action is not unprecedented. Several such cases were brought by the DOJ Antitrust Division during 1990s, although none of those cases resulted in a judicial

determination that the use of the clauses can be unlawful. Instead, the cases were all settled by consent judgments, pursuant to which the defendant insurer simply agreed to discontinue its use of the clauses in their hospital contracts. See, e.g., U.S. v. Medical Mutual of Ohio, 1999-1 Trade Cas. (CCH) ¶72,465 (N.D. Ohio 1999). At the same time, some courts have expressly rejected antitrust challenges to MFN clauses. See, e.g., Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101 (1st Cir. 1989) (the use of a most favored nation clause is a "bona fide policy to ensure that Blue Cross would not pay more than any competitor paid for the same services.") Accordingly, MFN clauses continue to be in widespread use to this day in the health care industry, except in those states that have enacted laws that limit their use. See, e.g., Idaho Code §41-3443.

Finally, AAG Varney concluded her remarks by announcing that she intends to "challenge similar anticompetitive behavior anywhere else in the United States." Thus, when coupled with AAG Varney's statements last Fall that the enforcement of the antitrust laws in the health care insurance industry is a Division "priority," it would not be surprising to see additional activity in this area, either from regulators or private parties, in the coming months. Stay tuned.

Senator Leahy Again Calls For the Repeal of the Insurance Industry's McCarran-Ferguson Act Antitrust Exemption

Following the Department of Justice's October 18 announcement of the filing of an antitrust action against Blue Cross Blue Shield of Michigan, Senator Patrick Leahy (D., Vt.) promptly called for the repeal of the insurance industry's antitrust exemption. Senator Leahy has long been a strong proponent of the repeal of the McCarran-Ferguson Act, and is the sponsor of McCarran repeal legislation (Senate Bill 1681) that is currently pending in the Senate. (McCarran repeal legislation was passed in the House -- as H.R. 4626 -- earlier this year by a vote of 406-19.)

In a press release issued immediately after the announcement of the DOJ action, Senator Leahystated: "I applaud the Department of Justice for employing our nation's antitrust laws to break up the stranglehold that massive insurance companies have on our health care industry. Given that much of the health insurance industry activity is shielded from the antitrust laws by an antiquated exemption, it is perhaps not surprising that insurers are also engaging in anticompetitive conduct that falls outside the exemption." He continued: "Only when Congress passes the Health Insurance Industry Antitrust Enforcement Act, which I introduced last year, will we know the full scope of how the industry's anticompetitive conduct is harming consumers and driving up health care costs. The House passed this bill by an overwhelming, bipartisan 406-19 vote. The Senate should do the same when it returns in November."

Only hours later, Representative John Conyers (D. Mich.), another strong supporter of the repeal of McCarran, issued a similar statement. He stated that he was "pleased" by the filing of the suit, and that the House Subcommittee on Courts and Competition Policy, which he chairs, "intends to closely follow the developments in Michigan as they unfold." Representative Conyers continued: "While the lawsuit is a helpful step forward, in the long run, the insurance industry needs to be fully subject to the antitrust laws," and "That is why I have long supported repealing the McCarran-Ferguson Act."

Congress returns from recess after the November elections for an abbreviated session that is expected to focus on budget issues and federal tax policy. Whether Senator Leahy's request that McCarran repeal be added to the agenda will be accommodated remains to be seen. If not, the McCarran-Ferguson Act will – somewhat unexpectedly – have survived the 111th Congress.

Ohio Attorney General Settles Antitrust Case Against Marsh

On September 27, Ohio Attorney General Richard Cordray announced that his office had reached a settlement with insurance broker Marsh & McLennan, resolving an antitrust lawsuit commenced against

Marsh in 2007. The action, brought in the Cuyahoga County Court of Common Pleas on behalf of Ohio universities, schools, cities and counties, accused Marsh of conspiring with certain insurers to increase the rates they paid for commercial casualty insurance. The action was one of many “follow-on” cases filed by entities not covered by the settlement of the New York Attorney General’s 2004 action against Marsh, which was settled by Marsh for approximately $850 million.

To resolve the Ohio matter, Marsh agreed to pay $4.75 million, but does not include any admission of liability by Marsh. The Ohio Attorney General’s office previously settled similar claims with several of the insurers with whom Marsh was alleged to have conspired. The Attorney General’s office recovered $9 million from AIG, $7 million from Zurich, and $6.6 million from St.Paul/Travelers. The Attorney General’s actions against Ace American Insurance and Chubb remain pending at this time.

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