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Antitrust

Justice Department, Michigan AG Sue Blue Cross Over Use of Parity Clauses

Following through on its promise to carefully monitor health insurers to guard against anticompetitive conduct, the U.S. Department of Justice, joined by the Michigan attorney general, Oct. 18 filed a complaint charging Blue Cross Blue Shield of Michigan with violating state and federal antitrust laws (*United States v. Blue Cross Blue Shield of Michigan,* E.D. Mich., No. 2:10-cv-14155, *filed* 10/18/10).

The complaint, which attacks the health insurer's use of ''most favored nation'' (MFN) or parity clauses in its contracts with many of the hospitals in the state, alleges the clauses—that either prohibit a hospital from giving any other insurer a better rate than the rate it has negotiated with BCBSM or require it to charge other insurers the MFN rate plus a percentage—constitute agreements in restraint of trade that harm competition in violation of Section 1 of the Sherman Act and Section 2 of the Michigan Antitrust Reform Act.

Health care antitrust attorneys who spoke to BNA said the lawsuit is a ''big deal'' and that, while the government enforcers face a ''tough challenge'' proving their case, the decision to file the case is consistent with statements by the Obama administration that enforcement involving health insurers will be a priority. The filing also is consistent with statements by DOJ officials that the department is concerned that there are significant barriers to entry and expansion by health insurers in many markets, one attorney observed.

Attorneys also noted that the conduct described in the complaint, if true, appears to describe particularly egregious behavior on the part of the company. The clauses described in the complaint are not traditional MFN clauses—designed to ensure a level playing field—but, rather, price-discrimination clauses designed to harm competing insurers, one attorney said.

Finally, attorneys told BNA that, while the case appears to have grown out of DOJ's investigation of a proposed BCBSM/Sparrow Health System merger that was called off in the face of government pressure, they would not be surprised if this case is just the first of a series of actions challenging allegedly anticompetitive conduct by health insurers with market power.

Allegations in Complaint. The complaint details the relevant geographic and product markets underlying the governments' claims and specifies the way the challenged contracting practices affected negotiations with an array of large, medium-sized, and community hospitals throughout the state. It also describes how they inhibited competition in health insurance markets by making it harder for competing insurers to enter or expand in the affected markets.

''Blue Cross' use of MFNs has reduced competition in the sale of health insurance in markets throughout Michigan by inhibiting hospitals from negotiating competitive contracts with Blue Cross' competitors,'' the complaint said. The MFNs harm competition by reducing the ability of other health insurers to compete with BCBSM, by excluding its competitors in certain markets within the state, and by raising prices paid by BCBSM competitors and self-insured employers, it added.

Douglas Ross, with Davis Wright Tremaine LLP, Seattle, said the allegations in the complaint are problematic for BCBSM and that, while the company will have an opportunity to tell its side of the story when it answers the complaint, if it did what the complaint alleges it did, ''they have a serious problem.''

''The facts alleged in the detailed complaint are, frankly, bad for Blue Cross.''

JEFF MILES, OBER KALER, WASHINGTON

Ross said that, ''given the well-known antipathy the DOJ Antitrust Division has to MFN clauses, it beggars belief that Blue Cross Blue Shield of Michigan would tell hospitals that to get a contract they have to charge other insurers more for no reason whatsoever.'' Until BCBS files its answer, however, ''we won't know if there is more to the story,'' he added.

Jeff Miles, with Ober Kaler in Washington, agreed that, while ''complaints do not typically tell the whole story,'' the complaint in this case contains serious allegations and that, whether or not the case is part of a government enforcement initiative, it could spur private actions by competing health insurers in Michigan and encourage insurers facing similar conduct in other markets to complain to enforcement officials.

''The facts alleged in the detailed complaint are, frankly, bad for Blue Cross,'' Miles said. ''The complaint is mostly indicative of DOJ's continuing concern over the use of MFNs and would have been brought even in the absence of the current pressure on DOJ to police health insurer conduct.''

Miles noted that most cases brought by the government in the past over MFN provisions have been settled and that this case, too, could end up going that route.

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That said, ''this case appears to be unlike other cases in alleging a scheme in which many of the contracting hospitals appear to have been willing participants,'' Miles said.

Not Really MFN Clause. According to Jack A. Rovner, with The Health Law Consultancy in Chicago, ''if you credit the allegations of the complaint, the BCBSM provider contract clauses provide a blueprint of how not to draft an MFN provision. In fact, neither of the contract clauses described in the complaint is really an MFN provision at all.''

A traditional MFN clause preserves competition by saying to a selling hospital ''charge my competitors whatever you like, but in doing so don't discriminate against me to my competitive disadvantage; and if you elect to charge one of my similarly situated competitors less for the same services I'm buying from you, I get that lesser price so I have a 'level competitive playing field,' '' Rovner said.

''What the complaint calls the 'MFN-plus' contract clause is better characterized as a 'disadvantage my competitor' clause because it forces hospital suppliers to price discriminate against competing insurers, thereby preventing price competition and a level competitive playing field,'' Rovner said. ''Similarly, what the complaint calls the 'Equal-to-MFN' contract clause is better characterized as a 'price-floor stabilization' clause because it blocks the ability of hospital suppliers to lower their prices below those charged to BCBSM.''

More Cases to Come? At a press gathering announcing the filing, Assistant Attorney General Christine Varney alleged that the MFN provisions in the BCBSM provider agreements with hospitals stifle competition, resulting in higher health insurance prices for Michigan consumers. Varney said the federal government is looking at the use of MFN clauses ''more broadly'' and that it will challenge the use of such provisions anywhere else by an insurer with market power.

Varney said the state and federal enforcers were bringing the case because BCBSM, which has a 60 percent market share in the state with 2009 revenues exceeding $10 billion, ''has used its dominance to impose anticompetitive MFNs in contracts with approximately half of the general acute care hospitals'' in the state.

While the action is significant in Michigan, it ''is also significant in a broader sense'' because ''these kinds of anticompetitive MFNs affect health care delivery and costs in a very fundamental way,'' Varney continued. ''Any time a dominant provider uses anticompetitive agreements, the market suffers.''

''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 competitor,'' Varney said.

In addressing reporters' questions, Varney said that the lawsuit was filed only after BCBSM declined to voluntarily cease its use of MFN provisions in its hospital agreements. She also acknowledged that much of the information to support the lawsuit's allegations of anticompetitive effects stemmed from its investigation into a proposed merger of two affiliates of BCBSM and Sparrow Health System.

Those parties announced in March that they were calling off their plan for BCBSM's Blue Care Network to acquire Sparrow's Physicians Health Plan of Mid-Michigan. DOJ and the Michigan AG's office said at the time that they had planned to file an antitrust enforcement action to block the merger (19 HLR 333, 3/11/10).

The action also is consistent with Varney's statements in March that DOJ was increasing its scrutiny of health insurer mergers and exclusionary practices in anticipation of changes precipitated by health care reform and in response to what she described as an informal ''health insurance industry review'' that exposed the existence and anticompetitive effects of entry barriers in certain health insurance markets (19 HLR 741, 5/27/10).

Michigan Attorney General Michael A. Cox (R) also issued a statement accusing BCBSM of ''greedy deals'' designed to maximize and maintain its superior position in the market. ''It is deeply disturbing that Blue Cross, a nonprofit created to help Michigan citizens, would strong-arm hospitals at the expense of hard-working families,'' Cox said.

Meanwhile, the company responded by saying it will ''vigorously defend'' itself against the lawsuit, which company spokesman Andrew Hetzel said was ''without merit.'' Rather than raising costs and premiums, ''negotiated hospital discounts are a tool that Blue Cross uses to protect the affordability of health insurance for millions of Michiganders,'' Hetzel said in a statement.

''Through this lawsuit, the federal government seeks to deny millions of Michigan residents the lowest cost possible when they visit the hospital,'' Hetzel continued. DOJ's allegations that Blue Cross's MFN clauses are anticompetitive and raise prices are ''groundless,'' Hetzel told BNA.

Hospital Liability? Several attorneys noted that the conduct described in the complaint would appear to support antitrust claims against the hospitals that agreed to the provisions challenged in the lawsuit. Hospitals may be liable under antitrust laws for collusion even if they are an unwilling participant, Miles said.

While some smaller community hospitals likely had the provisions ''crammed down their throats,'' Miles said, other hospitals named in the case appear to have been willing participants or even welcomed the arrangement that allowed them to get higher prices from BCBSM and even higher prices from other insurers.

Rovner agreed, saying ''it sounds a lot like certain hospitals were in a win-win situation, obtaining higher rates from Blue Cross and even higher rates from other insurers who would agree or be forced to agree, because of the hospital's market power, to pay those higher rates.'' Varney, however, declined to address the issue at the press briefing.

Robert Leibenluft, with Hogan Lovells US LLP in Washington, said that the action is consistent with statements by DOJ officials that enforcement involving health plans is a very high priority and that it would be no surprise if they bring other similar actions.

Stuart Gerson, with Epstein Becker & Green PC said the outcome of the case will all depend upon market definition and market power. ''The entity demanding MFN treatment argues that it is just getting lower prices for its customers and that argument is strongest where the entity is in a truly competitive market and, as an evidentiary matter, passes savings along to its subscribers as opposed to retaining them,'' Gerson said. ''The argument becomes weaker where the MFN demanding en-

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tity has sufficient market power to keep the base price high and can impose other barriers to entry or continued competition.''

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The complaint filed in the case is available at http://op.bna.com/hl.nsf/r?Open=psts-8acrxg.