Department of Justice and Private Plaintiffs Challenge Blue Cross Blue Shield Of Michigan's "Most Favored Nation" Provisions

On October 18, 2010, the Department of Justice ("DOJ") filed suit against Blue Cross Blue Shield of Michigan ("BCBS") to enjoin it from using most-favored-nation ("MFN") clauses in its contracts with hospitals, and to prevent enforcement of those clauses. The DOJ alleged that the MFN clauses in question reduce competition for the sale of health insurance. According to the DOJ, these clauses also have the effect of excluding BCBS competitors from certain markets and raising prices for health insurance for Michigan residents. *United States v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

Piggybacking on the DOJ's case, private plaintiffs brought a class action lawsuit on October 29, 2010, seeking money damages for violations of Sections 1 and 2 of the Sherman Act, and Section 2 of the Michigan Antitrust Reform Act. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14360-LPZ-VMM (E.D. Mich. Oct. 29, 2010). The proposed class would comprise direct purchasers of healthcare services at a rate contracted for by BCBS or one of its competitors from a hospital with which BCBS entered into an agreement after January 1, 2007 that included an MFN clause. *Id.* at ¶ 7.

The MFN clauses at issue are commonly the result of contract negotiations in which the hospitals seek increased fees while BCBS seeks to keep its costs down through lower fees or provider discounts. Such provisions are common in many industries, and the DOJ has traditionally not challenged them other than in the health care field. *See, e.g., United States v. Delta Dental Plan of Arizona, Inc.*, Civ. No. 94-1793 (filed D. Ariz. Aug. 30, 1994).

Like most MFNs, many of the BCBS provisions are what might be called "Equal-to-MFNs" and require that any rate BCBS agrees to pay will be the best rate that the provider will make available to any payor. Some of the BCBS provisions, however, require the contracting providers to charge other payors as much as 40% more than they charge BCBS, in what might be called an "MFN-plus." The DOJ and plaintiffs assert that the latter provisions impede competition at the insurer level by increasing the cost base of BCBS' competitors, rather than facilitating a "level playing field," which is arguably what "Equal-to-MFNs" do.

Plaintiffs further allege that BCBS holds 60% of the market for commercially insured persons in Michigan, insuring more than nine times as many Michigan residents as the next largest commercial health insurance competitor. Thus, plaintiffs allege, BCBS has market power in the relevant geographic markets throughout Michigan.

As these cases have only recently been filed, it is not possible to predict their outcomes. Parties considering MFN provisions, particularly in industries considered by the DOJ to be important to the national economy, must consider the possibility that such provisions will be scrutinized for their effect on relevant markets. Given the Obama administration's focus on health care reform, it is no surprise that the DOJ is continuing to scrutinize that industry. Whether the government will broaden its sights to include MFN clauses in other industries remains to be seen. In any event, businesses should be aware that the plaintiffs' bar now views MFN clauses as good grounds for private action and enforcement — and there is no reason to presume that the plaintiffs' bar will limit itself to the health care arena.

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