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DOJ FOLLOWS THROUGH ON PLEDGE; SUES BCBS OF MICHIGAN OVER MFN CLAUSES

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The U.S. Department of Justice filed an antitrust lawsuit today against Blue Cross of Michigan alleging that "most favored nation" clauses ("MFNs") in its hospital contracts violate §1 of the Sherman Act because they serve to raise hospital prices, prevent other insurers from entering the marketplace, and discourage hospitals from providing discounts to other insurers. DOJ seeks to have MFNs between Blue Cross and hospitals declared illegal, to permanently enjoin Blue Cross from entering into MFNs in the future and to void MFN clauses in existing hospital contracts. The State of Michigan joined the suit alleging analogous violations of state law.

According to the complaint, Blue Cross is the largest provider of heath insurance in Michigan, with over 60% of all commercially insured lives and has MFNs with acute care hospitals operating over 40% of all beds in the state. Notably, some of the MFNs are "MFN-plus" agreements that require the hospital to charge other insurers as much as 40% more than they charge Blue Cross. According to the complaint, Blue Cross has MFN-plus agreements with 22 hospitals that collectively operate approximately 45% of the tertiary care hospital beds in Michigan.

Today's lawsuit should come as no surprise to those who have been following the Antitrust Division's thinking on insurer-provider contracting issues. In early 2010, the Division undertook a review to determine whether, and if so, why market entry and expansion was more difficult in the health insurance industry than in other industries. Speaking at an antitrust in health care conference in May, Assistant Attorney General Christine Varney announced the Division's conclusions, including that scale is a major barrier to entry and expansion because "new insurers can not compete with incumbents for enrollees without provider discounts, but they can not negotiate for discounts without a large number of enrollees." The Division also concluded that this problem is most acute in markets "with one or two dominant plans" that may have the ability to engage in exclusionary practices.

Varney concluded her remarks on the subject with an unusually frank warning to health insurers that is particularly noteworthy in light of today's lawsuit:

> … you should expect the Justice Department to carefully scrutinize and continue to challenge exclusionary practices by dominant firms— whether for-profit or non-profit—that substantially increase the cost of entry or expansion. This is particularly so with respect to most-favored-nations clauses and exclusive contracts between insurers and significant providers that reduce the ability or incentive of providers to negotiate discounts with aggressive insurance entrants.

For other insurers with high market shares, today's action is a further sign that that one should carefully consider the consequences of demanding contract provisions that could be considered exclusionary. By contrast, if you are a provider negotiating with an insurer, there is no better time to push back on such demands.

If you would like more information on the content found in this alert, please contact Jonathan Grossman in Cozen O'Connor's Washington, D.C., office at 202.912.4866, or *jgrossman@cozen.com.*

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