Attacks Against Blue Cross Blue Shield's Most Favored Nations Clauses Continue

Aetna recently filed a civil action against Blue Cross Blue Shield of Michigan ("BCBS") seeking injunctions, treble damages, attorneys' fees and costs for violations of federal and state antitrust laws. Aetna's lawsuit is the latest action filed against Michigan's dominant health insurer for including allegedly anticompetitive Most Favored Nation ("MFN") clauses in its contracts with Michigan hospitals.

The challenge to BCBS' MFN contracts began in October 2010 when the Department of Justice ("DOJ") sued BCBS over the provisions, alleging that BCBS used MFN clauses to force hospitals to charge competing insurers higher rates than were charged to BCBS for the same services and, additionally, to ensure that the rates charged to BCBS never exceeded that of any other insurer. For an overview of the DOJ lawsuit, see our previous *Antitrust and Trade Practices Alert*.

Government antitrust actions and investigations often spur private actions by consumers or competitors seeking to take advantage of the treble damages authorized by the federal antitrust laws. Aetna is the first competitor-insurer to file suit against BCBS related to its Michigan MFN clauses. The individual hospitals are not named as plaintiffs, but, like the DOJ, Aetna asserts that BCBS' contracts with Michigan hospitals amount to agreements in restraint of trade in violation of Section 1 of the Sherman Act and Michigan's Antitrust Reform Act. Aetna claims that these violations led to higher costs to consumers and other insurers, loss of about two-thirds of Aetna's business and Aetna's partial withdrawal from the Michigan market.

Aetna's complaint largely tracks the DOJ's lawsuit, claiming that BCBS used its power to force hospitals to agree to one of two distinct MFN clauses. In the "MFN-plus" contract provisions, hospitals must agree to charge other insurers more than it charged BCBS for the same services. In the "Equal-to MFN" provisions entered into with smaller community hospitals, BCBS allegedly agreed to pay more for services so long as the hospitals agreed to charge other insurers an equal or greater rate. This allegedly established a price floor at the BCBS rate, requiring the hospitals to force its other contracted insurers to pay higher rates to match or exceed the BCBS rate, despite these insurers already having negotiated a more favorable rate.

BCBS' attempt to dismiss the DOJ lawsuit this summer failed.

What's Next?

These BCBS lawsuits are further representative of the attention that the healthcare industry has received in recent years by antitrust enforcers and also are illustrative of the larger ongoing battle between hospital systems and insurers to negotiate for provisions that reduce their respective healthcare costs. In order to limit liability and costs, healthcare companies must evaluate contracting practices prior to executing agreements and make sure antitrust compliance programs are in place to proactively address potential contracting pitfalls.

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