

## ANTITRUST AND TRADE PRACTICES ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### **Blue Cross Blue Shield's Most Favored Nation Clauses Under Attack**

**October 22, 2010**

#### **Key Point:**

- Antitrust enforcement agencies' challenge to Most Favored Nation ("MFN") clauses gives another signal of their escalating interest in the healthcare industry and their intent to have a seat at the healthcare reform table.

#### **DOJ Sues Blue Cross Blue Shield of Michigan**

The United States Department of Justice ("DOJ") and the state of Michigan filed suit on October 18, 2010 against Blue Cross Blue Shield of Michigan ("Blue Cross"). DOJ alleges that Blue Cross' use of MFN clauses in its contracts with hospitals in Michigan is anticompetitive.

MFN clauses typically require that the plan with the MFN clause receive the lowest rates that the participating doctors or hospitals offer to any other plan or that the participating doctors or hospitals charge any competing plan an agreed percentage above the rate provided to the plan with the MFN clause.

The DOJ alleges Blue Cross has MFN clauses in its contracts with at least 70 of Michigan's 131 general acute care hospitals, including many major hospitals in the state. The complaint further alleges that Blue Cross reduced payments to smaller hospitals that declined to enter into agreements with MFN clauses. With respect to larger hospitals, Blue Cross allegedly secured MFN clauses by agreeing to pay the hospitals more if the hospitals agreed to charge higher prices to competing plans. In one alleged example, a hospital was required to charge competing plans 40 percent more than the hospital was charging Blue Cross.

The DOJ claims that Blue Cross' MFN clauses give Blue Cross an unlawful competitive advantage and result in higher prices to consumers in violation of the Sherman Act as well as the Michigan Antitrust Reform Act.

A copy of the complaint filed in the U.S. District Court for the Eastern District of Michigan is [available here](#).

## What's Next?

Of particular note here is that MFN clauses in the healthcare industry have not garnered much attention from the enforcement agencies in some time. However, the absence of a recent challenge against a particular practice, such as MFN clauses, does not ensure that the agencies will not challenge those practices in the future. Companies in industries of high interest to antitrust enforcers – such as healthcare – should carefully evaluate the risks of their current and future contracting practices that may receive new scrutiny.

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