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DOJ AND FTC HOLD PUBLIC WORKSHOP TO CONSIDER THE ANTITRUST ISSUES RAISED BY "MOST FAVORED NATION CLAUSES" IN HEALTH INSURANCE CONTRACTS

by James M. Burns

On September 10, the Federal Trade Commission and the Department of Justice Antitrust Division held a joint public "workshop" to discuss the competitive issues that can arise in connection with the use of "most favored nation" clauses in health insurer contracts with health care providers. Specifically, the Agencies announced that the workshop would "provide a forum for discussion of the evolution of economic and legal thinking on MFNs and their implications," and provide an opportunity for senior government antitrust enforcers, economists, private attorneys and academics to express their views on this increasingly significant issue.

Notably, the presenters included Joseph Wayland, acting head of the DOJ Antitrust Division, who stated that the use of MFN clauses "have the potential to inflict significant harm to consumers and competitors" and acknowledged DOJ's strong interest in this issue over the last eighteen months to two years. However, notwithstanding the significant scrutiny of MFNs in healthcare over the last few years (at both the federal and state levels), the panelists generally acknowledged that the legal precedent on the issue remains somewhat sparse and not particularly instructive, and that the empirical evidence is equally unclear.

Consequently, with little definitive case law to point to, the discussion focused principally on how such clauses may be anticompetitive in *concept*, and several government enforcers described some theoretical adverse effects that can occur as a result of the use of MFN clauses. For example, several government enforcers indicated that, in some circumstances, MFN clauses can facilitate collusion by dampening competitor enthusiasm to compete vigorously on prices. In other circumstances, an MFN clause may impede the ability of current rivals to compete with the entity imposing the MFN clause (particularly if that entity has market power), they suggested, or to make it more difficult for new competitors to enter the market. On the other hand, most presenters also acknowledged that, in other circumstances, MFN clauses can have procompetitive effects. Not surprisingly, therefore, the presenters appeared to be unanimous in the view that the effects of such clauses can vary considerably from market to market and that, for that reason, a "rule of reason" approach (rather than per se condemnation) is the proper way to analyze them under the antitrust laws.

At the close of the workshop, the FTC and DOJ announced that they would be accepting public comments on the MFN issue through October 10, and that some guidance from the Agencies may also be forthcoming. In any event, at a minimum, the comments, as well as any DOJ/FTC response to the comments, will likely be available on the Agencies' websites later this year, which should provide some additional guidance on this increasingly significant issue. Stay tuned.

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1ST CIRCUIT AFFIRMS DISMISSAL OF ANTITRUST CASE AGAINST PUERTO RICO HEALTH INSURER

by James M. Burns

On September 7, the 1st Circuit Court of Appeals affirmed the dismissal of antitrust claims brought against MMM Healthcare, a Puerto Rico health insurer, in *Gonzalez-Maldonado v. MMM Healthcare*. In doing so, the 1st Circuit held that the insurer's decision to modify its compensation system for physicians from a fee-for-service basis to a capitation system did not give rise to an antitrust claim by physicians unhappy with the change in their reimbursement formula.

As the 1st Circuit explained, the action was brought by two physicians who had originally contracted with three health insurance subsidiaries of MMM Healthcare to provide services to MMM insureds on a fee-for-service basis. MMM subsequently modified its payment system, eliminating its fee-for-service reimbursement model in favor of a capitated system that reimbursed physicians a fixed amount per insured for the year. The plaintiffs were offered a new contract by MMM, with these new terms, but they refused to sign it; instead, they continued to bill MMM for services provided on a fee-for-service basis. When MMM refused to pay, the physicians brought suit, alleging that the decision by each of MMM's three insurance subsidiaries not to accept plaintiffs' proposed payment terms constituted an unlawful "group boycott" of their services.

In affirming the dismissal of plaintiffs' antitrust claims, the 1st Circuit first noted that defendants MMM Healthcare, PMC Medicare Choice and Medical Management Services are all wholly owned subsidiaries of MMM Holdings. As such, under the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), they share a "complete unity of interest" and, as a single economic unit, "cannot violate Section 1's conspiracy prohibition." Accordingly, the 1st Circuit affirmed the dismissal of plaintiffs' Section 1 claims on that basis.

Plaintiffs fared no better with respect to their Section 2 antitrust claims. As the Court explained, while a Section 2 claim of monopolization or attempted monopolization does not require two distinct entities (unlike Section 1), to state a Section 2 claim plaintiffs were required to plead that the defendants' alleged conduct had an adverse impact on competition – not just an adverse financial impact on them. The plaintiffs, however, had failed adequately to plead harm to competition, and thus their Section 2 claims were also properly dismissed.

GLASS REPAIR SHOP SUFFERS DEFEAT IN ANTITRUST CASE AGAINST AUTO INSURERS AND THEIR GLASS NETWORK ADMINISTRATORS

by James M. Burns

In early September, Judge Cathy Seibel, United States District Court Judge for the Southern District of New York, put an end to an antitrust case filed by an independent auto glass repair shop against numerous auto insurers and their third party claims administrators ("TPAs"), finding that the plaintiff had failed adequately to allege "antitrust injury" in his complaint or amended complaint.

The case, *Harner v. Allstate Insurance Co.*, was initially filed in April of 2011. Plaintiff claimed that the manner in which several large auto insurers in New York administered their auto glass repair operations violated the antitrust laws. Specifically, plaintiff contended that the defendants had all conspired to steer consumers away from his independent auto glass repair shop to shops in each insurer's respective networks that had agreed to offer their services for a reduced fee. Plaintiff also alleged that the various TPAs – including Safelite, Lynx and Pittsburgh Glass Works – assisted the insurer defendants in this allegedly unlawful conduct by making the steering recommendations when insureds would call seeking assistance.

Defendants sought to have plaintiff's antitrust allegations dismissed for a host of reasons and, at the invitation of the Court, plaintiff filed an amended complaint. However, plaintiff's amended complaint failed to cure all of the deficiencies defendants had pointed to in their initial motions. Instead, Judge Seibel held that plaintiff's amended complaint still failed as a matter of law, because he had not adequately alleged "antitrust injury." As Judge Seibel explained, "the antitrust injury requirement insures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." In this case, however, Judge Seibel stated, "the crux of plaintiff's argument is that . . . he was hurt either because he was not paid the full amount that he charged insured customers or because customers, after being informed that plaintiff's services are not fully covered under the insurance policies, took their business elsewhere." Thus, despite some possible harm to plaintiff individually, the defendants' alleged conduct had "resulted in a lower market rate for the services plaintiff provides." Because this injury "is the result of competition, it cannot support an antitrust claim," Judge Seibel concluded, and therefore plaintiff's antitrust claims were dismissed.

INSURER'S ANTITRUST ACTION AGAINST PHYSICIANS AVOIDS DISMISSAL

by James M. Burns

On September 17, Judge Gustavo Gelpi, District Court Judge for the District of Puerto Rico, denied the defendants' motion to dismiss plaintiff's complaint in *Humana Health of Puerto Rico v. Vilaro*. In the case, Humana alleges that defendant, Dr. Vilaro, in concert with several other physicians, unlawfully colluded during the course of their contract negotiations with Humana. Specifically, the Court noted that Humana had alleged that the physicians "included one another in attempted negotiations with Humana via email, copied one another on each other's notification of termination to [Humana], and jointly provided a table setting forth proposed higher rates that were required as a condition to continue providing services to [Humana] patients."

In rejecting the doctors' motion to dismiss the complaint, the Court held that defendants' actions "ostensibly reflect concerted behavior, rather than unilateral conduct," and that "collective efforts to boycott and price-fix offend Section 1." In addition, the Court held that because Humana's complaint "satisfactorily alleges consequent injuries to itself and the community due to defendants' refusal to treat certain patients," Humana had also adequately pled antitrust injury. Accordingly, the defendants' motion to dismiss Humana's complaint was denied, permitting the case to proceed towards trial.