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MICHIGAN GOVERNOR VETOES LEGISLATION BANNING HEALTH INSURERS FROM UTILIZING MOST FAVORED NATION CLAUSES IN PROVIDER CONTRACTS

by James M. Burns

On December 6, the Michigan Legislature passed legislation (S.B. 1293) that would have prohibited health insurers and health maintenance organizations in the state from including "most favored nation" clauses in any provider contract. The legislation was expected to be signed into law by Michigan Governor Rick Snyder, but in an unexpected move, on December 28 he vetoed the legislation, reportedly because another provision in the legislation (involving abortion coverage) that he opposed was added to the bill at the eleventh hour. Had the legislation been enacted, Michigan would have become the latest in a growing list of states that statutorily restrict or prohibit the use of "most favored nation" provisions in health care provider contracts.

A "most favored nation" clause, when used by a health insurer or HMO, generally requires that a health care provider offer its services to the insurer/HMO at the lowest price that the provider offers its services to any party. While such provisions have been used by many industries for many years without raising any significant antitrust issues, over the last several years they have become somewhat controversial in the health care industry, particularly when used by allegedly "dominant" insurers. Specifically, those opposed to such provisions contend that their use -- rather than ensuring that insurers receive the lowest prices from providers, thus lowering their costs and permitting them to keep insurance premiums as low as possible – instead limit the ability of other insurers to compete for insurance business, and thus can have anticompetitive effects. While the courts have yet to decide this issue in any definitive way, the legislatures in several states have passed legislation barring the inclusion of such clauses in health care contracts in their states. In 2011, for example, both Connecticut and Maine enacted legislation barring such provisions, and similar legislation was proposed, but not enacted, in Kansas, Missouri and North Carolina, among other states.

The Michigan legislation (SB 1293) would have provided that "… beginning in January 1, 2014, an insurer or health maintenance organization shall not use a most favored nation clause in any provider contract." In addition, the legislation would have rendered any provision in an existing contract unenforceable, and an insurer/HMO would have been prohibited from terminating an existing provider contract based upon the provider's decision to offer another insurer/HMO a lower rate than that offered to the contracting insurer/

HMO. These provisions were quite similar to those included in MFN legislation enacted in other states, but would not have been the first regulations in Michigan regarding the use of MFN clauses. Senate Bill 1293 was introduced on September 19, 2012; two months earlier, on July 18, 2012, Michigan Insurance Commissioner Kevin Clinton issued Order 12-035-M, which provides that, "…as of February 1, 2013, any attempt by an insurer to enforce a most favored nation clause in any provider contract, without the commissioner's prior approval, is prohibited …." The Order also states, however, that it "…does not constitute a determination regarding the permissibility of the use of any particular most favored nation clause …."

While Governor Snyder's veto of SB 1293 means that no statutory ban on MFN clauses goes into effect in Michigan now, recent press reports suggest that a new bill will likely be introduced in early 2013 that omits the coverage provisions that the Governor opposed. Accordingly, it seems likely that some type of legislative restriction on the use of MFN clauses in health care contracts may be on the horizon in Michigan.

DOJ ANTITRUST DIVISION APPROVES WELLPOINT'S ACQUISITION OF AMERIGROUP AFTER DIVESTITURE, PERMITTING THE PARTIES TO CLOSE THEIR DEAL

by James M. Burns

On November 28, the DOJ Antitrust Division announced that it would not challenge WellPoint's proposed acquisition of Amerigroup, paving the way for the parties to close their closely watched transaction on December 24. The deal -- valued at approximately $5 billion -- adds Amerigroup's multi-state Medicaid insurance business to WellPoint's existing portfolio of insurance products. WellPoint is the nation's second largest health insurer.

The parties' deal was initially announced in July, with the parties stating that they hoped to close the deal by year's end. However, the Antitrust Division issued a "Second Request" for additional information from the parties in August, holding up the transaction while the Antitrust Division examined the potential competitive implications of the proposed deal. While both Amerigroup and WellPoint have operations in many states, the Antitrust Division's concerns ultimately focused on the Northern Virginia Medicaid market, where both parties had operations. Despite the fact that Amerigroup's Northern Virginia operations amounted to only approximately 55,000 of its total 2.7 million members, the Antitrust Division contended that the combination, if permitted to proceed as initially planned, "would have substantially lessened competition in the provision of Medicaid managed care plans in Northern Virginia."

To address these concerns, Amerigroup subsequently announced that it would sell its Amerigroup Virginia subsidiary (which included its Northern Virginia Medicaid business) to Inova Health System, which operates five hospitals in Northern Virginia. Thereafter, Acting Assistant Attorney General Renata Hesse, who leads the Antitrust Division, announced that "the divestiture of Amerigroup Virginia will ensure continued competition in the markets for Medicaid managed care plans in Northern Virginia," and that because the divestiture "addresses the department's concerns," the Antitrust Division would no longer object to the combination.

After receiving federal regulatory approval for the transaction, the parties were quickly able to gain approval from the necessary state regulators in over ten states, and closed the transaction on December 24. WellPoint has announced that, going forward, Amerigroup will be operated as an independent subsidiary.

AUTO REPAIR TRADE ASSOCIATION REQUESTS THAT DOJ INVESTIGATE THE USE OF MOST FAVORED NATION CLAUSES BY AUTO INSURERS

by James M. Burns

Over the last several years, the use of most favored nation clauses by health insurers has been the focus of significant antitrust scrutiny, with legislation being enacted in several states that prohibits the use of such clauses in provider contracts and the DOJ Antitrust Division taking action against the use of such clauses as well. Now, it appears that the use of such clauses in other insurance contracts may be beginning to attract attention as well.

Specifically, the Automotive Service Association, a trade association of independent automotive service and repair professionals, recently sent a letter to the DOJ Antitrust Division urging the Antitrust Division to examine the use of most favored nation clauses by auto insurers. The association contends that the use of such clauses by national auto insurers, particularly when coupled with direct repair arrangements with other repair shops (typically those in an insurer's "preferred" network), impedes the ability of the association's members to compete for repair shop business from the insurers' insureds. The association further notes that, in its judgment, many of the potential concerns about the use of MFN clauses raised at the FTC/Antitrust Division's MFN clause symposium in September apply in the auto repair industry as well.

The association therefore urges the Antitrust Division to "continue to pursue the MFN clause issue," and requests that the DOJ agree to a meeting with the association's leadership to discuss how the use of most favored nation clauses allegedly impedes competition in the auto repair industry. Notably, however, most antitrust claims by independent repair shops challenging the right of an insurer to utilize a "preferred" network of repair shops, including the recent *Harner v. Allstate* case in the Southern District of New York, have failed, with the courts typically holding that the plaintiff could not allege antitrust injury resulting from the insurers' practices. Whether the Automobile Service Association will have any better success in advocating its views to the Antitrust Division, and if so, where it might lead, remains to be seen. Stay tuned.