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Healthcare Sector Comes Under Increased Government Antitrust Scrutiny

In May 2010, the Assistant Attorney General in charge of the Department of Justice's (DOJ) Antitrust Division, Christine Varney, referred to the essential role that antitrust has in preserving and protecting competition, which together with regulation, can be harnessed to expand coverage, improve quality and control the cost of health care. Ms. Varney stated that:

> [Y]ou should expect the Justice Department to carefully scrutinize and continue to challenge exclusionary practices by dominant firms…that substantially increase the cost of entry or expansion. This is particularly so with respect to most-favored nations clauses and exclusive clauses between insurers and significant providers that reduce the ability or incentive of providers to negotiate discounts with aggressive insurance entrants.
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> *See* Christine Varney, Antitrust and Healthcare, Speech before the ABA / American Health Lawyer's Association Antitrust in Healthcare Conference (May 24, 2010).

Now, less than six months later, DOJ and the state of Michigan have filed a civil antitrust lawsuit against Blue Cross Blue Shield of Michigan ("Blue Cross") alleging that the most favored nation (MFN) clauses in its agreements with hospitals, "raise hospital prices, prevent other insurers from entering the marketplace and discourage discounts...result[ing] in Michigan consumers paying higher prices for healthcare services and health insurance." *See* DOJ Press Release, Justice Department Files Antitrust Suit Against Blue Cross Blue Shield of Michigan (Oct. 18, 2010) and DOJ Complaint.

According to the complaint, Blue Cross is the largest provider of commercial health insurance in Michigan, covering more than 60% of the commercially insured population – more than nine times as many residents as its next largest competitor. DOJ alleges that Blue Cross used its dominance to impose one of two types of anticompetitive MFNs in contracts with at least 70 of Michigan's 131 general acute hospitals, including many major hospitals in the state. "Equal-to-MFN" clauses require the contracting hospital to charge other commercial health insurers at least as much as the hospital charges Blue Cross. "MFN-plus" clauses require the contracting hospital to charge some or all other commercial insurers a specified percentage *more* than it charges Blue Cross, resulting in as much as a 40% differential between the hospital's prices to Blue Cross and its competitors.

DOJ alleges that Blue Cross sought and obtained MFNs in many hospital contracts in exchange for increasing its reimbursement rates to the hospital thereby "purchas[ing] protection from competition by causing hospitals to raise the minimum prices they can charge to Blue Cross' competitors". DOJ alleges that these clauses are causing anticompetitive effects in the market for commercial health insurance in numerous local geographic markets in Michigan. In particular, DOJ alleges that MFNs have unreasonably lessened competition by:

(a) preventing rivals from lowering their costs and becoming a significant competitive restraint to Blue Cross;

(b) raising hospital costs to competitors reducing their overall ability to compete against Blue Cross;

(c) establishing a price floor with important hospitals which deters cost competition among rival insurers;

(d) raising the cost of commercial health insurance generally; and,

(e) raising the barriers to entry and expansion, which discourages entry and preserves Blue Cross' leading market position.

DOJ is requesting that the court enjoin Blue Cross from using MFNs in Michigan, and to strike out the existing MFNs from Blue Cross' contracts as void and enforceable.

Ms. Varney has stated that DOJ will continue to monitor the health care industry, including health insurance plans, providers, and others, and that antitrust has – and will continue to have – an essential role to play in health care. She emphasized that the Antitrust Division will vigorously pursue anticompetitive actions that stand in the way of achieving the goal of affordable health care at competitive prices for American consumers. *See* Christine Varney, Remarks at Pen-and-Pad Briefing in Antitrust Health Care Matter (Oct. 18, 2010). In particular, we can expect DOJ to carefully review mergers or collaborations in the health care and health insurance markets and to challenge those mergers that are perceived as likely to substantially lessen competition in properly defined antitrust markets.

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