

# “Most Favored Nation” Clauses in Health Care: What is All the Fuss About?



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*Some Basics Regarding  
“Most Favored Nation” Clauses*



# “MFN” What Is It?

“M” = Most

“F” = Favored

“N” = Nation

**NOT ALWAYS MOST FAVORED**

MFN not always an accurate description.



# Can Be A “Comparable To” Clause

- If you have seen one MFN clause – you have seen one MFN clause
- Party 1 and Party 2 Agree =
  - “At least as favorable” as prices/terms extended to others
  - “No less advantageous”
  - “Will receive best available prices”



# In Comparable Clause

- › If the price is reduced to others, get the same deal
- › It is a price protection clause
- › It ensures the lowest possible price



# What Is “MFN-plus”?

- › Rates to others must be higher than rate given to payor with an “MFN-plus” provision



*Judicial and Enforcement  
Views of MFNs*



# Background:

## Judicial Treatment of MFNs

- Leading case: *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7<sup>th</sup> Cir. 1995)
  - Blue Cross was the plaintiff, claiming exclusion
  - “Most favored nations’ clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The Clinic did this to minimize the cost of these physicians to it, and that is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing.”

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## Background: Judicial Treatment of MFNs (cont'd)

- Other courts have reached the same result:
  - *Applera Corp. v. MJ Research Inc.*, 2004-2 Trade Cas. (CCH) P74,654 (D. Conn. 2004)
  - *Blue Cross & Blue Shield of Mich. v. Michigan Ass'n. of Psychotherapy Clinics*, 1980-2 Trade Cas. (CCH) P63,351, 1980 WL 1848 (E.D. Mich. 1980)



## Background:

# Judicial Treatment of MFNs (cont'd)

- Likewise, challenges under Section 2 of the Sherman Act and Section 5 of the FTC Act have failed:
  - *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101 (1<sup>st</sup> 1989) (Section 2)
  - *E.I. DuPont de Nemours & Co. v. F.T.C.*, 729 F.2d 128 (2nd Cir. 1984) (Section 5 of the FTC Act)



# Background:

## Judicial Treatment of MFNs (cont'd)

- Most negative treatment:
  - In *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 970-71 & n.30 (10th Cir. 1990), the court allowed evidence of MFNs as evidence that the defendant monopoly was seeking to preclude new entry.
  - Several cases have denied motions to dismiss, finding MFNs are not per se legal. *See U.S. v. Delta Dental*, 943 F. Supp. 172 (D. R.I. 1996).
  - In *Blue Cross & Blue Shield v. Bingaman*, 1996-2 Trade Cas. (CCH) P71,600 (N.D. Ohio 1996), the court declined to prohibit investigation of an MFN.

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# Background:

## Academic Treatment of MFNs

- Some academics have claimed that MFNs can have a more anticompetitive effect than the courts have:
  - See Celnicker, “A Competitive Analysis of Most Favored Nations Clauses in Contracts Between Health Care Providers and Insurers,” 69 N.C.L. Rev. 863, 884 (1991) (claiming MFNs can “(1) eliminate a dynamic mechanism by which prices are ratcheted down to the competitive level; (2) reduce [output of medical services]; and (3) prevent the market from rewarding more efficient distribution systems”)
  - Jonathan B. Baker, “Vertical Restraints With Horizontal Consequences: Competitive Effects Of ‘Most-Favored-Customer’ Clauses,” 64 Antitrust L.J. 517 (1996)



# Background: Enforcement Agency Treatment of MFNs

- The antitrust enforcement agencies, however, at least during the Clinton administration, took an aggressive view and gained a number of consent decrees:
  - *U.S. v. Medical Mutual of Ohio*
  - *U.S. v. Delta Dental*
  - *U.S. v. Oregon Dental Serv.*
  - *U.S. v. Lykes Bros. S.S., Co.*
  - *RxCare of Tenn.* (FTC action)



*USA and the State of Michigan*  
*v.*  
*Blue Cross Blue Shield of Michigan*



# Summary of Claims

- Blue Cross is a dominant payor
- Blue Cross has two types of clauses:
  - MFN-plus
  - Equal-to-MFNs
- Both inhibit competition
- MFNs caused hospitals to raise prices to competitors by “substantial amounts”



## Summary of Claims (cont'd)

- MFNs caused hospitals to demand prices too high to allow competitors to compete, “effectively excluding them”
- MFNs “deterred or prevented” competitive entry and expansion in health insurance markets in Michigan
- MFNs “likely increased prices” for health insurance sold by Blue Cross and its competitors and prices paid for hospital services by insureds

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# Remedy Sought

- › Stop Blue Cross from including any MFN in contracts with Michigan hospitals.



# What Is Not In The Complaint

- The actual language of either type of MFN
- A description of the “similar clauses” referred to in the Complaint
- What happened to the “few” hospitals that did refuse the demand for an MFN (p. 16)
- Whether there is any difference in alleged anticompetitive effect between the different types of MFN



# Blue Cross Response = Motion to Dismiss

- Blue Cross is not a private profit-seeking competitor. It has a legislatively mandated mission making it a unique state created entity exempted from the antitrust laws by the state action immunity doctrine.
- MFNs have been challenged before and they have never been found to violate antitrust laws.
- Abstain because this is about state law.
- Under the current pleading standard, markets have not been sufficiently “plausibly” alleged and there is no viable theory of harm.

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# Regulators' Response

## › Generally:

- Not challenging Blue Cross' ability to obtain the lowest possible prices, but challenging using MFNs to prevent competitors from getting the best prices they can get.
- MFNs reduce competition by raising competitors' costs, "likely" increasing premiums and directly increasing costs to self-insured employers.

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## Regulators' Response (cont'd)

- MFN-plus requires hospitals to charge other insurers more than they charged Blue Cross.
  - In some cases, Blue Cross increased the prices it paid to induce MFN-pluses.
- No “free pass” for MFNs.



## Regulators' Response (cont'd)

- MFNs are analyzed under the “rule of reason.”
  - To survive an MTD just need to “plausibly” allege that MFNs “likely caused price increases” and “tended to exclude competition.”
  - No court has held that MFNs are pro-competitive as a matter of law.
  - No court has held that MFN-plus are permissible under the rule of reason.



## Regulators' Response (cont'd)

- The allegations are sufficient under the current pleading standard, construing the allegations in favor of the regulators.
- Relevant product markets are alleged.
  - Two-commercial group health insurance and commercial individual health insurance.
- Relevant geographic markets are alleged.
  - Seventeen specific MSAs/counties.



## Regulators' Response (cont'd)

- Market Power can be inferred from high market shares.
  - In each alleged market, the shares are alleged to be from more than 40% to more than 80%.
  - Blue Cross admits it is the dominant health insurer in Michigan.



## Regulators' Response (cont'd)

- “Although MFNs may indeed have a pro-competitive effect, whether or not a particular MFN has such an effect requires a factual inquiry and, ultimately, a balancing of anti-competitive and pro-competitive effects.”

*United States of America's Memorandum in Opposition*, page 16.



## Regulators' Response (cont'd)

- Complaint plausibly alleges anticompetitive effects.
  - Specific examples are where MFN-plus required hospitals to charge competing insurers more, preventing competitors from entering.
- This is not a predatory bidding case. There is no allegation that Blue Cross incurred losses when it paid hospitals more to get MFNs, so recoupment is not required.

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## Regulators' Response (cont'd)

- The state action doctrine is narrowly construed.
- Blue Cross is a private entity not subject to state control.
  - Blue Cross has insisted in court filings that it is a private entity.
- Non-profit status does not matter.
  - State action analysis focuses on the nature of the conduct, not the actor.



## Regulators' Response (cont'd)

- There must be clearly articulated state policy resulting in the action.
  - MFNs are not the foreseeable result of the statutory grant of authority to enter into hospital contracts.
  - Blue Cross has to satisfy the “active supervision” prong of state action.
    - There are two “completely different” types of MFNs.



## Regulators' Response (cont'd)

- MFN-plus
  - Blue Cross never sought, let alone received, review/approval
- Equal to MFN
  - Only minimal, after-the-fact review



## Regulators' Response (cont'd)

- Abstention is not appropriate
  - Extraordinary step
  - No adequate state court review where only forum for enforcing federal antitrust laws is federal court
  - Federal law issues prevail



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- Federal and State Legislative Agendas for Health Care Reform
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