

Competitive Effects of
Most Favored Nations Clauses
in Health Care Markets

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Competitive Effects of Most Favored Nations Clauses in Health Care Markets

- Terminology: MFN, MFC, nondiscrimination
- Common Health Care Setting
- Leading Anticompetitive Theories
- Efficiency Justifications
- Legal Treatment:MFNs in Health Care Markets
- Conclusion

Most Common Health Care Market Setting Attracting Antitrust Scrutiny

Dominant health plans contract with providers
(hospitals, MDs, dentists, pharmacists, etc.)

Providers agree not to accept lower
reimbursement from rival health plans

Leading Anticompetitive Theories

Facilitate coordination among providers relatedly: “dampening competition” short of tacit collusion

Exclusion of rival health plans (and entrants) more generally: “raising rivals’ costs” to achieve or maintain supra-competitive industry prices

Leading Anticompetitive Theories

Facilitate coordination among providers

- provider has less incentive to “cheat”
 - by accepting lower reimbursement rate from another health plan
- rival health plans have less incentive to bargain hard with providers, because can't obtain competitive advantage
- health care market example:
 - RxCare of Tenn.* (FTC 1996)

Leading Anticompetitive Theories

Exclusion of rival health plans (and entrants)

- reduces ability of rivals, entrants to obtain lower costs (rival exit not required)
- allows dominant health plan to maintain or achieve prices above competitive level
- health care market examples:
 - Reazin* (10th Cir. 1990)
 - multiple DOJ consents

The Best Efficiency Justifications

Rarely Fit in Most Common Health Care Setting

- Substitutes for futures market in long term contracts
- Retailers may signal low-price strategy to consumers when consumer search is costly (Moorthy & Winter, 2001)

Court Review of MFNs in Health Care Markets Through 1990

Some courts found no antitrust violation on the facts...

- *Ocean State v. BCBS* (1st Cir. 1989)
- *Kitsap v. Wash. Dental* (W.D. Wash. 1987)

Court Review of MFNs in Health Care Markets Through 1990

... while other courts recognized anticompetitive potential

- *US v. Eli Lilly* (D.N.J. 1959) (MFN offered non-conspiracy explanation for high prices)
- *Reazin v. BCBS* (10th Cir. 1990) (MFN provided evidence of BCBS market power)

Legal Treatment Since 1990

Federal antitrust agencies often challenge ...

DOJ consent settlements

Delta Dental Plan of Arizona

Delta Dental of Rhode Island

Vision Service Plan

Medical Mutual of Ohio

FTC consent settlement

RxCare of Tenn.

Legal Treatment Since 1990

...courts decline to declare MFNs legal *per se* ...

- *US v. Delta Dental of RI* (D.R.I. 1996)
- *BCBS of Ohio v. Bingaman* (N.D. Ohio 1996)
- *Willamette Dental Group v. Ore. Dental Serv. Corp.* (Or. App. 1994)

Legal Treatment Since 1990

... and Judge Posner changes his tune (in dicta).

BCBS v. Marshfield Clinic (7th Cir. 1995)

assumes MFN would help clinic bargain
with doctors for low prices

price-floor theory “ingenious but perverse”

In re Brand Name Prescrp. Drugs (7th Cir.2002)

notes authority for prohibiting industry-
wide adoption of MFNs

“which make discounting more costly”

Conclusion

Careful agency scrutiny of MFNs
in common health care market setting

- consistent with economic literature
- consistent with judicial precedent