

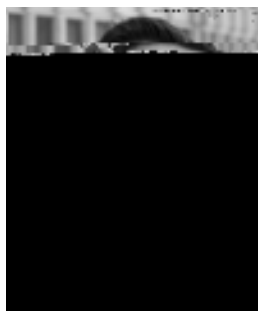


# HEALTH LAW REPORTER!

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The Affordable Care Act may very well reshape the landscape of the health care industry, deeply impacting providers, payers, and Medicare/Medicaid and other government programs. Putting aside the myriad questions raised by health care reform, it is readily apparent is that the Affordable Care Act will put significant economic pressure on the health insurance industry—an industry that has become highly concentrated and thus may have come to enjoy market power and the concomitant ability to alleviate health care reform's economic pressures by shifting their burden to health care providers.

## Dealing With Antitrust Fallout From Health Care Reform



BY ANKUR KAPOOR AND DAN VITELLI

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**H**ealth care reform has landed. Launched by the dissatisfaction expressed by Americans and their politicians with the state of health care, the meteor of comprehensive reform known as the Affordable Care Act may very well reshape the landscape of the health care industry, deeply impacting providers, payors, and Medicare/Medicaid and other government programs. Perhaps the recently enacted legislation will

eliminate the inefficiencies that have received public scrutiny. Perhaps millions of Americans will get the quality health insurance coverage and medical care they need at an acceptable cost while supporting a robust and competitive insurance industry. The answers to these questions lie years ahead; however, what is readily apparent is that the Affordable Care Act will put significant economic pressure on the health insurance industry—an industry that has become highly concentrated and thus may have come to enjoy market power and the concomitant ability to alleviate health care reform's economic pressures by shifting their burden to health care providers.

This article will note some of the economic pressures on health insurers created by the Affordable Care Act; briefly describe the antitrust laws that can be employed against insurers' exercise of market power, whether

Examples of harm to competition include higher prices to customers—and lower prices to providers, as the United States Court of Appeals for the Third Circuit very recently held. In *West Penn Allegheny Health System, Inc. v. UPMC* (3d Cir. , No. 09-4468, 11/29/10), plaintiff West Penn, Pittsburgh's second-largest hospital system, sued Pittsburgh's largest hospital system alleging that UPMC conspired with the region's dominant insurer, Highmark, to "maintain[] West Penn's reimbursement rates at artificially depressed levels" and to pay UPMC higher reimbursement rates in exchange for UPMC's refusing to accept other insurers. Slip op., at 4-5, 8-11. West Penn also alleged that Highmark took other actions, at UPMC's behest, specifically to harm West Penn financially and weaken it as a competitor to UPMC. *Id.* at 10-11.

The Third Circuit held that "artificially depressed" reimbursement rates constitute "antitrust injury," *i.e.*,

claims for payment lead to arbitrary and unjustified denials and abatements of reimbursements that “cheat[ed] physicians out of payment for services rendered.” *Id.* at 33.

Critically, the plaintiffs alleged that the defendants collectively achieved market dominance through their enrollment rates and market concentration, thus preventing the market from resolving the situation because the plaintiffs could not simply reject the reimbursement mechanism by switching to competing payors. *Id.* at 9. The plaintiffs cited statistics provided by the Blue Cross Blue Shield Association to establish that “Defendants and their [alleged] co-conspirator Blue Plans collectively insure over 100 million patients, or about one in three Americans.” *Id.* As alleged, this market power

The complaint alleges that, given Blue Cross's strong position in the market, the MFN clauses stifle competition in the health insurance market and increase health insurance premiums. The DOJ asserts that "Blue Cross is far and away the largest provider of health insurance in Michigan, with more than 60% of commercially insured lives (including lives covered under self-insurance arrangements administered by Blue Cross)." *Id.* at 15. As alleged, Blue Cross's MFN clauses harm competition by "[m]aintaining a differential between Blue Cross' hospital costs and its rivals' costs," "[r]aising hospital costs to Blue Cross' competitors," "[e]stablishing a price floor," "[r]aising the price floor for hospital services to all commercial health insurers," and "[l]imiting the ability of other health insurers to compete with Blue Cross . . . ." *Id.* at 19-20.

The proverbial jury is still out on whether MFNs implemented by a party with significant market share necessarily harm competition; however, this case may provide resolution. While MFNs such as Blue Cross's may benefit health care providers in the short term by establishing a price floor for reimbursement rates, hindering robust competition among insurers may harm providers in the long term.

As of this writing, the matter is pending. On October 18, 2010, Blue Cross of Michigan issued a news release defending its use of "deepest discount contract provisions."<sup>8</sup> Blue Cross stated, "This lawsuit is without merit, and we will vigorously defend our ability to negotiate the deepest possible discounts for our members and customers with Michigan hospitals." The combination of vigorous political scrutiny, the public's desire for satisfaction, and private insurers' desire to assert spirited defenses for their practices suggests that this lawsuit may be a significant battleground in the war to establish industry standards.

#### **IV. BENEFITS AND CHALLENGES OF THE CLASS ACTION DEVICE**

While there are legal remedies available to health care providers to check insurers' exercise of market power, the costs of antitrust litigation are often significant enough to dissuade even truly damaged plaintiffs from bringing suit against massive insurance companies. Litigation, particularly antitrust litigation, has al-

