

## US states moving to ban 'anti-competitive' health insurance contract clause

*This article originally appeared on May 16, 2013.*

As the Department of Justice (DoJ) continues to probe health insurers that include an allegedly anti-competitive clause in their contracts with providers, state legislatures are moving on their own to ban so-called "Most Favored Nation" (MFN) sections in those agreements.

"The DoJ investigations into the use of MFN clauses, which were announced in the spring of 2011 and led to several investigations, really raised the profile of the issue," James Burns, co-leader of the Antitrust Practice Group at Dickinson Wright, told PaRR.

Another attorney agreed that there have been rumblings about outlawing MFNs in several states. Jonathan Lewis, an antitrust attorney with Baker Hostetler, said he has heard "chatter" about similar initiatives in other states.

MFN clauses prohibit hospitals from giving discounts lower than those offered by the insurer under contract.

So far this year, legislatures in Michigan and North Carolina have enacted legislation banning the practice.

Legislators in New Jersey and Missouri have introduced bills to prohibit insurers from including the clauses in contracts, according to an analysis conducted by the National Conference of State Legislatures at the request of PaRR.

Legislation stalled in South Carolina, but the legislation will be held over for the next legislative session.

"It's an issue that's been around for a long time," said Doug Anderson, an attorney with Bailey Cavalieri in Columbus, Ohio, who was a presenter at an August DoJ-Federal Trade Commission workshop on MFNs. "It's not uncommon for this kind of thing to be placed in legislation."

The trend may only slow down because "most of the states that have expressed a strong interest in the issue have, by now, enacted legislation", Burns said.

In all, about 20 states have taken action to ban the use of MFN clauses in health insurance contracts. "It seems to be the case that the interest in such legislation is greatest in states where one insurer in the state has a large market share," Burns said.

In many of those states, Blue Cross Blue Shield is the dominant health insurance company. For instance, in Michigan, the DoJ filed suit against Blue Cross Blue Shield, charging that the firm attempted to stifle competition by prohibiting hospitals from giving other insurance companies better discounts than Blue Cross. However, when the Michigan legislature enacted the legislation, the lawsuit was dismissed. However, a suit filed by Aetna against Blue Cross Blue Shield remains pending.

PaRR recently reported that auto repair shops are now complaining that their contracts with auto insurance companies also contain the same controversial clauses. However, it might be more difficult for repair companies to provide that their contracts with insurers are harmful because the market for auto insurance is typically less concentrated than the market for health insurance, Burns said.

One supporter of banning MFNs said that auto insurance companies should be left out of the debate.

Referring to legislators, Frank Knapp, president of the South Carolina Small Business Chamber of Commerce, told PaRR, "It was all they could do to focus on healthcare. Don't confuse the issue with auto insurance".

In South Carolina, for several years, legislators have attempted to enact legislation banning MFNs in health contracts. But each time the bill, which has been opposed by Blue Cross Blue Shield, has stalled, Knapp said. On this occasion, the bill will be held over for the next legislative session but Knapp vowed to continue the fight.

"Nothing ever goes easy here," he said, referring to his home state.

by David Baumann in Washington DC

---

### ABOUT PaRR

The Policy and Regulatory Report (PaRR) focuses on competition laws and sector-specific regulatory changes to provide deep research and actionable intelligence to legal practitioners, financial advisors, corporates and institutional investors around the world. Through a strong aggregation tool, proprietary news articles, a database of M&A timetables and a regulatory pipeline, PaRR keeps subscribers in tune with how government intervention affects them, the market, and their clientele.

*Part of the Financial Times Group, a Pearson company*

**For US sales, please contact Mike Cronan at [mike.cronan@parr-global.com](mailto:mike.cronan@parr-global.com) +1.646.378.3166**

**For Europe sales, contact Olivia Fernandez at [olivia.fernandez@parr-global.com](mailto:olivia.fernandez@parr-global.com) or +44.20.7010.6384**

**For Asia sales, contact Christophe Barel at [christophe.barel@parr-global.com](mailto:christophe.barel@parr-global.com) or +852.9613.6535**