



March 12, 2010

**Statement  
Of  
Anthem Blue Cross and Blue Shield  
On  
SB 429 An Act Concerning Most Favored Nation Clauses In Healthcare Contracts**

Anthem Blue Cross and Blue Shield ("Anthem") *opposes* SB 429 An Act Concerning Most Favored Nation Clauses In Healthcare Contracts and encourages the Public Health Committee to reject this bill. The compelling reasons in support of Anthem's opposition are described below.

A. Connecticut Law Considerations Support Most Favored Nation Clauses

This proposed bill represents an inappropriate use of the legislative process in the negotiations of a private contractual matter between sophisticated bargaining parties. The Legislature should exercise restraint and avoid interjecting itself into a private contractual negotiation.

The proposed bill itself evidences the State's appreciation of the pro-consumer affect of most favored nation clauses in health care contracts; note the bill's proposed exemption for all health insurance plans procured by the State under Connecticut General Statutes §5-259 in recognition of the potential benefits that most favored nation clauses can provide

directly to State employees, municipal employees and other Connecticut residents who secure their health coverage through such State plans.

No federal or Connecticut court has ever concluded that most favored nation clauses, as a purchasing practice, are automatically anticompetitive. To the contrary, virtually every court that has considered the effects of a most favored nation clause has found that it is a legitimate buying practice and makes sound economic sense. In fact, many courts have upheld the valid business reasons for having a most favored nation clause, explaining that such clauses are exactly the type of practice by buyers that the antitrust laws are intended to encourage since these clauses are designed to get the buyer price protection. The determination whether a particular most favored nation clause has an anticompetitive affect is fact specific, and can be adequately addressed under existing law. Consequently, not only is there no basis in law or fact to legislate against most favored nation clauses, but there already exists a legal framework within which the market affect of a particular clause can be assessed from an antitrust perspective.

B. Most Favored Nation Clauses Further Legitimate Business Purposes and Produce Pro-Consumer Benefits

Insurers who buy health care services have legitimate business reasons, just like any other buyer, to include most favored nation clauses in their health care contracts. A common type of most favored nation clause used in health care contracts is called an equal rate provision. An equal rate provision permits the seller of health care services to offer other health plans the same rate as the buyer who holds the equal rate provision.

The equal rate provision is a prudent buying practice and produces real cost benefits and efficiencies for an insurer and its members. For example, when an insurer negotiates

with hospitals to obtain their services, the insurer bargains for the lowest possible cost of those services on behalf of its members. An equal rate provision is a valuable cost-control device that can keep insurers from paying prices that are over market rates. This cost protection also allows the insurer to enter into long-term purchase contracts, thereby assuring network stability for the insurer's members. This protection can directly and immediately benefit the insurer's self-funded employer groups, which fund the cost of their employees' health care services, as well as members whose health benefit plan requires the member to pay a percentage of the price of their health care services (e.g., a coinsurance).

An equal rate provision can be advantageous for both parties. An equal rate provision enables an insurer to enter into long-term contracts for health care services since the provision ensures that the insurer is not disadvantaged competitively with regard to costs and is not discriminated against. Long-term contracts for health care services are beneficial to consumers because they enable an insurer to control future costs, maintain stable provider networks for its members, and ensure that its members have participating hospitals readily accessible for their care. These long term contracts also benefit the seller of health care services (e.g., a hospital) because the seller is able to lock-in payment rate increases and assures a stable income stream.

As mentioned, most favored nation clauses are used by purchasers in many industries involving the sale of goods to ensure that the purchaser receives the lowest possible price. In fact, in the health care industry, hospitals commonly use most favored nation clauses when they purchase equipment, drugs and supplies. An insurer's use of a most favored nation clause is consistent with the use of such clauses by others in the health care industry, such as hospitals, as well as by purchasers in other industries.

C. There Is No Evidence That Justifies Interference With Freely Bargained Contracts

The health care market in Connecticut is a vibrant market with robust competition among many insurers. Most favored nation clauses have always been permitted, and there is no publicly available evidence that such provisions have produced any actual anticompetitive effects. In 2000, Dr. William Lynk, an economist, published an article which is the only published economic research to date on the effects of most favored nation clauses in health insurance contracts. This study titled "Some basics about most favored nation contracts in health care markets" is published in the Antitrust Bulletin/Summer 2000. The analysis and conclusions of this economic research study are extremely important for several reasons.

First, the article indicated that no empirical research had ever been done previously on the effects of most favored nation clauses in health care markets. This is critical because empirical economic evidence, not theory or assumptions, should be the basis for antitrust law and state law analysis of most favored nation clauses. As Dr. Lynk stated, "only factual investigation can determine whether in any actual market the balance of consumer benefits from MFNs [most favored nation clauses] is positive or negative." Dr. Lynk also explained that the relevant consideration is the effect on the average price paid by all consumers, not the effect on competitors.

Second, Dr. Lynk for the first time conducted an empirical study on most favored nation clauses in two markets and found that there were no anticompetitive effects. Rather, he found that the enrollment of the other plans increased and there were pro-competitive benefits because the most favored nation clauses caused a decrease in hospital prices.

In sum, the Lynk research study demonstrates that (i) there is no empirical economic evidence to date that most favored nation clauses in health insurance contracts produce

anticompetitive effects; and, (ii) the only existing empirical evidence shows that most favored nation clauses are pro-competitive and beneficial, and are based on valid economic and business reasons. As a result, this economic research study concluded that “If there is one lesson that is warranted from this analysis, it is that across-the-board presumptions opposing MFNs are groundless.” To Anthem’s knowledge, no empirical economic analysis of most favored nation clauses in health insurance contracts has been conducted since 2000.

The opposition to the use of most favored nation clauses is fundamentally based on theories and assumptions, which, as Dr. Lynk’s economic research study pointed out, cannot be relied upon. There is no valid economic evidence to justify a prohibition against the use of most favored nation clauses, especially when their purpose is to reduce costs for consumers.

In conclusion, Anthem submits that the use of most favored nation clauses by insurers who purchase health care services is pro-consumer. It is a prudent and legitimate buying practice that is engaged in by insurers for the benefit of consumers. Also, since there is no empirical economic evidence of any adverse affects from the use of these clauses, there is no valid legal or economic basis for the Legislature to interfere in the contract negotiations of buyers and sellers in the health care market. As a result, the provision in SB 429 to prohibit the use of most favored nation clauses would create bad law and bad health care policy in Connecticut, and we urge the Committee not to vote favorably on this bill.