

Issue Brief: Most Favored Nation Clauses

**Editor's Note (September 2020): See updated research paper on anticompetitive contract clauses including most-favored-nations clauses for more detailed analysis: ["Preventing Anticompetitive Contracting Practices in Healthcare Markets"](#).*

By: Evan Sznol, Source Fellow

Introduction: What is a Most Favored Nations Clause?

The contract provision known as the most favored nations ("MFN") clause is a promise obtained by a buyer from a seller that the seller will not give a better price to another buyer. In the healthcare context, an MFN clause [typically manifests](#) as a provision within a health network plan contract in which a dominant health plan obtains a promise that the provider (supplier of healthcare services) will not give an equal or more favorable price to any other plan.

An MFN clause is variously [referred to as](#) a "most favored customer clause," "prudent buyer clause," or "nondiscrimination clause" because it ensures that the customer or buyer of services will receive the best price from the seller.

Anticompetitive Potential of MFN Clauses

An MFN clause is not *per se* unlawful under antitrust law, but it may cause anticompetitive effects that outweigh the cost savings to the buyer. There are [two distinct theories of potential competitive harm](#) resulting from MFN clauses in contracts between providers and health plans: (1) a dominant health plan raises rivals' costs and/or abuses its monopsony power (a dominant buyer's ability to set terms); and (2) a cartel of providers

imposes an MFN clause on members to facilitate cartel pricing.

Theory 1: Abuse of Monopsony Power, Exclusionary Harm (plan/buyer driven)

Under the first theory of anticompetitive harm, if an incumbent plan holds an MFN clause, providers are discouraged from offering discounts to other plans because they would have to give the benefit of any discount to the holder of the MFN. Thus, the MFN clause acts as a barrier to entry that harms other plans because providers are unwilling to bargain for discounted rates. The anticompetitive effects include stifled innovation in health plans and fewer cheaper alternatives based around narrow-networks, tiered cost sharing, and the like.

Theory 2: Cartel Pricing, Collusion (provider/seller driven)

In economic theory, a cartel is an association of producers who pursue a cooperative arrangement to maintain prices at a high level.

In the healthcare industry, providers occasionally form networks or associations to negotiate rates as groups with a third-party insurers. Acting as a group can create leverage in negotiating more profitable prices. Under the cartel theory, cartel-member providers force would-be members to agree to an MFN clauses with the network's plan as a condition of membership in the network. Because members' business is predominated by business from the network, they are unwilling to extend discounts to other plans. The cumulative effect of the MFN clause is to create a price floor below which plans do not offer services. The ultimate results are inflated costs to consumers and exclusion of rival plans from offering cheaper, more innovative insurance products.

Studies on the Impact of MFN Clauses

According to a [2012 DOJ report on contracts that reference rivals](#), MFN clauses have been the subject of [significant economic study](#), showing that MFNs cause higher prices, especially where the buyer covered by the MFN has a higher market share. Although it may appear that permitting buyers to demand and receive the lowest price would be procompetitive, if a significant percentage of the market is covered by buyer protection (a guarantee of the most favorable rate available), there is no longer any incentive for providers to give discounts. Since no buyer receives a discount, prices are higher across the board owing to the MFN coverage, and consumers are harmed as a result.

The report also notes studies demonstrating the potential [efficiencies](#) of MFN clauses. Even though the sum effect of an MFN may be to counterintuitively increase prices to the buyer, MFN clauses reduce the transaction cost of negotiating the best price in the market, which may result in a net-positive savings to the individual buyer.

MFN Litigation and Enforcement

The FTC and DOJ have [litigated a number of cases](#) related to the use of MFN clauses in various contexts. The DOJ successfully enjoined the use of MFN clauses in network arrangements in *United States v. Medical Mut. of Ohio, Inc.*, 63 Fed. Reg. 52,764 (MFN enforced by state's largest health insurer increased costs and suppressed innovation); *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172 (D.R.I. 1996) (MFN by dental carrier covering 90% of dentists in state discouraged discounts to rival entrants); and *United States v. Vision Serv. Plan*, 1996-1 Trade Cas. (CCH) ¶ 71,404 (D.D.C. 1996) (prices for vision care higher because of MFN clause held by largest national vision care insurer, discouraging discounting to rival patients). The FTC entered a consent order in *In re RxCare of*

Tennessee, Inc., 121 F.T.C. 762 (1996) prohibiting the use of MFN clauses by a pharmacy service administrative organization, alleging that the providers utilized an MFN to facilitate cartel pricing.

In 2010, DOJ filed a civil antitrust lawsuit against Blue Cross Blue Shield of Michigan in *United States v. Blue Cross Blue Shield of Michigan*, No. 10-cv-14155 (E.D. Mich. 2010), alleging that the use of an MFN by the dominant health plan raised prices to consumers and created barriers to entry for rival plans. Ultimately, the complaint was dismissed in 2013 when the state legislature passed an MFN ban. In the accompanying press statement, the [DOJ stated](#) it would continue to investigate the use of MFN clauses in health plans in other areas.

Scope of the MFN Clause Ban

According to data collected by the [Source](#), 18 states have enacted a ban on MFN clauses in the healthcare context: Alaska, Connecticut, Georgia, Idaho, Indiana, Maryland, Massachusetts, Maine, Michigan, Minnesota, North Carolina, New Hampshire, New Jersey, North Dakota, Rhode Island, Vermont, Ohio, and Kentucky. Additionally, West Virginia, curbs the use of MFN clauses in small group employee plans only. Legislation to ban MFN clauses is currently pending in [Pennsylvania](#) and [Missouri](#).

All MFN clauses guarantee that the buyer receives the best price, but their mechanisms vary. For example, the clause may: (1) require the provider to give the contracting health plan the best price; (2) require the provider to disclose rates paid to other health plans; (3) require the provider to certify to the health plan that it is receiving the best price; (4) prohibit the provider from contracting with another health plan at a better rate; and (5) excuse the health plan from the contract if the provider contracts with another health plan at a better

price. Accordingly, existing state bans proscribe specific contractual terms for each of the five listed categories.

Requirement to Give the Carrier the Best Price

All state MFN clause bans surveyed by the Source prohibit contracts between plans and providers that guarantee the plans the same or more favorable rates for services given to other plans. Procedurally, most states ban MFN clauses by defining an MFN clause as prohibited or unenforceable contractual terms of managed care contracts. Some exceptions, including North Dakota and New Hampshire, ban the clauses by defining them as unfair and deceptive trade practices.

Requirement to Disclose Rates Paid to Other Carriers

In addition to prohibiting the guarantee of the best rates, ten states also prohibit a plan from requiring a participating provider to disclose the rates a provider negotiates with any other plan. Those states are Connecticut, Georgia, Idaho, Indiana, Maine, Michigan, North Carolina, New Jersey, Vermont, and Ohio. Requiring the disclosure of competitors' rates is a practice that dominant plans employ to ensure that they are receiving the best rates available. Accordingly, these states have staked out a cautious approach to competition regulation by banning both the rate guarantee and the disclosure provision.

Certification to the Carrier That They Are Receiving the Best Price

Two states, Connecticut and Maryland, prohibit a contractual term requiring the provider to certify to the plan that the negotiated reimbursement rate is the best rate available. Like the prohibition on rate disclosure, the certification prohibition is an additional means states use to prevent plans from enforcing MFN clauses or arrangements.

Prohibition from Contracting with another Carrier at a Preferred Rate

Another way for a plan to achieve the lowest price from a provider is to prohibit the provider from contracting with a competitor plan after the execution of the contract for a lower rate. Eleven states explicitly prohibit this formulation of an MFN clause: Connecticut, Georgia, Indiana, Maryland, Maine, Michigan, Minnesota, North Carolina, Vermont, Washington, and Ohio.

Term to Renegotiate or Terminate a Contract at a Future Date

Approximately ten states have prohibited a plan from requiring that a provider renegotiate or terminate an existing contract for services if the provider subsequently contracts with another plan for a lower rate. The provision to renegotiate or terminate can be contrasted with MFN clauses that simply require that the provider extend the benefit of any lower fee schedules or charges for services which the provider may subsequently agree to with other persons or entities automatically to the contracting plan (see the prohibition in [New Hampshire](#)).

Waiver of MFN Ban

Although the majority of MFN clause bans are absolute, Maine and Kentucky permit providers or carriers to rebut the presumption that an MFN clause is anticompetitive. In [Kentucky](#), the ban on MFN clauses does not apply if the Commissioner of Insurance determines that the market share of the carrier is “nominal.”

In [Maine](#), a carrier or provider may petition the Superintendent of the Bureau of Insurance to waive an MFN clause ban. The Superintendent may permit the usage of the MFN clause if it is not found to be anticompetitive, taking into account the

following factors: “(1) any reduction or limit on competition among carriers or providers; (2) the impact on quality and availability of health care services, including the geographic distribution of providers; (3) the size of the provider and the type of any specialty; (4) the market share of the carrier and the provider; (5) the impact on the price and stability of health insurance and health care services to consumers; and (6) the impact on reimbursement rates in the provider marketplace.”

MFN in Your State

For up-to-date information on state implementation efforts, please check the Source [MFN map](#). Additional information for each state can be found in their respective state pages under [Legislation/Regulation](#) or by navigating through the “States” tab.