

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DELTA DENTAL OF RHODE ISLAND,)
)
 Defendant.)
 _____)

Civil Action No. CA 96 113 ML

Filed: February 29, 1996

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this action for equitable and other relief against Delta Dental of Rhode Island ("Delta"), to prevent and enjoin defendant from continuing to violate the antitrust laws by means of a contractual provision that raises barriers to entry and discourages lower prices by, in effect, penalizing contracting dentists if they charge less to rival plans or other purchasers of dental services than they charge Defendant. Delta's policies and actions have, in violation of Section 1 of the Sherman Act, excluded potential rivals, retarded expansion by existing competitors, and substantially increased the costs to Rhode Island consumers of dental insurance and dental services.

I. JURISDICTION AND VENUE

1. The United States files this Complaint under Section 4 of the Sherman Act, 15 U.S.C. § 4, as amended, to prevent and restrain a continuing violation by Delta of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The Defendant is an inhabitant of, maintains an office and transacts business in, and is found within Rhode Island, all within the meaning of 15 U.S.C. § 22.

II. DEFENDANT

3. Delta, a Rhode Island not-for-profit corporation with its principal place of business in Providence, Rhode Island, is engaged in the business of underwriting and administering group dental care insurance plans for employers and other group purchasers located in Rhode Island and elsewhere. Delta is a member of Delta Dental Plan Association, a nationwide network of dental insurance providers.

III. CONCERTED ACTION

4. Various firms and individuals not named as defendants in this Complaint have entered into contracts and combinations and otherwise participated with Delta in the unlawful actions alleged in this Complaint, and they have performed acts and made statements in furtherance thereof.

IV. INTERSTATE COMMERCE

5. Certain employers remit across state lines not insubstantial premium payments to the Defendant for underwriting and administering dental care insurance for their employees.

6. Many employers that remit premiums to the Defendant are businesses that sell products and services in interstate commerce, and the premium levels paid by such businesses for dental insurance affect the prices of their products and services.

7. The activities of the Defendant that are the subject of this Complaint have been within the flow of, and have substantially affected, interstate trade and commerce.

V. RESTRAINT OF TRADE

A. DELTA'S POSITION IN THE RHODE ISLAND DENTAL MARKET

8. Delta is Rhode Island's largest dental insurer, covering nearly 200,000 subscribers in its service area (Rhode Island and border communities in Massachusetts and Connecticut). Delta insures or administers plans for about 35-45% of persons covered by dental insurance in Rhode Island. Delta obtains dental care services on behalf of its subscribers by contracting with approximately 675 actively practicing dentists, whom it refers to as "participating dentists," including about 500 or 90% of the dentists actively practicing in Rhode Island. The balance practice in bordering areas of Massachusetts and Connecticut.

9. Each Delta participating dentist agrees to accept payments from Delta--in addition to any deductible or co-payment paid by the patient--as payment in full for covered services. Delta made payments of approximately \$32 million to participating dentists in 1994. Most

actively practicing Rhode Island dentists receive a significant portion of their professional income from Delta.

10. According to Delta, the dental insurance market in Rhode Island "is being driven entirely by price." The cost of dental services generally constitutes about 85-90% of the price of dental insurance, as reflected in premiums or payments made by self-insured groups. Delta acknowledges that once a dentist has agreed to accept its payment levels, the dentist has no incentive to charge Delta patients less to attract more Delta patients.

11. Some other payers, however, have attempted further to reduce their cost of dental services in Rhode Island by contracting with a limited panel of conveniently located dentists who agree to accept fees discounted substantially below the fees paid by Delta.

B. DELTA'S MOST FAVORED NATION CLAUSE

12. Each Delta participating dentist agrees to comply with Delta's Participating Dentist's Agreement, which incorporates by reference Delta's Rules and Regulations (together, the "Agreement"). The Agreement governs the participating dentists' provision of dental care services to Delta subscribers and the fees that they may charge Delta subscribers. As applied, the Agreement also establishes the minimum fees that participating dentists may charge patients who are not Delta subscribers without incurring a potential financial penalty. Specifically, Rule 10, commonly characterized by Delta as its "Prudent Buyer Policy," provides as follows:

Reimbursement Policy. Delta Dental reserves the right to limit reimbursements to dentists to such levels as such dentists have agreed to accept as reimbursement from other non-governmental dental benefits reimbursement programs.

Provisions such as Rule 10 are known as Most Favored Nation ("MFN") clauses. Such clauses restrict a seller's ability to charge the buyer enforcing the provision more than the lowest price that the seller charges to any other purchaser.

13. According to Delta, it enforces its MFN clause whenever the fees that a participating dentist accepts from another non-governmental third-party payer are "demonstrably significantly lower than [Delta's]." Once the fees in issue are determined to be "demonstrably significantly lower," Delta claims that it will look at several "mitigating factors" before deciding whether to apply the MFN clause: whether the fee differential will soon be eliminated by a fee increase adopted by the other plan, Delta's administrative cost of applying the MFN clause, and Delta's ability to overcome the difference in reimbursement through its efforts to manage use of dental services. Delta also has not enforced its MFN clause when a dentist, who had considered or agreed to charge another plan substantially lower fees, then raised the fees to Delta's level or disaffiliated from the other plan.

14. Rule 7 of Delta's Rules and Regulations further allows Delta to audit the records of any participating dentist:

Verification program. Delta Dental at all times reserves the right to review services rendered and fees charged by participating and non-participating dentists or group practices with respect to which benefits are sought. Such review may encompass, without limitation, verification of . . . fees charged and collections made with respect to non-subscriber patients

Delta's audits ensure that no dentist charges any patient for any procedure a fee less than what the dentist charges to Delta.

15. Although Rule 10, as written, pertains only to dentists' payments from non-governmental dental benefits reimbursement programs, Delta also applies its MFN policy to dentists offering discounts to uninsured patients or patients with indemnity insurance. When Delta determines--either through an audit under Rule 7 or otherwise--that a dentist has charged an uninsured patient less for a procedure than the dentist charged Delta or has advertised price specials to uninsured patients, it will, except in limited circumstances, contact the dentist and demand that the discounted fees be discontinued or that the lower charges apply also to Delta subscribers.

C. THE MFN CLAUSE'S ANTICOMPETITIVE EFFECTS

16. Delta's MFN clause has harmed competition and reduced consumer welfare in the dental services and related dental insurance plan markets in Rhode Island and localized areas within Rhode Island. Delta's MFN clause has reduced competition in Rhode Island dental services markets by inhibiting participating dentists from lowering their fees below the level paid by Delta. The clause's deterrent effect on discounting of dental services has led to the further exclusionary effect of preventing competing dental plans from offering limited-panel insurance plans at premiums significantly below those of Delta.

17. The MFN clause inhibits lower fees for dental services by generally requiring a participating dentist who charges a fee lower than Delta's for any non-Delta patient to accept commensurately lower fees for all Delta patients. Because Delta patients are a significant portion of the practice of most Rhode Island dentists, the MFN clause effectively imposes a large financial penalty on Delta participating dentists who wish to charge fees significantly lower than those paid

by Delta. Because Delta represents such a large source of income for most Rhode Island dentists, relative to other payers that have sought to pay fees significantly lower than Delta, Delta's MFN clause makes it unprofitable for a dentist to accept lower fees from non-Delta patients, even if the dentist would have otherwise been willing to accept those lower fees. As a result, most participating dentists are unwilling to charge uninsured or indemnity plan patients, or to contract with other dental insurance plans, at fee levels below Delta's. The result is higher prices for and reduced output of dental services in Rhode Island.

18. The financial disincentive to discount posed by Delta's MFN clause also impedes competing dental insurance plans' ability to contract with Rhode Island dentists at fee levels significantly lower than Delta's. In some cases, Delta's MFN clause has caused participating dentists to disaffiliate from--or refuse to join--competing dental plans offering fees below those paid by Delta. In other cases, Delta participating dentists have insisted as a condition of their participation that payments be increased to Delta's levels. In either case, the high percentage of dentists in Rhode Island who participate in Delta means that the MFN clause has made it substantially more difficult for new plans to find enough dentists to serve their subscribers at lower fees. When Delta participating dentists are faced with the prospect of substantially reduced payments for all of their Delta patients if they participate in a reduced-fee plan, especially where such a plan would send them considerably fewer patients than Delta, participating dentists have uniformly opted not to participate in such lower-price plans, even though they would have been willing to do so in the absence of the MFN clause. Thus Delta's MFN clause has deprived

consumers of the benefits that discounted fee plans can offer: increased competition, lower premiums, and greater availability of dental care.

19. The experiences of the Dental Blue PPO in Rhode Island illustrate the anticompetitive effects of Delta's MFN clause. In the fall of 1993, Blue Cross and Blue Shield of Massachusetts ("Blue Cross of Massachusetts") recruited dentists in Rhode Island for Dental Blue PPO, a preferred provider organization (PPO) established for Raytheon employees and their families, including approximately 1,000 employees (plus family members) at Raytheon's facility in Portsmouth, Rhode Island. Dental Blue PPO sought to recruit and contract at substantially reduced fees with dentists used by a number of Raytheon Portsmouth plan members, including Rhode Island dentists practicing in Portsmouth, Tiverton, Jamestown, and Newport, who are located conveniently for most Portsmouth plant employees and their families. Dental Blue PPO was one of three dental benefit options for Raytheon employees. Blue Cross of Massachusetts also offered the employees coverage from a large, "traditional" network (including most dentists in the area) and from out-of-network dentists. However, Raytheon employees would incur the lowest out-of-pocket cost--often no cost or at least substantial savings--if they used dentists participating in Dental Blue PPO.

20. Dental Blue PPO recruited a number of Rhode Island dentists who practiced in the area around Portsmouth, and it expected to contract with more dentists in the area. All of the Rhode Island dentists who joined Dental Blue PPO also participated in Delta. Delta calculated that Dental Blue PPO would have paid these dentists at a substantial discount--14% lower, on average, than Delta's fees.

21. Identifying Dental Blue PPO as a long-run competitive threat, and in particular fearing that the Dental Blue PPO would be expanded beyond Raytheon, Delta's senior management met on or around December 9, 1993, and agreed to pursue three related tactics: (a) to establish communications with the Rhode Island Dental Association ("RIDA") regarding Dental Blue PPO; (b) to apply Delta's MFN clause to all dentists who had agreed to join Dental Blue PPO in order to, in the words of Delta's Vice President for Strategic Planning, "send a strong message to the provider community"; and (c) to develop its own limited-panel PPO.

22. Implementing the first tactic, Delta's president contacted the chairman of RIDA's Council on Dental Programs, who Delta's president knew to be a vociferous opponent of low fees and managed care programs, and who supports Delta's MFN clause because he believes it functions to set a floor on dentist's fees. Shortly after, RIDA sent its members a letter, dated December 14, 1993, warning that:

[T]he fee schedule proposed [by Dental Blue PPO] is below your current Delta profile, and if accepted may subject you to retroactive repayment of your collected Delta fees since by contract you have agreed to provide Delta patients your lowest fees (except from Medicaid).

Though the letter went on to say that each dentist must make an individual decision whether to participate in Dental Blue PPO, the RIDA letter reminded each member to "be aware that your decision may have severe financial penalties."

23. Soon after, Delta implemented its second tactic by informing the Rhode Island dentists, who it knew were participating in the Dental Blue PPO, of its intent to apply its MFN clause. Delta similarly informed several Massachusetts dentists who participate in Delta and who had also agreed to participate in Dental Blue PPO. Following up on telephone conversations with

many of the dentists, on December 30, 1993, as part of its yearly update of dental fees, Delta sent letters to these dentists, informing them that their payment levels would be lowered to the amounts that they had agreed to accept from Dental Blue PPO. Delta sent a second letter to each of those dentists in January, 1994, enclosing their new, reduced-fee schedule. This letter stated that:

[Y]our profile reflects certain adjustments necessitated by our reimbursement policy. We understand that you have agreed to accept these fees from the Dental Blue PPO. As a result, your Delta Dental of Rhode Island reimbursement has been limited to these levels.

24. By the end of January, 1994, the dental community had received Delta's "message." All of the Rhode Island dentists contacted by Delta disaffiliated from Dental Blue PPO, some of them making clear to Delta at the time that their reason for resigning was Delta's decision to apply its MFN clause. For example, on January 6, 1994, one dentist sent Delta copies of his letters to Dental Blue PPO of the same date resigning from Dental Blue PPO, and specifically asked that Delta update his fee profile because of his resignation. On January 25, 1994, another dentist did the same. A third dentist did not even wait until he received his new fee schedule from Delta. As he explained in his January 3, 1994 letter to Delta's Vice President for Provider Relations, he resigned from Dental Blue PPO once he received RIDA's letter detailing how participation with Dental Blue PPO would affect his payments from Delta.

25. Delta's MFN clause prevented Dental Blue PPO from developing a marketable network of Rhode Island dentists willing to accept fees substantially below those paid by Delta. By doing so it denied Raytheon employees and their families a meaningful choice of dental coverage through Dental Blue PPO, and the substantial savings that it represented to them.

Delta's tactics prevented Dental Blue PPO from successfully offering a lower-price, dental insurance plan in Rhode Island.

26. Delta's decision to apply its MFN clause to Dental Blue PPO also had an adverse impact upon the dental insurance market beyond its immediate effect on Raytheon employees and their families. Delta had feared that Blue Cross might ultimately expand Dental Blue beyond Raytheon, and offer it to other employers in Rhode Island. The disaffiliation of the Dental Blue dentists enabled Delta to postpone indefinitely its originally planned third response to Dental Blue: the development of its own limited-panel, reduced-fee PPO. With the collapse of the Dental Blue PPO network in Rhode Island, Delta felt no competitive pressure to offer an alternative low-cost product, and returned development of its own PPO to the back-burner. Over two years later, Delta still has not established a PPO in the market. Had Dental Blue PPO succeeded and had Delta been forced to respond as planned with its own PPO, Rhode Island consumers would have had dental insurance plan choices that could have been significantly lower-priced than those now available to them.

27. At least two organizations--a self-insured employee group and an uninsured retiree group--currently have contracted with limited panels of dentists in Rhode Island who have agreed to fees substantially below Delta's. Although all of these dentists also participate in Delta, they have avoided the application of Delta's MFN clause--despite Delta's commitment to consistently enforce the clause--because Delta had been unaware of the operation of their reduced-fee panels. Even now, Delta may remain unaware of which dentists participate in the panels. Both organizations have reason to believe that the dentists currently in their panels would disaffiliate

if Delta were to apply its MFN to them. Despite their preference for more Rhode Island dentists to serve their members at reduced fees, both have decided not to recruit additional dentists to avoid bringing themselves to Delta's attention and causing Delta to apply its MFN to their currently participating dentists. For members of each group, moreover, the availability of such discounted fees sometimes makes the difference between being able to afford dental care or not. Enforcement of Delta's MFN clause would consequently preclude some consumers from obtaining necessary dental care.

28. Delta's MFN clause also caused dentists to disaffiliate from or refuse to join a dental insurance plan--established by Dental Benefit Providers, Inc., on behalf of Harvard Community Health Plan--until the plan increased its payments to the levels paid by Delta. Because this plan has been forced to compete in Rhode Island with a network of dentists paid at higher fees than planned, consumers are being deprived of the opportunity to obtain lower-cost dental services and dental insurance. Delta's MFN clause has consequently restricted the ability of this plan to serve groups of patients in Rhode Island at lower, more competitive prices.

29. A plan operated by U.S. Healthcare seeks to contract with Rhode Island dentists to provide basic preventive services in return for a monthly capitated (fixed amount per patient) payment and to provide other services for payment according to a substantially discounted fee-for-service schedule. U.S. Healthcare has similarly encountered consistent resistance from dentists who fear that Delta would apply its MFN clause, lowering the fees they would receive for their Delta patients to the substantially lower level of U.S. Healthcare's discounted fee schedule. Indeed, concern with Delta's MFN clause among dentists has prevented U.S.

Healthcare from contracting with any Rhode Island dentists, and U.S. Healthcare has consequently been unable to offer its low-cost dental plan in Rhode Island.

30. As discussed above, Delta's MFN clause is not limited to third-party payer plans. Delta has applied it to any participating dentist who offers fees below Delta's fee schedule to patients with indemnity coverage or no insurance at all. The result of Delta's application of its MFN clause to such patients has been to discourage discounting, thereby increasing the price and diminishing the availability of dental services in Rhode Island.

D. THE MFN CLAUSE'S FUTURE ANTICOMPETITIVE EFFECTS

31. Delta intends to continue to enforce its MFN clause against those dentists who offer fees discounted below Delta's either to other dental insurance plans, patients covered by indemnity plans, or to uninsured patients. This enforcement will continue to prevent other dental insurance plans from paying fees for dental services discounted to levels below those paid by Delta and, therefore, will deter low-fee dental insurance plans from entering, or expanding their presence in, Rhode Island unless they raise their fees to Delta's level. By deterring low-cost plans' entry or expansion, Delta's MFN clause will deprive consumers of the benefits that such plans can offer: increased competition, lower premiums, and greater use of dental care. By discouraging dentists' discounting to patients covered by indemnity insurance and to uninsured patients, Delta's MFN clause will have similar adverse effects upon the cost and availability of dental care for indemnity-insured and uninsured consumers in Rhode Island.

E. THE MFN CLAUSE'S LACK OF PROCOMPETITIVE EFFECTS

32. In contrast to Delta's MFN clause's actual anticompetitive effects, the MFN clause, by Delta's own admissions, has not generated any meaningful savings or other procompetitive benefits. Delta has not considered the MFN clause a cost-savings device, has not sought to calculate any savings from its application, and has not factored any such savings into determining the premiums it charges its customers.

VI. VIOLATION ALLEGED

33. Beginning at a time unknown to the Plaintiff and continuing to date, the Defendant has entered into agreements with its participating dentists in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This offense is likely to continue or recur unless the relief hereinafter sought is granted.

34. For the purpose of forming and effectuating these agreements, the Defendant did the following things, among others:

- (a) required participating dentists to agree to the MFN clause;
- (b) enforced the MFN clause; and
- (c) made clear its intention to continue enforcing the MFN clause.

35. These agreements have had the following effects, among others:

- (a) caused Delta participating dentists to disaffiliate from, or charge higher fees to, reduced-fee dental plans in Rhode Island;

- (b) unreasonably restrained price competition among dental insurance plans in Rhode Island because the clause has substantially foreclosed other dental plans from obtaining or retaining a sufficient number of conveniently located Rhode Island dentists to provide low-cost services to their members at competitive prices;
- (c) deterred the entry or expansion of limited-panel PPOs and other low-priced dental insurance plans in Rhode Island;
- (d) raised prices for the provision of dental services to non-Delta patients and dental plans in Rhode Island because Delta-participating dentists have opted not to discount their fees, below levels received from Delta, to other dental plans, patients with indemnity insurance, or to uninsured patients;
and
- (e) deprived consumers of dental services and dental insurance in Rhode Island of the benefits of free and open competition.

VII. REQUEST FOR RELIEF

WHEREFORE, the Plaintiff requests:

1. That the Court adjudge and decree that the Defendant entered into unlawful agreements in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. That the Defendant, its members, officers, directors, agents, employees, and successors, and all other persons acting or claiming to act on its behalf, be enjoined, restrained and prohibited from, in any manner, directly or indirectly, continuing, maintaining, or renewing these agreements, or from engaging in any other combination, conspiracy, agreement, understanding, plan, program, or other arrangement having the same effect as the alleged violation.

3. That the United States recover the costs of this action.

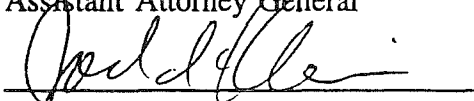
4. That the United States have such other relief as the nature of the case may require and the Court may deem just and proper.

Dated:

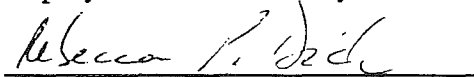
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