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January 13, 2012

Mr. Joshua H. Soven  
Chief, Litigation I Section  
Antitrust Division  
United States Department of Justice  
450 5<sup>th</sup> Street, N, Suite 4700  
Washington, DC 20530

**Re: Comments to Proposed Consent Judgment in U.S. v. Blue Cross and Blue Shield of Montana, Inc., et al. [FR Doc. 2011–29656]**

Dear Mr. Soven:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide comments in response to the action by the Antitrust Division of the Department of Justice (DOJ) in the matter of Blue Cross and Blue Shield of Montana, Inc. (Blue Cross) and several Montana-area hospitals (the Hospital Defendants) in *US v. Blue Cross and Blue Shield of Montana, Inc., et al.*, Civil Action No. 1:11-cv-00123-RFC. This action represents an important step towards reining in health insurers and hospitals whose actions conspire to restrain competition and maintain monopolized health insurance markets. Accordingly, the DOJ has acted in the public interest with the proposed decree, and the AMA submits the following comments in support.

According to the DOJ's complaint, Blue Cross agreed to pay \$26.3 million to the Hospital Defendants in exchange for their agreement to collectively stop purchasing health insurance from New West Health Services, an insurer owned by the Hospital Defendants, and instead buy from Blue Cross exclusively for six years (the Agreement). The Agreement, it is alleged, would likely cause New West to exit the relevant Montana markets for commercial health insurance. Because New West is Blue Cross's only viable competitor, the Agreement would have eliminated all competition. Accordingly, as the Complaint alleges, the Agreement would have led to higher prices and lower quality service for consumers.

The AMA applauds the DOJ for its vigilance in recognizing the anticompetitive conduct described above and for fashioning a remedy that holds the promise of nurturing competition in Montana. For years, the AMA has been expressing its concern over the lack of competition in health insurance markets nationally. In its most recent study of health insurance markets, the AMA found that 83% of the 368 metropolitan areas studied qualify as highly concentrated areas, while in 95% of these markets, at least one insurer has a market share of 30% or greater. See, "Competition in Health Insurance: A Comprehensive Study of U.S. Markets," American Medical Association (AMA) (2011

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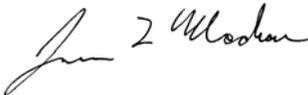
update). Health insurance markets that are monopolized not only hurt consumers directly, they also enable health insurers to exercise monopsony power in physician markets, eventually leading to reductions in service levels and quality of care. The market conditions in Montana are consistent with what the AMA has found nationally.

Blue Cross' dominance in Montana health insurance markets presents a significant barrier to the market success of smaller rivals such as New West, even assuming the absence of exclusionary conduct such as that alleged in this case. In 2010, then Assistant Attorney General Christine Varney reported that the DOJ found that new health insurer entrants cannot compete with incumbents for potential purchasers of their products unless the new entrants can offer similar provider discounts to their enrollees—but they cannot offer these competitive discounts without being able to promise providers a significant number of enrollees to make such an arrangement viable. In turn, these barriers of entry create an anticompetitive environment in which the dominant insurer can achieve lower input prices by demanding lower rates from providers (who face a significant loss of revenue if they refuse such demands), without having to lower their consumer output prices (the cost of their premiums).<sup>1</sup>

In the instant case, the DOJ has fashioned a pro-competitive remedy that addresses the entry barriers faced by small Blue Cross rivals such as New West. First, the proposed final judgment would eliminate the anticompetitive effects of the challenged Agreement by requiring New West and the Hospital Defendants to divest New West's commercial health insurance business. Tentative arrangements call for the acquiring entity to be PacificSource, which is an established health insurer in the Pacific Northwest. To overcome Blue Cross' advantage in obtaining discounts from the Hospital Defendants because of its size, the proposed consent decree creatively requires New West and the Hospital Defendants to help provide PacificSource with a cost-competitive provider network. The Hospital Defendants are required to sign three-year hospital contracts with PacificSource on terms substantially similar to the existing contractual terms with New West. The decree also requires Blue Cross to provide thirty days' written notice to the DOJ before entering into any exclusive contracts with health insurance brokers—contracts that might hinder important health insurer access to brokers. These provisions will help ensure that PacificSource will be able to compete as effectively as New West before the parties entered the Agreement.

In sum, the divestiture of New West mandated in the proposed consent decree will reverse the anticompetitive effects of the challenged Agreement, while the additional provisions may foster an even more robust competition within the market than existed before the Agreement. Given the weak state of health insurer competition in Montana, we applaud the DOJ for creating this remedy in the public interest.

Sincerely,



James L. Madara, MD

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<sup>1</sup> See, Speech by Christine Varney, Assistant Attorney General Antitrust Division, U.S. Department of Justice at American Bar Association/American Health Lawyers Association Antitrust in Healthcare Conference, May 24, 2010.