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Judge to consider consolidating lawsuits over Blues contracts

By [Chad Halcom](#)

A recent pile-on of prospective class-action lawsuits against **Blue Cross Blue Shield of Michigan** over its favorable charging agreements with health care providers could merge into one more orderly case in weeks, attorneys said.

At least four lawsuits seeking more than \$20 million in combined damages have been filed since October against the insurance company over its "most favored nation" contracts with hospitals, although one case already has been dismissed and a fifth case is still taking shape.

Most-favored nation agreements are billing arrangements Blue Cross allegedly began making with Michigan's 131 hospitals in 2007, either for the carrier to match any price a competing private insurer pays on medical services or requiring hospitals to charge competitors more than Blue Cross -- usually by a set percentage.

But is there one cohesive class that can be made out of four lawsuits?

"It's a real chess game right now, with all of the competing interests," said Gregory Drutchas, principal at Detroit-based **Kitch Drutchas Wagner Valitutti & Sherbrook PC** and head of its health care practice.

"There's probably not a county in this state that some attorney couldn't find a plaintiff -- employer or insurer. But consolidating all the cases could mix some winners with some losers, or spoil the whole case.

"I'm sure Blue Cross has some lawyers who are really thinking out every move here. Because what you do very early on could set the whole tone."

All of the cases filed so far largely mirror the **U.S. Department of Justice** and Michigan attorney general's joint antitrust lawsuit against Blue Cross but seek specific damages on behalf of other insurers or insured businesses. Attorneys in most, if not all, of the lawsuits expect to appear March 2 before U.S. District Judge Denise Page Hood on a motion for consolidation.

"We are going to have to prove some of the same things, but the government is after injunctive relief to stop the practice, and we have specific monetary damages to assert," said Jason Thompson, partner at **Sommers Schwartz PC** and chairman of its complex litigation department, who brought the latest class-action lawsuit on behalf of the City of Pontiac earlier this month.

Pontiac, which is self-insured and has used **Humana Inc.** as a third-party claims administrator since ending its Blue Cross relationship in 2008, is now suing the insurer and 22 Michigan hospitals alleged to have "most favored nation-plus" agreements with Blue Cross in a lawsuit before U.S. District Judge Steven Murphy.

The plus agreements allegedly caused hospitals to charge Blue Cross' competitors more than 20 percent above Blue Cross for services at **William Beaumont Hospitals** in Royal Oak and **St. John Providence Health System** in Warren, to as much as 39 percent more at **Covenant Medical Center** in Saginaw, according to government and class-action lawsuits.

More conventional most-favored nation agreements allegedly required only that Blue Cross get a billing rate at least equal to any other insurer.

Also suing are Hillsdale-based **The Shane Group Inc.** and Bradley Veneberg of Munising in an Oct. 29 lawsuit, and the **Michigan Regional Council of Carpenters Employee Assistance Fund** along with the **Abatement Workers National Health and Welfare Fund** and **Monroe Plumbers & Pipefitter Local 671 Welfare Fund** in a Dec. 8 lawsuit.

A fourth case over most-favored nation status was filed Nov. 22 by **Frankenmuth Mutual Insurance Co.** but withdrawn the same week; Haverford, Pa.-based **Chimicles & Tikellis LLP** is seeking plaintiffs who received care at any of at least 18 Michigan hospitals for a "potential" lawsuit against Blue Cross.

"We continue to believe the government's lawsuit is deficient and should be dismissed. (And) while we haven't responded formally to the civil suits, our position is that they ignore the benefits of negotiating for the deepest possible discounts for Michigan customers," said Helen Stojic, director of corporate affairs for the Blues.

"Piggyback plaintiff lawsuits are not a surprise or unusual in these circumstances."

The Justice Department and attorney general found that in 2007 Blue Cross had threatened to cut

payments up to 16 percent to 45 small and rural hospitals if they did not take most-favored nation contracts.

Blue Cross made a motion to dismiss that case, which is up for a hearing before Hood on March 2. Hood also expects to hear a motion to consolidate all the prospective class actions and appoint a lead counsel later the same day, and plaintiff attorneys said they are in an ongoing dialogue about combining their efforts.

Andrew Wachler, president of **Wachler & Associates PC** in Royal Oak, said the Blues could mount an argument that a dispute over billing rates belongs before the state **Office of Financial and Insurance Regulation**, not in court, under the state Public Act 350 of 1980, which creates a method for administrative appeals.

"If you show that the Blues failed to serve a class or fulfill its duties under (that law), you can file an administrative appeal to require the Blues to change their policies," he said. "I think you could challenge them there on something like this, but then you wouldn't make as much money as you could by challenging the practice this way."

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