

Blue Cross/Blue Shield Reaches Settlement Agreement with Class Plaintiffs in Private Antitrust Suit

The private antitrust case against Blue Shield/Blue Cross (BCBS) reached a preliminary partial settlement last month after eight years of litigation. A driving force for this settlement may have been the April 2018 district court ruling that was seen as a serious blow to the defendants.

In two antitrust suits that have been consolidated in Alabama federal court (put into Multi-District Litigation), [\[1\]](#) healthcare providers and employer subscribers sued BCBS companies across the country, alleging horizontal market allocation in violation of Section 1 of the Sherman Antitrust Act. The plaintiffs claim that BCBS conspired to divvy up insurance markets all over the country to avoid competing against one another, driving up insurance premium prices for subscribing consumers (see [class action complaint](#)) and pushing down the amounts paid to healthcare providers (see [provider complaint](#)).

After denying defendants' motion to dismiss, U.S. District Court Judge R. David Proctor of the Northern District of Alabama [held](#) that the insurer's alleged practice of creating exclusive territories is a "per se" violation of the Sherman Antitrust Act and would be evaluated using the highest legal standard, [\[2\]](#) as opposed to the lower rule-of-reason antitrust standard (see [Source Blog](#)). This higher standard assumes that the alleged behavior inherently hinders competition, essentially eliminating any defense BCBS may claim in terms of possible procompetitive benefits of its conduct. As long as plaintiffs prove at trial that BCBS engaged in the alleged

conduct, BCBS would be held liable without requiring further evidence of economic harm that results from its behavior. On interlocutory appeal, the 11th Circuit Court of Appeals upheld the lower court's standard in a one-sentence opinion.

Following the favorable ruling to the plaintiffs, BCBS agreed to tentative settlement terms to end litigation with the employer subscribers. Under the draft agreement, BCBS would pay \$2.7 billion to the class plaintiffs, in addition to modification of alleged anticompetitive practices. In an [interview](#) for the Wall Street Journal, The Source's Distinguished Senior Fellow Tim Greaney noted that the settlement terms BCBS agreed to would remove "two of the mechanisms that are pretty flatly anticompetitive" with regard to Blue plan subscribers.[\[3\]](#) First, the agreement would remove a BCBS Association rule that requires two-thirds of each Blue insurer's total national revenue to come from Blue-branded plans. This change would allow those companies' expansion of business with non-Blue brands. Second, BCBS agreed to remove the existing setup that requires national employer subscribers to work with a Blue insurer that covers the location of the employer's headquarters. This new agreement would allow competition between a smaller, in-state Blue insurer and other out-of-state Blue insurer for large national employers. Experts believe this competition would give larger Blue companies the advantage over smaller plans.[\[4\]](#) Additionally, Greaney warned that competition concerns remain, as the settlement does not address the Blues licensing setup, which limits direct competition between the insurers.

Importantly, this settlement would not end the provider suit against BCBS, as it only resolves issues from the subscriber complaint. Litigation with the providers is expected to continue unless a separate settlement is reached to alleviate concerns specific to the providers, who claim BCBS agreed to fix prices for goods, services and facilities rendered by healthcare providers and to boycott providers outside of their

service areas. As a result of decreased competition, the providers were allegedly paid much less and also subjected to less favorable terms than they would than they would be absent the BCBS conspiracy.[\[5\]](#)

While the settlement with class plaintiffs is encouraging development after years of litigation in the BCBS antitrust action, the case may still have a ways to go. Aside from the provider case, the settlement with the subscriber plaintiffs must still receive court approval from Judge R. David Proctor before it can be finalized and implemented, which can be a lengthy process. Stay tuned for further development.

[\[1\]](#) In re: Blue Cross Blue Shield Antitrust Litigation (MDL No.: 2406), N.D. Ala., No. 2:13-CV-20000-RDP.

[\[2\]](#) Memorandum Opinion Re Section 1 Standard of Review and Single Entity Defense, In re: Blue Cross Blue Shield Antitrust Litigation (MDL No.: 2406), N.D. Ala., April 5, 2018.

[\[3\]](#) Anna Wilde Mathews and Brent Kendall, *Blue Health Insurers Reach Tentative Antitrust Settlement for \$2.7 Billion*, Wall Street Journal, September 24, 2020.

[\[4\]](#) *Id.*

[\[5\]](#) Corrected Consolidated Second Amended Provider Complaint at 5, In re: Blue Cross Blue Shield Antitrust Litigation (MDL No.: 2406), N.D. Ala., November 25, 2014.