Is M&A for Insurers Bad? Ask the Blue Cross Plaintiffs.

The focus of most antitrust concerns in healthcare over the past few years has been provider consolidation and provider market power. But, lately all eyes appear to be on insurers, who, as The Source tweeted on June 16 and the [Wall Street Journal]() echoed three days later, followed by [CNBC]() yesterday, seem to have caught merger fever (ok, we said "consolidation fever," and we said that they seemed to have caught it from the providers, whereas they didn't trace the fever's origin). As the five largest insurers, United Health, Cigna, Humana, Anthem and Aetna vie for deals with one another, onlookers are becoming concerned about the healthcare landscape in which the numbers of both providers and insurers are dwindling due to consolidation. Many commentators have raised concerns over the tension between the ACA's incentives to consolidate and the antitrust enforcers' charge to prevent or redress anti-competitive consolidations. This tension now appears to be reaching a (merger) fever pitch.

While insurers all seem to be moving towards consolidation, one of the biggest insurers is being sued for antitrust violations that stem from its status as a dominant insurance company in many markets. Multiple class actions, separated into two tracks—provider and subscriber— alleging a market allocation conspiracy have been filed against Blue Cross/Blue Shield. The cases have been MDL'd (transferred to one court as a "multi-district litigation" for ease of administration) in federal district court in Alabama. Providers and subscribers, respectively, have filed class actions, each alleging that the individual Blues and their national association conspired to carve up insurance markets among the insurers across the country in a scheme. Put simply, once a Blue was allocated a particular market, it would agree not to compete with other neighboring Blues. The provider suit further alleges that the defendants used their "blue card" and "national accounts" programs, which come into play when a patient receives treatment outside her service area, to fix prices and carry out a boycott conspiracy.

The plaintiffs allege antitrust violations in 17 states. They argue that the Blues and their association used their market power, derived from being the dominant insurer in multiple markets across the United States, to engage in and profit from a market allocation scheme (and an additional price fixing and boycott scheme according to the providers). The plaintiffs ask that the court enjoin the conspiracy and award them treble damages.

A key component of any antitrust litigation is the relevant market definition, which includes both the product market and geographic market. The subscriber plaintiffs define the product market as the sale of full-service commercial health insurance products to individuals and small groups. Like the plaintiffs in OSF v. Methodist, which [we are watching]() in Ohio, the Blues plaintiffs exclude from this product market definition government health insurance programs, which they say are not substitutes for commercial insurance because government programs are only available to the disabled, elderly or indigent. The providers' definition is similar|however, they extend the product market to single-service insurance (like dental or vision) and administrative services for employee benefit plans. The subscriber plaintiffs offer two alternate geographic market definitions: (1) a given Blue plan's service area, or (2) Metropolitan Statistical Areas (MSAs) (per the U.S. Office of Management and Budget), and claim the Blues qualify as dominant firms under either definition. Likewise, the provider plaintiffs say MSAs or other definitions could be used, and regardless of the metric, the Blues have market power in the markets identified in the complaint.

The plaintiffs argue that the alleged conspiracy raises health care costs for consumers because the Blues use their market power to demand better pricing from providers, but do not pass those savings on. Instead, they argue, the Blues hold massive reserves and/or pay their executives excessive salaries. Recently, these reserves were cited as a reason for stripping Blue Shield of California was stripped of its tax-exempt status. These cases may help to shine a light on the dangers of one insurer achieving market power—i.e., the allegations of anticompetitive conduct may amount to a warning label for the M&A contemplated by the big insurers. We hope that the FTC and state enforcement entities are tuned in to this important litigation as they review potential consolidation efforts.