State Regulators Want 11th Circ. To Tweak $2.67B BCBS Deal

$2.7B BCBS Deal ‘Sold Out’ Some Claimants, 11th Circ. Told

Lawyers ask court to accelerate Blue Cross Blue Shield antitrust settlement appeals

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Blue Cross $2.7B antitrust

settlement appealed by Home Depot, others

Final Settlement of BCBS Antitrust Class Action Hopes to Increase Competition Among Insurers

This month, a long-standing private antitrust lawsuit against Blue Shield/Blue Cross came to a conclusion after a decade of litigation. After a favorable court ruling for the class plaintiffs on a key legal issue, the final settlement agreement received approval in federal court and provides both monetary and injunctive relief that is intended to boost competition in the insurance market.

Filed in 2012 by employers and individual policyholders with Blue Cross/Blue Shield (BCBS) coverage, the putative class action alleges that BCBS entities conspired to divvy up insurance markets all over the country using horizontal market allocation, in violation of Section 1 of the Sherman Antitrust Act. BCBS insurers are major players in individual and small-business health insurance markets across the country with about three dozen companies that cover over 100 million people, or one third of all Americans. The lawsuit claims that the alleged anticompetitive conduct, which BCBS has practiced for decades, allowed the insurers to avoid competing against one another and drive up customers' prices.

The case saw a major breakthrough in April 2018, when U.S. District Court Judge R. David Proctor of the Northern District of Alabama held in a 59-page opinion that the insurer's alleged practice of creating exclusive territories is a "per se" violation of the federal Sherman Antitrust Act and would be evaluated using the highest legal standard. Under the "per se" antitrust analysis, as opposed to the lower "rule-of-reason" standard, the alleged behavior is presumed to hinder competition without the need to examine how it is balanced with potential procompetitive benefits. This standard essentially prevents BCBS from introducing evidence of any benefits of the conduct as a defense, which makes it easier for plaintiffs to prove BCBS' liability as long as they prove the insurer engaged in the alleged conduct. On interlocutory appeal, the 11th Circuit Court of Appeals ruled against BCBS and upheld the lower court's use of the highest legal standard in a one-sentence opinion.

This decision quickly led to settlement talks of the parties and preliminary approval of the settlement was given in December 2020. On August 9, Judge Proctor approved the final settlement, which includes $2.67 billion in monetary compensation (including $627 million for plaintiffs' attorneys) and other injunctive terms that would target and alter the ways Blue plans operate in order to boost competition among insurers. Specifically, the conduct terms require the BCBS Association to drop two restrictive rules for Blue-licensed insurers:

> 1) The rule that restricts the amount of business from non-Blue brands for insurers that receive Blue licensing, specifically that at least two-thirds, or 66.7% of national net revenues from health plans and related services of these Blue-licensed insurers must come from Blue-branded products.
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> => What does it mean? The change would allow Blue

insurers to expand their non-Blue lines of business in each other's markets and increase competition.

2) The rule that limits Blue insurers from competing with each other for large national employers with employees in regions covered by different Blue insurers. The rule specified that large employers must work with the Blue insurer that offers coverage where the employer's headquarter is located.

=> What does it mean? The change would allow BCBS companies to compete with each other for large contracts and give national employers the choice to compare prices.

Experts believe these two rule changes would benefit larger Blue companies, such has Anthem, that may be able to better compete for national accounts due to its scale and lower costs. Notably, however, the settlement agreement does not address a major focus of the original lawsuit, which is the BCBS Association licensing setup. Under that setup, the BCBS Association licenses the Blue brands to the insurers that use them, and the companies would hold exclusive rights to the BCBS name within a certain geographic territory. According to Source Advisory Board Member and healthcare antitrust expert Tim Greaney, the continued licensing setup would allow BCBS to continue to limit direct competition among insurers. For that reason, Home Depot, one of the employers represented in the class action, has filed an objection to the settlement. The BCBS Association defended the licensing deals, arguing that it is a well-established trademark right and does not violate antitrust laws. Ultimately, given that resolving this larger legal issue would likely take many more years of litigation in court, plaintiffs' attorney believed settlement was in the best interest of the parties.

The settlement terms are set to be in effect 30 days after the final approval. Judge Proctor noted that BCBS will be closely monitored for their compliance with the settlement's terms as

well as antitrust laws in general. While the settlement in the case does not limit anticompetitive practices to the extent some had hoped for, it may be a step in the right direction to encourage more competition in the insurance market and signals increased scrutiny by enforcement agencies and disapproval by the courts of anticompetitive conduct of insurers. Moreover, the BCBS saga continues as this settlement merely resolves one of the two antitrust cases against BCBS for its anticompetitive practices. A parallel lawsuit filed by healthcare providers, alleging that the horizontal market allocation practice limited competition and payments to doctors and other providers, is still pending in the same court.

Stay tuned for more developments in the BCBS cases and check back next month for more litigation and enforcement actions on The Source Blog. In the meantime, be sure to check out the Source Litigation Portal for key cases, geographic trends, and search the litigation database for federal, state, and private enforcement actions.

Ochsner Health closes merger with 7-hospital Rush Health Systems, pledges higher minimum wages to new employees

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HB 286

Hospitals, private hospital assessment and Medicaid funding program extended for fiscal year 2025, Secs. 40-26B-71, 40-26B-73, 40-26B-77.1, 40-26B-79, 40-26B-80, 40-26B-81, 40-26B-82, 40-26B-84, 40-26B-88 am’d. For state fiscal years 2020, 2021, and 2022, 2023, 2024, and 2025, an assessment is imposed on each privately operated hospital in the amount of 6.00 percent of net patient revenue in fiscal year 2017 2020, which shall be reviewed and hospital cost reports updated annually.

HB 130

Under existing law, health care services and facilities, with some exceptions, are required to apply for and receive a certificate of need before they may construct new health care facilities or offer new or expanded services. This bill would repeal the certificate of need program and abolish the Certificate of Need Review Board, the State Health Planning and Development Agency, the Statewide Health Coordinating Council, and the Health Care Information and Data Advisory Council, which all exist to operate the certificate of need program and collect data to support the operation of the certificate of need program.
This bill would also update related code sections to remove references both to the program and to these agencies, councils, and boards.

HB 126

Under existing law, a health care provider must obtain a certificate of need from the State Health Planning and Development Agency (SHPDA) before the provider may operate a new institutional health service. Under the State Health Plan developed by SHPDA, an air ambulance service is considered an institutional health service. Certain federal courts have held that a state's authority to require a certificate of need for air ambulance services is preempted by federal aviation laws. This bill would exempt air ambulance services from the jurisdiction of SHPDA and would prohibit SHPDA from requiring a certificate of need for air ambulance services.

Providers Say 9th Circ. Ruling Helps BCBS Antitrust Case