Blue Cross of Michigan Antitrust Suit Joins Others in Alabama

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More Call For 11th Circ. To Redo $2.67B BCBS Deal

Major Insurers See Antitrust Enforcement Action Headed to Appeals

We ended 2022 with an update on trends in healthcare provider consolidation and enforcement actions. In this inaugural 2023 issue of Litigation and Enforcement Highlights, we turn to the latest action in healthcare payer enforcement and litigation. Major insurers UnitedHealth and Blue Cross Blue Shield experienced similar antitrust woes lately, as both insurers saw their seemingly finalized lawsuits headed to the appeals court.

UnitedHealth Merger Challenge Continues Post-Acquisition

The UnitedHealth and Change Healthcare merger lawsuit grabbed headlines at the end of last year. The deal was officially consummated in October after receiving court approval in the District Court for the District of Columbia. Per court order, Change Healthcare divested its claims-editing subsidiary ClaimsXten to private equity firm TPG Capital, and UnitedHealth also completed its acquisition of Change Healthcare. Just as we were about to close the case on the merger challenge as a valiant but failed effort on the part of antitrust enforcers, the Department of Justice (DOJ) announced in late November that it would appeal the lower court decision to the D.C. Circuit court. While the DOJ had 60 days after the initial ruling to file an appeal, the appeal was deemed unlikely and somewhat of a surprise, because the government would face the challenge of "unscrambling the egg" after both the acquisition and divestiture

were finalized in October. Nonetheless, following President Biden's executive order to revitalize competition in the healthcare industry, federal regulators signaled that they would step up its enforcement efforts including challenging anticompetitive transactions even after they are consummated.

Joined by the attorneys general of New York and Minnesota, the DOJ appeal seeks review of the decision by the U.S. District Court entered in September and the accompanying 58-page court opinion. The issue to be raised on appeal is whether the district court erred in denying the federal and state regulators relief under Section 7 of the Clayton Act. The appeals court docket has not seen action since before the holidays and no litigation timeline or substantive filings have been made as of this writing. It remains to be seen whether the DOJ will appeal the decision on the grounds of horizontal integration concerns (i.e., whether the divestiture was sufficient) or vertical integration concerns (i.e, the potential misuse of Change Healthcare data to benefit UnitedHealthcare), or both. If the appeal challenges the decision as to vertical merger concerns, it could be another shot at moving the law forward on vertical merger challenges, though it would be interesting to see how the government reframes what District Court Judge Carl Nichols called "serious flaws" in its legal arguments. For more analysis of the horizontal vs. vertical legal arguments considered at trial, see The Source's previous blog post.

Aside from its spotlighted acquisition of Change Healthcare, as a major healthcare conglomerate, UnitedHealth faces heightened regulatory scrutiny. Just after the announcement of the Change acquisition appeal, UnitedHealth announced that it would delay its proposed $5.4 billion acquisition of LHC Group, a home health provider. Similar to the Change Healthcare deal, the acquisition of LHC is a vertical integration with the Optum subsidiary of UnitedHealth. Originally announced in March 2022 and expected to close by end of 2022, the deal met scrutiny from the FTC, which has issued two requests for additional information as it reviews the proposed merger for regulatory concerns. As UnitedHealth continues to expand its footprint in the healthcare industry through both horizontal and vertical consolidation, we may be seeing just the beginning of antitrust actions.

BCBS of Alabama Antitrust Settlement Hits Roadblock

Another case that keeps coming back for more action is the private antitrust lawsuit alleging anticompetitive conduct against Blue Shield Blue Cross (BCBS) of Alabama. After a decade of litigation, a final settlement was entered in August last year for class action plaintiffs consisting of employers and individuals who subscribed to BCBS health plans. The settlement

terms included $2.67 billion in monetary compensation billion (of which $627 million is allocated for plaintiffs' attorneys) and injunctive relief that targets BCBS' alleged horizontal market allocation practice to boost competition in the insurance market. Notably, the settlement agreement does not address the contested practice of BCBS Association's licensing setup, which gives BCBS licensed insurers exclusive rights within a certain geographic territory, essentially carving up the country by markets. See detailed breakdown and analysis of the settlement terms in previous Source blog post. Case closed? Not so fast. Home Depot and some of the represented class plaintiffs were not satisfied with the settlement terms for reasons including the licensing setup and opted out of the final judgment. In September, four appeals were filed in the 11th Circuit, urging the court to reverse and vacate the final judgment.

In opening briefs filed last month, the appellants detailed their objections to the settlement, which include:

1. improper perpetual relief of rights barring individual class members from pursuing further injunctive relief for antitrust claims and future competitive restraints (including the alleged anticompetitive licensing practice which the settlement did not remedy);
2. inadequate representation in settlement terms: the same plaintiffs and counsel cannot represent injunctive relief and damages classes (financial relief) that have different and competing settlement priorities;
3. unequal distribution of the settlement funds among class members: 93.5% of the payout goes to fully insured claimants, even though class members are almost equally divided between self and fully funded subscribers;
4. improper determination of the reasonable amount of attorney fees (23.5% of settlement amount).

The slew of appeals also brought attention to the terms of the settlement from state insurance regulators. Led by Oklahoma, the department of insurance from a dozen states weighed in on the settlement with an amicus brief shortly after appellant briefs were filed in the 11th Circuit in December. The state regulators focused on a statement in the district court's opinion that said self-funded plans, which purchased only administrative services from BCBS, "did not buy insurance from the Blues". They claim this statement is problematic because self-funded plans, which is outside of state regulatory oversight due to ERISA preemption, frequently purchase stop-loss insurance, which is subject to state regulation. This statement would risk placing stop-loss insurance outside of state regulatory oversight. The states call for correction of that statement to avoid unnecessary misinterpretation.

As this case is only one of two parallel court actions against BCBS over the same conduct—the second of which was filed by healthcare providers—the BCBS antitrust saga is promised to continue in the new year. Stay tuned to The Source Litigation and Enforcement Highlights for the latest developments.

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

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

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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.
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> 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.
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> => 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