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Partial Summary Judgment Granted to Plaintiffs in the In re Blue Cross Blue Shield Antitrust Litigation MDL Proceeding

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On April 5, United States District Judge David Proctor (N.D. Alabama) granted partial summary judgment to the plaintiffs in the *In re Blue Cross Blue Shield Antitrust Litigation,* ruling that a network of trademark licensing agreements between the Blue Cross Blue Shield Association and its member insurance companies (referred to as the 'Blues'), which plaintiffs characterized as "horizontal market allocation agreements," are properly assessed under *per se* antitrust principles, and not the "rule of reason." The decision is of considerable significance because, as Judge Proctor's decision explains, in a *per se* case a defendant is not permitted to defend the claim by showing that its alleged conduct failed to cause anticompetitive harm or that it had countervailing procompetitive benefits (defenses that the Blues had asserted in the case). Instead, antitrust liability attaches to the conduct upon a finding by the Court that the alleged agreement existed, leaving only the issue of damages for trial.

In reaching his decision, Judge Proctor noted that the issue turned largely on whether two United States Supreme Court cases from almost half a century ago – *United States v. Sealy, Inc.* and *United States v. Topco Associates* – remained governing law on the *per se* issue. In those cases, the Supreme

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Court expressly held that horizontal market allocation agreements are generally subject to *per se* condemnation. The Blues maintained, however, that in more recent years the Supreme Court had moved away from applying the *per se* label to such conduct in some circumstances, and that for a host of reasons this case was an appropriate one for the more complete analysis of competitive effects afforded by the rule of reason.

Rejecting the Blues' argument, the Court began its analysis by stating that, despite the passage of time, "the holdings in both *Sealy* and *Topco* remain viable," and noting that as recently as 2010 (in *American Needle v. National Football League*) "the Supreme Court discussed the horizontal agreements at issue in *Sealy* and *Topco* without in any way indicating that either case had been overruled or abrogated by later developments in antitrust law."

Turning then to the Blues' remaining arguments against *per se* treatment, Judge Proctor quickly considered, and rejected, each of them. First, in response to the Blues' argument that the agreements were largely *vertical* agreements imposed by the Association, and thus not subject to *Sealy* and *Topco's* prohibition on *horizontal* market allocation agreements, Judge Proctor held that the Blues "are governing members of the Association" and that he "could not conclude that the [agreements] reflect conduct by a vertical licensor," particularly where the "competitive restraints [had been] agreed to by a majority of the Blue Plans."

In addition, Judge Proctor also held that, in some respects, "the restraints of trade created by the licensing agreements and the Association's rules appear even more restrictive than those in *Topco* and *Sealy,* because the licensees in those cases remained free to sell any amount of non-branded products." As Judge Proctor further explained: "In contrast, here, there are strict limits

placed on the volume of non-branded health insurance products the Blue Plans may sell both inside and outside their service areas."

Finally, Judge Proctor also took issue with a "National Best Efforts" rule that the Association had implemented in 2005 that required each Blue to derive at least 66 2/3% of its national health insurance revenue from its Blue brand. Judge Proctor stated that while "Defendants have largely defended [their agreements] as incidental to trademark rights, there is nothing in the Rule 56 record which indicates that there is any valid connection between trademark rights and the National Best Efforts rule." Instead, Judge Proctor held that "the National Best Efforts rule constitutes a *per se* violation of the Sherman Act, particularly when layered on top of other restrictions Defendants have placed on competition."

In conclusion, Judge Proctor summarized his decision as follows: "Today the court faithfully applies *Sealy* and *Topco* to the Rule 56 record before it and determines that, in navigating the antitrust landscape in this case, those decisions and their progeny remain polestars. Thus, the court concludes that Defendants' aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the *per se* standard of review."

Notably, the decision also contains a few favorable rulings for the Blues on several *other* issues in the case. For example, Judge Proctor rejected plaintiffs' request that he declare the Blues' "Blue Card" program, a system through which the Blues work together to provide health insurance coverage on a nationwide basis, to be subject to *per se* treatment (holding that rule of reason applied on that issue), and similarly found against *per se* treatment for the analysis of the Association's "uncoupling rules" that limit the use of a Blue's trade name in conjunction with its non-branded products. However, given the Court's decision that at least some of the Association

rules will be subject to *per se* analysis, it is unclear what impact these other rulings will have, or how the next steps in this litigation are likely to play out. Stay tuned.