

Blog Post

Health Insurers Contend Allergy Test Maker's Antitrust Claims Make No Economic Sense – Seek Early Dismissal on that Basis

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Three health insurers accused of having violated the antitrust laws in *Academy of Allergy & Asthma in Primary Care v. Blue Cross Blue Shield of Louisiana, et al.* (Eastern District of Louisiana), have filed motions seeking a swift win in the matter prior to the commencement of discovery. In support of their request, Humana, Blue Cross Blue Shield of Louisiana and Blue Cross Blue Shield of Kansas each contend that the allegations in the Complaint are implausible on their face, and thus fail to satisfy the test for pleading an antitrust conspiracy set forth by the United States Supreme Court in *Ashcroft v. Iqbal* (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is *plausible* on its face.’”)

The action, filed earlier this year, centers upon a claim by plaintiff United Biologics, a manufacturer of allergy tests, that the insurers’ decision not to reimburse their insured members for the use of United Biologics’ allergy tests was the result of a conspiracy designed to impair United Biologics’ ability to compete in the allergy testing market. In response to the Complaint, the insurers maintain that their respective reimbursement decisions, while all the same, were arrived at independently, based

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upon the insurers' perceived concerns regarding the safety and/or effectiveness of plaintiff's product. Moreover, given that plaintiff's test is less expensive than competing products, the insurers argue that "It makes no economic sense for defendants, who are buyers of health care services including allergy services, to conspire to restrict provider competition and eliminate a low-cost provider [United Biologics], thus *driving up* the cost of such services," characterizing plaintiff's claim as "nothing short of farcical." In any event, relying heavily on the Supreme Court's ruling in *Matsushita Electric v. Zenith Radio*, in which the court held that "If petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy," the insurers seek to have the claims against them dismissed.

A hearing on the insurers' motions has been scheduled for June 20. In the interim, the plaintiffs will undoubtedly file a response to the insurers' motions, seeking to demonstrate why they believe the insurers' arguments are mistaken or premature, and/or granting them permission to amend their claims to attempt to plead an actionable antitrust claim. Stay tuned.

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