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Per se versus ‘Rule of Reason’ Standard: Judge in Blue Cross Antitrust MDL Proceeding Certifies His Decision For Interlocutory Appeal

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In a somewhat unexpected but highly significant move, United States District Judge David Procter (Northern District of Alabama), who is presiding over the *In re Blue Cross Blue Shield Antitrust Litigation* (Case No. 2:13-cv-20000, N.D. Alabama), has granted defendants’ request that he certify his ruling that the defendants’ alleged conduct should be assessed under a *per se* standard (and not the “rule of reason”) for immediate interlocutory appeal to the 11th Circuit Court of Appeals. So, unless the 11th Circuit rejects Judge Procter’s request, it appears that we will receive an appellate court decision on this issue prior to the entry of a final judgment in this massive, and closely watched, action.

The multi-district litigation matter, which is now almost five years old, combined over 80 separate lawsuits from all across the country into two putative classes of plaintiffs – a subscriber class and provider class – and, as Judge Procter has noted, is “reportedly one of the largest (if not the largest) antitrust litigations ever filed.” As Judge Procter has further explained, in all of these cases, “the plaintiffs allege that the defendants (virtually all of the Blue Cross Blue Shield insurers across the nation – “the Blues”) have violated the antitrust laws by agreeing

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to allocate exclusive geographic service areas, imposing output restrictions, fixing prices for certain products and services secured from health care providers, and boycotting health care providers who reside outside of a Plan's allocated geographic service area." In an April 5 decision, the Court held 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," a ruling that would permit plaintiffs to prove liability in the case against the Blues simply by showing that the defendants entered into such an agreement, without being required to prove that the effect of any such alleged agreement was anticompetitive and/or counterbalanced by procompetitive benefits (unlike in a "rule of reason" case, which would require such additional proof). Recognizing the significance of the ruling, the Blues quickly filed a request that they be permitted to appeal the decision to the 11th Circuit, rather than await a final judgment in the matter.

Judge Procter, in deciding to certify his decision for immediate appellate review, began his analysis by acknowledging that only "exceptional circumstances justify the departure from the basic policy of postponing appellate review until after the entry of a final judgment." However, Judge Procter held that "determining the appropriate standard of review will drive virtually every future key judicial decision that [this Court] will make" in the case, and that "there is little doubt that the standard of review applicable to a Sherman Act claim is a controlling question of law which is determinative of the future course of this litigation."

In addition, Judge Procter also found that there is "substantial ground for difference of opinion" regarding his ruling, another factor pointing towards certification. In reaching this decision, Judge Procter acknowledged the Blues' contention that there is "evolving authority regarding the application of the *per se* rule to horizontal market allocations," and that prior Supreme Court case law on the subject

(*United States v. Topco* and *United States v. Sealy*) may no longer be controlling, particularly in light of the Supreme Court's more recent ruling in *Texaco v. Dagher*, where the Supreme Court held that the courts should "presumptively apply the rule of reason" in antitrust cases. Accordingly, while Judge Procter reiterated that he is "confident that his decision regarding the applicable standard of review is correct," he observed that "the question here is not whether the court believes that it erred in its conclusion." Instead, given that "the stakes in this multidistrict litigation are high," and that "the parties have poured millions of dollars and untold hours into this litigation," and that "if the 11th Circuit were to disagree with the court's ruling, finding out sooner (rather than later) would save millions more dollars and, potentially, years of full-scale litigation," Judge Procter concluded that certification was warranted.

A decision from the 11th Circuit regarding whether it will accept Judge Procter's request that they hear the matter now is expected shortly. In the interim, Judge Procter has decided not to stay discovery in the case, but given the size, scope and expense of the matter, it remains to be seen whether either side of the case will actively pursue discovery while such a significant issue remains undecided. Stay tuned.

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