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"Historic" Settlement of Blue Cross Blue Shield Association Antitrust Action May Significantly Boost Competition

November 9, 2020

After over 8 years of hard-fought litigation, the Blue Cross and Blue Shield Association, together with its 36 Blue Cross/Blue Shield members (the Blues), recently announced a proposed settlement of class action antitrust litigation (*In re Blue Cross Blue Shield Antitrust Litigation*) brought against them by a nationwide class of subscriber members. The settlement terms, summarized in the plaintiffs' motion seeking the Court's approval of the settlement, includes both the payment of substantial monies to the plaintiff class ($2.67 billion) and significant agreed-to changes to the way in which the Blues operate.

The action, begun as a single case in 2012 and subsequently converted into a multi-district proceeding in the Northern District of Alabama after numerous similar cases were filed across the country, centered on the contention that several of the Blue Cross Blue Shield Association (BCBSA) rules pertaining to the use of its trademarks unlawfully impeded competition among its Blue members, causing consumers to pay higher rates for health insurance. Notably, almost 1 in every 3 Americans with private health insurance currently obtains health insurance from 1 of the 36 Blue members. The Blues defended the existence of these rules as being reasonably necessary to protect the value of the Blue Cross trademarks.

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The litigation was particularly hard-fought and expensive, with the production of over 15 million pages of documents, over 120 depositions, and over a dozen motions to dismiss the plaintiffs' claims. After those motions to dismiss were denied, and the 11th Circuit Court of Appeals refused to consider those rulings on an interlocutory basis, settlement discussions between the parties accelerated. Most recently, the parties briefed issues relating to the potential certification of the class, which was an issue that was still pending at the time of the announcement of the proposed settlement.

While the money that will be paid under the proposed settlement, if approved, is substantial – even when shared among the 36 member Blues – the injunctive relief terms are even more significant, as they have the potential to re-shape the state of competition in health insurance markets going forward. In fact, the papers submitted to the Court in support of the settlement characterize them as "historic."

Specifically, a number of BSCBA rules that Blue member companies had been required to adhere to as part of their Blue Cross trademark licensing agreement with BCBSA would be eliminated as part of the settlement. These rules currently (1) limit the amount of "non-Blue" business that a Blue Cross licensee can have outside of the service area for which it possesses the Blue mark; (2) limit the ability of out-of-state Blues to bid for insurance business against a "home" Blue for larger employers (those with over 5,000 employees that also meet certain dispersion criteria); (3) restrict the ability of a Blue member to acquire another Blue member, making such restrictions permissible only to the extent that the restrictions are "reasonably necessary to prevent the impairment of the value of the Blue marks or the competitive or efficiency of Blue branded business"; and (4) would greatly restrict the ability of the Blues to utilize "most favored nations" clauses in their provider contracts. The proposed settlement would also create a 5-person "monitoring committee" that

would oversee compliance with the terms of the settlement for a period of 5 years.

While final approval of the proposed settlement is likely not to occur until the Spring of 2021, at the earliest, if approved, the changes to the Blue Cross rules potentially could spur additional competition in health insurance markets all across the country. Specifically, the elimination of the restriction on a Blue licensee's "non-Blue" business should permit out-of-state Blues to compete more often with a "home" Blue for new business, particularly for business from larger employers with dispersed employees. In addition, the settlement would also eliminate another current Blue rule that requires that a Blue proposal to a national account be submitted by the "home" Blue. The settlement expressly permits national accounts to seek, and the Blues to provide, a second bid from another Blue in addition to the bid received from the "home" Blue. Finally, the loosening on the restrictions on mergers among the Blues could lead to some consolidation among the smaller Blue licensees, making them more formidable competitors in states outside of their "home" territories, both as against the "home" Blue and the other large national health insurers.

Perhaps for these reasons, in announcing the proposed settlements, several Blues not only expressly stated that they "reject the claims plaintiffs made in the lawsuit," but that the proposed settlement allows them to "remain focused on the goal of improving access to quality healthcare for all Americans."

Accordingly, in the end, what are the likely implications of the settlement for health insurance markets, and consumers, going forward? What seems quite clear is that there will be greater competition among the various Blues going forward. However, no less clear is the fact that added competition from the Blues will likely require a competitive response from the other national and regional health insurers as well. And, with more

health insurer options to choose from, consumers should benefit, with such added competition likely resulting in consumers receiving higher quality services at lower prices – which, of course, is precisely the objective of antitrust laws in the first place. Stay tuned.
