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Antitrust Case against BCBS to Continue under Per Se Standard

In a long-running antitrust case, the Eleventh Circuit recently denied defendant Blue Cross Blue Shield's interlocutory appeal of the district court's ruling that certain allegedly restrictive practices of defendants must be analyzed under the per se standard rather than the more lenient rule of reason standard. *In re Blue Cross Blue Shield Antitrust Litig*., No. 2:13-cv-20000 (11th Cir. Dec. 12, 2018). Defendants had argued that because the restrictions are related to a valid trademark license agreement, they should be analyzed under the rule of reason, which would allow them to present antitrust defenses.

A series of purported class actions brought by health care providers and subscribers, consolidated in federal court in Alabama, allege that Blue Cross Blue Shield Association (the "Association") and several independent health insurance plans that own and control the Association (the "Blue Plans") have entered into anticompetitive trademark licensing agreements. The plaintiffs claim the arrangements severely restrict the ability and incentive of the Blue Plans to compete with each other, resulting in geographic market allocations that violate the antitrust laws. The litigation has been pending for six years, and the district court previously denied a motion to dismiss. Having already determined that it would analyze the agreements as a whole, rather than separately analyze each alleged anticompetitive restraint, the district court ruled in April that the per se standard of review is appropriate. The ruling stated, "the court declines to examine the Blues' [Exclusive Service Areas or ESAs], best efforts rules or brand restrictions in isolation where the Rule 56 evidence reveals that the Blues, through the Association, enacted new and unique aggregate competitive restrictions on top of the ESAs during the 1990s and 2000s." *Blue Cross Blue Shield Antitrust Litig*, 2018 U.S. Dist. LEXIS, at *32. (Under the Local Best Efforts Rule, at least 80% of a Blue Plan's annual health revenue from within its designated service area must be derived from services offered under the Blue Marks, which refers to the Blue Cross organization and its trademarks. Under the National Best Efforts Rule, a Blue Plan was required to derive at least 66 2/3 % of its national health insurance revenue under its Blue brand.)

Per Se Standard vs. Rule of Reason Approach

Certain types of agreements between competitors, such as price-fixing, market allocation, or group boycotts, are viewed as per se unlawful under Section 1 of the Sherman Act. As such, actual harm need not be proven by plaintiffs because it is presumed to result from the conduct. Other restrictive conduct is analyzed under the rule of reason, which engages in a balancing test to determine if the anticompetitive effects of the conduct outweigh the procompetitive benefits. Antitrust defendants typically prefer the rule of reason, as it provides them an opportunity to defend their actions by arguing procompetitive rationales. The vast majority of conduct in antitrust litigation is analyzed under this more permissive standard, which made the district court's decision in April surprising. Also surprising was the decision's heavy reliance on two dated Supreme Court cases, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that have been criticized as overly strict in their application of the per se rule in the context of restraints that are ancillary to legitimate agreements.

The Eleventh Circuit denied defendants' interlocutory appeal of the application of the per se standard without any explanation. The denial eases the burden on plaintiffs, relieving them of the need to offer evidence at trial of the competitive harm resulting from defendants' agreements. The next step in the case is class certification. It is unclear whether this loss will encourage defendants to settle, although the Association has already stated that the ruling was not unexpected because grants of pre-trial appeals are rare. This case continues to be an important one to follow.

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